**Disqualified Witnesses and the Conceptual History of Legal Testimony:**

**A Response to Paul du- Plessis**

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I was fortunate to receive the attention of several prominent scholars to my paper “Disqualified witnesses Between Tannaitic Halakha and Roman Law”, in their printed responses published in LHR 37.4 (2019), and I am greatly indebted to all of them. The expert contextualization they so generously outlined, by Christine Hayes regarding the study of Jewish law vis-à-vis and Roman law (955-959), and by Amalia Kessler regarding the history of evidence rules and their rational (937-946), is an extraordinary gift for which I am deeply grateful, and the critical points they raise grant me an invaluable opportunity to sharpen my argument and clarify its thrust. I take this opportunity to addresses here one particular objection put forward by Paul du –Plessis (947-954), as it seems to me to touch on some core methodological aspects of the research of ancient procedure. There surely cannot be a better forum to discuss these principle issues, and for this I am sincerely thankful to the editorial board of LHR and *The Docket* for hosting this discussion.

In my paper I propose an analogy between early rabbinic laws of disqualification for testimony and Roman legal *infamia.* Du- Plessis objects to this analogy given the differences between the two legal institutions. He especially highlights one difference, regarding the scope of disqualification for testimony. As he writes:” there was no blanket exclusionof a person from acting as a witness in a Roman court by virtue of that person being subject to *infamia…* neither litigants (nor their representatives), nor witnesses were ever excluded from access to a Roman court on account of being *infames*”(953). Implicitly, Du- Plessis considers this to be an important variation when compared to tannaitic Halakha, which puts together a list of people disqualified for testimony, the list which is the subject of my original article.

Before one can evaluate the force of this objection, it is important to note that what is phrased by Du-Plessis as a descriptive statement may be more accurately accounted for as an interpretive conclusion of surviving evidence, one that depends on certain contingent understanding of the materials. Moreover, this understating rests on certain presuppositions regarding the role of witnesses in legal procedure, presuppositions that are seldom made explicit in research, and which deserve a critical examination.

Surely, in what survived from Roman legal materials there is no explicit statement that ties together infamous occupations and disqualification for testimony. There is no doubt about that. Nevertheless, scholars that have studied *infamia* came to the conclusion that this status resulted in disqualification for court testimony, for several reasons. Firstly, Roman Jurist attest to an explicit debarring from testimony of people who are elsewhere subjected to *infamia –* although they do not make the link between those to facts. Thus, Callistratus in his *Cognitiones* notes that the lex Julia de vi mentioned a class of individuals who were forbidden to give evidence under this law; his list includes, *inter alia*, anyone who had been condemned in a *iudicium publicum* and had not been reinstated, who had hired himself out to fight with beasts, who had been convicted of taking money for the purpose of giving or refusing to give evidence, and women prostitute present or past.[[1]](#footnote-1) The same people are mentioned in other lists as subjected to legal *infamia* in both *Lex Julia Municipalis* (judging by *Tabula Heracleensis*) and the praetor's Edict (D.3.1.6). Are those two facts interconnected? Most scholars believe they do, despite the fact no explicit mention of *infamia* is made in the clauses refereeing to the disqualification of those people from testimony. The same is true with regards to people condemned under *Lex Julia* *Repetundarum* and *Lex Julia de adulteriis*: they were sanctioned with *infamia*, and likewise, disqualified for giving testimony.[[2]](#footnote-2) Again, these facts might very well be linked, and not coincidental.

