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The Hypothetical Witness in Gorgias and Antiphon

The paper below focuses on the shadowy figure of the hypothetical witness found in two mock-forensic works of the late 5th century: Gorgias' Defence of Palamedes and Antiphon's First Tetralogy. I argue that these witnesses, who only exist within the εἰκός arguments found in these speeches, are consistently characterized in impersonal ways, as individuals with knowledge pertinent to the resolution of the case. The issue of their will is also broached, particularly in last rebuttal speech of the First Tetralogy. Though such witnesses, being logical figments, could never appear in court, their characterization sheds important light on the ancient Greek notion of 'witnessing'. Indeed, the very ability of Gorgias and Antiphon to deploy such arguments shows that witnessing was, at least in these cases, not thought to be tied to the witness's prestige or character which remain entirely undefined. Rather, their characterization of a 'witness' as an individual who knows and who is motivated to testify implies that these were the features thought to be fundamental to witnesses, whether real or fictive.

Keywords: testimony, witnessing, forensic oratory, Antiphon, Gorgias

Introduction

Debate persists as to the precise function of the ancient Greek witnesses in contemporary scholarship. In short, though witnesses are almost universally acknowledged to have been fundamental to arguing one's case,¹ the precise function of a witness has been understood in two radically distinct ways.² The traditional model attempts to foist onto witnesses,

¹ SCAFURO (1994: 157); KENNEDY (1963: 89). CARAWAN (1998: 186) argues that they are also technically necessary. An important exception is LEISI (1907: 113). See also THÜR (2005: 147).

² I present both positions in the strongest possible terms even though most discussions are nuanced (e.g. TODD 1992: 27). Moreover, several refinements, most involving the

and through him to the ancient courts more generally, a concern for truth and truthfulness: witnesses are summoned in order to inform the court or – at least – to confirm facts which the litigant has mentioned in his narration.³ Under this paradigm, the witness is almost anonymous,⁴ summoned not because of his prestige or position in society, but because he knows facts which are relevant to the case. Yet, it is clear, both from the procedural rules which governed the use of witnesses and also from the extant forensic speeches,⁵ that this paradigm must be incorrect or, at least, a hyperbole. On the other hand, several scholars have now gone far in the opposite direction, considering the witness to be summoned primarily because of who he is.⁶ Under this paradigm, witnessing is a ‘socio-political ritual of support’⁷ and often far distant from any concern for the facts, quite beyond these rudimentary courts to discover.⁸ The role of a witness, in other words, was to show himself taking the litigant’s side in the courtroom, and in so doing to lend to him all the social privilege that he has accrued from his ancestors and his standing in society. Once again, a convincing case may be made against this extreme position.⁹

The following paper is an attempt to grapple with this question, though in an admittedly unconventional way. I examine Gorgias’ *Defence of Palamedes* and Antiphon’s *First Tetralogy* and, in particular, home in on the figure of the ‘hypothetical witness’. These shadowy figures are the would-be bystanders and fictive witnesses which populate the εἰκός

use of statistical analysis, have now added greatly to the debate: esp. TODD (1992); RUBINSTEIN (2005); GAGARIN (2019).

³ BONNER (1905: 27–38) and BONNER–SMITH (1938: 117–145) are the most important early sources. Similar, though more nuanced positions are given in CAREY (1994a: 183–184), MIRHADY (2002) and O’CONNELL (2017).

⁴ See esp. MIRHADY (2002: 262; 265).

⁵ Most importantly, the classical position is related to an attempt to find a subpoena in the procedural rules. On this issue see TODD (1992: 24–25).

⁶ HUMPHREYS (1985); TODD (1992). Cf. also THÜR (2005: 146), who argues that the ‘principle of determining the truth was not primary’. COHEN (1995) also presents a similar picture, in which witnesses are by-products of political strife.

⁷ TODD (1992: 27).

⁸ COHEN (1995: 109).

⁹ Esp. in CAREY (1994a: 183–184) and MIRHADY (2002: 262–263).

arguments found in these two works. Though no hypothetical person could, of course, be an actual witness – or anything else whatsoever – these figures shed crucial light on the author’s understanding of what it is to be a witness. In other words, I assume that these witnesses are hypothetical, but not entirely fictional since they betray the author’s concerns. What, then, are the qualities of these witnesses and how are they characterized? And how, in what cases and to what effects, do Gorgias and Antiphon employ this argumentative device? These are the questions I hope to address below.

Gorgias’ Defence of Palamedes

Gorgias’ *Defence of Palamedes* is a ‘mytho-forensic’¹⁰ speech composed in the late 5th century.¹¹ Though it has been relatively neglected until recently,¹² a number of scholars have now examined various aspects of the speech and, especially, its genre and purpose.¹³ There is, moreover, widespread agreement that the speech, though clearly modelled to suit its forensic backdrop,¹⁴ is a sophistic *epideixis*, one which showcases the infamous rhetorical abilities of Gorgias.¹⁵ In this respect, it resembles the other speeches and fragments attributed to a sophist who, as Goebel notes, never seems to have composed actual forensic speeches.¹⁶ Nonetheless, many scholars attribute a second purpose to the speech, a didactic one.¹⁷ Like Antiphon’s *Tetralogies*, the inherently antilogical¹⁸ *Pal-*

¹⁰ KNUDSEN (2012: 33).

¹¹ On the date of this speech see SEGAL (1962: 100) and GOEBEL (1983: 143–145).

¹² A survey of the older literature on the speech is given by TORDESILLAS (1990: 241–242).

¹³ See UNTERSTEINER (2008: 202–203); KERFERD (1980: 78–79); and MCCOMINSKEY (1997: 17–19) attempt to integrate the *Palamedes* with the rest of Gorgias’ writings. For a different view see LONG (1982: 243). See also TORDESILLAS (1990: 241–243).

