The Roots of the Modern Trial: Greenleaf's Testimony to the Harmony ...
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The Roots of the Modern Trial

Greenleaf's *Testimony* to the Harmony of Christianity, Science, and Law in Antebellum America

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> The Christian religion is part of our common law, with the very texture of which it is interwoven.
>
> Simon Greenleaf (1834)

Simon Greenleaf's life and legacy have been quietly influential even if overshadowed by the Websters and the Storys of American law. An accomplished lawyer, Greenleaf (1783–1853) served with Justice Joseph Story as a founding father of Harvard Law School, won the celebrated *Charles River Bridge Case* against Daniel Webster before the Supreme Court, and wrote a masterful legal treatise that earned acclaim in Britain while remaining authoritative in American courts into the twentieth century. Yet, one who researches Greenleaf today will find him best remembered by evangelical Christians. And what draws evangelicals is a curious, oddly evocative essay published in 1846, entitled *An Examination of the Testimony of the Four Evangelists* (hereinafter, *Testimony*), in which the Harvard law professor "investigate[d] the truth of [the Christian] religion" by applying the *Rules of Evidence Administered in Courts*

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of Justice. If those rules, Greenleaf reasoned, yielded the truth of facts all right-thinking Christians knew to be indisputably true as a matter of faith, the same rules could be relied upon to determine a wide range of factual or historical disputes. Greenleaf chose the title carefully; he did not purport to stage a trial of the evangelists, but sought rather to display the rules of evidence as a science of proof that could be used wholly apart from courtroom proceedings.[1]

Greenleaf's *Testimony* merits reappraisal for four reasons. First, it provides unique insights into the interrelationship of antebellum law and religion, which is often dominated by narratives of increasing secularization and church/state "separation." The *Testimony* evinces something quite different. Religion remained in the law not as residue or artifact; rather, Greenleaf resolutely believed, as quoted above, that Christianity was "interwoven" with the common law. And as a devout evangelical, an ardent Whig, and a chief architect of the common law of evidence, Greenleaf consciously threaded his beliefs about Christianity and science into the very rules and doctrines that are still used in today's courts.[2]

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1. Simon Greenleaf, *An Examination of the Testimony of the Four Evangelists, By the Rules of Evidence Administered in Courts of Justice* (1846; microfilm, 2nd ed., London, 1847) (hereinafter, *Testimony*), §2. Greenleaf's main essay, for which the volume is named, comprises less than 10 percent (48 pages) of the total book, which also included a lengthy "harmony" of the gospels and an appendix on the "trial" of Jesus, for which Greenleaf prepared a brief commentary on Jewish and Roman law at the time of Jesus. Indeed, the book's subtitle, "With an Account of the Trial of Jesus," juxtaposes the very distinction Greenleaf was drawing between "trials," on the one hand, and "examining" evidence "by the rules," on the other.

2. For antebellum perspectives on law and religion generally, see Johann N. Neem, "The Elusive Common Good: Religion and Civil Society in Massachusetts, 1780–1833," *Journal of the Early Republic* 24, no. 3 (2004), 381–417; John F. Wilson, "Religion, Government, and Power in the New American Nation," in *Religion and American Politics*, ed. Mark A. Noll (New York, 1990), 77. The separation of church and state is sharply debated among historians. Representative works, some of which are discussed later in this essay, are Daniel L. Dreisbach, "Thomas Jefferson and the Danbury Baptists Revisited," *William and Mary Quarterly* 56 (Oct. 1999), 805–16, especially 811, which argues that Jefferson's First Amendment "wall" applied only to the federal, not state, government; Philip Hamburger, *Separation of Church and State* (Cambridge, MA, 2002); James H. Hutson, "Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined," *William and Mary Quarterly* 56 (Oct. 1999), 775–90; Hutson, ed., *Religion and the New Republic: Faith in the Founding of America* (Lanham, MD, 2000), especially the essays by Thomas E. Buckley S. J. and Daniel L. Dreisbach

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Second, and related, it offers a unique perspective in the debate over the "hegemonic" influence of evangelical Christianity in antebellum culture and politics, a debate that has largely ignored the law except when confronting church/state issues. Through the *Testimony* as well as his influential legal scholarship and teaching, Greenleaf strove to make the modern trial a search for the truth that merited approbation on religious (specifically, evangelical Christian) as well as scientific grounds. The core of the modern trial drew from methodological and epistemological assumptions rooted in the Scottish Common Sense tradition, which dominated antebellum scientific thinking in most fields while finding much favor among evangelical Christians. Indeed, Greenleaf so completely and skillfully adopted mainstream thinking that some reviewers found the *Testimony* disappointing, yet by broadly borrowing common sense thinking Greenleaf guaranteed the legitimacy (popular acceptance) of modern judge-controlled trials dominated by rules that radically delimited a jury's power. Oddly, Greenleaf's "originality" resided in showing law's conformity with conventional thinking.[3]

Third, in Greenleaf we see how Whig politics and ideology affected the law. Distrustful of popular decision making, Greenleaf was nonetheless firmly committed to moral improvement, social uplift, and a commercial economy. He also reflected Whiggery's strong evangelical chord. The Whig penchant for elite leadership and institution building is strik-

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discussing Thomas Jefferson's "wall" of separation; Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* (New York, 1996); Sidney E. Mead, *The Lively Experiment: The Shaping of Christianity in America* (New York, 1963), 55–71, discussing Jefferson's "fair experiment"; Mark D. McGarvie, *One Nation Under Law: America's Early National Struggles to Separate Church and State* (DeKalb, IL, 2004).

3. For the current debate over evangelical "hegemony," see David D. Hall, review of *America's God: From Jonathan Edwards to Abraham Lincoln* by Mark A. Noll, *William and Mary Quarterly* 61 (July 2004), 539–44. According to Hall, "musings about the antidemocratic aspects of evangelical Protestantism" have been deemed "irrelevant" by some scholars. Ibid., 543. This may hold for party politics, for example, but the impact of evangelical Christianity on law remains largely unexplored. As we will see, Greenleaf's vision for the modern trial sharply curtailed the jury's power to decide law and even its suzerainty over "facts." These "antidemocratic" features are more likely traced to his streak of Whig elitism and views on science than his evangelical beliefs, although the strands are not always easy to differentiate.

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ingly evident in his reconceptualization of trials as judge-dominated proceedings in which jurors had no say in determining the law and an increasingly circumscribed role in finding facts. The "search for the truth" would be conducted under the protocols of a new legal science. And in his advocacy of evidence law as legal science, Greenleaf's Whig conservatism differed from that of Rufus Choate, who cloaked the common law's innovations in a largely fictitious past.[4]

Fourth, a reappraisal is warranted by Greenleaf's continuing influence among evangelicals and the legal profession. Several evangelical websites erroneously boast that Greenleaf originally set out to disprove the gospels' truth but instead convinced himself otherwise. The pious Greenleaf would be appalled because neither he nor his evangelical brethren harbored any doubts about their truth. Rather, Greenleaf's purpose was to use this established truth as the litmus test of his legal science. Thus, what draws present-day evangelicals to his *Testimony* is the implicit assumption, shared by many, that the law of evidence functions as a science of proof that may be applied inside or outside the courtroom. Greenleaf would be pleased.[5]

4. Greenleaf's example qualifies the polarity between Massachusetts Whigs and evangelicals observed by Neem. See "The Elusive Common Good," 413–415. The contrast between Greenleaf and Choate is drawn later in this essay. For Whig politics and thought, see Richard J. Carwardine, *Evangelicals and Politics in Antebellum America* (Knoxville, TN, 1997); Michael F. Holt, *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War* (New York, 1999); Daniel Walker Howe, *The Political Culture of the American Whigs* (Chicago, IL, 1979); Daniel Walker Howe, "The Evangelical Movement and Political Culture in the North During the Second Party System," *Journal of American History* 77 (Mar. 1991), 1216–39; Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (New York, 1990); Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York, 2005). On the conflicted emergence of legal science, see Robert Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920," in *Professions and Professional Ideologies in America,* ed. Gerald L. Geison (Chapel Hill, NC, 1983), 70–110; Howard Schweber, "The 'Science' of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education," *Law and History Review* 17 (Fall 1999), 421–66; Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York, 1993).

5. See Ark Web Designs, *Testimony of the Evangelists,* http://christjesus.us/greenleaf.html;Bibleteacher.org, *Testimony of the Evangelists,* http://www.bibleteacher.org/sgtestimony.htm.

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The essay begins with an overview of Greenleaf's life, which seamlessly blended his roles as lawyer, intellectual, and evangelical Christian. It then examines the *Testimony*'s principal arguments, and places it in its social, political, and intellectual context. First, the *Testimony*'s immediate catalyst was the assault on Christianity's fundamental tenets not only by "infidels" who denied them altogether, but also by a segment of Greenleaf's fellow Episcopalians who had fallen into serious error. The *Testimony* placed human reason and science firmly on the side of evangelical Christianity while simultaneously denying their benefit to infidels and errant thinkers. Second, Greenleaf also sought to convince contemporary intellectuals that the law embraced a science of proof, one fully consonant with rigorous thought in other fields that in turn drew from the dominant Common Sense tradition. Moreover, this science of proof could be applied outside the courtroom to resolve nonlegal controversies, including religious and historical disputes. In sum, Greenleaf staked law's claim near (or at) the apex of antebellum intellectual life. Third, the legal profession itself had to be persuaded to accept Greenleaf's Whiggish conception of law, lawyers, and trials, especially because the evidence rules would have mandatory force in the courtroom. Greenleaf envisioned lawyers as an elite, well educated in a law suffused with Christian values. Far from separating religion from law, Greenleaf saw Christianity as integral to the common law as he helped define it. And his "theory of proof," to quote the influential jurist Lemuel Shaw, was fully consistent with Christianity, proved the gospels' truth with as much certainty as human fallibility permits, and could, accordingly, be relied upon to resolve all other factual controversies, regardless of their nature, both inside and outside the courtroom.

Throughout the *Testimony* three distinct strands of thought are "interwoven" as one strong chord: science, evangelical Christianity, and law. Yet the essay was far more than an arid intellectual exercise, as Greenleaf's life "interwove" the same three elements.

