**What is the Role of Witnesses? A Chapter in the History of** **Probativity**

**Orit Malka**

The dominant position in modern legal theory of evidence holds that the purpose of submitting evidence in judicial proceedings is to provide information about the dispute in question to the judge or jury who decides the case. Witnesses are no exception. Generally, it is assumed that the role of the witnesses is to tell a story and to convey to the judge what they saw or heard. This model presumes a strict division of labor between witnesses and judges: the latter make the decisions, drawing on the authority granted to them by the state, whereas the former have an instrumental role, submitting their knowledge of the facts for the judiciary’s use.

However, this understanding of the division of labor is challenged by ancient depictions of judicial proceedings. In legal documents from the Ancient Near East, as well as in biblical texts that reflect on the roles of the parties in a legal dispute, those different roles often collapse into one another. In these sources, divine judges are called “witnesses” when they enact justice on human subjects, and gods are said to “testify” when they punish offenders.[[1]](#footnote-1)

What can explain this interchangeable use of juridical categories? How should one understand the mixing of terms and the blurring of boundaries between judges and witnesses? Often scholars have dismissed this phenomenon as one instance of the conceptual suppleness that prevails in the ancient world.[[2]](#footnote-2) However, I would like to suggest an alternative explanation. A different conception of testimony existed in antiquity, a conception that is incompatible with the instrumental paradigm that we use to consider testimony today. A central aspect of this conception emerges from an examination of the connection between testimony and oaths, a connection that will be the focus of this paper.

The link I would like to discuss between oaths and testimony in antiquity should not be confused with the modern tradition of sworn testimony, in which the witnesses themselves take an oath to speak the truth. Sworn testimony is indeed in line with the instrumental role of witnesses who are required to speak “the whole truth and nothing but the truth,” and the oath is a tool to achieve this goal. However, in the ancient model I will present here, the witnesses themselves do not take any oath; rather, they impose an oath on others—on the litigants. The witnesses compel the litigants to undertake an oath that contains self-subjugation to conditional punishment. In this model, the oath imposed by the witnesses provides the framework for the sentence that is the outcome of the juridical process. This understanding of testimony, I argue, is responsible, at least in part, for the association between the role of witnesses and judicial offices.

The basic argument I will present here is relevant for a variety of legal traditions from antiquity, however, due to time constraints, I will focus my presentation on the evidence provided by Jewish and Christian texts; I intend to expand on my argument in future publications. In what follows, I will analyze a selection of biblical sources that use the verb “to testify”—*‘ud* (ע.ו.ד) in Hebrew and *marturew* (μαρτυρέω) in Greek—in a way that has been overlooked in earlier scholarship. In the examples I will consider, these verbs describe a positive action, and therefore cannot be interpreted as merely referring to passive observance. At the same time, it is impossible to square these uses with the paradigm of testimony as the provision of an oral report. Scholars have therefore suggested a list of secondary meanings, not specifically connected to the judicial context, that should be attributed to the verbs *‘ud* / *marturew*. Often, these verbs are used to forewarn of harsh consequences, and in such cases are read as synonymous with the word “to warn.” In other instances, the verbs reflect a kind of solemn declaration, and are therefore translated as “a strong demand,” “charge,” or “affirmation.” However, I will argue that these apparently disparate meanings are in fact much less fragmentary then it may seem, and all bear on the association of *‘ud/marurew* with the imposition of an oath.

A classic example of the use of the verb *‘ud/marurew* in the semantic context of warning is found in Genesis 43:3, when Joseph’s brothers tell their father that they cannot return to Egypt without their youngest brother, Benjamin. All English translations of the verse use the word “to warn,” as in the following: “The man [Joseph] warned us saying, ‘You shall not see my face unless your brother is with you.’” However, the original Hebrew verb is not derived from the root *zhr* (ז.ה.ר), but rather from *‘ud* (ע.ו.ד), which means “to testify.” The verse in Hebrew reads: העד העיד בנו האיש לאמור לא תראו פני בלתי אחיכם אתכם. A more literal translation would therefore be: “The man testified to us/against us, saying,” etc. In the Septuagint version, the original meaning is preserved in the words: διαμαρτυρίᾳ διαμεμαρτύρηται ἡμῖν ὁ ἄνθρωπος.

Scholars have been reluctant to explain why or how “to testify” came to mean “to warn,” and tend to dismiss the problem as reflecting the polyphonous meaning of the word, without any jurisprudential significance. Since it is assumed that legal testimony normally entails reporting information, it is taken as a mere linguistic coincidence that the same Hebrew verb means both “to testify” and “to warn.”