¹⁴ Unlike the *Helen*, therefore, it is delivered in the first person (GOEBEL 1983: 146–147) and constitutes, in effect, a defence speech in a mythical trial which adheres to the court conventions (KNUDSEN [2012: 34]). On the importance of the courts in sophistic thought also see GAGARIN (1994: 59) and LAMPE (2020: 117).

¹⁵ E.g. KERFERD (1980: 78–79); GOEBEL (1983: 137); GAGARIN (2001: 287); KNUDSEN (2012: 36).

¹⁶ GOEBEL (1983: 137–138), referring to Dionysus of Halicarnassus.

¹⁷ E.g. MCCOMINSKEY (1997: 18) KNUDSEN (2012: 38).

amedes showcases various rhetorical tropes¹⁹ which may be used by litigants in court.²⁰ Unlike the *Tetralogies*, however, the *Palamedes* is firmly set in the mythical past. Though this surely would have added a measure of poetic polish to an otherwise dry exercise of logic,²¹ it is also clear that Gorgias has grappled with the myth in a number of ways. Palamedes's ἔθος, for example, is largely formed by a catalogue of inventions attributed to the culture-hero.²² More importantly, at least for the purposes of this paper, Gorgias has tampered with the myth itself: he has removed the false evidence with which Odysseus is supposed to have secured his conviction.²³ In effect, then, he has weakened his opponent's case. And, considering the infamous Protagorean promise of making *weaker* arguments stronger,²⁴ we may, perhaps, risk asking why this is. One suggestion is that of Goebel: he argues that this was a choice of mere convenience. By doing away with any hard evidence, Gorgias could give his argumentative imagination free reign.²⁵ Similar observations have been made of the *First Tetralogy*. Nonetheless, it is noteworthy that Gorgias alludes to these two mythical pieces of evidence which he has omitted: the letter confirming the conspiracy and the gold planted under Palamedes's tent. Indeed, he refers to them directly and grapples with the significance of their absence. In view of their centrality to Gorgias' argumentative display, noted below, I propose a different, though complementary, explanation for his choice.

¹⁸ As pointed out by GAGARIN (2001: 283).

¹⁹ The *Palamedes*, for example, deploys the three classical types of 'proofs' as described by Aristotle. See BIESECKER-MAST (1994: 153); MCCOMINSKEY (1997: 18–19); KNUDSEN (2012: 37–38).

²⁰ GOEBEL (1983: 183–184), following SCHWARTZ (1892: 8), argues that it also serves to illustrate a model disposition.

²¹ KNUDSEN (2012: 35). Knudsen's paper examines Gorgias' 'competitive engagement' with the poetic-mythical account of Palamedes. On this issue, see also LAMPE (2020), who also concentrates on the broader epistemological background of Gorgias' reception of the poetic heritage.

²² On Palamedes ἔθος see BIESECKER-MAST (1994: 153); SPATHRAS (2001: 400, n. 17); KNUDSEN (2012: 38); LAMPE (2020: 120).

²³ GOEBEL (1983: 146).

²⁴ GAGARIN (2001: 286–287) makes similar reflections.

²⁵ GOEBEL (1983: 146–147). For an alternative explanation, see GAGARIN (1994: 54).

Another prominent strand of scholarship on the *Palamedes* focuses more closely, instead, on the nature of the argumentation deployed by Gorgias,²⁶ and with good reason: the *Palamedes* also appears to be a model exercise in rhetorical *inventio*.²⁷ As such, and as already noted, Palamedes puts forth a number of topical arguments which could be deployed and adapted for actual court cases.²⁸ Moreover, the *Palamedes* also opens up and explores new avenues of argumentation, very much in the vein of Antiphon's *Tetralogies*.²⁹ Thus, much of the first half of Gorgias' *Palamedes* is dedicated to a complex and innovative argument in favour of the defendant's innocence (Gorg. *Pal.* 6–21). Gorgias explicitly divides this long argument into two complementary halves (διὰ δισσω̄ν ὑμῖν ἐπιδείξω τρόπων, *Pal.* 5), the first purporting to show that the defendant could not accomplish the alleged crime even if he had wished it, the second that he had no reasonable motive to betray the Greeks even if he had the means to do so. In other words, he neatly juxtaposes an argument dealing with opportunity and another which deals with motive.³⁰ And linking the two arguments together is a concession: 'even if I wished it, I could not; and I could not even if I wished it' (*Pal.* 5). Concession is also the fundamental propulsive force of the first half of this argument dealing with means.³¹ Here, Gorgias divides the hypothetical crime into a series of interlocking steps – meeting with Priam, speaking to him, exchanging sureties, and executing the plan – which

²⁶ Gorgias's argumentation is said to 'trade mercilessly on the principle of the excluded middle' (LONG [1984: 234]) and to make use of 'antimonies' (UNTERSTEINER [2008: 202]; SPATHRAS [2001: 398]). LONG (1982: 263, n. 4) also points out the frequent use of *Modus Tollens*. Others have noted 'arguments from exhaustion' (GOEBEL 1983: 147) and the use of *apagoge* (GAGARIN [1994: 59]; SPATHRAS [2001: 406]).

²⁷ GOEBEL (1983: 146–147); MCCOMINSKY (1997: 17–18); GAGARIN (2001: 287).

²⁸ GOEBEL (1983: 146) and LONG (1982: 234) both consider it a 'model speech'. Similar assessments in MCCOMINSKEY (1997: 17); TORDESILLAS (1990: 248–249) and GAGARIN (2001: 287).

²⁹ On the originality of the argumentative schema described see LONG (1982: 235–6). On the 'inventiveness' of these model speeches more generally, see GAGARIN (2001: 290).

³⁰ On this distinction, and its argumentative capital, see esp. LONG (1982: 223–225; 239).

