# ATHENS' DEMOCRATIC WITNESSES

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Socrates: How would you respond if you were going to lose a case because you had no witnesses?
Strepsiades: Nice and easy.
Socrates: So tell me.
Strepsiades: OK I will: if there were still a case being heard, before mine was called I'd run off and hang myself. (Ar. *Nub.* 776–780)

WHILE DISCUSSING THE CIRCUMSTANCES OF HIS DISPUTE, a speaker in the Athenian popular courts will pause from time to time to direct that testimony be given, or read, that he is "speaking the truth."[1] The witness testimony (*marturia*) then confirms what the speaker has already said himself—and probably for this reason is usually not recorded or even interpolated into the surviving text of the speech. But just what role did these witnesses play? There should be no doubt about the importance of testimony and witnesses for the procedure of the Athenian courts and for the functioning of the Athenian democracy. The passage above is not alone in making clear that testimony was a matter of life and death for the viability of a judicial presentation. The popular courts policed Athens, regulating its citizens' private affairs as well as providing a check on civic government. Witnesses served a vital role for those courts by affirming the information upon which they based their judgments. Not everyone could be a witness, however. Those eligible to give testimony, free adult males, represented only part of Athenian society. Not only children but women and slaves were excluded. Unlike the procedures of a private arbitration, which had the freedom of any private and domestic affairs in Athens and so employed whatever evidence the private arbitrator wished, the civic ideology of the democracy greatly restricted its popular courts' (as well as its public arbitrators') sources of information.

I have incurred many debts to colleagues who have advised me in the writing of this paper, several of whom have taken issue with its claims: they include Victor Bers, Edwin Carawan, Edward Harris, Virginia Hunter, Adele Scafuro, Stephen Wexler, and most especially, the referees for *Phoenix*. At the *XIII Symposion 2001* meeting at Northwestern University, Lene Rubinstein presented a brilliant paper on witness testimony in Athens. Since I had already submitted this paper to *Phoenix* at the time, I have chosen not to try to incorporate any of this important paper's thinking into mine. See now Rubinstein forthcoming.

[1] Andoc. 1.28 is typical: "please call the witnesses of these points" (καί μοι κάλει τούτων τοὺς μάρτυρας). Cf. Lys. 1.29: "witnesses on these points please come forward" (καί μοι ἀνάβητε τούτων μάρτυρες). Lysias (12.61) adds that the witness testimony will give him a breather. During the presentation of testimony the water clock limiting the length of the litigant's presentation was stopped (Lys. 23.4, 11). See Rubinstein 2000: 66–67 (reviewed in this issue of the journal, at 376–378).



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This paper will argue against some recent scholarship which has emphasized the varying statuses of Athenian witnesses and characterized their function, principally in relationship to the litigants, as partisan, their role as other than to tell the truth. The paper will argue instead that an overwhelming mass of evidence indicates that the legally, rhetorically, and politically sanctioned function of Athenian witnesses, in relation to the dicasts and the court, was indeed to tell the truth, to report what they knew. Although, as the self-help procedures of the courts dictated, witnesses were summoned not by the court but by the litigants, their testimony, as free, legally autonomous men, served the needs of the courts and the Athenian demos and not simply the partisan aspirations of the litigants. The paper will also show that beyond the rather limited conceptions of the rhetorical theorists of their time, the practitioners of forensic rhetoric developed sophisticated arguments that confirm the distinct, forensic function of their witnesses within Athenian law and democracy.

The importance of *marturia* is underlined by the number of times speakers try to pass off other forms of argumentation as *marturia*. *Marturia* is the form of supporting evidence *par excellence*. It is very common, for instance, for a speaker to refer to the actions of his opponent as *marturiai* against him.[2] Properly speaking, such actions are only suggestive, *semeia* or perhaps *tekmeria*, but the speakers refer to them metaphorically as *marturiai* in order to elevate their persuasive value.[3] Programmatic statements on evidence consistently give witness testimony pride of place over any other form of proof, though conceits can obscure this fact.[4] Lysias 7.37 is typical: "you know, I came to such a point of eagerness because I thought it was in my interest that you discover the truth of the matter from *basanoi*, from witnesses, and from *tekmeria*." The sequence *basanoi* (the torturing of slaves), *marturiai*, *tekmeria* (Aristotle calls them "sure signs")[5] is ostensibly in

[2] Aeschin. 2.64; 3.27; Antiph. 2.2.8; 5.9, 15; 6.32, 41; Dem. 27.7; 28.4; 34.17; 37.18, 31; 38.11; 41.19, 20; 43.47; 46.19; 47.4; 55.7; cf. 58.27; 59.62–63; Hyp. 1.F4; Isaeus 2.38; 3.55; 6.12; 7.18; 8.14. Isocrates (21.14) cites a situation in which the opponent's intimate knowledge of the person for whom the speaker is speaking would allow him to testify to the man's innocence; cf. Lyc. 1.29, 35. Many passages are cited in the footnotes of this paper. It is important to note how much evidence there is without burdening the text of the paper. Those passages that provide programmatic statements are indicated by italic script.

[3] Cf. Dem. 25.97; 36.27; 44.49; 48.11; Din. 1.64; Lyc. 1.97. Isaeus (8.14) argues that simply by refusing the challenge to have slaves tortured his opponent has "testified" against himself. Aeschines (1.130) makes the suggestion of Athena as witness; in 2.91 he presents the *boule* as his witness; Apollodorus (Dem. 59.88) presents the *demos* of the Athenians. Hypereides (1.14) refers to time as the most reliable witness. Cf. Dem. 33.23; Hyp. 6.1; Isaeus 5.41.

[4] See Dem. 22.22; 50.3; 52.32; Isaeus 3.20–21.

[5] A *tekmerion* is a "sign" (such as the refused opportunity for a *basanos*), from which it is still necessary to make disputable inferences. Although the rhetoricians attempt to discern distinctions between *tekmeria*, *semeia*, and arguments based on probability (*eikota*; Arist. *Rh.* 1.2 1357a22–b21; 1.15 1376a18–23; Anax. *Rh. Al.* 7–14), in practice it is difficult to distinguish them. For our purposes it is likely best to say simply that they are all inferential arguments. The orators tend to interweave arguments supported by witness testimony and by signs (Antiph. 2.3.9; Dem. 33.22; 40.60; 47.12;

descending order of importance. But we have no report of evidence adduced from a *basanos* being used in court, so the first element relies on a conceit.[6] The appearance of the *basanoi* here thus represents a form of evidence that is prior to *marturia* not only in terms of credibility, but also temporally and conceptually. By the time of the contest before the democratic court, the opportunity to perform a dispute-ending *basanos* has passed.[7] Challenges, whether to *basanos* or oath, generally serve to bolster the credibility of witness testimony in situations where the two sides present conflicting testimony (Dem. 47.5, 8; Lyc. 1.28). They are therefore a sort of second, extra-judicial order of proof.[8] The exclusion of slave testimony (educed by such challenges to torture) from the democratic courts, as well as the limited use of free testimony supported by oaths, underlines the special place of *marturia* as the testimony of free men, the principal method of proof in the Athenian courts.