However, the coincidence hypothesis fails to account for the fact that in ancient legal thought testimony and warning are in fact juridically connected through the legal mechanism of oaths. This connection most clearly emerges from the study of Ancient Near Eastern political treaties. A vast body of scholarly literature written over the past seventy years has demonstrated that such bilateral agreements between political entities in the ancient world share a consistent legal structure and terminology involving oaths and witnesses. But before I touch on this aspect of these treaties, some general background is in order.

The texts that have come down to us from international treaties from antiquity, ranging from the second millennium BCE until the beginning of the Common Era, mainly originate from the Babylonian, Assyrian, and Hittite empires, but they also have parallels in Aramaic and even in Greek and Latin texts. Scholarship on these treaties has shown that, despite important variations, throughout this varied cultural context the basic legal structure and formulas of the treaties remain the consistent. The parties to such treaties could be kings or rulers of equal or similar status, but often they involve the king of a regional empire on the one hand, and a local vassal king on the other. In the treaties, the parties make certain commitments. For example, the vassal king commits to be loyal to the king of the empire, in return for the latter’s patronage or protection. These commitments are made in the form of an oath that contains a preconditioned curse on the oath taker: If he fails to fulfill his obligations, he will suffer severe curses and sanctions. Alongside these curses we often also find blessings and promises for prosperity that will be the reward for truly and faithfully keeping the oath. Most importantly, the oath is declared in the presence of divine entities referred to as witnesses, who are entrusted with the enforcement of the oath by imposing curses and granting blessings.

The scholarship on ancient treaties has also shown that the Hebrew Bible makes use of the same treaty format. This is true both with regards to agreements between human beings and covenants between the People of Israel and their God. When the parties to the agreement are human, God is said to be the witness who will enforce the oaths and impose the curses on the parties to the treaty (this is the case in the covenant between Jacob and Laban in Genesis 31:50). In the hierarchical covenant type between the God of Israel and his people, heaven and earth are often called as witnesses (e.g., Deuteronomy 30:19). Here, in a slight variation on the Ancient Near Eastern model, the God of Israel serves a double role: on the one hand, he is the king to whom the People of Israel swear loyalty, and on the other hand, he inflicts punishment for the violation of the covenant and grants rewards for its fulfillment.

The role of witnesses is fundamental for every treaty or covenant because of the central role that oaths play in these documents. There is no treaty without an oath, and all oaths, explicitly or implicitly, assume a conditional curse undertaken in the presence of divine witnesses. Given the role of witnesses in making the oaths that are the basis of all covenants, I argue that the references to summoning witnesses in many biblical verses stand for the imposition of an oath. We can now consider a few examples that support this argument.

The first example is from 1 Kings 2:42-43:

**42** the king sent and summoned Shimei and said to him, “Did I not make you swear by the Lord and solemnly warn you, saying (in Hebrew : הֲלוֹא הִשְׁבַּעְתִּיךָ בה' וָאָעִד בְּךָ לֵאמֹר), ‘Know for certain that on the day you go out and go to any place whatever, you shall die’? And you said to me, ‘What you say is good; I will obey.’ **43** Why then have you not kept your oath to the Lord and the commandment with which I commanded you?”

Here King Solomon reminds Shimei that he (the king) has agreed to protect Shimei’s life, on the condition that Shimei not leave Jerusalem. Literally translated, the Hebrew verse reads “did I not testify to you,” ואעיד בך, which is also preserved in the Greek version, “ἐπεμαρτυράμην σοι.” In the words of Solomon, making Shimei swear by the Lord is equal and parallel to testifying to him. Testifying means imposing an oath or an obligation. The king says further that when the obligation was first presented to Shimei, he accepted it and undertook to fulfill it by saying, “What you say is good; I will obey.’"

A second example from a covenantal context is found in Jeramiah chapter 11. Here the prophet says to the People of Israel:

"Hear the words of this covenant and do them. For I solemnly warned your fathers when I brought them up out of the land of Egypt, warning them persistently, even to this day, saying (in Hebrew: הָעֵד הַעִדֹתִי בַּאֲבוֹתֵיכֶם, הַשְׁכֵּם וְהָעֵד לֵאמֹר), Obey my voice. Yet they did not obey or incline their ear, but everyone walked in the stubbornness of his evil heart. Therefore I brought upon them all the words of this covenant, which I commanded them to do, but they did not.”