³¹ On this argument see esp. LONG (1982: 235–238) who names it a 'Chinese box' argument and SPATHRAS (2001: 406–407) who dubs it a 'Russian doll' argument. Similar analyses are given by GOEBEL (1983: 147–148); KNUDSEN (2012: 38) et al.

are considered sequentially and rejected. In each case, Gorgias moves from one disproof to the next by conceding, *ex hypothesi*, that the former steps 'which could not have happened, happened' (*Pal.* 11). In this first half of the argument, then, the defendant 'shows' that he could accomplish none of the steps necessary for the crime and in so doing creates the overwhelming impression that the task was completely beyond the realms of possibility.³² And while serial concession gives the argument its shape and much of its forcefulness, it is the appeal to εἰκός which does the heavy lifting of refutation.³³ Indeed, at the most general level, the reconstruction of the crime is an εἰκός reconstruction: Gorgias must break down the overall crime into a series of plausible steps.³⁴ More importantly, each attack on an individual step is constituted by arguments which invoke εἰκός, whether explicitly, as in *Pal.* 9, or implicitly. In general, then, we find Palamedes referring repeatedly to the physical and psychological improbability of the various actions which are implied in Odysseus's accusation.³⁵ As Gagarin notes, the prominence of εἰκός in this speech is at odds with Gorgias' *Helen*, in which it is hardly found at all.³⁶ But this very fact too may serve Gorgias didactic purposes: εἰκός is only relevant when the *facts* themselves are in question and, indeed, may constitute one's only resource even when truth is on one's side.³⁷

It is not incidental, then, testimony being the standard way of establishing facts in court,³⁸ that the figure of the 'hypothetical witness',³⁹ makes his appearance as a crucial part of this εἰκός argumentation, most explicitly in *Pal.* 7:

³² LONG (1982: 236) rightly considers the whole sequence an *a fortiori* progression.

³³ On the use of εἰκός in this speech, see GOEBEL (1983: 148–151); TORDESILLAS (1990: 246–249); GAGARIN (1994: 54–55); SPATHRAS (2001: 384–387) and KNUDSEN (2012: 38–39).

³⁴ On this point see MCCOMINSKY (1997: 18).

³⁵ Goebel's analysis (1983: 148–151) of these arguments remains the most thorough.

³⁶ GAGARIN (1994: 54–55). SPATHRAS (2001: 395) makes the same point.

³⁷ GAGARIN (1994: 54).

³⁸ The relationship between testimony and demonstration is examined by O'Connell (2017: 86–90).

³⁹ These witnesses have been largely neglected in the literature. One notable exception is SPATHRAS (2001: 397–398), who examines Gorgias' use of witnesses by concentrating on the transformation of Odysseys into a witness in *Pal.* 23 (text below).

Yet let us grant, for the purpose of the argument (λόγος), that this betrayal was possible. And suppose further that, in some way, I am with him and he is with me. Yet who are these people but a Greek man and a barbarian? How, then, could they speak and listen to one another? Alone (πότερα μόνος μόνωι)? But we would not have understood one another (ἀγνοήσομεν λόγους). With an interpreter then? So a third witness is added to those things which must remain hidden (τρίτος ἄρα μάρτυς γίνεται τῶν κρύπτεσθαι δεομένων). (Gorg. *Pal.* 7)⁴⁰

This argument can be used as a paradigm of those deployed by Gorgias in the first half of his argumentative section referred to above. It starts, as already noted, with a concession: Gorgias grants, for the purpose of the λόγος, that Palamedes and Priam have somehow agreed to meet. Contrary to the preceding argument (*Pal.* 6), the two would-be conspirators find themselves in each other's company and are about to hammer out their traitorous plans. The question – indeed the rhetorical question – is how?⁴¹ Two options are envisaged, options which reappear elsewhere,⁴² namely that the conspirators acted alone or in the company of others. The first option is rejected on *a priori* grounds:⁴³ a Greek and a barbarian cannot actually converse with one another without an interpreter.⁴⁴ *A fortiori*, the two could not have plotted together.⁴⁵ The only possible option, therefore, is that they met with an interpreter, the hypothetical 'third witness'. This eventuality, however, comes at a heavy

⁴⁰ All translations are my own.

⁴¹ As SPATHRAS (2001: 395) notes, the possibilities 'are proved to be invalid for *practical reasons*'.

⁴² E.g. Gorg. *Pal.* 11 (see below).

⁴³ The argument bears comparison with Herodotus' account of the foundation myth of DODONA (Hdt. 2, 44–45) which also invokes necessity and treats of the acquisition of a foreign language.

⁴⁴ In Homer, of course, no such difficulty is considered. More interestingly, the same can be said of Herodotus' account (Hdt. 2, 112–120) and, indeed, of Gorgias' own *Helen* where Paris' λόγος is not only understood by Helen, but persuades her.

⁴⁵ The argument is spurious and trades on understanding Ἕλλην and βαρβάρως as absolute categories. In other words, the possibility that Palamedes or Priam learnt one another's language in a decade-long war is not considered. Interestingly, language acquisition of Greeks and Barbarians was a standard topic of sophistic thinking. See GERA (2000).

price: a third person has been let in on the plans which should have remained a secret.⁴⁶ This, Gorgias implies, is equally a non-starter by the rules of εἰκός.

Before discussing the qualities of this τρίτος μάρτυς, and just how his hypothetical existence constitutes a counterargument to the events discussed, it is worthwhile considering briefly the identity of the unmentioned 'first' and 'second' witness. Happily, two likely candidates are close at hand: the conspirators themselves. Though neither Priam or Palamedes were – nor could be – 'witnesses' in the literal sense of the word, the word μάρτυς may also be used to refer to an individual with privileged epistemological access to the events in question.⁴⁷ In the present case, the two conspirators would possess knowledge of their intent, of their plans, and of their imagined crime. In Greek, they would have possessed συνείδησις or guilty self-knowledge, a form of knowledge which is typically shared only with oneself or with one's fellow co-conspirators, but which can be extended to one's accomplices, should they be needed.⁴⁸ This, in fact, is what Palamedes argues would have had to happen in this case. What makes this interpreter a 'third witness', therefore, is his knowledge of the crime, a knowledge extended to him by the fact that the conspirators met in his presence and made use of him to communicate with one another.

