

# THE TRANSFORMATION OF THE CIVIL TRIAL AND THE EMERGENCE OF AMERICAN TORT LAW

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*Everyone agrees that American tort law expanded significantly in the late nineteenth century. But the story of that change, as usually told, is radically incomplete. One important precondition of tort law, as we now know it, was a major change in evidence law, one that only began to emerge after 1850. Before then, plaintiffs, defendants, and other “interested” parties were almost universally prohibited from testifying in civil trials. With this prohibition on party testimony, what the jury knew about the facts underlying a tort action was derivative and incomplete. Far fewer tort actions were brought because often the only evidence available to the plaintiff was his or her own account of what had happened, and that was inadmissible. But with the change, victims of personal injury were now able to describe before juries the circumstances in which they had been injured. They were able to talk about what they had done, what the entities they were suing had done or not done, and how they had suffered. They no longer needed the fortuitous presence of third-party witnesses to elicit testimony about how they had been injured. The abolition of the prohibition on party testimony, in short, made it much easier to succeed in personal injury lawsuits.*

*At stake in this transformation was the very epistemology of the civil trial. With the admission of party testimony, civil trials went from being premodern efforts to resolve disputes whose outcomes were affected by the spiritual weight assigned to oaths taken by third-party witnesses, to the modern searches for factual truth that we now (incorrectly) assume they always have been. Without this transformation, other factors that later brought about modern tort liability could not have exercised the influence that they did. The transformation created the very conditions under which modern tort law could, and then did, emerge. Yet, the transformation and its significance for tort law have gone largely unrecognized.*

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*Modern tort scholars appear to be completely unaware of the prohibition on party testimony and have therefore failed for more than a century to take it into account in the way they have written and taught about the development of the law of torts. Because the rules and practices that preceded the transformation have now completely disappeared from modern torts cases, what the transformation accomplished may appear, incorrectly, to have always been the case. But it is lack of visibility, rather than lack of responsibility, that has actually been at work in hiding the significance of the transformation for the emergence of modern tort law. In order to appreciate the causal significance of the abolition of the prohibition on party testimony for the emergence of tort law in America, we need to recover a “lost” epistemology of civil trials.*

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### INTRODUCTION

The conventional story regarding the emergence of American tort law late in the nineteenth century is radically incomplete. That story omits a critically important factor: a transformation in the epistemology of the civil trial that took place decades earlier. Without that transformation, tort liability as we know it

could not have developed. Yet the transformation and its significance for tort law have gone largely unrecognized.<sup>1</sup>

The most striking part of this unrecognized story is that, for two centuries before 1850, plaintiffs, defendants, and other “interested” parties were almost universally prohibited from testifying in civil trials. With this prohibition on party testimony in place, what the jury knew about the facts underlying a tort action was often derivative and incomplete. Far fewer tort actions were brought at all, because often the only evidence available to the plaintiff was his or her own account of what had happened, and that was inadmissible. After the prohibition on interested party testimony was lifted, victims of personal injury were now able to describe, before juries, the circumstances in which they had been injured. They no longer needed the fortuitous presence of third-party witnesses to elicit testimony about how they had been injured. The abolition of the prohibition on party testimony, in short, made it much easier to succeed in personal injury lawsuits and therefore made possible the emergence of modern tort liability.

In contrast, the conventional story, briefly summarized, is as follows. As the common-law writ system of pleading withered away and a general civil action for negligence crystalized, Oliver Wendell Holmes, Jr., in three articles in the 1870s and 1880s,<sup>2</sup> identified tort as a substantively distinct subject, divorced from its procedural origins in the writs.<sup>3</sup> At the same time, the industrial and

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1. In this Article, we define *epistemology of the civil trial* in a particular fashion. A conventional definition of epistemology is a theory of knowledge. We adopt that definition but emphasize the tacit presuppositions shared by historical or contemporary actors, which affect their efforts to understand the world about them, and the actual structure within which the information deemed pertinent to civil trials is presented. Put another way, the epistemology of civil trials, in what we call their premodern and modern versions, is what counts as knowledge in those trials. We use the phrase *what counts* to capture assumptions about the nature of the universe, the organization of society, and the purposes of civil trials that affected searches for knowledge in different historical eras. In a more literal sense, we use *what counts* to describe the evidence that was permitted to be part of the knowledge base of trials, and the evidence that was excluded from that knowledge base by the rules of evidence, such as rules disqualifying “interested” persons, including the parties, from testifying in most civil cases.

2. Holmes’s essays, in chronological order, were *The Theory of Torts*, 7 AM. L. REV. 652 (1873); *Common Carriers and the Common Law*, 13 AM. L. REV. 909 (1879); and *Trespass and Negligence*, 14 AM. L. REV. 1 (1880). For a discussion of each article and Holmes’s changing theories of how the subject of tort law should be understood, which culminated in his two chapters on torts in his 1881 book *THE COMMON LAW*, see G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 123–24, 137–47 (1993). In *THE COMMON LAW*, Holmes’s chapters on tort law were entitled *Torts: Trespass and Negligence*, and *Fraud, Malice, and Intent: The Theory of Torts*. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 71–147 (G. Edward White ed., Harvard Univ. Press reprint ed. 2009) (1881).

3. Earlier, Holmes, in reviewing Nicholas St. John Green’s abridged 1870 edition of Charles G. Addison’s *THE LAW OF TORTS*, first published in 1860, had stated that “[t]orts is not a proper subject for a law book,” because the subject amounted to a grab-bag collection of civil actions not arising out of contract without any common substantive elements. See [Oliver Wendell Holmes], *Book Notice*, 5 AM. L. REV. 340, 341 (1871). The book notice was unsigned; John Chipman Gray, one of the founding editors of the journal,

transportation revolutions generated unprecedented levels of bodily injury that required legal redress through the imposition of liability for negligence. These developments were possible only because of a changed understanding of the causal agencies responsible for bodily injury, which made imposition of liability for such injury compatible with this new world view. In combination, these factors generated the body of law addressing “tort” liability for accidental physical harms that came to be recognized as “negligence” law late in the nineteenth century.

We do not quarrel with this story as far as it goes. Tort law as we know it would not have emerged if these factors had not come into being. They are causal forces in precisely that sense. Indeed, each of the factors conventionally understood to have helped to generate tort liability can be seen as aspects of late nineteenth-century legal modernity; they are reflections of the evolution from the premodern to the modern stages of American legal culture during the nineteenth century.<sup>4</sup>

But modernity obviously did not emerge all at once. Although it is generally understood that what is termed “the enlightenment” of the eighteenth

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identified Holmes as the author in John Chipman Gray’s copy of the journal. OLIVER WENDELL HOLMES PAPERS, Harvard Law School Archives. For more detail, see White, *supra* note 2, at 516. In a subsequent article, Holmes said that “[t]he worst objection to the title Torts . . . is that it puts the cart before the horse, that legal liabilities are arranged with reference to the forms of action allowed by the common-law for infringing them.” Holmes, *The Theory of Torts*, *supra* note 2, at 659.

4. For discussions of premodern and modern epistemology, and the relationship of “modernist” attitudes toward causal agency, social organization, and the sources of knowledge to “modernity,” see MODERNIST IMPULSES IN THE HUMAN SCIENCES 1870–1930 (Dorothy Ross ed., 1994), especially Dorothy Ross’s essays, *Modernism Reconsidered* and *Modernist Social Science in the Land of the New/Old* [hereinafter *Modernist Social Science*], at pages 1–25 and 171–89, respectively. We are associating a shift from premodern to modern epistemology with a massive change in attitudes toward the sources of causal agency in the universe that took place over the course of the nineteenth century in England and America. The shift amounted to a relocation of the locus of power to determine the destinies of humans and the course of a society’s history from external causal agents, such as the “will” of an omnipotent deity, the relatively fixed hierarchy of social classes and orders, the forces of nature, and the purportedly inevitable cycles of history in which societies came into being, matured, and decayed, to humans holding power, exercising their wills, using science and technology to learn about and master the external world, altering the class structure of society, and making their futures better than their pasts.

Early recognition of the ubiquity of this epistemological shift can be seen in J.G.A. Pocock’s *THE MACHIAVELLIAN MOMENT* (1975). For an effort to link the shift to the emergence of the social sciences in America, see DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991), and Ross’s earlier article, *Historical Consciousness in Nineteenth-Century America*, 89 *AM. HIST. REV.* 909 (1984). One of the Authors identified the consciousness of the Marshall Court, and the attitudes of its justices and early nineteenth century commentators toward law and judging, as forming a stark contrast to “modern” attitudes, but he did not employ the term *premodern*. See G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* (1988). For definitions of the terms *modernity* and *modernism*, see G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 5–10 (2000), and STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM* 11–18 (2000).

century was the first manifestation of modernist epistemological attitudes, the strands of legal premodernism extended well into the nineteenth century. One such strand has been conspicuously omitted from the story of tort law's emergence. Its disappearance served to eliminate the remnants of premodern legal consciousness from what would eventually become the modern civil trial.

During roughly the first half of the nineteenth century, the epistemology of the civil trial, including trials in which plaintiffs sought damages for bodily injury or property damage, underwent a transformation. Civil trials went from being premodern efforts to resolve disputes whose outcomes were affected by the spiritual weight assigned to the oaths witnesses took and the social roles associated with judges and juries, to the modern searches for factual truth that we now (incorrectly) assume they always have been.

Below, we will relate the ways in which the epistemology of civil trials was transformed during the middle decades of the nineteenth century. But the key feature of this transformation, for our purposes, can be simply described. Before about 1850, the plaintiff, the defendant, and other "interested" witnesses were almost universally prohibited from testifying in civil trials. This undisputable fact bears emphasis because it is both so fundamental and so surprising: until the middle of the nineteenth century, neither the plaintiff nor the defendant was permitted to testify in a tort suit by the former against the latter.<sup>5</sup> Modern tort scholars appear completely unaware of this evidentiary prohibition and have therefore failed to take it into account in the way they write and teach about the development of tort law.<sup>6</sup>

Merely to state this rule of evidence, however, is to highlight how different the premodern epistemology of tort trials was from their modern epistemology, which emphasizes transparency in the introduction of evidence. Without the parties' testimony, what the jury "knew" about the facts underlying a tort action would have been derivative and incomplete, like the reflection in a broken mirror. And fewer tort actions would have been brought at all, because often the only evidence available to the plaintiff was his or her own account of what had happened, and that was inadmissible. Add to this the fact that premodern tort trials generally admitted hearsay testimony but relied only lightly, if at all, on cross-examination as a means of assuring the ability of the jury to find facts accurately, and the distinctiveness of the premodern epistemology becomes even more evident.

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5. As early as the sixteenth century, English common-law courts established the rule that parties to a lawsuit were not permitted to give testimony. In the seventeenth century, that rule—typically characterized as either the disqualification of "interested" witnesses or as the treatment of some classes of witnesses as "incompetent" to testify—was extended to nonparties with an "interest" in the outcome of a litigation. See MICHAEL R.T. MACNAIR, *THE LAW OF PROOF IN EARLY MODERN EQUITY* 204–07 (1999).

6. The sole exception we identified is John Fabian Witt's *THE ACCIDENTAL REPUBLIC* 56–57 (2004). In an earlier work, one of the Authors of this Article brought the application of the prohibition to party testimony to the attention of tort scholars and identified some of its possible effects on the development of tort law. See Kenneth S. Abraham, *The Common Law Prohibition of Party Testimony and the Development of Tort Liability*, 95 VA. L. REV. 489 (2009).

Without a transformation in the epistemology of the civil trial that enabled the parties and other interested witnesses to testify, restricted hearsay, and permitted cross-examination, the other factors responsible for the emergence of modern tort liability could not have exercised the influence that they did. The transformation created the very conditions under which modern tort law could, and then did, emerge.

The constitutive influence of the transformation, however, has been virtually invisible to modern tort scholars. Because the transformation reversed a number of now-obscure rules and practices that have completely disappeared from modern torts cases, what it accomplished may appear, incorrectly, to have always been the case. But it is a lack of visibility, rather than lack of causal responsibility, that has actually been at work in hiding the significance of the transformation for the emergence of modern tort law.

This Article therefore aims to make the influence of the transformation on the emergence of tort law more visible and thereby revise the conventional understanding of how and why that emergence took place. Part I addresses the conventional story and its flaws. Part II describes the nature and bases of the premodern epistemology of civil trials. Part III relates the demise, in both England and America, of the premodern epistemology and its replacement by the modern regime. Part IV reports our efforts to identify the particular ways that the transformed epistemology affected tort trials in the early years of the transformation. Part V concludes with observations on the enterprise of recovering “lost histories” of legal institutions.

## I. THE CONVENTIONAL STORY AND ITS FLAWS

There are currently three conventional explanations for the late emergence of tort law in America as a discrete common-law subject and a basic field of legal study. In some respects, the explanations significantly overlap; in other respects, they diverge, particularly on issues of causation. Although their proponents do not necessarily offer them as only partial explanations, we think that most often they are understood this way. Because the explanations are not mutually exclusive, most tort scholars believe that the combination of explanations comes close to accounting for, or actually does account for, the emergence of modern tort law. But even a combination is only as strong as the sum of its parts, and in this case, the sum is inadequate.

The first explanation is more established, dating back at least to the first edition of Lawrence Friedman’s *A History of American Law*,<sup>7</sup> and anticipated by earlier scholarship.<sup>8</sup> Friedman maintained that the proliferation of bodily injury

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7. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973) [hereinafter *A HISTORY OF AMERICAN LAW: FIRST EDITION*].

8. An early vivid example of Friedman’s approach can be found in Charles O. Gregory’s *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951), which contained the following passage suggesting an explanation for Chief Justice Lemuel Shaw’s apparent holding in *Brown v. Kendall*, 60 Mass. 292 (1850). In that case, Shaw declared that either intent or fault should be the standard of liability for personal injury actions. *Brown*, 60 Mass. at 295–96. In his article, Gregory wrote:

cases that emerged in English and American courts in the last decades of the nineteenth century—a development that all legal historians writing on the topic agree occurred—was connected to the emergence of industrial enterprises, mines, railroads, and trolleys that either engaged in dangerous activities or carried passengers and goods at high rates of speed. Those developments, Friedman argued, increased the chances that travelers, industrial workers, and consumers of products would be injured in those pursuits and seek compensation for their injuries in tort suits.<sup>9</sup> Friedman believes, more generally, that law is a “mirror of society,” so that the causal arrows between law and its social context invariably run in one direction.<sup>10</sup> It follows from Friedman’s hypothesis that had the

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While it is pure speculation, one of Chief Justice Shaw’s motives underlying his opinion appears to have been a desire to make risk-creating enterprises less hazardous to investors and entrepreneurs than it had been previously at common law . . . . Judicial subsidies of this sort to youthful enterprise removed pressure from the pocket-books of investors and gave incipient industry a chance to experiment on low-cost operations without the risk of losing its reserve in actions by injured employees. Such a policy . . . in a small way . . . probably helped to establish industry, which in turn was essential to the good society as Shaw envisaged it.

Gregory, *supra* at 368.

The fact that there was not a shred of language in Shaw’s opinion making any reference to risk-creating activities or to industrial enterprise, and that the defendant in *Brown v. Kendall* was a dog owner who injured a stranger seeking to break up a dogfight, did not deter Gregory. He merely extrapolated Shaw’s “motives” from the presence of “infant” industries in Massachusetts at the time. *See id.*

9. As Friedman put it,

The explosion of tort law, and negligence in particular, has to be laid at the door of the industrial revolution . . . . From about 1840 on, one specific machine, the railroad locomotive, generated . . . more tort law than any other in the 19th century . . . . American law had to work out some fresh scheme to distribute the burden of railroad accidents, among workers, citizens, companies, and the state . . . . The law developed in a way which the power-holders of the day considered socially desirable. This way, in brief, was to frame rules friendly to the growth of young businesses; or at least rules the judges thought would foster such growth. The rules put limits on the liabilities of enterprises. This was the thrust of the developing law of negligence.

LAWRENCE M. FRIEDMAN, *A HISTORY IN AMERICAN LAW* 223 (3d ed. 2007) [hereinafter *A HISTORY OF AMERICAN LAW: THIRD EDITION*].

10. Friedman explained:

This is a social history of American law . . . . This book treats American law . . . not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society. This is the theme of every chapter and verse.

*A HISTORY OF AMERICAN LAW: FIRST EDITION*, *supra* note 7, at 10. In the third edition of his book, referring to the book’s connection with its earlier editions, Friedman said:

“transportation revolution” and industrialization been delayed in England and America until the early twentieth century, the proliferation of bodily injury actions in the courts would likely have also been delayed.

The second conventional explanation for the late emergence of tort law might be considered a variation of Friedman’s hypothesis that proposed a different model of historical causation. This explanation focuses on the relationship between both the nineteenth-century developments in transportation and industrial enterprise that Friedman described and the persistence of the writ system of common-law pleading in England and America throughout the first half of the nineteenth century.<sup>11</sup> According to this hypothesis, writ pleading functioned to translate putative civil actions for damages into specific forms of action, whose acknowledgment (“granting”) by a common-law court was predicated on the technical requirements of the writs being met.<sup>12</sup> For example, instead of filing a general action for contract (*ex contractu* in the parlance of the time), lawyers filed a plea in “assumpsit” (one promised), which recited that a party had made a promise to the person filing the plea. It was not necessary to show that the promise had been made and had not been fulfilled; it was implied in law.