One reason to assume that these sanctions are indeed related to the status of *infamia* is the link offered by several sources between the disqualification for testimony in courts of law and the ban on serving as witnesses to wills. Such link is made by Paul, when discussing the sanction put on a person found guilty of corruption, whom “cannot witness a will or give evidence” (D.22.5.15). Papian draws a similar connection between the two sanctions when referring to the legal outcomes of adultery (D. 22.5.14). According to both these jurists, the two forms of disqualification of witnesses seem to go hand in hands. Now let us recall that ill repute is explicitly tied in several sources with the sanction on serving as a witness to a will, unlike the indirect connection between *infamia* and the disqualification for court testimony described earlier. Thus, according to a provision preserved by Aulus Gellius, already in the XII tables we find that -

Whosoever shall have allowed himself to be called as a witness or shall act as one who balances the scales (libriprens), if he refuses to provide his testimony as a witness, he must be dishonored as morally corrupt (inprobus) and incapable of acting as witness (intestabilisque) in the future. (Gell. Att. 15.13.11)[[3]](#footnote-3)

The sanction of being *intestabilis*, i.e., disqualified for witnessing a will,[[4]](#footnote-4) is intrinsically connected here with the title *improbos*, one of many forms of indicating social dishonor of the kind that later became more standardly known as *infamia*.[[5]](#footnote-5) This association appears to be stable over the years, as we find it again in the Justinian *Institutiones*:

Those persons only can be witnesses who are legally capable of witnessing a testament. Women, persons below the age of puberty, slaves, lunatics, persons dumb or deaf, and those who have been interdicted from the management of their property, or whom the law declares worthless and unfitted to perform this office, cannot witness a will (Ιnst. II.10.6)

Here too, the same phrase “improbus” used in the XII tables is connected with social disgrace and dishonor.[[6]](#footnote-6) Notably, the fact that we find here “improbus” and not, say “infamis”, is an important reminder of the terminological indeterminacy of this civil-legal degrading that is referred to in scholarship under the unifying title of *infamia*.[[7]](#footnote-7) In fact, several other terms are used in similar contexts: variations of *improbus, probum, ignominia, nota, notare,* notatio, as well as the many appearances of *fama* in its negative form.[[8]](#footnote-8) This is not a mere linguistic issue; “The diverse terminology reflects the lack of a clear and consistent legal definition or meaning for the concept” at any given period of Roman law.[[9]](#footnote-9) Given this characteristic of *infamia*, one should not be surprised that the indications for the connection of this status with disqualification for testimony are partial and blurred. The entire mechanism and its legal meaning were not “strongly-defined” (in the mathematical sense of the word); It was more of a living idea than a fixed institution. Therefore, to determine that *infamia* was linked with disqualification for court testimony one may rely on tacit and complex indications, if only their conjunction portrays a sufficiently unambiguous picture.

On this point Greenidge writes: “We shall find many civil disabilities imposed on individuals in consequence of some stain on their moral character or some defect in their social standing; but how far the persons so enumerated are coincident with the list made out by the praetor and developed by the imperial legislation is in most cases a matter of doubt […]. But it is clear that a civic disability, recognized by the State, and resting on moral grounds, is an integral part of the history of Civil Honour, and as such these cases require discussion, whether we believe that, in treating them, we are dealing with the *infames* proper or not”.[[10]](#footnote-10) This is the kind of logic that leads him to determine that *infamia* –or however we choose to name the overall phenomenon of degrading legal status due to moral deficiency - was intrinsically connected with disqualified from court testimony.

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It seems that Du-Plessis views this conclusion reached by Greenidge and others as mistaken, based on the following general statement by the 3ed century Jurist, Modestinus:

The value of testimony depends on the dignity, faith, morals, and gravity of witnesses. Hence, those who depart from their previous evidence are not to be listened to (D.22.5.2).

This quote is taken by Du-Plessis to indicate that Roman law knew no rules of inadmissibility, or “blanket exclusion”, as Du -Plessis calls it, of *infames’* testimony. Whether or not this is the correct understanding of this note by Modestinus might be questionable (is it possible that in his opening statement, regarding the considerations that should be taken into account when evaluating testimony, Modestinus only means to introduce the background for the closing conclusion, i.e., that that one who departs from a previous version is not to be listened to, with no intention of making any general claims regarding inadmissibility rules? The phrasing of this quote might suggest that). But even if we accept it as a valid reading, what we are left with is a presumed contradiction between this statement by Modestinus and other indications for an a- priori disqualification for testimony of certain people (whether due to *infamia* or not), mentioned by Callistratus (D.22.5.3.5),[[11]](#footnote-11) Paul (D.22.5.15),[[12]](#footnote-12) Papian (D. 22.5.14),[[13]](#footnote-13) Marcellus (D. 1.9.2)[[14]](#footnote-14) and Venuleiuss Aturninus (D.48.11.6.1).[[15]](#footnote-15) What is the meaning of this presumed contradiction? It seems to me that the best way to understand the relation between the statements of different jurists is to assume a development in the perception of the role of witnesses in Roman law.

