

THE WITNESS'S *EXOMOSIA* IN ATHENS¹

Witnessing in Athenian courts was one of the issues to which a comparative anthropological approach was applied relatively early. The differences between the modern Western judicial systems and ancient or non-European societies have provoked detailed analysis, for example regarding the kinds of people a litigant would summon to give testimony or the purpose and function of witnesses in the courts.² Witnesses have been shown to be primarily supporters of one litigant and therefore partisan. Establishment of the facts is thus not the only, perhaps not even the main, purpose they serve. In addition, their personal authority or authority of office was supposed to support the speaker's credibility. Friends, moreover, acted as witnesses to demonstrate the social status of the litigant. However, despite progress in this branch of scholarship, complete clarification regarding the details of the procedure does not seem to have been achieved. The present paper deals with the *ἐξωμοσία*, the oath of ignorance, by which unwilling witnesses were able to refuse to give evidence. It has been assumed that witnesses could not only state their ignorance of the matter at issue, but could thereby also indicate that the litigant's pre-formulated testimony was untrue. In contrast to this view, I aim to show that in the *ἐξωμοσία* it was not only impossible to indicate that the statement in the deposition was incorrect, but also that we should refrain from assuming that the oath implied such a contention. Secondly, I will attempt to show that we have no reason to think that the *ἐξωμοσία* could be taken on a part of the testimony only. The views I am opposing derive, in my opinion, from an inadequate understanding of the role of witnesses: that they serve only to help find the truth. Instead, depositions should be regarded as nothing more than a means in the process of persuasion, an element in the speaker's legitimate aim to present his side of the case without interruption. I thus return to a view that has been rejected because it seemed awkward and alien to our concept of witnessing. However, I aim to show that it can be reconciled with modern studies and matches their results better.

¹ In compiling this paper I am indebted to the keen eye of Martin Korenjak, who read an earlier draft.

² Some important papers dealing with witnessing in Athens are S.C. Humphreys, 'Social relations on stage: witnesses in classical Athens', in ead. (ed.), *The Discourse of Law* (London, 1985), 313–69; S. Todd, 'The purpose of evidence in Athenian courts', in P. Cartledge et al. (edd.), *Nomos. Essays in Athenian Law, Politics and Society* (Cambridge, 1990), 19–39; A. Scafuro, 'Witnessing and false witnessing. Proving citizenship and kin identity in fourth-century Athens', in ead. and A.L. Boegehold (edd.), *Athenian Identity and Civic Ideology* (Baltimore/London, 1994), 156–98; D.J. Cohen, *Law, Violence, and Community in Classical Athens* (Cambridge, 1995), 107–12.

I

In the Athenian courts witnesses were not cross-examined.³ Before⁴ the trial the litigants handed in the texts of the testimonies to the magistrates. These texts were then stored, together with other documents such as laws, contracts, and challenges in special jars. No change of text and no improvised responses were possible at the trial proper. Normally, witnesses were in favour of the litigant for whom they gave evidence.⁵ In general, we may assume that the speaker worked out the formulation of the testimony in cooperation with his witness. This was probably a matter of convenience for both parties, but not mandatory. In most cases, the witnesses were friends and family of the speaker, naturally backing him and his version of the case.⁶ They were character witnesses at least as much as they were witnesses to the facts.

Originally, the witness was requested to step forward and read the testimony aloud or pronounce it by heart; at some point in time, presumably around 380,⁷ the procedure was changed, and the clerk of the court read out the deposition, while the witness only had to confirm the statement. Even though he⁸ could no longer be questioned, the witness had to attend the trial and confirm the deposition publicly. We do not know how exactly he did so, but Gerhard Thür has drawn attention to the fact that testimonies are either introduced (where we have a, potentially forged, text) or paraphrased by the speaker with the words 'to know', 'to have been present' or, if the actual witness is dead, 'to have heard' (that is: from that direct witness).⁹ Therefore, he makes it plausible that witnesses may just have been required to say *οἶδα, παρῆν* or *μαρτυρῶ* (cf. Dem. 45.25).

This was the rule, if we can take the extant speeches as representative of Athenian practice. However, the witness could also take the oath of exemption (*ἐξωμοσία*)¹⁰ and thus refuse to give evidence. Unlike what happens in modern courts he did not

³ There are some cases of interrogation, most famously represented in Plato's *Apologia* (24D–27D). However, the practice vanished when the clerks of the courts took over the reading out of testimonies. In this paper the cases of cross-examining are not relevant, as they *a priori* exclude an *ἐξωμοσία*.

⁴ Apparently this did not always have to happen in the pre-trial, cf. A.R.W. Harrison, *The Law of Athens. Volume II. Procedure* (Oxford, 1971), 97. This is natural in the *εἰσαγγελία* against Leocrates (Lycurg. *Leocr.* 20), where there was no *ἀνάκρισις*. Moreover, no speaker states that an *ἐξωμοσία* has already been taken. Thus some *ἐξωμοσίαι* may not have been sworn before the trial. Aristotle (*Ath. Pol.* 55.5; cf. also Dem. 45.58), however, makes it reasonably certain that the earlier date was the rule. I follow G. Thür, 'The role of the witness in Athenian law', in D.J. Cohen and M. Gagarin (edd.), *The Cambridge Companion to Ancient Greek Law* (Cambridge, 2005), 146–69 at 161, 167–8 in his explanation of these passages: the uncertainty of the speaker is probably simulated. One could well imagine that the audience would have been alienated if the speaker had announced in advance that the testimony would not be given. In any case, I will attempt to show that it was clear for other reasons whether a witness was going to take the oath of exemption.