In tort actions for bodily injury or property damage, which had long been recognized at common law, two writs were commonly employed. One was the writ of trespass. That writ alleged that a party had “directly” caused injury to the plaintiff’s person or property. Intentional torts, such as assaults or batteries, were treated as trespasses. The other writ, which seems to have been the equivalent of a catch-all pleading, was trespass on the case. Although the typical locution for trespass on the case writs was that they involved “indirect” rather than “direct” injuries, the case writ was in fact far more broadly utilized. It often covered all actions for bodily injury or property damage that were not subject to criminal sanctions and were not governed by contract, commercial transactions, or situations where real or personal property had been exchanged in accordance with

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It is still a *social* history of law. It still rejects any notion that law is autonomous. Law is a mirror of society. Perhaps it is a distorted mirror. Perhaps in some regards society mirrors law. Surely law and society interact. But the central point remains: Law is the product of social forces, working in society. If it has a life of its own, it is a narrow and restricted life.

A HISTORY OF AMERICAN LAW: THIRD EDITION, *supra* note 9, at ix.

11. See G. Edward White, *The Intellectual Origins of Torts in America*, 86 YALE L. J. 671, 679–82 (1977). For a more extended version of the hypothesis, see G. EDWARD WHITE, TORT LAW IN AMERICA 8–19 (expanded ed. 2003).

12. Initially, writs were simply devices by which a party could appear before the King’s (common-law) courts. Much more attention was originally devoted toward shaping writs to meet the particular facts of a case, known as *special pleading*, and was done by persons, often other than lawyers, who were affiliated with the chancery courts. Although the original purpose of special pleading may have been to sharpen the issues in a case so as to permit quick and easy resolution by a court or a jury, the writs increasingly became devices by which a court could dismiss a case out of hand for failure to employ the appropriate writ for the facts. It was at this point that the writs became the equivalent of substantive law categories. For a further discussion, see S.F.C. MILSON, HISTORICAL FOUNDATIONS OF THE COMMON LAW 70–74 (2d ed. 1981).

existing property rules.<sup>13</sup> The writ of “case” thus applied to situations where a defendant’s carelessness had resulted in bodily injury or property damage to another. English courts routinely called writs in case alleging carelessness actions in “negligence.”<sup>14</sup>

Not only did each common-law writ have its own technical requirements, but plaintiffs were not permitted to engage in alternative pleading. This meant that a plaintiff’s failure to fit the factual setting of his or her injury into the requirements of one writ or another meant that the plaintiff would be “nonsuited.” This was the equivalent, under a unitary civil action under the Federal Rules of Civil Procedure, of failing to state a claim under which relief could be granted.<sup>15</sup> It was only when the writ system of pleading was replaced by a unitary civil action, beginning in America in the latter half of the nineteenth century,<sup>16</sup> that a need to organize the common law into separate fields with their own doctrinal requirements surfaced.<sup>17</sup> Once that occurred, a doctrinal space for the “new” field of tort law was created. The dramatic rise of late nineteenth-century bodily injury actions could then pour into that space.<sup>18</sup> If the writ system had not been replaced, there might have been many more such actions, but they would not have been considered simply to be “tort” or simply “negligence” actions.

A third explanation has emphasized the evolution away from a premodern consciousness<sup>19</sup> about the societal effects of bodily injury.<sup>20</sup> Prior to the emergence of altered understandings of the sources of causal agency in the universe that

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13. Trespass and trespass on the case provided for a jury trial and money damages. Initially, trespass was the only writ that so provided and was limited to actions “with force and arms,” the equivalent of “intentional” actions. By the fourteenth century, the writ of trespass had expanded to include “trespass on the case,” which was used for all actions where a wrong had been committed, but not with force and arms. From the umbrella category of trespass on the case, there were writs signifying that the action arose out of contract (“assumpsit”), a dispute over real property (“ejectment”), or an allegedly unlawful taking of the personal property of another (“restitution”). For a more detailed discussion, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 839–74 (4th ed. 2002); DAVID IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 126–51 (1999); A.W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT (1975); and A.K. KIRALFY, THE ACTION ON THE CASE (1951).

14. See, e.g., *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402, 404 (Exch.) (holding that only a person in privity of contract with a contractor of mail coaches could maintain an action in tort for damages caused by a coach’s collapse in which “negligence and want of care” on the part of the contractor was alleged).

15. Nonsuited plaintiffs could re-file in the common-law courts using the proper writ. They could also appeal to the chancery courts, but the primary advantage provided by chancery, discovery proceedings that included testimony from witnesses, was not invariably one of which personal injury plaintiffs could take advantage. Chancery courts remained separate from common-law courts in England until Parliament fused the two court systems between 1873 and 1875. For a more detailed discussion, see JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW 271–399 (2009).

16. A HISTORY OF AMERICAN LAW: FIRST EDITION, *supra* note 7, at 346.

17. See WHITE, TORT LAW IN AMERICA, *supra* note 11, at 12–15.

18. *Id.* at 20–39.

19. See WHITE, THE CONSTITUTION AND THE NEW DEAL, *supra* note 4, at 4–9.

20. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC 13–17 (2004).

accompanied the advent of modernity<sup>21</sup> in England and America, fortuitous injuries to humans were thought of as “caused” by agents, such as God, fate, nature, the cycles of history, and a social order with relatively fixed ranks, that were independent of human will and determined the destinies of individuals and societies.<sup>22</sup> Being injured, like falling sick, was treated by this view of causal agency as the equivalent of “fate,” “God’s will,” or as a punishment for failing to conform to the conduct expectations associated with one’s rank in the social order. Injuries were not thought of as something for which society had a responsibility to provide an avenue for redress. Humans occupied social roles in which they cared for the sick and hurt, but the state, or society at large, was not regarded as having an obligation to compensate or provide injured persons a means of obtaining compensation, for their suffering. Some civil remedies existed for persons who could trace their injuries to the conduct of others that society deemed reprehensible, but such situations were regarded as unusual.<sup>23</sup> According to this

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21. Following Ross’s formulation in her *Modernism Reconsidered* essay, one of this Article’s Authors defined *modernity* as “the actual world brought about by a combination of advanced industrial capitalism, increased participatory democracy, the weakening of a hierarchical class-based social order, and the emergence of science as an authoritative method of intellectual inquiry.” WHITE, THE CONSTITUTION AND THE NEW DEAL, *supra* note 4, at 5.

22. For more detail on changing conceptions of causal agency, see ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE, *supra* note 4, at 3–17. The critical themes for Ross’s account of causal agency are what she calls the “discovery of modernity” and “American exceptionalism.” By her *Modernism Reconsidered* and *Modernist Social Science* essays, Ross had broadened her thematic approach to include a variety of premodernist and modernist causal agents, such as history, nature, science, and time. See, e.g., *Modernist Social Science*, in MODERNIST IMPULSES IN THE HUMAN SCIENCES 1870–1930, *supra* note 4, at 172–78.

23. As late as 1881, in a noteworthy passage in THE COMMON LAW, Holmes invoked this attitude, arguing that liability in tort should be restricted to injuries that are the product of another’s intentional or negligent conduct:

The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. . . . The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens’ mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts . . . . The state does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some other benefit is derived from disturbing the status quo. . . . [I]t is no more justifiable to make me indemnify my neighbor against the consequences [of losses from accidents] than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW, *supra*, at 87–88.

One of the Authors of this Article associated the late emergence of liability insurance in tort law and the resistance of late nineteenth-century courts and commentators to the idea that the tort system should be employed as a means of compensating injured persons to the persistence of an older “ethos of injury” in which injuries suffered by humans were attributed to bad luck, deficiencies of character, or the “costs of the struggle of life,”

hypothesis, tort law did not begin to expand its ambit, nor develop doctrines that defined it as an independent legal subject, before modernist understandings of the sources of causal agency in the universe were in place. Those understandings emphasized the importance of human will and human power-holding in shaping the course of societal events and the destinies of individuals. The understandings displaced premodernist epistemological assumptions, which had treated laws and policies fashioned by humans as largely powerless to alter the course of history, the organization of society, or the destinies of individuals.<sup>24</sup>

We believe that each of those explanations contains more than merely a kernel of historical truth. But none constitute a complete, or even largely complete, temporal correlation to the emergence of tort law in America. For example, the growth of heavy industry and the shift away from an agriculture-centered economy was well underway in England as early as the 1820s,<sup>25</sup> yet no English treatise on tort law appeared until after the 1850s,<sup>26</sup> and the English treatises included coverage of material that would subsequently be regarded as within the common-law fields of property, evidence, and damages.<sup>27</sup> In the United States, transportation-related tort actions had appeared before the Civil War, but the emergence of tort law as a discrete common-law field and subject took place in the 1870s, at least a decade before, as discussed in more detail in Part IV, personal injury suits arising out of transportation accidents spiked in American courts.

Similarly, research on the writ system of pleading in England suggested that, at least by the late eighteenth century, it had become habitual for plaintiffs who could not meet the strict requirements of the writs to file bills in equity asking for relief and for the chancery court to routinely assume jurisdiction over common-

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rather than something for which “society bore some collective responsibility.” WHITE, *supra* note 4, at xvii, 70. A recent work uncovered examples of governmentally funded disaster relief as early as the late eighteenth century. See MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE* 17–23 (2013). Yet the relation between these sporadic legislative actions and general cultural attitudes is unclear.

24. Under the premodernist understanding, humans were essentially self-interested creatures who coveted power and pursued their “interests,” and certain humans, such as sovereigns or the masters of slaves, had a form of absolute power. Those power roles, however, were not treated as the result of human intervention but as gifts from God. For a more detailed discussion, see WITT, *THE ACCIDENTAL REPUBLIC*, *supra* note 20, at 6–16.

25. See John Fabian Witt, *Toward a New History of American Accident Law*, 114 HARV. L. REV. 690, 747 (2001).

26. Charles G. Addison’s *THE LAW OF TORTS* was published in 1860. An American work on torts, Francis Hilliard’s *THE LAW OF TORTS*, was published in two volumes in 1859.

27. For example, Nicholas St. John Green penned a preface to his 1870 abridgement of Addison’s *THE LAW OF TORTS*, in which Green noted that “a large portion of the matter which [Addison’s 1860 edition contained] included coverage of ‘bailments, easements, patents, and copyrights,’ as well as ‘evidence’ pleading, and practice.” CHARLES G. ADDISON, *THE LAW OF TORTS* iii (1870 ed.). For a more detailed discussion, see G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870–1930*, 11 U. ST. THOMAS L.J. 463, 468 (2014).

law cases.<sup>28</sup> The common-law writs may have been the equivalent of substantive categories of law, but the contours of writ pleading were apparently not as sharply etched as they first appear.<sup>29</sup>

It is thus hard to know why the practice of writ pleading would have had the effect of altogether suppressing the development of any common-law field, including tort law. It is clear that although the writ of *assumpsit* remained in use in the 1850s,<sup>30</sup> there was a recognized common-law field of contract law in that decade.<sup>31</sup> In contrast, the writs of trespass and trespass on the case also continued to be employed during that decade,<sup>32</sup> but tort law had not yet reached comparably distinct and recognizable status.<sup>33</sup> Moreover, the emergence of tort law as a

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28. See Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 57–64 (1980).

29. The strict enforcement of such writs may have occurred more in America because of the resistance, by both British colonies and states, to equity courts. Historians have noted two patterns of response to the relationship of common-law courts to equity courts in early America: that of Massachusetts, which never established separate equity courts, see William J. Curran, *The Struggle for Equity Jurisdiction in Massachusetts*, 31 B. U. L. REV. 269, 269 (1951); and that of New York, which, after a comparatively long period of having a technically separate equity jurisdiction, appointed James Kent chancellor of equity courts in 1814 and encouraged him to develop the law of equity in the state, see HENRY W. SCOTT, *THE COURTS OF THE STATE OF NEW YORK* 260 (1909). The Massachusetts experience suggests that, at least in some early American jurisdictions, the common-law courts were inclined toward a more flexible interpretation of common-law writ pleading. For more detail on early Massachusetts, see Curran, *supra*. For a more detailed discussion on New York, see SCOTT, *supra*, at 259–62.

30. See, e.g., *Hancock v. Ross*, 18 Ga. 364, 364–65 (1855); *The Master, Wardens, Assistants, and Fellowship of the Company of Tobacco-pipe Makers v. Loder*, 20 Law Journal Rep. (n.s.) Q.B.414 (1851).

31. See, e.g., THEOPHILUS PARSONS, *TREATISE ON CONTRACTS* (1853). An English treatise, John Joseph Powell's *ESSAY ON THE LAW OF OBLIGATIONS AND CONTRACTS*, had appeared as early as 1818.

32. See *Brown v. Kendall*, 60 Mass. 292 (1850). In England, the Common Law Procedure Act confirmed the practice by permitting counts of trespass and trespass on the case to be included within a single writ. See Common Law Procedure Act 1852 15 & 16 Vict. c. 76, § 41 (Eng.).

33. The common treatment of *Brown v. Kendall* in current American torts casebooks suggests that the case illustrates the emergence of a general negligence standard of liability in tort, which was displacing actions based on the writs. See, e.g., RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, *CASES AND MATERIALS ON TORTS* 92 (11th ed. 2016). But *Brown v. Kendall* cannot be fairly understood as what Holmes came to call a “modern negligence” case, where reasonable conduct under the circumstances had become a general standard of liability for unintentional personal injury actions. Holmes, *supra* note 2, at 653. It is not commonly emphasized that when Shaw attempted to formulate the boundaries of liability for civil actions not arising out of contract, he said that plaintiffs needed to show that defendants were “in fault,” rather than “at fault.” *Brown v. Kendall*, 60 Mass. 292, 295 (1850). He was thinking of “fault” as a kind of writ, the equivalent of “neglect,” which by the 1850s had become a catch-all term for conduct which precipitated an action in trespass on the case, and generally meant the failure to perform an obligation imposed by law, such as the owner of the mail coach in *Winterbottom v. Wright*, who was under contract with the Postmaster General to deliver mail and through “neglect and want of care” allowed the

discrete, basic common-law field and subject preceded, in many American states and in American law schools, the abandonment of the writ system of pleading—a process that was not universally completed until the early twentieth century.<sup>34</sup>

Finally, even though the emergence of modernity, and modernist attitudes toward causal agency, can be observed in England as early as the 1830s and in America by the decade following the Civil War,<sup>35</sup> there is not much evidence that a large number of residents of the United States, by the decades immediately following the Civil War, had developed a consciousness that society bore some responsibility to alleviate the suffering and compensate for the economic losses of injured persons, either directly or by providing an avenue of redress against private parties. Some private institutions were performing those tasks, and many family members may have done so, but the idea that the state should facilitate redress for injured persons, either through worker's compensation or other social insurance schemes, was not widely accepted.<sup>36</sup> Yet, in those decades, American torts treatises and casebooks appeared and torts became a basic course at some American law schools.<sup>37</sup>

We believe that there was another ingredient in the combination of factors that led to the emergence of tort law as a separate field late in the nineteenth century: the transformation of the epistemology of the civil trial. We now turn to that transformation.

## II. THE ORTHODOX ANGLO-AMERICAN CIVIL TRIAL, 1600–1850<sup>38</sup>

We begin by reviewing the existing evidence and scholarship on the epistemology of the Anglo-American civil trial from the opening of the seventeenth century to the middle of the nineteenth, when the last and arguably most important feature of the premodern epistemology—the witness disqualification rule—came under pressure and was eventually abolished, first in England and then in America. In order to do this, we consider how the early rules

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coach to deteriorate to the point of collapse. *See* *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402 (Exch.).

34. *See* ROBERT WYNESS MILLER, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 52–57 (1952) (demonstrating that the replacement of writ pleadings with a unitary civil action, first introduced in New York in 1848, was still not fully in place in 1912 in New Jersey and in 1915 in Michigan).

35. *See* ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE*, *supra* note 4, at 3–21, 53–93.

36. *See* WITT, *THE ACCIDENTAL REPUBLIC*, *supra* note 20, at 12–17. It is striking how under-researched antebellum American attitudes about the causal origins of injury and suffering have been among historians. For a notable exception, see Thomas L. Haskell, *Capitalism and the Origins of Humanitarian Sensibility*, in *THE ANTISLAVERY DEBATE* 107–60 (Thomas Bender ed. 1992).

37. For a more detailed discussion, see WHITE, *TORT LAW IN AMERICA*, *supra* note 11, at 13, 18.

38. The dates are necessarily approximations. As noted, the witness rules were clearly in place in the sixteenth century and their abolition in some American jurisdictions did not take place until the late nineteenth century. *See infra* Part III. The period between 1600 and 1850 is an epoch in which the rules seemed to be firmly in place, and in which commentators regularly provided justifications for their existence.

of evidence and procedure in Anglo-American civil trials reflected premodern epistemological understandings of the nature and function of those proceedings.

### A. *The Epistemology of the Civil Trial*

We should note at the outset that, with the exception of James Oldham's retrieval of Lord Mansfield's civil trial notes,<sup>39</sup> there has been no scholarship that has been able to rely on civil trial court testimonial records, either in England or in America, for the period discussed in this Part. John Langbein's comparably important retrieval of Judge Dudley Ryder's eighteenth-century trial notes focuses on criminal cases.<sup>40</sup> So we only have a limited glimpse of what took place in early English civil trials, and, to the best of our knowledge, the data from the United States is virtually nonexistent. But contemporaneous commentary<sup>41</sup> and current scholarship<sup>42</sup> have made it plain that the witness disqualification rule was universally in place, in England and the United States, from at least 1600 to the 1840s.

Consequently, based on these sources, a case can be made that, prior to the middle of the nineteenth century, the function of the civil trial was more dispute resolution than truth-seeking. Although to the modern observer truth-seeking may seem always to have been one of the trial's functions, the epistemology of the trial—the basis upon which truth was sought and found—was fundamentally different in the seventeenth, eighteenth, and early nineteenth centuries from the epistemology of trials in what we are calling the modern period.

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39. See 1–2 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* (1992) [hereinafter OLDHAM, *MANSFIELD MANUSCRIPTS*]; James Oldham, *Truth Telling in the English Courtroom*, 12 L. & HIST. REV. 95 (1994) [hereinafter Oldham, *Truth Telling*].

40. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1 (1983); John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 92 MICH. L. REV. 1047 (1994). For a more general treatment, albeit focusing on criminal rather than civil proceedings, see JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003). Oldham's transcriptions of Mansfield's trial notes in torts cases between 1756 and 1788 reveal that there was no witness testimony by either plaintiffs or defendants in the cases. Under the definition of *torts cases* we include claims in libel, nuisance, assault, false imprisonment, negligence, trespass, and trover. 2 OLDHAM, *MANSFIELD MANUSCRIPTS*, *supra* note 39, at 810–62, 894–1065, 1122–1218. The Selden Society is in the process of publishing Judge Dudley Ryder's notes. See 131 *The Judicial Notes of Sir Dudley Ryder* (Thomas P. Gallanis ed., Selden Society, forthcoming).

41. Particularly notable is *On the Testimony of Witnesses, Parties to the Record*, 10 MONTHLY L. MAG 50 (1841), an English publication. Connor Hanly's *The Decline of the Jury Trial in Nineteenth-Century England*, 26 J. LEGAL HIST. 253 (2005), collects a significant amount of early- and mid-nineteenth-century articles and parliamentary debates about the efficacy of jury trials in civil disputes—commentary that was, in our view, highly relevant to the increasing professional dissatisfaction with the witness disqualification rule.

42. See Abraham, *supra* note 6, at 490–93 (providing a collection of the sources). LANGBEIN ET AL., *supra* note 15, at 247, take it for granted that what they call the application of “disqualification for interest” rules to parties as well as nonparties was in place “[i]n the seventeenth century.” They also suggest, without elaborating, that “[t]estimonial disqualification retarded branches of the law, especially tort.” *Id.* at 248.

At the center of this epistemological change was the jury, considered both as a legal and social institution.

George Fisher's important work on the history of the criminal jury describes its evolution, and surveys the completed historical research on the subject, in both criminal and civil cases.<sup>43</sup> Shortly after the Norman Conquest, at least in criminal trials, there was trial by ordeal—by water, fire, or battle. The ordeal revealed God's truth. When the Church forbade priests to participate in ordeals in 1215,<sup>44</sup> jury trial developed. The loss of the divine verdict that was understood to be the product of the ordeal was replaced by testimony under oath. Because oath was sacred and taken to God, the notion that truth came from God was not eliminated. Rather, the oath was a different source of God's word.

The exact role of the jury in civil cases around this time is not completely clear, in part because there are far more records of criminal trials. But certainly by the early thirteenth century, civil juries were at least partly self-informing, in both civil and criminal cases. They were chosen from men of the neighborhood, who had either witnessed the relevant events themselves or spoken to those who had witnessed or knew about them. Jurors came to court at least as much to speak as to listen, although there was also testimony from witnesses.<sup>45</sup>

#### 1. *The Oath Regime*<sup>46</sup>

With the growth and dispersal of populations in medieval and Renaissance England, jurors became less likely to be familiar with or capable of making themselves familiar with the facts underlying lawsuits. Testimony from witnesses became more necessary, but the notion that trials sought God's truth did not disappear. Testimony under oath therefore became one of the principal means of arriving at the truth.

At least by 1600, civil trials in England employed an approach to oral testimony that centered on the witnesses taking of an oath. The oath was understood in a markedly different way from its role in modern civil trials, where it amounts to an affirmation that the person testifying will "tell the truth, the whole truth, and nothing but the truth." That oath typically concludes with the phrase, "So help me God." In that phrase, one can see the remnants of an earlier epistemology of civil trials. During the oath regime of civil trials, however,

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43. See George Fisher, *The Jury's Role as Lie Detector*, 107 YALE L.J. 575 (1997).

44. *Id.* at 586.

45. *Id.* at 591–94.

46. In this Article, *oath regime* means a civil trial whose epistemological assumptions reinforced the idea that the testimony of a witness or party was designed to help resolve a dispute in a satisfactorily spiritual or social way, as distinguished from helping arrive at the truth. The oath regime of pleading originated in the medieval practice of *compurgation*, in which, as a method of proof in a factual dispute, one of the disputing parties swore an oath that his or her account of the facts was true, and other witnesses swore oaths that it was true that the party had done so. For a more detailed discussion of compurgation, see John S. Beckerman, *Procedural and Institutional Change in Medieval English Manorial Courts*, 10 L. & HIST. REV. (1992); R.H. HELMHOLZ, *THE IUS COMMUNE IN ENGLAND* (2001).

witnesses were expected to be facing God, as it were, by testifying in a fashion that would not damn them for eternity.<sup>47</sup> Although modern trials equate that concern with an obligation to tell the truth, that was not quite the understanding in the oath regime. Instead, the understanding was that a witness's testimony would be approved by God's will. Testimony would be seen as reinforcing the natural order of things in society, which was, after all, God's handiwork.<sup>48</sup>

There was thus another function of oath-taking, aside from truth-seeking, in the regime. It assured that a witness's testimony would not radically disturb the social hierarchies of the time. In a world in which social status was the very essence of one's place in the world, and where the "orders" of society were relatively fixed and perceived as ordained, one might think of oath-taking as a way of saying, "I as a witness am not going to say something that will disturb the existing social order." This is not to say that there was no room for truthful testimony from a witness under the oath regime, or no concern with ferreting out false or self-serving testimony. As discussed below, the witness disqualification rule was partially concerned with doing just that. But it is important to understand that reaching the truth about contested factual issues, while a goal of the oath regime's epistemology, was not *the* goal. Truth was to be placed in spiritual and social contexts.<sup>49</sup>

Two features of civil trials under the oath regime present a relatively stark contrast to the modern civil trial.<sup>50</sup> First, the judge's function was not quite that of an arbiter or "umpire," ensuring that the trial was fairly and accurately conducted and that the jury was not misled by the tactics or the legal arguments of counsel. Instead, judges can be said to have played a role somewhat analogous to the role

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47. One can see an illustration of this perspective in an excerpt from the Chancellor of England, John Morton, Archbishop of Canterbury, in a 1489 yearbook entry. Chancellor Morton said, in holding that a subpoena should be served on an executor who had released a person indebted to his testator, that "if he does so . . . and makes no amends or satisfaction . . . he shall be damned in Hell." LANGBEIN ET AL., *supra* note 15, at 314 (quoting Y.B. Hil. 4 Hen. 7, fol. 4, p. 8 (1489)).

48. We previously noted that most of the historical scholarship on early English trials emphasizes criminal rather than civil trials because the records of the latter trials are so attenuated. See *supra* Section II.A. The scholarship has also been preoccupied with the shifting role of the jury in early trials, and only incidentally with how that role illustrated the tacit assumptions about the function and purposes of trials themselves, what we are calling their epistemology. See, e.g., Fisher, *supra* note 43, at 609–10. It is plain that nearly all the historical scholarship on early English and American trials cited in this Part takes for granted that the oath regime of civil trials emphasized the spiritual and social significance of those events rather than what might be called their empirical significance, as devices for learning the actual truth of contested factual matters.

49. As James Oldham put it, the primary goal of trials was "peaceable, regulated dispute settlements." Searching out the truth, however desirable in the abstract, was secondary. See Oldham, *Truth Telling*, *supra* note 39, at 120.

50. All the historical scholarship on early Anglo-American trials we consulted emphasizes the presence of these two features, including Fisher, *supra* note 43; Hanly, *supra* note 41; LANGBEIN ET AL., *supra* note 15; Oldham, *Truth Telling*, *supra* note 39; T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499 (1999); and Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HAST. L.J. 579 (1993).

played by squires in viva voce voting in eighteenth-century America. It was customary, in some eighteenth-century American parishes, for certain members of a squire's household, or certain artisans in the nearby township, to be eligible to vote—although the franchise was limited, possession of freehold land, or even just the payment of taxes, was often a sufficient basis for eligibility to vote in local elections.<sup>51</sup> In this setting, the squires of plantations or large farms would approach the ballot box and declare their preferences, and then, often in rote order, the members of their households and their “hired hands” would announce that they were voting “as the Squire does.”

The assumption was that the squire, holding both superior social status and economic leverage over his “inferiors,” could educate them about their political preferences. A like assumption seems to have driven the early Anglo-American civil trial. The judge, as a person of high status and respect, could instruct jurors, drawn from the ranks of the community at large, about how witness testimony should be understood. In particular, once a witness took an oath and testified, the judge was at liberty to decipher the meaning of that testimony for the jury. Indeed, it appears that judges felt more comfortable referring civil trials to arbitration, where arbitration agreements could authorize procedures not otherwise available, and felt entitled, in both civil and criminal trials, to disregard a jury finding if it did not comport with the judge's sense of a just outcome.<sup>52</sup>

Second, it followed from this conception of the judges' role under the oath regime that the jury's role would also have been understood as somewhat different from that in modern trials. Today we anticipate that a jury verdict is the equivalent of the truth about what happened. We allow for miscarriages of justice and even for corrupt or utterly incompetent juries, but we do that against a baseline that the jury is, as George Fisher puts it, a “lie detector.”<sup>53</sup> Under the oath regime, juries were not so regarded. Although finding out “what happened” in a contested dispute was clearly their function, “what happened” meant as much what *was spiritually and socially appropriate* as what was “the truth of the matter.”<sup>54</sup>

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51. For the classic study of the dominant influence of squires on the voting practices of members of their households or village residents of lower social status, see THOMAS J. WERTENBAKER, *THE FOUNDING OF AMERICAN CIVILIZATION: THE MIDDLE COLONIES* (1938). This work is an extension of Wertenbaker's *PLANTERS OF COLONIAL VIRGINIA* (1922).

52. Both Mansfield and Ryder engaged in those practices. See Langbein, *Historical Foundations of the Law of Evidence*, *supra* note 40; 2 OLDHAM, *MANSFIELD MANUSCRIPTS*, *supra* note 39, app. E, at 1541–623. Mansfield initiated the practice of having plaintiffs and defendants in civil cases testify before arbitrators as early as 1758, and continued it through 1786, but the great majority of the arbitration orders recovered by Oldham do not involve torts cases. See *id.*

53. Fisher, *supra* note 43.

54. Much of the scholarship on the early history of evidence and procedure has implicitly recognized, but not focused on, the epistemological underpinnings of civil and criminal trials. This is because scholars have been preoccupied with two other issues: the relationship between the common-law courts and chancery, and attitudes and practices affecting the place of the jury in trials. Hanly, *supra* note 41, Devlin, *supra* note 28, Gallanis, *supra* note 50, and Landsman, *supra* note 50, demonstrate, along with Fisher,

## 2. *The Witness Disqualification Rule*

With this epistemology of civil trials in place, one can readily understand how the witness disqualification rule emerged. Apparently in an effort to protect the sanctity of oath taking, individuals with an “interest” in the outcome of litigation were precluded from testifying. The most frequently quoted passage stating the rationale for the rule is from the eighteenth-century evidence scholar, Jeffrey Gilbert:

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, 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.<sup>55</sup>

Thus, the rule minimized the risk of perjury, and protected the legitimacy of oath taking by preventing those thought most likely to commit perjury from doing so.<sup>56</sup> Moreover, if the parties testified they might contradict each other under oath and thereby call into question the notion that testimony under oath revealed God’s word, the rule avoided this kind of open contradiction.

Gilbert’s rationale remained implicitly in place when Thomas Starkie published *A Practical Treatise of the Law of Evidence* in 1824.<sup>57</sup> Although Starkie regarded the English law of evidence as having become far more regularized and professionalized since the first published version of Gilbert’s treatise appeared in 1754, he devoted no explicit attention to advancing justifications for the witness disqualification rule, noting only that it was in place and that there was frequent litigation in the *nisi prius* civil courts as to whether particular individuals were “incompetent” to testify because of an “interest” in the proceedings.<sup>58</sup> Starkie also devoted a good deal of his treatise to showing how the rule prohibiting “hearsay” evidence from being introduced at trial had expanded and formalized since

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*supra* note 43, an awareness that such practices as cross-examination, liberal or strict interpretations of the treatment of hearsay evidence, and the discretion of trial judges to comment on matters presented to juries changed significantly between the late eighteenth and mid-nineteenth centuries, and that, cumulatively, the changes could be described as ushering in a “modern” conception of civil trials. But those sources pay little attention to the meaning attached to the changing attitudes and practices by historical contemporaries.

55. JEFFREY GILBERT, *THE LAW OF EVIDENCE* 122 (London, Henry Lintot 1756); *see also* Fisher, *supra* note 43, at 625 (quoting GILBERT, *supra*).

56. Fisher cites Wigmore’s conclusion that the parties were barred from testifying in civil cases by the mid-sixteenth century, and interested witnesses by the mid-seventeenth century, but suggests that this may simply have been because these were the earliest references that Wigmore could find. Fisher, *supra* note 43, at 624–25 & n.204.

57. THOMAS STARKIE, *A PRACTICAL TREATISE OF THE LAW OF EVIDENCE* (London, J. & W.T. Clarke 1824).

58. Gallanis showed that the competence of witness issue was regularly litigated in the 1820s, with particular emphasis on the disqualification for “interest.” *See* Gallanis, *supra* note 50, at 527.

Gilbert's treatise first appeared, but he made no explicit connection between that trend and the witness disqualification rule.<sup>59</sup>

The rule carried over to the American colonies. In America, the sole criterion for disqualification of a witness seems to have been a showing that the witness had a "pecuniary" interest in the outcome of the litigation. "Pecuniary" appears sometimes to have been defined narrowly, so that, for example, relatives or servants of parties to a litigation might or might not be permitted to testify on a party's behalf. But quite early on the witness disqualification rule was understood to apply to *both* parties to a civil lawsuit. Over the centuries, there also developed a series of rules detailing the way in which juries should deal with conflicting testimony, which was under oath and therefore answerable to God. The most notable such rule came from *Bethel's Case*, which dictated "that juries should call one witness mistaken before calling either witness a liar."<sup>60</sup> Similarly, in felony cases, the defendant could "testify," but not under oath. These rules preserved the legitimacy of the oath.<sup>61</sup> Moreover, there seems to have been a tacit understanding in early Anglo-American civil trials, after the witness disqualification rules were in place, that the "best evidence" was written rather than oral evidence.<sup>62</sup>

In accidental personal injury or property damage cases, there was rarely any written evidence. However, sometimes such accidents took place in public, where evidence might have been available from disinterested, third-party witnesses. Indeed, a number of the canonical pre-nineteenth century accident cases explicating the differences between trespass and trespass on the case turn out to have involved accidents that occurred in public.<sup>63</sup>

No American commentators squarely addressed the rule by the time Starkie's treatise appeared, although in 1836, the ubiquitous Joseph Story

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59. For more detail on Starkie's treatise and his treatment of hearsay evidence, see generally Gallanis, *supra* note 50.

60. Fisher, *supra* note 43, at 584, 590 (citing THE TRYAL OF SLINGSBY BETHEL ESQ. (London, R. Harbottle 1681)); see also LANGBEIN ET AL., *supra* note 15, at 41, (citing JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 90 (Boston, Little & Brown Co. 1898)); John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1170 (1996).

61. Fisher, *supra* note 43, at 606. We have seen nothing to indicate that there was an analogous practice of permitting the unsworn testimony of the parties in civil cases.

62. Gallanis argues that between the publication of Gilbert's and Starkie's treatises, the law of evidence had come to emphasize oral rather than written proof. See Gallanis, *supra* note 50, at 523. His discussion of civil trials between 1820 and 1824, however, reveals that civil cases seem to have been as concerned with issues involving the legitimacy of written evidence as those pertaining to oral evidence. See *id.* at 526–28.

If one thinks about the epistemology of the oath regime of civil trials, a preference for written over oral evidence might well comport with the tacit purposes of those trials. Only a very limited number of people could write, and such persons were overwhelmingly of high status because they belonged to the nobility, gentry, or clergy. For more detail, see HEIDI BRAYMAN HACKEL, *READING MATERIAL IN EARLY MODERN ENGLAND* (2005). Thus one can imagine, in a setting in which an important purpose of evidence at a trial was to instruct the jury as to the spiritually and socially beneficial outcome of the dispute, why evidence produced by persons of high status would have been preferred.

63. See Abraham, *supra* note 6, at 499–500.

published a treatise on equity jurisprudence that included attention to the relationship between common law and equity pleading.<sup>64</sup> It was only when Simon Greenleaf<sup>65</sup> compiled and published his treatise on evidence in 1842,<sup>66</sup> six years before Connecticut became the first state to partially abolish the rule,<sup>67</sup> that the witness disqualification rule received an extended treatment by an American commentator. In addition to reviewing English cases and commentary, Greenleaf integrated early American decisions, virtually creating the field of evidence in American law.<sup>68</sup> His treatise was in the tradition of Kent's *Commentaries on American Law*<sup>69</sup> and Story's commentaries on multiple subjects. It remained the authoritative work on American evidence law until the early twentieth century, when John Wigmore, who had edited a portion of the last edition of Greenleaf's *Evidence*,<sup>70</sup> issued his own remarkable treatise.<sup>71</sup> We will consider Wigmore's approach to the witness disqualification rule in some detail in Part V.

Greenleaf's treatise provides a snapshot of the condition of the witness rule in the United States just at the point where its epistemological assumptions were about to be rethought. Greenleaf devoted 104 pages of his treatise to discussion of the rule, its permutations, and its exceptions.<sup>72</sup> His discussion and analysis do not reflect any dissatisfaction with or criticism of the rule.

Greenleaf described the rule as one that declared certain classes of persons "incompetent" to testify in civil proceedings. The principal application of the incompetency rule, Greenleaf felt, was against persons

who are *interested in* [the] *result* [of litigation.] The principle, on which these are rejected, is the same with that, which excludes the parties themselves, namely, the danger of perjury, and the little credit generally found to be due to such testimony, in judicial investigations.<sup>73</sup>

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64. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (Boston, Hilliard, Gray & Co. 1836).

65. For the best current source of biographical information on Simon Greenleaf, see Daniel D. Blinka, *The Roots of the Modern Trial*, 27 J. EARLY REPUBLIC 293 (2007).

66. SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (Boston, Little, Brown & Co. 1842).

67. An Act for the Regulation of Civil Actions (adopted 1848), CONN. REV. STAT. tit I, ch. X, § 141 (1849).

68. Blinka suggests that prior to Greenleaf's treatise the field of American evidence law was virtually nonexistent. See Blinka, *supra* note 65, at 302.

69. See, e.g., 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW (New York, O. Halsted, 1826). Story and Greenleaf were the two faculty members at Harvard Law School at the time Greenleaf issued his treatise. For more detail, see DANIEL R. COUILLETTE & BRUCE A. KIMBALL, ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY 166–73 (2015).

70. Wigmore edited the first volume of the 16th edition of Greenleaf's A TREATISE ON THE LAW OF EVIDENCE (John Henry Wigmore ed., Boston, Little, Brown, & Co. 1899).

71. JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (Boston, Little, Brown, & Co. 1904).

72. 1 GREENLEAF, *supra* note 66, at 375–478.

73. *Id.* § 386, at 431–32.

Greenleaf next turned to some common applications of the rule, one of which he summarized as follows:

If the witness believes himself to be under an *honorary obligation*, respecting the matter in controversy, in favor of the party calling him, he is nevertheless a competent witness . . . and his credibility is left with the jury.<sup>74</sup>

Why should Greenleaf have regarded a witness who was “under an honorary obligation” to testify in favor of the party who called him as competent? It would seem that there was no plainer example of a “biased” witness. And yet, Greenleaf maintained, such witnesses typically were not, and should not be, disqualified. Rather, they should be allowed to testify and the jury allowed to assess the witnesses’ credibility.

The “honorary obligation” illustration from Greenleaf reveals that premodern conceptions of “honor”—strong concern for the value of one’s name, family heritage, class, and reputation—were continuing to be treated, in early nineteenth century America, as significant constraints on perjury or other evasive conduct by witnesses in civil trials. Greenleaf and many of his historical contemporaries believed that the preservation of one’s “good name” and social reputation were so important that many witnesses would testify because they were honor-bound to do so, whether or not that testimony was true.<sup>75</sup> Here one sees, as late as 1842, the remnants of an older epistemology of the civil trial: an epistemology where the dictates of social class occasionally trump the search for truth. Greenleaf did not assert, positively, that the jury should invariably believe the testimony of a witness who was honor-bound; he simply stated that the jury could weigh that witness’s credibility. But the fact, as Greenleaf recognized, that the witness rule was not automatically applied to persons under “an honorary obligation” is itself noteworthy.

Greenleaf also discussed the treatment, under the witness rule, of the testimony of agents and servants in trespass-on-the-case actions where employers or masters were defendants in third-party suits based on the “neglect” of the agents or servants.<sup>76</sup> In one set of such actions, the defendants were employers exposed to civil liability under the vicarious liability principle. In the other set, the agents or servants were witnesses to accidents that caused damage to their employers’ or masters’ property, and for which the employers or masters sought recovery in actions in trespass on the case. And, in all the cases, the agent or servants were deemed incompetent to testify, for the reasons outlined by Greenleaf above.<sup>77</sup> As Greenleaf put it, first in his text:

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74. *Id.* § 388, at 433.

75. Although the concept of an honorary obligation was perhaps heightened in the antebellum American south, *see* BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* (1st ed. 1982), it was entrenched in other areas of nineteenth-century America as well. *See* RYAN CHAMBERLAIN, *PISTOLS, POLITICS AND THE PRESS* (2009); ANDREW PORWANCHER, *THE DEVIL HIMSELF* (2016).

76. GREENLEAF, *supra* note 66, § 394, at 439.

77. *Id.* § 396, at 442 n.2.

[I]n an action for an injury to the plaintiff's cart or coach or horses, by negligently driving against them, the plaintiff's own driver or coachman is not a competent witness for him, without a release.<sup>78</sup>

Then, after citing five English cases, the last of which, *Sherman v. Barnes*, followed an earlier case, *Moorish v. Foote*, Greenleaf added:

In *Sherman v. Barnes* . . . the same point was so ruled, by Tindal, C.J. upon the authority of *Moorish v. Foote*; though he seems to have thought otherwise, upon principle, and perhaps with better reason.<sup>79</sup>

In early nineteenth-century Anglo-American jurisprudence, it was common for courts and commentators to distinguish arguments based “upon authority” from those based “upon principle.” The distinction was meant to capture the difference between reasoning from relevant precedents, whether in a particular jurisdiction or in “general” common law, and reasoning from “general principles” of law, logic, reason, or the nature of things.<sup>80</sup> Greenleaf was suggesting, in the footnote, that Chief Justice Nicholas Tindal of the Court of Common Pleas had reservations about declaring a servant an incompetent witness when that servant had seen the accident in question, and when the master, as prospective plaintiff, might well have been dependent on the servant's testimony because he had either not witnessed the damage to his property or had perhaps not even been present. “Upon principle,” Greenleaf seems to have thought, Tindal believed that the servant should be allowed to testify. “[P]erhaps,” Greenleaf wrote, Tindal had the “better reason,” but only “perhaps.” Greenleaf was unwilling to jettison an established witness disqualification rule even where it did not seem commonsensical.<sup>81</sup>

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78. *Id.* at 442.

79. *Id.* at 442 n.2.

80. For an illustration in a Marshall Court case involving a title dispute in Kentucky, see G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, *supra* note 4, at 766–73 (discussing *Johnson v. Pannel's Heirs*, 15 U.S. (2 Wheat.) 206 (1817)).

81. Greenleaf's discussion of another exception to the rule deserves some comment. It was, as Greenleaf put it:

founded on considerations of public necessity and convenience, for the sake of trade and the common usage of business. [It exempted] *agents, carriers, factors, brokers*, and other *servants*, when offered to prove the making of contracts, the receipt or payment of money, the receipt or delivery of goods, and other acts done within the scope of their employment.

GREENLEAF, *supra* note 66, § 416, at 459–61. At first blush, this exception appears difficult to reconcile with the exclusion of the testimony of agents or servants in negligence cases, especially because Greenleaf used the language “acts done within the scope of their employment,” reminiscent of modern vicarious liability cases in tort. But Greenleaf's illustrations make it plain that he was not thinking of tort cases at all. His illustrations involved an acceptor of a bill of exchange, a porter, a journeyman or salesman delivering goods, a broker, a factor, a clerk who has received money, a carrier who paid a sum of money by mistake, a banker's clerk, a seller of coal, a bookkeeper, a shipmaster who advanced money for a voyage, and a cashier of a bank. All those witnesses were involved in

Similarly, in England, there were also commentators who were quite content with the rule. In 1841, as the English legal profession's debate about the witness rule heated up, two cases<sup>82</sup> that contested the application of the rule came before the Queen's Bench Court, which took appeals from the Court of Common Pleas and other trial courts. An anonymous commentator in the *Monthly Law Magazine* in 1841 made his views on the rule plain. After a detailed discussion of the uneven application of the rule in numerous civil cases, the commentator bemoaned "such a variety of [judicially fashioned] distinctions as to the admissibility of witnesses [who were] parties to the record," and called for a "plain and intelligible rule on the subject." "[W]e confess we know of none so simple and convenient," he declaimed, "as that of rejecting altogether the testimony of plaintiffs or defendants under any circumstances."<sup>83</sup>

The anonymous 1841 commentator made an additional allusion worth noting. At one point he described a case, decided by Lord Mansfield decades earlier, in which "one of several plaintiffs" had "come . . . forward voluntarily to disprove the defendant's liability to the demand made upon him," and had, with the consent of the other plaintiffs, been admitted as a witness, even "though at the same time [the witness's testimony] defeat[ed] the claim of those who jointly sue[d] with him." Mansfield "said on that occasion," the commentator noted, "that it was a new case, that he never recollected a case where a plaintiff had been called as a witness, and perhaps the same thing may rarely occur again."<sup>84</sup> Here was one example in which the idea that a civil trial was a search for the truth of a dispute prevailed. Or, perhaps, the other plaintiffs were misled about the purport of the witnesses' testimony. In any event, Mansfield thought it rare that a plaintiff would be called as a witness for any reason. The anecdote shows the witness rule in full flower.

### 3. Cross-examination and the "Hearsay Evidence" Rule

Early civil trials had two other features: limited counsel cross-examination of witnesses, and no rule barring evidence of third-party statements to

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commercial transactions. By "public convenience and necessity" Greenleaf meant only "for the sake of trade and the common use of business." Indeed, he made it clear that "[t]his exception . . . cannot be extended to cases, where the witness is called to testify to facts *out of the usual and ordinary course of business*." If "the cause depends on the question whether the agent has been guilty of some tortious act," Greenleaf concluded, "or some negligence in the course of executing the orders of his principal, and in respect of which he would be liable over to the principal, if the latter should fail in the action pending against him, the agent, as we have seen, is not a competent witness for his principal without a release." *Id.* § 417, at 461–62.

82. See *Worrall v. Jones* (1831) 131 Eng. Rep. 153; *Green v. Sutton* (1840) 174 Eng. Rep. 285. *Worrall* was an action in debt, and the Court of Common Pleas concluded that the principal debtor, who could not claim contribution from his co-defendants, was a competent witness for the plaintiff. *Worrall*, 131 Eng. Rep. at 153. *Sutton* was an action in assumpsit, and the trial judge held that a defendant who had suffered judgment by default was not a competent witness for the plaintiff against his co-defendants. *Sutton*, 174 Eng. Rep. at 285.

83. *On the Testimony of Witnesses, Parties to the Record*, *supra* note 41, at 58.

84. *Id.* at 53.

a witness, either oral or written (so-called “hearsay” evidence), if the third party was not physically present in court. Those features are so basic to contemporary civil litigation that it may be hard to imagine a civil trial without them. Yet their omission appears to have been conventional for much of the period when the witness disqualification rule was in place.<sup>85</sup>

Once again, if one considers the epistemological assumptions of the oath regime, limited cross-examination and the absence of a hearsay rule of evidence can be seen as logically entailed. Cross-examination is a method of impeaching a witness’s testimony on behalf of one party in litigation. Without it, a jury might be misled as to what actually occurred in a dispute because of “interested” testimony by a party or a witness for that party. The true facts of the dispute might not emerge. Similarly, the hearsay evidence rule is designed to prevent parties or their witnesses from bringing evidence into court that cannot be rebutted because the source of that evidence is not present. Both of those evidentiary practices presuppose that the function of a civil trial is to reveal the truth about a dispute.<sup>86</sup>

But we are suggesting that if one grants the epistemological assumptions of the oath regime, a trial’s primary purpose is somewhat different. Truth was a concern of early trials, but truth was filtered through spiritual and social lenses. The jury was not ignored in its role as decision-maker, but the jury was less a lie detector than the voice of a community in which spiritual and social principles were foundational to that community’s flourishing. What we, in modern society, are experiencing in looking back at the oath regime of civil trials is a window into a premodernist sensibility, one that attributed causal significance in the universe to agents, such as God or the relatively fixed “orders” of society, that were to an important extent external to human free will and served to limit human capacity to control events.

To oversimplify, then, the tripartite epistemological structure of the tort trial until late in the period when witness disqualification prevailed was (1) no party or interested-witness testimony; (2) little or no cross-examination of those who did testify; and (3) loose, if any, limits on the admission of hearsay testimony. Each of those features of tort trials served to reinforce the starting premises of the oath regime.

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85. The most extensive discussion of the transformation of evidence law in England between the 1780s and 1820s is Gallanis, *supra* note 40, at 511–35. Oldham, *Truth Telling*, *supra* note 39, Fisher, *supra* note 43, and LANGBEIN ET AL., *supra* note 15, at 452–56, agree that in the decades on which Gallanis focuses, and most particularly between the 1820s and the 1850s, when the witness rules began to be abolished in both England and America, prohibitions against hearsay evidence were tightened and cross-examination of witnesses in both criminal and civil trials became routine. Compare Fisher, *supra* note 43, at 659–62, with LANGBEIN ET AL., *supra* note 15, at 452–56, and Oldham, *Truth Telling*, *supra* note 39, at 98, 110–13.

86. As Wigmore put it, cross-examination was “the greatest legal engine ever invented for the discovery of truth.” 2 WIGMORE, *supra* note 71, § 1367, at 1697.

4. *Summary: The Witness Rule, the Writ System of Pleading, and Civil Trials at Common Law and in Equity*

It remains to explore the possible connection between the witness rule and the tension between common law and equity courts that existed in England and early America for all of the eighteenth and at least half of the nineteenth centuries. There has been almost no investigation of the precise relationship between the witness disqualification rule and the writ system of pleading in civil trials that was in place, in both England and America, at the same time as the witness rule.<sup>87</sup> It seems apparent, however, that both writ pleading and the witness rule, along with limited cross-examination of witnesses and the presence of chancery courts as an alternative to courts that used the common law to resolve disputes, can be seen as consistent with the epistemological assumptions of the oath regime.

We noted that much has been written on the role of the writs employed in early English and American civil proceedings as the equivalent of substantive doctrinal rules in common-law cases. Although it is plain that the writs eventually came to function as doctrinal surrogates,<sup>88</sup> our interest in the writ system of pleading is in the connection between that system and the witness rule, and more generally, in the connection between those two procedural features of early civil trials and the oath regime.

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87. Most of the historical work we surveyed recognized that there were rough temporal parallels between the appearance of cross-examination and stricter enforcement of the hearsay rule, an ongoing tension between the strict requirements of common-law writs and chancery proceedings, mounting concern about juries as decision-makers in common-law trials, and the decline of the witness disqualification rules. For an overview, see LANGBEIN ET AL., *supra* note 15, at 450–64. But none of the sources we consulted attempted to explore whether there was a precise connection between the gradual decline of writ pleading in England and American common-law cases and the abolition of disqualification of “interested” witnesses in civil trials.

88. In bodily injury actions, for example, failure to allege “direct injury” in the writ of trespass meant that a claimant was nonsuited, resulting in an implicit definition of one category of tort cases as requiring a showing of something like “intent.” See LANGBEIN ET AL., *supra* note 15, at 103. But a requirement that an injury be “direct,” and thus a basis for bringing a suit in trespass, was not the precise equivalent of requiring that actions in trespass demonstrate a violation of a tort liability standard. Hypothetically, “direct” injuries to land or persons could result from intentional, unintentional but negligent, or unintentional and non-negligent conduct. However, as tort law developed, the greater number of assaults, batteries, and other intentional tort suits were brought in trespass, and the overwhelming number of suits where the defendant’s conduct was not intentional were brought in trespass on the case. So, in a case where an injured party sought tort redress, it was vital, at least in the common-law courts, for that party to conform the facts of the injury to the requirements of the trespass or case writs. In that respect, the failure to choose the proper writ can be likened to the failure, in modern torts cases, to sue in battery, as opposed to in negligence, when a surgeon amputates the wrong leg. Amending such a plea is typically possible in contemporary tort procedure, but it was not possible under the writ system; the only remedy for disappointed suitors was to file a bill in chancery and hope it would be entertained. For more detail, see LANGBEIN ET AL., *supra* note 15, at 268–70.

Consider what both “special pleading”—as illustrated by the technical requirements of the common-law writs and chancery courts’ response to them—as well as the witness rule, were designed to accomplish. Special pleading, above all, served to *limit* the number of civil actions that could be brought in a common-law court by ensuring that disputes between persons were worthy of being heard by courts. Of the range of injuries to persons and property that occurred in early England and America, only a few, once confronted with the technical requirements of the common-law writs and the additional requirements of bills in chancery, ended up being actionable.<sup>89</sup>

The witness rule served an analogous function. It limited the number of persons who could testify in civil suits at common law, and, by doing so, implicitly relegated a potentially large category of disputes to extra-legal resolution. Why would two evidentiary features of a common-law system serve to funnel disputes outside the common-law courts? Here one risks anachronism. It is commonplace today to think of civil litigation as an expanding method of dispute resolution whose trial procedures are designed to make it relatively easy to bring cases to court. Arguably, the purpose of civil litigation under the oath regime was almost the opposite. Both the witness rule and the writ system functioned to ensure that only a special category of cases would be brought in the common-law courts: cases where a clear showing of injury and damage had been made out, where the jury would not be distracted by perjured or biased testimony from “interested” witnesses, and where the courts would thus remain institutions that could resolve disputes without unduly upsetting the existing social and spiritual realms of life.

What, then, of the persistent modification of the strict requirements of the common-law writs by chancery proceedings? Numerous historians have noted the continued presence of chancery courts in England up to and beyond the time when the witness rule was abolished by statute. They also noted that chancery courts did not survive, for the most part, in American states after the 1850s.<sup>90</sup> Here, once again, the connection between chancery courts as an alternative to the English common-law courts and the oath regime seems intuitively obvious. The concept of “chancery,” or the King’s grace, originated in medieval England with the practice permitting persons, whose conduct subjected them to punishment under the common law, to repair to a church, seek sanctuary, and remain outside the jurisdiction of the common-law courts. From those origins a system of “chancery courts” developed in which the law of “equity”—a concept roughly equivalent to “God’s justice and the sovereign’s mercy”—emerged as an alternative to the

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89. For more detail on chancery procedures in the sixteenth and seventeenth centuries, see JOHN P. DAWSON, *A HISTORY OF LAY JUDGES 151–72* (1960).