The covenantal context of testimony in these verses is clear: the testimony serves as a call to fulfill covenantal obligations. When this obligatory call is breached, it carries with it the divine sanctions that are part and parcel of the covenant. Therefore, the punishments in verse 8 is: “I brought upon them all the words of this covenant.” Testimony here is not free-standing warning, but rather the activation of a covenantal obligation that by definition brings to bear prescribed sanctions if the agreement is violated.

A comparison with covenantal oaths also explains the cases in which testifying results in a positive outcome, instead of the usual negative outcomes associated with warning. We find an example of this in Zechariah chapter 3:

6 And the angel of the Lord solemnly assured Joshua (in Hebrew:וַיָּעַד מַלְאַךְ ה' בִּיהוֹשֻׁעַ ):

7 Thus says the Lord of hosts: If you will walk in my ways and keep my charge, then you shall rule my house and have charge of my courts, and I will give you the right of access among those who are standing here.

Here God’s angel is said “to testify” to the high priest Joshua when he promises him rewards for his loyalty. In this case “I testified to you” could not be translated as “I warned you,” since the anticipated outcomes are positive rather than negative. However, the promises made to Joshua have the same conditional structure as those in covenants and treaties. There, the oath mechanism not only includes sanctions for violating the parties’ agreement, but also rewards for loyally fulfilling its obligations.

According to the reading I am suggesting, testifying in this sense means imposing on another an obligatory undertaking like an oath that inherently entails conditional sanctions and rewards. Therefore, whenever the verb *‘ud* in the Hebrew bible is traditionally translated as warning, it should be replaced with the imposition of an oath. If we return to the example of Joseph’s brothers in Genesis 43 that I mentioned earlier, it can be shown here, too, that when Joseph “testified” to his brothers, he did not only warn them but also imposed an oath on them. In fact, when Joseph first speaks to his brothers in Genesis 42, he uses an oath formula: “By the life of Pharaoh, you shall not go from this place unless your youngest brother comes here.” The phrase “by the life of Pharaoh,” similar to “by the life of the king,” is a well-known oath formula. Therefore, when the brothers later report their conversation with Joseph to their father, they clearly say that they have been made to swear an oath.

Early Christian and Jewish texts from late antiquity similarly attest to the association of testimony with the imposition of an oath.[[3]](#footnote-3) Recall, for example, the concluding verses of the Book of Revelations (22:18-19):

18 I warn (μαρτυρῶ ἐγὼ) everyone who hears the words of the prophecy of this book: if anyone adds to them, God will add to him the plagues described in this book, 19 and if anyone takes away from the words of the book of this prophecy, God will take away his share in the tree of life and in the holy city, which are described in this book.

As mentioned, according to the basic structure of a treaty or covenant, the oath takers are exposed to a series of curses and disasters that will befall them if they violate the oath or the obligations of the covenant. Thus, Solomon testified to Shimei that he would die if he broke the oath and crossed the borders of Jerusalem, and Joseph testified to his brothers that they would die if they did not bring their brother with them. Similarly, the author of Revelations “testifies” to the readers of his book that if they add or remove anything from it, they will suffer divine curses. Here again *marturew* does not mean a warning in the plain sense of the term, but instead entails the imposition of an oath.

In a similar fashion, in the Second Epistle to Timothy, Paul instructs Timothy to spread the Gospel using the language of testimony:

[1](http://biblehub.com/2_timothy/4-1.htm) I charge you in the presence of God and of Christ Jesus (διαμαρτύρομαι ἐνώπιον τοῦ θεοῦ καὶ Χριστοῦ Ἰησοῦ), who is to judge the living and the dead, and by his appearing and his kingdom: [2](http://biblehub.com/2_timothy/4-2.htm) preach the word; be ready in season and out of season; reprove, rebuke, and exhort, with complete patience and teaching…

These verses use a covenantal formula that we can easily recognize from the book of Samuel. After Samuel asks the people of Israel whether any of them has a claim against him, and they admit that no one has such a claim, he asks that they confirm their statement in a covenant. The witnesses summoned to this human covenant are God and his chosen king, as we read in 1 Samuel 12:5: “And he said to them, ‘YHWH is witness against you, and his anointed is witness this day, (in Hebrew: עד יהוה בכם ועד משיחו) that you have not found anything in my hand.’” The people assent to undertaking the covenant, replying with the formulaic answer appropriate in such contexts: “He is witness (עד).” The covenantal structure of this formula has been discussed extensively in scholarship and requires no further support. However, when we read the line suggested by Paul, διαμαρτύρομαι ἐνώπιον τοῦ θεοῦ καὶ Χριστοῦ Ἰησοῦ, with the verses from 1 Samuel, we can clearly see that the epistle is rephrasing the same oath formula—a formula that is entered into by the fact that “God and his anointed” are called as witnesses. (A similar use of this formula is found in 1 Timothy 5:21-22, where additional divine entities are also called as witnesses, a phenomenon known to us from several Ancient Near Eastern treaties).[[4]](#footnote-4)