⁵ The normal way of procuring evidence is described in Isae. 3.19.

⁶ Humphreys (n. 2), esp. 322, 325–6.

⁷ R.J. Bonner, *Evidence in Athenian Courts* (Chicago, 1905), 46–8; G.M. Calhoun, 'Oral and written pleading in Athenian courts', *TAPA* 50 (1919), 177–93 at 192 tries to pin down the change to 378/7.

⁸ The formal giving of testimony is restricted to free men (with few exceptions); women and slaves can only give evidence under oath or under torture respectively, and only if both parties consented, cf. Harrison (n. 4), 136–7.

⁹ Thür (n. 4), 153.

¹⁰ On this oath see C. Carey, 'The witness's *exomosia* in the Athenian courts', *CQ* 45 (1995), 114–19.

have to give reasons for his refusal (such as kinship or involvement in a related ongoing suit) – at least we never hear of such an obligation; we do not even hear of such a reason.¹¹ The freedom to testify or not makes good sense since the witness was not free to state whatever he wanted but had to stick to a pre-formulated text handed in by the litigant. For, despite the cooperation between litigant and witness, which I have above assumed to be the rule, in the end it was in the hands of the litigant as to what the text looked like. As we will see, it was possible for the speaker to summon whomever he wanted. Since the witness was not in a position to comment on the deposition and thus to make corrections or specifications, small inaccuracies would have been enough to make him liable to a suit for false testimony (*δίκη ψευδομαρτυριῶν*). Therefore, he had to be given the possibility to decline to give evidence. At the trial the unwilling witness probably said nothing more than ‘οὐκ οἶδα’, ‘οὐ παρήν’ or rather ‘ἐξόμνημι(α)ι (μὴ εἰδέναι)’. This was not a statement about the content of the deposition but a general refusal to say anything on the matter at all.

This last restriction has often been questioned, most recently by Thür, who argues that, by taking the *ἐξωμοσία*, the witness may deny that the text written by the litigant is true. Thür states that the ‘*exōmosia*’ should not be understood as an excuse of not knowing, but rather as a negative assertion, denying the content of the testimony.¹² The scholar, who in the same paper demonstrated the existence of formulae for the confirmation, appears to imply that the witness also used no more than a formula when taking the oath of exemption. This formula, however, expressed disagreement with the content of the testimony.

Thür supports his view by mentioning that a witness who did not appear on a summons could be fined heavily.¹³ The one who appears but does not say anything of substance, by contrast, goes scot-free. The different treatment does not at first sight seem to make sense, as both, in equal measure, contribute nothing to the outcome of the trial. Therefore, the supposed difference lies in the substance: the *ἐξωμοσία* is more than the avoidance of a statement; it is the negation of the deposition. Thus this argument looks only at the impact of these two types of conduct on the provision of the evidence. It overlooks a fundamental difference: the person who refuses to testify by swearing an oath follows a prescribed procedure, by which he incurs the gods’ wrath in the case of perjury; and the consequence of such a false oath is divine revenge, while prosecution by a human being is not possible.¹⁴ The other person is guilty of (to use a modern concept) contempt of court by neglecting the summons. One may compare the opposite case: the false confirmation of a testimony led to a *δίκη ψευδομαρτυριῶν*; a false oath (for example in a *πρόκλησις*) had no legal consequences.

¹¹ The exceptions are imputations by the speaker, e.g. that the testimony is too shameful to be confirmed (Aeschin. 1.45–6, 67). This reason, however, is not sufficient in modern courts.

¹² (n. 4), 163, cf. Harrison (n. 4), 144, who states that reason demands that one should allow for this meaning.

¹³ Thür (n. 4), 163.

¹⁴ Cf. Thür (n. 4), 157. An oath generally freed from responsibility towards human institutions. Punishment was left to the gods. The idea is affirmed by an exception: Isocrates says on one occasion that the oaths taken after the fall of the 30 were backed up by special legislation because in this case it was *not enough* to leave punishment to the gods (Isoc. 18.3).

There is more to say on the positive side for the restricted meaning of the *ἐξωμοσία*. Pollux states three clear alternatives for a witness, without room for protest against the testimony's truth. He writes (8.37):

ἔδει δὲ αὐτὸν ἢ μαρτυρεῖν, ἢ ἐξωμόσασθαι ὥς οὐκ εἰδείη ἢ μὴ παρείη ἢ χιλίας ἀποτίνειν.

He [sc. the witness] must either confirm or take an oath of exemption that he does not know or was not present (so far trans. Thür) or pay a fine of a thousand drachmae.¹⁵

I see no way in which οὐκ εἰδείη can be understood to mean: 'I know it was not the case.'¹⁶ Otherwise, we would have to translate μὴ παρείη as 'I was there, and it was not the case.' The grammar will not permit this. Pollux elsewhere defines the *ἐξωμοσία* in the following way (8.55):

ἐξωμνυντο δὲ καὶ οἱ κληθέντες μάρτυρες, εἰ φάσκοιεν μηδὲν ἐπίστασθαι τούτων ἐφ' ᾧ ἐκαλούντο.