Born in 1783, Greenleaf spent his childhood in Newburyport, Massachusetts. When his father, a ship's carpenter, moved the family to Maine in 1790, Simon remained in Newburyport with his maternal grandfather, the Reverend Jonathan Parsons, who saw to the boy's education and spiritual well-being. Over the next nine years, Simon received a "thor-

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Figure 1: Simon Greenleaf. In this portrait Greenleaf looks as much a clergyman as he does the skilled, learned lawyer who commanded his law school classroom and dominated the study of evidence law. Credit: Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America* (2 vols., 1908; rep., New York, 1970), 1: following 484.

ough classical training" at the town's Latin School. At age sixteen, he joined his parents in New Gloucester, Maine, and two years later began his training for the law by working in the office of a locally prominent lawyer.[6]

6. In the absence of a Greenleaf biography I have relied upon the following for basic background: *Dictionary of American Biography* (hereinafter *DAB*) (New

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Greenleaf drove himself to become an extraordinarily learned and skilled lawyer. Not content with the smattering of technical details and practical know-how that sufficed for journeyman attorneys, Greenleaf spent twelve years reading widely and acquiring a mastery of common-law doctrine known to few lawyers of his time. By 1820 he had established himself in Portland as a leader of the Maine bar, where he edited, digested, and published the annual reports of Maine's supreme judicial court. Greenleaf's reputation swelled along with his legal erudition. He resigned his duties as Maine's reporter in 1832 because of his burgeoning practice and, the very next year, accepted Harvard's invitation to join its fledgling law faculty.[7]

Greenleaf continued to practice law while at Harvard. Although he worked without fee for various church-related groups, he accepted other cases to supplement his modest salary and further enhance his reputation, as vividly illustrated by his role in the celebrated *Charles River Bridge Case*. The dispute concerned two rival bridge companies, the Charles River Bridge Company, which the legislature had essentially granted monopoly rights decades earlier, and the newly formed Warren Bridge Company, which expressly contested the legality and economic efficacy of that monopoly. First argued before the Supreme Court in 1831, the case languished until the upstart Warren Bridge Company retained Greenleaf to argue the case (again) in early 1837 against the redoubtable Daniel Webster, who appeared on behalf of the Charles River Bridge.[8]

York, 1931), 7: 583, s.v. "Greenleaf, Simon"; Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America* (2 vols., 1908; rep., New York, 1970), 1: 480–83.

7. Warren, *History of the Harvard Law School*, 1: 481. The reports provided helpful notes for practitioners as well as a summary of the court's holding and counsels' arguments. See, e.g., 1 *Maine Reports* (1820–21) (Boston, MA, 1851). Greenleaf's reports included digests and notes for practitioners. He remained the reporter through the ninth volume (1832–35) and analyzed even those cases in which he appeared as counsel; e.g., *Partridge* v. *Ballard*, 2 *Maine Reports* (1822–24) (n.p., 1824), 50, 53. One source avers that Greenleaf's reports were noted for their "clear yet concise captions and admirable abstracts of the arguments," the accuracy of which has "never been impugned." *DAB*, 583. For early nineteenth-century legal education, see Paul D. Carrington, "The Revolutionary Idea of University Legal Education," *William and Mary Law Review* 31 (Spring 1990), 527, 530.

8. Greenleaf sometimes lamented his limited law practice, yet remained as active as his teaching load and required residence in Cambridge permitted. Warren,

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Greenleaf performed impressively, prevailing before a bitterly divided Court. In a letter to his son, Justice Story praised the "glorious argument on all sides, strong, and powerful and *apt*. Mr. Greenleaf spoke with great ability and honored Dane College [Harvard Law School]." Story's private praise of Greenleaf's lawyering skills seems unsurprising at first blush, as the two were close friends and Story had beckoned Greenleaf to Harvard. Yet Story passionately dissented from Chief Justice Roger B. Taney's majority opinion. Even before the Court's decision was officially announced, Story plaintively wrote Greenleaf with news that his client had prevailed, that Taney would write the opinion, and that he, Story, was appalled: "[a] case of grosser injustice, or more oppressive legislation, never existed. I feel humiliated, as I think every one here is, by the Act which has now been confirmed."[9]

Deeply committed to the Whig cause politically and ideologically, Greenleaf felt the critics' sting that he had abandoned the rule of law by pandering to popular expediency. While still in Washington, Greenleaf wrote Charles Sumner, who was teaching in his stead at Harvard, that the Warren Bridge's defense rested on law, not "peoplish" sentiment. Greenleaf later published an anonymous article defending his legal position and, to further prove his point for posterity, filed his case papers and notes in the Harvard Law Library, including a note protesting the distortion of his argument before the Court, "as though it was agrarian in its character, and tended to the destruction of vested rights."[10]

Greenleaf's sensitivity underscored his commitment to rigorous intel-

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History of the Harvard Law School, 1: 500; 2: 19. For the *Charles River Bridge* case, see Stanley I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (New York, 1971); Carl B. Swisher, *History of the Supreme Court of the United States: Volume 5 , The Taney Period, 1836–64* (New York, 1974). The charter for the Warren Bridge permitted it to collect tolls only until its construction costs had been recovered, when it would then become a free bridge and effectively absorb the toll traffic of the Charles River Bridge, as occurred by 1836. Swisher, *Taney Period*, 79. The Warren Bridge Company had been represented by the distinguished William Wirt before his death and Greenleaf's retention. See ibid., ch. 4.

9. Quoted in Swisher, *Taney Period*, 81, 87. Essentially, Greenleaf argued that the Warren Bridge had not violated the Charles River Bridge company's contract, yet the latter might nonetheless seek some compensation under Massachusetts law. Ibid., 82.

10. Quoted in Swisher, *Taney Period*, 91 (emphasis original).

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Figure 2: Joseph Story. In the early 1830s Story enticed Greenleaf to join him in Cambridge to help build Dane College (later, Harvard Law School) into a respected and financially feasible academic institution. Much of the burden fell to the able Greenleaf, as Story's duties as an associate justice on the Supreme Court limited his participation on the faculty. Credit: Warren, *History of the Harvard Law School*, 2: following 32.

lectual standards and unwavering belief that law was a science. Along with Story, Greenleaf labored to build the law's respectability as an academic discipline and to establish Harvard Law School as its institutional apogee. In 1843 a young Rutherford B. Hayes recorded in his diary that Greenleaf was "very searching and logical in examination. It is impossible for one who has not faithfully studied the text to escape exposing his ignorance." Greenleaf steadfastly believed that legal reasoning, like the

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natural sciences, was inductive. "Adjudged cases" were to law what "facts" were to the "natural sciences"; lawyers must use induction to discern the "great and leading principles" ensconced in the cases.[11]

Through his scholarship Greenleaf shaped the law. He wrote the first American treatise on the law of evidence, thereby establishing a nationwide reputation and influence that endured long after his death in 1853. First appearing in 1842, the treatise grew to three volumes by the early 1850s and quickly assumed canonical status within the legal profession until the early twentieth century. Indeed, a British reviewer praised the treatise with almost embarrassing hyperbole: "Upon the existing Law of Evidence (by Greenleaf), more light has shown from the New World than from all the lawyers who adorn the courts of Europe."[12]

Although rooted in his lawyerly interests, Greenleaf's *Testimony* was ultimately a product of his deeply held Christian faith, which informed all avenues of his life. A devout evangelical Episcopalian, Greenleaf provided legal representation for churches in matters of land conveyances and the like. And in 1847, the same year he published a "corrected," revised edition of his *Testimony*, Greenleaf served as a director of the newly formed Protestant Episcopal Society for the Promotion of Evangelical Knowledge, a group, as we will see, dedicated to eliminating the many "errors" that pervaded the Episcopalian church. After retiring from Harvard because of ill health, he served as president of the Massachusetts Bible Society from 1849 until his death four years later. Greenleaf saw no tension whatsoever between his religious and legal pursuits.

11. *DAB*, 583–84. See also Warren, *History of the Harvard Law School*, 2: 101. In 1833 Story had lured him from Maine with an offer of the Royall professorship and, fittingly, upon Story's death in 1845, Greenleaf succeeded his friend and colleague in the prestigious Dane professorship. Hayes's quote appears in William P. LaPiana, *Logic and Experience: The Origins of Modern American Legal Education* (New York, 1994), 50. For Greenleaf's view that legal reasoning was inductive and similar to that used in the natural sciences, see ibid., 31. See also *DAB*, 584.

12. The "testimonial" quoted in the text is attributed to the *London Law Magazine* and appeared as front matter in an 1874 edition of the *Testimony of the Evangelists*. Simon Greenleaf Papers (Harvard Law School Library, Cambridge, MA). Simon Greenleaf, *A Treatise on the Law of Evidence* (3 vols., 1842–1852; 4th ed., Boston, MA, 1848). Warren, *History of the Harvard Law School*, 2: 122. For the second volume, I have relied upon the 1850 (third) edition, and for the third volume the 1856 edition (also the third edition).

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At his inauguration as Royall Professor of Law in 1834, he made the point explicit: "*The Christian religion is part of our common law, with the very texture of which it is interwoven.*"[13]

The *Testimony* simultaneously responded to the looming schism within the Episcopalian church, the need for greater rigor in trials, and Greenleaf's capacious vision for legal science in American intellectual life. Although we need not exhaustively survey its many arguments, a brief summary of his *Testimony* is in order to better understand Greenleaf's three-fold purpose.

The essay opens with a seemingly disarming yet daunting proposition: The proof of Christ's truth "demands nothing more than is readily conceded to every branch of human science." Greenleaf proposed to subject the four gospel writers' "narratives to the tests to which other evidence is subjected in human tribunals." Put simply, if the evangelists "ought to be believed and have weight" in a "court of justice," then they "ought to have weight and credit here." Thus, Greenleaf laced together Christianity, "human science," and the law.[14]

The first issue addressed the authenticity of the gospels as historical documents. Implicitly acknowledging centuries-old criticism that endless copying and bad translations had obliterated the original text, Greenleaf deftly placed the burden on his opponents. The first rule held that "[e]very document, apparently ancient, coming from the proper repository or custody, and bearing on its face no evident marks of forgery, the law presumes to be genuine, and devolves on the opposing party the burden of proving otherwise." The gospels had "been used in the church since time immemorial, and thus are found in the place where

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13. Review of "A Discourse Pronounced at the Inauguration of the author as Royal [sic] Professor of Law in Harvard University, August 29, 1834, by Simon Greeleaf," *The New England Magazine* 7 (Oct. 1834), 339, 340, http://cdl.library.cornell.edu/cgi-bin/moa/moa-cgi?notisid=ABS8100-0007-92. For examples of his work on behalf of religious organizations, see George P. Giddings to Greenleaf, Nov. 21, 1843 (conveyance issues); Folder 25-4 (sale of church pews), Greenleaf Papers. Greenleaf's terms as president of the Massachusetts Bible Society are documented in *Centennial Souvenir, The First Hundred Years of the Massachusetts Bible Society, 1809–1909,* 22, 55 (Wisconsin Historical Society, Madison, WI).