Litigants refer to the cases they are presenting as consisting of only two elements: their statement and testimony.[9] The litigant's own statement incorporates both his account of the events and his application of the law. Witness testimony has the rhetorical power to turn that statement into a fact,[10] since the judges/jurors are said to have relied so heavily on its credibility.[11] In cases where the speaker

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49.2, 65, 69; 50.57; 52.17; 55.12; Isoc. 21.4; Lys. 4.12; 7.42; 12.33; 19.27, 55; 18.16). The speaker in Isaeus 4.12 makes a special argument that in inheritance disputes more consideration ought to be given to *tekmeria* than to witness testimony (cf. 4.17, 23; 8.6; compare 4.26). Clearly the normal practice was to value witness testimony more.

[6] I have argued that *basanoi*, when they are conducted by the agreement of both sides after a challenge, decide cases and could thus rarely, if ever, be presented before judges. See Mirhady 1991b; 1996; 2000a; 2000b; Hunter 1994. Thür (1977; 1996a; 1996b), Todd (1990), and Gagarin (1996) have rejected the view that the completed torture-challenge always ended dispute over the issue for which it was used.

[7] Arguments can be made only from that missed opportunity to use this decisive form of evidence, not from that evidence itself. These arguments are often extremely elaborate, but that does not diminish the fact that they are based on a phantom, since they refer to circumstances in which the *basanos* was not in fact used; Gagarin (1996: 1 *et passim*) applies the term "legal fiction." The term that Gagarin applies to the *basanos* that might result from a challenge, "evidentiary *basanos*," is very useful so long as it is not understood to describe "evidence" that might then be evaluated by judges. Only the challenge to the *basanos* that *might have been* is evidentiary in this sense.

[8] Dem. 49.42; 55.5–7; 57.11–12; 59.120; Isaeus 8.10, 13, 28; cf. Isaeus 12.10. To my knowledge, only two passages in all the Attic orators refer to *any* challenge being fulfilled and its evidence being brought before the court. In Dem. 49.43 Apollodorus refers to a challenge by his opponent Timotheus before the arbitrator that Apollodorus produce the bank records, which Apollodorus did. But in the next section it is clear that Timotheus still disputed the point, so it is unclear to what extent Timotheus' challenge was a formal one and to what extent he could have agreed that it was fulfilled. In Dem. 48.48–49 a challenge is mentioned that would have produced evidence to be evaluated in court, but it was not accepted. It is unclear how seriously the challenge is to be understood.

[9] Cf. Lys. 14.3. Several passages refer to their statement and the presentation of testimony being the contents of a case: Antiph. 5.84; Dem. 48.31; 59.49, 119; cf. Arist. *Rh.* 3.13 1414a30–35.

[10] Antiph. 4.1.1; 5.84; cf. Isaeus 3.9; 6.15; Arist. *Rh.* 1.15 1376b16–17.

[11] Dem. 47.3; 57.17, 36. In Antiph. 5.94, "for now just become discerners of the case, next time become judges of the witnesses; for now you have opinions, then you will decide the truth" (νῦν

must refer to previous, perhaps related, cases that have gone against him, it is useful for him to shift the blame away from the democratic judges. He will say that they were deceived; he will blame his opponent and especially his opponent's witnesses, who deceived the judges on matters of fact (Dem. 59.6; Isaeus 5.8). In Demosthenes 46.4 Apollodorus attempts to review the place of witnesses in the Athenian court. He argues to the dicasts, "you would not know whether what each side says is true or false unless someone provided witnesses also."[12] Simply providing credible witnesses seems most to the point in supporting a case.[13] Against the opponent, his failure to provide witnesses is given as sufficient reason to disregard his arguments.[14] Even a single witness can be deemed sufficient (Isaeus 5.3). Where a speaker has no witnesses, he has to argue that the context did not allow it.[15]

*Marturiai* were the strongest piece of evidence available for supporting the *credibility* of a litigant's case. But there were other documents whose *persuasive* value might be stronger, namely, the laws and decrees of the Athenian *demos*. These were, however, not always pertinent to the case, which underlines the fact that credibility is not the only factor determining the persuasiveness of witness testimony. In Demosthenes 29.32 this point is strikingly emphasized: "could any speaker or sophist or charmer appear to you to be so wondrous and clever at speaking as to persuade anybody with this testimony?" The testimony referred to, which is quoted in 29.31, concerned only a procedural point, not the central issue of the dispute. Since witness testimony, however, is so seldom challenged, when we read the Attic court speeches we can generally assume that what a witness

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μὲν οὖν γνωρισταὶ γίγνεσθε τῆς δίκης, τότε δὲ δικασταὶ τῶν μαρτύρων· νῦν μὲν δοξασταί, τότε δὲ κριταὶ τῶν ἀληθῶν), where the words τῶν μαρτύρων ("the witnesses") have sometimes been challenged, the nexus of thoughts suggests that there is an intimate connection between the functions of the judges as such and the witnesses. The speaker wants the judges to discern only procedural issues first. Subsequently, they can decide issues of fact, which entails "judging" witness testimony.

[12] Cf. Ar. *Vesp.* 782–783; Lyc. 1.23.

[13] Antiph. 6.28–29; Dem. 22.22; 36.54; Isaeus 6.15; 8.29. Note also the passage of Aristophanes at the beginning of the paper.

[14] Aeschin. 2.162; Dem. 19.120; 30.19–21, 23, 30; 33.26; 40.21, 61; 40.53–54; 43.30, 39–40, 41, 60; 46.2; 49.37, 39, 41, 45, 55–56; 52.22; 57.11; Isaeus 3.25–26; 12.11; Lys. 7.23, 38.

[15] Antiph. 5.81, 84. The introduction of witnesses in Antiphon 6 is odd and suggests that witness testimony may have been used even in speeches where we see little indication of it. A word indicating their presence only appears between sections 15 and 16, before the word μεμαρτύρηται. But Antiphon has used the word ἀποδείξω at the beginning of 15 (cf. 6.33), and an *apodeixis* appears to derive as a rule from witness testimony (cf. Lys. 17.10). These witnesses must actually present their testimony. I suggest that the speaker actually pauses in 39, after Ἀθηνᾶς, for them to do so then. The following words, καὶ μετὰ τοῦτο, suggest a more substantial break than the editors concede with a colon. Likewise, the words μάρτυσιν ὑμῖν ἀποδείξω in 41 indicate that witnesses must be introduced once more. Cf. Gagarin (1997b: 242), who rightly points out that the choregus, as an experienced litigator, did not need to have places for witness testimony indicated for him. My guess is that witnesses are introduced at the end of 44 to the matters dealing with the transition from the first *basileus* to the next, and in 46 between ἀπογράφεσθαι and καὶ ἱκανά for his opponents' reticence during the speaker's activities as a councilor.