The summoned witnesses took the oath of exemption if they declared [that is: by declaring] that they had no knowledge of the things they were summoned to testify.

If the first passage is closer to the Athenian formulae, this definition shows how Pollux understood the Athenian procedure: that the witness does not know whether the statement is correct.

I would like to add some general considerations: let us suppose that οὐκ οἶδα could really mean 'I know it was different' – what could a witness do if he really did not know? There is no evidence for an alternative procedure, in the case where one wanted to decline to testify without risking a fine for not appearing at all. Moreover, it would be absurd if a witness had no chance to state his ignorance. If, however, the *ἐξωμοσία* was only the refusal to make any statement about the testimony, the witness still had the chance to present his positive knowledge by testifying for the opponent – and did so, as we shall see.¹⁷

Furthermore, denial of the facts is rendered unlikely by the fact that, as Thür himself concedes (cf. n. 14), those who took the *ἐξωμοσία* were not liable to be accused of false testimony. If by the oath the witness explicitly declared that the statement was wrong, he did testify to something and changed the balance of evidence. Moreover, to say that something was not the case might be as decisive for the establishment of the truth as the opposite; only saying that he does not know has the effect of allowing the witness to sit on the fence, making it impossible for either party to sue for the damage caused by giving false testimony.

In addition to these theoretical considerations, our best evidence, the speeches, also suggest that the *ἐξωμοσία* is first and foremost a refusal to make any statement. In *Against Stephanus I* (Dem. 45.55–6) the witness Deinias apparently took the oath of exemption in order not to harm the defendant, who was his kinsman:

¹⁵ (n. 4), 157; he continues in his own words: 'it is easy to see that in the *exômosia* the witness does not excuse himself by "not knowing"; rather, he takes an oath that the statement devised by the litigant and formulated as the witness's knowledge is not true.' The second sentence is not a paraphrase but an interpretation of Pollux' words, and one that does not stick to the lexicographer's words. Pollux' reliability is not beyond question, cf. D. Whitehead, *The Demes of Attica* (Princeton, 1986), 53. If his evidence is regarded as unreliable, we can dismiss it; if we accept it, it cannot be used, as I hope to show, to back Thür's contention.

¹⁶ This usage, which would be comparable to οὐ φημι, is not attested in LSJ or Kühner-Gerth.

¹⁷ Dem. 57.36, Aeschin. 1.69.

ὁμοίως γ' ὁ Δεινίας, ὃ ἄνδρες δικασταί, τούτῳ, ὃς ὑπὲρ τῆς θυγατρὸς καὶ τῶν θυγατριδῶν καὶ ἐμοῦ τοῦ κηδεστοῦ διὰ τὴν συγγένειαν οὐδὲ τάληθῇ μαρτυρεῖν ἐθέλει κατὰ τούτου. ἀλλ' οὐχ οὕτως Στέφανος, οὐκ ὥκνησε καθ' ἡμῶν τὰ ψευδῇ μαρτυρεῖν.

Deinias, men of the jury, is like Stephanus. Because of his relationship he refuses to testify even to the truth against the defendant, and on behalf of his daughter and his daughter's children, and me, his son-in-law! Not so Stephanus here. He did not hesitate to give false testimony against us.¹⁸

The speaker Apollodorus equates the two people, but draws a distinction between what they do: one person (who refused to testify) avoids telling the truth, the other told lies in an earlier trial, when he acted as a witness. If the *ἐξωμοσία* meant to deny the truth, Deinias would have lied and even perjured himself, and Apollodorus could hardly have phrased the text as he does. Being unwilling to tell the truth is different from declaring that the alleged truth is untrue.

The formulation is even clearer in *Against Euboulides* (Dem. 57.36):

ἀκούσαντες, ἐὰν ὑμῖν ἐπιδεικνύω τῆς μητρὸς τοὺς οἰκείους οἶους προσήκει εἶναι ἀνθρώποις ἐλευθέροις, ἃ καταιτιάται περὶ αὐτῆς, ταύτας τὰς διαβολὰς ἐξομνυμένους, καὶ μαρτυροῦντας αὐτὴν ἀστὴν οὖσαν εἶδέναι, οὗς ὑμεῖς φήσετε πιστοὺς εἶναι, δικαίαν ἡμῖν θέσθε τὴν ψήφον.

Listen to my words, and if I prove to you that my mother's relatives are such as free-born people ought to be, that they refuse to confirm upon oath the calumnious charges which this man makes regarding her, and testify that they know her to be of citizen birth – and you will acknowledge that they are trustworthy –, then cast your votes in my favour.

The witnesses are apparently summoned by both parties: once to provoke an *ἐξωμοσία* and once to confirm the opposite. The slander of Euboulides and his friends must have contained allegations that disqualified the woman from being a citizen. Therefore, if the witnesses had disputed these allegations by their *ἐξωμοσία*, it would not have been necessary for Euxitheus, the speaker, to call them to the tribunal again to obtain their confirmation of his version: that his mother was indeed a citizen.

