**Witnesses, Judges: A Revolution Untold**

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# Introduction

“SURPRISINGLY LITTLE WORK has been done on the comparative study of witnesses and witness testimony in different societies. The pervasive doctrine of modern Anglo-American legal theory, that witnesses are called ‘to establish the facts,’ has created an impression even among anthropologists and historians that the functions and activities of witnesses do not vary much from one culture to another. When lawyers have studied witness testimony in past societies their questions have been shaped by the Anglo-American law of evidence “[…]” If we start out from the assumption of modern courts that witnesses are called to ‘establish the facts of the case’ we shall misunderstand the Athenian data.”[[1]](#footnote-1)

With this scolding note Sally Humphreys opens her discussion of the role of witnesses in Athenian courts of law. She is not alone. Various scholars of ancient and late antique societies have similarly noted the inadequacy of modern perceptions of witnesses as depicted in early sources.[[2]](#footnote-2) Often what follows is an attempt by the same scholars to account for some particular feature that they identify in a given ancient context, be it the Great Code of Gortyn (GC), legal documents from the Ancient Near East (ANE) or the Hebrew Bible (HB). Such accounts tend to remain local, confined to the particularities of a certain time and place. Therefore, to date, there has been no attempt to portray a broad picture of the notion of witnesses in the earlier chapters of Western civilization, and no account of the value that such a portrait might carry. The result is that, despite the acknowledged inadequacy of the “Anglo- American” paradigm, it nevertheless prevails. In the absence of an alternative, it is used as a default theoretical model from which particular ancient societies, at times, deviate.

This state of affairs is problematic for several reasons, first and foremost because it distorts our understanding of pre-modern law. Seen through the lens of the prevailing paradigm, much of the ancient material is misunderstood or overlooked; only large deviations are noticed, and even they are often explained away in an intuitive? attempt to keep in line with the prevailing paradigm as much as possible. Thus, we fail to understand ancient laws and perceptions of the legal process. However, the consequences are also not insignificant if our interest lies exclusively in the modern world and its legal ideas. Modern legal procedure, and the role of witnesses and judges within it, might seem natural if one is unaware that there ever was an alternative. Learning to know the different role witnesses played in ancient societies provides a different adjudicative model and with it a different idea of what justice might look like. This perspective can help us better articulate our own contemporary notion of adjudicative justice.

### What is the Function of a Witness? The Instrumental Paradigm and its Limitations

From a modern perspective, we are used to thinking of witnesses’ testimonies as primarily a form of evidence, a means to inform a judicial body of the relevant facts in a given case. The information provided by the witnesses is to be considered by the judicial forum, be it a single judge, a panel of judges or a jury assembly (‘court of facts’), who will consider it before reaching a conclusion. A judicial decision will typically consider testimony along with other relevant factors, such as the provisions of law or the requirements of justice. According to this view, the role of a witness and the role of a judge in adjudication are, at least conceptually, clearly distinct from one another: one provides information; the other, informed by this report, adjudicates the case and sentences the defendant. In this account, the authority to make the decision is that of the judge and not the witnesses; the witnesses are only instrumental to the judge’s authority. I term this model “the instrumental paradigm of testimony.”

The instrumental paradigm provides a useful account of how we think of witnesses’ testimony in courts today, but is it fit to describe witnesses’ role in ancient times as well? Humphreys does not phrase her challenge to the “Anglo-American” worldview in these terms; however, I am not the first to raise this question. Scholars have long noticed difficulties with the instrumental paradigm when reading ancient materials and highlighted an abundance of sources where it seems that the witnesses bear more authority than one expects.[[3]](#footnote-3) However, scholars’ conclusions from these findings tend to be confined to either a specific cultural context, represented by the body of texts where the puzzling sources are found, or, more often, to a more specific sub-context within a given body of texts. For obvious reasons, the generalizations of these findings cause discomfort for one who wishes to adhere to the standards of critical research. However, it seems that responsible criticism requires us to account for the abundance of findings that point in a similar direction.

In this article, I would like to propose a method for considering some general conclusions on the conception of witnesses that prevailed in antiquity, in the societies from which Western civilization emerged. To clarify, it is not my intention to provide the motivation for such consideration; this motivation is given to us by the numerous anomalies that one encounters when attempting to apply the instrumental paradigm to ancient depictions of witnesses, which, as noted, have been described extensively in previous research. Rather, my goal is to suggest a tool that can enable one to prudently generalize the impression created by these multiple anomalies and to rule out the option that they are mere exceptions to a rule. This article will not aim at a full description of the role of witnesses in antiquity, a task that is beyond the scope of any single article. Instead, it will offer a perspective on some recurring problems in the study of ancient depictions of witnesses. These problems, I suggest, amount to a pattern; the fact that the same problems come up in very different cultural contexts is itself indicative of a broader picture, in which the concept of a witness must have been different than how we understand it today. In this alternative picture, witnesses did not ‘provide evidence,’ instrumentally assisting the judicial decision; rather they were the authoritative body, who either made the judicial decision or on whose word these decisions depended.

Building on previous studies of the role of witnesses in different ancient societies, I will argue for the repeating patterns of specific problems which have puzzled researchers, patterns that have been thus far overlooked in scholarship. I will discuss three examples in the three parts of the article. **Part A** will explore a dilemma that repeatedly presents itself when reading ancient legal texts (laws as well as judicial private documents), which frequently condition verdicts on the words of witnesses, stating the result that applies ‘if witnesses testify.’ In **part B,** I will discuss the conspicuous, overlapping terminology one finds in ancient texts referring to witnesses and judges. In **part C,** I will present a conceptual problem that arises in the study of oath formulae, where deities are referred to as ‘witnesses’ of an oath while entrusted with judgment of oath violators.

A brief note on terminology is required before we begin. This article examines the conception of witnesses and testimony in antiquity in the regions that formed the beginnings of Western civilization: the ANE and its contemporary Mediterranean milieu. I refer to these societies when using the terms “antiquity” or “ancient” throughout the article. Other civilizations of past and present will not be discussed in this article, as my intention is to offer a historical perspective rather than an anthropological one. The period under consideration begins as early as the first written documents known to us, but its endpoint is less clear, since ideas do not disappear in one day. Most of the texts discussed in the article are dated circa the first millennium BCE, although they often reflect much earlier ideas and concepts. Later texts examined span until the beginning of the common era. According to the argument laid out in this article, there was once an overarching concept of witnesses and testimony very different from the one we have today. This description suggests that a revolution occurred in the meaning of these concepts. When this revolution occurred and the circumstances that brought it about remain to be told.

# Chronic Interpreters’ Dilemma

Ancient texts often refer to witnesses when describing standards of adjudication. A well-known example is found in the book of Deuteronomy, where the following law is found: “On the word of two witnesses or of three witnesses the one who is to die shall be put to death; a person shall not be put to death on the word of one witness.”[[4]](#footnote-4) Scholars debate the amount of discretion afforded, according to this law, to a judge who was presented with the testimony of “two or three” witnesses. In a different cultural context, Aristotle tells us of a law which similarly referred to the word of two witnesses as mandatory (and perhaps sufficient?) for a conviction of murder: “at Cyme there is a law relating to trials for murder, that if the prosecutor on the charge of murder produces a certain number of his own relatives as witnesses, the defendant is guilty of the murder.”[[5]](#footnote-5) We may assume that there is no literary connection between Aristotle and the HB. One can still ask whether or not there is any connection between the legal norm cited by Aristotle and that found in Deuteronomy. Is the testimony of witnesses mentioned in these two sources decisive? Is it subject to any evaluation by a judicial body or is the judicial entity, upon hearing those testimonies, bound to accept them?

In considering these questions, scholars have usually regarded the specific cultural context in which each of these texts is found to be the most relevant factor for arriving at answers. However, what is often lost in this discussion is the broader point that the same dilemma recurs in many ancient texts, even though they are clearly not dependent on one another. In what follows, I will demonstrate the consistency of this dilemma as it recurs in some Neo-Babylonian court documents and the Great Code of Gortyn. In both of these different contexts, we find conditional statements determining that a legal resolution will enter into force “on the day that a witness comes” or ”if a witness testifies.”