affirms will be conceded by the opposing side. That being the case, the witnesses clearly do not often testify to the specifically critical points in a case. Rather, their testimony can be used to build up a mass of credibility for the speaker, not generally about his character or status (or theirs) but regarding the circumstantial details surrounding his dispute and his attempts at dispute resolution.[16]

Despite the importance of the *marturia*, the sources for it are limited in democratic Athens to the class of free, adult males. Women, children, and slaves cannot, properly speaking, present *marturia*, though their statements can certainly be conveyed by the speaker, but with less rhetorical force[17] since they are reported by hearsay and no one need take legal responsibility for them. As Bonner (1906: 127) writes, "this conclusion is not based upon any distinct statement in our authorities, but is a matter of inference from the absence of explicit reference to the testimony of women in any of the extant cases."[18] Women's statements can be offered by a speaker as oaths[19] and slaves' by means of the refused challenges to have them tortured by both sides to the dispute. The challenge mechanism could serve as a formalistic method for raising the credibility of such hearsay evidence. Edward Harris (1988: 45–52) argues on the basis of Dem. 49.42, unsuccessfully I believe, that Athenian males younger than eighteen could give testimony, and by extension he suggests that women were also not excluded from acting as witnesses. But beyond the lack of positive evidence for this understanding, it seems unlikely that any youth (or woman or slave) could take legal responsibility for his statements, since he would have had to run the risk of a suit for false testimony.[20] There is certainly no evidence at all that young children gave testimony in Athens.[21] Slaves, and others, could provide "information" (*menusis*),

[16] Passages dealing with the relevance of testimony: Isoc. 17.38; Dem. 45.18; 59.93; Aeschin. 1.71, 160.

[17] Dem. 27.40. On the exclusion of slaves, see esp. Thür 1977; Gagarin 1996; Mirhady 2000b. On women, see Leisi 1907: 12–18; Bonner 1905: 32–34; Gagarin 1998.

[18] Lysias (32.12–18) describes a woman taking an active part in a family meeting. She does not, however, appear to give testimony in the democratic court. In Dem. 59.46 a woman also speaks before private arbitrators. Demosthenes (57.67–68) and Isaeus (12.5) show, moreover, that even where women are available who have knowledge, only their men testify in the democratic court. Lampis in Dem. 34, although described as a slave (*oiketes*, 5; *pais*, 10), is also a shipper (*naukleros*, 18) and resides at Athens with his wife and children (37). He is said to have testified before a private arbitrator (28, 31, 41), and given conflicting testimony (49). He does not, and I believe cannot, give testimony before the popular court (47). Cf. Hunter 2000: 6, n. 13.

[19] See Mirhady 1991a; Gagarin 1997a; Thür 1996a.

[20] Youths were also presumably not yet enrolled in their demes and so not yet recognized as enjoying the full rights of citizens (or of free adult males). See Vestergaard *et al.* 1992 for evidence of deceased minors only exceptionally being described by their demotic. Lysias (32) describes a case in which younger children's testimony might have been used with great effect had it been normal practice to use it. Trevett (1991: 21–25) enumerates several other arguments against Harris's view, which I think are decisive.

[21] In Dem. 47.69–70, the possibility of women and children swearing out an accusation to a homicide that they alone witnessed is abandoned because of the social disapprobation it would bring.

which might be used as the basis for investigating wrongdoing, but it was not provided in court as testimony. The *menusis* is sometimes referred to loosely as *marturia*—as are many other things, as mentioned above—but a *menusis* was not accepted as credible without being checked, since a slave had so much to gain from it (he might, for instance, receive his freedom).[22]

The legal status of witnesses and their testimony, as well as their rhetorical significance, should thus not be doubted. As a study of witnesses and democracy, however, this paper delves more widely into the rhetorical and democratic contexts of Athens' judicial epistemology. Aristotle notes how laws (and presumably judicial systems) are framed to suit the constitutional arrangements of city-states.[23] Athens' laws and judicial system are democratic. Hansen (1999: 73–85) and others have pointed out that Athenian democracy had two basic principles, freedom and equality. A rough understanding of "democratic judicial epistemology" might characterize its "knowledge" as whatever a majority of witnesses attested: Socrates claims in Plato's *Gorgias* (471e), for instance, that the rhetorical method of the democratic law courts involves refuting one's opponent by introducing many reputable witnesses while he only provides one or none (cf. Leisi 1907: 107). He suggests that there was a radical democratization of the judicial process wherein a litigant secured victory by getting out a bigger team of witnesses. But that is not an accurate picture of the role of witnesses that emerges from the speeches of the Attic orators. Certainly "justice" in a particular case was ultimately whatever a majority of the dicasts decided. But in Athens the factual truth of a litigant's statement needed the attestation of only one free male witness who was knowledgeable about the fact in dispute. There is no question of majority votes of witnesses. The criticisms of some against democracies, that they are ruled by and for the many and the poor, are not credible in regard to the role played by Athens' witnesses. Athens' witnesses are democratic in the sense that they are all *free*, adult males, whose credibility is *equal* beyond this fundamental status distinction. Their role, however, is also distinctly forensic, governed by the rule of law: they were expected to tell the truth.

The amount of data available about the actual practice of witnesses in Athens is immense, since witnesses are cited in many speeches as often as once every three sections or so.[24] The two standard studies of Athenian witnesses by Bonner

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Clearly, in this case the possibility of women and children testifying under oath in a homicide trial, if there really was one, was not worth pursuing. If a group of free men had witnessed the homicide, it would have been a different story.

[22] The instances of slaves being referred to as giving testimony in Antiph. 1.30 and 5.48 appear to result from such confusion; cf. Bonner 1905: 35, n. 4. See also Antiph. 2.4.7; Dem. 34.46; Lys. 5.4. On *menusis* dealing particularly with religious offences, see Osborne 2000: 81–85.

[23] Arist. *Pol.* 3 1282b1–9; 4 1289a10–20; 5 1309b14–15. Isocrates (15.309) makes clear that he wants to see Athens' courts run democratically and even-handedly in civil matters, but with a consideration for excellence in politics and military matters. Cf. Dem. 24.24, 34, 69, 76.

[24] Todd (1990: 23 and 27) counts six citations of witness testimony in every 100 sections of forensic oratory, a total of 404 instances of witness testimony in all. He also provides (39) excellent tables on

and Leisi, now almost one hundred years old, focus on strictly legal questions concerning evidence and testimony: what sorts of people were competent as witnesses and on what sorts of matters they could legally give testimony. Bonner (1905: 47) made the interesting observation that all witness testimony came to be presented in written form sometime early in the career of Isaeus.[25] But except in making the witness more accountable for the specific information to which he testified, this change did not, I believe, greatly affect the function of Athenian witnesses. Bonner made no link between the change and the principles of democracy, and he and Leisi offer no general account of the tactical, rhetorical role of witnesses in a litigant's presentation, let alone their political role within the democracy. Bonner (1905: 3) claimed to deal with the whole subject from the standpoint of English law, which was for him "the most perfectly rational system of rules ever devised for ascertaining the truth about matters in dispute." Bonner and Leisi's approaches did not employ the legal anthropology that has characterized more recent research and seen legal systems as embedded in society.

