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## THE TRIAL OF THE ARGINOUSAI GENERALS AND THE DAWN OF «JUDICIAL REVIEW»

After the victory at Arginousai in 406 BC the Athenian generals were accused of «betrayal» and condemned without trial, by a decree that the Athenians later repudiated as «unlawful»<sup>1</sup>. What precisely made the proceedings *paranomon* is hard to define: What is the *nomos* that was violated? There was no constitutional document prescribing what we would call «due process», no general statute that expressly guaranteed to each citizen the right to trial by a properly constituted jury. And, as Xenophon describes it, the process was not altogether arbitrary. The assembly debated the matter at length and the defendants made a brief statement, presented witnesses, and nearly persuaded the people to leave them free on bond. But as it was nearly dark and impossible to count hands in a close vote, it was decided that the council should draft a measure defining «the manner in which the men should be judged». One of the councilmen, Kallixenos, introduced a decree for the assembled demos to judge the defendants summarily and *en masse*: «... let the Athenians all decide, tribe by

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<sup>1</sup> Plato, *Apologia*, 32b: στρατηγούς τοὺς οὐκ ἀνελομένους τοὺς ἐκ τῆς ναυμαχίας ἐβουλεύσασθε ἄθρόους κρίνειν, παρανόμως, ὡς ἐν τῷ ὑστέρω χρόνῳ πᾶσιν ὑμῖν ἔδοξεν. Cf. Xenophon, *Hell.* 1.7.25: ... τοὺτους ἀπολλύντες ἀκρίτους παρὰ τὸν νόμον. Andrewes (1974) concludes from Diodoros (13.100-103) that it was the generals who began the recrimination. Nemeth (1984) gives a useful summary of prosopography; five of those condemned were associated with Alkibiades, a group on the ascendant, while Theramenes in eclipse had every reason to discredit them. Both perspectives have their value; cf. Krentz (1989), p. 159.

tribe»<sup>2</sup>. Now Euryptolemos, a kinsman of defendant Perikles, tried to block Kallixenos' decree by charging him with *paranoma*. But Euryptolemos was then threatened with having his name added to the list of those indicted, so he prudently withdrew his challenge. Instead he offered a counter-proposal: let the defendants be tried separately according to the decree of Kannonos, a measure notorious for its severity. A vote was taken and Euryptolemos' proposal prevailed, but the outcome was challenged. On a second vote, Kallixenos' measure was approved; the six generals who were in custody were put to death. Some months later Kallixenos himself was condemned (by *probole*) for his role in the proceedings.

The *graphe paranomon* is one of the defining institutions of Athenian democracy and this famous episode is often read as a primer on how it works and what it all means. This one case seems to illustrate how the *graphe* might apply against legislation at any stage. Kallixenos' proposal was challenged as a preliminary decree of council (stage 1), before the assembly could vote upon it; and if Euryptolemos had not withdrawn his challenge, Kallixenos' decree would have been suspended until the court could decide the issue<sup>3</sup>. Euryptolemos' measure was introduced on the floor of the assembly (without a *probouleuma*), passed by majority vote, and may then have been challenged as *paranomon* (at stage 2)<sup>4</sup>. And it is

<sup>2</sup> *Hell.* 1.7.5 ff.: (hearing in the assembly) οἱ στρατηγοὶ βραχέως ἕκαστος ἀπελογήσατο (οὐ γὰρ προτέθη σφίσι λόγος κατὰ τὸν νόμον) ... μάρτυρας παρήχοντο τοὺς κυβερνήτας καὶ ἄλλους ... πολλοὺς, τοιαῦτα λέγοντες ἐπειθον τὸν δῆμον: ... (Kallixenos' decree) ἡ βουλὴ εἰσήνεγκε τὴν ἑαυτῆς γνώμην Καλλιξένου εἰπόντος τήνδε: Ἐπειδὴ τῶν τε κατηγορούντων κατὰ τῶν στρατηγῶν καὶ ἐκείνων ἀπολογουμένων ἐν τῇ προτέρᾳ ἐκκλησίᾳ ἀκηκόασι, διαψηφίσασθαι Ἄθηναίους ἅπαντας κατὰ φυλάς: ... ἂν δὲ δόξωσιν ἀδικεῖν, θανάτῳ ζημιῶσαι ... (9). Ps.-Plato, *Axiochos*, 368e-369a, suggests that the final vote was delayed a day (apparently to install more cooperative *prytaneis*).

<sup>3</sup> Hansen (1974) argued strongly that where a *probouleuma* was blocked in this way the court's acquittal would ratify the measure (not send it back to the assembly for ratification). Hannick (1981) offered some reasonable objections, but Hansen's reply (1987) is convincing on most points. The crucial illustration is Androtion's *graphe paranomon* against Euktemon, as described in *Dem.* 24.9-14: Euktemon had introduced the measure in council (as a concerned citizen, not *ex officio*); there had been no debate of the issue in the assembly before the *probouleuma* was presented for a *preliminary* vote. In the *procheirotomia*, the measure was not unanimously approved but clearly favored, and at that stage Androtion made his challenge.

<sup>4</sup> This is Hansen's view (1974, p. 29 with n. 9) and it may be right; the idea goes back to Schömann (1819), p. 161 n. 5. But Lipsius (1905-1915), pp. 393-394, supposed

often supposed that the *graphe paranomon* might also be invoked at a later date, after the decree was enacted (stage 3), but after one year the mover himself would be immune; for the real target of this remedy is the unlawful measure itself, not the instigator. That reading seems at least consistent with Kallixenos' case, as he was condemned sometime later by another procedure <sup>5</sup>.

And the speech that Xenophon gives Euryptolemos is the best evidence we have for the rationale behind *graphe paranomon* in the late fifth century, before the ideological adjustments that followed the restoration of democracy in 403/402. His argument suggests that the *paranomon* is already understood as an act in conflict with some larger *nomos*, not simply at odds with the wording of a particular statute. Among scholars of the twentieth century something like a consensus emerged, especially after Wolff's important study «Normenkontrolle» (1970): even in 406, the *nomos* that is violated is the system of laws as a whole, the set of rules that we might call the constitution.

Long before Wolff's study, almost unanimously, legal historians had adopted what I would call a «constitutional model», based on the analogy between the Athenian *graphe paranomon* and an essential safeguard of modern democracies, judicial review: the court has authority to reject legislation or official decisions that violate the constitution <sup>6</sup>. The most influential analogy draws on the American version

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that in this instance the sworn challenge, the *hypomosia*, was not the first move in a *graphe paranomon* but rather a challenge to the tally of votes, demanding a recount. That is the most natural implication of Xenophon's phrasing (34): «When these (two) measures were put to a vote, at first they decided for Euryptolemos', but when Menekles challenged and the vote was taken again, they judged for the council's (bill)» (τούτων δὲ διαχειροτονουμένων τὸ μὲν πρῶτον ἔκριναν τὴν Εὐρυπτολέμου ὑπομοσαμένου δὲ Μενεκλέους καὶ πάλιν διαχειροτονίας γενομένης ἔκριναν τὴν τῆς βουλῆς). Cf. Ostwald (1986), pp. 441-442 with n. 123.