### Neo-Babylonian Uruk

Among the surviving legal documents from the Neo-Babylonian period are several types of documents whose functions and meanings are still unclear. These documents record the existence of a legal dispute and, at the same time, determine the outcome of the dispute, stating that it will apply “on the day that a witness comes and establishes (the case against PN).” Before we describe the hermeneutical problems which such conditional statements raise, let us consider two examples of documents of this sort, both from a sixth-century BC Eanna district in Uruk (near modern Samawah, Iraq). Both of the examples involve some accusation of theft from the local temple of the Lady-of-Uruk, for which the (maximum?) punishment is a fine of thirty times the value of the stolen goods. In the first case, mIna-ṣilli-Ištar is accused of stealing tithe-barley:

On the day that a witness (*lu2mu-kin-nu*) comes and establishes (the case) against mIna-ṣilli-Ištar, slave of mIddin-Marduk son of Eṭēru, that he opened the storehouses where mNabû-ušabši son of mNabû-zēraukīn placed the tithe-barley of the Lady-of-Uruk and took (it), […] he (mIna-ṣilli-Ištar) shall repay thirty-fold to (the temple of) the Lady-of-Uruk. If a witness does not establish (the case) against him, mIna-ṣilli-Ištar is clear.[[6]](#footnote-6)

In this case, mNabû-ušabši accuses mIna-ṣilli-Ištar of theft of temple property. His punishment for this theft is set out in this document, however this punishment is not yet enforceable; it will enter into force only “on the day that a witness (*lu2mu-kin-nu*) comes and establishes (the case).” If a witness does not appear, then the accused would be dismissed of all charges. The second example is similar, and demonstrates the formulaic nature of the documents:

On the day that a witness (*lu2mu-kin-nu*) or informer establishes (that) mNabû-ēṭir son of mBēl-aḫašubši descendant of Eda-ēṭir had received silver or gold from mItti-Šamaš-balāṭu, the pilferer, or m-Bau, the goldsmith, the pilferer, son of mNādinu, […] whatever the witness establishes against him he shall pay 30-fold to (the temple of) the Lady-of-Uruk.[[7]](#footnote-7)

This time mNabû-ēṭir is accused of stealing silver and gold from the temple. Here too, the document tells us what the future verdict against mNabû-ēṭir will be for his conviction. But something is missing. It is clear from other parts of the document that it was drafted by the Eanna officials as a formal lawsuit.[[8]](#footnote-8) Yet it seems that these authorities did not have an opportunity to consider the evidence, i.e. the testimony of witnesses pertaining to the accusation, before drafting their resolution. Rather, it seems that they have entrusted the future resolution of the lawsuit to a future witness, should such witness appear, stating that “whatever the witness establishes against (mNabû-ēṭir) he shall pay.”

In discussing these texts Shalom Holtz classifies them as “penalties pending evidence,” as part of a large group of text-types that he terms “text-types calling for evidence.” The penalties pending evidence clearly demonstrate a feature characteristic of all other texts in this group, where the decision that concludes the case seems to be set forth in the document that was drafted before the evidence (i.e. the witnesses’ testimony) was presented at the judicial forum, and therefore before it could have been reviewed by the judicial authorities.[[9]](#footnote-9) This feature is puzzling since it is unclear what is supposed to happen once witnesses eventually appeared. Do the parties return to the judicial forum for evaluating?their testimonies? If this is the case, then what is the purpose of stating the outcome of the case in advance?! – Doesn’t this outcome surely depends upon the consideration of evidence by judges? As noted by Holtz:

Examples from all three text-types suggest that they were composed during formal proceedings. The requirement for evidence is the result of a charge made in court. Whether the case will return to court is a matter that remains open. Phrased in somewhat modern terms, all of these texts raise the question of whether they were written during the evidentiary phase of the trial or during the sentencing. […] [T]here are those who interpret all three types of texts as “summonses,” which implies that the case remains open and awaits a final ruling. It may be, however, that all three text-types represent the end of the court’s involvement […] the penalties pending evidence may also reflect the end of proceedings if they are understood as sentences which will take effect when evidence becomes available.[[10]](#footnote-10)

Holtz notes the various titles that were offered for the ‘penalties pending evidence’ documents in previous scholarship.[[11]](#footnote-11) These titles reflect a disparity between two positions. Some scholars hold that, once the witnesses give their testimony, it should be considered by the judicial forum. They therefore classify these documents as “preliminary decisions” or “accusation pending trial.” These titles signify that the judicial proceedings have only just begun; the judges remain involved, and “they would decide if the evidence had indeed ‘established’ the case.”[[12]](#footnote-12) Conversely, other scholars refer to these documents as “judgments in principle” or “conditional verdicts.”[[13]](#footnote-13) These titles imply that the documents under consideration “reflect a concluding stage of the proceedings,” and that “there seems to be no further need for any adjudicating authority to render a decision.”[[14]](#footnote-14) The disagreement between these two opinions is neither rooted in a different reading of the cuneiform script nor in some other source of information outside of the text themselves. Rather, it is a question of understanding the legal procedure reflected by these documents and the role of witnesses vis-à-vis judges. Do we assume that the instrumental paradigm applies here at all?

### Gortyn Code

In the 5th century inscription of laws from Gortyn (today in southern Crete) a similar dilemma arises. Several passages in the GC state the outcome of a legal disputes to be applicable “if a witness testify,” or rather, left for the discretion of a *dikastas*,[[15]](#footnote-15) the Gortyn official responsible for handling lawsuits (whose title is controversially translated as “judge”[[16]](#footnote-16)), “unless a witness testifies.” It is not always clear to what degree the *dikastas* was bound by the words of the witnesses or whether he had discretion to decide against witness testimony.

In some instances, the code is nearly explicit, as in the following example of a dispute over the ownership of a slave:

[I. 17-24] And if they contend about a slave, each affirming that he is his, if a witness testifies, (the *dikastas*) is to rule (*dikzein*) according to the witness, but if they testify[[17]](#footnote-17) either for both sides or for neither, the *dikastas* is to swear an oath and decide (*krinein*).[[18]](#footnote-18)

In this case, it seems rather clear that if a witness testifies the *dikastes* should rule according to the word of the witness. Only if the testimony is not decisive, because there are competing testimonies, or if no testimony is available, is the *dikastes* instructed to take an oath and decide the case, apparently on his discretion. Scholars have noted that this case demonstrates a consistent difference in terminology found throughout the Gortyn Code, namely between two forms of ruling by a *dikastas*: one based upon the testimony of witnesses (or an oath of denial taken by the defended), which is referred to by the verb *dikazein,* ‘to give judgment’,[[19]](#footnote-19) and another made in the absence of the latter, which is referred to using the verb *krinein* ‘to decide’.[[20]](#footnote-20) The difference in terminology signifies two varying levels of discretion granted to the *dikastas* in his ruling: when instructed to *dikazein*, he has limited discretion, or rather, he is bound by the testimony (or the oath). However, when instructed to *krinein*, he has a broader discretion.

There is a scholarly consensus regarding this description of the role of the *dikastas*.[[21]](#footnote-21) However, scholars differ substantially when considering other clauses of the GC where there are no explicit instructions for how the *dikastas* is to use a witness testimony when ruling on the dispute. An example is the case of a suit for damages for an attempted sexual seduction:

[II. 16-20] If someone attempts to have intercourse with a free woman while a relative is watching over her (alternatively: who is under the guardianship of a relative[[22]](#footnote-22)), he shall pay ten staters if a witness should testify.[[23]](#footnote-23)

There is no direct instruction here to apply a specific method of ruling*,* either *dikazein* or *krinein*; the law simply states the fine to be paid, while adding that it is due “if a witness [should?] testify.” Scholars are in agreement that if a witness does *not* testify, then the *dikastas* has no discretion, and he is bound to reject the claim automatically.[[24]](#footnote-24) However, it is less clear what happens when a witness does testify. Is the decision in this case also automatic or, did the *dikastas* enjoy broad discretion when making a decision while considering the words of a witness among other forms of evidence and the arguments of the parties?

Alberto Maffi asserts that, whenever witnesses testify, the procedure will be automatically decided according to their testimony. To him, there can be no *krinein* if witnesses come forward. Michael Gagarin, however, is hesitant to accept this interpretation.[[25]](#footnote-25) He holds that, in the GC, “there is no general rule for witnesses,”[[26]](#footnote-26) and that it is perfectly possible for a *dikastas,* in certain circumstances, to consider the testimony of witnesses without being bound by it.[[27]](#footnote-27)

This difference of opinion comes to a head when we consider the interpretation of clause XI. 26–31 of the GC, which does not refer to specific legal controversies, as the previous clauses cited above, but rather sets a general rule to apply in a variety of cases. The opposing opinions are manifested in the different translations offered to this clause by different scholars. This is the translation offered by Kevin Robb:

[XI. 26-31] Whatever is written, he [the *dikastas*] shall rule on; the *dikastas* shall give judgment (*dikazei*) as it is written, according to witnesses or oaths [of denial]; but in other matters he shall himself take an oath and decide (*homnunta krinei*) according to the pleas.[[28]](#footnote-28)

According to this reading, in any legal dispute, the *dikastas* must apply a two-stage test for decision. First, if the law covers the dispute, he ought to make his ruling “bound strictly to the wording of the law and the testimony of witness.” [[29]](#footnote-29) Only in cases where this is not possible for any reason, then must he decide the case (*krinein*) according to his discretion. It might be impossible to rule according to the law if the matter at stake is not covered in the written law, or because witnesses are not available (and the defendant will not take an oath of denial), as stated explicitly in the case of the dispute over slave ownership (clause I. 17-24 cited above).