90. Devlin, *supra* note 28, remains the fullest treatment of the interaction between the common law and chancery courts in England in the late eighteenth and early nineteenth centuries. Fisher, *supra* note 43, represents the most searching effort to discuss the epistemological dimensions of common-law jury trials in nineteenth and early twentieth century America.

common law.<sup>91</sup> Suitors in the equity courts needed to answer on oath, although they did not testify.<sup>92</sup>

In short, one can see both chancery courts and the evidentiary practices of the early English common-law courts as outgrowths of the epistemology of the oath regime. Why should a suitor get the benefit of clergy in the first place? Why were writ pleadings that threatened to be dismissed by the common-law courts sometimes reshaped for consideration by the Chancellor and his officials? Why were some lawsuits eligible for disposition by the chancery courts *ab initio*? Because, we are suggesting, the oath regime's epistemology assumed that there was a spiritual world that existed above and beyond the temporal world of ordinary life. That spiritual world, and the presence of God and his appointed human servants, were omnipresent in the temporal world. Humans thus needed to live their lives with one eye, as it were, on their worldly affairs and the other on their prospective salvation or damnation. Further, humans needed to "know their places" in the temporal world, but also to recognize that it was a mystery as to whether they would retain those places in the hereafter. The oath regime's practices and institutions were designed to communicate each of those messages.

### III. REPEAL AND ITS AFTERMATH

As the middle of the nineteenth century approached, a number of related influences would lead to the eventual repeal of the witness disqualification rules. Cross-examination of witnesses had become a more common practice, arguably lessening the concern that perjured testimony would be unchallenged. Meanwhile, something like the modern hearsay rule was a regular feature of civil trials, replacing earlier practices that had placed virtually no limitations on evidence introduced by witnesses recalling absent parties' statements. Both of those changes can be seen as having epistemological roots: civil trials were becoming events in which judges and juries were expected to assess critically the testimony of witnesses based on what they said, rather than who they were or to whom they owed spiritual allegiance. As such, the changes can be seen as a shift away from premodern epistemology. Criticism of the witness disqualification rule was part of that shift as well.

#### A. Criticism and Reaction

As time went on, the tensions within the rule were more evident, as exceptions testing its coherence became a matter of increasing concern. For example, the anonymous 1841 English commentator quoted earlier considered the application of the rule to some tort cases. "It is said," he observed, "that if one of several defendants in trespass allow judgment to go by default, he is not a competent witness for the plaintiff, though he is for his co-defendants."<sup>93</sup> In

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91. A standard reference on the origins of the chancery courts in England is THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 178–81 (5th ed. 1956).

92. Devlin, *supra* note 28, at 58–59.

93. *Id.* at 54. The case was *Chapman v. Graves* (1810), quoted in full in *Stevens v. Lynch*. (1809) 170 Eng. Rep. 1174, 1174 n.\*2.

addition, “where one of several defendants suffers judgment by default in an action of tort, he is a competent witness for his *co-defendants* to prove that he alone is liable.”<sup>94</sup> The commentator then gave a rationale for that treatment, which he apparently thought sufficiently unusual to require explanation. He stated, “For though [the co-defendants] be acquitted, [the defendant witness] would remain liable, and he is not necessarily liable to the costs of the issue tried against his co-defendants.”<sup>95</sup>

But “Best, C.J.,” the commentator pointed out,

thought [in the case of *Mash v. Smith*<sup>96</sup>] that a defendant in trespass who had suffered judgment to go by default was not a competent witness for his co-defendants who had pleaded, if the jury are to assess the damages against him, as well as to try the issues against the other defendants; it was said that the proposed evidence would give a complexion to the case, and it might go to reduce the damages against himself, and therefore he was not competent.<sup>97</sup>

Moreover,

It appears also that Burrough, J. refused to admit as a witness one defendant who had suffered judgment by default, on behalf of a co-defendant who had pleaded to an action of trespass for an assault—proved to have been a joint act—it being said that such a witness was interested in reducing the damages which might be levied wholly on him; and as there is but one assessment of damages, this seems a reasonable opinion.<sup>98</sup>

Such cases seem to have presented courts with a conundrum when they sought to determine whether a potential witness for the plaintiff or the defendant was an “interested” party. It seems clear that, by the early nineteenth century, English common-law courts defined “interest” as limited to pecuniary concerns, but at the same time had difficulty figuring out, at least in trespass actions involving multiple defendants, where a potential witness’s “interest” lay. A major reason for not allowing witnesses to testify whose liability was no longer at issue, because they had defaulted (such as co-defendants) or whose sympathies with a party for whom they were prepared to testify seemed obvious (as with servants of masters or agents of employers), was that a judgment might eventually rebound on them. A defaulted defendant might want to impeach his co-defendant in order to avoid paying the full judgment. An agent or servant might want to aid the position of his employer or master in order to avoid their coming against him for damages.

But the “interest” of a prospective witness might line up the other way. A co-defendant in a trespass action might simply want to help the cause of his fellow defendants. A servant or agent might want to aid the cause of his master or employer. Indeed it might be in the “interest” of such persons to do so because

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94. *On the Testimony of Witnesses, Parties to the Record, supra* note 41, at 54.

95. *Id.*

96. (1824) 171 Eng. Rep. 1324.

97. *On the Testimony of Witnesses, Parties to the Record, supra* note 41, at 54.

98. *Id.* at 55. The case in question was *Webber v. Budd*, Exeter S.A. 1826.

they wanted to preserve good relations with others who had been named a defendant in a trespass suit, or because they wanted to maintain good relations with their masters or employers. In short, defining “interest” as a pecuniary interest did not necessarily make the witness rule easier to apply. It is a small wonder that the author of *On the Testimony of Witnesses*, after parsing several instances of the witness rule in application, concluded that the “simple and convenient” solution was to apply the rule across the board. But that meant that both plaintiffs and defendants in tort suits may well have had difficulty getting *anyone* to help them bring their cases. And of course, as parties, they could not testify either.

Other mid-nineteenth-century commentators began to take aim at the rule as well. Jeremy Bentham, who had been called to the bar in 1772 but had never practiced law and was a lifetime opponent of the elaborate procedures in place in the late eighteenth- and early nineteenth-century common law and equity courts, attacked the witness rule in lectures as early as 1777, but not in print. In 1827 Bentham’s *Rationale of Judicial Evidence* was posthumously published, and his arguments against the rule, which he had refined over the years, became publicly disseminated. Bentham argued that the principal purpose of the rule, eliminating perjured testimony, was largely negated in criminal trials by the practice of cross-examination and in civil trials by the jury’s awareness of any “interest” that a disqualified witness might have.<sup>99</sup> Bentham believed trials should be searches for truth, not vehicles for perpetuating spiritual and class attitudes. Although Bentham’s critique of the witness rule was actually seven decades old in the 1840s, only in that decade did legal audiences become receptive.

All this culminated, in England, in Parliament’s passage of Lord Denham’s Act, which in 1844 abolished the rule with respect to non-party witnesses in civil and criminal cases. Eventually, Parliament abolished the rule for all “interested” parties in civil cases in 1851.<sup>100</sup>

Similar tensions were brewing on the American side of the Atlantic. Though, as noted earlier, Greenleaf was not critical of the rule, his treatise described its complications. For example, he indicated that “[t]he record of a judgment . . . is not always and in all cases admissible in a subsequent action by the master against the servant.” His discussion of that proposition made it plain that he was thinking of what would now be called vicarious liability cases in tort law: cases in which, because of the negligence of a servant, the servant’s master was exposed to liability against an injured third party. Could the master then, Greenleaf asked, automatically bring an action against the servant to recover the damages the master incurred? He concluded that the answer was no, citing Starkie’s evidence treatise.<sup>101</sup> As Greenleaf put it, “The record of a judgment . . . is always admissible, even in an action between strangers,” but only “to prove the

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99. Jeremy Bentham, *Rationale of Judicial Evidence: Part 2*, in 7 WORKS OF JEREMY BENTHAM 564–66 (reprt. ed. 1962) (1843). The contemporary account in *On the Testimony of Witnesses, Parties to the Record*, *supra* note 41, at 52–58, lists several cases in which the question of whether a particular witness should be disqualified was litigated in the courts of Westminster.

100. St. 14 & 15 Vict. c. 99, § 1.

101. GREENLEAF, *supra* note 66, § 404, at 450.

fact, that such a judgment was rendered, and for such a sum.” The record of the judgment was “not always and in all cases admissible to prove the truth of any fact on which the judgment was founded.”<sup>102</sup>

Consider the implications of applying the witness rule to cases where a master considered filing a trespass on the case action against a servant to recover damages the master incurred because the servant’s negligence injured a third party. Greenleaf believed that there were only “certain cases” in which the evidence of the servant’s previous negligence could be introduced in that action. One was “where the servant or agent has undertaken the defence.” The other was where the servant was “bound to indemnify.” In both cases, the servant, Greenleaf concluded, was “duly required” to assume an obligation to the master.

These kinds of difficulties were increasingly considered a cause for concern.<sup>103</sup> An article in the American Law Register in 1857 captured the point of view that was becoming dominant. “The only conceivable objection that can be urged against a repeal [of the witness rule],” the author argued, “is the pretended inducement to the commission of perjury it would afford.” He noted the growing number of exceptions to the rule, and asserted that it “has worked much injury in past times to the rights of deserving men and has retarded the due course of justice . . . .” Perjury could be prevented by “cross-examination—at once the most perfect and effectual system for the unraveling of falsehood ever devised by the ingenuity of mortals.”<sup>104</sup>

Connecticut was the first state to abolish the witness rule in civil cases, in 1848. Nine states followed in the 1850s, eighteen in the 1860s, and three in the 1870s. Arkansas finally did so in 1894.<sup>105</sup> Repeal in criminal cases sometimes occurred simultaneously, and sometimes at different points. By 1904, every state had abolished the rule in civil cases.<sup>106</sup> Georgia still adhered to it in criminal cases

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102. *Id.* at 449.

103. For discussion of the various sources of attack, see Joel Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91, 94 (1982).

104. *Of the Disqualification of the Parties as Witnesses*, 5 AM. L. REG. 257, 259–64 (1857). Although we are writing about the effect of the witness disqualification rule on the rise of tort liability, it would be a mistake to suppose that pressure for reform arose because of a felt need to facilitate bringing personal injury suits in particular. We have found no evidence that this was the case, and the applicability of the rule to all lawsuits makes this very unlikely.

105. See Fisher, *supra* note 43, app., at 709–11.

106. WIGMORE, *supra* note 71, § 578, at 707. The abolition of the witness disqualification rule did not remove all obstacles for plaintiffs seeking to advance personal injury suits. One of the more formidable of those obstacles was the res gestae rule, which excluded statements that could not be corroborated by the direct testimony of a witness. The effect of the res gestae rule was to bar any out-of-court statements that were not made contemporaneously with the events that precipitated litigation. In state cases decided between 1855 and 1894, courts invoked the rule to bar virtually all post-accident statements by servants or agents of companies who were defendants in tort suits, even where the statements were made only minutes before or after the accident. Even “dying declarations” by plaintiffs, typically treated as an admissible exception to the hearsay rule, were barred unless they were made contemporaneously with the accident that caused death. For

when, in 1961, its statute on the issue was ruled unconstitutional in *Ferguson v. Georgia*.<sup>107</sup>

#### IV. TRACING THE EFFECTS OF THE TRANSFORMATION

This Article contends that previous scholarship has not recognized the importance of broad developments in the law of evidence in the mid-nineteenth century for the emergence of modern tort liability toward the end of that century. We characterized these developments—most importantly, repeal of witness disqualification for interest—as reflecting a shift from a premodern to a modern epistemology of Anglo-American civil trials.

It may seem obvious that, while witness disqualification was in force, it would have substantial effects on what lawsuits were brought and how trials in those suits were conducted. Witness disqualification may also have had some less obvious effects on the development of tort law. It may also seem obvious that, after repeal, these effects would disappear. Empirical efforts to confirm or refute these effects, however, are likely to encounter the obstacles that are described below. Consequently, we are not sanguine about the prospects for empirical research that would help us better understand the transformation of tort trials in the nineteenth century. Our first step in explaining these obstacles is to identify the effects that we hypothesize. We then describe our own efforts at confirming or refuting our hypotheses and the limiting character of the available material.

##### A. *The Effects of Witness Disqualification and Its Repeal*

One of us has previously identified some possible effects of the repeal of the witness disqualification rules. There could have been fewer tort suits, because sometimes the necessary testimony could only come from a potential plaintiff, whose testimony was inadmissible.<sup>108</sup> The eventual emergence of liability for negligence could have been impeded, because of the greater evidentiary demands of suits sounding in negligence as opposed to trespass.<sup>109</sup> The jurisprudence of damages in bodily injury cases could have been limited, because of the difficulty of proving the plaintiff's subjective pain and suffering.<sup>110</sup> For similar reasons, the

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illustrative cases, see *Ready v. Steamboat Highland Mary*, 20 Mo. 264 (1855); *Mobile & Montgomery R.R. v. Ashcraft*, 48 Ala. 15 (1872); *Lincoln Coal Mining v. McNally*, 15 Ill. App. (15 Bradw.) 181 (Ill. Ct. App. 1884); *S.P. Forsee v. Ala. Great S.R.R.*, 63 Miss. 66 (1885); *Louisville & N.R. Co. v. Pearson*, 12 So. 176 (Ala. 1893); *Barker v. St. Louis, I.M. & S. Ry.*, 28 S.W. 866 (Mo. 1894). In an 1892 treatise on evidence, Frank S. Rice suggested that strict enforcement of the “contemporaneously” requirement was a response to “apparent abuses resulting from [courts and juries] receiving descriptive declarations of pain [by injured plaintiffs] in negligence cases.” The *res gestae* rule sought to distinguish, Rice suggested, a party's subsequent descriptions of his pain and suffering from “apparently spontaneous manifestations of the distress” at the time the party was injured. FRANK S. RICE, *THE GENERAL PRINCIPLES OF THE LAW OF EVIDENCE* 384 (Rochester, Lawyer's Co-Operative Publ'g Co. 1892).

107. 365 U.S. 570 (1961).

108. Abraham, *supra* note 6, at 502–04.

109. *Id.* at 504–06.

110. *Id.* at 508–09.

rejection of a subjective standard for assessing negligence was even more likely than it would otherwise have been.<sup>111</sup>

We now add several other hypotheses. First, the central feature of the modern negligence suit—that it involves an “all things considered” determination by the jury—would have been missing, because all things could not be considered. Second, the capacity of modern appellate courts to make a judgment about whether justice was done at trial, and then sometimes to implement that judgment in its doctrinal rulings, would also have been missing. Without confidence that it could understand accurately how the accident that injured the plaintiff had actually occurred, such judgments could not be made, and appellate review would not have proceeded with the “subtext” of ensuring justice that we now think sometimes occurs on appeal.

Third, the centrality of the parties’ testimony that characterizes modern negligence cases would have been missing, and, consequently, the modern truth-testing device of a jury’s assessing the parties’ credibility based on their testimony would not have been a feature of civil trials. The plausibility of the circumstances that surrounded an injury, to the extent that there was evidence of these circumstances—for example, as we noted earlier,<sup>112</sup> because an accident had occurred in public in the presence of disinterested third-party witnesses—would therefore have been a more important determinant of fact-finding than it is in modern trials.

It is difficult to estimate exactly how this testimony, on its own, would have affected findings of fact, but for the most part, this is not necessary. Although the plaintiff’s case might often have consisted of such testimony, it seems likely that such testimony was less often at the heart of the defendant’s case. The reason is that—as discussed below—so many defendants in torts cases even in the mid-nineteenth century were entities such as railroads, steamboat companies, and municipalities. In many states, employees of such entities were permitted to testify on the entities’ behalf, on the (sometimes fictional) ground that they did not have an interest in the outcome of a suit against their employer at least when they had already been released from the potential liability to their employer.<sup>113</sup> When an employee had been a percipient witness to an accident, it would have been as if the defendant itself was testifying.

Consequently, trials in which the defendant was an entity—many, perhaps even most tort trials, judging from the admittedly limited data set out below—did not consist of entirely second-hand testimony. Rather, they consisted of second-hand testimony on behalf of the plaintiff and first-hand testimony on behalf of the defendant. Over large numbers of cases it seems likely that this disparity in the immediacy of testimony worked in favor of defendants. A number of commentators suggested that tort law was stacked against plaintiffs in the nineteenth century, and to some extent, it may have been.<sup>114</sup> But we think that the

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111. *Id.* at 510–12.

112. *See id.* at 499–500.

113. GREENLEAF, *supra* note 66, § 396, at 442.

114. *See, e.g.*, A HISTORY OF AMERICAN LAW: FIRST EDITION, *supra* note 7, at 262 (1st ed.) (“The law developed in a way that the power-holders of the day considered socially

impact of this evidentiary imbalance on plaintiffs' prospects of success may have been at least as much responsible for any bias against recovery in tort as were tort law's substantive rules.

Fourth, because of the absence of party testimony, there may well have been fewer purely factual disputes.<sup>115</sup> Whereas most cases that come to trial today do so because of factual disputes, a larger percentage of cases would have involved disputes about the *significance* of the facts. Plaintiffs would have tended not to bring suit when the parties' versions of the facts clearly would differ and there was no way to prove the plaintiff's version. Moreover, when there was evidence introduced in early nineteenth-century American civil trials about a plaintiff's perceptions of how he or she was injured, it would have been through testimony by a third party. This testimony would have been several steps removed from direct perception. It would have been limited to what the witness remembered the plaintiff had said about what the plaintiff had just experienced.<sup>116</sup>

The suits that actually went to trial, therefore, would more often be the ones in which the facts were not disputed. The contemporary two-step process of (1) determining what the defendant did and (2) deciding whether what the defendant did constituted a breach of duty would more often have been reduced to step two. With the facts less often at issue, the morality or reasonableness of the defendant's conduct might more often have been the central or exclusive issue.

