Reconstructing Late-Antique Legal Thought:

On procedure and the Role of Witnesses in Late Antiquity

A Research Proposal

# Introduction

What is the role of witnesses in legal proceedings? According to modern perception, witnesses have an instrumental role in legal procedure: their main function is to convey information to the judicial forum that holds the authority to rule the case (“the probative function of testimony”). However, in different ancient and late antique legal texts the witnesses are portrayed in ways that do not adhere to this paradigm. According to the probative function of testimony one would expect the witnesses to be passive observers of events, which later report what they heard or saw; however, the ancient texts often describe witnesses as active players, interfering with speech acts in the event on which they will later testify. Moreover, witnesses are credited with substantive authority to decide legal disputes, an authority which seems to be equal or event superior to that of judges. What is the meaning of these surprising and counterintuitive depictions of witnesses? Is it possible that the role of witnesses in ancient and late-antique legal thought was different then the way we understand it today? And what are the ramifications for the perception of procedure in antiquity more generally? The proposed project will aim to address these questions through the test case of early Jewish and Christian texts.

# Background

Scholars of both Jewish and the Christian texts from late antiquity have noted that these texts relate to witnesses and testimony in a manner that is hard to reconcile with the common conception of those notions. This is true both with regards to the Hebrew Bible, the New Testament and rabbinic compositions (see e.g, regarding the Hebrew Bible, Gemser 1969, Bovati 1994; regarding rabbinic literature Enker 1994, Ettinger 2011 contra Albeck 1987; regarding the New Testament Strathmann in TDNT, Luz 2001). For example, according to rabbinic law, witnesses are required not only to be passively observes of the events on which they will later testify but also to intervene in those events by warning the potential offenders in advance about the consequences of performing the offence and the anticipated punishment. This requirement of forewarning by the witnesses (*hatra’a*) is a precondition for conviction. Of course, it is hard to understand why witnesses, whose main role is understood to be the report of information, would be required to perform an active role of this sort. Another interesting example is found in the gospel according to Mathew. Here too we find an account of legal procedure where the witnesses warn the offender, albeit this time post factum. In a different vein, according to Mathew 18:16, those referred to as “witnesses” are clearly not required to have been present while the offence took place, or to have seen or heard it in person. Moreover, it is not at all clear that those “witnesses” report anything to a judicial body of any sort; It seems that their sole presence at the judicial setting and the dialog they have with the offender is the basis for conviction. Tannaitic laws of forewarning, and the verses from Mathew 18 are are only two examples out of many others where late-antique Jewish and Christian depictions of witnesses in a legal context do not fit the common (arguably modern) expectations from witnesses in a judicial context.

So far, this phenomenon was treated as a local thing, presumably reflecting idiosyncratic aspects of religion and ritual which vary in different religious cultures. In the proposed research I will argue that, contra theses local explanations, the surprising depictions of witnesses in the Jewish and Christian texts from late antiquity exceed the vicinities of religion, and are indicative of a different perception of the role of witnesses in ancient legal thought. This argument will be based primarily on comparative research of Jewish and Christian texts with sources from other ancient and late-antique cultures. In the last few decades, scholars have pointed out similar difficulties in understanding the role of witnesses in Ancient­-Near-Eastern, Greek and Roman sources (see e.g., in the Ancient Near Eastern context, Ponchia & Bellotto 2009; in the Greek context Todd 1990, Mirhady 2002; and in a Roman context Meyer 2004). Although the particularities vary, it seems that sources from all these ancient cultures share the same basic features: they all portray witnesses as active players with a role that exceeds mere report of facts, and they all attribute to them a great deal of the authority in deciding the legal dispute. It is therefore my contention that this challenge calls for an articulation of a different perception of legal testimony that ostensibly prevailed during antiquity and late antiquity, which may differ from our modern perception regarding the probative function of testimony, and can better explain the early reflections on witnesses and their role in legal proceedings.