Sally Humphreys is one of the first to have pioneered this newer approach for the Greek world, and she emphasizes the need in a court presentation to recreate the private social sphere before the public court. She argues along lines similar to Plato's (1985: esp. 313). She puts her emphasis, however, not on the number of witnesses, as Plato did, but on their reputability. She argues that what witnesses testified was not very important, but that, instead, their presence set the scene against which the litigant wished his own actions and character to appear, and she details a hierarchy of witnesses ranked by their putative credibility. According to her view, it matters more who a witness is than what he has to say. More recently, Stephen Todd has attempted to complement Humphreys's account[26] by emphasizing the legal responsibility of witnesses in sharing the risk of the litigant: if the opposing party loses, a witness may be made responsible for the damage done to that party through a suit for false testimony. For Todd, "witnessing in Athens is a ritualized socio-political act of support." He understands an Athenian witness as offering "to share his principal's danger": "it is for the opponent to decide whether to take that offer up."[27] Relying on "familiar principles of agonistic

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the frequency of witnesses in different orators and in different classes of speech. Also helpful would be tables on the frequency of witnesses who testify about events in the process of litigation, such as the serving of summonses and at challenges, rather than about the primary issue of the litigation.

[25] See now Rubinstein 2000: 72–75, emphasizing how this reform widened the gap between witnesses and *synegoroi*. I suspect that she overstates the extent to which an oral witness, with the water-clock stopped, could play the role of co-pleader and thus win extra time for the litigant's presentation. But, as she admits, we are in the realm of conjecture here, and Rubinstein's conjectures are well worth making.

[26] Todd 1990: 23, n. 5. Osborne (2000: 80) argues in a similar vein: "witnesses as supporters of speakers in court play a part in the gaining of honour by the successful party, and share the loss of honour by the losing party."

[27] Todd 1990: 27–29; 1993: 96–97. He finds corroboration for this view also in the historians Herodotus and Thucydides, though the evidence from them is at best equivocal. He cites Hdt. 2.18.1,

societies" as well as comparative evidence, David Cohen (1995: 107–110) has put forward the most radical view of witnesses in the Athenian courts thus far. He argues that witnesses were expected to lie for their friends, that they were part of a large legal mechanism used for the purpose of pursuing personal and political feuds.[28]

All these views have difficulties which point toward a different understanding. First, since it is very often difficult, if not impossible, to determine who the witnesses in the Athenian courts are, their identity and status seldom seem a significant factor.[29] The witnesses' anonymity puts greater emphasis rather on their generic status as free adult males. In their testimony itself, which we generally do not have (but see, e.g., Dem. 35.14, 20, 23), the witnesses did of course identify themselves. That the speakers put so little emphasis on their identity, however, indicates its generally limited legal and rhetorical significance.

Where witnesses are identified,[30] it is very often not by name and generally only for the purpose of showing that they were actually in a position to know what they are talking about.[31] They can thus testify to and so confirm what is true. They were, first of all, present at the incident in question.[32] Sometimes they are simply the sort of people who should know that sort of information.[33] In matters regarding an estate, for instance, litigants call relatives as witnesses;[34] about citizenship or

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for instance, for witnesses as "somebody (or something) which supports [Herodotus'] argument on this point," but the oracle of Ammon is hardly a partisan supporter of Herodotus, as Todd would have it, and the Carian graves on Delos are hardly "at the moment supporting" Thucydides (Thuc. 1.8.1).

[28] Cf. Rubinstein 2000: 71, n. 138.

[29] Anonymous witnesses appear in the following passages: Dem. 25.58; 27.22, 26, 28, 33, 39, 41; 31.19, 30; 32.13, 16, 19; 33.8, 12, 15, 18, 19, 27; 36.10, 13, 16, 21, 35, 40, 48, 56, 62; 37.8, 13, 30, 31; 38.3, 13; 39.5, 7, 15, 18, 19, 20, 36; 40.33, 35, 44; 41.11, 24, 26; 42.8–9, 16, 23; 43.31, 35, 42–46; 44.14, 30; 45.13; 47.10, 24, 27, 32, 40, 48, 51; 48.3–4, 33–34, 49; 49.43; 50.13, 28, 37, 40, 42, 56, 68; 52.19, 31; 53.19–21, 25; 54.6; 55.14, 34; 57.19, 25, 27, 28; 58.32; Isaeus 1.16, 17; 2.5; 3.7, 14, 15, 37, 43, 53; 5.2, 4, 13, 18, 24, 33, 38; 6.16, 26, 34, 42; 7.10, 32; 8.11, 13, 25, 27, 47; 9.6, 9, 20, 28. In Dem. 21.21, 82, 93, 107, 121, 167, and 174, the texts of the witness testimonies that appear in the manuscripts identify the witnesses, but their identity is not otherwise referred to in the text of the speech.

[30] The following passages identify witnesses by name, but beyond that simply as people who know about the matter under dispute: Dem. 41.11; 42.29; 48.47; 49.18, 42; 52.21; 54.9, 10, 12, 32; 57.44–45; 58.8–9, 21, 26, 33, 35; 59.22–23; Isaeus 1.32; Lys. 4.10–11.

[31] The following passages put emphasis on the importance of witnesses knowing what they are testifying about: Andoc. 1.18; Antiph. 4.1.7; Dem. 22.23; 38.6; 41.14–16, 28; 55.5, 21; Isaeus 2.37; 8.6, 42; 9.29; Isoc. 17.16; Lyc. 1.19; Lys. 7.18–19; 12.46–48.

[32] The following passages put emphasis on the fact that the witnesses were present: *Isaeus 3.19–20*; 5.6, 20; 6.7, 37, 53, 60; 8.14; 9.4; Lys. 1.42; 3.14, 20, 28, 37; 7.20; Isoc. 20.1; Dem. 35.19; 36.24; 37.17; 41.16.

[33] Anonymous witnesses identified only to explain why they know what they do: Aeschin. 1.100; 2.46, 126; Antiph. 4.1.7; Dem. 25.62; 37.17; 39.24; 40.31; 41.6; 43.70; 45.37; 47.67; 49.33–34; 50.10, 30; 58.10, 15; 55.5; Isaeus 2.33; 3.13; 7.36; 9.25, 28; Isoc. 17.8, 40; 18.8.