An alternative interpretation, however, is also possible. In the preceding section, Gorgias argues that the two alleged co-conspirators must first have met one another in order to communicate, and this could only be done by means of messages:

⁴⁶ I place the argument concerning third witnesses firmly within the practical concerns of the εἰκός argument. As GOEBEL (1983: 150) notes, Gorgias does not appear to draw a firm distinction between physical and psychological improbability and, as the discussion below makes clear, the hypothetical witness is invoked in both types of argument. For other interpretations of the third witness, see esp. BIESECKER-MAST (1994: esp. 155–157) and LAMPE (2020: 118; 122–124).

⁴⁷ E.g. Antiph. 5.43. On the flexibility of the term μάρτυς see MIRHADY (2002: 256; 264)

⁴⁸ On the use of this notion in the forensic rhetoric of the late 5th century see GATT (2021).

And how could words have been exchanged if we were not in each other's company? And how should such a meeting have taken place if he did not send a messenger to me (πρὸς ἐμὲ πέμψαντος), nor I to him (παρ' ἐμοῦ πρὸς ἐκεῖνον ἐλθόντος)? For no message in writing can arrive without a courier (οὐδὲ παραγγελία διὰ γραμμάτων ἄφικται ἄνευ τοῦ φέροντος). (Gorg. *Pal.* 6)

The exchange of messages, Palamedes argues, would have involved the creation of yet another two 'hypothetical witnesses': a messenger sent by Priam (πέμψαντος) to Palamedes, the other going (ἐλθόντος) in the opposite direction.⁴⁹ These two messengers, therefore, could very well be the 'first and second witnesses' implied by the τρίτος μάρτυς of *Pal.* 7. Though the argument tolerates both possibilities equally well, this reading has the benefit of emphasizing the cohesiveness of the first two arguments of the *Palamedes*. They are related not only in their theme – the impossibility of communication – but also by the gradual accumulation of witnesses, a point to which I will return shortly. Whichever reading is adopted, it is clear that the underlying logic of the two arguments remains the same. The only possible way in which the plan could have even got off the ground would have involved the creation of multiple witnesses, not only the interpreter through which the two conspirators *must* have communicated, but the messengers which they *must* have used to arrange the meeting in the first place.

Messengers and hidden messages are, of course, standard tropes in Greek literature and already prefigured in the only sure reference to writing in Homer: the σήματα λυγρὰ carried by Bellerophon to his soon-to-be father-in-law (Hom. *Il.* 6, 168f.). They are also found in other myths, such as the traditional account of Palamedes' condemnation. Nonetheless, Gorgias would surely not have lacked other 5th century prototypes of conspirators communicating via secret messages, the most famous – and ingenious – of whom come from Herodotus. In Hdt. 1, 123, for example, Harpagus sends his most trusted messenger (θηρευτῆ τῶν οἰκετέων τῷ πιστοτάτῳ) to Cyrus with a message hid-

⁴⁹ The choice of a neutral term, ἐλθόντος, as opposed to one implying intent, πέμψαντος, is another mark of Gorgias' great rhetorical skill. Even if such an exchange were to have taken place, we are to understand, then it was initiated by Priam.

den inside a butchered rabbit, taking care to tell the Persian to open up the animal with his own hands and when no one was present (αὐτοχειρῶν μιν διελεῖν καὶ μηδένα οἱ ταῦτα ποιεῦντι παρεῖναι). Similarly, in Hdt. 5, 35, Histiaeus, also fearing that a conventional message to Aristagoras would be intercepted on the heavily guarded Royal roads, branded his most trustworthy slave (τῶν δούλων τὸν πιστότατον) with a secret message on his scalp, let his hair grow back, and sent him to his co-conspirator with instructions to shave off the slave's hair and examine his head (ξυρήσαντά μιν τὰς τρίχας κατιδέσθαι ἐς τὴν κεφαλὴν). In both of these cases, and in agreement with Palamedes' rule about plots (*Pal.* 6), written messages mark the beginning of grand conspiracies, the first resulting in the overthrow of the last Median King, the second in the Ionian Revolt.⁵⁰ And like Gorgias, Herodotus also refers to the great importance of secrecy.

Yet Gorgias also had other, more mundane, and even more relevant prototypes of secret messages coming from the world of the courts. The alleged murder-plot in Antiph. 5, for example, also involves a messenger remarkably similar to those mentioned in the *Palamedes*:

The prosecution further allege (φασὶ) that they discovered on board a note stating that I had killed Herodes, which I had intended to send to Lycinus. But what need had I to send a note, when the courier himself was my accomplice (αὐτοῦ συνειδότης τοῦ τὸ γραμματείδιον φέροντος)? (Antiph. 5, 53)

This argument is found in a 'real' forensic speech and seems to refer to an actual person.⁵¹ It may, therefore, give some meagre indication of the usefulness of alleging the discovery of such damning 'secret messages' in actual trials. More importantly, Antiphon's argument has two significant points of continuity with Gorgias's mock-forensic speech. Firstly, the litigant reflects on the irrationality of manufacturing evidence, in this case the letter the prosecution claims to have discovered. Why, the

⁵⁰ Interestingly, all three four stories mentioned involve, directly or indirectly, 'barbarians' coming from the more literate world of the East.

