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Introduction: justice and the impulse to narrate

The English criminal trial at common law is a fact-finding model which has long been dependent on the testimony of witnesses. Those who give evidence to a common law court have traditionally had to 'be *un oyant et veyant*, a hearer and seer . . . one who could say, as the witnesses to courts in older times always had to say, *quod vidi et audivi*; it must not be testimony at second hand'.[1] The testimonial evidence of the credible eye-witness induces some kind of assent in the minds of the jurors who are to decide upon the facts, an assent which may amount to either 'certainty' or at least the degree of conviction required to acquit or condemn the accused:

> *A Jury of twelve men are by our laws the only proper Judges of the matter in issue before them*. As for instance,
> 1. That Testimony which is delivered to induce a Jury to believe, or not to believe the matter of Fact in issue, is called in Law EVIDENCE, because thereby the Jury may out of many matters of Fact, *Evidere veritatem*, that is, *see clearly the truth*, of which they are proper Judges.[2]

As Geoffrey Gilbert, author of one of the earliest treatises on evidence in English, has noted, what is at stake in the presentation of competing witness narratives is a claim to the reconstruction of 'reality' itself; in response to the presentation of credible and probative testimony, 'the Mind equally acquiesces therein as on a Knowledge by Demonstration, for it cannot have any more Reason to be doubted than if we ourselves had heard and seen it'.[3]

Hence, the presentation of evidence in a court of law has often served authors of fiction as a coherent and influential model of 'reality', and writers have long imitated the strategies of persuasion privileged by legal forensic methodology. Michael McKeon has rightly implicated the generation of assent in the definition of genre; romance narratives invariably fail to persuade, and '[b]y an easy transference, credulity in the auditor is mendacity in the speaker'.[4]

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His approach is also central to this study; he too asks '[w]hat kind of authority or evidence is required of narrative to permit it to signify truth to its readers?'[5] We see these issues well illustrated in Wilkie Collins's analysis of his own impetus to create. In his exploration of the relationship between the case of *R* v. *Palmer* (1856) and the genesis of *The Woman in White*, John Sutherland draws attention to this passage in Nuel Pharr Davis's biography of Collins:[6]

> One day about 1856 [Collins] had found himself at a criminal trial in London. He was struck by the way each witness rose in turn to contribute a personal fragment to the chain of evidence. 'It came to me then . . . that a series of events in a novel would lend themselves to an exposition like this . . . one could impart to the reader that acceptance, that sense of belief, which was produced here by the succession of testimonies . . . The more I thought of it, the more an effort of this kind struck me as bound to succeed. Consequently when the case was over I went home determined to make the effort'.[7]

As a number of critics have pointed out, Collins's assertion that this imitation of the trial format, with its particular emphasis on the presentation of personal testimony, was a new species of writing was at best a little naive. It is more accurate to see Collins as part of a long tradition of English writers, including Daniel Defoe, Samuel Richardson, Henry Fielding, Charles Dickens, and George Eliot, who felt the need to ground their fictional endeavours in the conditions or sanctions which govern the telling of truthful tales in a court of law.

Although legislative provision was made as early as the sixteenth century for the recording of testimony in certain circumstances, for example, in the pre-trial examination of the accused before a magistrate,[8] it is oral evidence – the stories of witnesses – which is of particular significance to English legal procedure.[9] Common law litigious practice was unique in its emphasis upon the presentation of eye-witness testimony at trial, and long-cherished notions of judicial fairness required that the tribunal hear both sides of a dispute before proceeding to judgement. The narratives of those eye-witnesses who could meet certain qualifications of competence and credibility were thus intimately associated with the discovery of facts and the just assessment of action and intent.