It is therefore no surprise that Holmes, writing barely 20 years after Massachusetts repealed its disqualification rule, chose to emphasize in his chapter on trespass and negligence in *The Common Law* the development of per se rules regarding the negligence issue.<sup>117</sup> A conception of "negligence" as a mixed question of fact and law rather than a contested question of pure fact probably had dominated tort trials in Massachusetts until just a few years before Holmes first began writing on tort law in the 1870s.<sup>118</sup>

Turning from witness disqualification alone to the interaction of this rule with the other evidentiary developments we have described yields further hypotheses. John Langbein's study of the Ryder sources, previously alluded to, noted little concern with or exclusion of hearsay evidence in mid-eighteenth-century England, and other sources suggest that American courts were similarly

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desirable."); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 99-101 (1977) ("[C]ommon law doctrines were transformed to create immunities from liability and thereby to provide substantial subsidies to those who undertook economic development.").

115. Blackstone took a different view, but he was writing in an era when there were few tort actions. "[E]xperience will abundantly show, that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of." 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 330 (Oxford, Clarendon Press 1768).

116. This would have been admitted under the *res gestae* exception to the hearsay rule, as part of the surrounding circumstances. GREENLEAF, *supra* note 66, § 108, at 120.

117. HOLMES, JR., *supra* note 23, at 77-129. Massachusetts repealed its witness disqualification rule in 1857. *See* An Act to Enable Parties in Civil Actions and Proceedings to Be Witnesses Therein, ch. 305, 1857 Mass. Acts 655.

118. *See* Holmes sources cited *supra* note 2.

willing to admit such evidence.<sup>119</sup> In the next century, however, hearsay restrictions took hold. The introduction of those restrictions was part of a broader effort on the part of courts to exercise control of juries by, among other things, excluding information from jurors that might mislead them, directing verdicts, and giving jurors precise instructions based on increasingly specific rules of law.<sup>120</sup>

Both contract and tort disputes may have been affected by the new hearsay rule in ways that changed the epistemology of trials and led to pressure to repeal witness disqualification. Langbein explained how, in the eighteenth century, disqualification of the parties powerfully reinforced the common law's preference for written testimony, encouraging "prudent transaction planners to attempt to channel significant matters in writing."<sup>121</sup> That may have worked for some parties, but if party disqualification gave those who made contracts the incentive to make them subject to writing, the increased velocity of commerce in the first half of the nineteenth century may have rendered this increasingly unrealistic and infeasible. It might well have been difficult to enforce typical informal contracts because of the inability of parties to those contracts to testify about their terms and alleged breaches.

Similarly, in tort actions, the exclusion of previously admissible hearsay testimony would have eliminated any looseness about admitting hearsay testimony regarding the elements of the action in question.<sup>122</sup> When such testimony was deemed admissible, tort suits might well have been feasible even in the face of party disqualification from testifying, but once hearsay became inadmissible, the epistemology of tort trials would have been constricted because both hearsay and party testimony would have been precluded.

Theoretically, if both "interested" witness and hearsay testimony were treated as inadmissible, the practice of cross-examination, still comparatively new in the early nineteenth century,<sup>123</sup> would have had little subject matter in tort trials on which to operate. But once other forces put pressure on the rules precluding party testimony, the availability of cross-examination as a preventer of perjury by the parties may have softened the concerns that had been preserving the disqualification rule until that point.<sup>124</sup>

While the witness disqualification rule was being abolished, the formal requirements of the writ system of pleading were coming under attack as well. The

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119. See Langbein, *supra* note 60, 1187 n.94 (citing WILLIAM E. NELSON, *THE AMERICANIZATION OF THE COMMON LAW* 25, 192 n.121 (1975)).

120. *Id.* at 1195–96.

121. *Id.* at 1185.

122. For example, Gallanis, *supra* note 40, at 512, notes in discussing trials around 1755 that "hearsay was necessary because of the many restrictions on competence; statements by the parties, for example, could only come into court second-hand." (footnote omitted).

123. WIGMORE, *supra* note 71, § 1367, at 1697, suggests that the possibility of cross-examination dates to the beginning of the eighteenth century. But how frequent the practice was is another matter. For example, Langbein, *supra* note 60, at 1199, indicates that in the early nineteenth century, cross-examination was displacing the role of the judge and that the other hallmarks of lawyer-driven criminal procedure fell into place in these years.

124. This is, in essence, Langbein's view. See Langbein, *supra* note 60, at 1200.

writ system and the witness disqualification rule reinforced each other in a particular manner. Although each procedure inhibited suits for accidental injury, in combination they were all the more effective in doing so. The strict requirements of pleading under the writ system forced plaintiffs to make an irrevocable choice as to the legal wrong alleged, with no possibility of amendment as the actual facts became known. Moreover, in the field of tort law, the writ system, combined with witness disqualification, may have inhibited the development of negligence as a standard of liability. This was because, in contrast to the “direct” harm involved in a trespass action, actions in negligence more often turned on antecedent conduct that neither party was permitted to testify about and as to which there were no “independent” witnesses, at least when both parties were individuals. With the near-simultaneous abolition of the writ system and repeal of witness disqualification, civil trials could become more freewheeling efforts to determine the facts and identify wrongful conduct.

All this yields a mystery. If the premodern epistemology had the powerful effects that it seems both logical and reasonable to suppose it had, then why has it been so difficult for us, and why do we expect that it would be difficult for others, to find evidence of those effects? In tort liability, with which we are particularly concerned, why have we been unable to find direct evidence that tort suits were suppressed by the rule while it applied? Most importantly, why have we been unable to find substantial empirical evidence of differences between the character of testimony at tort trials before and after repeal? We turn now to describe what we have found, and attempt to answer these questions.

### *B. The Nature and Limits of Trial Records*

There is an enormous obstacle to the investigation of the epistemology of tort trials in the nineteenth century: very few trial records of the time contain accounts of the substance of the testimony given at trial. Detailed, direct evidence of the substance of trial testimony before the twentieth century is therefore extremely scarce. The microfilm copies of various local trial court records that we have been able to examine—often called “Order Books” and “Minute Books”—do not indicate much more than the nature of the actions, motions filed, orders issued, and judgments entered.<sup>125</sup> The modern practice of preparing a transcript of trials,

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125. The most substantial repository of trial records appears to be the Family History Library in Salt Lake City, Utah, which has a collection of microfilmed trial court records from the nineteenth century. The Library of Virginia is a repository of Virginia trial court records. We reviewed microfilm records of Kanawha County, West Virginia; Marion County, Indiana; and Austin County, Texas, supplied by the Genealogical Library for selected years pre- and post-repeal in these localities. The Kanawha County records were simply case captions, sometimes, but not always, indicating the nature of the case. This made quantitative comparison of filings before and after repeal unreliable, and qualitative assessment impossible. It turned out that the Austin County records filmed only selective types of cases, and did not include tort or any subset of tort cases. The Marion County records were handwritten orders and judgments of a wide variety by judges in the Marion County Court. Because we were unable to determine what percentage of filed cases that these orders, judgments, and opinions represented, quantitative assessment of what they signified would not have been meaningful or reliable.

whether in anticipation of appeal or for other purposes, was not adopted until decades after the developments we have described. Stenography itself was primitive until the 1880s.<sup>126</sup>

In fact, transcripts of trials were taken only in exceptional instances. Perhaps the most studied law practice of the nineteenth century is that of Abraham Lincoln, who practiced in Springfield, Illinois, from 1836 to 1861. Books on Lincoln's law practice make almost no reference to testimony in his cases that went to trial. Additionally, the references that are included are citations to newspaper stories, not to transcripts.<sup>127</sup> The substantial online data regarding Lincoln's law practice indicates that he handled twenty-one tort cases during his career that were characterized as negligence actions. Fourteen of those involved defendants that were stagecoaches, municipalities, or railroads. Eight were actions for bodily injury; thirteen were actions for property damage.<sup>128</sup> But that is the extent of the data.

The reason there is virtually no record of trial testimony in Lincoln's cases, or more generally, is that when an appeal depended on the testimony given at trial, the relevant portion of the testimony was reconstructed from notes or memory and an agreed-upon summary was prepared.<sup>129</sup> This required the preparation of handwritten narrative summaries until the introduction of the first commercial typewriters in 1874.<sup>130</sup> Thus, it will be extremely difficult, if not impossible, to get a representative sense of how trials were conducted or what evidence was introduced in the periods in question, either from trial or appellate records. In the absence of a discovery analogous to John Langbein's Ryder

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The Library of Virginia microfilm records were similarly unhelpful. We reviewed records for the Hustings Court of Richmond and of the Albemarle County Circuit Court. These records consisted of thousands of pages of handwritten summaries of trial court orders and actions, without sufficient information to be useful. It is possible that a more systematic review of all the trial court records available from the Salt Lake City Genealogical Library would reveal more than we have discovered. A more important fact about the records that seem to exist, however, is that they can give us only a very limited glimpse into the nature of trials in the first half of the nineteenth century because they are not records of trials. Rather, they are records of actions taken by courts in connection with lawsuits.

126. Oswald M.T. Ratteray, *Verbatim Reporting Comes of Age*, 56 JUDICATURE 368, 369–70 (1973).

127. See, e.g., JOHN J. DUFF, A. LINCOLN, PRAIRIE LAWYER 56 n.12 (1960). See generally MARK E. STEINER, AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN (2006) (providing a narrative description of the highlights of Lincoln's cases).

128. See *LPAL: Search*, L. PRAC. ABRAHAM LINCOLN: SECOND EDITION, <http://www.lawpracticeofabrahamlincoln.org/Results.aspx> (last visited Mar. 5, 2017). The search we conducted was for all cases classified as involving "negligence." This yielded twenty-four cases, two of which were duplicates and one of which involved breach of contract.

129. Ferdinand Fairfax Stone, *The Record on Appeal in Civil Cases*, 23 VA. L. REV. 766, 775 (1936); see also Frank O. Bowman III, *Stories of Crimes, Trials, and Appeals in Civil War Era Missouri*, 93 MARQ. L. REV. 349, 361–67 (2009) (describing the situation in Missouri after 1836).

130. Ratteray, *supra* note 126, at 369.

sources,<sup>131</sup> we doubt that future research will be able to determine systematically what nineteenth-century tort trials were like.

Admittedly, there may be occasional treasure troves that we have not discovered. And sometimes there is a find that just falls short. For example, we discovered that in 1939, the W.P.A. published a ten-volume *Annals of Cleveland Court Series* study, covering the period of 1837 to 1874.<sup>132</sup> This study contains narrative descriptions of cases in various categories, based on the project's review of Cleveland court records. These descriptions average about 200 words each. They appear to have been written by lay people based on pleadings and depositions. And they are merely selected cases, apparently representing less than 10% of all cases filed.<sup>133</sup> The only references in the narratives to the trials themselves are to the verdicts rendered.

Because there are no descriptions of what occurred at trial, we have been unable to discern any meaningful differences between the cases filed before and after Ohio repealed its witness disqualification rule in 1853.<sup>134</sup> The most salient feature of the twelve tort cases described through 1864 is that each one involved transportation in one way or another. With one exception, the defendants are railroads and steamboat, ship, or stagecoach companies. There is only one case involving a collision between private parties. Ten of the twelve cases involved bodily injury. We hesitate to draw any inference from the nature of these twelve cases, however, because the entire project was intended to report on the nature of "ordinary life and business relationships" in Cleveland during this period, rather than provide technical or precise information about the law.<sup>135</sup> The cases may therefore have been selected because of the reviewers' sense of what they revealed about these matters rather than because they were thought to be representative in other ways.

A more systematic exercise that is at least theoretically possible would be to quantify tort filings before and after repeal of witness disqualification. Certain important studies of late nineteenth-century tort filings in particular localities have revealed important features of the rise of tort liability during this period. These studies document substantial increases in tort filings, especially involving personal injury, between 1880 and 1910.<sup>136</sup> But only one of the studies includes data from

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131. See generally Langbein, *supra* note 60 (describing and detailing the material in Judge Ryder's notes).

132. 9 WORKS PROGRESS ADMIN., ANNALS OF CLEVELAND: COURT RECORD SERIES (1939).

133. One of the later volumes, for example, indicates that it includes descriptions representing "244 cases, which is a coverage of approximately [12%] of the total number of court cases in these years." *Preface* to 8 ANNALS OF CLEVELAND: COURT RECORD SERIES, *supra* note 132.

134. An Act to Establish a Code of Civil Procedure, tit. X, ch. I, § 310, 1853 Ohio Laws 57, 108.

135. 1 ANNALS OF CLEVELAND COURT SERIES 1837–50, *supra* note 132, Preface.

136. See, e.g., RANDOLPH E. BERGSTROM, COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870–1910 (1992); ROBERT A. SILVERMAN, LAW AND URBAN GROWTH: CIVIL LITIGATION IN BOSTON TRIAL COURTS, 1880–1900 (1981); Lawrence M. Friedman,

the 1870s, and none included data for decades prior to that.<sup>137</sup> Therefore, it would be difficult to correlate in any systematic way the repeal of witness disqualification to any subsequent increases in accident rates or tort filings.

Based on our review of microfilm trial court records from the 1850s, we believe that the difficulty of quantification will vary from locality to locality. And even where that would be feasible, there would often be a confounding factor. Most states repealed their witness disqualification rules shortly before, during, or after the Civil War. The intervention of the Civil War surely affected the incidence of both accidents and suits, because a large portion of the male population was away from home, and so much economic activity was associated with the War. Comparing pre-War suits to those occurring during the War would therefore be misleading.

However, comparing suits in the 1850s in a state that repealed its witness disqualification rule during that decade to suits in the same state after the Civil War also would be misleading, both because of the lapse in time after repeal and because, at least in many northern states, post-war industrialization, which is generally credited with generating an increase in the incidence of accidental injury and consequent lawsuits, would confound the comparison. Local results might also vary. A study of the composition of the civil docket of the St. Louis, Missouri, courts, done for other purposes, shows no increase in tort suits immediately after repeal in 1866; indeed, there is no significant increase until after 1910.<sup>138</sup> A study of litigation in Chippewa County, Wisconsin showed a sizable increase in trespass cases in the decade after repeal in 1858, but no other increase.<sup>139</sup>

### *C. The Limits, and Some Limited Analysis, of Appellate Opinions*

The dangers of relying on appellate opinions as evidence of what was occurring at the trial level are almost too obvious to state. Most importantly, the sample of cases that are appealed is not necessarily representative of the cases that are filed or the cases that are tried to a verdict. And the issues that are selected for appeal in any given case are not necessarily indicative of the character of the trial that occurred even in that particular case. Nonetheless, appellate opinions are what we have.

Consequently, because the preferred trial records to examine do not exist, researchers will have to behave like the man who looks under the lamp post for his lost key because that is where the light is. To help reveal what such an undertaking might and might not uncover, we have done a qualitative assessment of appellate opinions in tort cases for a decade before and a decade after repeal of witness disqualification rules in four states that repealed their witness disqualifications

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*Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. BAR FOUND. L. J. 351.

137. See Bergstrom, *supra* note 136, at 17.

138. Wayne McIntosh, *150 Years of Litigation and Dispute Settlement: A Court Tale*, 15 L. & SOC'Y REV. 823, 829 (1981).

139. FRANCIS W. LAURENT, *THE BUSINESS OF A TRIAL COURT: 100 YEARS OF CASES* 163 (1959) (stating that the number of "intentional damage to realty" cases rose from 3 in the period 1855–1864, to 15 in 1865–1874).

during this period: Connecticut (1848), Ohio (1853), Maine (1856), and Massachusetts (1857).

We begin by noting that tort actions in the mid-nineteenth century are not the rare birds that they are sometimes considered. John Langbein found an “absence of tort” in his eighteenth-century review of the Ryder sources,<sup>140</sup> but that was a century earlier in England. Lawrence Friedman said, “[T]he law of torts was totally insignificant before 1800.”<sup>141</sup> Fifty years later, however, tort suits certainly appear from our sources to have been meaningful in number. The Cleveland Court Project, described above, uncovered a number of tort actions, as did our own review of appellate cases in the four states during the same decades. In Massachusetts, for example (allowing for differences in how one classifies certain actions), the Supreme Judicial Court wrote opinions in ten appeals of tort actions in 1849, nine in 1860, fifteen in 1861, and ten in 1862. If appeals are the tip of the iceberg, then tort actions are not rare, even if they are a tiny percentage of the number of actions that would be brought 50 years later. A very rough quantitative search that we conducted also appears to reveal a striking increase in the number of appellate opinions referencing testimony by the parties in the years immediately following repeal.<sup>142</sup>

As might be expected, the opinions do not clearly reveal or reflect a change in the epistemology of trials before and after repeal. Many of the opinions

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140. Langbein, *supra* note 60, at 1178–79. Langbein suggested that some other features of eighteenth century English law may have functioned to limit the number of tort actions, such as the lack of liability insurance, the underdeveloped state of the law of vicarious liability, and the *action moritur* doctrine, which extinguished tort claims on the death of the prospective claimant. *See id.* at 1179. Norma Landau’s research, however, suggests that eighteenth-century England misdemeanor prosecutions were often converted into tort actions. *See* Norma Landau, *Indictment for Fun and Profit: A Prosecutor’s Reward at Eighteenth-Century Quarter Sessions*, 17 L. & HIST. REV. 507 (1999).

141. A HISTORY OF AMERICAN LAW: THIRD EDITION, *supra* note 9, at 350.

142. To obtain a very rough and not necessarily representative sense of the impact of the change in the rules that began to occur in the 1850s, we conducted Westlaw searches to identify all reported federal and state decisions between 1800 and 1880 that used the phrase “the plaintiff testified” or “the defendant testified,” whenever each phrase appeared in an opinion that also used the word “negligence.” Before 1850, there are virtually no such cases. In the 1850s there were 13 of the former and 9 of the latter. In contrast, in the 1870s—a decade before the escalation in tort filings is generally understood to have occurred—there were 264 of the former and 80 of the latter, 20-fold and 8.5-fold increases, respectively. These are obviously general results. Nonetheless, the results may tell us something about the change that took place after repeal: a massive increase in the number of appellate cases involving negligence in which one or both parties had testified at trial. There were so many other forces at work during these periods that it would be reckless to try to identify repeal as the sole cause of change, but the fact that very marked change did occur after repeal is noteworthy.