A different translation is offered by Gagarin of the same clause:[[30]](#footnote-30)

Whenever it is written that the *dikastas* is to rule according to witnesses or an oath of denial, he is to rule as is written, but in the other cases he is to swear an oath and decide with reference to the pleadings.

According to Gagarin, the *dikastas* is bound by the testimony of witnesses, when such exist, *only* *in cases* *where the law explicitly states that he is bound in this way*. However, in other cases (according to Gagarin, the majority of cases mentioned in the code), the *dikastas* is not compelled to rule according to the witnesses, and even if witnesses come forward to testify, he can nevertheless decide the case at his discretion.[[31]](#footnote-31)

Gagarin’s reading of these clauses reflects his assumption that Gortyn legal procedure followed the logic of modern procedure. According to Gagarin’s analysis, the Gortyn Code generally assumed a “rational” process of decision-making based on deliberation and examination of evidence.[[32]](#footnote-32) For Gagarin, the role of the *dikastas* was similar to that of a modern judge:[[33]](#footnote-33) if not instructed otherwise, he “should consider the evidence on both sides, including witnesses, and any arguments that either side might present” and then reach a decision.[[34]](#footnote-34) However, several scholars, including Robb and Maffi mentioned above, reject this assumption as anachronistic.[[35]](#footnote-35) They argue that, if the code is silent at times with regards to the guidelines that should direct the *dikastas* in ruling, we ought not to interpret this silence through contemporary standards of decision-making. Instead, we ought to interpret these vague types of clauses in light of the other clauses in the GC which clearly outline the limitations posed on the discretion of the *dikastas* by the testimony of witnesses.[[36]](#footnote-36)

The latter argument seems persuasive, especially with regards to those clauses of the GC where the conditional statement is used: “if a witness testifies” (αἰ ἀποπνίοι μαῖτυς(. A similar conditional statement appears in clauses that portray witness testimony as undeniably decisive (for instance, in clause I.17-24 quoted above), and thus may be considered a formula.[[37]](#footnote-37) However, for now, let it suffice to acknowledge that similar conditional statements appear in the legal documents from Uruk, also using formulaic phrasing, thus raising a similar question of the amount of authority immanent to the witness testimony.

# What’s in a Term

The conceptual distinction between the role of a judge and those of witness in modern thought accords with our usage of two different terms to denote each function. This is presumably the case also with regards to ancient languages. However, various ancient languages preserve instances where the term used for a witness could not be understood as denoting anything but someone acting in the capacity of a judge. In what follows, I discuss this peculiar conflation attested in four ancient languages: Akkadian, Biblical Hebrew, Greek and Latin. Those occurrences of linguistic ambiguity were thus far treated in scholarship mostly as coincidence. Scholars who addressed it, and were unaware that a similar phenomenon existed in other languages, usually attempted to explain it on etymological grounds. However, I argue that if the same phenomenon of linguistic over-determination recurs in several languages without mutual dependency between the technical term used for witness and judge in those languages, it is no longer tenable to assume the dual meanings as mere coincidence. Rather, it should be regarded as a conceptual pattern. I argue that the explanation for this must be sought in the common legal background of the ancient societies under examination.

### Akkadian

In the old Babylonia period, the Akkadian term for a witness was *šibu.* [[38]](#footnote-38)Literally, this term denotes ‘elder’, equivalent to Hebrew *sav* (שָֹב) and Arabic *šāyeb* ( شايب). However, the elder in the ANE (as in the HB) is also a judicial role and the elders (*šibūtu*) constitute a communal judicial institution.[[39]](#footnote-39) This overlapping conception might, therefore, lead to translation difficulties. One is found in the case of the Hittite law concerning lost property. This law is preserved in two versions, one being a revision of the other.[[40]](#footnote-40) The Old Hittite (OH) version of the text (1500-1300) reads as follows:

If anyone finds a stray ox, a horse, a mule (or) a donkey, he shall drive it to the king’s gate. If he finds it in the country, they shall present it to the elders [ŠU-GI-aš]. (The finder) shall harness it (i.e., use it while it is in his custody). When its owner finds it he shall take it in full value, but he shall not have him (the finder) arrested as a thief. But if the finder does not present it to the elders [ŠU-GI-aš], he shall be considered a thief.[[41]](#footnote-41)

The New Hittite (NH) version of the same law reads as follows:

If anyone finds implements or an ox, a sheep, a horse, (or) an ass, he shall drive it back to its owner, and (the owner) will lead it away. But if he cannot find its owner, he shall secure witnesses that he is only maintaining custody. Afterward (when) its owner finds it, he shall carry of in full what was lost. But if he does not secure witnesses, and afterwards its owner finds it (in his possession), he shall be considered a thief: he shall make threefold compensation.[[42]](#footnote-42)

In both these wordings of the law regarding the discovery of lost objects, the same basic principle is stated. For a finder of a lost object to avoid an accusation of theft, he ought to declare his discovery publicly. According to the earlier version, this declaration has to be made to local authorities: to the king’s gate, if the discovery takes place in the city, or to the elders if it is in the country. The elders here are designated through the Sumerogram *ŠU-GI* which signifies *šibūtu*. In the later version, the same result is achieved by introducing the lost object to witnesses. To designated ‘witnesses’, the NH version uses the Hittite term *ku-ut-ru*..

What should we make of the difference between the two versions of this law? Clearly the dual solution is not preserved in the NH version of the law. There, the option of introducing the lost object to the king’s gate officials in a city is omitted entirely. Things are less clear, however, with regard to the option of presenting it to the elders (according to the OH version), as opposed to introducing it to witnesses (according to the NH version). Did the NH version attempt to change the norm that governed the finding of lost objects, by moving from the elders, who were city officials, to witnesses with no such capacity? Scholars have noted that the Late Parallel text of the NH version of the Hittite laws has introduced several modifications to the earlier OH version of certain laws, some more substantial than others, though not all have been changed. Much of the earlier version is preserved in the revised version. It is the task of scholars to interpret and inquire what is merely a stylistic modification, perhaps for the purpose of modernizing the language, and what is a more substantive alteration.[[43]](#footnote-43)

One should note that the Sumerogram *ŠU-GI* that is translated as ‘elders’ in the earlier version could have equally been translated as ‘witnesses’. The fact that it was translated by ‘elders’, indicating the capacity of officials, is an interpreter’s choice. This choice is informed by the fact that officials designated by the Sumerogram have a parallel function, according to the text, to that of the ‘king’s gate’. This parallel suggests a formal office-bearing authority. According to the instrumental paradigm, this sort of authority is not typical of witnesses, whose testimony is rather a means for the implementation of someone else’s authority (for instance, a judge’s). This reasoning is clearly not unique to this clause. One might suspect that it lies in the background of additional translations involving the Sumerogram *ŠU-GI.* [[44]](#footnote-44)

### Biblical Hebrew

In Hebrew, the *terminus technicus* for a witness is *‘ed* (עד). It is regularly used when describing witnesses appearing before a judge in a legal setting. However, its use in the following verses from Exodus 23:1-3 is not straightforward:

**1**You shall not accept a false report. You shall not join hands with a wicked man to be a malicious witness (*‘ed*). **2**You shall not follow the many (alternative: the rich or respectable people) to do evil, nor shall you bear witness in a lawsuit siding with the many (alternative: with the rich or respectable people) thus giving a distorted judgment; **3**neither shall you be partial to a poor man in his lawsuit.

This clause has been immensely difficult to interpret and has consequently generated numerous translations. These strive to make the verses coherent and thus introduce readings that obscure the interpretive difficulty. Here, I would like to examine these difficulties in more detail and draw attention to the interpretive challenge posed by the verse when we attempt a literal reading. Thus, in the translation above I maintained the standard meaning of the technical language used throughout the HB for lawsuits and adjudicative functions. Clearly, the outcome of such a reading is rather confusing: it seems to suggest that the addressees of these verses are some hybrid combination of witnesses and judges. Verse 1a refers to a witness (*‘ed*); verse 2 does not mention the term *‘ed* but 2b makes use of a verb typically used to denote testimony (*lō ṯa‘ăneh‘al rib).* At the same time, verse 1a seems to be addressing the person whose role is to receive testimony, warning him not to accept a false report (*lō**ṯiśā šêma‘ šāw*), rather than to the one making this report.[[45]](#footnote-45) Verse 2b seems to imply that the subject of instruction is involved in giving judgment (*le’hatot*). According to the instrumental paradigm, both these latter functions are those of a judge. Verse 3 may be interpreted in either manner.