14. Greenleaf, *Testimony*, 2–3 [§§2–3].

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alone they ought to be looked for." "[S]light inconsistencies" did not conclusively establish that the "originals were anywhere corrupted." Nor did the absence of originals pose a problem because in "matters of public and general interest, all persons must be presumed to be conversant[.]" Early Christian communities would have vigilantly policed the texts for accuracy, a habit that continued "in all ages" because the Scriptures were the "authoritative source of all ecclesiastical power and government." In sum, the law placed the burden on the "objector to show them spurious," which they had failed to do.[15]

Greenleaf next turned to the heart of the matter: the historical accuracy of the gospels. Like any form of testimony, their accuracy directly depended upon the witnesses' veracity and thus an assessment of "what manner of men they were." Matthew's occupation as a tax collector, for example, marked him as "an experienced and intelligent observer of events passing before him" and undoubtedly a man "familiar with a great variety of form of fraud, imposture, cunning, and deception, and must have become habitually distrustful, scrutinizing, and cautious." In short, Jesus wisely selected his witnesses.[16]

After brief biographies of the gospel writers, Greenleaf set forth a "fundamental rule": "In trials of fact, by oral testimony, the proper inquiry is not whether is it [sic] possible that the testimony may be false, but whether there is sufficient probability that it is true." The "ordinary affairs of life" could be shown only by "moral evidence." Their nature did not permit proof by "demonstration," the highest degree of persuasion and a realm reserved for deductive systems such as mathematics. And when is a fact "proved" by moral evidence? The law presumes that "[a] proposition of fact is proved, when its truth is established by competent and satisfactory evidence." "Competent evidence" described whatever "the nature of the thing to be proved requires." And "satisfactory evidence" consisted of evidence sufficient "to satisfy the mind and conscience of a man of common prudence and discretion" such that he would "venture to act upon the conviction in matters of the highest concern and importance to his own interest."[17]

Nor did Greenleaf doubt for a second that the gospels were legally

15. Ibid., 7–10 [§§8–10].
16. Ibid., 10 [§11]; 13 [§14].
17. Ibid., 21–22 [§§ 26–27].

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sufficient proof of Jesus's life and miracles. Here too the objecting party bore the burden because the law presumes all witnesses to be credible, absent any grounds for suspicion. More than half the *Testimony* is devoted to a detailed analysis of five factors relevant to the evangelists' credibility.[18]

First, their honesty was a product of their sincerity. After Christ's death, "[t]he fashion of the world was against them." The evangelists braved "contempt, opposition, reviling, bitter persecutions, stripes, imprisonments, torments and cruel deaths." No reasonable person would have fabricated testimony at such cost.[19]

Second, one had to examine the evangelists' opportunity to observe events, the accuracy of their powers of perception, and their capacity to later recall what they saw or heard. Obviously no proof existed concerning the evangelists' memory, but the law conveniently filled the gap with a presumption that "men are honest, and of sound mind, and of the average and ordinary degree of intelligence." Moreover, Luke's calling as a physician and Matthew's background as a tax collector marked them as trained, careful observers.[20]

Third, Greenleaf considered the "number and consistency of their testimony." Put simply, there was "enough of discrepancy to show that there could have been no previous concert among them; and at the same time such substantial agreement as to show that they all were independent narrators of the same great transaction."[21]

Fourth, the evangelists' testimony conformed to "experience." Sparring with Baruch Spinoza and David Hume, who had denied the reality of miracles, Greenleaf observed that all of Christ's miracles occurred in public and were so "plain and simple" that anyone could comprehend what had occurred.[22]

Finally, the evangelists' testimony coincided "with collateral and contemporaneous facts and circumstances." Liars revel in "general statements and broad assertions." Where details are necessary, the false witness fabricates secret events that cannot be refuted by others. Although the four evangelists wrote at different times and without apparent

18. Ibid., 25 [§29]. Ibid., 22–25 [§§28–29].
19. Ibid., 25–27 [§§30–32].
20. Ibid., 28 [§33].
21. Ibid., 28–29 [§34]. Ibid., 28–31 [§§34–36].
22. Ibid., 32 [§37]; 37 [§38]. Ibid., 32–38 [§§37–38].

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concert, "they all alike refer incidentally to the same state of affairs and to the same contemporary and collateral circumstances." Moreover, the gospels are laced with details of Jesus Christ's public life, facts that could be easily refuted if false. Yet "not a vestige of antiquity has been found, impeaching, in the slightest degree, the credibility of the sacred writers."[23]

The *Testimony*'s objective was to win support for his legal science from three groups about which Greenleaf cared deeply: evangelical Christians, the intellectual community, and the legal profession. It is thus necessary to look at the role of "evidence" in the church, in the public sphere, and in the courtroom.

In the mid-1840s Greenleaf found it propitious, if not provident, to turn his energies toward the crisis threatening Christianity while at the same time advancing the cause of Whig legal science. The *Testimony*'s immediate catalyst, it seems, was the looming schism within the Episcopal church but attacks by "infidels" against the Christian fortress's outer walls also motivated Greenleaf to defend his religion's most fundamental tenets. Ill equipped to engage theologians on their own terms, Greenleaf instead arrayed his lawyerly arsenal against those who threatened his evangelical faith.

The threats from without were formidable. A reviewer for the *New Englander* averred that the Enlightenment "infidelity" of "Hume, Voltaire, Priestly, and Paine" remained "current." Nonetheless, the gravest threat came from radical intellectuals within German universities, who gave birth to "two schools of modern infidelity, the rationalistic and the mythical." Rationalism "explain[ed] away the supernatural phenomena of the Bible" as "feats of legerdemain, or at best scientific experiments above the comprehension of the multitude . . ." while the other "regard[ed] the sacred scriptures, not excepting the life of Christ, as a collection of oriental myths" and the New Testament as "fable."[24]

23. Ibid, 38 [§39]; 42 [§44]; 42 [§43].

24. "Christianity Examined in a Court of Law," *The New Englander* 5 (July 1847), 459–66, 460, http://cdl.library.cornell.edu/cgi-bin/moa/moa-cgi?notisid=ABQ0722-0005-67. For attacks on Christianity by intellectuals, see especially Sydney Ahlstrom, *A Religious History of the American People* (New Haven, CT, 1972), 605–6; Paul Conkin, *The Uneasy Center: Reformed Christianity in Antebel-*

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Greenleaf's campaign against the infidels is dramatically confirmed by Francis Bowen's dual review in the Unitarian *North American Review*, entitled "Greenleaf and Strauss: The Truth of Christianity," which paired Greenleaf's *Testimony* alongside the second volume of David Strauss's radical *The Life of Jesus* (both published in 1846). "Of course," the *North American* joined the two "only by way of contrast" because it would be "hard to conceive of two works more unlike in their scope, character, and purpose." Both were "excellent specimens, the one of clear and shrewd English common sense, and the other of German erudition, laborious diligence, and fertility in original speculation." Strauss's work embodied a "new science called *Symbolism*" which regarded the Bible, including the New Testament, as a "myth" or "fable." Yet to Christians, "to say that the life of Jesus is mythical is to affirm that it's a fiction, a lie." Bowen thought it a "good omen" that the "honored head of the most distinguished and prosperous school of English law in the world" had joined "the professed champions of Christianity," namely, "professed theologians and metaphysicians" whose writings were far too esoteric for popular consumption.[25]

German philosophers were not, however, Greenleaf's primary foes. Other Christians, specifically fellow Episcopalians, had plainly lost their way, spreading errors far more concrete, immediate, and threatening

lum America (Chapel Hill, NC, 1995), 268–85. Boston had battled its own infidels, particularly the troublesome Abner Kneeland. See Christopher Grasso, "Skepticism and American Faith: Infidels, Converts, and Religious Doubt in the Early Nineteenth Century," *Journal of the Early Republic* 22, no. 3 (2002), 465–508.

25. Francis Bowen, "Greenleaf and Strauss: the Truth of Christianity," *The North American Review* 63 (Oct. 1846), 382–433, 382, 401, 382, 384, http://cdl.library.cornell.edu/cgi-bin/moa/moa-cgi?notisid=ABQ7578-0063-22. As we will see, Bowen fretted that Greenleaf's brief essay failed to carry the day because it had largely "taken for granted" the gospels' "genuineness" and instead "comment[ed] upon evidence already in possession of the court." Bowen's criticism, however, erroneously assumed that Greenleaf was staging a trial in the first place and offered nothing substantive beyond this curt dismissal. It may be that Bowen, who pushed ahead to vanquish Strauss on his own terms, hungered to prove his mettle over that of law professors as well as "professed" theologians and metaphysicians. Bowen's own refutation of Strauss drew on key parts of Greenleaf's argument. See ibid., 386, 391–95. See also Herbert Hovenkamp, *Science and Religion in America, 1800–1860* (Philadelphia, PA, 1978), 74–76.

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than dreary tomes that smelled of the lamp. And by affirming the truth of the gospels, Greenleaf hoped to quell these falsehoods.

Bitter conflicts pervaded the Episcopal church in the 1840s. Discord was not new to Episcopalians, whose church inherited the Anglican mantle after the Revolution. In the early nineteenth century, a "High Church" party contended with a strong, vocal evangelical wing over the church's direction, particularly the difficulty of reconciling orderly forms of worship with the religious enthusiasm that swept large parts of the new nation. By the 1830s, the two sides had worked out a "tenuous peace" which was soon shattered as the tidal surge over "Puseyism" (the Oxford Movement) within Britain's Anglican Church broke over the United States. Puseyism sought reformation of Anglican spirituality and religious practices, its advocates producing the *Tracts for the Times* beginning in 1833. Opponents derided the *Tracts* as betraying the Protestant Reformation and further confirmation of the Anglican Church's "Roman Catholic tendencies." When the controversy crested over the Episcopal church, it dissolved the truce between the High Church and evangelical parties.[26]

No dry theological dispute, the conflict manifested itself in several scandals that also raised troubling issues of proof. First, in 1843 a student at the General Theological Seminary, Arthur Carey, applied for ordination as a minister of the Protestant Episcopalian church. After Carey's pastor denied him the necessary certificate because of Carey's expressed "Romish" views, the Bishop of New York convened a "council of his Presbyters," which held a hearing and recommended ordination despite two vehement dissents. The Bishop obligingly ordained Carey the very next day while the dissenting presbyters dramatically "turned their backs on the altar." The press reveled in the Episcopalians' embarrassment. The *New Englander* harped that Carey's ordination, "with the protest of two eminent clergymen against him, on the ground of his

26. Diana H. Butler, *Standing Against the Whirlwind: Evangelical Episcopalians in Nineteenth-Century America* (New York, 1995), 93, 96–99. The controversy's historian, Diana Butler, concludes that the truce had "occurred, in part, because the two parties essentially agreed on the primitive and apostolic vision of the Episcopalian Church." The Oxford Movement, however, "betrayed" the vision. Ibid., 100.

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being in effect a Roman Catholic, became the town's talk, and filled the newspapers, not only in the city of New York, but everywhere else."[27]

The Carey incident paled, however, when compared to the firestorm triggered by the scandalous charges against Bishop Benjamin T. Onderdonk, the very bishop who had ordained Carey. Onderdonk, along with his brother, Henry, the Bishop of Pennsylvania, were identified as Tractarians, yet their evangelical opponents chose to remove them not for their beliefs—a slippery, subjective inquiry, as in the Carey case—but for objectively provable acts of misconduct. While Henry was suspended for mere intemperance, church authorities condemned Benjamin for indecently touching women while intoxicated. During the sensational church trial both parties bitterly contested the facts and presented competing versions of the "truth." What does it mean to be "drunk in the sense of the law"? What standard of proof governs "offense[s] against chastity and purity, on the part of an ecclesiastic"? Onderdonk's supporters caustically concluded that he was "martyred" because of his High Church leanings and affinity for the Oxford Movement.[28]

Adding to the mortification of professed evangelical Episcopalians, other evangelicals pointed to "Oxfordism" and the Carey/Onderdonk scandals as evidence that Episcopalianism itself was inconsistent with evangelical faith and perhaps the American "spirit" itself. A pamphlet by Albert Barnes, a prominent Presbyterian, excoriated Episcopalians for "utterly refus[ing] as a body to give the Bible without the Prayer-book" and for "religiously abstaining from all connections with any association for promoting any religious object out of connection with '*the church.*'" Barnes's indictment openly charged that Episcopalianism, a "religion of forms," conflicted with the American "spirit":

27. "The Ordination of Mr. Arthur Carey," *The New Englander* 1 (Oct. 1843), 586, 591, 592, http://cdl.library.cornell.edu/cgi-bin/moa/moa-cgi?notisid=ABQ0722-0001-73.