An analysis of the relationship between evidence and the generation of assent in courts of law and in acts of reading must examine the role of eye-witnesses in the reporting of an 'event'. Does their act

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of perception create meaning or does meaning reside in facts external to the witness? The Christian faith, which underpinned Victorian ideas of civilisation and culture, depended upon the reliability of testimonial evidence, and, in the mid-nineteenth century, the impact of German higher criticism rendered the paradigm of the evangelist as eye-witness particularly vulnerable to these competing anxieties. The role of the witness in twentieth-century historiography is well-established; the rise of the news media has produced a journalism obsessed with obtaining access to the true 'facts' of an 'event' and there is a corresponding emphasis on the value of the stories of individual lives told by the participants 'in their own words'. For scholars of testimony, such as Richard Weisberg, Shoshana Felman, and Dori Laub, the current reliance on eye-witness testimony arises in part from responses to the horrors of the Second World War, particularly to the Holocaust. Both Weisberg and Felman see contemporary history as 'an Era of Testimony'; 'testimony has become a crucial mode of our relation to events of our times'.[10] In Elie Weisel's words, '[i]f the Greeks invented tragedy, the Romans the epistle and the Renaissance the sonnet, our generation invented a new literature, that of testimony. We have all been witnesses and we all feel we have to bear testimony for the future'.[11] Scholars of Holocaust literature define testimony in this context in broad terms, to include both factual accounts of war-time atrocities and fictionalised responses which can also 'bear witness' to cultural upheaval and genocide. For Weisberg, the characteristic feature of this post-modern emphasis on individual narrative is its 'tendency to undermine "authoritative" testimony' generated by those in power:

> [T]he most prescient story-tellers of our generation . . . were far less sceptical of individual eye-witness accounts than of the manner in which institutional forces ignored, warped and distorted them for their own purposes . . . [I]n the context of our own generation, the eye-witness gains credibility just as the political or institutional or cultural account is precisely devalued.[12]

For Felman and Laub, the Holocaust may be understood as 'a radical historical crisis of witnessing, and as the unprecedented, inconceivable, historical occurrence of "an event without a witness" – an event eliminating its own witness'.[13] The most famous example of this extinction of the voice of the witness is perhaps the conclusion to Anne Frank's *Diary of a Young Girl*; there is no first-person narration

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of a redemption from her captivity, only the closure wrought by an editor's hand – 'Anne's diary ends here'[14] – which confirms, and is premised on, the silencing of Anne's own voice.

Reliance on testimony thus carries great ethical weight. The narrative of the eye-witness often records the experiences of people expelled from their own communities by those who wield power and privilege. For Paul Ricoeur, as for Weisberg, narrative construction should not shirk issues of ethical responsibility; the impulse to narrate is intimately associated with the lost voices of the oppressed and the disempowered:

> We tell stories because in the last analysis human lives need and merit being narrated. This remark takes on its full force when we refer to the necessity to save the history of the defeated and the lost. The whole history of suffering cries out for vengeance and calls for narrative.[15]

These observations are particularly applicable to the genre of autobiography and the need to document 'real' accounts of individual experience. Autobiographical writing can also testify to the forces or influences which have shaped an author's intellectual life, and there are many examples of such narratives in the period I discuss, such as Fielding's *Journal of a Voyage to Lisbon* (1754) and John Henry Newman's *Apologia pro Vita Sua* (1856). In his *Biographia Literaria* (1817), Samuel Taylor Coleridge attributes the genesis of his exculpatory first-person narrative in part to a response to public criticism, thus associating the generation of testimony with personal trial. And there are many fictional imitations of this form, with its emphasis on the justification of individual action, such as Charlotte Brontë's *Jane Eyre* (1847) or Dickens's *David Copperfield* (1850). In such texts as these, the value of autobiographical testimony as a narrative model is implicit. But third-person narrative (whether 'realistic' or otherwise) may also be said to 'bear witness' to the author's perceptions of his or her era or to his or her own imaginative transfiguration of experience.[16] In fictional texts where formal accusations of guilt are made and subsequently proven or rejected in a legal forum, we see a particular sensitivity to many of the most important epistemological issues of the age. Hence, I focus on narratives where the self-reflexive assessment of the trial format invokes the fictional representation of testimony as a means of proof, not simply as a subjective and unfalsifiable account of an individual's 'life'.