Which is it then? Do these verses refer to a witness or a judge?[[46]](#footnote-46) Scholars have suggested a range of explanations to address this question, but they all are unsatisfactory. If we read verse 1 as referring to a witness, we have to concede an irregular usage in the giving of testimony (*lō**ṯiśā*).[[47]](#footnote-47) If we understand verse 2 to be referring to a judge, it is difficult to explain why it uses the customary language of testimony. It seems that the established terminologies regarding ‘witnesses’ and ‘judges’ are so deeply intertwined in those verses that it is nearly impossible to untangle them.[[48]](#footnote-48)

One fact to consider in reading these verses is that in other instances, the term *‘ed* describes purely judicial roles, albeit in a metaphorical sense, i.e., when depicting Yahweh as judging sinners and punishing them. Two examples of this phenomenon are especially striking. The first comes from the first chapter of the prophecy of Micah:

**2**Hear, you peoples, all of you; pay attention, O earth, and all that is in it,
and let the Lord Yahweh be a witness (*‘ed*) against you, the Lord from his holy temple.
**3**For behold, Yahweh is coming out of his place, and will come down and tread upon the high places of the earth. **4**And the mountains will melt under him, and the valleys will split open, like wax before the fire, like waters poured down a steep place. **5**All this is for the transgression of Jacob and for the sins of the house of Israel.[…] **6**Therefore I will make Samaria a heap in the open country, place for planting vineyards, and I will pour down her stones into the valley and uncover her foundations.[[49]](#footnote-49)

Prima facie, it seems that in verse 2 Yahweh is announcing his forthcoming judgment of the sins of Samaria, a judgment that is recounted in verse 6. The only factor which casts doubt on this reading is that in verse 2, Yahweh is referred to as an *‘ed*, presumably as a witness and not a judge. This creates a problem as it is odd for Yahweh to be playing an instrumental role in divine judgment (as we would expect a witness to play). It seems clear that the text considers Yahweh as the ultimate judge. Various solutions have been suggested to this problem.[[50]](#footnote-50) According to one, *‘ed* is used in the sense of the accuser and not the judge. Indeed, in other instances in the HB, the witnesses seem to be making the accusations against a defendant in a trial.[[51]](#footnote-51) However, this reading does not solve the problem since, if Yahweh is the accuser, who is the judge? In the standard legal arrangement, the accuser, like a witness, is subject to a higher authority, who presides over the case. Portraying Yahweh as fulfilling such a secondary role, either as a witness or as an accuser, seems equally problematic.[[52]](#footnote-52) Another suggested solution is to view Yahweh as possessing a dual function, both as an accuser/ a witness (in v. 2) and as a judge (in v. 3-6).

Against these readings, David Anderson and Noel Freedman suggest that *‘ed* here should be read as simply meaning: a judge.[[53]](#footnote-53) This seems to be the only plausible reading when we turn to our second example, from the book of Malachi:

Then I will draw near to you for judgment. I will be a swift witness *(‘ed*) against the sorcerers, against the adulterers, against those who swear falsely, against those who oppress the hired worker in his wages, the widow and the fatherless, against those who thrust aside the sojourner, and do not fear me, says the Yahweh of hosts.[[54]](#footnote-54)

In these verses, Yahweh promises to judge and punish his people harshly for their extensive violations of the law and unjust behavior. Yet in doing so, he is referred to as an *‘ed*. Therefore, *‘ed* must also denote ‘judge’. Some commentators have attempted to resist this conclusion and to maintain some conceptual distinction between the role of a witness and that of a judge, an effort which yields complex readings such as the following: “Here the function of the witness within the court proceedings is not secondary but rather identical with that of the judge who can act swiftly because he was himself a witness.”[[55]](#footnote-55) However, this reading appears incompatible with the text of the verse since Yahweh is said here to be “a swift witness” *exactly when imposing judgment*. No other description is provided for his judicial function. This is very different from acting swiftly as a judge based on one’s previous knowledge as a witness. According to the phrasing of the verse in Malachi, the capacity of the *‘ed* as an *‘ed* is, therefore, that of a judge.[[56]](#footnote-56)

### Greek

For Greek sources, our focus will be on the archaic term *istor* (ἴστορ). Dictionaries translate the term as having two meanings: (1) witness and (2) judge.[[57]](#footnote-57) The identification of *istor* as a witness is based on inscriptions from several cities in Boeotia, where *istores* (spelled ϝίστορες) are mentioned in manumission procedures; Those function-bearers could be termed either *istores* or *martures*, a standard word for witnesses.[[58]](#footnote-58) While these sources are dated as early as the third century BCE, support for this reading is found in even earlier sources, where *istores* is used in archaic oath formulae. Again, these formulae could refer to divine entities either as *istores* or as *martures*.[[59]](#footnote-59)

However, in the other early usages of the term, its meaning is less clear. Hesiod mentions the *istor* (spelled ἵστωρ) as a person blessed with some kind of talent granted from birth.[[60]](#footnote-60) This meaning is difficult to reconcile with the definition of an *istor* as depending on a concrete event that he or she may or may not witness in the future. The term *istor* appears in two much-debated instances in Homer’s *Iliad* as one who is required to put an end to a dispute between rival parties, where the *istor* seems to function as a judge or arbiter (a description more in line with the attribution of a general talent as suggested by Hesiod).[[61]](#footnote-61) In one instance, Agamemnon is referred to by Idomenenus as the *istor* who could be chosen to decide between his and Aias’ opinion of the outcome of a race.[[62]](#footnote-62) The other mention, which is found in a more elaborate context, is in the ekphrastic trial scene on Achilles’s shield:

In the meeting-place a crowd of citizens had formed; a dispute had arisen there, and two men were quarreling over the blood-money of a man who had been killed. One claimed he had paid it in full, appealing to the people, while the other said he had received nothing; both were anxious to go to an arbitrator (*istor*) for judgment. The people took sides, shouting support for both; heralds were holding them back, while the elders sat on polished stones in a sacred circle, holding in their hands the loud-voiced heralds’ staffs. The disputants rushed up to these men, and they gave their judgments in turn; two talents of gold lay before them, to be given to the judge who should deliver to them the straightest verdict.[[63]](#footnote-63)

This is one translation out of many offered of this passage, which poses significant interpretive problems.[[64]](#footnote-64) One central ambiguity has to do with the role of the *istor* in the scene apropos that of the elders who are mentioned shortly afterward. Is the *istor* one of them, or does he have a different role? This question arises because it is clear from the text that the *istor* holds the authority to resolve the case at hand. The Greek reads: *amphô d' hiesthên epi istori peirar helesthai* ([ἄμφω](https://www.perseus.tufts.edu/hopper/morph?l=a%29%2Fmfw&la=greek&can=a%29%2Fmfw0&prior=e(le/sqai" \t "morph) [δ᾽](https://www.perseus.tufts.edu/hopper/morph?l=d%27&la=greek&can=d%277&prior=a)/mfw) [ἱέσθην](https://www.perseus.tufts.edu/hopper/morph?l=i%28e%2Fsqhn&la=greek&can=i%28e%2Fsqhn0&prior=d%27" \t "morph) ἐπὶ ἴστορι πεῖραρ ἑλέσθαι). The noun *peirar* denotes an ‘end’ or ‘limit’. To give just a handful of examples of translations of this line:[[65]](#footnote-65) “Both parties insisted that the issue should be settled by a referee”;[[66]](#footnote-66) “both were willing to appeal to an umpire for the decision”;[[67]](#footnote-67) “Both then made for an arbitrator, to have a decision”;[[68]](#footnote-68) “both were eager to take a decision from an arbitrator”;[[69]](#footnote-69) “both men pressed for a judge to cut the knot.”[[70]](#footnote-70) All these translations reflect the reading that the *istor* puts an end to the dispute. This is, in fact, the only manner in which the *istor* is introduced in the text, and thus the decisive role of the *istor* in any translation seems unavoidable.[[71]](#footnote-71)

The translation of the word *istor* as an arbiter or a judge has raised objections. Some scholars have preferred a more neutral word, e.g. ‘an umpire’, ‘referee’, or ‘one who knows.’[[72]](#footnote-72) Most scholars assume that *istor* is derived from verb *(h)oida,* ‘to see, to know,’ which would fit with the identification of an *istor* with a witness of some kind.[[73]](#footnote-73) However, in light of the authority that is attributed to the *istor* to resolve the dispute, commentators are hesitant to translate it as simply denoting ‘witness’, even if they assume that one aspect of his role is also to bear witness and record something in his memory, such as the parties’ arguments, oaths, or simply past events.[[74]](#footnote-74)

### Latin

[To be completed]

# Deities as Witnesses to Oaths

The third context in which a pattern arises that challenges the instrumental paradigm is that of ancient oaths. Again, this is a broad-ranging pattern, since the societies of the ANE and their Mediterranean contemporaries shared the same basic oath structure.[[75]](#footnote-75) Witnesses play an important role in this structure and, arguably, this role hardly fits the instrumental paradigm. In this context, witnesses are mostly divine rather than mortal; a point which will further underscore the argument advanced below.