<sup>5</sup> *Hell.* 1.7.35: καὶ οὐ πολλῷ χρόνῳ ὕστερον μετέμελε τοῖς Ἀθηναίοις, καὶ ἐψηφίσαντο, οἵτινες τὸν δῆμον ἐξηπάτησαν, προβολὰς αὐτῶν εἶναι, καὶ ἐγγυητὰς καταστήσαι, ἕως ἂν κριθῶσιν, εἶναι δὲ καὶ Καλλίξενον τούτων. But the charge against Kallixenos must have included quashing the original *graphe paranomon* by threatening the prosecutor, as the *prytaneis* seem to have regarded that tactic as the chief illegality (§ 14).

<sup>6</sup> On the European model «judicial review» often refers to the court's review of actions by official agencies carrying out the law, esp. for acting *ultra vires* (not to dispute Parliament's sovereignty in making law). In this study I use «judicial review» generally in the American sense, referring to the court's authority to overturn legislation.

of judicial review, whereby the court may invalidate even federal legislation. This parallel gained popularity in the U.S. just before the turn of the twentieth century, after an influential article by Goodell (1893-1894) <sup>7</sup>. The way the common principle was constructed at that time became something of a paradigm, often invoked thereafter in much the same language. Scholars focusing on the Athenian example generally overlooked the apologetic cast of Goodell's essay: where European jurists had found it puzzling or absurd that the court could overrule the supreme legislative body, Goodell cited the Athenian example to vindicate the American institution. Thus, in wording reminiscent of Goodell's, Bonner and Smith (1938, pp. 296-297) saw in the *graphe paranomon* «a parallel to a function of the Supreme Court of the United States», describing this procedure as a trial of the legislation itself in which the mover's liability was incidental.

Wolff made important corrections to this model but he was drawn to the modern parallel and often described the *graphe paranomon* in similar imagery, as a «bulwark» of the constitution <sup>8</sup>. He saw much the same defense of legal principle in the German *Verfassungsgericht* of the post-war era <sup>9</sup>. Judging from the limited testimonia on fifth-century cases – principally the arguments of Euryptolemos – Wolff argued that the *graphe paranomon* was invented for this very purpose, sometime 427-415 BC: in order to protect the *politeia* from the blunders of the demos, the court would overrule the assembly. After all, the speeches of the fourth century are full of this idea. The later orators demonstrate a more sophisticated technique for discovering that higher law but, as Wolff argued, it is essentially the same rationale that Euryptolemos invoked <sup>10</sup>.

<sup>7</sup> Goodell's article is cited approvingly by Goodwin (1895), reporting a special session of the American Philological Association. Goodwin then followed this approach in his influential commentary on Dem. 18 (1901), pp. 316-332.

<sup>8</sup> Wolff (1970, hereafter «*Normenkontrolle*»), p. 22 n. 49, p. 25 n. 56, against Cloché (1936), citing Aischines' praise of *graphe paranomon* as «das letzte Bollwerk gegen die Demagogen» and emphasizing the U.S. parallel. In American commentary the image goes back to Hamilton's essay, *Federalist* 78, regarding «the courts ... as bulwarks of a limited Constitution against legislative encroachments» (Scigliano [2000], p. 500); see further below at nn. 61-63.

<sup>9</sup> For this feature of the *Grundgesetz* and later practice, see Michalowski and Woods (1999), esp. pp. 37-44.

<sup>10</sup> «*Normenkontrolle*», pp. 21-23: in dating the introduction of *graphe paranomon* to the post-Periclean era, Wolff adduces its essential function: «... von Anfang an nur die

There has been sporadic criticism but, it is fair to say, the «constitutional model» prevails to this day. In this essay I argue against the standard assumption of that model, the view that *safeguarding the constitution was the original rationale* for *graphe paranomon*; and I focus on Wolff's reformulation in order to offer what I hope will be useful distinctions but also to reaffirm his essential insight. For Wolff's study is at least as important for the corrections he made to the constitutional model as for his defense of it. And it is a recurrent irony of legal history that, over time, we tend to misread the jurist to whom we owe the deepest debt. The new paradigm that he established has become so familiar that we lose sight of the fixed ideas that he argued against.

So we begin with (§ 1) a perspective on how Wolff framed the issue – what he built upon and what prior assumptions he disputed. In that light, some of the objections to Wolff's treatment seem misleading or unproductive. We then examine two of the premises of the constitutional model, one that Wolff himself questioned and another that he established as the basis for further discussion. The older premise (§ 2) is a rather fixed notion that the decree (alone) could be attacked at the third stage: even after it had been enacted and implemented, the measure could yet be overturned by the court at any time, while the mover became immune after the first year. It is that unlimited reach against the decree itself that seems most clearly to assert the sovereignty of the court and to confirm the constitutional model; but, in fact, there is little evidence to support it, and Wolff himself had his doubts. More difficult to assess is Wolff's finding (§ 3) that the principle invoked in the fourth century, that *paranomon* violates the system of law as a whole, is essentially the same idea we meet in the fifth century – indeed, it is the original rationale. That may be true in some sense, but I think a closer comparison (§ 4) will show an important distinction: before the turn of

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Rolle einer Schranke für Auswüchse der grundsätzlich unbegrenzten Beschlußmacht des Demos zugefallen sein kann». He continues in the same vein, «Wann immer die Einführung der γραφή παρανόμων erfolgt sein mag: Daß sie ein von der Demokratie geschaffenes Instrument zur Eindämmung ihrer eigenen Exzesse war, dürfen wir als sicheres Ergebnis unserer Untersuchung festhalten ... (23) Ausfluß der Erkenntnis daß die attische Demokratie im Interesse ihrer eigenen Erhaltung gewisser konstitutioneller Selbstbindungen bedurfte».

the fourth century there is a different idea about what *paranomon* means. And in conclusion (§ 5), I argue that the familiar model of judicial review – court control of legislation *per se* – was probably not the original purpose of this procedure but emerged in the aftermath of the Arginousai trial.

## 1. THE CONSTITUTIONAL MODEL AND ITS CRITICS

It was once supposed that the *graphe paranomon* (or some precursor) was introduced by Solon <sup>11</sup>, but scholars have moved that starting date progressively later. In the half century or so before Wolff's study it was usually supposed that *graphe paranomon* began with the reforms of Ephialtes (or soon after) <sup>12</sup>: when the Areopagos council lost its oversight of the laws, that role passed to the ordinary courts of the people. And of course that turn of events would naturally suggest that *graphe paranomon* was designed, from its inception, as a safeguard of some higher law <sup>13</sup>. But even as Bon-

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<sup>11</sup> So Schömann assumed (1819), p. 169. Wilamowitz (1893), pp. 2.193-194, insisted that the right to lodge a sworn challenge (*hypomosia*) against a decree, as essentially a form of appeal, must have availed ever since there was a probouleutic council presiding over the the assembly, as the chief grounds for the appeal was the lack of a *probouleuma*.