Like its autobiographical counterpart, the representation of testi-

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mony in imaginative fiction can also serve to recover evidence of suffering. In *Expulsion and the Nineteenth Century Novel: The Scapegoat in English Realist Fiction*,[17] Michiel Heyns draws attention to the plight of those expelled from the cosy world of Victorian domesticity as a consequence of perceived transgression – such as fallen women, the poor, the insane, or the criminal – and he explores the society against which such scapegoats are defined. The nature of their alleged offence determines whether such scapegoats can be 'rehabilitated'; for some, such as Arthur Donnithorne in *Adam Bede*, reconciliation is possible – at a price – whilst for others, such as Hetty in the same novel, the expulsion is final and complete. In this study I argue that the provision of testimony in nineteenth-century narrative is frequently represented as the voice of the oppressed or persecuted – those accused of crime or on trial for their lives in the work of Henry Fielding, William Godwin, George Eliot or Charles Dickens, or those shunned for their religious convictions in the work of John Henry Newman or Robert Browning.

For this is the essential ambiguity of the term 'testimony' – that it not only encompasses narratives of experience which need lay no immediate claim to issues of truth or falsehood, but that it seeks to be regarded as a species of evidence. Seen as evidence, testimony serves as a vehicle for the attestation of the 'real' because of its roots in ancient notions of legal and religious authority. In his analysis of Augustan attitudes towards the demonstrative knowledge of the high sciences ('*scientia*') and the non-deductive proof of the 'low sciences' (the realm of physico-theology), Douglas Lane Patey has revealed the epistemic foundation of literature's commitment to probabilistic representations.[18] And, as Barbara Shapiro has demonstrated in her detailed studies of seventeenth-century thought, English scientific empiricism and natural philosophy have long regarded the testimony of credible witnesses to the realm of the probable as capable of generating 'fact' or knowledge rather than simply opinion.[19] In legal or religious testimony, the purpose of eye-witness narrative is to persuade the listener of the probable truth or 'moral certainty' of an event, not merely to entertain. The aim of this enquiry is to trace the fictional, legal, and religious antecedents of the contemporary reliance on testimony in narrative and to use imaginative literature to explore the role of eye-witness representations in the proof of 'fact'.

Central to my study is the claim that the representation of

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testimony in nineteenth-century English realist fiction is often closely allied to proof of innocence rather than guilt. That Victorian authors felt compelled to prove a protagonist's innocence in the face of unjust accusation places the act of literary construction in a peculiarly symbiotic relationship to legal history, where the emphasis has traditionally been on the proof of guilt. It is arguable that the history of the realist novel is also a history of strategies of acquittal, and later in this study I suggest some reasons why the comparatively late appearance of defence lawyers in trials for felony may have afforded authors the imaginative space to explore narratives of exculpation. This emphasis on acquittal is partly a response to literary convention which required the heroic protagonist to demonstrate his or her innocence of any possible taint of criminal culpability in order to be worthy of the earthly and spiritual rewards invariably conferred by narrative closure. It is also partly a response to the daily administration of justice in the criminal courts which often required some declaration of innocence on the part of the accused if he wished to escape condemnation; in Jeremy Bentham's words, 'innocence claims the right of speaking, as guilt invokes the privilege of silence'.[20]

As legal historians have established, the presumption that the prosecutor bore the burden of proof in a criminal trial emerged during the mid-eighteenth century, but in practice, unless an accused person could adequately explain the evidence marshalled against him or her, s/he was unlikely to be acquitted. This placed the story of accused persons at the heart of the criminal trial and gave the court access to their own descriptions of their own behaviour or their intentions. The legislative expansion of the work of the Bar in the early nineteenth century helped alleviate the injustices of a harsh legal system (which had previously denied full legal representation to those accused of felony), but the gradual appearance of defence counsel created other problems for the representation of just adjudication in narrative. As I discuss in subsequent chapters, the speeches of the lawyers replaced the prisoners' own accounts of events, leaving public opinion (particularly as voiced in the periodical press) suspicious of verdicts founded only on technicalities or on the power of rhetoric divorced from more substantive ideas of truth. Anxieties about the ethics of professional representation also inform fictional texts such as Dickens's *Posthumous Papers of the Pickwick Club* (1837), *Bleak House* (1851), Eliot's *Felix Holt* (1866), Elizabeth Gaskell's

