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

**Orit Malka**

The dominant stance in Modern legal theory of evidence is that the purpose of submitting evidence in Judicial proceedings is to bring information on the legal dispute to the knowledge of the judge or the Juries who decide the case. Witnesses are no exception. Generally, it is assumed that the roll of witnesses is to tell a story, to convey to the judicial authority what they saw or heard. This model assumes a strict division of labor between the role of the witnesses and that of judges: the latter make the decisions, implementing the authority granted to them by the state, whereas the former bear an instrumental role, of delivering their knowledge of the facts to be used by the judiciary.

However, this division of labor is challenged by ancient depictions of judicial proceeding. In legal documents from the ancient near east, as well as in biblical texts reflecting on the role of legal players, those different roles often collapse into one another. In such sources, divine judges are named ‘witnesses’ when enforcing justice on human subjects, and gods are said to testify when they punish offenders.[[1]](#footnote-1)

What can explain this exchangeable use of the juridical categories? How should one understand the mixing of terms and the blurring of boundaries between judges and witnesses? Often scholars dismiss this phenomenon as a matter of conceptual suppleness that prevails in the ancient world.[[2]](#footnote-2)

Instead, I would like to suggest that antiquity has had a different conception of testimony, which is incompatible with the instrumental paradigm through which we think of testimony today. A central aspect of this conception emerges when we examine the connection between testimony and oath, a connection that will be the topic of the current paper.

The link I would like to discuss between oath and testimony in antiquity is not to be confused with the modern tradition of sworn testimony, where the witnesses themselves take an oath to say the truth. A sworn testimony is indeed in line with the instrumental role of witnesses whom are required to say ‘the whole truth and nothing but the truth ‘, and the oath is a tool to promote 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 which contains self-subjugation to conditional punishment. In this model, the oath imposed by the witnesses is the infrastructure of the sentence declared in the outcome of the juridical process. This meaning of testimony, I argue, is responsible (at least in part) for the association of the roll of witnesses with a judicial office.

The basic argument I will present here is relevant for a variety of legal traditions from antiquity, however due to time limits I will focus my presentation on the evidence of Jewish and Christian texts (I intend to expand the argument in a written and longer version of a Journal article). In what follows I will analyze a selection of biblical sources which use the verb ‘to testify’ - *‘ud* (ע.ו.ד) in Hebrew and *marturew* (μαρτυρέω) in Greek – in a manner that was so far overlooked in scholarship. In the examples I consider this verb describes a verbal action, and therefore cannot be interpreted as refereeing merely to passive observance. At the same time, it is impossible to square these uses to fit the paradigm of testimony as a provision of verbal report. Scholars have therefore suggested a list of secondary meanings that should be attributed to the verb *‘ud* / *marturew*, which are not specifically connected to the judicial context. Often the use of these verb foresees harsh consequences, and in such cases, it is read as synonym for warning. In other instances, the verb reflects some kind of solemn declaration, and is therefore translated as a strong demand, charge or affirmation. However, I will argue that these presumably divided meanings are in fact much less fragmentary then it may seem, and they all bear on the association of *‘ud/marurew* with the imposition of an oath.

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

Scholars are reluctant to explain why or how ‘to testify’ came to mean: ‘to warn,’ and tend to dismiss it as reflecting the polyphone meaning of the word without any jurisprudential significance. Since it is assumed that legal testimony normally means report of information, it is taken as mere linguistic coincidence that the same verb in Hebrew 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 literature composed in the past 70 years or so have demonstrated that such bilateral agreements between political entities of the ancient world share a consistent legal structure and terminology involving oaths and witnesses. But before I touch on this aspect of the treaty, some background as to its general format is in order.

The texts of international treaties from antiquity that have come down to us, ranging from the second millennium BCE until the beginning of the common era, originate mainly from the Babylonian, Assyrian and Hittite empires, but they have parallels also in Aramaic, and even in Greek and Latin texts. The treaties’ scholarship has maintained that despite important variations, throughout this varied cultural context the basic legal structures and formulations of the treaty remain the same. 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 treaty the parties make certain undertakings, for example the vassal king is committing to be loyal to the king of the empire, in return for the latter’s patronage or protection. These undertakings are made in the format of an oath which is a preconditioned curse on the oath-taker: if he fails to fulfill his undertakings, he will bear sever curses and sanctions. Often, alongside the curses we find blessings and a promise for prosperity, which will be the reward for truly and faithfully keeping the oath. And most importantly, the oath is being declared in the presence of divine entities referred to as witnesses, whom are entrusted with the enforcement the oath by imposing curses and granting blessings.

The scholarship on ancient treaties has also shown that the Hebrew bible vastly uses the treaty format. This is so both with regards to agreements between human beings, as well as to 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 oath and impose curses on the parities to the treaty (this is the case in the covenant between Jacob and Laban in the book of Genesis 31, 50). In the hierarchical covenant type between the god of Israel and his people often heaven and earth are called as witnesses ( e.g, Deuteronomy 30,19 ). Here, in a slight variation on 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 to be loyal, and on the other hand he is the one who inflicts punishment for the violation of the covenant and grants reward for its fulfillment.

The role of witnesses is fundamental for every treaty or covenant, because of the oath that lies in its heart. There is no treaty without an oath, and all oaths either explicitly or implicitly assume a conditional curse undertaken in the presence of divine witnesses. I argue that given the role of witnesses in establishing oaths which are the basis of all covenants, the language of summoning witnesses in many biblical verses stands for the imposition of an oath. Let us see a few examples that support this argument.