28. "The Martyrdom of Bishop Onderdonk," *The New Englander* 3 (Apr. 1845), 284, 298 , 293, http://cdl.library.cornell.edu/cgi-bin/moa/moa-cgi?notisid=ABQ0722-0003-29. The Onderdonk scandal is described at ibid., 284–306. The church court's verdict was mixed: A majority (over two-thirds) found him guilty, but "suspended" rather than removed Onderdonk as the Bishop of New York. See also Conkin, *Uneasy Center*, 163–64 (asserting that alcohol was a "family affliction" among the Onderdonks); Butler, *Standing Against the Whirlwind,* 114–16.

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We regard the prevailing spirit of Episcopacy, in all aspects, high and low, as at variance with the spirit of this age and of this land. This is an age of freedom, and men *will* be free. The religion of forms is the stereotyped wisdom or folly of the past, and does not adapt itself to the free movements, the enlarged views, the varying plans of this age. . . . It makes a jar on American feelings.[29]

Greenleaf undoubtedly followed these controversies with interest as both a legal scholar and a devout evangelical Episcopalian. An October 1844 letter from a friend provided Greenleaf with a first-hand account of the bitter infighting at the church's General Convention, the grave concern over "the irreligious, the mere formalists and the errorists," and the imminent "overthrow" of the "ungodly" Onderdonk brothers. Yet the letter also warned against radical evangelicals, those "few pertinacious individuals, [inexperienced?] in church legislation, who would consent to no measures which did not embrace the extreme opinions they had imbibed[.]" In short, the church needed responsible, moderate leadership. The same writer praised Greenleaf as "the man and almost the only man in the Church" capable of achieving the "desired result."[30]

Greenleaf likely viewed the scandals as threatening on two levels. First, Oxfordism threatened the taproot of evangelical faith—the authority of the gospels, the *sola scriptura*. Second, they raised questions about whether anything, be it faith or fact, could be known with certainty. Onderdonk's trial, for example, centered on the veracity of witnesses, particularly women, the strength of circumstantial evidence, and the unseemly difficulty of proving a "fact" as seemingly mundane as intoxication. One writer flayed Onderdonk's supporters on the church court, "trust[ing] that the ignorance of these right reverend gentlemen as to what degree of excitement by wine or strong drink is improper, will be

29. "The Position of the Evangelical Party in the Episcopal Church," *The New Englander* 2 (Jan. 1844), 113, 117 (emphasis original), 142 (emphasis original), http://cdl.library.cornell.edu/cgi-bin/moa/moa-cgi?notisid=ABQ0722-0002-13. Butler identifies the author as Albert Barnes, who originally published the article as a pamphlet. Butler, *Standing Against the Whirlwind,* 120, 123. The passage also illustrates that evangelicalism was not monolithic. Mark A. Noll, for example, observes at least four "polarities" among evangelicals in this period. Noll, *America's God: From Jonathan Edwards to Abraham Lincoln* (New York, 2002), 175–79.

30. Edward New[ton?] to Greenleaf, Oct. 28, 1844, Greenleaf Papers.

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enlightened by the decision of that higher court—'the church diffused'—to which the case has now been carried." Greenleaf understood, however, that the public—the "church diffused"—required leadership and enlightenment.[31]

Greenleaf answered the challenge with the *Testimony* and his leadership role in the Protestant Episcopal Society for the Promotion of Evangelical Knowledge (PESPEK). Both underscored his Whiggish commitment to eradicate error and to foster reform through education and institutions. PESPEK's first president, the Reverend William Meade of Virginia, had spearheaded the charges against the Onderdonks in 1844. "[E]rror is spreading throughout our church," declared PESPEK's promoters. Not only was it "dangerously corrupting to a pure gospel and a pure church," but by "our silence and want of organization, we label the poison as GOOD MEDICINE for our families and our parishes." PESPEK's avowed mission was to "publish, select, and sanction such books and tracts as we approve" and thereby "prevent the silent and gradual disappearance of evangelical views." Specifically, PESPEK would disseminate "DOCTRINE, distinctively EVANGELICAL," which emphasized the authority of the "*Scripture*, the sole rule of faith."[32]

The revised ("corrected") edition of the *Testimony* coincided with PESPEK's formation in 1847; both served similar ends by affirming the authority and accuracy of the Scriptures, a fundamental evangelical tenet, while also reassuring those who craved truth and certainty in their lives. PESPEK's executive committee included the Reverend J. S. Stone, a Brooklyn minister who had published an 1844 book attacking the Tractarians while affirming the tenets of Protestantism. In an October 1846 letter, Stone thanked Greenleaf, a friend, for sending him a copy of the *Testimony*. Politely suggesting that its lengthy appendix and elaborate "notes" may well "render the book less immediately popular," Stone quickly added that it would simultaneously "render it more permanently valuable": "Yours is a book for the *Student*, and not for the *cursory reader*." Greenleaf's greatest contribution, however, was to expose the

31. "Martyrdom of Bishop Onderdonk," 299.

32. Address of the Protestant Episcopal Society for the Promotion of Evangelical Knowledge (Philadelphia, PA, Nov. 27, 1847), Greenleaf Papers. For Meade, see Conkin, *Uneasy Center*, 163.

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"irrational . . . mode of trial" demanded by "infidels." Stone concluded that "there is one thing which lies on favor of the work, so that any reader may see it - you have shown, conclusively, that Infidels have arrogantly demanded of the Evangelical Witnesses what they [would] never think of demanding of a common witness on oath before a Court of Justice."[33]

Greenleaf hoped that his *Testimony* demolished attacks against the gospels' truth by those who doubted their authenticity and accuracy, particularly the Episcopalian High Church party and infidel intellectuals. The gospels withstood the closest, most demanding scrutiny that human intelligence permitted, namely, the test of courtroom proof. And in so doing, Greenleaf also sought to demonstrate that the study of law deserved to be taken seriously as a science by American intellectuals.

Although the crisis within the Episcopal Church initially spurred Greenleaf's work, the *Testimony* conveniently conformed to his ongoing mission of raising the intellectual status of law study in general and the reputation of Harvard's fledgling law school in particular. The *Testimony* begins by threading together three ideas: (1) the need to "investigate the truth of our religion," (2) by applying the same standards "readily conceded to every other branch of human science," namely, (3) "the tests to which other evidence is subjected in human tribunals." Clearly implicit is the remarkable notion that evidence law comprised a metascience capable of finding "truth" whenever facts are disputed, even outside the confines of a courthouse trial.[34]

In dedicating the *Testimony* to the "legal profession," Greenleaf immodestly proclaimed that its members had not only the "peculiar" skill but also a corresponding obligation to resolve important political and historical controversies. Lawyers are professionally charged, he contended, "to explore the mazes of falsehood, to detect its artifices, to pierce its thickest veils, to follow and expose its sophistries, to compare

33. Rev. J. S. Stone to Greenleaf, Oct. 12, 1846, Greenleaf Papers (emphasis original). For a contemporary discussion of Stone's views, see "Review of Dr. Stone's Mysteries Opened," *The New Englander* 2 (Oct. 1844), 510, http://cdl.library.cornell.edu/cgi-bin/moa/moa-cgi?notisid=ABQ0722-0002-56.

34. Greenleaf, *Testimony*, §2–§3.

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the statements of different witnesses with severity, to discover truth and separate it from error." Moreover, the profession's influence "upon the community is unquestionably great; conversant, as it daily is, with all classes and grades of men, in their domestic and social relations, and in all the affairs of life, from the cradle to the grave." Thus, it was imperative that lawyers apply their skill, influence, and erudition to the most singularly important issue in history, the truth of gospels, lest the broader public mistakenly think that the legal profession "lightly esteem[s]" the evidences of Christianity.[35]

This grand vision of the legal profession was rooted in his own dreams for legal education. Greenleaf had labored for over a decade to place Harvard Law School on a sound financial footing, a feat he and Joseph Story accomplished by raising the school's academic standing through their teaching, scholarship, and reputations within the profession. Their first burden was to convince students to attend law school at a time when bar admission did not require any formal legal education, much less a law degree. In 1833, Greenleaf's first year, the Law School enrolled just 31 students and was mired in debt. Under his administration, enrollment surged to 156 students from 21 states and territories by 1844. Its burgeoning enrollment "placed the School financially in a most prosperous condition" by the mid-1840s. Although students undoubtedly enrolled for myriad reasons, Greenleaf's and especially Story's national reputations likely attracted those who preferred a more academic education to purely practical training, and who had sufficient affluence to pay the tuition.[36]

More daunting perhaps than attracting students and raising funds, Story and Greenleaf faced a second challenge, namely, demonstrating that law study belonged in a university and amounted to something more than reified training in a trade or craft. Their rigorous teaching was one step. Another was their prolific outpouring of treatises, although most were directed at courts and practicing lawyers, not the public or an aca-

35. The quotes are taken from Greenleaf's dedication of the work, dated May 1, 1846, to the "Members of the Legal Profession." Greenleaf, *Testimony*, vii–viii.

36. Warren, *History of the Harvard Law School*, 1: 485; 2: 34, 93. Francis Bowen, the editor of the *North American Review*, criticized Harvard's poor financial condition and management in a cutting 1849 article. Bowen noted, however, that the "Law School alone flourishes like a green bay tree." Quoted in ibid., 2: 128. On Story's and Greenleaf's vision for Harvard Law School and legal science, see Schweber, "The 'Science' of Legal Science," 437–38.

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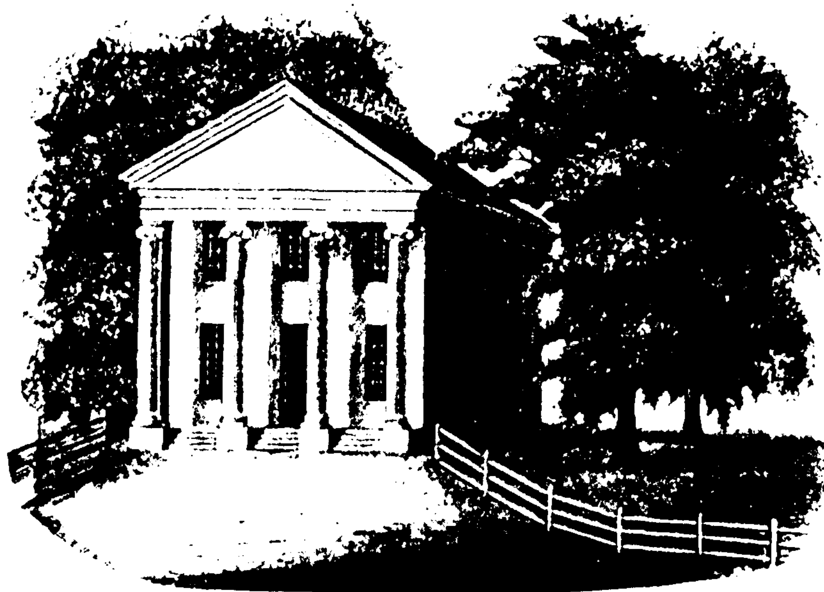

Figure 3: Dane Hall (Harvard's law school), 1832–1845. The building's quaint, almost bucolic rendering in this illustration nicely mirrors the challenges faced by Greenleaf and Story as they struggled to accommodate burgeoning enrollments while legitimating law study in antebellum higher education. Credit: Warren, *History of the Harvard Law School*, 1: following 476.

demic audience. Despite its dedication to lawyers, Greenleaf's *Testimony* purported to break the mold by demonstrating to a broader public that law was a science that could resolve nonlegal controversies.[37]

Greenleaf ensured that influential people knew of his *Testimony*. Prominent intellectuals as well as powerful evangelicals received copies, including James Walker, Harvard's preeminent expert on "common sense" philoso-

37. A fairly complete bibliography of Greenleaf's printed work appears at Warren, *History of the Harvard Law School*, 2: 122. For Story's bibliography, see R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill, NC, 1985), 449–51. On the bar's generally poor reputation among all segments of society throughout nearly all of American history, see Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776–1876* (Cambridge, MA, 1976), ch. 5, 138 ("antilawyer protest remains overwhelmingly a middle-class phenomenon that centers upon demands for cheaper and speedier justice").