[34] See Dem. 28.5; 30.21, 23; *40.28*; 48.11; 57.20, 22, 37–38, 67; Isaeus 2.16; *6.11*, 64; 7.26–28; 8.14; 9.8, 30; cf. 12.1.

participation in any other society, they call the members of the relevant deme, phratry, or religious association,[35] or even the neighbors.[36] Since witnesses testify to events in many contexts, their identity will vary according to those contexts. In Dem. 59.40, for instance, the former polemarch is used as a witness, not because of the prestige of his position—Athenians knew he was simply chosen by lot—but because he was likely to have known what he was testifying to. The speech goes on to discuss an arbitration and to call as witnesses the people who joined the litigants at a dinner party after the arbitration (47–48), demesmen, members of the genos and phratry (55–62), and the arbitrators themselves (70–71). The need for witnesses could be anticipated on formal occasions, like weddings and related family events, as well as when someone wanted to confront an opponent,[37] issue a summons,[38] make a challenge,[39] or make a statement before his opponent.[40] When drawing up a will, a man tended to summon his friends as witnesses, not people associated with those named in the will.[41] Likewise, when celebrating a child on the tenth day after its birth, a father invited his friends.[42] Witnesses certainly attended both private and public arbitrations (Dem. 54.29). Murder victims call on people and make them witness their dying words,[43] which created an exception to rules against hearsay evidence.[44] Financial transactions were occasions for the presence of witnesses,[45] although such transactions with bankers were carried on without witnesses.[46] When paying back money one summoned witnesses,[47] although the increasing role of writing led to the borrower simply taking back the written loan agreement from the lender (Dem. 34.31). If an

[35] See Dem. 44.44; 52.28; 57.14, 23, 39–40, 46, 67–69; Isaeus 2.16; 3.76, 80; 6.11, 64; 7.17, 28; 8.20; 9.22, 33. Cf. Hunter 1994: 98.

[36] Isaeus 3.13; Lys. 7.18.

[37] Dem. 47.62–63; 52.10; 56.13; Isaeus 8.22. Isaeus (3.19) refers to such events as πρόδηλοι πράξεις. Scafuro (1997: 44–46) makes good use of the programmatic statement on this issue in Isaeus 3.21–22. At Isaeus 3.27 the speaker notes the curious fact that the opponent is relying on the testimony of the husband's uncles even though he represents the wife.

[38] Lys. 3.22; Dem. 33.25; 34.13. A witness to a summons is called a *kleter*; see LSJ and Dem. 40.28, where it seems implied that two witnesses are necessary for this procedure, although more should be provided for a child's tenth-day ceremony.

[39] Lys. 7.22, 33; 32.26; Isoc. 17.23; Dem. 42.19; 46.11; 52.15; 55.27, 35; 59.123.

[40] Dem. 44.36; Isaeus 3.9.

[41] Isaeus 4.23; cf. 8.14, 17; 9.10, 12, 22. At 4.13 Isaeus argues that the witnesses to a will do not know its contents; at 9.13 he says that a great number of witnesses might be summoned to a will.

[42] Dem. 39.22; 40.28, 59; Isaeus 3.30.

[43] Antiph. 1.29; Isoc. 19.12.

[44] On hearsay, see Antiph. 5.74; Dem. 44.55; 46.7, 8; 57.4; Isaeus 3.20.

[45] Ar. *Nub.* 1153; *Eccl.* 448; Dem. 30.38; 35.9; Isoc. 17.2; 21.4.

[46] Dem. 52.7; Isoc. 17.2, 53; 21.7. My understanding of the reason for this is that the bankers' principal role involved simply currency exchange, which could be concluded quickly and without controversy, that is, without the need for witnesses. When bankers got into other lines of financial transaction, the absence of witnesses continued. E. Cohen (1992: 117–118) also notes that the banker's professional reputation obviated the need for his transactions to be witnessed (cf. Isoc. 17.2).

[47] Dem. 33.12; 34.29–30, 32; 38.5; 47.64.

Athenian felt that he had suffered an injustice, his first impulse was to see that the situation was witnessed. Then he might seek to retaliate. (Where someone today might yell "call the police," an Athenian yelled, "call a witness."[48]) In the early stages of a dispute, when the parties were trying to establish their own positions, as well as their opponents', admissions of fact before witnesses became binding.[49]

As with the size of the democratic courts, the more the witnesses, the greater the expectation of accuracy,[50] but there is no sense that Plato's picture of democratic pluralities determines the truth (see above, 260). There seems rather the view that if one witness guaranteed the truth, more guaranteed it better. Where there is conflicting witness testimony, there is recourse not to greater numbers of witnesses, but to the challenges mentioned above, to torture a slave or to accept a statement on oath.

In cases that have an element of notoriety, a speaker will call on the judges to act as witnesses.[51] This very common argument assimilates the status of judges to that of witnesses. Aeschines uses versions of it extensively in his prosecution of Timarchus for prostitution. He alleges that most other witnesses he might have called would have had to incriminate themselves by testifying to what they had done with the prostitute: "if this trial were in another city selected as judge, I would demand that you become my witnesses, since you know best that I am telling the truth" (1.89). There are also countless references to things people know, to what is clear, or to the fact that "all the older men know" (e.g., Dem. 57.60), without anyone specifically being called to testify. Just as Athens' judges belonged to no specialized class of legal experts but were drawn by lot from those Athenian males over thirty who were sworn as judges each year, the witnesses before its courts were free men who for circumstantial reasons had specific knowledge pertinent to the case in dispute.

Two passages shed particular light upon the analogous roles of the witnesses and judges. Isaeus (3.17–23) provides detailed consideration of the testimony provided by opponents in a previous suit. His opponent in this suit asserted that he had had his sister married to a man in the presence of only one witness from his side, whose written testimony (*ekmarturia*) was brought into court (18). One witness might actually have been sufficient, though most people would have sought more because of the likelihood that such a lone witness might die or be otherwise unavailable when needed, perhaps many years later. At any rate, when confronted, the witness disavowed the written testimony (19). Much seems to turn on the testimony of the men who obtained and then presented the *ekmarturia*. The speaker claims that an *ekmarturia* should be witnessed by "the most honest of *citizens* and those most reputable in our eyes," not one or two but as many

[48] Ar. *Ach.* 926; *Av.* 1031; *Nub.* 495, 1297; *Pax* 1119; *Vesp.* 1436–39; Dem. 47.38; 53.16, 18.

[49] Dem. 27.10, 24, 34, 39, 42–43; 42.12, 28; 43.38.

[50] Dem. 57.24; Isaeus 3.16, 40; 6.32; 9.13. Cf. Antiph. 2.1.9.