<sup>12</sup> Fränkel (1877), pp. 68-69, cited the testimony of Philochoros, that officers called *nomophylakes* were introduced in Ephialtes' reforms (Lex Cantabrig. 674 = FGrHist 328 F64b). Lipsius (1905-1915), pp. 34-36, found Philochoros' testimony conclusive (‘läßt sich ... nicht länger bezweifeln’); in this he relied upon Keil's reconstruction of Anon. Argentinensis (1902, pp. 170-179) as showing the *nomophylakes* in office down to 404. Wilken (1907), pp. 409-412, however, disputed Keil's reading; Jacoby (1954, *ad loc.*, IIIb Suppl., pp. 336-339 with n. 10) followed Wilken's view but would not discount the implication of Philochoros, that *nomophylakes* were established in 462/461. Cf. Busolt - Swoboda (1926), pp. 895-896. Jones (1956), pp. 103-104 and 109-110, discounted the early *nomophylakes* as mere archivists.

<sup>13</sup> Thus Triantaphyllopoulos (1962). Cloché (1936), esp. p. 412, insisted upon this original intent despite the fact that the remedy was continually misused, to the opposite effect: ‘... la *graphè paranomôn* semble avoir été plus nuisible qu'utile à la démocratie et à la patrie atheniennes: cette arme se retourna contre les intentions de ceux qui l'avaient forgée’. For review of earlier scholarship, cf. Gerner (1949), pp. 1281-1287; Hignett (1952), pp. 210-213 (anticipating Wolff's theory, ‘it is possible that the *graphè paranomôn* was not introduced until a later date, when experience had shown the dangers of uncontrolled legislation’).

ner and Smith's second volume appeared (1938), Ulrich Kahrstedt reduced the conventional reconstruction to a paradox. We know of no case that can be securely dated earlier than 415, more than forty-five years after Ephialtes. And, Kahrstedt argued, the function much acclaimed in the fourth century, to protect the laws from aberrant decrees, can only have arisen after 403, alongside the more rigorous procedure for making and maintaining *nomoi* (enacted by *nomothesia* and confirmed by regular review); for it was only this process that marked *nomoi* as superior to decrees. To retroject that rationale back to the earliest cases is to suppose that the safeguard was invented before the hierarchy of rules it was designed to protect. Kahrstedt's explanation was that the suits described as *graphai paranomon* in the era before 403 simply had a different function, not to safeguard higher law – there was no higher law than the people's decree. The original aim of this remedy was to punish the officials who abuse that power. In keeping with that principle of accountability, Kahrstedt concluded, there was no limitation on the mover's liability.

Kahrstedt's paradox was quickly discounted by others but it is clear that Wolff saw the fundamental problem he had exposed. If *graphe paranomon* was introduced as a means of controlling aberrant decrees by reference to some higher law, we should be able to reconstruct that guiding principle<sup>14</sup>. Wolff had to agree that the introduction of *graphe paranomon* finds its most plausible context not in the overthrow of the Areopagos but in the post-Periclean era, when the first cases appear. But he rejected any categorical divide between what is attested for fifth-century cases and the fourth-century speeches.

For Wolff there is an essential continuity running through Demosthenes' arguments back to Euryptolemos and the other fragments of fifth-century thinking. Even the earliest instances seem to invoke the legal system as a whole, *die Rechtsordnung als Ganzes*. Specific comparanda – such as the laws that Euryptolemos cited against Kallixenos – serve to illustrate a broader principle. The original ra-

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<sup>14</sup> Thus «Normenkontrolle», esp. pp. 11-12: Wolff reproaches scholars – «even the jurists among them» – for failing to investigate the Leitgedanke that governs the full range of applications.

tionale is positivistic in the sense that only the statutes that the people have enacted and enforced can serve as the source from which principles are extracted: the higher law is not revealed in the word of god (as at Sparta) or customary law (in oral tradition), and the scant references to precedent count for very little. In fact, for Wolff, this positivistic rationale is the strongest indicator that *graphe paranomon* was introduced in the era of the radical democracy, when the people's assembly had unfettered authority. The *nomos* that *graphe paranomon* defends is thus the corpus of laws in which the particular statute is fixed, and only the statutes themselves give access to that source <sup>15</sup>.

Wolff's reading was especially provocative because of the way he explained the disparity between fifth-century and fourth-century arguments. In the latter, particularly in the hands of Demosthenes, the technique of finding a higher principle became eminently more sophisticated. But even at the height of their powers the fourth-century authors could not venture beyond the well-worn path: they must first find the principle as revealed in statute and then apply that principle to the measure in question. Demosthenes and his contemporaries never advanced to the level of recognizing cardinal principles above and beyond the statute (such as «due process»), as independent criteria which one might apply deductively to the case at hand <sup>16</sup>. After all, there was no body of legal experts to formulate such super-statutory rules. Instead in each case, the prosecutor of an unlawful measure must construct his foundation anew, reasoning inductively from the particular wording and practical implications of relevant statutes (and some not so relevant).

... as surely as they could extricate themselves from bondage to the express wording, even so their conception of the *paranomon* remained

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<sup>15</sup> «Normenkontrolle», pp. 20-23, on the positivistic character of this remedy; pp. 49-50, suggesting Euryptolemos would have used a more juristic argument in court.

<sup>16</sup> «Normenkontrolle», p. 66: «The speeches against Aristokrates and Timokrates give eloquent testimony to this. Despite their relatively high level of juristic argument, they indicate a capability for constructing abstract and dogmatic categories as yet undeveloped. They had not yet reached the point where one could extract the principle that was recurrent in various provisions and recognized to be inherent in them all (cf. Dem. 23.62 ...) as a super-statutory concept (*überpositiv*), a rationale superior to the particular laws and sufficient in itself to brand as *paranomon* the proposal that clashes with it.

fixed upon the idea of conflict with the particular provisions examined in isolation. Regardless of the fact that invariably the result was in each case the same and, moreover, always on similar grounds, they apparently knew no other method than to proceed from one statutory provision to another, in tiresome monotony, always describing how [each provision] stood in conflict with the indicted measure *ab initio* and without reference to the others. («Normenkontrolle», p. 66)

This finding involves two important corrections to the older constitutional model. (1) The principles invoked by the Athenians against unlawful measures were neither constructed nor applied in quite the same way as modern judicial review; it is only an *approximation*. And (2) Wolff describes a *continuous development* in argumentation, from a more radical positivism toward rationalized control<sup>17</sup>. In this perspective on the argumentation, Wolff's study is compelling, and his way of defining the issue has been widely accepted and adapted<sup>18</sup>.

But Wolff's hegemony has faced some effective opposition. Where Wolff insists that the *graphe paranomon* was conceived and consciously employed as an instrument of constitutional control, that approach naturally suggests that legal issues trump the political calculations<sup>19</sup>. To the contrary, Yunis (1988) has argued persuasively

<sup>17</sup> «Normenkontrolle», p. 80: «Zu einem Instrument, das den die Normenkontrolle des heutigen Staatsrechts tragenden Gedanken in einem gewissen Umfang zu verwirklichen vermochte, konnte sich die γραφή παρανόμων, nunmehr im Zusammenwirken mit ihrem Schwesterinstitut, der γραφή νόμον μη ἐπιτήδειον θείναι, erst auf Grund der Reform von 403/2 entwickeln» («Now, on the basis of the reform of 403, the *graphe paranomon* could develop into an instrument capable of realizing the ideas that support the judicial review of modern constitutional law [within a certain range] in combination with its sister-procedure, the suit against unfitting law»).