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phy and later the University's president. Walker read Greenleaf's "Observations" with "greater pleasure than [he] expected." Apparently examining an early 1846 version, Walker "made a few notes in pencil" but found "it no easy matter to pick a quarrel either with your method or your style." To Walker it appeared that his "friend," the law professor, was "as much at home if not more, than the most [practical?] Theologian."[38]

Among those also receiving a copy was the famed biblical scholar Edward Robinson. Enormously erudite, Robinson pioneered the application of geography and archeology in his studies of Palestine and biblical history. In 1845 Robinson published his own study of the four gospels ("in Greek"), which ambitiously harmonized their content and explained discrepancies with reference to Middle Eastern geography. While encouraging, Robinson seems to have been largely unimpressed by Greenleaf's effort, or at least unsure what to make of it. In a short letter, Robinson thanked Greenleaf for the "handsome volume" and for his "timely contribution to the cause of truth and divine revelation." He closed by politely affirming that it would prove "extremely useful" to that "class of readers for whom it was, specially," written, namely, the legal profession, and hoped it may some day be "heeded by multitudes of inquiring minds in other classes of Society." To be sure Robinson was not about to abandon archeology for law, but he had correctly guessed

38. James Walker to Greenleaf, Jan. 31, 1846, Greenleaf Papers. It is unclear whether Walker was commenting on a draft or the first (1846) edition; the volume was "corrected" and revised in 1847. At any rate, Walker's letter, while brief, closed by suggesting that Greenleaf consider omitting Section 2 of the *Testimony*, which Greenleaf clearly did not do. Walker did not elaborate except to voice his concern lest Greenleaf "offend" those that Walker was "most anxious [Greenleaf] should propitiate in order to convince." Section 2 is critical because it (again) sets forth the proposition that Christianity should be subjected to scrutiny by "human science." It is unlikely that this proposition troubled Walker, as it runs throughout Greenleaf's arguments. Rather, it seems more likely that Walker was concerned with Greenleaf's curt dismissal of the "perverse and headstrong" followed by his pointed refusal to offer "irresistible evidence to the daring and profane to vanquish the proud scorner, and afford evidences from which the careless and perverse cannot possibly escape." For Walker's mastery of the Common Sense tradition and standing as an intellectual, see Donald H. Meyer, *The Instructed Conscience: The Shaping of the American National Ethic* (Philadelphia, PA, 1972), 155–56; Bruce Kuklick, *A History of Philosophy in America, 1720-2000* (New York, 2001), 61.

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that Greenleaf's ambitions ranged beyond lawyers and certainly the Christian faithful, who needed no persuasion.[39]

The *Testimony* staked the law's claim as a science of proof at a time when competing disciplines struggled for recognition if not primacy. Greenleaf's arrival at Harvard had coincided with increasing specialization in fields such as botany, chemistry, geology, geography, and philology.[40]

In an 1838 letter to Charles Sumner, Greenleaf frankly confessed that his own legal training had cabined his mind but that five years of teaching had burst the desiccated framework of case law and doctrine. While Greenleaf now saw law as a set of general principles, a true science, these insights had not diminished any of its harmony with religion:

> The result of wider and deeper researches is to make me less exclusively addicted to the Common Law . . . ; in short, to lead me to regard the law . . . as a system of principles—of higher and holier origin than any codes whatever, though disclosed with more or less symmetry and beauty in the codes of all civilized nations.

By sending copies to Walker and Robinson, Greenleaf hoped the *Testimony* would advance the law's progress as an emerging academic discipline.[41]

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39. Edward Robinson to Greenleaf, Sept. 23, 1846, Greenleaf Papers. For Robinson's work on the gospels, see Review of *A Harmony of the Four Gospels in Greek, According to the Text of Hahn* by Edward Robinson, *The New Englander* 4 (Apr. 1846), 292, http://cdl.library.cornell.edu/cgi-bin/moa/moa-cgi?notisid=ABQ0722-0004-32. For Robinson's influence, see Conkin, *Uneasy Center*, 269. Greenleaf's relationship with Robinson is unknown, but the revised second edition of the *Testimony* (1847) advertised that it incorporates "[t]he arrangement of the Gospels by Dr. Robinson . . .[,] a scholar of the highest reputation." Greenleaf, *Testimony*, "Advertisement to this Edition."

40. Hovenkamp, *Science and Religion*, 64.

41. Quoted in Warren, *History of the Harvard Law School*, 2: 4. See also Schweber, "The 'Science' of Legal Science," 440. Greenleaf seems to have exhibited many of the qualities of the "archetypical evangelical scientist," namely, a "biblically informed philosophy of nature," a predilection for inductive reasoning, and an "insistence on harmony between true science and true religion." John Hedley Brooke, "The History of Science and Religion: Some Evangelical Dimensions," in *Evangelicals and Science in Historical Perspective*, ed. David N. Livingstone, D. G. Hart, and Mark A. Noll (New York, 1999), 17–40, 25–26.

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Indeed, for the law of evidence to be taken seriously as a science, it too had to show its usefulness in finding "truth" outside the courtroom. Robinson's tools were geography and archeology. Benjamin Silliman demonstrated the harmony of geology and the Old Testament while his student, Edward Hitchcock, also worked to "unify geology and religion." Others looked away from nature and drew instead from history and philology. Andrews Norton, Greenleaf's Harvard colleague, used literary criticism to demonstrate objectively the Bible's accuracy and authenticity. At Andover, Moses Stuart also eschewed geology in favor of philology to support the scriptures.[42]

Despite their many differences and rivalries, all shared roots in the tradition of Scottish Common Sense philosophy. Mark Noll observes that "the Common Sense tradition . . . dominated American intellectual life before the Civil War" while also "occup[ying] a major place in evangelical theology." The tradition embraced different facets. Epistemologically, it "cut the nerve of skepticism" and rejected David Hume: "the mind is structured in such a way that it is impossible not to act and think as if our perceptions revealed the real world to us directly." Methodologically, it embraced Francis Bacon: the "truths about consciousness, the world, or religion must be built by strict induction from irreducible facts of experience."[43]

42. Hovenkamp, *Science and Religion,* 129, 132, 67–68, and 64. Silliman, for example, wrote that "geology contradicts nothing contained in the scripture account of the creation; on the contrary, it confirms the order of time and requires only that the time should be sufficiently extended." Quoted in ibid., 129. On the lively disagreements among Silliman, Hitchcock, and Stuart, see Rodney L. Stiling, "Scriptural Geology in America," in *Evangelicals and Science in Historical Perspective*, 177–92, 179–80. Schweber asserts that Greenleaf was "an early important writer in the tradition of law as a form of natural science," but this may be an overstatement. Schweber, "The 'Science' of Legal Science," 437. Undoubtedly influential among lawyers and evangelicals, he seems not to have overawed his fellow academics.

43. Mark A. Noll, "Common Sense Traditions and American Evangelical Thought," *American Quarterly* 37 (Summer 1985), 216–38. Noll observes that a key to understanding the history of evangelical religion is "an awareness of the particularly intimate relationship between evangelical thought and the Scottish Philosophy of Common Sense." Ibid, 217. See also Hovenkamp, *Science and Religion*, 10; George M. Marsden, *The Soul of the American University, From Protestant Establishment to Established Nonbelief* (New York, 1994), 90–91; Schweber, "The 'Science' of Legal Science," 444, 447.

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Indeed, Noll posits that "[t]his aspect of the Common Sense tradition, which contributed its share to the general scientism of nineteenth-century American life, played an unusually large role in evangelical thought." In sum, the Common Sense tradition bequeathed an "insistence that all knowledge, both natural and scriptural, must be based on facts and not 'hypotheses.' "[44]

Greenleaf carefully and consciously wove the Common Sense tradition into the first volume of his famed treatise, *Evidence*, which seamlessly blended technical issues of admissibility (What should the jury hear?) with the problem of proof itself (When is a fact "proved"?). The discussion of "moral evidence," "sufficient probability," and when facts are adequately "proved" are, for example, drawn from the core of the Common Sense tradition.[45] When addressing the "general nature and principles of evidence," Greenleaf extensively quoted from Thomas Reid's "profound" work and explicitly rejected Hume's skepticism. Of critical importance was the term "moral evidence," by which all "matters of fact" are proved; it extended to all evidence drawn from the senses and thus obtained other than by "intuition" or "demonstration" (e.g., mathematical truths). Whatever the allure of reason and abstraction, at bottom human experience and observation underlies all knowledge.[46]

Written shortly after completing the evidence treatise, Greenleaf's *Testimony* is also suffused with Common Sense epistemology. Three examples suffice. First, citations to, and discussions of, writers within this

44. Noll, "Common Sense Traditions," 220, 223; Hovenkamp, *Science and Religion*, 17. See also Mark A. Noll, "Science, Theology, and Society from Cotton Mather to William Jennings Bryan," in *Evangelicals and Science in Historical Perspective*, 99–119.

45. William Twining, *Theories of Evidence: Bentham & Wigmore* (Stanford, CA, 1985), 123.

46. Greenleaf, *Treatise on the Law of Evidence*, 1: §1 and § 7, especially 12–14n1 (quoting the "profound" words of Thomas Reid). Moral evidence never attains absolute certainty; rather, the "most that can be affirmed of such things, is that there is no reasonable doubt concerning them." Ibid, at 1: §1. Greenleaf's enormous debt to the Common Sense tradition is best summed up in his statement of the three bases of "evidence": (1) the "disposition to believe"; (2) "our faith in human testimony, as sanctioned by experience"; and (3) "the known and experienced connexion subsisting between collateral facts or circumstances, satisfactorily proved, and the fact in controversy." Ibid., § 9, § 10, and § 11. The *Testimony*, as described earlier, applied the same terms. See Greenleaf, *Testimony*, § 27.