[51] Aeschin. 1.25, 78, 92; 2.56, 64, 122; Andoc. 1.37; Dem. 21.18, 217; 23.168; 27.57; 29.49; 47.17, 44; 58.28; 59.4.

as possible "good and fine men" (20–21). This is not a straightforward job of witnessing. With an *ekmarturia* the witnesses must act not just as witnesses of an action but apparently as surrogates for the court itself, whose *citizen* judges would have heard the testimony directly if the witness had been able to appear before it. It is for this reason that the speaker puts such emphasis on the reputability and numbers of the witnesses, that is, because they represent the court. Instead of the requisite copious number of witnesses, who might have represented the Athenian court, the opponent is said to have produced only two men, "whom no one else would have trusted about anything" (23). Besides their names, we learn nothing more about their identities or untrustworthiness. In Lys. 7.22 likewise the presence of the nine archons might have taken the place of witnesses (perhaps because they would have represented the Athenian *polis* itself), "or some other members of the Areopagus, . . . for then the truth of your statements would have been ascertained by the very persons who were to decide upon the matter." The Areopagus court was judging this case.

The generic status of the witness as a free man and his consequent personal anonymity are typical of the democratic ideology of the popular courts stretching back to Solon. He gave the courts, in which every citizen, regardless of status, could serve as a *dikastes*, the final say in democratic legal decisions and enabled any citizen volunteer an equal right to prosecute wrongdoing. The only distinction between the judges and the free, adult, male witnesses and litigants over whom they judged was that the judges were all Athenian citizens and over thirty. So despite the value of Humphreys's study as a detailed prosopographical survey of some of the sorts of people that are identifiable as witnesses in the Athenian courts, her account does not give us an accurate description of the governing principles that determined their role. Indeed, even her hierarchy of credibility (1985: 325), moving from "more independent" to "less independent," seems a largely modern construct. The relative personal anonymity of the witnesses and the emphasis speakers put on their knowledge reflect a democratic view that Athens' courts were blind to issues of status except to the extent that its witnesses were, like the litigants who came before them, free men.

Rather than a means of *sharing* risk, the suit for false testimony appears, *pace* Todd, a way of detaching the witness's accountability for his testimony from the outcome of the suit in which he testifies. If his side loses, the witness does not have to pay anything as a result, so he has no share in the loss. A particularly vindictive litigant may sue even one of his losing opponent's witnesses, but that is a separate matter from the winnings entailed in the original suit.[52] If a witness's side wins, he can be charged with false testimony, but that only rarely has consequences for the outcome of the original case.[53] In most cases it is necessary to prosecute the

[52] See Isaeus 3.4–5. On the relative risks of giving testimony for winning and losing litigants, see Rubinstein 2000: 71, n. 139.

[53] See Behrend 1975.

original opponent again in a suit for subornation (*dike kakotechnion*) in order to win redress from him.[54] Certainly witnesses are said to run a risk in presenting their testimony.[55] Their accountability makes their testimony credible. But this accountability of theirs as free, legally autonomous men is all their own. It is not shared. Athenian litigants have the power to compel reluctant witnesses to testify by forcing them to swear to their ignorance or threatening them with a suit for failure to appear as a witness.[56] If the witness's version of the events were other than the litigant's, the opponent would presumably recruit him.[57]

In a non-judicial setting, a witness might formally give testimony (called a *diamarturia*) to support the allotment of an estate. Those wishing to challenge that allotment had to sue the witness for false testimony (Isoc. 18.11, 15; Dem. 44.57–60). Cases of *dike pseudomarturion* that arise from a *diamarturia* use the trial for false testimony as a vehicle for competing claims to an estate. The competing claims and the content of the *diamarturia* are really the issue. Such trials are, as a result, not necessarily very informative about "testimony" and witnesses in general. Where the character of the "witness" is assailed, it is really as opponent, not as witness.

The evidence of Athenian oratory indicates that, *pace* Cohen, witnesses were expected to tell the truth. The speaker's formulaic statement, that the witnesses are to show that he is speaking the truth, would be pointless unless this were the general expectation. Lysias 8.18 suggests that one of the reasons for joining in association with people is that they might testify (justly) for you, but even in this text, which is problematic for several reasons, there is hardly a suggestion that mendacity on behalf of friends is normal (cf. Isaeus 9.25). Cohen appears to have fastened on to the relatively infrequent attacks on witnesses that are found in the orators. Litigants' complaints against their opponents as "sykophants" and their opponents' witnesses as their facilitators do not show that "enmity is taken to justify perjury" (Cohen 1995: 107).[58] These passages show rather what is abnormal and so selected for criticism. Cohen cites Andocides 1.7,

[54] See Dem. 45.2, 52; 47.1, 56.

[55] Demosthenes (40.54) declares the witnesses liable for their testimony; cf. Dem. 41.16; 45.44–45. In Dem. 57.8 a man complains that his having given testimony in another case earned him the enmity of his current opponent. On the extent of the risk, see Rubinstein 2000: 69.

[56] Isaeus 9.18; Dem. 19.176; 58.42–43; 59.53–54, 84; Lyc. 1.20. Cf. Aeschin. 1.45, 67.

[57] On the *kleteusis* procedure, Carey (1995) has already responded to Todd's (1990: 36) claim that by demanding the *exomosia*, "you are forcing the potential witness to declare openly which side he is on." It was not simply a matter of the witness taking sides.

[58] See Johnstone 1999: 147, n. 58 and 167, n. 21. Cf. Lys. 29.7; Isoc. 18.52–57; Dem. 21.139; 33.37, suggesting that it is easy to find people who will testify falsely, but their falsity is in each case identified as transparent and useless. *Pace* Todd (1990: 28), μαρτυρεῖν at Ar. *Eccl.* 561–562 is not a "comic synonym for συκοφαντεῖν." It is important to distinguish the roles of the litigant/sykophant and the witness. That is why μαρτυρεῖν and συκοφαντεῖν are used in the passage. The one verb is used of initiating and prosecuting cases (συκοφαντεῖν), the other for their presentation and argumentation (μαρτυρεῖν; cf. Ar. *Eq.* 1315–16; *Plut.* 891, 932–933): the sykophant and his witness are a team and a perversion of the judicial process.

where the judges are told that many instances have occurred in which witnesses have testified falsely and destroyed people, only later to be convicted of false testimony. Andocides' remarks clearly refer to the judicial abuses surrounding the tyranny of the Thirty. They cannot be used as a general criticism of Athens' democratic judicial process, one in which Andocides himself is putting his trust.[59] Did Athenian witnesses actually tell the truth? We do not know. In their heart of hearts, did the Athenian dicasts expect them to tell the truth? This we also do not know. But the evidence indicates, *contra* Cohen, that the legal and rhetorical mechanisms of Athens dictated that truth-telling by witnesses was normative. It seems unlikely that widespread mendacity could co-exist with such normative expectations and with the legal controls that compelled truth-telling.