In another trial, Aeschines prepares the judges for an *ἐξωμοσία* of Misgolas, who will try to 'cover up' Timarchus' shameful conduct and his own involvement (Aeschin. 1.47):

ἐὰν δ' ἄρα ὑπακούσῃ μὲν, τράπηται δὲ ἐπὶ τὸ ἀναιδέστατον, ἐπὶ τὸ ἐξόμνυσθαι τὰς ἀληθείας, ὡς Τιμάρχῳ μὲν χάριτας ἀποδιδούς, ἐτέροις δὲ ἐπίδειξιν ποιούμενος, ὡς εἰ ἐπίσταται τὰ τοιαῦτα συγκρύπτειν, πρῶτον μὲν εἰς ἑαυτὸν ἐξαμαρτήσεται, ἔπειτα οὐδὲν ἔσται αὐτῷ πλεόν...

But if Misgolas does indeed answer the summons, but resorts to the most shameless behaviour, exempting himself by an oath, as a grateful return to Timarchus and a demonstration to the rest of them that he well knows how to help cover up such conduct, in the first place he will damage himself, and in the second place he will gain nothing by it.

συγκρύπτειν is a better choice of word if one assumes that he denied knowledge, because that is indeed 'concealing'. Misleading the jury by lying, claiming that it was not true, could be phrased in stronger terms. By saying οὐκ οἶδα or ἐξόμνυμαι one

¹⁸ The English versions of Demosthenes, Isaeus and Aeschines are adapted from the translations of N.W. and N.J. DeWitt, E.S. Forster and C.D. Adams respectively.

did not say: 'I know it was different', but at best what we may paraphrase as: 'My knowledge does not include what the deposition states.'

However, if a speaker presents a witness who takes the oath of exemption, he will try to prepare the audience. He gives alternative reasons for why it is taken, which show that it is not a complete lack of knowledge that leads to the refusal to testify. The passages make good sense if the witness does not express the view that he regarded the text as false. Isaeus does so in an unobtrusive way (Isae. 9.18–9):

οἷδ' ὅτι οὐκ ἂν ἐθελήσειε μαρτυρῆσαι ἐναντία ταῖς διαθήκαις αἷς αὐτὸς ἀποφαίνει. Ὅμως μέντοι καὶ κάλει Ἱεροκλέα, ἵνα ἐναντίον τούτων μαρτυρήσῃ ἢ ἐξομώσῃται.

ΕΞΩΜΟΣΙΑ

Ἀκριβῶς μὲν ᾔδειν.

I am sure that he will not be willing to give evidence to the detriment of the will which he is himself producing. But for all that, summon Hierocles that he may give his evidence before the court or else swear to his ignorance of the fact.

OATH OF DENIAL

I knew it well.

Another indication of the wider meaning of the oath is the way in which the litigants introduce the decision of the witness to confirm or deny: in most cases they use the word *ἐθέλειν* to describe this decision. The preceding example of Isaeus may suffice.¹⁹ Thus before the actual statement the witnesses are depicted as having and making a choice.²⁰ They can decide whether or not they 'want' to confirm what the speaker has drafted. In this way the speaker insinuates that the unwilling witnesses are not just ignorant but know the truth (implying that the deposition contains nothing but this truth) – no matter whether or not the witness decides to confirm it. So even where the choice is between confirmation and perjury (Dem. 19.176, 29.15; Aeschin. 1.67), the perjury need not consist in denying the fact. Since *ἐθέλειν* implies familiarity with the facts, the harsh accusation is appropriate even if the witness does not deny the truth of the deposition but only his knowledge of the truth.

The evidence being so, there is no obstacle to the *ἐξωμοσία* meaning denial of knowledge, not denial of facts. The distinction may at first sight appear to be blurred when the testimony concerns an act by the witness himself. In this case it is not possible to commit the act without at the same time knowing that it has been committed. Denial of knowledge is thus – from a logical point of view – identical with denial of the fact (certain mental states aside). Another passage from *Against Euboulides*, however, demonstrates that litigants nevertheless upheld the distinction. Euxitheus accuses Euboulides and his 'gang' of robbing some true Athenians of their citizen rights during the *διαβήφισις* while procuring it for others who are not of Athenian blood (Dem. 57.58–9). He now acts as if his opponents were to testify to their selling citizen rights to aliens. For he says (§59):

¹⁹ Cf. also Aeschin. 1.46, 50, 69, Dem. 45.56, 59; in the passage from *Against Stephanus I* the usual term is replaced by *μέλλειν*.

²⁰ One may even suppose that the formulaic use of *εἰδέναι* in depositions was once introduced to give someone who was summoned against his will the opportunity to decline to testify. For only in this way is a 'no' not a denial of the fact – which would be a dangerous statement that makes the witness liable to a suit by the litigant.

καὶ ταῦτ' οὐκ ἂν ἐξομῶσαιτ' Εὐβουλίδης οὐδ' οἱ μετ' αὐτοῦ μὴ οὐκ εἰδέναι.

And Euboulides will not swear that he has no knowledge of this, nor will his friends.

Again the word *εἰδέναι* is prominent, as in the witness formulae and the explanation provided by Pollux. But if the *ἐξωμοσία* were a denial of the fact itself, it would be strange to say they deny 'knowledge' of the fact: the 'witnesses' are identical with the (alleged) offenders, so if they could, they would probably deny that they have *done* the deed, and the speaker could very well call it thus. Doing it is inseparable from knowing that one did it. And if the *ἐξωμοσία* stated that Euboulides did not procure the naturalisation of non-Athenians, it would be more natural to say so. As a consequence, we must assume that by taking the oath Euboulides would only have stated that he 'had no knowledge' of having done so – even if that seems absurd to us.