The rational of court testimony is too often regarded as self-evident, stable and unchanging, and the possibility that it might have radically transformed throughout cultures or generations is seldom taken seriously. However, certain important works have pointed to different ancient contexts where the role of court witnesses must have been different from the way we perceive it today. In these ancient depictions, the witnesses seem to have an authoritative function of making decisions rather than an instrumental role of merely providing information for a third party- a judge- who is authorized to decide.[[16]](#footnote-16) But if we take these depictions seriously, we ought to conclude that a conceptual evolution of the meaning of court testimony necessarily took place, at this point or another and its history should be told. In the context of Roman law, this very change was already alluded to, albeit briefly, by Yan Thomas. In an article exploring the legal status of women in Roman society he describes what seems to be a transformation in the perception of the role of witnesses:

In the earliest period of Roman law women could not make wills, because to make a will one had to belong to a comitia, or political assembly. Nor could they testify in court. Under archaic procedure testifing was a virile office because the entire body of citizens had to vouch for a claim in order for it to stand up in court...women were of course excluded from this public function. **They ceased to be excluded when the meaning of testimony changed from vouching for the exitance of a claim guaranteed by all citizens to simply providing evidence.** Women could testify because their testimony no longer had the abstract force of a kind of mediation, the general import of an *officium*’.[[17]](#footnote-17)

Here Thomas draws attention to a change in the meaning of court testimony in Roman law, a change from an office, an authoritative political stance, to mere evidence, or the provision of information. Notably, the former meaning of testimony portrayed by Thomas echoes the ancient concept of testimony mentioned above, whereas the latter, were testimony is grasped as simple evidence, is very much what we think of testimony today. This conceptual transformation has resulted, according to Thomas, in at least one change in the laws governing inadmissibility of witnesses’ testimony: women were barred from court testimony as long as it was grasped as viril office, but allowed to testify when testimony was perceived as mere evidence.[[18]](#footnote-18) Could it be the case that the same change affected also other norms of inadmissibility, like those regarding *infames*? Is it possible that they too were initially disqualified for court testimony, in the same way as they were excluded from witnessing wills and from serving in a political office, but when court testimony was no longer perceived as an office their status changed, so that the prior blanket exclusion was replaced with judicial discretion of the kind portrayed by Modestinus?

Other indications have been pointed out in scholarship for a change in the perception of the role of witnesses took place in roman legal thought, roughly around the first century CE,[[19]](#footnote-19) and this debate is far from exhausted. Until we have a better picture of this change and its reasons, we ought to be careful with what presuppositions we make when addressing ancient sources on witnesses and testimony. Now, a clear-cut separation of the rules regarding court testimony and witnessing documents, among them wills, might be guided by such an anachronistic presupposition regarding the role of witnesses in courts. For what is the justification for assuming that the role of witnesses in the two procedures was different? Such an assumption is not supported by any terminological distinction neither in Latin, nor in Hebrew.[[20]](#footnote-20) Obviously the function of these two types of witnesses is different from a modern perspective, since today we think of witnesses in court as merely providing information to the judicial authority and not as bearing any substantial authority, whereas with regards to authorization of documents we are less invested in this argument. Du-Plessis openly admits to holding a modern perspective on this point, as he writes that “**as in modern law**, the value of the evidence [in roman courts of law] was judged with reference to its credibility” (952; my emphasis). In his response he does not touch at all on the disqualification of *infames* or others for serving as witnesses to wills, implicitly assuming that it should be regarded on different grounds. But what if this division is only the product of a change in the conceptual role occupied by witnesses in court, as Thomas suggests? It is my contention that we ought to avoid assuming this conceptual separation when it comes to the ancient sources, especially when these sources indicate a link between the two witness functions, as is the case in the writings of the classical Roman Jurists. And if we think of court testimony and the role of witnesses to wills, or other documents, in tandem, we receive a picture that clearly connects *infamia* with disqualification for witnesses’ roles, in their various forms.