The first example is from 1 Kings chapter 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 will not leave Jerusalem. The Hebrew has here: did I not testify at you, ואעיד בך, which is also preserves in the Greek version : “ἐπεμαρτυράμην σοι”. In the words of Solomon, making Shimei swear by the Lord is equal and parallel to testifying at him. Testifying means imposing an oath, or an obligation. The king further mentions the fact that when the obligation was first presented to Shimei he accepted it upon himself 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 the book of 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 is a call for fulfillment of covenantal undertakings, an obligatory call, that when breached carries with it the result of divine sanctions, which are part and parcel of the same covenant. Therefore, the punishments in verse 8 is: “I brought upon them all the words of this covenant”. Testimony here is not a free-standing warning, it is an activation of a covenantal obligation that by definition bears prescribed sanctions in the case of violation.

Covenantal oath also explains the cases were testifying at somebody results in positive outcomes, instead of the usual negative ones associated with warning. We can see that in the prophecy of 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 angle is said ‘to testify’ at the high priest Joshua, when he is promising him rewards for his loyalty. In this case “I testified at you” could not be translated as “I warned you”, since the anticipated outcomes are not negative but rather positive. However, the promises made to Joshua bear the same conditional structure as in covenants and treaties, where the oath mechanism includes not only sanctions for violation of the parties’ undertakings but also reward for fulfilling the obligation and being loyal.

According to the reading I am suggesting, testifying at somebody means imposing on him an obligatory undertaking like an oath, to which conditional sanctions and rewords are inherently attached. 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 which I mentioned earlier, in Genesis 43, here too it could be shown that when Joseph “testified” at his brothers he did not only warn them but rather imposed on them an obligatory oath. In fact, when Joseph originally speaks to his brothers, in Genesis 42, he uses an oath formula, saying to them: “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 formulation. Therefore, when the brothers later report their conversation with Joseph to their father, they clearly say that they have been sworn.

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 in the book of Revelation (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 I said, the basic structure of a treaty or a covenant is one in which the oath takers are exposed to a series of curses and disasters that may befall them, if they violate the oath or the obligations of the covenant. Thus, Salomon testified at Shime’i that he would die if he broke the oath and left the borders of Jerusalem, and Joseph testified at his brothers that they would die if they did not bring their brothers with them. Similarly, the author of Revelation "testifies" in the readers of his book that if they add to or detract from it, they will suffer divine curses. Here again *marturew* does not mean plain warning but rather entails also the imposition of an oath.

In a similar fashion, in the Second Epistles 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 easily recognize from the book of Samuel. After Samuel inquires with 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 seal this statement in a covenant. The witnesses summoned to such 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 approve their undertaking in the covenant, using the formulaic answer due in such contexts, replying “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 phrasing suggested by Paul, διαμαρτύρομαι ἐνώπιον τοῦ θεοῦ καὶ Χριστοῦ Ἰησοῦ, against the verses form 1 Samuel, we can clearly see that this is a rephrasing of the same oath formula, oath that is set by the very fact ‘god and his anointed’ are called as witnesses. (A similar use of this formula is found also in 1 Timothy 5, 21-22, this time mentioning additional divine entities 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 according to which to testify at or against one means to impose an oath on one. It is hard to use this raw material of linguistic insight to reach any decisive conclusions regarding the nature of the legal proceedings in antiquity in general. However, there are certain evidence regarding the role it played in the design of legal procedure in Jewish and Christian traditions from late antiquity. Indeed, it seems that the biblical terms were taken literally, to mean that the role of the 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.

In the Gospel according to Mathew chapter 18, we read of 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 involve 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 somehow take back the offending behavior. If the offender does not accept the rebuke, then the victim is instructed to take along with him additional one or two people and repeat the rebuke. If this still doesn’t 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, upon which he will be treated, according to the Jewish sentiment, “as a gentile and as a tax collector”.

According to verse 17, the victim and the one or two additional people with whom he jointly rebukes the offender are referred to together as two or three witnesses, while alluding to Deuteronomy 19:15. In other words, the person who was offended is also named a witness here, since otherwise we do not have two or three witnesses but only one or two. Notably, those additional one or two people 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 a witness. In other words, being a witness here does not include providing information of any sort, neither on the offence itself, nor on the procedure of rebuke. Rather, scholars have assumed that the role of the two or three witnesses is indeed only to warn the offender, to demand that he changes his ways, or otherwise he 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 in charge of warning the defendant.

However, the question remains: how could the defendant be convicted if no evidence was submitted with regards to his fault? And how can the warning by the witnesses substitute the procedure of inquiry into the fact 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 that the excommunication is anchored in an oath. It opens with the “Amen” which in biblical Hebrew regularly reflects an assertion of oath taking and is likewise used in rabbinic writings. 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 language, asserting that “ ‘binding’ always means an oath.” [[5]](#footnote-5) . It therefore appears that the author of these verses in Mathew thinks of an oath when accounting for the obligatory nature of the excommunication. [Further support in such reading is found in the rabbinic laws of *hatra’a* (התראה) which also entail the forewarning of the defended by the witnesses as a precondition for conviction, a forewarning that is very similar in its language and structure to the imposition of an oath. I cannot get into all the details of this parallel in the short time-frame, however I discusses them in full in the written version of my paper].

In sum, I argued that biblical texts reflect a jurisprudential perception according to which testifying at one means imposing an oath on one. 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 roll of witnesses was associated with the imposition of an oath on litigants. If my argument is convincing, and the notion of testimony as an imposition of an oath indeed prevailed ancient conceptions of procedure, this means that the structure of legal procedure in antiquity radically departs from our modern one, and therefore that the division of labor we imagine between judges and witness, in which judges decide cases while witnesses merely supply information, is basically irrelevant for ancient dispute resolution. Of course, the topic is far from being exhausted by the above discussion and required extensive future study of the different 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 procedure in antiquity, and to explain the changes this perception has gone through over time, until it yielded the model which 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)