Thus even in the cases in which denial of knowledge and denial of fact have virtually the same result, the litigant speaks of the former. Taking the *ἐξωμοσία* may in some cases have practically implied disputing the correctness of the deposition, but only the fact that the witness claims 'not to know' is relevant and exploited. Moreover, the 'status' and force of a statement is different if it is not assertive but indifferent and no more than a refusal to say anything. The distinction between not knowing and not doing may look like splitting hairs. However, I have not been able to find a passage where a speaker attributes to his witness a clear denial of the facts mentioned in the deposition. It is therefore impossible to draw a line between the formal (*de jure*) significance of the *ἐξωμοσία* in Athenian jurisdiction and its use and interpretation by speakers. It seems clear that there is neither a separate formulation for the denial of fact nor an instance of the speaker expressly attributing this meaning to an *ἐξωμοσία*. So we have to assume that this type of statement was not envisaged in the Athenian administration of justice. Nor was it perceived like this by the audience – at least if we can judge by the use litigants (both friends and foes of the witnesses) make of it.

What seems to be a blatant deficiency of the system becomes perfectly understandable if we look at the way the system worked. In an Athenian trial two opposing speakers are given the opportunity to plead their cases in continuous 'presentations' based purely on rhetoric. The documents that are read out are not obligatory parts of the speeches but optional aids to support the argumentation. Thus the speakers are absolutely free to employ them or dispense with them: just as there are speeches without quotation of any law, similarly nobody can force the speaker to present any witness. The cases of *ἐξωμοσία* in which the witness is 'disproved' by further evidence are indicative that the speaker expected a refusal to testify. Therefore, the speaker includes the summons of the unwilling witness for a purpose different from the mere confirmation of a fact – and only under special circumstances.

Given these characteristics of Athenian pleading, the denial of the truth of a deposition is not a real possibility for the witness. On the contrary, it would be at odds with the idea that the two speakers present their arguments with only the pleas balancing each other, but not with a witness damaging a litigant's case; and it would be extremely strange if a speaker took the risk of being openly contradicted by his own witness.

II

There is a second theory about the *ἐξωμοσία*, which was proposed in this journal some ten years ago. In his study of the oath Christopher Carey pointed out that

testimonies can mix indubitable information with crucial and problematic evidence. As an example he quotes a testimony from Demosthenes' *Against Stephanus I*, after which the above *ἐξωμοσία* is sworn (§60):

Μαρτυροῦσι φίλοι εἶναι καὶ ἐπιτήδευοι Φορμίῳ, καὶ παρῆναι πρὸς τῷ διαιτητῇ Τεισίᾳ, ὅτε ἦν ἀπόφασις τῆς διαίτης Ἀπολλοδώρῳ πρὸς Φορμίῳ, καὶ εἶδέναι τὴν μαρτυρίαν ὑψηρῆμενον Στέφανον, ἦν αἰτιάται αὐτὸν Ἀπολλόδωρος ὑφελῆσθαι.

[The witnesses] testify that they are friends and associates of Phormio, and that they were present before the arbitrator Teisias when the announcement of the award was made in the suit between Apollodorus and Phormio, and that they know that Stephanus filched away the deposition which Apollodorus charges him with having stolen.

Since part of the statement is definitely correct (viz. that they were present), the witnesses cannot say that they have no knowledge. If they did, the speaker could easily disprove them and thus undermine their overall credibility. Therefore, Carey concludes, witnesses were allowed to specify in their oath and to deny only a detail.²¹

Several objections can be raised against this view, based on linguistic, practical and rhetorical/strategical considerations. First of all, the frequent disjunctions of the type 'He must either confirm the testimony or take the *ἐξωμοσία*,'²² suggest that there is nothing in between.

Second, what happens to the information that is not part of Carey's partial *ἐξωμοσία*? Is it automatically confirmed without the witness saying so? Or does the witness have to explain exactly which parts he confirms and which he rejects? A passage in Demosthenes' *On the False Embassy* illustrates the problem. The orator calls his fellow ambassadors to testify about Philocrates' and Aeschines' dealings during their mission. He mentions a number of points to appear in the testimony and announces that he will summon the ambassadors one by one (§176). If they were to take the *ἐξωμοσία*, Demosthenes promises the judges, he would refute them. It may be reasonable enough to assume that some of them had knowledge of certain things, some of others. Demosthenes himself and his allies within that group may have given a straightforward confirmation of the allegations. The rest, however, would have given very diverse answers. Are we to assume that each witness listed the events he had no knowledge of, leaving out the rest he was familiar with? That would be confusing rather than clarifying the situation.

Furthermore, even if the text in the manuscripts, on which Carey rests his argument, were genuine,²³ why could the witness not dismiss the testimony as a whole?

²¹ (n. 10), 117.

²² Isae. 9.18, Dem. 19.176, 29.20, 45.60, 49.20, 58.7, 59.28.