Going back to the comparison between rabbinic and Roman rules of disqualification for testimony, it should be noted that the disqualification of the list of four characters in rabbinic context is by no means limited to court testimony, and similarly applies to the capacity of serving as a witnesses to legal documents: The Hebrew word *‘edut* [עדות] refers equally to both witness roles. Thus, the tannaitic norm echoes the Roman bar on *infames* from witnessing wills. Moreover, women are disqualified for serving as witnesses to formal documents according to both tannaitic and Roman rules. Therefore, even if there is a difference in the exact scope of disqualification of people subject to *infamia* between the tannaitic and the roman context, the large picture shows a strong tendency by both normative systems to limit the capacity of such people in the context of witness roles, and to associate their status with that of women. This is all that that I have argued for in my article. This shared tendency should in turn be combined with other aspects of resemblance between the two mechanisms to evaluate the argument for a possible historical connection between them.

To clarify, I was not arguing for a direct and clear parallel in the way that the Roman and the tannaitic mechanisms operated on the ground, but rather to a strong literary resonance between the surviving sources that allude to them. For this argument to stand, a clear-cut blanket exclusion of all *infames* for testimony is absolutely not necessary. Likewise, it does not take all sources to monolithically connect women and *infames*, neither to harmonically declare all women week, to support the claim established in previous scholarship for a link between *infamia*, weakness and femininity. It is sufficient that some sources clearly make these connections, as my contention is merely that the tannaim interpret the legal institute of *infamia* as they understand it, probably based on its reflections in aristocratic circles, while adapting it to their needs. Given the structural, ideological and technical parallels between the two institutions (recall the phrase חזרה גמורה – which is a literal translation of *restitution in integrum*, suggesting that some reference to a Roman legal institute is indeed in the background!) I believe that the claim for a genealogical ancestry connecting them still holds. But even if I’m wrong, hopefully I have shown enough to demonstrate that the jurisprudential rationale of testimony in antiquity deserves further study, as it challenges common assumption regarding the logic of testimony as mere evidence.