<sup>18</sup> E.g. Ostwald's study, *From the Sovereignty of the People to the Sovereignty of Law* (1986), pp. 125-128. Hansen (1991), pp. 205-212.

<sup>19</sup> Cf. Yunis (1988), pp. 368-369. Wolff sets aside the political element as tangential to his inquiry and disregards partisan exploitation as «Missbrauch» («Normenkontrolle», pp. 15, 26-27). There are several cases where the only attested grounds are political (though the testimony is slim): Wolff disposes of these as mere exceptions (pp. 61-63). In one of the better preserved examples Wolff's insistence seems strained: in Hyp. *For Euxenippos*, 15-17 (against a decree ordering two demes to restore a property to the sanctuary of Amphiaraios) where the mover was fined a mere 25 drachmas, Wolff insists that legal grounds are quite probable, and far from trivializing the procedure, the modest fine shows that even minor infractions were treated seriously, as worthy of judicial review.

sively that (whatever its original aim) the *graphe paranomon* was commonly regarded as a control on policy as well as legality<sup>20</sup>. The fourth-century speeches recognize this balance of issues in programmatic statements. Thus in Dem. 23.18, the prosecutor will show that the decree is not only contrary to law but also a disadvantage to the polis, and moreover that the honorand is undeserving. More plainly, Aischines (3.8) charges Ktesiphon with drafting a bill that is παράνομα ... ψευδῆ καὶ ἀσύμφορα τῇ πόλει<sup>21</sup>. But, it is fair to say, Yunis's distinction between legal and political issues might have seemed artificial to the Athenians (and to Wolff), especially in the suits against grants of citizenship and other honors (which represent more than half of the attested cases in the fourth century). If the law of that era prescribed, as Apollodoros suggests ([Dem.] 59.89), that any grant of citizenship be merited by *andragathia* toward the Athenian demos, then the argument over whether the recipient is worthy of the honor – and whether it is in the people's interest to reward him – is integral to the legal issue. In other words, «factual defect» may be construed as an element of illegality<sup>22</sup>.

Also critical is the recent work by Sundahl, particularly the article that appeared in 2003. Sundahl's dissertation (2000) laid the groundwork with useful analysis of the seven extant speeches. The dissertation is particularly valuable for its catalogue of legal arguments and for its account of the practical aspects of the procedure – how parallel texts of the proposal and the relevant law were presented on boards (*sanides*) and the express contradictions were thus illus-

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<sup>20</sup> Yunis's approach, legitimizing the policy arguments, at least avoids the dysfunction that Cloché (1936) had found: in sum, as a safeguard of the democracy, *graphe paranomon* proved more harmful than useful (p. 412). Be that as it may, Cloché is a prime example of the failings that Wolff undertook to correct; for Cloché assumed that *graphe paranomon* was originally devised as a safeguard of the democratic regime, but largely *a priori* (esp. pp. 406, 409) without any serious investigation of the historical conditions that prompted the safeguard.

<sup>21</sup> Yunis (1988), esp. pp. 37-43; cf. Lyc. fr. 91 Sauppe (Hansen's catalogue nr. 36), another honorary decree. In other speeches without so straightforward an *apodeixis*, Yunis shows a similar organizational principle. Wolff for his part had acknowledged the predominance of political interests in some cases but discounted the idea that the juristic element was inseparable from the political («Normenkontrolle», pp. 26-27).

<sup>22</sup> See Singh (1985), pp. 71-79, esp. p. 77 on «factual defects». Wolff treats factual defect as an element of illegality in the difficult case of Leogoras against Speusippos (discussed below at n. 42).

trated from direct comparison. But that text-centered presentation leads Sundahl to insist upon a rather formalistic reading of the arguments, and some of the distinctions seem lost in abridgement from the dissertation. Sundahl's main contention against Wolff is that the fourth-century speeches show no significant reliance on the overarching principle. In fact the great majority of the arguments in the seven speeches are closely tied to specific contradictions between the proposal and the wording of a standing law, without building any clear connection to a higher concept.

On that point Sundahl's analysis has merit but, by focusing on that feature, he sometimes gives a misleading impression of Wolff's position. For Sundahl suggests (here and there) that Wolff saw the major shift from fifth-century reasoning to the fourth-century speeches as a matter of overcoming a formalistic constraint. Wolff indeed suggested that fifth-century arguments had to be closely tied to the wording of statute, but in the fourth-century speeches, Sundahl summarizes, «No longer was it necessary to show formal violation of a specific statute. According to Wolff, a proposal could be successfully challenged if it was shown to be inconsistent with principles embodied in the standing laws»<sup>23</sup>. This phrasing suggests that in Wolff's view the more evolved argumentation might address abstract principles without posing any contradiction with the wording of a particular statute<sup>24</sup>. But Wolff's construction involves a finer distinction: the difference between the fifth century and fourth is

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<sup>23</sup> Sundahl understands the distinction but passes over it in a way that is bound to be misleading to others. Thus the passage discussed here (2003), p. 143, reads more fully: «Wolff proposes a theory about the evolution of legal argumentation in the *graphe paranomon* and *graphe nomon me epitedeion theinai*. He first posits that in the fifth century *graphe paranomon* trials the prosecutors limited themselves to formal legal argumentation that alleged procedural transgression or some other violation of the express dictates of a standing law. By the beginning of the fourth century ... the criteria had changed ... *No longer was it necessary to show formal violation of a specific statute*» (emphasis added).

<sup>24</sup> In n. 54 Sundahl cites «*Normenkontrolle*», p. 54, quoting and translating as follows: «Es sind nicht mehr allein individuelle Bestimmungen in ihrer unmittelbar am Tage liegenden Erscheinung, an welchen eine inkriminierte Vorlage gemessen wird, sondern das durch sie konkretisierte ... allgemeine Prinzip» («Indicted proposals were no longer measured against the plain everyday meaning of individual statutes, but were instead [measured] against the general principles which were given form through these [statutes]»). The phrase in ellipse is <aber erst auf dem Wege der Auslegung erkennbar>.

that the *earlier* argumentation does not go about constructing the higher law by sophisticated comparison but rather seems to invoke a set of rules implicit in the relevant statutes or the procedures they prescribe. In the fourth century, by contrast, an indicted proposal is measured against the general principle that is «... given form through these statutes but *first recognizable in the course of explaining them*»: «... das durch sie konkretisierte *aber erst auf dem Wege der Auslegung erkennbar allgemeine Prinzip*» (my emphasis). In other words (as we saw above), in the 350s the prosecutor seems incapable of arguing deductively from the abstract principle (or doubtful that the jury would recognize it), *without first constructing it from the particular examples*.

After all, Wolff's study came in response to Kahrstedt's paradox and as a correction to the older constitutional model. Where Kahrstedt had insisted that suits *described as παρανόμων* in the fifth century involve different procedures from γραφαὶ παρανόμων in the fourth century, Wolff finds that the procedure is the same and the positivistic rationale is fundamentally unchanged.