²³ The chances are that it is forged. A strong case has been made by H. Schucht, 'Über die Echtheit attischer Rednerurkunden', *BPhW* 39 (1919), 1120–7 and 1143–51, who demonstrates that some of the documents in the speech contain only information given in the speech itself. He also calls attention to irregularities in the manuscripts. (The documents are not preserved in the best manuscript S.) J. Trevett, *Apollodoros, the Son of Pasion* (Oxford, 1992), 191 reaches the conclusion that it is more likely than not that the documents in the speech are spurious. Moreover, the first parts (*φίλοι εἶναι*) are similar to those given in Dem. 43; but in the latter speech the witnesses always confirm their kinship, not some vague friendship. How could the witnesses deny this part? In the following section Demosthenes asks the clerk to take out and read *ταύτην τὴν μαρτυρίαν καὶ τὴν πρόκλησιν*. What follows is only one document; the *πρόκλησις* mentioned in the testimony was probably not recognised as an extra document by the forger. The 'testimony' in §25 of the same speech, which suggests a testimony deposed bit by bit, is unrealistic and has, to my knowledge, never been taken seriously.

If there was a single detail in the text he had no knowledge of, could he not express that fact by saying that he did not know? This would be correct from a logical point of view: if anything conflicts with his knowledge, he cannot be forced to confirm.²⁴

This argumentation, however, may be more complicated than necessary. It presupposes that the *ἐξωμοσία* was a real possibility under normal, 'neutral,' circumstances: that a speaker drafts a deposition to the best of his knowledge; the witness then checks which parts he can confirm and denies knowledge of the rest. All our evidence, however, suggests that the *ἐξωμοσία* never occurred as a surprise. Instead, the speaker planned it carefully, and he could be reasonably sure whether or not the witness would confirm the testimony. So my final argument is based on the function of the *ἐξωμοσία* in the strategy of persuasion.

Litigants sometimes leave it open as to whether they expect their witnesses to testify or take the oath of exemption. That does not mean that they do not know what is going to happen. There are no *ἐξωμοσῖαι* of neutral witnesses in our texts; the people taking the oath of exemption can always be assigned to the opponent's party. In one case the testimony is obviously even formulated in such a way as to make confirmation impossible without incurring the social 'death' of the witness.²⁵ So it is predictable that the 'witnesses' will eschew the fulfilment of their function. As a consequence, in the speeches which we have, the speaker is always prepared for an *ἐξωμοσία*.

In some cases he does not comment on it. Thus in *On the False Embassy* Demosthenes does not follow up the testimony/*ἐξωμοσία*, neither on a note of triumph nor by countering the denial of knowledge. Whatever the reason for this reticence, it was not because an *ἐξωμοσία* caught him unprepared. For, as has been mentioned, he announces in advance that he can disprove those who deny knowledge. So even though he does not stick to his announcement,²⁶ he was certainly aware that not everybody would confirm. Aeschines provokes two *ἐξωμοσῖαι* in *Against Timarchus*, presenting testimonies to which the witnesses cannot give evidence without risking their reputation. After the first one, he does not state that Misgolas refused to confirm,²⁷ but goes on as if it were clear that the *ἐξωμοσία* was false. In the second case, he uses Hegesandrus' *ἐξωμοσία* only as a demonstration that this man was contemptuous of the gods and the laws. That means that even if Hegesandrus had left out almost everything from the *ἐξωμοσία*, Aeschines would still have claimed that the little remaining part contained perjury.

The witness in the one instance of *ἐξωμοσία* in Isaeus (Or. 9.18) is the man who has possession of the testament of Astyphilus, which is said by the speaker to be a forgery. While the speaker was the next of kin of Astyphilus, the will gives his estate to an unnamed person. The latter was, according to the speaker, the adopted son of Cleon, the killer of Astyphilus' father. A bit later (§19) we hear from the speaker that Astyphilus would not let anyone from that family approach his tomb – let alone (one has to add) inherit anything. Apparently, the speaker requests Hierocles to testify to

²⁴ To put it the other way round: to initiate a *δίκη ψευδομαρτυριῶν* an inaccuracy in a single detail was enough.

²⁵ Aeschin. 1.67; for similar cases cf. below.

²⁶ Cf. D.M. MacDowell, *Demosthenes. On the False Embassy* (Oxford, 2001), 278, who takes it as a sign of the unrevised status of the speech and assumes that in the speech actually delivered Demosthenes made suitable comments.

²⁷ In all likelihood he did so, cf. N.R.E. Fisher, *Aeschines. Against Timarchos* (Oxford, 2001), 183.

the story of the murder. Hierocles' confirmation, however, would make the will he has, which is in favour of Cleon's son, implausible. So the *ἐξωμοσία* is a logical consequence. The relationship between Astyphilus' and Cleon's families in general, and the murder in particular, must be at the centre of the testimony. Moreover, this central point is proved by the speaker's next witness (§19). Thus again the refutation of the *ἐξωμοσία* is independent of the supposed possibility for the witness to exclude part of the text when he denied knowledge of events or facts. In other words, a partial *ἐξωμοσία* does not improve the witness's position.