First, it is necessary to recall the basic structure of oaths in the ancient societies under consideration: an oath is a declaration, or an undertaking, accompanied by a conditional curse (self-curse, if the speaker is the one taking the oath), pronounced with the invocation of divine entities (whether explicitly or through reference to sacred objects).[[76]](#footnote-76) The curse will apply if the declaration is false, or, in the case of promissory oaths, where a person undertakes to perform a certain act, if this promise is not kept.

The divine entities who function as the oath deities are summoned to oversee the enforcement of the oath. “The role of these para-human beings in this context was to reward or punish those who either observed or contravened, respectively, the conditions imposed upon them by oath.”[[77]](#footnote-77) If the oath is violated, the deities that bore witness to it will be the ones to impose the curses and thus punish the oath violators. Similarly, the deities may also be said to grant benefits and reward those who righteously fulfill their oaths.[[78]](#footnote-78) Such rewards are a positive means of enforcement of oaths, parallel in function to the negative means of curses and punishments. Thus, some scholars refer to the role of oath deities as ‘guarantors’ or ‘guardians’ of the oath.[[79]](#footnote-79) As guarantors, the deities are also required to cast judgment and decide whether or not a violation took place, before they impose appropriate sanctions, giving their role an apparently quasi-judicial function. Some ancient texts use adjudicatory verbs when describing the role of the deities who witness oaths. This is the case in Genesis (chapter 31), where Laban is cited as inviting Jacob to take an oath and thus enter into a mutual covenant: “(47) Let us make a covenant […] (53) The God of Abraham and the God of Nahor, the God of their father, let them judge (*[yišpəṭū](https://biblehub.com/hebrew/yishpetu_8199.htm%22%20%5Co%20%22yish%C2%B7pe%C2%B7Tu%3A%20may%20they%20judge%20--%20Occurrence%201%20of%203.)*) between us.” The following verse concludes (54): “So Jacob swore by the Fear [*i.e.,* god] of his father Isaac.”

While adjudicative verbs might be employed, no terms are used to designate the deities’ titles as judges or guarantors of oaths.[[80]](#footnote-80) Rather, oath deities are regularly referred to as ‘witnesses’. A few examples from various cultural contexts will demonstrate this pattern. These examples are by no means unique but represent a common oath formulation.

1. In the book of Jeremiah, the people of Israel take an oath to obey the commandments of YHWH. The oath is expressed through a conditional phrase (*‘im lō*), intimating a conditional curse to apply in case of violation, and by the call unto Yahweh to be a witness:

May Yahweh be a true and faithful witness against us if we do not act according to all the word with which Yahweh your God sends you to us.[[81]](#footnote-81)

1. In Homer’s Iliad, Hypnus makes Hera swear that she will let him marry Pasithea, in return for his help in putting Zeus to sleep. He too calls upon gods as witnesses:

Well then, swear to me now by the inviolable waters of Styx, with one hand on the fertile earth, one on the shimmering sea, so that all the gods with Cronos down below may bear witness, that you will grant me one of the young Graces, Pasithea, whom I’ve longed for all my days.[[82]](#footnote-82)

1. The Roman historian Livy records the oath taken by Lucius Junius Brutus to take revenge for Lucretia’s rape and to hunt down Lucius Tarquinius Superbus and his family. Again, gods are called as witnesses:

By this blood, most chaste until a prince wronged it, I swear, and I take you, gods, to witness, that I will pursue Lucius Tarquinius Superbus and his wicked wife and all his children, with sword, with fire, aye with whatsoever violence I may […].[[83]](#footnote-83)

It is also worth noting that Cicero, in a more general account of what oaths are, mentions the inevitable element of calling gods as witnesses: “For a sworn oath is a religious affirmation; and it is what you promised with this affirmation and, as it were, with a god as your witness, which must be kept.”[[84]](#footnote-84)

The association of oath deities with their title as witnesses to oaths is so strong that the very mention of a divine entity as a witness is, in itself, sufficient to indicate that an oath is being initiated, even when any other oath terminology is lacking.[[85]](#footnote-85) Moreover, the verb indicating the summoning of witnesses in both Hebrew (*hē‘îd*) and Greek (*marturomai*) functions as a synonym for the initiation of an oath.[[86]](#footnote-86) This identification of oath deities as witnesses raises the question of why, as a matter of terminology, deities were so often termed ‘witnesses’ and not ‘judges’, ‘guarantors’ or similar? Scholarly reflections on this problem suggest different strategies for dealing with it. I consider two such approaches below: one is that oath deities functioned as either witnesses or judges; the second is that oath deities functioned as both witnesses and judges.

### Either Witnesses or Judges

In some texts, an oath is taken without the divine entities being explicitly summoned as witnesses. Some scholars suggest that a distinction should be made between two types of oaths: one in which the role of deities is (only) to witness the parties’ initial declarations and a second type in which they function as judges or guarantors who enforce the oath. An example of this attitude can be found in the following account by the late biblical scholar Moshe Segal:

There are times when the oath-taker calls upon Yahweh to be a witness that he is indeed speaking the truth; in others, which are probably the majority, the oath-taker undertakes a self-curse which he shall suffer from the hand of Yahweh in case he lies. Thus, we have two kinds of oaths: one where Yahweh, or some other dear or holy entity, is called upon to be a witness, and we shall call such an oath ‘the oath of testimony’, and the other, that includes a curse, where Yahweh is called upon to be a judge and to impose the curse to the oath-taker or the one whom the oath was imposed upon, if he violates it, and that is ‘the oath of curse’.[[87]](#footnote-87)

There is a consensus among scholars that Segal’s distinction between two types of oaths, depending on their formula, is a mistake. Many oaths explicitly include both functions of the deities, who are called upon both to witness and to punish violators. One biblical example of this is the oath of Jacob and Laban mentioned above. In Gen. 31:50 Laban says to Jacob: “God is witness between you and me […]”; and a few verses later he adds (53): “The God of Abraham and the God of Nahor, the God of their father, let them judge between us.” Another example is an oath from the Iliad (XIX 258-65): “Let Zeus first be my witness, highest of the gods and greatest, and Earth, and Helios the Sun […] that I have never laid a hand on the girl Briseis […] If any of this is falsely sworn, may the gods give me many griefs, all that they inflict on those who swear falsely before them.”

In fact, there is no need for an explicit mention of deities as introducing judgment to assume that the swearing parties entrusted them with this task. That this is their basic function with respect to oaths is integral to the internal logic of oaths. Most scholars therefore hold that the function of the deities as judges or guarantors is implicitly assumed even in those oaths which simply refer to the deities as witnesses.

A Hittite oath text from the middle of the fourteenth century BCE affirms this line of argument. In this case, the oath is taken within the framework of a treaty between Suppiluliuma I, king of Hatti, and Aziru, king of Amurru. Since this was an international treaty, two versions of the text were drafted (and luckily survived) one in Akkadian, and the other in Hittite. This is how the section on witnesses is presented in the Hittite version of the treaty:

 §16 I have now summoned the Thousand Gods to assembly for this oath, and I have called them to witness, they shall be witnesses.

The Hittite text ends here. Nothing more is added, although we find a lacuna on the tablet. When we turn to the Akkadian version, it presents us with a long enumeration of the gods and goddesses guaranteeing the oath, and adds two further paragraphs:

§16 (continued) (long list of deities) They shall be witnesses to this treaty and oath.

§17 All the words of the treaty and of the oath which are written on this tablet – if Aziru does not observe these words of the treaty and of the oath, but transgresses the oath, then] these oath gods shall destroy Aziru, together with his person, his wives, his sons, his grandsons, his household], his city, his land, and his possessions.

§18 But if Aziru observes theses words of the treaty and o the oath which are written on tablet, then these oath gods shall protect [Aziru], together with [his person, his wives, his sons, his grandsons], his household, his city, his land, [and his possessions].

Since the Akkadian and Hittite texts are two versions of the same document, it is clear that the role of the deities is the same in both of these texts. Even if the function of the deities as those imposing curses and blessings is not explicitly enumerated in the Hittite version, it is nevertheless implied. Notably, the concluding paragraphs of the treaty, starting with the presentation of the oath gods as witnesses followed by the presentations of curses and blessings imposed by them, are formulaic. Many parallels for this phrasing exist in other Hittite treaties.[[88]](#footnote-88) Apparently, in writing the Hittite version of the treaty, the scribes did not feel the need to be as explicit and to cite the entire formula.