A fruitful approach to Athenian witnesses has been explored by Adele Scafuro (1994), who describes how witnesses, in disputes concerning citizenship, performed as a sort of "living communal archive," in a role that would today be filled by written documents. "In the citizenship and inheritance disputes that we find in the orators, the most important evidence for proving identity is that supplied by live witnesses who were present at communal events of personal significance to the individual whose status is questioned" (157). Her study suggests that we should examine not the social but the formal roles that are played by witnesses in the *polis*: "witnessed participation in communal events as a function of being born Athenian was perceived by Athenians as tantamount to 'being-Athenian'" (158). Scafuro's study is limited to Athenian citizens, and it deals particularly with cases concerning citizenship and inheritance. It does not deal with wider issues of witnessing in Athens or with the special issues raised by metics and foreigners, that is, by free non-citizens. (Non-Athenians certainly participated in Athens' courts, both as litigants and as witnesses.[60] Since some of them were in a position to leave Athens more easily than citizens, they could escape accountability for their testimony, which seems to have made them less credible. A proper examination of this question is beyond the scope of this paper.[61]) Scafuro's living communal archive of Athenian citizens reflects a faith in the integrity of the democratic community that it could keep accurate records for the purposes of citizenship and inheritance.

In reacting to the work of other scholars, this paper has argued that Athens' witnesses were democratic, that their status was insignificant aside from their

[59] Johnstone (1999: 164, n. 99) points out that many litigants did not have witnesses to some important factual claims, which suggests that lying was not a matter of routine.

[60] The depositions in Dem. 35.14 list both Athenians and non-Athenians. Aeschines introduces an Olynthian (2.155) and a Phocian (2.143). Demosthenes (47.36) describes a man wanting citizen witnesses, but the emphasis simply seems to be that they not be slaves. Cf. Dem. 47.60; 49.61; 57.29; Isaeus 1.11. Cf. Todd 1990: 27, n. 14; Rubinstein 2000: 47–48, n. 60.

[61] Isaeus (5.8) describes a gang of men by whom the speaker has been defrauded through false testimony as Melas the Egyptian and friends. Specific ethnicities were also a factor.

being free, adult males, that they were expected to have direct knowledge about the facts to which they testified and were selected accordingly, that they were individually legally accountable for their testimony, and that they were expected to tell the truth. Since, however, the role of witnesses was clearly rhetorical in that they served to make statements of the speaker credible and persuasive, it is also worthwhile to consult the rhetorical thinking of the time.[62] But the rhetorical handbooks of the fourth century offer only cursory accounts of the role of witnesses.[63] Their thinking is clipped, inchoate, and largely divorced from the reality of the courts. Aristotle appears to base his reasoning on *a priori* grounds rather than a thorough knowledge of court practice. Indeed, one of the greatest reasons for treating their accounts of witnesses with caution is that the point on which the rhetorical handbooks lay so much emphasis, namely, the credibility of witnesses, arises relatively infrequently in the orators themselves. As Todd (1990: 24) points out, "there are . . . very few attacks on the credibility of the opponent's witnesses, or attempts to defend [one's] own witnesses against such attacks."[64] Anaximenes' *Rhetoric to Alexander* 15 concentrates on five factors, however, that might give grounds to suspect witnesses' credibility: 1) their friendship or enmity with the litigant, 2) bribery, 3) the law against false testimony, whose existence was supposed to suggest that witnesses could lie,[65] 4) the reputation of the witness, and, finally, 5) the oath of the judges, according to which they were not supposed to surrender their responsibility to decide the case by uncritically trusting the testimony of a witness—an argument that appears nowhere in the orators (cf. Aeschin. 1.92). Despite the relative infrequency of discussions concerning the credibility of witnesses in the orators, the issue does come up, so it is worthwhile to follow up on the rhetoricians, particularly regarding the issues of 1) friendship (or enmity), 2) bribery, and 3) the suit for false testimony. The arguments that the logographers develop portray witnesses in a distinctly forensic role, as serving the purposes of the Athenian courts rather than pursuing social, economic, or religious considerations.

Friendship is a natural theme for argumentation surrounding witnesses, since the idea of helping friends and hurting enemies is one of the most pervasive in Greek culture (Dover 1974: 180–184). It was expected that friends would

[62] In his discussion of contracts, Aristotle (*Rh.* 1.15 1376b1–5) makes a helpful distinction between contracts being *credible* and *persuasive*. In the case of contracts, the testimony of witnesses accomplishes only the former.

[63] I argue (Mirhady 1991b: 13–16) that the accounts of Aristotle and Anaximenes (*Rh.* 1.15 1376a17–32 and *Rh. Al.* 15 1431b20–32a3) are similar and probably based on the same source. See also Trevett 1996 for a general account of Aristotle's (lack of) knowledge of Athenian oratory; Johnstone 1999: 147, n. 58, 149, n. 97; Carey 1996.

[64] Anaximenes also suggests that comment need be made concerning witnesses only if they are otherwise somehow suspect (15.2). His account is close to that of Dem. 29.22–23, which D. Cohen (1995: 107) follows closely as a reliable indicator of actual practice. It seems more likely to be based on rhetoricians' theorizings. Cf. Mirhady 1991b: 15.

[65] Isaeus 4.17; 8.12.

not testify (falsely) against friends,[66] so litigants take great delight in being able to present friends of their opponents as witnesses for themselves.[67] Friendship could be fickle, however. If a man was arrested and underwent physical suffering, his "friends" might seek to distance themselves from him by giving (false) testimony against him (Antiph. 5.18). Such concessions are rare. Too close an association between the litigant and a witness suggested grounds for an accusation of false testimony.[68] An opponent is chastised, for instance, because he provides two witnesses only, his brother and brother-in-law.[69] The witness was not supposed to have a direct interest in the outcome of the dispute.[70] If a litigant does want to blacken the testimony offered for his opponent, one of the most common arguments is that the opposing witness is a co-conspirator with the opponent.[71] Dem. 54.31–37 has one of the most sustained arguments against the opponents' witnesses. They are characterized as members of the same aristocratic club (*hetairia*) as the opponent; as such, they bully people and disrespect the democratic judicial system and its mechanism of written testimony.[72]

The conclusion to be drawn generally from these arguments concerning witnesses and friendship is that, from a legal point of view, friendship was to play a neutral role in their testimony. Naturally, a litigant would often have friends present at events for which he needed testimony (Dem. 30.23; 49.38, 41; Isaeus 3.23). Friends spend time with friends. Since the essential first part of a witness's role is to observe, friends will often have observed important events and thus be in a position later for the second part of a witness's role, to give testimony, and testimony to an event is crucial to confirming for judicial purposes that it occurred. But friends were not expected to lie. The witnesses' interests were expected to be distinct from those of the litigants. This sort of neutrality ran against social expectations and marks out the judicial sphere and the witnesses' role as distinct from the social. There would of course be a tension between these spheres, and it surfaces in the speeches for rhetorical purposes. Perhaps it is fair to say that it involves a conceit about just how distinct the roles of friend and witness could ever be. The speaker in Isaeus 2.33, for instance, calls on the arbitrators to a former case to testify to its fulfillment, but, recognizing that they are his opponent's friends, he does not press the point and settles for others who were

[66] See Dem. 45.53, 56, and 49.38, understanding that "friends," in the Greek sense, include family (*sungenoi*).