Finally, Carey's own example: Apollodorus announces (Dem. 45.59) that 'If [the witnesses] really [take the *ἐξωμοσία*], I will have a challenge read to you by which you will catch them in the act of perjury and know that [Stephanus] did snatch the testimony.' Therefore, even if the witnesses restricted themselves to refusing the *καὶ εἰδέναι*-part of the testimony, Apollodorus claims for himself the right to convict them of swearing a false oath. So why should they exclude the *παρεῖναι*-part in the first place?

These are all the cases of *ἐξωμοσία* we find in the orators. The speakers always state what is the content of the testimony, or at least the core of it. After the *ἐξωμοσία* has been taken, they are either silent about it (but still act as if the point at issue had been proved) or they pretend to prove what they are most interested in. Nowhere do we have to assume that an *ἐξωμοσία* was 'selective' in the way Carey proposes. If the speakers were always able to give the impression that they proved the core of the rejected testimony or to ignore the testimony completely – in other words, if the outcome of the summons is certain anyway and the speaker has no need to resort to smuggling in circumstantial evidence – the deliberate mixing of information in the testimony Carey infers from *Against Stephanus I* is unrealistic. Testimonies are drafted either to be confirmed or to be rejected; there does not seem to be a middle way. Therefore, either the entire testimony is written in a way that is acceptable or it will not help the witness that he distinguishes between true parts and those concerned with the *ἐξωμοσία*.

Carey himself has shown how carefully testimonies could be drawn up:²⁸ in one case witnesses are probably requested to confirm a deposition that leaves out information detrimental to the litigant. At first they are reluctant; however, in the end they do confirm because that part of the information that is in the testimony is correct. We know of similar cases: witnesses are unwilling but cannot avoid confirming because otherwise they would lose their credibility – and thus do their own side more harm than good (Dem. 29.20, 57.14). Thus the drafting of such documents was a matter of much caution. Why would a speaker be so clumsy as to include something in the deposition that would, on the one hand, be unlikely to be part of the *ἐξωμοσία* and, on the other hand, worthless if confirmed by the witness?

The speaker is thus in almost total control of his witnesses' actions. The ones on his side will confirm. The opponent and his friends, by contrast, will take the *ἐξωμοσία* where possible. So he will only summon them if he can draft their testimony in such a way that is expedient for him. Either they have to admit that the deposition is correct or the speaker can make it plausible to his audience that their *ἐξωμοσία* constitutes perjury. This even applies to witnesses about whom the litigant cannot be absolutely

²⁸ "‘Artless’ proofs in Aristotle and the orators", *BICS* 39 (1994), 95–106, at 97–101: for example, depositions can be composed so as to leave out essential information (but the witnesses are still forced to confirm) or they can be syntactically ambiguous.

sure as to their sympathies and willingness to confirm. For such ‘neutral’ witnesses, the speaker will normally hand in a testimony that is true (though it may be incomplete) and must therefore be confirmed. Of the five cases of *ἐξωμοσίαι* really taken in our speeches only one concerns witnesses of whose alliances we cannot be absolutely sure (Dem. 19.176). However, we have heard in the earlier part of *On the False Embassy* that among the ambassadors to Philip there were many sympathisers of Demosthenes’ opponent (apart from Philocrates that is: §§116–8, 157). Even Demosthenes seems not to have been sure how many of them would swear exempt.²⁹ So the *ἐξωμοσία* may have served as a demonstration of whose side each witness was on. Thus speakers could anticipate the appearance of a witness of the opponent and prepare the audience in a way that improved their own position or diminished the advantage of the opponent.

This brings us back once more to the theoretical treatment of witnessing in Athens. For Todd states that one of the purposes of provoking an *ἐξωμοσία* was precisely this: to make clear (at least to the judges) whose side a person is on.³⁰ Thus we see again that the content of a testimony is not necessarily worth more than the identity of the person who gives it.³¹

Another purpose of the *ἐξωμοσία*, and perhaps the most important one, becomes clear when we look at when it is employed. All five instances (from four speeches) occur in the first speeches delivered at the respective trials.³² This matches Todd’s explanation: in the second speech there was no need to show who was on the speaker’s side. Yet in most cases of *ἐξωμοσία* this was not necessary anyway, since the unwilling witness was already known as an ally of the opponent. So in addition to Todd’s explanation we need another one. The position of the *ἐξωμοσία* in the first speech is a strong hint at the anticipatory character of the device: the speaker takes the opportunity to ‘introduce’ certain topics and people before his opponent can do so. Aeschines, for example, announces that the prominent politician Hegesandrus will address the judges as supporting speaker on behalf of Timarchus (Aeschin. 1.68):

οὐκ ἡγνόουν ὅτι ὑπερόψεται τὸν ὄρκον, ὃ Ἀθηναῖοι, ἀλλὰ καὶ προεῖπον ὑμῖν. καὶ κεῖνό γε πρόδηλόν ἐστιν ὅτι ἐπειδὴ νῦν οὐκ ἐθέλει μαρτυρεῖν, αὐτίκα πάρεισιν ἐν τῇ ἀπολογίᾳ. καὶ οὐδὲν μὰ Δία θαυμαστόν· ἀναβήσεται γὰρ οἶμαι δεῦρο πιστεῦων τῷ ἑαυτοῦ βίῳ, ἀνὴρ καλὸς καὶ ἀγαθὸς καὶ μισοπόνηρος καὶ τὸν Λεωδάμαντα ὅστις ἦν οὐ γινώσκων ἐφ’ ᾧ ὑμεῖς ἐθορυβήσατε τῆς μαρτυρίας ἀναγιγνωσκόμενης.