The case of the Arginousai generals is, again, crucial. For Wolff suggests that there is an essential continuity linking the arguments of 406 and the classic case of 352, Demosthenes, *Against Aristokrates* (or. 23). In Demosthenes' speech the approach that Euryptolemos followed has achieved «full development» («zu voller Entfaltung gelangt»). It is not a difference in kind but an advance in technique: from its inception in the post-Periclean era, *graphe paranomon* was meant to defend the law as an inviolable body of rules. In the fourth century that body of rules was more clearly identified with the corpus of all the laws authorized from 403, but the juristic rationale was much the same as its original inspiration: it came of «the recognition that the Athenian democracy required, for its own preservation, a certain self-imposed restraint»<sup>25</sup>. I make this distinction not to vindicate Wolff's position – he hardly needs me to defend him – but rather to suggest that this is precisely where he ventures too far beyond the evidence.

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<sup>25</sup> «Normenkontrolle», p. 23, beginning the paragraph that Sundahl quotes partially (see n. 23 above): «Sie war ein früher ... Ausfluß der Erkenntnis, daß die attische Demokratie im Interesse ihrer eigenen Erhaltung gewisser konstitutioneller Selbstbindungen bedürfte».

Wolff discounted Kahrstedt's paradox but some of its premises are at least consistent with what we know of cases before 403: where the offense is described as *paranoma*, what seems to be at issue is official misconduct. For instance, where Andokides describes his father's suit against Speusippos as a trial before 6000 dicasts, Kahrstedt suggests that he is referring to a suit for official wrongdoing against the councilman (*bouleutes*) for his handling of a hearing before the council<sup>26</sup>. Wolff dismissed this approach and, indeed, Kahrstedt was probably wrong to conclude that these early suits were not the same procedure<sup>27</sup>. But I think Kahrstedt was right to argue that the purpose was somewhat different, that indeed the early cases were not necessarily aimed at *overturning the decree on the grounds of some conflict with prior statute*.

As we shall consider more fully in the following sections, there is no clear evidence for the positivistic premise, the view that early *graphe paranomon*, before 403, insisted upon the express contradiction between a new decree and older legislation. To be sure, Euryptolemos cites comparable statutes but (as Wolff himself conceded) that is to support his own alternative proposal and may not represent the typical arguments at trial in a *graphe paranomon* of that era. And Euryptolemos' argument is the only evidence we have suggesting that before 403 *paranoma* might be construed from the express wording of statute. A rather different meaning is indicated in other testimony from the late fifth century, as we see from Ostwald's findings on the evolving meaning of *nomos* and its cognates (1969). Long after *nomos* was adopted as the proper term for statutes of permanent validity, it retained an archaic sense of customary practice or traditional role; *nomos* often seems to describe the familiar path or range of activity by which a person in power deals with someone subject to it. In fact, fifth-century use of *paranomon* is largely consistent with this essential idea: it often seems to describe a transgression *ultra vires*, beyond one's proper role. The issue is

<sup>26</sup> Kahrstedt (1938), pp. 22-23 with n. 1, also objecting to the exaggeration: «... not before the full body [of 6000] but before an ordinary court» (= 1968, pp. 248-249 n. 166).

<sup>27</sup> «Normenkontrolle», pp. 16-17, citing other studies (esp. Hignett [1952], p. 212), and the formal phrasing of our reports on the early cases: in each instance the suit is identified in the proper technical way, with a genitive of the charge, *παράνομων*, and often with *γραφή* or *γράφεσθαι*.

certainly larger than any particular conflict between old statute and new decree, but it does not necessarily involve the corpus of «all the laws». The evidence is largely consistent with Kahrstedt's basic observation: early *graphe paranomon* was directed against those who abuse their law-given powers.

On this view *graphe paranomon* was devised as an adversarial remedy of a peculiar sort but probably without any positivistic criterion: it was not seen as a bulwark of the democracy but rather as a counter measure against the wrong to a particular victim. Of course this sort of reconstruction involves a bit of mind-reading, and that is an uncomfortable exercise for historians. We undertake this exercise only because the scholarly tradition requires it of us. It was once supposed that *graphe paranomon* was introduced to replace Areopagite *nomophylakia* – that safeguard is what the Athenians had in mind. Wolff argued instead that *graphe paranomon* was conceived in a positivistic era and consciously applied as a safeguard of the radical democracy. But the one procedural feature that is supposed to reflect this original intent most clearly has no basis in the evidence of actual cases.

## 2. COURT SOVEREIGNTY AGAINST ANY LEGISLATION, WITH LIMITED LIABILITY FOR THE AUTHOR

Underpinning the constitutional model is the double premise that any decree could be overturned by the court at any time, whereas the mover was liable *only* if prosecuted within a year of his proposal<sup>28</sup>. Thus the proper aim of *graphai paranomon* was to protect the constitution, not necessarily to punish the demagogue. But we have evidence for the limit on liability only in regard to the fourth-century suit «for enacting an unfitting law», the *graphe nomon me epitedeion*

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<sup>28</sup> For the implications of this dogma see, e.g., Goodwin (1901), pp. 316-323, emphasizing the salutary effect: the «vituperative quarrel of rival litigants ... was to a great extent removed after the expiration of a year, when the process became a sober and dignified trial of a legal question». Goodwin is thinking (rather generously) of the speech *Against Leptines* (a *graphe nomon me epitedeion theinai*); cf. Gerner (1949), pp. 1286-1287.

*theinai*. Soon after 403 the body of *nomoi* became formally distinct from decrees by virtue of the procedures for legislation and legal challenge. New *nomoi* were ordinarily subjected to review before a special court of dicasts sitting as *nomothetai*, with public advocates to defend the old law. We shall examine other complications below, but here it is the anomalous situation that most interests us: once a new law was enacted, it could still be challenged as an «unfitting law»; and if the trial was somehow postponed for a year, the author of the law was no longer liable. Such was the case against Leptines' *nomos*<sup>29</sup>. We have no clear example of a decree indicted in this way, after the author was immune.

To be sure, there is late testimony that the same rule applied in suits against decrees as in suits against laws: the hypothesis to Demosthenes' speech *Against Leptines' Law*, claims, «the author of a law or a decree is not liable after one year» (τὸν γράψαντα νόμον ἢ ψήφισμα μετὰ ἐνιαυτὸν μὴ εἶναι ὑπεύθυνον). But as Kahrstedt recognized, the author of the hypothesis was probably generalizing from the case at hand, a case against an unfitting law<sup>30</sup>. So Wolff himself acknowledged in a footnote: the prospect of prosecuting the decree alone, when the mover was no longer liable, is not quite so probable as usually supposed<sup>31</sup>. After all the «suit against an unfitting law» seems to be an extension of the apparatus for legislative review: its purpose is to preserve the integrity of the corpus of laws as rules of permanent validity and applicable to all cases; therefore it is all the more important to remove any conflicting measure whenever it is discovered. By contrast, most decrees targeted by *graphai paranomon* in the fourth century have a very limited effect (esp. honorary decrees). So the old assumption that the same limitation applies in *graphai paranomon* as in *graphai nomon me epitedeion theinai*, may be simply a mistake. And even if it is accurate testimony on the law of the 350s, we have no reason to suppose that

<sup>29</sup> See Hansen (1985), pp. 368-371.