⁵¹ On the identity of the witnesses in Antiph. 5 see EDWARDS (1985: 89) and GAGARIN (1989: 59–63).

defendant asks, would he have taken the risk of sending his accomplice a written message, when the messenger already knew of the plot and could have informed Lycinus himself? The very existence of the message – we are to infer – beggars belief because it violates the rational self-interest of the would-be criminal who, of course, does not want to be discovered. Thus, the defendant seeks to convince his jurors that the letter is a forgery since no rational criminal would have taken such an unnecessary risk.⁵² It is a similar calculation of self-interest which underlies the implausibility of Palamedes's creation of hypothetical witnesses. And, once again, it is εἰκός which provides the crucial missing link. Since conspiratorial plans must remain secret – τῶν κρύπτεσθαι δεομένων – it would have been contrary to the rational self-interest of the conspirators to have engaged in any action which would have furnished the prosecutor with so many witnesses to their crimes. And since the only possible plan must have involved the creation of witnesses, indeed many witnesses, Odysseus' allegations are inherently ἀπευκός. No rational criminal would have acted in such a way. Secondly, Gorgias' hypothetical witness and the alleged letter-bearing-messenger of Antiph. 5 are characterized in the same way: in terms of their knowledge. Antiphon's messenger-accomplice, therefore, is described as συνειδώς. And though none of the first three witnesses encountered above are explicitly described as 'συνειδότες', one such reference characterizes yet another group of hypothetical witness to which Palamedes soon refers:

And in doing this, did I do it myself or with others? But it is not a job for one man. With others then? Who? Clearly, my associates (δηλονότι τῶν συνόντων). Would these be free men or slaves? But *you* are my free associates (ἐλευθέροις μὲν γὰρ ὑμῖν σύνειμι). Who, then, among you shares knowledge (ξύνοιδε) of this crime? Let him speak (λεγέτω). And as for slaves, how is one to trust them? Willingly would they make the accusation, in hopes of their freedom, and if not they would be forced to do so by torture (ἐκόντες <τε> γὰρ ἐπ' ἐλευθερία χειμαζόμενοί τε δι' ἀνάγκην κατηγοροῦσιν). (Gorg. *Pal.* 11)

⁵² Antiph. 5, 53–56.

Once again, we find ourselves following a familiar line of argument. Gorgias first questions the ability of the conspirators to bring their plans to fruition without the help of some accomplices, whether free men or slaves. Secondly, these *necessary* accomplices – who must now share in the knowledge of the plans and in their συνείδησις – automatically assume another identity: they are potential witnesses who could provide Odysseus with the clinching proof that he needs. Indeed, it is this very knowledge which qualifies them as μαρτύρες. And, once again, the underlying assumption of the argument is the εἰκός ‘rule’: a criminal wants to remain undetected and, thus, makes sure that which must remain a secret remains hidden: τῶν κρύπτεσθαι δεομένων. There is, of course, one important difference between the three witnesses discussed above and this fourth group: their identity is more ‘concrete’ and, therefore, somewhat less hypothetical. In more precise terms, their role is not merely that of accomplice and witness, but also audience-member, perhaps even juror of the imaginary trial.⁵³ As such, they are addressed directly by the defendant and invited to testify against him. Indeed, they are addressed once again, and in similar terms, at a later point in the speech:

Are you accusing me with accurate knowledge, or are you just guessing (τῶν κρύπτεσθαι δεομένων)? And if you know, then you must have seen, you must have taken part in it, or you must have learnt of it from some accomplice of mine (ιδὼν ἢ μετέχων ἢ του <μετέχοντος> πυθόμενος). And if you saw, then, tell these men the way, the place, the time! When? Where? What is it that you saw? And if you took part, then you are subject to the same blame. And if you heard it from someone who did take part, who is he? Let him come here himself. Let him speak. Let him testify! (Εἰ δέ του μετέχοντος ἀκούσαις, ὅστις ἐστίν; αὐτὸς ἐλθέτω, φανήτω, μαρτυρησάτω.)
(Gorg. *Pal.* 22)

Again, we must note that the precise role of this hypothetical witness is different to those already discussed. Not only is he an accomplice (μετέχοντος) and a potential witness (μαρτυρησάτω), he would also

⁵³ On judges being addressed as witnesses see MIRHADY (2002: 264).

have informed Odysseus and granted him sure knowledge. The underlying assumption of both these open invitations, however, is that they are unanswered, indeed unanswerable. Palamedes is, after all, innocent. In both cases, therefore, the invitation makes the crucial point that all the hypothetical witnesses mentioned so far, the messengers, the interpreter, the accomplices in the camp, are just that, mere hypotheses with no actual existence. Indeed, Palamedes will soon criticize Odysseus explicitly for lacking any testimonial support for his allegations (Gorg. *Pal.* 23). It is against the backdrop of this argument that Palamedes' invocation of numerous hypothetical witnesses is best understood. Gorgias defends Palamedes not merely on the grounds that the actions discussed are contrary to the self-interest of a rational criminal because they are so eminently discoverable, but he also identifies those witnesses which Odysseus has failed to summon should the crime have really taken place. And since the only possible plans, laid out by Palamedes in the process of his argument, must have *necessarily* involved the creation of several witnesses on which Odysseus could have *hypothetically* called, the lack of any *actual* witnesses can only mean one thing: no such plans were ever laid down. This is because, as Palamedes tells his opponent, witnesses were not only possible in his case, they were ready-at-hand *had the crime been committed* (Gorg. *Pal.* 23). Indeed, it is not only witnesses that are invoked in such a way, but evidence of every sort. Thus, just in the passages invoked above, Palamedes' conspiracy would have generated letters and slaves to be tortured via the βάσσαυος. Moreover, it would have involved the exchange of sureties, such as gold, which would have been discovered, and breaches in the wall that everyone would have seen. In other words, Odysseus would have the evidence which he was said to have fabricated in the traditional account of the Palamedes-myth, and more besides. By removing these pieces of evidence from the equation, then, Gorgias has doubly underlined this important and likely original argument: the only way in which Palamedes could have betrayed the Greeks would have created a veritable mountain of evidence which would have condemned him. No sane criminal would have gone through with such a plan. Moreover, should they have done so, contrary to all reasoning, Odysseus would have not only pos-

sessed a ready means of knowledge, the accomplices, but also been able to prove them guilty beyond any doubt by means of witnesses, both free and unfree, letters, gold, and evidence of all sorts. His inability to do so, as well as the fact that Palamedes repeated invitations for hypothetical witnesses to testify go unanswered, 'proves', by a classical *Modus Tollens* and by the use of 'negative signs',⁵⁴ that Palamedes is innocent. In other words, by identifying these would-be hypothetical witnesses and 'key' pieces of evidence, Palamedes catalogues the way in which his opponent has *failed* to demonstrate his guilt.