The project will suggest that an important source for reconstructing this different perception of testimony is to be found in oath formulations. Indeed, testimony and oaths are traditionally viewed as two distinct realms in the study of ancient civilizations. Accordingly, scholarship dedicated to the study of ancient rules of legal testimony never deals with oaths, and the vast literature on oaths does not reflect upon the perception of testimony. The proposed research will argue that this dichotomy, likely the product of anachronistic separation between law and religion, misses the fundamental link between the two spheres, and that the joint study of oaths and legal testimony can illuminate many of the challenges in the research of both domains, given the central role played by witnesses in the establishment of oaths. An oath is basically a declaration made in the presence of witnesses by which one undertakes to suffer certain consequences upon violation of one’s word. The witnesses are so strongly associated with oaths that often it is enough to mention their presence in order to indicate that an oath is being sworn. Admittedly, the witnesses to oaths are, on the most part, divine witnesses, and this fact was probably the reason that scholars have hesitated to draw the analogy with human witnesses. However, I will argue that there is much to gain if we overcome this hesitation and explore the two realms in tandem.

Previous decades have seen major progress in the study of oaths, their form and structure in various cultures of the ancient world. Building on the work of prominent scholars who studied oaths (as well as oath-based treaties) such as Moshe Weinfeld, Dennis McCarthy, Haim Tadmor, Noel Weeks, Gary Beckman, Alan Sommerstein, Frances Hickson and Małgorzata Sandowicz, it is now possible to compare various oath traditions from Ancient Near Eastern, Greek and Roman cultures, which all ascribe a similar role to divine witnesses. As pointed out by these scholars, the role attributed to divine entities who are called to witness oaths seems to exceed the role commonly associated with witnesses: they are active and not passive players, and moreover, they are entrusted with enforcing oaths and therefore act in the capacity of judges. Of course, this description echoes the problematic depiction of human witnesses mentioned above. Here, I maintain, rests the potential of legal testimony and oaths, when studied together, to shed light on one another. Given the similar contours of the challenges in the study of the two domains, it seems that once we let the divine witnesses’ model inform our inquiry of the ancient legal texts, we may achieve a better understanding of the role of witnesses in ancient legal thought, and vice versa: a newly articulated perception of the role of witnesses in the ancient world can explain why divine entities are referred to as witnesses in oath formulations although they don’t seem to function according to the passive (arguably modern) model of witnesses.

# Objectives

The goal of this project is to decipher and articulate the conception of witnesses, both human and divine, and their legal role, as reflected in early Jewish and Christian texts (read and understood against their contemporary historical background). This model will need to account for the active and authoritative role characterizing the descriptions of witnesses in those texts, vis-à-vis the passive and instrumental view of witnesses according to a modern perception. Accordingly, the proposed model ought to relate also to the distinction between judges and witnesses in ancient thought, a distinction which seems to be directly influenced by the different perception of witnesses.

# Methodology

The proposed project is a qualitative research based on textual analysis of sources. It will focus on references to the idea of testimony and witnesses in Hebrew, Aramaic and Greek found in the Hebrew Bible, the New Testament, Qumranic and rabbinic literature (however, parallels from other cultures and languages will also be considered given the trans-cultural dimensions of the problem, as described above). Those texts will be studied from a multidisciplinary perspective, using philological tools as well as legal analysis. The project will have three parts:

1. Analyzing the role played by divine witnesses to oaths. This part will include an inspection of oath formulations and literary descriptions of oaths from various ancient cultures, in order to critically evaluate the significance of calling divine entities to witness an oath. Beyond the basic understanding that gods are expected to punish violators of the oath, I intend to focus on the elements that are more akin with traditional witnesses’ role: what are gods expected to see or hear? And when exactly are they expected to act as witnesses by seeing or hearing; is it during the primary phase when the oath is being initiated, or rather in the secondary phase where they watch over the oath takers’ compliance? What are the actions for which gods are termed “witnesses” and how do they relate to the overall sum of actions that the gods are expected to perform during the lifetime of an oath?
2. Analyzing the language and vocabulary used to describe testimony and the role of witnesses. In this part of the project I will examine the typical terminology characteristic of oaths on the one hand, and testimony on the other, and scrutinize their affinities and differences. It has already been determined in scholarship that a call upon the gods to witness a solemn declaration is equal to swearing an oath, and many oaths are simply phrased “X is witness” - X being a divine entity or force of nature. However, there are preliminary indications that this oath formula does not make exclusive use of divine witness, but at times it may also refer to human witness. This occurs both in Hebrew (see e.g. Josh. 24:22) and in Greek (The Testament of Levi 19:32).These mixed literal expressions may indicate that summoning human witnesses is also associated, to a certain degree, with the act of establishing an oath, and the project will aim to trace this possible connection.

Another terminological development that requires scrutiny relates to the verb used to refer to witnesses and their role. In biblical Hebrew the verb *leha’id* is used to denote the summoning of witnesses, and it is my hypothesis that as a result of an early development, the verb itself has come to be associated with the imposition of an oath, even without specifying who the witnesses are, whether human or divine. This hypothesis is supported by verses in which the verb seems to function as a synonym for the imposition of an oath (see e.g. 1 Kings 2:42-43), however it requires further exploration and elaboration. Interestingly, the same verb undergoes a semantic shift in the post-biblical period: in Mishnaic Hebrew it only rarely denotes summoning witnesses but is instead used to signify one being a witness or testifying. It may be the case that in this late phase the very act of testimony comes to be linked with the initiation of a sworn obligation, given the semantic field attached to the verb (when coupled by the strong link between witnesses and oaths, as described above). These questions will also be studied with regards to the Greek verbs *marturomai* (denoting the summoning of others as witnesses) and *marturew* (denoting one being a witness and testifying), as they are used in the Septuagint, in the New Testament and other contemporary Greek texts from this tradition.

1. Analyzing direct references to human witnesses in legal contexts. This part of the project will combine the insight drawn in the previous parts to examine how it could change our reading of texts that refer directly to human witnesses and their role in legal proceedings. One immediate path to explore would be the places where the witnesses are ascribed an active role, such as in the rabbinic elaborated requirement mentioned above that witnesses forewarn the offender (the rules of *hatra’a*) which are echoed in Qumranic texts and in the New Testament (see e.g., CD-A 9:16-23; Matthew 18:15-18). Notably, the warning by the witnesses resonates the threat inherent to any imposition of an oath (if the oath-taker violates the sworn obligation he will be punished). Could this link indicate that when the witnesses warn the defendant regarding his forthcoming punishment, they actually adjure him to bear this punishment? And if so, is this development a post-biblical exegetical phenomenon, or does it preserve an ancient tradition regarding the role of witnesses in the legal procedure? I will explore the various possibilities through a close reading of trial depictions in the Hebrew Bible against parallels from the Ancient Near East.

# Significance

The project is expected to contribute significantly to the fields of ancient legal history as it suggests a new path for exploring ancient legal thought in the field of procedure, and for understanding the transformations that the notion of a witness has undergone from antiquity to the beginning of the common era. In addition, the project is expected to also have a methodological contribution by challenging the common assumption that one cannot infer from the religious sphere to the mundane legal sphere, and by demonstrating the potential of religious sources to advance our understanding of ancient law.

# Evaluation and Dissemination

In the short term the project is expected to yield two journal articles: One will be dedicated to the thematic study of the links between testimony and oaths, and accordingly I will attempt to publish it in a journal in the field of legal history; The other article will deal with the philological dimensions of Biblical terminology of testimony and oaths and will be directed to a journal in the field of Biblical studies. The two articles will set the grounds for a book project that I intend to write on this topic in the future.