<sup>30</sup> Kahrstedt (1938), p. 25. So, too, Lipsius (1905-1915), p. 386.

<sup>31</sup> «Normenkontrolle», p. 10 n. 8: the evidence of Demosthenes only indicates the rule in *graphe nomon me epitedeion theinai*, «nach Ablauf der Ausschlussfrist für den Strafprozeß in einem objektiven Verfahren gegen das Gesetz als solches vorzugehen. Daß die beiden γραφαί auch in dieser Hinsicht parallel liefen, wie man gleichfalls als selbstverständlich annimmt, ist mir jedoch nicht ganz wahrscheinlich».

the time-limit applied to *graphe paranomon* before it was devised for *graphe nomon me epitedeion theinai*.

Mogens Hansen has identified a few cases where supposedly the court overturned a decree a year after enactment. Indeed, he reconstructed what may be the earliest attested *graphe paranomon* as just such a suit against the decree alone, after the mover's liability had ended. This is the case for which Antiphon wrote a speech against the general Demosthenes in a *graphe paranomon*. It may be as late as 415, the same year as the suit of Leogoras (discussed below). But on historical grounds it is at least as likely that it belongs to Demosthenes' embattled generalship in the 420s<sup>32</sup>. Whatever the date, ps.-Plutarch refers to this case as *πρὸς Δημοσθένη* rather than *κατὰ Δημοσθένους*, and from that Hansen supposed that this was indeed a case prosecuted after the time-limit had expired, therefore attacking the decree and not the author. But if we put together all the fragments and testimonia, it seems reasonably clear that Antiphon's speech was for the defense against a suit that Demosthenes prosecuted. We have seven citations in Harpocration referring to this speech as Ἄντιφῶν ἐν τῇ πρὸς τὴν Δημοσθένους γραφῆν ἀπολογία<sup>33</sup>. So it was presumably this speech for the defense that ps.-Plutarch called *πρὸς Δημοσθένη*, loosely adding the genitive of the charge, *παρὰ νόμων* (a usage easily paralleled)<sup>34</sup>.

If we are still inclined to suppose the limit on liability applied to decrees<sup>35</sup>, consider the comparable situation where the *graphe* was initiated at the first stage, against the council's *probouleuma*, and then came to trial more than a year later. Ordinarily, after a year

<sup>32</sup> Cf. Carawan (1996), p. 20.

<sup>33</sup> *Svv.* Ἀλκιβιάδης: Ἄνδρων[ἀντιγραφῆν] Ἀποτετελιχισμένος· Δεκατευτάς· Κελέοντες· Σκαφίον· Συνήγοροι. There is one variant reading in fr. 14 (*s.v.* Ἄνδρων) referring to Demosthenes' suit as an *antigraphē*, and from this Hansen supposed that we are dealing with suit and countersuit. But it is surely more economical to suppose that ps.-Plutarch has simply abbreviated the description, amid a list of famous works. It is likely to be this famous speech against Demosthenes to which Harpocration refers repeatedly as *πρὸς τὴν Δημοσθένους γραφῆν ἀπολογία*. So supposed Blass (in his Teubner edition of Antiphon, 1892) and Lipsius (1905-1915), p. 384.

<sup>34</sup> Cf. Lys. fr. V (Gernet), *πρὸς Κινησίαν ὑπὲρ Φανίου παρὰ νόμων* (with n. 49, below).

<sup>35</sup> Hansen (1987a), p. 172 n. 590, cites Dem. 23.104: Autokles was indicted by another procedure after the time-limit for *graphe paranomon* had passed.

the measure could no longer be enacted, as we learn from Demosthenes 23: Aristokrates authored a *probouleuma* giving special protection to Charidemos, but the measure was promptly challenged and never took effect. Nonetheless, at trial a year later, Demosthenes demands that the jury punish the mover of the decree. Now, if the mover could still be punished for a wrongful measure that was moot, surely he was not shielded from liability for a wrongful measure that actually took effect<sup>36</sup>. But among the known *graphai paranomon*, we find no clear case against the author of a decree a year after it was actually enacted<sup>37</sup>. The constitutional model supposes that there was no such case because the mover became immune; the decree could still be overturned. The more probable explanation is just the reverse: there was no statutory limit on the mover's liability but there was a practical limitation on quashing the decree: one could not ordinarily overturn a decree in court, once it had been implemented. After all, many of the decrees targeted by *graphai paranomon* would be irreversible once they were carried out; this is especially true of punitive decrees – as in the case of the Arginousai generals<sup>38</sup>.

There are, however, two cases soon after democracy was restored where, supposedly, the trial came some months after the decree was implemented. The first is the suit against Thrasybulos for a decree granting citizenship to all who joined the democrats in Peiraeus. Supposedly the decree must have taken effect only to be

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<sup>36</sup> The mover's liability, after the *probouleuma* should have expired, is confirmed in the suit against Ktesiphon, although that peculiar case may have been subject to an exception or a change in the law. As Hansen has argued (esp. 1987b, pp. 66-67), the speeches proceed consistently as though the court's decision will decide whether to punish Ktesiphon or carry out his decree crowning Demosthenes. Cf. Yunis (2001), p. 12, assuming that Demosthenes was indeed crowned.

<sup>37</sup> The limitation is also brought into the case against Demades (Hansen [1974], nr. 38). From the oblique testimony in Athenaios (6.58), the case is reconstructed as *paranomon*. But it is at least as likely that the suit is *asebeias*, as Aelian attests (VH 5.12).

<sup>38</sup> Much of the earlier scholarship (before Wolff) labors under the assumption that *graphē nomon me epitedeion theinai* was simply a particular type of *graphē paranomon* (e.g. Gerner [1949], esp. p. 1287). Lögdberg (1898), pp. 35-36, mistakenly treats Hermogenes' hypothetical case in *Peri Staseon*, 8, as testimony on Athenian practice, showing that suits against measures passed and enacted were barred after thirty days; but the exercise may reflect later restrictions elsewhere recognizing the practical limitation.

later overturned in court; scholars have found that window of opportunity attractive because it would give Lysias the status to prosecute Eratosthenes. But that thread of inference will not hold. Lysias did not have to be a citizen to make his complaint<sup>39</sup>. Nowhere in the speech does Lysias indicate that he is a citizen; in fact he emphasizes how he was victimized as a metic and never suggests that his status has changed. The very fact that the decree was *aprobouleuton* would suggest that it was challenged at the first opportunity, immediately after it passed in the assembly; therefore the grant of citizenship never took effect.

The second case is the *graphe paranomon* against Theozotides for a measure benefitting the orphans of the «heroes of Phyle»; only «rightly born» sons (*gnesioi*) need apply; *nothoi* and *poiatoi* get nothing. In the fragments of Lysias' speech we find reference to a measure affecting the cavalry corps, a decision that had passed and taken effect sometime prior to the speech. Hansen supposed that the two measures were part of the same spending decree; so here again, supposedly, we have a decree prosecuted sometime after it was implemented<sup>40</sup>. But as Stroud argued when he published the inscription, the cavalry measure probably had nothing to do with funding for the orphans. Lysias mentions the cavalry decree as a *fait accompli*, not at issue in the current case but simply another example of Theozotides' arrogance. Thus, as the relevant fragments would naturally suggest, the suit *paranomon* was directed against the orphans decree before it could take effect.