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tradition are laced throughout. William Paley, who did so much to popularize Common Sense thinking, is prominently featured. Indeed, Paley provided some of the key arguments concerning the circumstantial credibility of the evangelists (e.g., the delicate weighing of discrepancies and similarities among the gospel writers). Greenleaf also explicitly drew from the Common Sense core of his legal treatise, *Evidence*, when discussing "moral evidence" and "sufficiency" of proof.[47]

Second, Hume's skepticism is again singled out for criticism and rejection. Rebutting Hume's formidable arguments against the existence of miracles, Greenleaf concluded that the facts were "plain and simple in their nature, easily seen and fully comprehended by persons of common capacity and observation." And to close his case, Greenleaf (again) referred to the irrefutable argument of "Dr. Paley."[48]

Third, by freely drawing from illustrations not strictly involving courts or law, Greenleaf underscored how his principles of evidence law served as a science of proof. For example, a "few discrepancies" among the evangelists did not mean they were lying or mistaken. To demand perfect consistency, Greenleaf said, was to reject "many of the contemporaneous histories on which we are accustomed to rely." Paley himself had noted the discrepant accounts of Lord Stafford's execution and Greenleaf, drawing from the French Revolution, added the example of the diverging accounts of the French royal family's flight to Varenne in 1792.[49]

The *North American*'s review, by Francis Bowen, perfectly captured the *Testimony*'s commingling of history and law. Lamenting that Greenleaf had not specially addressed the "genuiness of the gospels," Bowen declared,

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47. Greenleaf, *Testimony*, 28–29 [§34], 30 [§36]. Greenleaf also asserts that Paley put beyond reasonable dispute any "absurd" notion that the evangelists were "bad men" who fabricated their accounts. Ibid., 27. Greenleaf's papers include a meticulous, lengthy handwritten memorandum, signed by one William Woodward, that bears the title "Paley's *Evidences of Christianity*." File 25-9, Greenleaf Papers. For Paley's popularity, see Noll, "Common Sense Tradition," 218. See, e.g., Greenleaf, *Testimony*, 21–22, [§27].

48. Greenleaf, *Testimony*, 38 [§38]. Greenleaf contended that the proof of any one miracle satisfactorily proved the truth of all miracles. Paley made the same argument with respect to the death and resurrection of Jesus—"an argument incapable of refutation." Ibid.

49. Greenleaf, *Testimony*, 30 [§36].

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We wish, however, that instead of contenting himself with mere references to the works of those authors who have so satisfactorily established the genuiness of our Gospel records, *he had favored us with a summary of the historical evidence upon this point, and then given a legal opinion of its credibility and sufficiency.*[50]

But Bowen had missed Greenleaf's point, which was that the law now followed those very same principles of proof that Bowen had found so compelling. Clearly, Bowen expected more of the law; Greenleaf found Paley quite sufficient, however, and saw no need, as we will see, to grapple with technical rules that applied only in courtroom trials.

In sum, the *Testimony* showcased law's capacity to resolve nonlegal controversies outside the courtroom. Greenleaf's law of evidence was epistemologically and methodologically consonant with the Common Sense tradition, which in turn served as the foundation for much of antebellum scientific thought. Moreover, because of their training and experience, lawyers were experts in its application and thereby able "to discover truth and separate it from error" where others could not. In a sense, Greenleaf's originality consisted of establishing the law's unoriginality in tracking conventional Common Sense thinking. And although critics like Bowen were free to reject their application outside the courtroom, the rules carried the force of law (literally) within the courtroom.

Law's claim to intellectual ascendancy, or at least academic respectability, compels a closer examination of Greenleaf's vision for legal science and the modern trial. For if Greenleaf faced an uphill struggle in using evidence law to prove the gospels' truth to infidels and errant Christians or to convince intellectuals that law was more than a desultory trade, he also had to persuade lawyers to accept principles that were at once elitist, troublingly antidemocratic, and solidly rooted in his Whiggish outlook.

50. "Greenleaf and Strauss," *North American Review,* 385 (emphasis added). Despite his criticism of Greenleaf, Bowen later seconded Greenleaf's argument regarding discrepant witnesses, quoted Greenleaf's examples, and added others involving the battles of Bunker Hill and Lexington during the Revolution. Ibid., 392–94. Such discrepancies, he thought, meant little because "[a]ll the important points, all the great features, all that is really and intrinsically valuable to the student of history, of the battles of Lexington and Bunker's hill are perfectly well known; they are as clear as the sun in the heavens." Ibid., 394.

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An ardent supporter of Whig politics, Greenleaf's writings and teaching fell within the broad stream of Whig ideology. "The Whig commitment to institutions," observes Daniel Walker Howe, "helped them synthesize order with freedom and change." A modernizer deeply committed to evangelical Christianity, moral reform, and the Common Sense philosophy, Greenleaf struggled to retune the instruments of law to better serve an increasingly commercial economy. Perhaps best remembered in this respect for his role in the "creative destruction" of monopoly power in the *Charles River Bridge* case, Greenleaf's ideas helped remold the common-law trial into an institution that preserved its venerable trappings, especially its devotion to hierarchy, while serving this newer social and economic order.[51]

More exhortatory than celebratory, Greenleaf's dedication of the *Testimony* to the legal profession postulated that the "law of evidence" comprised one of the profession's "peculiar studies," one that uniquely equipped and even obligated lawyers to examine the truths of Christianity. Greenleaf surely overstated these propositions, yet they illustrate a Whiggish merging of evangelicalism and intellectual elitism. Indeed, the task he set for the "legal profession" was one that only Greenleaf himself could likely undertake in light of his "peculiar" blending of legal scholarship and evangelical faith. And the *Testimony*'s dedication set the stakes at the highest level: If Christianity's doctrines are "well founded and just, they can be no less than the high requirements of Heaven, addressed by the voice of God to the reason and understanding of man, . . . and essential to the formation of his character and of course to his destiny, both for this life, and for the life to come."[52]

Yet, what role did law play in answering such questions and what of the separation of church and state? Historians vigorously disagree over the tenor, timing, and degree of church–state "separation" before the Civil War. Some find little "separation" in the 1830s. Philip Hamburger

51. For discussions of law's role in the new social and economic order, see Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA, 1977); Kutler, *Privilege and Creative Destruction*. For Whig ideology, see Howe, *Political Culture*, 31 (hierarchy as applied to a more commercial, industrial social order); ch. 8. Howe also observes that evangelicalism was an "important dimension of Whiggery" which helped shape the "dominant culture of nineteenth-century America." Ibid., 150.

52. Greenleaf, *Testimony*, vii–viii.

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concludes that issues of antiestablishment and religious freedom predominated before 1850; "separation of church and state" arose from a "nineteenth century movement to impose an aggressively Protestant 'Americanism' on an 'un-American' Catholic minority." Other historians find strong evidence of antebellum separation. Mark McGarvie, provocatively emphasizing the sharp "ideological conflict over disestablishment" after the Revolution, contends that contract law mediated the decades long process by which religion was removed "from public policy and the churches from roles of public responsibility." Yet he finds it ironic that just when Massachusetts disestablished religion in 1833, the surge of evangelical Christianity sapped the "forces of separation" of "much of their power among Americans."[53]

Irony may not be the right word. Greenleaf and Joseph Story saw no inconsistency, much less conflict, between the common law and Christianity. Story, a Unitarian, also fervently believed that Christianity coursed through the common law. Upon Story's death in 1845, Greenleaf delivered a moving eulogy to Harvard's law students in which he extolled his departed friend and their teacher as a "man of deep religious feeling" who hoped that students would fulfill "their duty to the cause of learning and religion, and of their ultimate accountability to posterity and to God." Greenleaf closed by emphasizing Story's Christianity and the late Justice's (apparent) endorsement of his yet unpublished *Testimony*:

> He [Story] had studied the evidences of Christianity with professional closeness and care, and had given to them the testimony of his full assent; and he has often been heard to declare that, in his judgment, the great facts of the gospel history were attested by a mass of evidence which, in any court of law, would be perfectly satisfactory and conclusive.[54]

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53. Hamburger, *Separation of Church and State*, ch. 8, 191 (quote); McGarvie, *One Nation Under Law*, 4, 7, 181–82, and 191. See also Kramnick and Moore, *Godless Constitution*, 111 (early Baptists "expected nothing in religious terms from the state and dictated nothing in religious terms back to the state"); Mead, *Lively Experiment*, 63. Hamburger asserts that the "standard history of separation has some qualities of a myth," as it lacks details and continuity. *Separation of Church and State*, 3.

54. Simon Greenleaf, *A Discourse Commemorative of the Life and Character of the Hon. Joseph Story* (Boston, MA, 1845), 39, 47 (Wisconsin Historical Society,

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Thus, neither Greenleaf nor Story understood the issue as simply one of whether law and Christianity might harmoniously coexist in separate spheres; rather, the two were inextricably bound up with one another, a theme Greenleaf often sounded. His inaugural address as Harvard's Royall professor, as we have seen, asserted that Christianity was "interwoven" with the common law. A former student, Massachusetts judge David Cross, recalled Greenleaf lecturing the class that "The Common Law is Christian; It has been baptized." To say that Christianity is "interwoven" in the common law, or that the latter has been "baptized," is compelling evidence that when shaping the law, Greenleaf's Christianity was its bedrock. Story held virtually identical views. At his own inaugural address as Harvard's Dane Professor, Story intoned that "Christianity is part of the Common law. . . . There never has been a period, in which the Common Law did not recognize Christianity as lying at its foundation." In sum, Story and Greenleaf could not have consciously construed the common law in a way that conflicted with Christianity.[55]

Madison, WI). For Story's religious beliefs, see Jay Alan Sekulow, *Witnessing Their Faith: Religious Influence on Supreme Court Justices and Their Opinions* (Lanham, MD, 2006), 26–28. Greenleaf and Story held very different beliefs about Christianity. According to Sekulow, Story "denied the Trinity," yet this striking divergence created no apparent friction between the two friends, who seem to have held similar notions of church-state relations. Ibid. In 1844, Justice Story wrote the Supreme Court's unanimous opinion in the famous *Girard Will* case. Briefly stated, Girard's will bequeathed a large sum of money to several cities, including Philadelphia, for educating "poor white male orphans" with the odd proviso that the funds not be used to pay the members of "any sect," who were also forbidden from even "visit[ing]" the college. The Court upheld the proviso. In one historian's words, Story "found that the exclusion of ecclesiastics was not tantamount to an attack on the Christian religion and that the will was not thereby invalidated." Christianity's truths and values could be effectively taught without direct involvement of clerics. Swisher, *Taney Period*, 215–17. Sekulow summarizes Story's views of the church-state relation as such: "While he upheld freedom of religion, meaning that anyone could practice his faith according to his conscience, he firmly believed that Christianity was the only true foundation for civil order." *Witnessing Their Faith*, 30, 32–39 (discussing the *Girard Will* case).

55. Sekulow, *Witnessing Their Faith*, 28–29; Warren, *History of the Harvard Law School*, 2: 27. McGarvie's persuasive assessment of the role of ideology in disestablishment must be qualified by looking at legal doctrine other than contract law in which religion was more subtly embedded in public policy. See McGarvie, *One Nation Under Law*, 3–4.