I was sure, fellow citizens, that Hegesandrus would disdain the oath, and I told you so in advance. This too is plain at once, that since he is not willing to testify now, he will presently appear for the defence. And no wonder, by Zeus! For he will come up here to the witness stand, I suppose, trusting in his record, honourable and upright man that he is, an enemy of all evil-doing, a man who does not know who Leodamas was – Leodamas, at whose name you yourselves raised a shout as the affidavit was being read.

So by summoning the man the speaker can damage his reputation and credibility – by denigrating him because he has an incriminating text read out by the clerk. The same can be done with a factual point. By anticipating the opponent’s argument and suggesting that he will say something that is not true, one can make it much harder

²⁹ Cf. MacDowell (n. 26), 278.

³⁰ (n. 2), 36.

³¹ Cf. Humphreys (n. 2), e.g. 350.

³² That means they occur in prosecution speeches; Isae. 9, however, is a plea in a *διαδασία*. For this reason the more general term is used.

for him to score a point: before stating his own case the speaker will have to disprove the first speaker, which may be both difficult and time-consuming.³³ Thus by bringing up the issue of the murder of Astyphilus' father, the speaker in Isaeus forces his opponent to respond to this point. By making Hierocles deny knowledge of it and by subsequently corroborating his own version by means of other witnesses (Isae. 9.18–9), he not only suggests that he has got the better arguments. Hierocles also seems to be trying to conceal something that gives rise to doubts about the will he has allegedly forged for the benefit of the opponent (§18). This, however, supports the speaker's theory that Hierocles is conspiring with his opponent in order to secure the inheritance.

The advantage in spending time on the summoning of witnesses (as opposed to raising the issue in the course of monologic argumentation) is not only the vividness of direct confrontation. In addition, the speaker provides for himself the opportunity to have the testimony read out. The judges thus have to listen to it, which may be psychologically more effective than the presentation by the speaker. This may also provide a good explanation of why we have no instance of (or reference to) *ἐξωμοσία* in the extant speeches before 380: if a witness refused to read out the deposition, it had no effect at all. Only later, when the clerk read it out before the witness could confirm or deny knowledge, did the judges hear the content of the testimony. When the witness denies knowledge, the speaker is still free to (pretend to) disprove this denial – which makes the impact of the argument far stronger. The fact that the testimony is worthless because it remains unconfirmed is not an obstacle. Quite the opposite: it is not an infrequent tactic to base one's argumentation on 'documents' that do not exist. One may compare the 'stealing' of testimonies or the argument based on hypothetical *προκλήσεις*.³⁴ What these techniques have in common is that the speaker can draw on 'artless proofs' without actually having them.

III

A short conclusion will suffice. We have to return to a view of the *ἐξωμοσία* that may seem awkward in some respects:³⁵ a witness denied having knowledge of, or having been present at, the events or facts mentioned in a testimony. If he did not agree with any single piece of information, he still had to reject the entire testimony. More complicated explanations do not withstand scrutiny. They are caused by a too 'rational' look at the issue, that is by an attempt to reconcile the Athenian institution of *ἐξωμοσία* with modern expectations of witnesses. However, Athenian court practice was not interested in 'fair treatment' of witnesses by our standards, and the value of a witness had different aspects. The ancient plea was not primarily an instrument to establish the truth but the opportunity for the speaker to make himself and his case agreeable to the judges – and to make his opponent disagreeable

³³ On the *praeoccupatio* cf. e.g. *Rh. Al.* 18.12.

³⁴ Testimonies: *Rh. Al.* 15.7–8, *Lys.* 4.4; *προκλήσεις* for torture: Antiph. 1.11 (and other examples of what has been termed 'hypothetical role-reversal' by F. Solmsen, *Antiphonstudien* [Berlin, 1931], 6), *Dem.* 55.27; for an oath: *Dem.* 31.9. Carey (n. 28), 101 points out that the reading out itself did not cost the speaker any time because the water-clock was stopped and that, furthermore, 'Some mud will always stick.'

³⁵ Earlier scholars holding this view include J. Lipsius, *Das Attische Recht und Rechtsverfahren unter Benutzung des Attischen Prozesses von M.H.E. Meier und G.F. Schömann* (Leipzig, 1905), 878–9 (most precisely in n. 51) and Todd (n. 2), 24, n. 8.

in turn.³⁶ Therefore, the summoning of witnesses, including the provocation of an *ἐξωμοσία*, must be explained as a rhetorical tool in the hands of the litigant (not the witness!). This example should warn us that we must not only ask how a procedural measure in Athenian law would have been used in order to make sense to us, but how it was actually used by litigants – and whether it made sense for them to use it in order to carry the day.

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³⁶ This ‘agonal’ view of Athenian litigation is not undisputed; a number of scholars oppose it in favour of a more ‘rational’ and ‘modern’ view in which the corpus of laws is systematic and in which the courts are an institution aiming to find the truth and give their verdicts strictly according to the laws; see, for example, the writings of A.R.W. Harrison, H.J. Wolf or E. Harris. However, even Harrison (n. 4), 144 largely seems to agree with the interpretation of the *ἐξωμοσία* presented in this article.