For the former, the search inquiry was as follows: advanced: “plaintiff testified” & DA(180\*) [by decade] % “#for the plaintiff testified” “#for plaintiff testified” “#of the plaintiff testified” “#of plaintiff testified” “#by the plaintiff testified” “#by plaintiff testified”. For the latter, the search inquiry was: advanced: “defendant testified” & “negligence” & DA(180\*) [by decade] % “#for the defendant testified” “#for defendant testified” “#of the defendant testified” “#of defendant”.

and the syllabi that precede them do not describe testimony in detail or at all, being often directed solely at doctrinal issues of law. Moreover, we suspect that within a decade prior to repeal, the adjustments made by the law to witness disqualification (permitting employees and spouses of parties to testify, for example) would have been maximized, and that trials immediately before repeal would more nearly have resembled post-repeal trials than would have been the case many decades earlier.

However, it is not easy to confirm this. After repeal, the limits on the universe of available evidence were lifted, and the epistemology of trials was free to develop. With the artificialities and imbalances created by witness disqualification removed, the modern tort trial could develop. Legal practices often are path-dependent, however, and they may well have controlled the way in which a case was structured and presented. Undoubtedly, the parties, who had previously been barred from testifying, began almost immediately to do so after repeal of witness disqualification.<sup>143</sup> But it probably would have taken some time before lawyers learned not only that testimony by plaintiffs now could include evidence of what the plaintiffs had directly perceived, but also how to exploit the jury sympathy that such testimony could elicit. The factual richness of the modern negligence trial may not have been the immediate result of the repeal of witness disqualification, but witness disqualification could well have been one of the necessary conditions for the eventual emergence of that kind of trial.

A second telling point is that, both pre- and post-repeal, defendants in the appellate cases in our sample typically were businesses or municipalities for whom the testimony of a servant or employee would frequently have been admissible under the rule that an employee released from liability to his employer was not “interested.” As a result, the witness disqualification probably had much less impact on the ability of commercial defendants to stake out their positions. Plaintiffs might sometimes have been able to circumvent the disqualification, but not as easily. We found no evidence of their doing so.

In Massachusetts before repeal, for example, the Supreme Judicial Court held that testimony by a third-party regarding the plaintiff’s expression of present pain was admissible, but that testimony by the same witness regarding the plaintiff’s narrative describing his pain after the fact was inadmissible.<sup>144</sup> It is no surprise, therefore, that as late as the eighteenth century the rules governing damages for bodily injury made no express reference to this form of loss.<sup>145</sup> After repeal, however, plaintiffs could testify and the opportunity to clarify the rules on this issue arose. Thus, before repeal, it would have been difficult for plaintiffs in

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143. See, e.g., *Derwort v. Loomer*, 21 Conn. 245, 247 (1851); *Hood v. N.Y. & N.H. R.R.*, 22 Conn. 1, 3 (1852); *Stover v. The Inhabitants of Bluehill*, 51 Me. 439, 440 (1863); *Brown v. Perkins*, 83 Mass. (1 Allen) 89, 96 (1861).

144. *Bacon v. The Inhabitants of Charlton*, 61 Mass. (7. Cush.) 581, 586 (1851); see also *Lund v. The Inhabitants of Tyngsborough*, 63 Mass (9 Cush. 36) 36 (1851) (elucidating the *res gestae* rule on which the distinction in *Bacon* was based).

145. See John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 *passim* (2006) (noting that pain and suffering was not an express component of damages awards); Abraham, *supra* note 6, at 508–09 (discussing the same issue).

bodily injury cases to introduce testimony about the extent of their pain and suffering.

There are hints in the post-repeal cases of how repeal would come to affect testimony. In one Connecticut case, the plaintiff and his wagon were thrown over a bridge onto the rocks below. The defendant objected to an instruction to the jury that, in the assessment of damages, it might consider “the peril and danger to which the plaintiff was exposed, by the accident which produced the injury complained of.” The court held that the instruction was correct, indicating that actual injury

is not confined to wounds and bruises upon [the plaintiff’s] body, but extends to his mental suffering. His mind is no less a part of his person than his body; and the sufferings of the former are oftentimes more acute and more lasting than those of the latter . . . . The dismay, and the consequent shock to the feelings, which is produced by the danger attending a personal injury, not only aggravate it, but are frequently so appalling as to suspect the reason and disable a person from warding it off . . . .<sup>146</sup>

There is nothing in this opinion suggesting that allowing testimony about pain and suffering connected to a physical injury was a new principle of tort law. But we found no cases addressing the issue in the ten years before Connecticut repealed its witness disqualification rule. The fact that the defendant raised the issue implies that it was not viewed as fully resolved at that point. At the least, repeal of the disqualification rule made it easier for issues such as this to arise and be squarely resolved. A robust jurisprudence of pain and suffering damages could then develop.<sup>147</sup>

Similarly, in a Massachusetts case, the plaintiff, who sued for injuries suffered when he was struck by a train, testified that:

in crossing the platform in going to the cars he did not go in a direct course, but a little obliquely, from Boston; that he looked to see where he should get into the cars, and as he was stepping from the platform he saw the train coming from Boston, and instantly after that the sound of the whistle struck his ear; that the train was then twenty or thirty feet from him, and he had not time to save himself; that he had no intimation whatever that the train from Boston was coming; that he did not recollect that he looked towards Boston at any time after he came out of the station, until he was stepping on to

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146. *Seeger v. Town of Barkhamsted*, 22 Conn. 290, 298 (1853).

147. Some evidence of this development can be seen in the treatment of damages for pain and suffering in one of the leading post-Civil-War treatises on negligence law. In the first edition of this treatise, there was no separate section on pain and suffering damages—only half a sentence in the section on damages for personal injury. *See* THOMAS G. SHEARMAN & AMASA G. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 606, at 662 (New York, Baker, Voorhis & Co. 1869) [hereinafter LAW OF NEGLIGENCE: FIRST EDITION]. Two decades later, the treatise contained a separate section on pain and suffering, and cited more than a dozen cases on the subject. *See* 2 THOMAS G. SHEARMAN & AMASA G. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 761, at 657–58 (4th ed., New York, Baker, Voorhis & Co. 1888).

the rail of the track; and that on the outside of the platform he could see an approaching train at a distance of thirty or forty rods.<sup>148</sup>

We did not see this kind of granular, factual detail about plaintiffs' perceptions in the opinions in cases decided before repeal. In rare cases before repeal, it may have been possible to introduce this sort of perceptual evidence viewed from the standpoint of the plaintiff, but it would have been difficult. Once plaintiffs could testify, however, this sort of evidence could become routine. The tests for negligence, and for contributory negligence, could then become the under-all-the-circumstances notions into which they eventually developed.

Our review also revealed the significance of the "transportation revolution" of the first half of the nineteenth century.<sup>149</sup> Many—in some instances most—of the cases both before and after repeal involved railroad and highway accidents. Often the suits were based on statutes creating maintenance and safety obligations for railroads and municipalities and affording injured parties causes of action for breach.<sup>150</sup> Both before and after repeal, cases involving property damage predominated, but, after repeal, there is a discernible increase in the number of appeals involving bodily injury claims. The absolute numbers, however, are too small to be statistically significant.

The expansion of the railroads in the 1850s surely helps to explain the frequency of railroad cases. Total railroad mileage expanded from 9,000 to 30,000 miles between 1850 and 1860.<sup>151</sup> An increasing number of suits involving encroachment on neighboring property or obstructions, as well as suits involving actual physical damage, would have been generated by this new construction.

An additional explanation is that, in contrast to some situations that cause bodily injury, the conditions that give rise to property damage suits, especially those involving encroachment and obstructions, are durable. Witnesses other than the parties can observe and testify about these conditions, without having been present at the scene at any particular moment. In contrast, the conditions that cause bodily injuries are more likely to be momentary—how a train was operated, how a victim behaved—and therefore less susceptible to proof on behalf of the plaintiff by third-party, disinterested witnesses. As a consequence, the percentage of bodily injury accidents that resulted in suits was probably lower than the percentage of accidents or occurrences involving property invasions or losses.

Two other features of the opinions were particularly surprising. First, there were very few appeals of torts cases in Ohio during the entire period. In the entire 20-year period there were fewer than a dozen. This compares with dozens in the other three states. This is especially surprising because the population of Ohio

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148. Warren v. Fitchburg R. Co., 90 Mass. (8 Allen) 227, 228 (1864).

149. See GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION 1815–1860 (1951).

150. See, e.g., Bradley v. Bos. & Me. R.R., 56 Mass. (2 Cush.) 539 (1848); Sherwood v. Town of Weston, 18 Conn. 32 (1846); Chidsey v. Town of Canton, 17 Conn. 475 (1846); Perkins v. Eastern R.R., 29 Me. 307 (1849).

151. DEP'T OF THE INTERIOR, STATISTICS OF THE UNITED STATES IN 1860, at 333 (1866) [hereinafter U.S. STATISTICS: 1860], <https://usa.ipums.org/usa/resources/voliii/pubdocs/1860/1860d-01.pdf>.

in 1850 (1.9 million) was more than twice that of Massachusetts (just under 1 million), nearly four times that of Maine (580,000), and nearly six times that of Connecticut (370,000).<sup>152</sup> Perhaps the much greater land area of Ohio meant that its population, though greater, was more dispersed and therefore less subject to accidental injury at the hands of third parties. In addition, at the beginning of the period, there were almost twice as many miles of railroad track in Massachusetts (1,035) as in Ohio (575).<sup>153</sup> To the extent that the amount of railroad activity is correlated with the accident rate, this may help to explain the difference.

The second surprising phenomenon that our review revealed was the treatment of plaintiffs' contributory negligence. The received wisdom for a considerable period in the mid-to-late twentieth century was that contributory negligence operated as a judicial device for controlling plaintiff-oriented juries.<sup>154</sup> Through the later work of Gary Schwartz, torts scholars have come to believe that, at the least, the doctrine was more neutrally applied. Schwartz's reading of appellate cases in California and New Hampshire led him to conclude that contributory negligence was typically a question of fact submitted to the jury and that courts did not use the doctrine to constrain juries.<sup>155</sup>

The handful of cases we identified do not support Schwartz. In Massachusetts and Maine, for example, the burden of proving freedom from contributory negligence was on the plaintiff<sup>156</sup>—a defendant-favoring doctrine that Schwartz did not identify, probably because it was not in force in California or New Hampshire, which were the jurisdictions he studied. And there definitely are cases in which the courts held as a matter of law that the plaintiff did not satisfy that burden.<sup>157</sup>

#### *D. The Effects of the Transformation: A Summary*

In sum, we have not been able to recover much direct evidence demonstrating the impact of the abolition of the witness rules on tort cases, primarily because of the rudimentary state of nineteenth-century trial records and the minimal attention paid to trial proceedings in nineteenth-century appellate opinions. Ideally, we would be able to show that in tort cases beginning in the 1880s, negligence personal injury actions arising from transportation accidents dramatically increased, and plaintiffs regularly testified about their injuries. This showing would have enabled us to document what we suspect to be the case: despite the fact that railroads and steamboats had become common features of American transportation by the 1850s, when some states abolished their witness disqualification rules, the proliferation of personal injury suits in state courts did

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152. U.S. CENSUS BUREAU, UNITED STATES RESIDENT POPULATION BY STATE: 1790–1850 (1990), <http://lwd.dol.state.nj.us/labor/lpa/census/1990/poptrd1.htm>.

153. U.S. STATISTICS: 1860, *supra* note 151, at 325, 329.

154. *See, e.g.*, A HISTORY OF AMERICAN LAW: THIRD EDITION, *supra* note 9, at 412–13.

155. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1759–62 (1981).

156. *See, e.g.*, *Counter v. Couch*, 90 Mass. (8 Allen) 436 (1864); *Waldron v. Portland, Saco & Portsmouth R.R.*, 35 Me. 422, 424 (1853).

157. *See, e.g.*, *Callahan v. Bean*, 91 Mass. (9 Allen) 401, 402 (1864).

not begin until the abolition of the rules became widespread. Moreover, it was this spike of personal injury cases, most of which were based on allegations that transportation and other industrial enterprises were negligent, that confirmed the intuition of commentators that the discrete identity of tort law as a common-law field and subject was largely connected to its being concerned with civil actions in which defendants engaging in potentially risky activities were charged with violating a duty to act reasonably so as not to expose others to those risks.

Put another way, we are suggesting that the other factors conventionally associated with tort law's "late" emergence as a common-law field and subject in America also had an as-yet unrecognized and complicated connection to the abolition of the witness rules and the consequent ability of parties to testify in tort cases. The transportation revolution and the associated emergence of industrialization in mid-nineteenth-century America enhanced the likelihood that people would be injured in transportation accidents, but those developments did not precipitate a spike in personal injury suits for several decades. This was partly because the rate of accidents associated with these activities probably did not truly skyrocket until later,<sup>158</sup> but also because even with the rise of transportation and industrial accidents it still was not possible in many jurisdictions to bring a modern tort suit. Although dissatisfaction with the strict requirements of the writ system surfaced in America by the mid-nineteenth century, several states retained writ pleading in common-law actions late in that century. Finally, between the appearance of the first English and American treatises on tort law at the close of the 1850s and the spike of personal injury cases that occurred after 1880, three commentators, Holmes and the practitioners Thomas Shearman and Amasa Redfield, recognized that the future of tort law was likely connected to negligence suits and the consequent application of a standard of civil liability based on negligence.<sup>159</sup> In those decades, the abolition of the witness rules was already making it easier for plaintiffs to bring negligence cases, and, as those cases proliferated, tort law's distinctiveness became easier to grasp.

The impoverished state of mid- and late nineteenth-century trial records leaves us, however, with hypotheses about the effects on American tort law of the witness rules, and their abolition, that remain suggestive rather than capable of proof. But if one removes the witness disqualification rules as a causal agent in the late nineteenth-century emergence of tort law, one is left with some unexplained puzzles. Industrialism was well under way in the United States before the Civil War, but a spike in negligence bodily injury actions did not occur until the 1880s. If the writ system functioned to limit the number of bodily injury actions that could have been brought in the early nineteenth century, the rigors of that system, which may rarely have been strictly observed, had broken down by the middle of the century, and yet bodily injury actions were still comparatively rare. Additionally, if an altered ethos of injury, in which public institutions were expected to take a greater share of responsibility for alleviating the costs of injuries to individuals,

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158. We say "probably" because, as noted above, available data on increases in tort filings prior to 1880 is very limited. See sources cited *supra* note 136.

159. See HOLMES, *supra* note 2; LAW OF NEGLIGENCE: FIRST EDITION, *supra* note 147.

was partly responsible for the advent of such early twentieth-century social programs as workers' compensation, there is no evidence that such an ethos surfaced when bodily injury actions began to proliferate in the 1880s. And there is some evidence, such as Holmes's statements from *The Common Law*, that the "prevailing view" in that decade was that losses from personal injury should lie where they fell.

So if the abolition of the witness disqualification rules is removed as a causal factor in the later nineteenth-century proliferation of personal injury actions, one is left with a puzzle. With industrialization, and the associated growth of transportation modes that could carry numerous passengers, notably railroads and streetcars, and were, in the early stages of their history, relatively dangerous, more accidents allegedly connected to the negligent conduct of those transportation entities occurred. Eventually, many of those accidents spawned bodily injury lawsuits, resulting in a noticeable spike in those lawsuits in urban centers between 1880 and 1920. But the major spike in bodily injury claims did not take place contemporaneously with the growth of railroad networks, or even with the emergence of streetcar lines. It started approximately one to two decades after railroads and streetcars became the dominant modes of urban transportation. Moreover, the dramatic growth of bodily injury suits with transportation franchises as defendants took place in jurisdictions that abolished their witness disqualification rules. The suits were typically actions in negligence, and frequently included damages for pain and suffering, an element that hitherto had been lacking.

We are thus confronted with a historical scenario in which one set of phenomena—industrialization and the consequent growth of railroads and streetcars as ubiquitous modes of urban transportation, resulting in more persons being exposed to the risks of railroad and streetcar travel—might have been expected to cause a proliferation of bodily injury suits from injured railroad and streetcar passengers, but did not initially. During the time period in which a growth in those suits did not occur, another phenomenon—the witness disqualification rules—was in place. Then, in the next two decades, many jurisdictions abolished their witness disqualification rules, and a spike in bodily injury actions in those jurisdictions began. Moreover, in the limited number of such cases that we were able to recover, plaintiffs were able to testify about their injuries.

It thus seems probable that the abolition of the witness rules was a causal agent that, when added to the dramatic increase in the number of persons exposed to the risks of railway and streetcar travel, helped turn the option of seeking civil redress for injuries suffered from that travel from an unlikely to a more likely possibility because injured passengers could now describe, before juries, the circumstances of their injury. They were able to talk about what they had done, what the entities they were suing had done or not done, and how they had suffered. They no longer needed the fortuitous presence of third-party witnesses to elicit testimony about how had they had been injured. The abolition of the witness rules, in short, made it much more likely that they would consider filing bodily injury lawsuits.

If the presence of the witness disqualification rules, and their abolition, were important causal factors in the timing of tort law's emergence as a discrete common-law subject in America, why has so little attention been paid to them in conventional accounts of the history of American tort law? In our view, the disappearance of the rules from the consciousness of most modern tort scholars needs to be recognized as just as significant as their existence. They have disappeared because they were a product of different attitudes toward the purpose and function of civil trials that have been lost. We thus turn back to that lost history.

### V. THE "LOST HISTORY" OF THE WITNESS DISQUALIFICATION RULES

At the close of the nineteenth century, as noted previously, John Henry Wigmore was preparing the 16th edition of Greenleaf's treatise as a precursor to launching, five years later, his own multi-volume overview of the Anglo-American system of evidence in common-law trials. In the course of that work, Wigmore noted the existence of the witness disqualification rule and its widespread abolition, critiqued it, and sought to confine it to oblivion. He was so successful in that last effort that his 1904 treatise on evidence can be seen as marking the first stage of the witness rule passing out of modern memory.