### Both Witnesses and Judges

If we reject the idea that deities should be seen as either witnesses or as judges of oaths, what alternative conceptual model is possible to account for their complex function? A leading opinion among scholars is that it is a dual role, that gods are both witnesses *and* judges. However, this dual function is not simultaneous. This model is expressed in the following account by Malgorzata Sandowicz, who examines ANE oaths from the Neo- and Late-Babylonian periods:

The oath is distinguished from a common statement in that it invokes a supreme authority or a sacred object representing the divine. Through such an invocation, the Oath-taker brings punishment upon himself in case his declaration proves untrue or his promise be broken. The authorities appealed to are commonly referred to as witnesses of the oath. However, their power seems further-reaching: they are not only to witness a solemn statement, but also to mete out punishment in case the declaration is or turns out to be untrue. Thus, the function of the authorities is also that of guarantors.[[89]](#footnote-89)

Similarly, Frances Hickson notes, with regard to oaths in a Roman context:

[T]he speaker either explicitly or implicitly makes two requests of the divinities by whom he or she swears; thus an oath is a type of petitionary prayer. The primary request is a self-curse that the speaker suffer some punishment if the words are intentionally false. The secondary request, that the divinities be present as witnesses to the speaker's words […].[[90]](#footnote-90)

We may note that this dual model is informed by the instrumental paradigm. When the deities act, i.e. when they punish, they are judges (even if one labels them guarantors). Yet when they are passive, receiving information, they are simply witnesses. The two functions are conceptually distinct and co-exist alongside each other, however *de facto*, they are performed by one and the same entity. This dual-function model, while accounting more fully for deities’ oath-related role, is nevertheless unsatisfying. Two objections can be made, one semantic and the other philological.

This reading is semantically problematic since it suggests that although the dominant function of the deities is that of adjudication, they are referred to by their minor function, that of witnesses. Admittedly, they bear witness to the undertakings of the swearing parties, which they are called upon to see or hear, like human witnesses of transactions involving land transfer or the manumission of slaves. However, this aspect of the role that deities play in oath procedure is, as Hicks and Sandowicz both note, secondary to the deities’ more substantive responsibility: to enforce the oath by imposing curses or granting rewards. Why, then, does their minor function supplant their major function, at least regarding how they are denoted? The question is not simply about the economy of the texts, which use one title when the deities in fact perform two separate functions. According to the instrumental paradigm, the role of witnesses is a passive one, as they are only there to record the facts and, at a later stage, report them to some authoritative judicial entity. It would be misleading to represent oath deities by their passive role in recording the human undertakings, rather than by their active roles of keepers of the oath.

Another more substantial objection is based on the careful reading of ancient depictions of oaths. According to the dual-function model, deities are presumably termed ‘witnesses’ due to their roles in the preliminary stages of the oath, in which they hear and see the pronunciation of the conditional curse and the undertakings of the oath-taker. However, in several ancient texts, we find that oath deities are referred to as ‘witnesses’ even when referring to their role in the later stages of the lifetime of the oath when they are to impose curses and punish violators. In other words, they are called to be witnesses when enforcing judgment.

This can be demonstrated by the two biblical oaths mentioned above. In Jer. 42:5, the people of Israel call upon Yahweh to be a witness, while stating explicitly that this call shall apply in the unlikely event of a future violation. Thus, the phrasing is: “May Yahweh be a true and faithful witness against us if we do not act according to all the word with which Yahweh your God sends you to us.” If the people do not act according to Yahweh’s words – *then* He will bear witness. A similar message is expressed in the play of words that accompanies the covenant of Jacob and Laban in Gen. 31:46-50. Here, through the description of the parties’ mutual acts of naming a pile of stones as a witness to the oath, the prose suggests analogies that manifest the intended role of God qua witness:

And they took stones and made a heap, and they ate there by the heap. Laban called it *yəḡar-śāhăḏūṯ*[*ā*](https://biblehub.com/hebrew/sahaduta_3026.htm)(Aramaic for ‘a heap of testimony’) but Jacob called it *gal -’ed* (Hebrew, literally: ‘a heap which is a witness’).Laban said, “This heap is a witness between you and me today.” Therefore he named it *gal-’ed*, and *miṣpāh*(Hebrew, literally: a place of watch), for he said, “Yahweh will be watching (*yiṣep̄)* between you and me, when we are out of one another's sight,if you oppress my daughters, or if you take wives besides my daughters, although no one is with us, see, God is witness between you and me.” (Genesis 31: 46-50).

Laban and Jacob name the pile of stones that they built “a heap of testimony”/ “a heap which is a witness,” after their mutual call for the gods to witness their oaths. However, the text further suggests a striking analogy between these names and another Hebrew name suggested for the same pile of stones, “a place of watch” (*miṣpāh*). Although not a synonym, this name is clearly meant to convey an analogous meaning. When Yahweh is a witness, he watches. Notably, this watching is not of the event where both parties take their oaths, but rather at a future time, when the parties are “out of one another’s sight,” in case Jacob might break his oath and violate his obligation. In other words, Yahweh is called to be a witness in watching and overseeing the enforcement of the oath, or – to use the terminology in verse 53 – when he “judges” between Jacob and Laban.

# Conclusion

In this article, I have portrayed three recurring contexts in which witnesses are depicted in ancient sources. In some of these contexts, the witnesses are human beings participating in actual legal procedures, and in others, they are deities enacting divine judgment. Despite this diversity, all three contexts have in common the similar presupposition that to be a witness is to play a decisive, determinative role, rather than merely contributing to the result of a judgment.

The first context is the ancient laws of procedure as found in Neo-Babylonian legal texts and the Gortyn Code. These texts suggest that witness testimony is not only necessary but is also sufficient for convicting defendants; testimony need not be subject to consideration by a judicial forum. While this conclusion is more evident in some cases than in others, the compelling cases shed light on the more ambiguous ones. It is likely that the latter’s ambiguity is simply the unconscious bias of the modern reader toward the instrumental paradigm.

The second context is the terminology used in a variety of ancient texts concerning witnesses in human legal proceedings as well as divine adjudication. The surprising recurrence, in different languages, of reference to an adjudicating body as a ‘witness’ calls for attention.

The third context is the role of divine witnesses in oath-taking. The oaths are structured as legal instruments that invoke divine adjudication. The divine judges are consistently termed ‘witnesses’ despite their unequivocal adjudicating function. This usage underscores the fact that the role of witnesses must have been conceived of as including the active exercise of authority, in contrast to the conception of witnesses in the instrumental model as mere contributors of information who do not play a role in enforcement.

I have demonstrated that each of these phenomena appears in a variety of ancient cultures, indicating that these are consistent, cross-cultural conceptions and not occasional deviations from the instrumental paradigm. This fact, I argue, calls for a generalization of the findings. To be a witness in the ancient societies under review was, generally, an authoritative role that implied powers of adjudication. This must have been the rule, even while every rule has its exceptions.

The analysis of the conception of witnesses in these ancient texts has clear implications for the study of ancient societies. I would like to suggest that these implications are actually much broader and are no less relevant to scholars of legal theory and the history of legal thought. The conception of testimony as judgment rather than merely evidence indicates an altogether different logic of legal proceedings in ancient societies than what we are familiar with today. The basic triangular arrangement of a trial, comprised of litigants, witnesses and judges, is thus revealed to be a contingent structure that is subject to change depending on ideology and worldview. Further questions relating to the alternative logic of this past model remain to be addressed: what gave witnesses their authority? Was it their status as members of the community? Their unmediated knowledge of the facts? Why was professional knowledge of the law, which today is seen as so central to the authority of judges, deemed irrelevant in granting this authority? Finally, what brought about the change, whereby witnesses lost the authoritative function they once had? All these questions can only be addressed once we recognize that, like legal institutions, legal ideas also have a history to be told.