In sum, among the early cases there is no probable instance where the court overturned a decree after it was implemented. In the later fourth-century there may have been cases where a decree was overturned after it was ratified and briefly became valid, but this «third-stage» *graphe paranomon* would be effective only against honorific decrees with limited effect<sup>41</sup>. And if there were such cases in the later period, it probably reflects the ideology of that time and

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<sup>39</sup> Whitehead (1977), pp. 90-97; followed in the main by Todd (1993), pp. 194-199. Cf. Wilamowitz (1893), 2, pp. 219-220 n. 4.

<sup>40</sup> Hansen (1974), nr. 5 (p. 30); cf. Stroud (1971), pp. 297-301; Carawan (2008), pp. 403-404.

<sup>41</sup> If the hypothesis to Dem. 20 is to be given any credence, it might refer to a measure of the mid fourth century.

not necessarily the original rationale. The early cases, where decrees are as potent as the laws, point to a different idea: the decree can only be overturned by attacking the mover in the very act of abusing that power.

Such was the suit of Leogoras against the councilman Speusippos (Andok. 1.17, 22). To prosecute profaners of the Mysteries, the council was made *autokrator*, with full authority to conduct the investigation and hand down their verdict to a special court for final decision. Leogoras apparently made no complaint about the constitutional maneuver – there was nothing illegal in bringing an indictment in this way; instead Leogoras seems to have argued that the councilman abused his official authority by departing from the traditional path of justice<sup>42</sup>. At least Andokides suggests that Leogoras won the point by challenging Speusippos to examine his slaves. This sort of challenge would ordinarily apply in preliminary investigation; so it probably represents an argument that Speusippos had committed *paranoma* by producing an indictment on improper evidence – the information of a slave without threat of torture and uncorroborated by traditional forms of proof. The evidentiary rules do not seem to have been encoded in statute but were part of customary practice.

The same distinction applies in Euryptolemos' suit against Kallixenos – to return to our focus. Council had again assumed the authority to investigate and hand down an indictment. There was nothing unconstitutional in that procedure; indeed, the councilors abided by their oath, «to condemn to death no citizen without a quorum of the people». And Euryptolemos cannot point to any language in law that expressly bars or preempts Kallixenos' procedure. The measure was unconstitutional only in the positivistic sense that Wolff constructed: it went against the system of laws that the demos had enacted. But that construction was not yet a rationale that the Athenians could readily articulate. Indeed those who sided with Kallixenos objected that it was wrong to thwart the will of the people<sup>43</sup>.

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<sup>42</sup> Even if Andokides' description involves some distortion, it is likely to reflect current assumptions and recent memory c. 400/399. From his account Wolff invokes «factual defect» as an element of illegality («Normenkontrolle», p. 48).

<sup>43</sup> Much the same objection was made in defense of a (convicted) unlawful measure in 349/348: [Dem.] 59.3-8 (Hansen's nr. 18); cf. Carey (1992), *ad loc.* with n. 51, below.

For Wolff that objection shows in itself that *graphe paranomon* was naturally construed as a restraint upon the people's power of decree. But if that were so, surely Euryptolemos and his followers would reply that *graphe paranomon* was the proper remedy for precisely that purpose.

### 3. POSITIVISM AND GUARDING «ALL THE LAWS»

For Wolff the law of Athens is thoroughly positivistic: it is the command of the sovereign demos set down in statute. By this view, traditional practices have little authority in themselves; what gives law its power is the people's enactment. The system of rules is viewed as a product of decisions by the demos, and any contradictory measure violates that body of laws as a whole. This construction is easily defended in the fourth century, not so easily demonstrated for the earlier period <sup>44</sup>.

Wolff points to an anecdote in Xenophon's *Memorabilia* and to Plato's *Krito*. In the former, Perikles is shown as a «crass positivist», doubtful of any constitutional limits upon the people's power. He asserts that «*Nomos* is whatever the legitimate sovereign declares by constitutional means», but whatever «one compels another to do, without persuading him, ... this seem to me to be compulsion rather than *nomos*». The precocious Alkibiades asks, «And when the whole *plethos* is in power, whatever it prescribes for the propertied class, without persuading them, would this be compulsion rather than *nomos*?» And Perikles has no answer. The anecdote (even if fictitious) perhaps suggests that *graphe paranomon* was not yet available in Perikles' time; it certainly indicates that positivism was well entrenched (at least as Xenophon recalls). Similarly Socrates' unquestioning obedience to the laws (even when they are unjust) was a principle «that had long governed the polis ... a natural consequence of unlimited popular sovereignty». To be sure, Wolff care-

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<sup>44</sup> Wolff relies upon the negative findings of his study *Gewohnheitsrecht und Gesetzesrecht* (1968, orig. 1962), pp. 112-117, against a foundation in customary law. For the analysis of Xen. *Mem.* 1.2.40-46, and *Krito*, 50a-54c, see (respectively) «*Normenkontrolle*», pp. 19-20 and 70-72.

fully acknowledged that legal thinking was much affected by the adaptations after 403, but he insisted that the basic rationale is essentially the same: *nomos* is the system of rules authorized by the people, and the *paranomon* violates that system.

There are two basic problems with that model. First, there is no direct evidence that the *paranomon* was construed in quite this way in the fifth century. And second, there is considerable evidence that traditional thinking about the binding effect of custom and characteristic practices contributed to the conception of the *paranomon*. Let us reserve that second consideration for the following section (§ 4). Here let us examine the positivistic model, that an act in conflict with a particular statute violates the whole system of rules that the demos has authorized. That model only appears fully articulated in the fourth century and it is at least as likely that the idea was inspired by the reforms of that era. After all, if we look closely at the way that model is articulated in the 350s, we find that it is introduced as a novel idea, one that must be explained and justified, not treated as a familiar and well-accepted premise.

The laws of the fourth century constitute an integral body of rules such that violating any particular provision is a violation against the whole<sup>45</sup>. This is the rationale (however irrational it may seem) for the commonplace in the speeches, arguing that the measure indicted as *paranomon* or *me epitedeion* violates «all the laws», not just the particular statutes that it contradicts. The Athenians themselves seem to recognize that this principle represents a shift from the older rationale: thus Aischines laments the loss of the good old practice of indicting a measure «if it transposed a single syllable, not just [as now] if it leaps over *all the laws*»<sup>46</sup>. It may then strike us as trivializing when

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<sup>45</sup> In order to propose a new measure that is in any way at odds with the old, one must either (a) challenge the old law in an annual «review of the corpus», for a jury to decide between the old law and a new formulation, or (b) repeal the old law, offering a replacement to complete the set. Cf. Dem. 24.19-23 (the «Review Law») and 33 («Repeal Law»). The latter citation refers to the law authorizing γραφαί νόμον μη ἐπιτήδειον θεῖναι as governing the suit against anyone who repeals a law but substitutes one that is «unsuited to the demos or in conflict with any of the established laws» (μη ἐπιτήδειον τῷ δήμῳ τῶν Ἀθηναίων ἢ ἐναντίον τῶν κειμένων τῶν).