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Greenleaf wove Christianity into the law of evidence in various ways. Not surprisingly, he ardently supported the requirement that witnesses take oaths. Persons who refused the oath were deemed incompetent and hence disqualified from offering testimony; the "religious sanction" was "an indispensable test of truth." As to the "degree of religious faith" so required, one must believe "in the being of God, and a future state of rewards and punishment; that is, that Divine punishment will be the certain consequence of perjury." The oath itself sufficed to establish this faith, for "the law presumes that every man brought up in a Christian land, where God is generally acknowledged, does believe in him, and fear him." For similar reasons, Greenleaf also supported blasphemy prosecutions, for that crime's "mischief consists in weakening the sanctions and destroying the foundations of the Christian religion, which is part of the common law of the land, and thus weakening the obligations of oaths and the bonds of society."[56]

More telling than his views on witness oaths or blasphemy was Greenleaf's modern approach to proof and trials generally, a triumph of Whig institution building that crystallized decades of change. Like so many ideas, institutions, and practices, the common-law trial changed dramatically following the Revolution. The old-style trial of the eighteenth century was exceedingly informal and governed by few, if any, rules of evidence. Verdicts reflected the parties' character and the community's sense of fairness more than they did a finding of historical fact (What "actually" occurred?). Juries were "morally" but not "legally" obligated to follow a judge's instructions. Verdicts were not rigidly confined (even

56. Greenleaf, *Evidence*, 1: § 368; 1: § 369; 1: § 370; 3: § 68. With respect to the importance of oaths, Greenleaf explained that secular safeguards were wholly inadequate: "[i]t is not sufficient, that a witness believes himself bound to speak the truth from a regard to character or to the common interests of society, or from fear of the punishment which the law inflicts upon persons guilty of perjury." Ibid., 1: § 368. For those "not of the Christian religion," the judge will "inquire as to the form in which an oath is administered in his own country, or among those of his own faith, and will impose it in that form." Ibid., 1: § 371. Greenleaf defined common-law blasphemy as follows: "all contumelious reproaches of our Savior Jesus Christ, all profane scoffing at the Holy Bible, or exposing any part thereof to contempt and ridicule, and all writings against the whole or any essential part of the Christian religion, striking at the root thereof, not in the way of honest discussion and for the discovery of truth, but with the malicious design to calumniate, vilify, and disparage it." Ibid., 3: § 68.

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in theory) to evidence formally presented in court, nor were jurors expected to deliberate in any meaningful sense. By the later eighteenth century, the trial was evolving into a more formal proceeding governed by exclusionary rules of evidence and controlled by the judge. Historian William E. Nelson observes that by the 1830s Massachusetts law had begun shearing the jury of its raw power to make law, compelling jurors to obey the judge's instructions on law while relegating them to the role of determining witness credibility. In short, the trial was taking its modern form as a "search for the truth" bounded and controlled by technical rules of proof administered by lawyers and judges.[57]

Greenleaf championed this new conception of trials in both his teaching and scholarship. Published in 1842, the first volume of *Evidence* bristles with commentary on cases, statutes, and doctrine—the stuff of lawyering. Yet of far greater significance were its opening 97 sections, over one seventh of the volume's total pages, which set forth core principles of proof. This core infused an epistemology into the law of evidence that was, as we have seen, predicated upon the Common Sense tradition, which Greenleaf used to bring order and consistency to the mishmash of legal rules and practices.[58]

The unifying principles of Common Sense epistemology remedied many of the problems Greenleaf had discerned in evidence law. Shortly after he started teaching, Greenleaf wrote Charles Sumner of his dissatisfaction with the leading British evidence treatise, "Starkie," and of his inclination to write his own book: "Starkie vexes me by his frequent obscurity, diffuseness, and want of method; and I sometimes resolve to write a compendium of the law of evidence myself." In an 1838 letter to Sumner, quoted earlier, Greenleaf insightfully proclaimed a commitment

57. William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, MA, 1975). See also Christopher Allen, *The Law of Evidence in Victorian England* (Cambridge, UK, 1997), 3–4; J. M. Beattie, "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries," *Law and History Review* 9 (Fall 1991), 223–67, 231; T. P. Gallanis, "The Rise of Modern Evidence Law," *Iowa Law Review* 84 (1999), 499–560; John Langbein, *The Origins of Adversary Criminal Trial* (New York, 2003), 207n131. See also Daniel D. Blinka, "'This Germ of Rottedness': Federal Trials in the New Republic, 1789–1807," *Creighton Law Review* 36 (Feb. 2003), 135–89.

58. Greenleaf, *Evidence*, 1: §§ 1–97. For Whig institution building, see Howe, *Political Culture*, 181; Nelson, *Americanization of the Common Law,* 170–71.

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to law as a "system of principles" as a result of his "wider and deeper researches," which had left him "less exclusively addicted to the common law." Upon publishing the treatise's first volume's in 1842, Greenleaf cast aside Starkie and adopted his own evidence book as a student text. And while it included British authority, *Evidence* drew heavily from American practice and precedent. Greenleaf dedicated the treatise to Joseph Story, giving thanks that the latter's "life and vigor have been spared, until the fabric of [American] jurisprudence has been advanced to its present lofty eminence, attractive beauty and enduring strength."[59]

Greenleaf's legal science contrasts with that of Rufus Choate, the great Boston lawyer whom Daniel Walker Howe calls the "evangelist of the common law" and uses to epitomize the essence of Whig conservatism. In seeking elite status for the legal profession, Choate sought to make "the new class of lawyers the high priests of the community," vastly preferring the "the supremacy of the calm and grand reason of the law over the fitful will of the individual and the crowd." Here Choate and Greenleaf would agree. Yet, as one expects of "an enthusiastic disciple of Edmund Burke," Choate's "organicism and traditionalism" compelled him to root American common law in centuries-old English soil, denying the mantle of innovation in favor of "discovering immemorial truths." Here Greenleaf would take issue. Having openly criticized Starkie's treatise and the jumble of common law rules for their "obscurity" and "diffuseness," Greenleaf understood that innovation was necessary and explicitly rooted his science in the Common Sense tradition, not the ancient mists of Saxon England. Greenleaf and Choate were, at bottom, very different people. When Greenleaf retired because of poor health in 1848, Harvard named Choate to succeed him; Choate, however, turned down the appointment, which would have gutted his lucrative law practice.[60]

59. Greenleaf to Charles Sumner, Mar. 8, 1834, quoted in Warren, *History of the Harvard Law School*, 1: 491; Greenleaf to Sumner, June 13, 1838, quoted in ibid., 2: 4; Greenleaf, *Evidence*, 1: vi (dedication to Story). For Greenleaf's jettisoning of Starkie in favor of his own evidence treatise, see Warren, *History of the Harvard Law School* , 2: 87–88.

60. Howe, *Political Culture*, 235, 227, 229, 230. Howe concurs with Horwitz that legal formalism masked innovations in the guise of timeless truths to ensure their legitimacy. Ibid., 230. On Choate's refusal to succeed Greenleaf, see Warren, *History of the Harvard Law School*, 2: 122–23. Greenleaf reputedly told a confidant that "in a civil or criminal case, taking law and fact into view as they were to

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Greenleaf's Whig politics buttressed his legal science. His same 1838 letter to Sumner blithely predicted Martin Van Buren's "doom" in the throes of the Panic of 1837 (accurate) and "[o]ur country's brightening prospects" upon Henry Clay's election as president (not accurate). Although conventionally comfortable with the jury's role as trier of disputed facts, Greenleaf denied the jury any independent role in determining the law. Moreover, learned judges decided "all questions on the admissibility of evidence," namely, what the jury would hear about the disputed facts as well as whether there was sufficient evidence upon which a jury might hear the case in the first instance. Jurors were obligated to follow the judge's instructions on law even in criminal cases. In short, Greenleaf's legal science exhibited a decided Whiggish preference for elite decision making, not the "peoplish" sentiment he had so disdained after his victory in the *Charles River Bridge* case.[61]

In proving the truth of the gospels, Greenleaf's *Testimony* conformed to his Whig legal science, yet it is strikingly free of technical jargon and lawyerly citations, a styling that seems to have confused some of his critics. Indeed there are surprisingly few references to his own recently published treatise in the *Testimony*'s text or notes. Nor was this simple modesty, as he only sparingly cited other legal authority as well. To take but one example, while Greenleaf's *Evidence* devotes several hundred pages to hearsay evidence, the *Testimony* never takes up the manifold layers of hearsay that comprise the scripture. Contemporaries noted the lacunae. Bowen, as we saw, expected more by way of "legal opinion." The *New Englander*'s reviewer was also "disappointed." Despite Greenleaf's "high reputation as a jurist," the reviewer doubted that "principles of legal evidence" could be used to settle such disputes outside the courtroom and dismissed "[t]he argument [as] nothing more than that of [William] Paley, drawn from the historical allusions and the undersigned

be presented in the presence of a jury, he considered Choate, to use [Greenleaf's] exact words, 'more terrible than Webster.'" Quoted in ibid., 2: 122n2.

61. Greenleaf to Charles Sumner, June 13, 1838, quoted in Warren, *History of the Harvard Law School* 2: 4; Greenleaf, *Evidence*, 1: § 49 . Whatever powers Greenleaf held in proving the past obviously did not carry forward into the future, as he badly missed on Clay's prospects in 1840. On the jury's obligation to follow the judge's instructions Greenleaf relied upon Story's opinion in *United States v. Battiste*, quoted at ibid., note 1. See also Nelson, *Americanization of the Common Law*, 171.

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coincidences in which the sacred writings abound; but . . . present[ed] . . . under the legal aspect." Yet Greenleaf's very purpose was to center "the legal aspect" on Paley.[62]

Upon closer reflection one sees that Greenleaf recognized two broadly different kinds of evidence rules. First, there were the technical rules of admissibility that controlled the flow of information (evidence) to the jury. For example, when could a party use a prior statement to impeach a witness or offer hearsay evidence? Greenleaf devoted the bulk of his 1842 evidence volume to this rapidly burgeoning, already arcane body of doctrine and practices. Such rules applied only during the trial itself, however, when parties contested reasonably disputed issues of fact. Greenleaf's second category was more fundamental; these rules governed the core process of proof, including when trials were necessary, and provided an overarching epistemological framework. Contemporaries, including the influential Chief Justice Lemuel Shaw of Massachusetts' highest court, recognized Greenleaf's "remarkable" innovation in presenting "the grounds and principles of the theory of proof in general, [rather] than as a detail of the rules of evidence."[63]

Greenleaf's *Testimony* demonstrated this second type of rules, a modern view that was at once elitist and antidemocratic in its cabining of popular decision-making. Greenleaf's purpose was not to stage a fictionalized common-law trial. Rather, he analyzed the surviving proof as a scientist might study a rock, but his tools were the law, not geology. Indeed Greenleaf found the truth of the evangelists so compelling and persuasive, so beyond reasonable dispute, that under the law no trial need be held at all because the testimony of the evangelists presented no question for a jury:

62. "Christianity Examined," *The New Englander*, 460, 463. The reviewer trenchantly observed that "[a]s we approach the confines of history, we recede from all such rules." Ibid., 465. The references to Greenleaf's own treatise, *Evidence*, appear in notes at Greenleaf, *Testimony*, 7 (twice), 8 (twice), and 22. Greenleaf cited Starkie's treatise on English evidence law in notes at ibid., 7, 8, 22, 25, 28, 29, 38–9, and 41. Other legal treatises are cited in notes at ibid., 17, 22, and 41. Case citations are also relatively spare. The closest Greenleaf comes to raising the hearsay issue is to liken the gospels to an investigative commission that issues a report of its inquiries. See Greenleaf, *Testimony*, 17–18 [§ 22].