So far, I have shown that biblical and early Christian sources reflect a tradition in which to testify to or against another person means imposing an oath on him or her. This raw linguistic material does not necessarily allow us to reach any definitive general conclusions regarding the nature of legal proceedings in antiquity. However, there is certain evidence of the role it played in the design of legal procedures in Jewish and Christian traditions from late antiquity. Indeed, it seems that the biblical terms were taken literally to mean that the role of witnesses in legal proceedings is to impose the sentence as an oath on the litigants. I will conclude my talk by presenting one example for the prevalence of such traditions from the Gospel according to Mathew.

Mathew chapter 18 discusses a legal or semi-legal procedure that is concluded by sentencing the defendant to excommunication. However, the details of this procedure have long troubled interpreters, since, despite the fact it clearly involves witnesses, it does not seem to include any factual inquiry. Let us recall the relevant verses:

15 If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother.

16 But if he does not listen, take one or two others along with you, that every charge may be established “at the mouth of two or three witnesses” [Deuteronomy 19:15].

17 If he refuses to listen to them, tell it to the church. And if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector.

18 Amen, I say to you, whatever you bind on earth shall be bound in heaven, and whatever you loose on earth shall be loosed in heaven.

The legal procedure depicted in these verses begins with an accusation and ends with a verdict. In verse 15, the victim of an offence is encouraged to confront the offender and rebuke him, apparently in order to convince him to repent his offending behavior in some way. If the offender does not accept the rebuke, then the victim is instructed to return with “one or two” companions and repeat the rebuke. If this still does not work, the rebuke is to be repeated once again, this time by the entire community. If the offender is persistent and still does not change his ways, he is doomed to excommunication. In that case, he will be treated by the community, in line with Jewish sentiment, “as a gentile and as a tax collector.”

According to verse 17, the victim and the companions with whom he rebukes the offender are referred to collectively as “two or three witnesses,” an allusion to Deuteronomy 19:15. In other words, the person who was offended is also named as a witness here, since otherwise we do not have two or three witnesses, but only one or two. Notably, these others are not required to witness the original offence in order to join the rebuke. Similarly, we cannot see them as witnesses to the rebuke itself, since the verses do not distinguish between their role as witnesses and the function of the victim, who is also named as a witness. In other words, being a witness does not include providing information of any sort, neither about the offence itself, nor about the procedure of rebuke. Instead, scholars have assumed that the role of the witnesses is only to warn the offender, to demand that he change his ways, or otherwise be made liable for the penalty of excommunication. It was assumed that the biblical meaning of testimony as warning was preserved in these verses, and that is why the witnesses are charged with warning the defendant.

However, the question remains: How could the defendant be convicted if no evidence of his fault was presented? And how can the warning by the witnesses substitute for a procedure of inquiry into the facts of the matter? I will suggest that the answer lies in verse 18, which spells out the metaphysical mechanism that affirms the communal sentence of excommunication. The phrasing of this verse strongly alludes to the fact that the excommunication is anchored in an oath. It opens with “amen,” which in biblical Hebrew, and also in rabbinic writings, regularly appears as part of oath formulas. Moreover, the verse continues: “Whatever you bind shall be bound, and whatever you loose shall be loosed.” Binding and loosing are also typical oath language; recall, for example Numbers 30:3: “If a man vows a vow to the Lord, or swears an oath to bind himself by a pledge, he shall not break his word.” Jewish traditions from late antiquity preserve this same language, asserting that “‘binding’ always means an oath.”[[5]](#footnote-5) It therefore appears that the author of these verses in Matthew is thinking in terms of oath-making when he accounts for the obligatory nature of the excommunication. [Further support for such a reading is found in the rabbinic laws of *hatra’a* (התראה) which also entail witnesses’ forewarning of the accused as a precondition for conviction, a forewarning that is very similar in its language and structure to the imposition of an oath. Unfortunately, it is impossible to discuss this issue in detail within the limited timeframe of this talk, but I will address it in full in the written version of my paper].