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1. Humphreys, Social Relations, 313. The last sentence is quoted from the abstract of the paper. [↑](#footnote-ref-1)
2. Often those findings are compared to the customs of tribal societies: see Humphreys, Social Relations, 315. This analogy seems to imply an explanation for the anomaly, which should not be taken for granted. [↑](#footnote-ref-2)
3. Regarding witnesses in the Neo-Assyrian context, it has been noted by Démare-Lafont, Arbitration, 4, that “sometimes, the persons named on a tablet as ‘witnesses’ appear on the case with the sentence ‘these gentlemen (were) judges’; Holtz, Neo-Babylonian Procedure 297-299, writes: “There is […] reason to believe that the witnesses play more than the role of simple observers […]. They are among those who decide the case”; Anderson and Freedman, Michah, 155 hold that the term ‘witness’ in the HB “should not be permitted to attract its modern juridical connotations—a person who supplies evidence […] the ‘“witnesses’ constitute a court.” See also Bovati, Re-Establishing Justice 81-82, according to whose analysis the procedure in the HB is ruled by “a witness-arbiter”: “The witness-arbiter does not pass a law court judgment, but the invocation of one has the same practical effect of declaring the innocent right and shaming whoever is in the wrong.” While these scholars relate to witnesses as possessing a clear adjudicative role, scholars have also recognized witnesses as participants in adjudication rather than merely suppliers of evidence even in legal settings where their testimony is reported to another official who administers the case like a modern judge. Thus, Falk, Hebrew Law, 33, holds that in the HB “Evidence given by two witnesses was conclusive.” The decisive nature of witness testimony according to (some clauses of) GC was acknowledged extensively, and will be discussed in detail below. See further Robb, Heraclitus, 646: “[the *dikastas*] gives judgment [..] being bound strictly by the wording of the law and by the testimony of witnesses […] the resolution is viewed as automatic, or mechanical.” [↑](#footnote-ref-3)
4. Deut. 17:6. See also Deut 19:15; Num. 35:30. [↑](#footnote-ref-4)
5. Arist. Pol. 1269al–3. [↑](#footnote-ref-5)
6. TCL 12, 70; Holtz, Neo-Babylonian Court Procedure, 154. [↑](#footnote-ref-6)
7. YOS 6, 191; Holtz, Neo-Babylonian Court Procedure, 156. [↑](#footnote-ref-7)
8. In a line omitted from the quote, we are told that a certain amount of the goods included in the original claim is excluded from the future verdict, apparently because the defendant was able to provide the authorities which heard the case with a coherent explanation as to why they were found in his possession. See discussion in Holtz, Neo- Babylonian Procedure, 158. [↑](#footnote-ref-8)
9. Cf. the analysis offered by Wells, Testimony, 108-129. Wells believes that the such documents were likely drafted when the judicial body which considered a certain amount of evidence, maybe it already heard one witnesses, nevertheless required more evidence, thus calling for a second witness. Based on this reading he compares texts of this sort with the Deuteronomistic requirement for two witnesses or more. [↑](#footnote-ref-9)
10. Holtz, Neo-Babylonian Procedure, 162-163. [↑](#footnote-ref-10)
11. Holtz, Neo-Babylonian Procedure, 158-159. [↑](#footnote-ref-11)
12. Holtz, Neo-Babylonian Procedure, 142. [↑](#footnote-ref-12)
13. Wells, Testimony, 109. [↑](#footnote-ref-13)
14. Holtz, Neo-Babylonian Procedure, 142. [↑](#footnote-ref-14)
15. The spelling of this office holder in Gortyn *dikastas* is different from the *dikastes* in other ancient Greek sources. [↑](#footnote-ref-15)
16. See Thür, *a Response*, 147-148 [↑](#footnote-ref-16)
17. For the use of ‘testify’ to translate the verb *apoponen*, see Gagarin and Permlman, The Laws, 139. [↑](#footnote-ref-17)
18. Gagarin and Perlman, The Laws, 338. [↑](#footnote-ref-18)
19. This is the translation preferred by Willetts. Gagarin and Perlman translate with ‘to rule’. [↑](#footnote-ref-19)
20. On the difference in terminology and its meaning, see Headlam, Procedure, 49, followed by Willetts, 33; Robb, Heraclitus, 643-646; Gagarin & Perlman, The Laws, 137 and esp. 421-422. [↑](#footnote-ref-20)
21. Although there are some differences as to the level of discretion granted to the *dikastas* even in the case of *krinein*. See further discussion below. [↑](#footnote-ref-21)
22. Willetts’ translation, the Law Code, 40; and the explanation of this clause by Robb, Herclitus, 655-656. [↑](#footnote-ref-22)
23. Gagarin and Perlman, The Laws, 345. [↑](#footnote-ref-23)
24. Gagarin, Procedure, 133. It is not clear how Gagarin views this case. While he states that in the absence of witnesses the claim will be automatically rejected, he also says in the same page that “the determining factor” as to whether the claim will be automatically rejected in the absence of witnesses, “seems to be whether the witness is a formal witness (who testifies to something he was formally summoned to witness) […] in which case the absence of a witness would mean that the transaction probably did not take place, or is an accidental witness (who testifies to facts he happens to know).” However, elsewhere Gagarin suggests that the witness in II. 16-20 must be an accidental witness; see Gagarin, Function, 42. [↑](#footnote-ref-24)
25. Gagarin & Perlman, The Laws, 422, list all the cases that, to them, are subject to the limited discretion rule, and II.16-20 is not one of them; apparently, they hold that the method of free decision applies for this case as well. Note that Gagarin’s position on this matter might have changed over the years. In his 1989 article regarding a similar phrasing found in clause I.14, he writes that “it is neither stated nor (in my view) implied by the law” that the *dikastas* must follow the testimony of that witness. In Gagarin and Perlman, The Laws, 341, he takes the opposite stance, writing that “if there is a witness the judge should rule according to the witness.” [↑](#footnote-ref-25)
26. Gagarin, Procedure, 133. [↑](#footnote-ref-26)
27. Certainly, this is Gagarin’s opinion on any clause of the GC that instructs the *dikastas* to *krinein.* See Gagarin, Procedure, 137. Gagarin and Perlman, The Laws, 422. Here Gagarin and Perlman state more broadly that the method of free decision as in the case of *krinein* should apply whenever the GC does not include a specific instruction to the contrary. To them, this is the default of the GC: “In most provision, however, nothing is said about how the dispute is to be judged; in these the second method (swear and decide freely) would have to be used, making this method the most common one.” [↑](#footnote-ref-27)
28. Robb, Heraclitus, 645. Robb’s translation slightly deviates from the translation by Willett: “Whatever it is written that he shall give judgment upon, either according to witnesses or under oath of denial, the judge is to give judgment as is written; but in other matters he shall decide under oath according to the pleas.” [↑](#footnote-ref-28)
29. Robb, Heraclitus, 646. [↑](#footnote-ref-29)
30. Gagarin, Procedure, 128; Gagarin and Perlman, The Laws, 421. [↑](#footnote-ref-30)
31. Gagarin, Procedure, 137; Gagarin & Perlman, The Laws, 422. [↑](#footnote-ref-31)
32. Gagarin, Antiphon, 28-29. [↑](#footnote-ref-32)
33. Gagarin and Perlman, The Laws, 74. [↑](#footnote-ref-33)
34. Gagarin, Procedure, 137 [↑](#footnote-ref-34)
35. See also Thür, a Response, 148. Thür objects to the translation of *dikastas* as ‘judge’, he holds that the authority of the person holding this title was only magisterial one and therefore his discretion, even when permitted by the Code, must have been narrow. [↑](#footnote-ref-35)
36. This debate is linked to further disagreement in scholarship regarding the type of witnesses whose testimony is discussed in the GC. Over a hundred years ago, JW Headlam argued that all the witnesses mentioned in GC are only formal witnesses who were summoned beforehand for the purpose of witnessing a legal act and validating it. One possible implication of this reading is that the *dikastas* will always be bound to the testimony of such witnesses. Gagarin, Function, claims to have refuted Headlam’s theory; according to him, several clauses in the GC should be read as allowing accidental witnesses; presumably, if this reading is accepted, the the assumption the *dikastas* is always confined in his ruling by the words of witnesses should be rejected as well. However, many are not convinced by this alleged refutation by Gagarin of Headlam’s analysis; see the criticism in Robb. [↑](#footnote-ref-36)
37. The formulary nature of this phrase is noted by Robb, Heraclitus, 657. [↑](#footnote-ref-37)
38. Ponchia & Bellotto, Zeuge; Šibū, CAD. [↑](#footnote-ref-38)
39. See Démare-Lafont, Judicial Decision-Making; Wells, Judges and Elders; Willis, the Elders. [↑](#footnote-ref-39)