1. []. That disqualification of witnesses according to this list is due to *infamia* is accepted by most scholars. See e.g. Gardner, 123; Peter Garnsey, *Social status and legal privilege in the Roman Empire*, 1970, p. 231. [↑](#footnote-ref-1)
2. For *lex Julia repetundarum* see D. 1.9.2; For lex Julia de adulteriis see 00. [↑](#footnote-ref-2)
3. Translation by Jeffrey A. Stevens, Staring into the Face of Roman Power: Resistance and Assimilation from behind the 'Mask of Infamia' (PhD. Dissertation, University of California, 2014) [↑](#footnote-ref-3)
4. At least according to a limited interpretation. See Berger, 00. Some interpret it more broadly, as referring also to serving as a witness in court. See Gardner, p. 118. This might be the plain reading of Gaius, D.28.1.26. [↑](#footnote-ref-4)
5. See the analysis of the connection between the different terms by Stevens, p. 49-54. [↑](#footnote-ref-5)
6. See also Paul, sent. 2.26.13 (Gardner p.122) [↑](#footnote-ref-6)
7. Greenidge, 9.34 [↑](#footnote-ref-7)
8. See Greenidge, p. 2-6, Stevens, p. 46 n. 58. [↑](#footnote-ref-8)
9. Stevens, p. 46. [↑](#footnote-ref-9)
10. Greenidge, p. 161-162 [↑](#footnote-ref-10)
11. See note 00 above. [↑](#footnote-ref-11)
12. [] [↑](#footnote-ref-12)
13. [] [↑](#footnote-ref-13)
14. [] [↑](#footnote-ref-14)
15. [] [↑](#footnote-ref-15)
16. For a description of witnesses functioning authoritatively, as pseudo- judges, in Ancient Near Eastern Context, see Simonetta Ponchia & Nicoletta Bellotto, “Witnessing Procedures in the Ancient Near East: Problems and Perspective of Research”, in *Witnessing in The Ancient Near East* 225, 242-243 (Simonetta Ponchia & Nicoletta Bellotto eds.,2009); and compare Shalom E. Holtz, *Neo-Babylonian Court Procedure* (2009) 294-300. Throughout most of his book Holtz assumes that witnesses’ testimony is simply one kind of evidence, but in certain cases he is forced to back off from this assumption, where the procedure seems to be resolved by the presence of witnesses alone, with no judicial forum preset. For the role of court witnesses in the Hebrew Bible see Pietro Bovati, *Re-Establishing Justice: Legal Terms, Concepts and Procedures in the Hebrew Bible* (105 JSOTSup; Sheffield, 1994). Bovati depicts a system where judicial disputes are resolved by a third party whom he describes as “witness-arbiter” who “does not pass a law court judgment, but the invocation of one has the same practical effect” (p. 82). In the Greek context see David C Mirhady, *Athens' Democratic Witnesses*, 56 Phoenix 255, 264-265 (2002); Mirhandy describes certain circumstances in which witnesses must have acted as “surrogates for the court itself”. In the Roman context see Alan Watson, *International Law In Archaic Rome: War And Religion* 10-19 (1993). ‏ According to Watson, in several texts the word *testis* means “judge” and not “witness”. He reaches this conclusion because of the authoritative function of *testes* implied by these texts. The research in this field is far from exhausted, and the meaning of combined findings from the various cultural contexts requires further scrutiny. [↑](#footnote-ref-16)
17. Yan Thomas, “The division of the sexes in Roman law”, *A History of women: From Ancient Goddesses to Christian Saints.* Cambridge Massachusetts 1992, pp. 83-138, 137. [↑](#footnote-ref-17)
18. Contrary to Du- Plessis statement that “gender was not a bar to acting as a witness” (953). One indication noted by Thomas for the claim that women were previously barred from court testimony is the fact that the vestal priests were granted the capacity to testify in what seems to be a special privilege deprived from regular women who did not belong to this selected group (*ibid,* n. 166). For a detailed discussion of the sources referring to this prerogative see Robin Lorsch Wildfang, *Rome's Vestal virgins*, Routledge 2006, p. 67-69. Notably, the very same logic is used by Paul (D. 22.5.18) and Ulpian (D.28.1.20.6) to deduce the reverse conclusion, i.e., that women were, at a certain point, accepted as court witnesses: they note that certain women are disqualified for testimony according to the *lex Julia de adulteriis*, and therefore this must mean that other women are allowed to testify. More important for our context, the very fact that Paul and Ulpian even address the question of women’s eligibility for testimony at all shows that it was not evident or clear-cut that women were indeed legitimate witnesses at their days, again reinforcing the claim that the status of women must have changed at about this period. [↑](#footnote-ref-18)
19. Elizabeth A. Meyer, *Legitimacy and law in the Roman world: tabulae in Roman belief and practice*, (Cambridge UK: Cambridge University Press, 2004), 118-119 and notes 111-112. Meyer discusses the change in the conception of *testes* authorizing acts of private law, and their gradual merge with *signatores* of documents, around the 1st century CE (p. 158) [↑](#footnote-ref-19)
20. In both contexts it is עד in Hebrew, *testis* in Latin. Moreover, in the Hebrew Bible, the language used to describe the authorization of legal transactions and the role of witnesses in judicial proceedings is the same (see Det. 19.16, יקום דבר, and cf. Ruth 4.7 לקיים כל דבר); Gene M. Tucker, “The Legal Background of Genesis 23”, 85.1 Journal of Biblical Literature 77, 83 (1966). [↑](#footnote-ref-20)