As we have noted, as modernity emerged in America, the epistemology of the legal world that preceded repeal was transformed. What is also striking, however, is that the older epistemology would be re-characterized, and then forgotten. Wigmore first made the re-characterization, and the forgetting, by every twentieth-century tort scholar, followed fairly quickly. This development, taken together with the difficulty of obtaining evidence about the testimonial character of trials discussed in Part IV, seems to offer an opportunity for some observations on the phenomenon of "lost history."

#### A. *Wigmore and His Modern Successors*

Writing about the rule and its demise just after the turn of the twentieth century, Wigmore characterized and criticized the rule, and made his own attempt to reconstruct the epistemological assumptions behind it. Wigmore, whose early scholarship was on the history of tort law,<sup>160</sup> had, by the 1890s, taken on the editorship of the 16th edition of Greenleaf's treatise, whose publication in 1899<sup>161</sup> could be analogized to Holmes's 12th edition of James Kent's treatise, issued in 1871.<sup>162</sup> In both instances, a celebrated jurist was updated by a scholar of

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160. See John H. Wigmore, *A General Analysis of Tort Relations*, 8 HARV. L. REV. 377 (1895); John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 383, 441 (1894); John H. Wigmore, *The Tripartite Division of Torts*, 8 HARV. L. REV. 200 (1894).

161. SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* (John Henry Wigmore ed., 16th ed. 1899).

162. JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (Oliver Wendell Holmes Jr. ed., 12th ed. 1871).

comparable talents.<sup>163</sup> Wigmore was quite interested in the details of the witness rule and its abolition, writing on those subjects as early as 1904 in the first edition of his treatise.<sup>164</sup> Wigmore took pains to review the history of the witness rule, including its origins, its application, the emergence of dissatisfaction with it, and its eventual abolition, which he regarded as nearly complete by this time. Wigmore's historical account of the rise and fall of the rule was interlaced with his abiding concern for modernizing the Anglo-American law of evidence, a project he had begun when he undertook to edit Greenleaf's treatise in the 1890s and pursued to the untimely end of his life in 1943.<sup>165</sup> Wigmore's response to encountering the existence of the witness disqualification rule in civil cases can best be described as somewhere between shock and contempt. He was determined to demonstrate that the installation of the rule in England and America had been seriously misguided.

Wigmore pursued a threefold strategy in his effort to demonstrate the poor fit between the rule and a proper system of evidence in Anglo-American civil trials. First, he suggested that the rule's existence had been anomalous in the first place. In a sweeping historical analysis, ranging back to Roman times and including fourteenth- and fifteenth-century English commentary and yearbooks, as well as a handful of seventeenth-century English cases, Wigmore identified the presence of the oath regime, the apparent freedom it gave witnesses to testify in civil trials, and then the unpleasant surfacing of the witness rule, which he demonstrated was firmly in place by that time period. Wigmore summarized the results of his historical inquiries in a paragraph:

The result, then, may be summed up in this way: That the party's oath was necessarily excluded in jury trial; that when modern witnesses came into vogue in the 1400s and 1500s, the party was naturally deemed incapable of being such a witness; that otherwise no rule or disqualification for interested persons was recognized in the earlier days of witnesses; and that finally, after Coke's time and probably under the influence of his utterances, the rule for a party was extended by analogy to interested persons in general.<sup>166</sup>

The fact that Wigmore completely ignored the premodern epistemology that the rule reflected, and either was not clearly right or was wrong on every

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163. Wigmore was a great admirer of Holmes's scholarship. His early articles on tort law made ample use of Holmes's work in that field in the 1870s. Holmes, for his part, reciprocated the admiration. For more detail, see ANDREW PORWANCHER, *JOHN HENRY WIGMORE AND THE RULES OF EVIDENCE* 47–59 (2016).

164. 1 WIGMORE, *supra* note 71, §§ 575–77, at 688–706.

165. Wigmore, still vigorous and engaged nearly full time with his scholarship, died when the taxicab he was riding in after attending a luncheon collided with another vehicle. The accident occurred on April 20, 1943, a month after Wigmore's 80th birthday. For more detail, see W.R. ROALFE, *JOHN HENRY WIGMORE* 275 (1977); PORWANCHER, *supra* note 163, at 35. At the time, he was at work on the fourth edition of his evidence treatise.

166. WIGMORE, *supra* note 71, § 575, at 696.

conclusion he drew from his historical survey,<sup>167</sup> did not deter him from proceeding to the next step in his attack upon the witness rule.

This step began with a quotation from Starkie's *A Practical Treatise of the Law of Evidence*, one of the principal expositors of the witness rule. "This rule of exclusion," Wigmore quoted Starkie as saying,

considered in its principle, requires little explanation. It is founded on the known infirmities of human nature, which is too weak to be generally restrained by religious or moral obligations, when tempted and solicited in a contrary direction by temporal interests . . . [T]he law must prescribe general rules; and experience proves that more mischief would result from the general reception of interested witnesses than is occasioned by their general exclusion.<sup>168</sup>

Wigmore responded to Starkie's arguments by treating them as unsound policy. As he put it,

The answer to this syllogism is merely that both its premises are unsound—that pecuniary interest does not necessarily raise any large probability of falsehood, and even if it did, the risks of false decision are not best avoided by such testimony.<sup>169</sup>

In other words, the syllogism was unsound because Wigmore said it was. But Wigmore was not content with that assertion; he next summoned up a series of commentators, beginning with Bentham, who advanced arguments against the witness rule.

Several pages later, having quoted not only from Bentham but from an 1853 English commission<sup>170</sup> and the 1848 report of the New York Commissioners

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167. The historical sources Wigmore cited did not demonstrate that the oaths of parties were "necessarily excluded" in jury trials: we do not know whether medieval civil trials had juries or not. The term *modern witnesses* for trials in the 1400s and 1500s equates "modern" with "trials not governed by the oath regime," and Wigmore did not know whether trials in the 1400s were governed by the oath regime or not (recent historical research suggests they were). Why would a party "naturally" be "deemed incapable of being a witness" in the 1400s and 1500s? That would seem a question which Wigmore, or the sources he cited, were incapable of answering, given the absence of data. On what basis could Wigmore claim that, "otherwise no rule or disqualification for interested persons was recognized in the earlier days of witnesses?" His insight may well have been accurate, but not because disqualification for "interest" was regarded as unnecessary. Instead, this was because taking an oath was regarded as a sufficient deterrent to perjury. Finally, although the seventeenth-century cases Wigmore cited made it plain that interested *persons*, not just interested *parties*, were being regularly disqualified under the witness rule, Wigmore claimed that that development was probably due to the (sinister?) influence of Sir Edward Coke. He had no basis for that claim other than Coke's statements that the rule was in place and its object was to protect against perjury.

168. WIGMORE, *supra* note 71, § 576, at 699 (quoting THOMAS STARKIE, *supra* note 57, at 83).

169. *Id.* at 699–700.

170. *Id.* at 701–02.

on Practice and Pleading,<sup>171</sup> Wigmore was ready to sum up. And sum up he did, relegating the witness rule to obscurity:

It is not easy nowadays to appreciate why these plain objections remained so long without recognition: (1) One reason, certainly, is found in the much stronger influence, up to the 1800s, of the emotional element in human conduct . . . . Speech and action were more passionate and violent: witness . . . the enormous excess of libel actions over their present number, as well as the extremities of abuse that were indulged in by gentlemen . . . . Eventually the influence of scientific research and of industrial invention and organization made for a more rational and less emotional life . . . . Thus with the diminution of the control of mere emotion and partisanship over conduct and opinion, the rules of law which were natural enough while that domination existed ceased gradually to correspond to the facts of life and survived as anachronisms.

(2) A second reason perhaps is to be found in that “dead weight of an oath” which in popular probative notions prevailed from primitive times and still is so difficult in some communities to make weight against.<sup>172</sup>

Here, Wigmore felt he had unearthed a truly significant feature of his project for modernizing Anglo-American evidence law, so he spelled matters out:

As long as juries were inclined to give a numerical value to witnesses . . . to believe that ten witnesses were ten times as probative as one witness, and to treat a sworn assertion on the stand as being good for so much testimony, irrespective of the witness’ personal credit, so long might a legislature well hesitate to admit to the stand persons who in their credit would certainly be weaker than the normal witness and would yet be indiscriminately counted as good witnesses by the jury.

[Nowadays] . . . the tribunal’s opportunity for a careful weighing of a witness’ measure of credit, and the means afforded for doing so by cross-examination and the like, form the safeguards which induce us to take the risk of introducing interested witnesses . . . . If [during the time the witness rule was in place] the tribunal [would have been] apt to ignore those safeguards, the reason for admission [of “interested” persons would have been] much weaker.

Perhaps the two foregoing considerations sufficiently explain why the [legislation abolishing the witness rule] dates no earlier than the second half of the 1800s.<sup>173</sup>

Wigmore consigned the witness rule to history. It was “unscientific,” inconsistent with “modern” procedure in evidence cases, and an anachronism. Wigmore, himself, was anachronistic at every point, either ignoring or being unaware of the cultural and social significance of oaths and witness testimony

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171. *Id.* at 702–03.

172. *Id.* at 703.

173. *Id.* at 704.

during the period when the rule was in force. In his historical and policy analyses of the witness rule, this not only had not troubled him; it had very likely not troubled his early twentieth-century legal contemporaries either.

However anachronistic his dismissals of the witness rule were, at least Wigmore acknowledged the rule's existence. Tort scholars in the next generation, however, apparently were not even aware of it. We have found no mention of the rule or its repeal in any of the early twentieth-century torts scholarship of Francis Bohlen, the Reporter for the first *Restatement of Torts*. The first edition (1941) of Prosser's *Handbook on the Law of Torts*<sup>174</sup> contains no mention of the rule, nor does the competing Harper and James treatise, published in 1956.<sup>175</sup> Even late twentieth- and twenty-first-century tort scholarship that refers to the history of tort law, including our own, makes no reference to the rule, its effects, or the effect of its repeal on the development of tort law.<sup>176</sup> It is as if the rule never existed.

### *B. The Lessons of the Project*

We have sought in this Article to make some contributions to the history of Anglo-American civil trials and to link our findings to the late emergence of tort law in America. Our account of Wigmore's writing, and that of the tort scholars that followed him, raises some endemic issues that surface when one engages in legal history scholarship, issues that seem worth commenting on.

We began the inquiries that are central to this Article—why generations of twentieth-century legal commentators seemed unaware of the witness disqualification rules and their impact on civil trials, what the existence of the rules might signify about the epistemological underpinnings of early trials, and whether the continuation of the rules into the 1850s impacted the emergence of tort law as a discrete common-law subject—making the routine assumptions that legal historians make when they begin a scholarly project. We assumed that sustained qualitative and quantitative analyses of cases and commentary on the witness rules, and on the routine disqualification of “interested” persons, would enable us to confirm or to qualify the hypotheses with which we began the project. Most centrally, perhaps, we assumed that there would be ample sources for us to examine along the way.

Instead, we found a much more attenuated collection of relevant sources than anticipated. Although there was some discussion of the witness rules by eighteenth and early nineteenth-century commentators, there was less than we expected, particularly in America. And although there were obviously a large number of cases in which the rules were in place, there was very little *comment* on the rules by courts or litigators, at least in the very few trials where something like transcripts was available. Moreover, the number of meaningful repositories of information about the effect of the witness rules—that is, repositories from which we could gain a sense of the *impact* of the rules—was quite small, particularly in America. We detailed the reasons why this turned out to be the case, and,

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174. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (1st ed. 1941).

175. FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* (1956).

176. The notable exception among tort scholars is WITT, *supra* note 20, at 56–57, whose reference to the rule first acquainted us with it.

cumulatively, the paucity of meaningful sources presented an insurmountable obstacle to our attempting to state any authoritative historical propositions based on our research.

A richer and more meaningful historical “record” would have been welcomed. But other legal historians would also surely have examined it. What we have encountered in this exercise of researching legal history are some features of that enterprise to which comparatively little scholarship has been directed, although most practitioners of legal history are well aware of them. The existence of those features has been as intriguing to us as the project to recover the “lost history” of the witness rules itself.

First, to talk about a historical “record” is just to begin the enterprise of doing legal history. Data from the past is nearly infinite, both in its quantity and its variety. The central question for a historian is why a particular set of data on a particular topic seems a fruitful topic for study. That is an extremely complicated question, implicating contemporary attitudes, a historian’s own inclinations, and, most mysteriously, why the same historical inquiries seem prosaic or trivial at some times, and exciting and meaningful at others. In the case of the witness rules and their demise, we confronted a topic that we found fascinating, all the more because early generations of scholars found it hardly worth mentioning, let alone investigating.

We also found the possible connection between the prolonged existence of the witness rules in civil trials and the late emergence of tort law in America fascinating. This was particularly true because both of us were well aware of the conventional explanations for American tort law’s “late arrival.” It was intriguing to consider that neither of us, despite having taught torts for nearly all of our careers and having written historical works in the area, had ever considered the presence of the witness disqualification rules as a possible causal agent in the timing of tort law’s emergence as an autonomous, “basic,” common-law subject in America. In fact, both of us taught and wrote in the field of torts for a number of years without even knowing of the witness disqualification rule’s existence.

Here was surely an episode in the lost history of American jurisprudence, possibly, given the widespread impact the witness disqualification rules may have had on the conduct of civil trials, a major lost episode. As we researched the matter further, we found that a scattered group of English and American legal historians, and several prominent English and American commentators on the law of evidence, were aware of the existence of the rules and had unearthed some explanations and justifications for their presence and for their subsequent abolition. But what we did not find, in any quantity, were precise descriptions of how civil trials were conducted with the rules in place, or how the process of a civil trial might have been altered as jurisdictions began to modify or abolish the rules. The only descriptions we found, either in archival sources or in works by scholars who had encountered them, suggested that the epistemological assumptions of those who conducted civil trials with the rules in place were quite different—arguably radically different—from modern epistemological assumptions about the primary purposes of a civil trial. The witness disqualification rules seemingly led us to a premodern world in which the

participants in a civil trial, judges, juries, litigants, and witnesses, were thought of as engaging in something more than the conventional “search for truth” associated with modern civil trials. Instead, the participants in a premodern civil trial, one in which “interested” persons, including the parties, were disqualified from testifying, seem to have been thought of as engaging in a search for the “appropriate” social and spiritual resolution of a legal dispute, that is, the “truth” of that dispute seen as filtered through the commonly understood social and spiritual values of the community in which the trial took place.

Here we confronted another of the endemic difficulties of legal history scholarship. How should the historian react when evidence from the past seems to reveal that past actors hold a set of meta-theoretical beliefs about the human condition, the role of social organization, even the meaning of existence, that are no longer held by most contemporaries in the twenty-first century? How can historians of law prevent themselves from recoiling from the meta-theoretical beliefs of past actors if they seem so alien as to nearly lack credibility? How, in short, can historians prevent episodes of history from being “lost” to present actors because they can no longer truly be understood?

In raising these questions we came, indirectly, to the “solution” to the mystery with which we began this inquiry. We began by asking ourselves why, if the witness disqualification rules were so pervasive, and arguably so fundamental to an understanding of the epistemology of premodern civil trials, had they passed out of the consciousness of modern legal scholars so rapidly and, apparently, so quietly? It turned out that the “answer” to that question was not that to which a modern observer of procedure, evidence, or even the substantive law of current civil trials might leap. It was not that the witness disqualification rules were never widely implemented or strictly enforced. Our evidence suggests just the opposite: the rule disqualifying “interested” persons from testifying was so widely adopted, and regarded as so natural and necessary, that it had to be narrowed to allow *any* relevant testimony at all in personal injury cases, such as that of relatives or servants of the disqualified parties.

So why, if the witness rules were so pervasive, has there been such comparatively little recognition of their existence? Here again, we have encountered one of the endemic themes of engaging in legal history scholarship. When a shift in consciousness among a community of persons occurs at a certain level of breadth and depth—such as a shift in the very conception of a civil trial, along with accompanying conceptions about the nature of the human condition and the purpose of resolving disputes through trials—that shift, if sufficiently powerful and broad ranging, can serve to “wipe out” previous, arguably irreconcilable, sets of cosmic attitudes. It is as if once one believes that the purpose of a trial is something like an empirical search for the truth, one also believes that “it makes no sense” to disqualify “interested” witnesses because their testimony is folded into the truth-seeking, adversarial process. Thus, the earlier regime of conducting civil trials, with its earlier epistemology, is not merely dismissed as “wrong-headed.” It is, literally, lost from consciousness because its assumptions seem so alien that they cannot be imagined, let alone painstakingly recovered. That is how the phenomenon of “lost history” occurs.

Doing legal history is arguably all about such complicated interactions with the past. And sometimes, as in this instance, the “lessons” to be drawn from a historical inquiry are not those associated with a putatively authoritative “explanation” for a historical phenomenon. Instead, we associate them with a “solution” to a “mystery,” a mystery about how so arguably important an episode in the Anglo-American law of evidence, procedure, and tort law could have largely passed from the consciousness of contemporary lawyers and scholars. The solution, for us, does not just lie in a suggestion about why tort law was late to emerge in America. It lies in the discovery of a different epistemological universe of civil trials that has mainly been forgotten.

### CONCLUSION

We offer this effort to revise the conventional understanding of the “late” emergence of tort law in American for what it is: a preliminary hypothesis that for the reasons we have set forth may be difficult to test, let alone confirm. But we are convinced that the mid-nineteenth-century transformation of the epistemology of Anglo-American civil trials, and the effect of that transformation on the ability of “interested” parties and witnesses to testify in personal injury actions, significantly delayed not only the emergence of those actions in American courts, but also the associated emergence of tort law as a basic common-law field and legal subject.