Yet as it stands, the argument from hypothetical witnesses, though undoubtedly ingenious, is invalid, and this for interesting reasons. In short, Palamedes must assume, though he nowhere argues, that any witness who possessed knowledge would have actually testified in court. No witness could have lied and no bystander would have failed to answer his summons. In other words, the various motivations which could have influenced Palamedes to betray the Greeks are like nothing when it comes to the hypothetical witness. No gold, no enmity or friendship, no fear of retribution would have convinced a witness to remain aloof. If he were to exist, Gorgias must assume, a witness is simply an automaton who would make himself available to Odysseus and answer Palamedes' invitations without reservation. Interestingly, he does raise the issue of a witness's motivation once, with respect to the slave, and this only to argue that a slave would surely have given him up, either because he was motivated by gain or by torture. Once again, then, the existence of a knowledgeable accomplice is simply assumed to give Odysseus his proof under all imaginable circumstances. This, of course, is a questionable assumption at best, but one which, perhaps, can be explained by the ambiguity of the term μάρτυς to which we have already referred. A μάρτυς, then, may simply refer to a person with privileged epistemological access to the facts of the case. In this sense, any accomplice, by possessing knowledge of the crime, is also a 'witness' in this limited sense. From here, it is a simple matter of equivocation to argue that any accomplice is also a 'witness' in the stricter, more forensic sense of the word. The lack of forensic witnesses at the actual

⁵⁴ On the use of negative signs, and their relationship to εἰκός see GOEBEL (1983: 18–20).

trial, therefore, is taken to imply the lack of any knowledgeable ‘witnesses’ whatsoever. And since the plans *must* have involved accomplices and ‘witnesses’ in the limited sense, Gorgias can sophistically claim to have disproved the accusations. To see how a clever prosecutor could disentangle this sophistic web, we must turn to the antilogies of Antiphon’s *First Tetralogy*.

Antiphon’s First Tetralogy⁵⁵

The *First Tetralogy* is a hypothetical who-done-it in which the mock-defendant stands accused of murdering a rival of his. As in the *Palamedes*, the main issue of the trial and the subject of much of the argumentation of the four speeches concerns a matter of fact:⁵⁶ the two mock-litigants cannot agree on the identity of the murderer. As a consequence, much of the speeches addresses this basic question and relies, often explicitly, on εἰκός. The mock-prosecutor, however, does have one piece of direct evidence, the testimony of a slave-witness who died shortly after the assault, but as in the *Palamedes*, the author appears to have deliberately constructed a weak case for the prosecution.⁵⁷ In so doing, Antiphon has occasioned for himself the perfect opportunity for developing a series of εἰκός arguments across the back-and-forth which ensues.⁵⁸ Indeed, the *Tetralogies* are typically read as a showcase for this type of argumentation.⁵⁹ Thus, as with the *Palamedes*, we not only find argumentative τόποι adapted for the case, but also such experiments as the reverse-εἰκός argument, pioneered by Tisias and Corax, which does not seem to have been used much in court.⁶⁰ What is more pertinent for

⁵⁵ The authorship, and hence the date, of the *Tetralogies* has been subject to controversy with some arguing that it is the work of Antiphon (e.g. GAGARIN, 1997; 2002); others that it is a much later work (e.g. CARAWAN 1993; 1998; SEALEY 1984). Though I favour Gagarin’s unitarian approach, and will refer to Antiphon as their author, the issue of authorship is largely irrelevant to this paper. On dating see DOVER (1950: 56–57).

⁵⁶ On Antiphontean ‘*stasis*-theory’ and the *Tetralogies* see RUSSELL (1983: 17); CARAWAN (1993: 236) and GAGARIN (2002: 106).

⁵⁷ CARAWAN (1998: 246).

⁵⁸ GAGARIN (1997: 142). Cf. GAGARIN (2002: 118), see below.

⁵⁹ GAGARIN (2002: 112–115).

⁶⁰ GAGARIN (1994: 52).

the discussion at hand, however, is the fact that the author addresses directly the relationship of εἰκός and testimony. On this point, Goebel and Gagarin agree that the author draws a firm distinction between merely probable arguments which appeal to εἰκός and factual proof provided by witnesses.⁶¹ At Antiph. 2, 4, 10, then, the mock-defendant opposes the actual (ὄντως) murderer as revealed by witnesses and the merely probable (εἰκότως) accusations made by his rival. He does this in the train of introducing witnesses at the very end of his defence, ones which he claims can prove that he is innocent in point of fact, rather than by εἰκός: οὐκ ἐκ τῶν εἰκότων ἀλλ' ἔργῳ δηλώσω. The introduction of the witness at the end of his second speech is undoubtedly bizarre⁶² and would have shocked the mock-jurors. As Gagarin notes, however, it's 'shock value' may well be calculated: Antiphon can show that with the introduction of the witnesses, we have finally come to an ἔργον which sweeps away the multitude of εἰκός arguments which preceded it.⁶³ And yet, as Gagarin himself notes,⁶⁴ and as Wohl has shown in greater detail,⁶⁵ there is also, and running parallel to this stark distinction, a persistent conflation of the εἰκός and testimony, one which leaves the door open for hypothetical witnesses to enter into the courtroom. The prosecutor, for example, after drawing the very distinction mentioned (esp. Antiph. 2, 1, 1), conflates the two with one another, arguing that the circumstantial details have 'informed' against his opponent:

First of all, it is unlikely that a mugger would have killed the man. For no-one would endure the gravest of perils and be ready to risk his life and then, when the deed is done, leave his reward behind him. And the victims were found still wearing their cloaks. Nor is it likely that he was killed in a drunken brawl, for such a killer would have been known by his fellow revellers (ἐγιγνώσκετο γὰρ ἂν ὑπὸ τῶν συμποσιῶν). Nor was it the result of some quarrel, for who could have

⁶¹ GOEBEL (1983: 22); GAGARIN (2002: 116).