In sum, I have argued that biblical texts reflect a jurisprudential perception that testifying to a person means imposing an oath on them. I have further argued that certain Jewish and Christian legal traditions from late antiquity took this idea literally and shaped legal procedures in which the role of witnesses was to impose oaths on litigants. If my argument holds true, and the notion of testimony as oath-making indeed prevailed in the ancient world, this means that the structure of legal procedures in antiquity radically departs from that of our modern era. The division of labor we imagine between judges and witnesses, in which judges decide cases while witnesses merely supply information, is irrelevant for an understanding of ancient dispute resolution. Of course, the topic is far from being exhausted, and requires extensive future study of the various depictions of legal proceedings in ancient texts and documents. Such research should aim to articulate a new model for describing the inner logic of legal procedures in antiquity, and to explain how this perception has changed over time, until it yielded the model that we take for granted today.

1. God as a punishing witness is portrayed vividly by the profit Micha in the following versus (1,2-4):

Hear, you peoples, all of you; hearken, O earth, and all that is in it; and let the Lord God be a witness against you, the Lord from his holy temple.

3 For behold, the Lord is coming forth 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 be cleft, like wax before the fire, like waters poured down a steep place.

A simillar depiction is provided by the profit Malachi 3:5, micha 1:2.

In ancient near eatern materials this confusion of roles is found in the treaty context, where the gods that are call upon to enforce the treaty and bring disasters on the parity who violates are reffered to as witnesses of the treaty. [↑](#footnote-ref-1)
2. Some attribute the mixted uses to terminology only, as von Desau writes, reffeing to neobabylonian court protocols: (p. 12) "evidently scribes were able to adapt formulas to the circumstances”. Others attribute it to the nature of the legal process during this period, for example TLOT: "In ancient Israelite law, which did not strictly distinguish the various legal functions, the ‘ed whose testimony proved true could also participate as a judge in reaching the verdict and assist in executing the death sentence". [↑](#footnote-ref-2)
3. The Testament of Levi 19

30 And now, my children, ye have heard all; choose, therefore, for yourselves either the light or the darkness, either the law of the Lord or the works of Belial.

31 And his sons answered him., saying, Before the Lord we will walk according to His law.

32 And their father said unto them, the Lord is witness, and His angels are witnesses, and ye are witnesses, and I am witness, concerning the word of your mouth.

33 And his sons said unto him: We are witnesses.

[μάρτυς κύριος, καὶ μάρτυρες οἱ ἄγγελοι αὐτοῦ, καὶ μάρτυς ἐγώ, καὶ μάρτυρες ὑμεῖς περὶ τοῦ λόγου τοῦ στόματος ὑμῶν. Kαὶ εἶπον αὐτῷ οἱ υἱοὶ αὐτοῦ . Μάρτυρες. ] [↑](#footnote-ref-3)
4. Sifra Kedoshim Chapter 4: “ From "Reprove shall you reprove." I might think that he must do so even if his face changes color (in shame); it is, therefore, written "but do not bear sin because of him." R. Tarfon said: I swear that there is no one in this generation who is able to reprove. R. Elazar b. Azaryah said: I swear that there is no one in this generation who is able to accept reproof. R. Akiva said: I swear that there is no one in this generation who knows how to give reproof. R. Yochanan b. Nuri said: I call heaven and earth as witness against me that more than four or five times Akiva was beaten because of me before R. Gamliel, to whom I would complain about him, and he loved me all the more for it, in keeping with (Mishlei 9:8) "Do not reprove a scoffer lest he hate you." Another example from the rabbinic corpus is found in the Sifra. Here three rabbis express their confidence that it is impossible to perform the commandment of rebuke in their generation. In order to express their certainty in this position they all swear. Then a forth rabbi steps forward and responds with a counter oath, claiming that it is not only possible to perform the commandment of rebuke, but that he has personally fulfilled it by rebuking R. Akiva. The language of his counter oath is the biblical phrase that is used in many covenantal passages: “I call heaven and earth as witnesses against me”. Cnf. Murabba'at Papyrus 43: משמעון בן כוסבה לישע בן גלגלה ולאנשי הכרך שלום. מעיד אני עלי תשמים יפס[ד] מן הגללאים שאצלכם כל אדם שאני נתן תכבלים ברגלכם כמה שעסת[י] לבן עפלול [↑](#footnote-ref-4)
5. אין איסר אלא שבועה: Sifre Numbers 153 (a rabbinic legal homiletic composition on the book of numbers) [↑](#footnote-ref-5)