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Mary Barton (1848), and Anthony Trollope's *Orley Farm* (1862), and for a time the activities of defence counsel served as the standard against which the moral purposes of realistic literature could be articulated and defined. The testimony of the prisoner enjoys a privileged position in criminal trials at common law as it provides the only direct evidence of the accused's intention at the time an allegedly felonious act was committed. It is thus crucial to the enquiry as to whether or not a particular act merits punishment as a crime – an enquiry of interest to both the courts and authors of fiction – and the novelists were reluctant to follow the courts in the procedural suppression of stories told by represented felons. In nineteenth-century narrative, characters are rarely subject to judgement without the reader being offered their personal testimony of guilt or innocence, and thus realist fiction represents itself as capable of reaching the truths of human behaviour to which the bench was now denied access. To extend the analyses of John Bender and John Zomchick, a prisoner's story is the point of intersection between personal responsibility and public accountability; testimony is important to the representation of the protagonist as a criminal juridical subject because it posits a consistency between criminal responsibility (or the interiority of conscience) and the public act of adjudication, which the law can reach towards but never guarantee.[21] But there is also a way in which the very emergence of the novel in the eighteenth century can be seen as an imaginative imitation of the lawyers' skills in the manipulation of evidence, and hence the relationship between the two professions remains uncomfortably ambiguous.

LAW, LITERATURE, AND THE MANIPULATION OF EVIDENCE

Throughout this study, I will be exploring this creative alignment of literature and the laws of criminal evidence. Does fiction follow the law, imitating legal procedure and invoking legal authority for its representations of reality? In many ways, the answer to this question is yes; for example, a number of notorious trials have generated fictional commentary, and authors are often keen to argue that their tales would satisfy tests of evidentiary probity. Like witnesses in a court of law, authors wish to be 'taken at their word'; they are afraid of allegations of perjury and they resist an over-reliance on hearsay material. 'My Lord, this is clearly not evidence', said counsel for the

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defendant to the bench in respect of certain hearsay material in the famous trial of *Norton* v. *Melbourne* on 22 June 1836,[22] and Charles Dickens was the man who reported the exchange for *The Morning Chronicle*. We see this concern surface in Dickens's later fiction, just as it informs Wilkie Collins's strategies of persuasion in *The Moonstone*. As Gabriel Betteredge states,

> I am forbidden to tell more in this narrative than I knew myself at the time . . . In this matter of the Moonstone the plan is, not to present reports, but to produce witnesses. I picture to myself a member of the family reading these pages fifty years hence. Lord! what a compliment he will feel it, to be asked to take nothing on hearsay, and to be treated in all respects like a judge on the bench.[23]

Many commentators have noticed that authors, like lawyers, must be able to argue a case, to master the manipulation of evidence, and the similarities between the construction of fictional and of legal narratives are now well documented. Attention has been drawn to the ways in which narrative closure may be likened to a judicial verdict and it is recognised that the aims and purposes of the criminal trial impact upon narrative form as well as content. As Alexander Welsh has noted, '[t]he trial, which must end in conviction or acquittal, confers the idea of completeness upon that of connectedness',[24] and these qualities are in turn implicated in the construction of realist narrative.

There has been some debate amongst contributors to the 'law and literature movement' whether such similarities are more apparent than real. Richard Posner has argued that 'legal matter in most literature on legal themes is peripheral to the meaning and significance of the literature', and that 'law as depicted in literature is often just a metaphor for something else that is the primary concern of author and reader'.[25] Posner concedes that 'this is in general, not in every case',[26] but he is nevertheless criticised by jurists such as Robin West and Richard Weisberg, both of whom stress the value of literary texts as a medium of jurisprudential debate. They accept that fiction may be preoccupied with legal procedure and the assessment of evidence in a structural and thematic way; indeed, Weisberg suggests that in post-Providential analysis, legality has emerged as 'the controlling principle in modern society'.[27] As a consequence:

> [S]erious fiction has never used law as merely a source of satire or even of social criticism. In each period, law has drawn the attention of the literary