⁶² GAGARIN (1997: 142). CAREY (1994b: 97), however, notes that challenges were less formal at the end of the 5th century.

⁶³ An explanation favoured by GAGARIN (2002: 118).

⁶⁴ GAGARIN (2002: 116–117).

⁶⁵ WOHL (2010: 138–139).

quarrelled during the night in such a deserted place? Nor, finally, could have he been killed in error, for such a man would not have also killed the slave. And thus, with every other possibility being dismissed, the death itself informs us that he was the victim of a murder-plot (αὐτὸς ὁ θάνατος ἐξ ἐπιβουλῆς ἀποθανόντα μὴνύει αὐτόν). (Antiph. 2, 1, 4–5)

It is clear, even from this argument alone, that Gorgias and the author of the *First Tetralogy* are drawing on a common stock of logical tricks and argumentative tropes. At its most general level, the εἰκός argument is explicitly based on the assumption that the criminal is a supremely rational actor (see esp. Antiph. 2, 2, 4–5, below), one who behaves only in accordance to a cold calculation of his own self-interest. Thus, the fact that the cloak was found on the victim – a fact which no defendant could reasonably contest – is presented as a sufficient indication (σημεῖον, Antiph. 2, 2, 4) that muggers are not responsible for the crime since they would not have forgotten to actually rob the corpse. No sane criminal, the mock-prosecutor implies, would have killed for profit and then forgotten to take his prize. The argument here is also an *apagoge* and one which involves an analysis of the various possible motives for the homicide. As such, it takes the same shape of Gorgias' examination of the defendant's motives in the second half of the *Palamedes*, as well as that of the grand argumentative strategy in his *Encomium to Helen*.⁶⁶ The mock-prosecutor's aim, of course, is rather different to that of the 'defendant' in either of these speeches. While Palamedes examines all the possible motives to demonstrate that none can be reasonably imputed to him, the mock-prosecutor here argues that the victim must have been murdered because no other motive fits the facts of the case. It is because of this that he concludes that the death itself, by which he means the circumstantial details which are beyond dispute, 'informs' (μὴνύει) against the murderer. Εἰκός here has become a surrogate witness for the prosecution. This, however, is not the only 'conflation' of the two *pisteis*. Thus, though the figure of the hypothetical witness is far more explicit in the back-and-forth which follows from this *apagoge*, we already get a

⁶⁶ SPATHRAS (2001: 406).

whisper of him here. The second possibility, namely that the victim was killed in a drunken brawl, is dismissed altogether because the would-be killer would have been recognized, ἐγινώσκετο, by his fellow revelers. This possibility, the mock-prosecutor implies, can simply be dismissed because it would have involved the creation of witnesses, people who *knew*. And as with the *Palamedes*, these hypothetical witnesses are simply assumed to be a source of evidence against the would-be killer had they existed, even though they would, presumably, have been the friends of the offender and also very drunk.

In the subsequent speech, however, the defendant does not pick up on any of these problems and chooses, rather, to focus on the first possibility:

But it is not unlikely, as they say, but likely (ἔστι δὲ οὐκ ἀπαικός, ὡς οὔτοί φασιν, ἀλλὰ εἰκός) that he was killed in the small hours of the night by some prowler and for his cloak. For the fact that he was found clothed is no proof at all (οὐδὲν σημεῖόν ἐστιν). If they, fearing the approach of someone (τινας προσιόντας φοβηθέντες), left before stripping him, the muggers would have been sensible and not insane to prefer their own safety to their prize (ἔσωφρόνουν καὶ οὐκ ἐμαίνοντο τὴν σωτηρίαν τοῦ κέρδους προτιμῶντες). (Antiph. 2, 2, 4–5)

The aim of this argument is clear. By appealing to the same calculus of self-interest, one which opposes sanity (ἔσωφρόνουν) and insanity (ἐμαίνοντο) in a way reminiscent of the *Palamedes* (Gorg. Pal. 25), the mock-defendant attempts to imagine a scenario in which a mugger could still be guilty and leave the cloak behind him. In so doing, he seeks to undermine the force of the *apagoge* by showing that his opponent has dismissed this possibility inappropriately. The scenario imagined, moreover, also involves hypothetical ‘witnesses’ who wander over the scene of the crime (τινας προσιόντας) and scare off the criminal before he has had time to rob the victim.⁶⁷ In this way, the mock-defendant shows that the ‘proof’ his opponent has presented comes to naught since a mugger could still be involved. The mugging could, after all, have been botched by the sudden and unexpected appearance of some nosey

⁶⁷ On by-standers as witnesses in such crimes, see SPATHRAS (2008: 181).

parker. As in Gorgias' *Palamedes*, therefore, the defendant conjures up hypothetical witnesses in order to defend himself. Unlike Palamedes, however, Antiphon's mock-defendant does not attempt to show that he could not have committed the crime because it would have necessarily involved 'third witnesses' and accomplices – it is agreed that there could be none (Antiph. 2, 1, 1)⁶⁸ – but rather conjures up bystanders to argue that others *could* have been implicated. Moreover, the hypothetical witnesses conjured are merely 'possible', perhaps even unlikely, and by no means necessary to the scenario imagined, as they are in *Palamedes*. Yet, since Antiphon is here not deducing anything from their absence, mere possibility is all he needs to make his point.