40. On the two versions of Hittite laws see Roth and Hoffner, Law Collections, 214. [↑](#footnote-ref-40)
41. Section 71; Hoffner, The laws of the Hittites, 80, [↑](#footnote-ref-41)
42. Section XXXV; Hoffner, The laws of the Hittites, 54. [↑](#footnote-ref-42)
43. On this example of difficulty in translation see Willis, The Elders, 70–71. Willis holds that witnesses act in their capacity as having an authoritative function, being not just witnesses but rather the elders of the village. For previous studies that have made similar proposals, see Gelb, supra note 33, at p. 271 and references therein. [↑](#footnote-ref-43)
44. A similar difficulty occurs with the verb used to describe the statements of witnesses and judges in judicial settings. See for example the legal protocol from the Old Babylonian period discussed by Roth, Reading. The protocol makes use of the same verb (*qabûm*) for the statements of both witnesses and judges. In the translation, however, an effort is made to differentiate the meanings: when attributed to judges the verb is translated using the English verb ’to order’ (see, *e.g.*, p. 266, 285); when attributed to witnesses, it is translated using the English verb ‘to know’ (e.g.p. 267, 271, 272). [↑](#footnote-ref-44)
45. A common solution is to understand the verb *nasa* in the sense of ‘to convey, to carry’, rather than its more typical meaning which is ‘to bear with, to accept’. This suggeststhat verse 1 *in toto* addresses the witness alone. [↑](#footnote-ref-45)
46. On this problem see Propp, Exodus, 274. It seems that whoever the ‘witness’ is, referred to in verse 1, is also the addressee of the instruction in v. 2. See Childs, Exodus, 480–481 Jackson, Wisdom laws, 404. [↑](#footnote-ref-46)
47. See also the Greek version in LXX: οὐ παραδέξῃ ἀκοὴν ματαίαν.   [↑](#footnote-ref-47)
48. Weinfeld, Judge and Office, 78 notes a striking parallel between these verses and similar instructions recorded in an Egyptian document, the stele of Horemheb. There it is clear that the instructions are directed to judges. Weinfeld does not comment on the use of the title *‘ed* in this context in Exodus. [↑](#footnote-ref-48)
49. Mic.1, 2-6. [↑](#footnote-ref-49)
50. According to another reading, the title *‘ed* is not used here in a legal sense at all but rather entails a simple warning; The verb *‘wd*, from which the noun *‘ed* is derived, bears the meaning of warning in other places in the HB. Such a reading is based on a layering of the sources, assuming that verses 3–5 are later than 1–2. See Hoffman, Michah, 59. For an objection to such layering see Anderson & Freedman, \_\_. ADD PAGE NUMBER. [↑](#footnote-ref-50)
51. See Osborn, Aspects, 59; Van Leeuwen, *‘ed*, 843. [↑](#footnote-ref-51)
52. For Yahweh as both a witness and a judge here, see Verhoef, 293; Snyman, 138-139. [↑](#footnote-ref-52)
53. Anderson & Freedman, Michah, 138–139, 155. [↑](#footnote-ref-53)
54. Mal. 3:5-6. [↑](#footnote-ref-54)
55. Simian – Yofre, *‘wd*, 506. Van Leeuven, *‘ed*, 843, similarly mentions these verses as one of the examples in which God acts as a witness and as a judge at the same time. [↑](#footnote-ref-55)
56. For additional examples in which Yahweh is titled *‘ed* when sitting in judgment see Jeremiah 23, Malachi 14. [↑](#footnote-ref-56)
57. ἴστορ, Henry G. Liddell, Robert Scott & Henry S. Jones., Greek-English Lexicon 842 (ninth ed. with supplements, 1996). The meaning of *istor* as ‘judge’ is often considered archaic and earlier. [↑](#footnote-ref-57)
58. For the discussion of these manumission inscriptions, see Grenent, Manumission; Fossey, Dedication. The title *istores* for witnesses appears in manumissions from Thesipai, Lebadiea, Khaironeia, and more. [↑](#footnote-ref-58)
59. Examples for the use of *istores* in oaths are the famous Athenian ephebic oath (Poll. 8.106; Lykourgos 1.77) and the Hippocratic oath (Hp. Jusj. init.) [↑](#footnote-ref-59)
60. Hesiod, Works and Days, 792, noting that a son begotten in the month’s twentieth day will prove to be a *histor fos.* According to an alternative reading, the twentieth day is good for a *histor* to beget son. See Floyd, Sources, 159–160. [↑](#footnote-ref-60)
61. The scholarly discussion of the *istor* in Homer is abundant; relevant references are noted in context. [↑](#footnote-ref-61)
62. Iliad XXIII, 486. [↑](#footnote-ref-62)
63. Iliad XVIII, 497–508 Trans. A. Verity, The Iliad, 2011. ADD TO BIBLIOGRAPHY, REMOVE DATE. [↑](#footnote-ref-63)
64. For an overview and summary of central discussions of this passage see Avramović, Blood-Money. [↑](#footnote-ref-64)
65. See furtherAvramović, 725-731. [↑](#footnote-ref-65)
66. E. V. Rieu, The Iliad, By Homer, 1950. ADD TO BIBLIOGRAPHY, REMOVE DATE. [↑](#footnote-ref-66)
67. W.H.D. Rouse, The Iliad, Cambridge 1938. [↑](#footnote-ref-67)
68. R. Lattimore, The Iliad of Homer, Chicago 1951 [↑](#footnote-ref-68)
69. M. Hammond, Homer: The Iliad. A New Prose Translation, London 1987. [↑](#footnote-ref-69)
70. R. Fagles, The Iliad, New York 1990. [↑](#footnote-ref-70)
71. Cf. Thür, Oath, 69. For Thür, the *istor* is a divine guarantor that will oversee the enforcement of an oath that the parties are about to take. For the judicial aspect of this role see discussion below. [↑](#footnote-ref-71)
72. Hammond, The Scene; Smith, the administration; Wolf, The Origin. [↑](#footnote-ref-72)
73. For a critical evaluation of the etymology of *istor*, see Floyd, Sources. Floyd suggests an alternative etymology based on the verb ιζειν “to sit, to seat”; whichwould better explain, according to him, the archaic meaning of *istor* as a judge. [↑](#footnote-ref-73)
74. Avramovic, Blood-Money, 751, and also 737 n. 42; Basile, 30. Also cf. Cantarella, Private Revenge, 478. Basile suggests the concept of divine entities who witness oaths and thus record human undertakings as a model for the *istor* as witness. However, the divine *istores* are hardly witnesses in this simple sense. See discussion below. [↑](#footnote-ref-74)
75. For a cross-cultural treatment of ancient oaths in ANE and the Mediterranean milieu, see Karavites 1992; Kitts 2005. This shared tradition is reflected also in the uniformity of treaty and covenantal structures as oath-based mechanism, see Weinfeld, Common Heritage. [↑](#footnote-ref-75)
76. On oaths in the Ancient Near East, see Sandowicz, Oaths and Curses. On HB oaths, see Ziegler, Promises to Keep. On Greek oaths in the archaic and classic period, see Sommerstein and Torrance, Oath and Swearing. On Roman oaths, see Hickson, Roman Prayer Language. [↑](#footnote-ref-76)
77. Beckman, *Zeuge.* Similarly with regards to Greek oaths, Torrance, “*Of Cabbages and Kings*,111: “The defining feature of an oath is the invocation of one or more superhuman powers, normally gods or cult-heroes, to witness the oath statement in order to guarantee its validity and to punish the would-be perjurer.” [↑](#footnote-ref-77)
78. On blessing and rewards and oaths in the Greek context see Sommerstein and Torrance, Oaths and Swearing, 12– 13. [↑](#footnote-ref-78)
79. For the use of ‘guarantors’, see Sandowicz, Oaths and Curses 5; Beckman, Hittite Diplomatic Texts, 42, 47; Thür, oaths, 69; for ‘guardians’, see Sommerstein and Torrance, Oaths and Swearing, [↑](#footnote-ref-79)
80. Beckman 42, 47 need to check [↑](#footnote-ref-80)
81. Jer. 42:5. [↑](#footnote-ref-81)
82. Iliad XIV 270- 275. [↑](#footnote-ref-82)
83. Livy, 1.59.1. [↑](#footnote-ref-83)
84. Cicero, *On Duties*, III.104, p. 164. [↑](#footnote-ref-84)
85. Cf. Polinskaya, Calling Upon Gods. Polinskaya claims, albeit in a Greek context, that it was possible to call deities to witness “situations where no oaths [were] sworn” (24), and that gods could be invoked “as simple observers, not as executors of justice” (27). Sommerstein, Oath and Swearing, 4–5, explains the implausibility of this analysis. [↑](#footnote-ref-85)
86. On the Hebrew, see Malka, *hē‘îd*; on the Greek see X. *Cyr*. 7.1.9, Hdt. 5.93, Thuc. 6.29. [↑](#footnote-ref-86)
87. See Segal, *Pesuqei ha-Shevu‘ah*, 218; and similarly, Ziegler, Promises to Keep, 43-44: “It is possible that God is meant to function in separate and distinct capacities, depending upon the context or formula of the oath.” [↑](#footnote-ref-87)
88. For other Hittite treaties that use this formula see Beckman, 00. ADD REFERENCE.

נוסחים של בריתות חתיות המסתיימים באופן דומה: ברית הכפיפות שערך שֻׁפִּלֻלִיֻמַה א' לחֻכַּנַה מחַיַשַׁה (אלטמן, לעיל ה”ש 86, בעמ' 287); foבברית הכפיפות שערך שֻׁפִּלֻלִיֻמַה א' לשַׁתִּוַזַה ממִתַנִי (שם, בעמ' עמ' 309); ברית הכפיפות שערך שֻׁפִּלֻלִיֻמַה א' לתֶתֶּה מנֻחַשֶּׁה (שם, בעמ' 325–326); ברית הכפיפות שערך מֻרשִׁלי ב' לנִקמֶפַּע מאֻגַרִת (שם, בעמ' 377); ברית הכפיפות שערך תֻדחַליַה ד' מלך חַתִּי לכֻּרֻנתַה מלך תַרחֻנשתַשַׁה (שם, בעמ' 438, 449) ועוד. [↑](#footnote-ref-88)
89. Sandowicz, Oaths and Curses, 5. [↑](#footnote-ref-89)
90. Hickson, Roman Prayer Language, 107. [↑](#footnote-ref-90)