63. *Commonwealth v. York*, 50 Mass. 93, 106 (1845). See Twining, *Bentham & Wigmore*, 123. On the halting progress of exclusionary rules of evidence in the early nineteenth century, see Gallanis, "The Rise of Modern Evidence Law."

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> If [the facts set forth by the evangelists] were separately testified to, by different witnesses of ordinary intelligence and integrity, in any court of justice, the jury would be bound to believe them; and a verdict rendered contrary to the uncontradicted testimony of credible witnesses to any of these plain facts, separately taken, would be liable to be set aside, as a verdict against evidence.

Greenleaf's law of evidence empowered judges to scrutinize proof to determine when there was sufficient evidence to warrant a trial. Implicit was the judge's power to direct the outcome when the judge's assessment of the proof yielded but one answer. These rules, then, institutionalized the judge's primacy in the legal hierarchy.[64]

The courtroom was thus becoming a laboratory of the truth where error must be eliminated or reduced. Just as the law was stripping the jury's power to decide questions of law, it was also limiting and controlling its fact-finding authority. The key figure in this search for the truth would be a judge learned in the very principles of proof that Greenleaf found in the law of evidence, principles he derived from mainstream thought.

The *Testimony* advanced a remarkable argument, namely, the gospels could be proven true by legal rules of proof. Good Christians could take heart that science supported their deeply felt beliefs with the most rigor that human intelligence offered. Infidels and errant Christians could no longer claim the Enlightenment's legacy, as reason literally proved them wrong. Yet Greenleaf's contribution rests in his strong claims about law as a science and its power to determine truth even outside the courthouse. To be sure, intellectuals in other disciplines hardly felt compelled to concede the field to the lawyers; it would also take time before the lay public and even lawyers embraced Greenleaf's brand of legal science.

The review in the *New Englander*, a Congregationalist journal strongly sympathetic to evangelicals, reflects the challenge that confronted Green-

64. Greenleaf, *Testimony*, 37 [§38]. Put differently, the judge would "direct the verdict" and thus decide the issue regardless of the jury's verdict. This passage addressed the existence of miracles but stands as his implicit thesis throughout the *Testimony*. For similar passages, see ibid., 22, 41. Neem observed that for Massachusetts evangelicals "there was one truth." Neem, "The Elusive Common Good," 414.

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leaf's law-bound epistemology even among a segment of the public predisposed to embrace its message. "The great value of Mr. Greenleaf's work," asserted the reviewer, "lies in its authority; in the fact that one so well versed in the rules of evidence administered in courts of justice, declares that the testimony of the evangelists will bear the most rigid sifting by those rules." Yet the *New Englander* concluded that "Mr. Greenleaf has failed to do the very thing which he proposed, and which he is certainly competent to do, *if it could be done*." The *Testimony* ultimately foundered because the "principles of strict legal evidence," concluded the *New Englander*, "are wholly inapplicable to a matter of history"; after all, the evangelists could not be examined as witnesses in a courtroom. The earnest reviewer had, however, missed Greenleaf's very point that a judge, applying the rules, would declare that no trial was even necessary. The *New Englander*, then, misunderstood Greenleaf's "first principles"; his legal science inhered not in the process of trial, but in the rules of evidence themselves, particularly their Common Sense core.[65]

Nor would lawyers be easily convinced. Journeyman lawyers, as Robert Gordon observes, were mostly skeptical of Whig legal science but even elite lawyers were occasionally perplexed. Daniel Lord, another of Greenleaf's evangelical confidants, was a prominent New York attorney whom Joseph Story thought worthy of a Supreme Court seat. Lord's 1847 letter to Greenleaf ranged across a number of topics, including the lawfulness of Jesus Christ's trial for blasphemy, while also praising Greenleaf's *Testimony*'s "high value and usefulness." Lord admitted that he sometimes found himself

> day dreaming that I come on among you, and without any previous notice walk in and take your professor's chair and as vice professor deliver a lecture on the examination of witnesses—not on what rules of law apply, but on the practice, experience and tactics of an examination before a jury—How to deal with a reluctant, an exu-

65. "Christianity Examined," 460, 461, 465. The reviewer also acerbically quipped that the volume itself was "great only in dimensions and in price." Ibid., 460. Moreover, the review expressed disappointment that Greenleaf had not been more rigorous in applying the law of evidence to the gospels; it asserted that he had largely "assume[d] the genuiness of the sacred writings" but had "not see[n] fit to sift this point thoroughly," aside from several "hints." As with Bowen's review, this criticism was inaccurate and wide of the mark.

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berant, an arid, a false, an imaginative witness—to get out the truth in spite of all difficulties.

One suspects that Greenleaf took warm comfort in his friend's support, although it was precisely those "rules of law," not a lawyer's trial skills, that mattered most to him.[66]

The grimly ironic murder trial of Dr. John Webster in 1850 provides a useful vehicle for understanding how the legal profession embraced Greenleaf's view of modern trials. Two years after Greenleaf's retirement, the grisly death of Dr. George Parkman rocked Harvard. Parkman's partial remains were found dumped at the medical college, and suspicion quickly focused on Webster, a chemistry professor, who owed Parkman money. The murder's irony rests in Greenleaf's strong support in 1844 for Webster's proposed course in "medical jurisprudence," wherein law students would study insanity as well as the "modes of perpetrating homicide by poison and other secret means." Such knowledge, thought Greenleaf, was "equally essential to accomplish a lawyer in his profession."[67]

Chief Justice Lemuel Shaw both presided over the trial that resulted in Webster's conviction and later wrote the opinion denying his appeal. Shaw and Greenleaf had cultivated a close personal and professional relationship. Moreover, as we have already seen, Shaw's opinions had praised Greenleaf's accomplishment in presenting evidence law as a "theory of proof."[68]

Shaw's 1850 opinion in *Commonwealth v. Webster* offered an early, influential legal definition of proof beyond a reasonable doubt, and in terms fully consistent with Greenleaf's views. Shaw had instructed Webster's jury that reasonable doubt is not "possible doubt," for "everything

66. Daniel Lord to Greenleaf, Sept. 12, 1847, Greenleaf Papers. For Story's mention of Lord as a Supreme Court candidate, see Warren, *History of the Harvard Law School*, 2: 99. For "journeymen lawyers'" reluctance to embrace Whig legal science, see Gordon, "Legal Thought and Legal Practice," 85.

67. Warren, *History of the Harvard Law School*, 2: 31. See Simon Schama, *Dead Certainties: Unwarranted Speculations* (New York, 1991).

68. *Commonwealth v. York*, 50 Mass. at 106. Shaw sat with Greenleaf as one of Harvard's "Law Lords" who, together, had named Greenleaf's own successor at the Law School. Warren, *History of the Harvard Law School* 2: 124. Charles Loring, another Massachusetts judge, completed the triumvirate.

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relating to human affairs and depending on moral evidence, is open to some possible or imaginary doubt." Rather, "the evidence must establish the truth of the fact to a reasonable and moral certainty . . . because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether." Greenleaf undoubtedly approved, for he had made remarkably similar observations in the *Testimony*: Sufficient "moral evidence" need not eliminate all doubt, only "reasonable doubt," that which is sufficient "to satisfy the mind and conscience of a man of common prudence to act upon that conviction in matters of the highest concern and importance." Thus, *Webster* illustrates Whig legal science's embodiment of Common Sense reasoning in the rules, instructions, and doctrines that comprised the work-a-day world of the legal system. And the *Testimony* exhibits their application outside the courtroom.[69]

Greenleaf's *Testimony* reveals the complex interrelationship of antebellum law and religion, the vital role of evangelical thought, and the contested emergence of Whig legal science. First, whatever the salience of "separation" or "antiestablishment" in other contexts, Greenleaf found Christianity at the core of the common law. To secularize the common law, which he deemed "baptized," would have been to desecrate and destroy its essence. Yet, in criticizing the "obscurity, diffuseness, and want of method" in the leading British authorities, Greenleaf surely appreciated his opportunity to "interweave" Christian values and beliefs with his creation of the American common law of evidence.

Second, those Christian beliefs carried a distinctly evangelical cast. The Scottish Common Sense tradition provided the underlying epistemological and methodological foundation for modern law, just as it pro-

69. *Commonwealth v. Webster*, 5 Mass. 295, 319 (1850). *Testimony*, 22 [§27]. Although the *Webster* decision contains no direct citations to Greenleaf's *Testimony* or, more interestingly, his *Evidence* volumes, Shaw had relied on the treatise in *Commonwealth v. York* (quoted above); moreover, his extensive ties to Greenleaf through the legal profession and Harvard strongly implies that both men were of one mind. See Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, MA, 1957), 223.

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vided the framework for much of evangelical thought and antebellum science generally. In a sense, the *Testimony* signaled the evangelical and scientific communities that they should trust and respect the rules identified by Greenleaf.

Third, such trust was important because evidence law embodied an elitist, antidemocratic strain in Whig legal thought. A consummate modernizer and institution maker, Greenleaf built Harvard Law School into a nationally recognized citadel of legal science. The law of evidence would now guide judges in their search for the truth and even in deciding when trials were needed; juries were stripped of any formal power to determine the law and relegated an increasingly limited role in finding facts. The *Testimony*'s thesis, simply put, was that the law of evidence, particularly its epistemological core, proved the gospels' truth with as much certainty as humankind could expect, and thus could be relied upon to prove most anything. Whig legal science required no courtroom, no jury, and no trial.

In short, Greenleaf reconciled emerging legal doctrine with Christianity and antebellum scientific thinking. In a perverse sense, critics' complaints that the *Testimony* was simply Paley's views in their "legal aspect" paid Greenleaf the ultimate compliment. Certainly, good Christians did not require such proof, for the gospels were a matter of faith. And antebellum intellectuals, weaned on Paley, fully concurred in the Common Sense tradition. Rather, Greenleaf labored to convince influential Christians, intellectuals, and lawyers themselves that the law's core assumptions were in complete harmony with both. By broadly absorbing and embodying dominant religious and scientific thinking, his Whiggish modern view of trials purchased legitimacy and hence popular acceptance. Greenleaf's originality rested in his effort to present the modern trial as less innovative than it was.

Ultimately his labors were rewarded. Even into the twenty-first century the law of evidence harbors many of the underlying assumptions identified by Greenleaf and his successors. And these roots in antebellum scientific thinking may account for the law's frosty and often inhospitable attitude toward modern psychology and social sciences (e.g., battered women's syndrome, eyewitness identification experts) that run counter to its core assumptions.

More important perhaps than its warm reception by the legal profession, the modern trial garnered the begrudging respect of the public on

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which its legitimacy wholly depended. To end where we began, many who research Greenleaf today, unlike the contemporary reviewer for the *New Englander*, are hardly troubled by the impossibility of conducting a trial of the evangelists; they have fully accepted the premises that Greenleaf claimed were "interwoven" with the common law.

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