The mock-prosecutor comes to the defence of his *apagoge* early in his rebuttal speech:

For if the killers, having seeing some people approaching, left and abandoned their victims, fleeing before they stripped them, then those who chanced upon (οἱ ἐντυχόντες) them would have found the slave alive even if the master was already dead. He did, after all, testify after he was picked up. It is clear, then, that these men would have questioned the slave and passed on the identity of the perpetrators to us (σαφῶς ἀνακρίναντες τοὺς ἐργασαμένους ἡγγειλαν ἂν ἡμῖν). And if this were the case, then this man would not now be ascribed the blame. (Antiph. 2, 3, 3)

The mock-prosecutor's argument is, once again, closely related to the known circumstances of the crime and is, in effect, a mere elaboration of the original scenario depicted in his first speech. Had bystanders happened onto the scene, he argues, we would know about it. The slave, who was still alive, would have denounced his attacker to these hypothetical by-standers and they, in turn, would relayed this testimony to its proper place, to the victim's home and to his relatives. As a result, the defendant would have never been blamed since the real perpetrator – the mugger – would have been identified and prosecuted. The prosecu-

⁶⁸ The reason given is, again, reminiscent of arguments from hypothetical witnesses. The mock-prosecutor argues that a clever witness would ensure that no witnesses to his crime exist.

tion would have *known* – much as Odysseus *should* have known – where the guilt actually lay. Once again, then, the mock-prosecutor simply assumes that any bystander who would have seen the mugging would have made his testimony public. In this, Antiphon's mock-prosecutor and Palamedes agree.

It is in response to this challenge that the mock-defendant of Antiphon's *First Tetralogy* offers Odysseus a convincing counter to Palamedes' argument. We note, then, that in the process of the dialectical back and forth, the mock-prosecutor has had to ascribe ideal qualities to the hypothetical bystander: he diligently collects information from the slave, proceeds to report it to the relevant parties, and, presumably, appears in court when summoned as a witness. Worse still, the defendant implies that these qualities are *universal*. Any bystander who would have come across the scene would have behaved in such a way. All the wily orator had to do, therefore, is challenge one, or more, of these questionable assumptions:

They say that each and every one of those who would have happened upon the victims while they being assaulted would, rather than flee, be more likely (εἰκότερον εἶναι) to accurately investigate (σαφῶς πυθόμενον τοὺς διαφθείραντας) who the murderer was and then carry the news to the victims' home (εἰς οἶκον ἀγγεῖλαι). Yet I know no one who is so hot-headed and brave (ἐγὼ δὲ οὐδένα οὕτω θερμὸν καὶ ἀνδρεῖον ἀνθρώπων εἶναι δοκῶ), and who would not turn round and flee when coming across men on the very point of death and at night rather than endanger his own safety by inquiring about the murderers (φεύγειν μᾶλλον ἢ πυθανόμενον τοὺς κακούργους περὶ τῆς ψυχῆς κινδυνεῦσαι). Since these would-be witnesses then are more likely to have fled, as is reasonable (εἰκότως ἀφίοντο), it is no longer necessary to dismiss the possibility of men who would have murdered to rob the pair. So I have been freed of suspicion. (Antiph. 2, 4, 4–5)

The idealized behaviour that the mock-prosecutor has had to foist on every passer-by, the mock-defendant now argues, is *not* as universal as his opponent claims. Indeed, it is not even εἰκός. When the 'hypothetical bystander' introduced in his former speech is suddenly and unexpected-

ly confronted by a mugging scene, the mock-prosecutor plausibly argues, it is more reasonable (εἰκότερον) that he would prefer his own safety to investigating the crime: φεύγειν μᾶλλον ἢ πυνθανόμενον. It is not merely knowledge, therefore, which characterizes the real, as opposed to a merely hypothetical witness. At least in this scenario, he must have been brave, even hot-headed. More generally, then, a witness must be 'motivated' to discover the truth and then testify. And this, the mock-prosecutor explains, carries risk: κινδυνεῦσαι (cf. Arist. *Rhet.* 1376a14–15). The examination of an agent's motivation by means of εἰκός, which has occupied much of the prosecution's case as well as Palamedes' defence, has been finally foisted on the witnesses themselves. In so doing, Antiphon has levelled an important and devastating challenge to the defendant's *apagoge*. More importantly, Antiphon has attributed to the hypothetical witness a second important trait: a will.

Conclusion

A number of conclusions can now be drawn from the use and characterization of these would-be witnesses. Firstly, it is clear that both Gorgias and Antiphon assume that in summoning witnesses, a litigant is furnishing evidentiary material supportive of his own case. Thus, in the *Palamedes*, the availability of witnesses is grouped with other sorts of evidence that Odysseus would possess had Palamedes really been guilty. The prosecutor of the *First Tetralogy*, on the other hand, justifies his use of εἰκός on the grounds that he could not demonstrate his claims to be true by means of witnesses, while his opponent explicitly relies on witnesses to demonstrate his innocence in the final part of his rebuttal speech. Secondly, the hypothetical witness is one prominent figure enlisted to help in this εἰκός back and forth. Moreover, the analysis has demonstrated that this argumentative scheme possesses great flexibility and may be used by both sides of a case and to various effects. It is also noteworthy that both Gorgias and Antiphon show considerable ingenuity in adapting the argument to the specifics of the case. There is, however, one important caveat to this flexibility: like real witnesses, hypothetical witnesses – as a species of εἰκός argument – are used only when the facts are in dispute. Thirdly, the close association of εἰκός and testimony also underlines the porousness of the Aristotelian categories of proof. As

the brief reference to Antiph. 5 shows, then, hypothetical witnesses can be invoked even to counter a non-technical *pistis*: a letter. Above all, however, the characteristics of the hypothetical witness sheds some light on the role of actual witnesses or, at least, on the broader category of 'witnessing'. Thus, to start off with, it is already telling that there is such a figure as a hypothetical witness. It is clear, in other words, that at least on these occasions the precise identity of the witness and his non-existent relationship to the litigant is unimportant to his status as a 'witness'. Moreover, the characteristics which are imputed to these would-be witnesses are entirely impersonal and not related, in any significant way, to a question of his status, respectability, or 'socio-political' affiliations with the litigants. What does characterize these witnesses, rather, are two things: his knowledge of the things to which he is testifying and, secondly, his willingness to testify. In this, perhaps, the hypothetical witness comes far closer to our own sanitized notions of a 'witness' in a modern trial than does any flesh-and-blood witness summoned into the messy world of the Athenian courts.

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