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artist because of its similarities to narrative art, not its differences. Law's manner of recreating and discussing reality strikes the artist as close (and where misguided or erroneous, threateningly close) to what story-tellers themselves are in the business of doing.[28]

In the period under analysis in this study, it is the legal representation afforded to accused felons which both appeals to, and simultaneously repulses, the authors of realist fiction. The narration of facts, and the discussion of character and intention in a criminal court, where the penalty for guilt may be death, did indeed seem to 'strike' such authors as 'threateningly close' to their own activities, although authors chose to imitate the advocacy of their legal counterparts as well as to criticise it. A comparison of these competing yet related strategies of representation reveals, and in turn depends on, the ethical agenda of both types of discourse. The role of literature as 'an ethical laboratory where the artist pursues through the mode of fiction experimentation with values' has been articulated since ancient times,[29] and both West and Weisberg presuppose the effectiveness of what Ricoeur calls 'the heuristic force of fictions' – 'their capacity to open and unfold new dimensions of reality by means of our suspension of belief in an earlier description'.[30] C. R. B. Dunlop summarises this type of claim as he promotes 'the power of literature to move and discomfit the reader in a way that philosophy or law simply cannot do'.[31] This approach is somewhat naive; Dunlop's assertion that '[a]fter a lawyer or law student reads Charles Dickens's *Bleak House*, he can never again be completely indifferent or ''objective'' towards the client across the desk'[32] is both over-generalised (in that the responsiveness of a reader is neither predictable nor quantifiable) and idealistic (in that, as West cautions, the complicity of literature with the power structures which also inform the law may mean that fiction is not always well placed to redeem or recover the stories of the oppressed).[33] But the assumption that literature can serve as an ethical supplement to the law receives some support from Ricoeur's belief that 'the practice of narrative lies in a thought experiment by means of which we try to inhabit worlds foreign to us'. Thus, 'reading also includes a moment of impetus' and 'becomes a provocation to be and to act differently'.[34]

But if the narrative arts of authors and barristers are closely related, it must also be acknowledged that, in other ways, fiction is shaped by its very dissimilarity to the act of adjudication. As West

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has observed '[t]he analogy of law to literature . . . although fruitful', confuses textual interpretation with acts of imperative power imposed by the courts.[35] The criminal trial has a purpose (to find facts and to determine guilt according to certain established standards of proof) and a concomitant power to impose state-enforced sanctions in the event of a finding of culpability. This purpose and power cannot be separated from other more narrative-oriented aspects of trial procedure; it alters, for example, the act of reading a criminal statute or of composing a statement of facts or a plea of guilty. This is not to deny that interpretative communities wield some power in preferring one reading of a text over another,[36] but it is usually in the law that the perpetrators of such exclusory readings are most equipped to enforce their judgements with the penal powers of the state. Authors of fiction also respond to this sense of the law's distinctness; for example, a number of narratives begin where the laws of evidence define a piece of information as relevant to the cause in hand, but inadmissible, or obtainable only by paralegal means, and the resolution of many a narrative lies in the fact that, for all its indebtedness to the evidence-based generation of assent, the novel is not a trial. Authors are thus liberated by artistic licence to snatch a protagonist from the gallows, to reverse judgements at will or to act on the basis of information which would not have been available to a court. The exclusionary rules of evidence in force in England in the early nineteenth century, which impacted upon both witness competence and the admissibility of evidence, provided much material for criticism in the press. If this witness had been allowed to give evidence, what would he or she have said? If this piece of evidence had been available to the jury, would they have reached a different decision? It is equally arguable that authors of fiction share this interest in what falls outside the law, that they somehow require a legal lacuna in order to find their own imaginative space in which to pursue their own quest for justice.

Hence, law and literature circle warily around their representations of each other's discourses, leaving authors to construct an image of their own ethical activities from their opposition to the work of lawyers as well as from a sense of their shared role as culturally-preferred story-tellers. Often authors choose to engage with, and manoeuvre around, the public power of legal discourse in order to find a legitimate space for their tale. This reading is perhaps to concede that the law had certain institutionalised advantages in

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