[67] Aeschin. 1.47; Dem. 29.15; 37.17; Isaeus 1.2; 2.34–35; Lys. 3.19–20; 7.19.

[68] Dem. 45.64; 52.17.

[69] Dem. 47.11, 14–15, 16, 46; cf. Dem. 29.28.

[70] Apollodorus (Dem. 46.9–10) notes the law that forbids a person from testifying on his own behalf. There seems no actual law that forbids a witness from testifying in a suit in which he had some interest, but the force of this law and the comment in Dem. 40.58, "witnesses are those who have no interest in the matter at issue in the suit," seem consistent.

[71] Dem. 33.38; 34.28, 34, 38, 46; 37.48; 39.2; 40.59; 43.4, 38. Todd (1990: 24) also notes Isaeus 5.7–8, 9.22–25, and Dem. 40.57–59.

[72] See Mirhady 2000a: 199–200; cf. Dem. 58.42.

present at the arbitration and its fulfillment. The tension between testimony and the obligations of friendship, which might entail injustice on behalf of a friend, underlines the expectation that witnesses in general told the truth.

Bribery is cited as a reason both for false witnesses to appear[73] and for truthful witnesses not to appear.[74] But witnesses were expected to appear when they were summoned and had truthful testimony to deliver, regardless of the financial consequences for themselves. Nevertheless, a man's wealth in itself created the suspicion that he might bribe witnesses.[75] An accusation of bribery need not even be leveled against a specific witness; simply the charge that the opponent has at some time in the past himself given false testimony was sufficient to suggest that he might suborn testimony from others (Isoc. 18.52–57). Somewhere between friendship and bribery, witnesses might also be accused of acting out of a sense of reciprocal favour (*charis*).[76] Both monetary exchange and pre-monetary reciprocity were thus, like friendship, to be absent from a witness's considerations. The reliance on a number of witnesses might forestall the possibility of bribery, and this may be another reason why multiple witnesses were preferred.

Far from derogating the credibility of witness testimony, as the rhetorical handbooks suggest, the suit for false testimony gave the assurance that witness testimony before the popular courts was reliable. Not to sue witnesses for false testimony in a democratic court is to allow that what they say is true (Dem. 48.44; Isaeus 3.11–12). Statements of slaves had credibility through the coercion of torture, statements of free men through the coercion of the law (Antiph. 6.23). In a private arbitration, where the rules of evidence followed in the popular judicial process were not adhered to, oath-swearing by witnesses may have been common. There is no mention of a suit for false testimony before a private arbitrator; the suit was part of the apparatus of the democratic court (Dem. 34.19). Unlike the judges, who each year had to swear the heliastic oath, witnesses were not generally required to swear to the truth of what they testified.

In Dem. 54.26, the opponent, Conon, is said to have insisted at a public arbitration that the speaker's witnesses swear to their testimony, a highly irregular step since the suit for false testimony and not an oath was to guarantee credibility in that context. (It is thus important to distinguish the word "perjury" from false testimony.)

Witnesses in homicide trials were obliged, of course, to attest to the accusation and swear an oath asserting their knowledge about the culpability or innocence of the accused (Antiph. 4.1.1; 5.12; Lys. 4.4). Here religion and law merge somewhat. Homicide trial procedures are markedly different from other sorts

[73] Aeschin. 2.154; Dem. 19.216; 21.113, 139; 29.28; 44.3; 45.2; 57.52–53; Isaeus 3.39; 4.22; 9.25; 11.43; Isoc. 18.52–57; Lyc. 1.20; Lys. 29.7.

[74] Dem. 21.112; 32.30; Lys. 7.20–21.

[75] Leisi (1907: 11) cites Dem. 21.112, 139; 44.3; 57.52. Isaeus (8.41–42) also mentions physical intimidation as a reason for witnesses not to appear.

[76] Aeschin. 1.47; Dem. 41.16, 49.37; Lys. 15.6. Cf. Anax. *Rh. Al.* 15.

of trials (Antiph. 5.88). Distinctions of status between male and female, adult and child, can be blurred.[77] The speaker in Antiph. 5.95 protests that it is easy to give false testimony against him in what is, essentially if not in fact, a trial for murder. His emphasis, however, is on immediacy. He means that in real murder cases things are drawn out so that there is time for such easy, immediate perjured testimony to be challenged. In capital cases, the anticipated execution of a convicted defendant would be irremediable—he would be in no position to bring a suit for false testimony—so both the prosecutor and his witnesses had to swear to the guilt of the accused three times over successive months so that the sworn testimony could be challenged. Excessive haste in such trials limited the accountability of witnesses (Andoc. 1.7, 74; Lys. 19.4).

The cursory treatments of witness testimony in the rhetorical handbooks lead us to unsurprising argumentation in the orators about ways to challenge or bolster its credibility. But they do not lead us in any sense away from the conclusion that witness testimony in Athens was generally expected to be reliable. The role of witnesses was distinct from friendship, monetary or other rewards, and (for the most part) from the religious scruples of oath-swearing. It was a distinctly forensic role.

The transition from oral to written testimony that occurred early in the fourth century must be one of the most significant phenomena in the history of literacy in the ancient world. It shows, perhaps above all, that the Athenians were interested in the transparency and specificity of the contents of testimony rather than in the identity of the people who gave it. Though it did not greatly alter the function of the witness in the democratic court, it facilitated greater accountability in testimony,[78] even as it foreshadowed a declining need for live witnesses in an increasingly literate culture. The collective memory of the community conveyed through oral testimony that has been described by Scafuro (above, 267) was giving way even during the classical period to the written deme register (Dem. 57.26, 60–61). The witnessed oral agreement and conveyance of goods between parties to a business transaction gave way, at least partially, to the written contract (Dem. 33.36), and the bankers' account books superseded the testimony of countless witnesses to their transactions (Dem. 49.5).

But for a moment in time, as literacy in Athens was still nascent and the idea of using material evidence was still far from the Athenians' minds, the democratic citizen, and more widely the free male, had the most significant role to play in grounding a democratic epistemology for Athens' popular courts. This epistemology was democratic in the sense not of being reducible to politics, to a majority vote of witnesses, but in crediting the legal and civic accountability of the free male as the guarantor of judicial knowledge. Distinct from the realm of friendship, money, or religion, the witness was enjoined to tell the truth as he

[77] Dem. 47.69–72. See Bonner 1906; Gagarin 1998: 41–42.

[78] Dem. 45.44; 46.6; 47.8. A conflict between writing and witnesses is described in Isaeus 5.25.

knew it. This paper has argued from the point of view of the Athenian democracy, its judicial system, and its dicasts. Previous scholarship has emphasized more the point of view of the litigants who, after all, selected the witnesses. The challenge in reading individual presentations of Athenian forensic oratory is in navigating between the systemic expectations that witnesses should tell the truth and the litigants' undoubted desire to use them in partisan ways.

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