<sup>46</sup> Aischin. 3.192: ἡλίσκοντο οἱ τὰ παράνομα γράφοντες, οὐκ εἰ πάντας παραπηδήσειαν τοὺς νόμους, ἀλλ' εἰ μίαν μόνον συλλαβὴν παραλλάξειαν.

Aischines accuses Ktesiphon of violating «all the laws» (3.212, οὗτος παρὰ πάντας τοὺς νόμους γέγραφε στεφανῶσαι) simply because he proposed to crown Demosthenes before his accounting. But that formulation appears to be the product of an evolving rationale.

Consider the classic case of Demosthenes, 23, *Against Aristokrates*. After detailed discussion of all the particular laws regarding homicide, showing how Aristokrates' *privilegium* for Charidemos would conflict, the legal argument concludes (100), «I don't think even Aristokrates will be able to deny that he has authored a decree *against all the laws*»<sup>47</sup>. But it is not at all clear that the measure is construed as a violation of «all the laws» in quite the sense that Wolff would put upon it. In this particular context it is at least as likely that the jurors would understand Demosthenes' words as applying to the particular set of laws that he has just examined exhaustively – not all the laws absolutely but all *these* laws, the ones relevant to the prosecution of homicide.

After all we are given a remarkable exercise in the evolving theme just a year earlier, in the speech against Timokrates for authoring an «unfitting law» (that allowed state-debtors a generous reprieve). Here we find the text of the Review Law itself (19-23) and high praise for it (24): All *these* laws (governing legislation) are of long standing and often tested, containing «nothing rough, violent, or oligarchic». And that perspective seems to invite the notion that «all the laws», perennially corroborated by this Review process, belong to an integral corpus (38-39): all the measures against bribery and corruption Timokrates has invalidated and in their place «he has introduced a law contrary to all the laws in existence, so to speak» (νόμον εἰσήνεγκεν ἅπανσιν ἐναντίον, ὡς ἔπος εἰπεῖ, τοῖς οὖσιν); for he neglected to repeal the laws in conflict or to follow any of the procedures prescribed for new legislation. Here the speaker scrupulously acknowledges that «all the laws» is a figure of speech, but then he proceeds to insist upon this

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<sup>47</sup> Ὡς μὲν τοῖνυν οὐ παρὰ πάντας τοὺς νόμους φανερώς γέγραφεν τὸ ψήφισμ' Ἀριστοκράτης, οὐκ οἶμαι λέγειν αὐτὸν ἕξειν. Cf. *Normenkontrolle*, pp. 27, 50-54, esp. the connection between § 90 (τὸ δεινότατον πάντων ἐστὶ, τὸ μηδεμίαν κρίσιν ...), and Euryptolemos' objection (25), τοὺτους ἀπολλύντες ἀκρίτους παρὰ τὸν νόμον: the latter, «shows that Euryptolemos understood the particular clauses of criminal laws that he cited as manifestations of a general principle – though originally they governed only the applicable procedure of relevant cases» (50).

description, often without that qualification: «Timokrates' law in every feature contradicts all the existing laws» (41); «he has made a law, I would nearly say, against *all the existing laws* in the polis» (61); he is guilty of «first legislating in violation of the laws (that govern legislation) and secondly authoring provisions in conflict with *all the existing laws*»<sup>48</sup>. It is the assault at this level, against «all the laws», that inevitably involves the political dimension: «I think you [judges] all will realize that [Timokrates'] law is subverting the whole *politeia* and disrupting all the city's business» (91); «yet it is the existing laws, which have authority over us, that give these judges authority over all» (118). Any change in the law is viewed as a zero-sum process because the laws are now envisioned as a closed set; against that whole structure of authority Timokrates' law stands in conflict.

In this speech Demosthenes approaches the theme cautiously, at first carefully acknowledging that it is, after all, a figure of speech to say that the one measure violates all the laws. That caution suggests that the idea is not yet commonplace in quite this form. And it is important to remember that we have a wide gap in the evidence: beginning soon after 402/401, up until the 350s (when Demosthenes 20 and 22-24 appear), we have no record of the arguments that were used in suits for unlawful measures. But we know that this was a period of profound change in the way legislation was enacted and evaluated.

Of course the nature of the case against Timokrates – a *graphe nomon me epitedeion theinai* for violating the legislative process – naturally lends itself to a defense of all the laws. There is an older version of the charge that *paranoma* violate all the laws, one that is applicable even against decrees, but the difference is significant: from this perspective the proponent of unlawful decrees is seen as a lawless character and thus constantly abuses «all the laws»<sup>49</sup>.

<sup>48</sup> Dem. 24. 41, ὅλος μὲν γὰρ ἐστὶν ἅπασιν ἐναντίος τοῖς οὔσι, μάλιστα δὲ ταῦτα; 51, πάντων τῶν νόμων οἷς οὗτος ἐναντίον εἰσηγήνοχεν; 61, μικροῦ δέω παρὰ πάντας εἰπεῖν τοὺς ὄντας ἐν τῇ πόλει, τέθηκε τὸν νόμον; 108, πρῶτον μὲν παρὰ τοὺς νόμους νομοθετοῦντα, δεύτερον δ' ὑπεναντία τοῖς οὔσι νόμοις γεγραφότα. Cf. 84, singular in the same sense, «against every law, παρὰ πάντα τὸν νόμον, ... to protect the wrong-doer»; 187, ὡς μὲν οὐκ ἀσύμφορος ὑμῖν ἐσθ' ὁ νόμος καὶ παρὰ πάντας τοὺς νόμους εἰσηνηγμένος καὶ κατὰ πάντ' ἀδίκως ἔχων, οὐχ ἕξει λέγειν.

<sup>49</sup> This theme is illustrated c. 390, in a long excerpt from Lysias' speech *Against Kinesias*, for Phantias as defendant in a *graphe paranomon* (fr. 195 Carey = fr. 5 Gernet;

We meet with that characterization in the earlier speech *Against Androtion*. The legal issue is roughly (and ironically) analogous to the case that would later develop against Ktesiphon: Androtion had proposed an honorary crown for the council in which he served, disregarding a law that prohibited such honors if the council had failed to build warships. For his part Androtion could argue that he and his colleagues had struggled heroically against an impossible situation. But those heroic efforts would now be turned against him. Demosthenes, as synegoros, begins (§ 1) with the personal wrongs that his colleague Euktemon has suffered, treated with *hybris* by Androtion, against all the laws, *πολλὰ καὶ δεινὰ καὶ παρὰ πάντας τοὺς νόμους Εὐκτήμονος ὕβρισμένου*. He then devotes much of the speech to the lawless conduct of Androtion in his official duties collecting revenue.

So, in a passage that would be reprised in the speech against Timokrates, we read that Androtion violated the most precious protections of the democracy, dealing tyrannically with those who had gotten into debt: rather than pursue lawful process for confiscation of their property, «you [Androtion] imprisoned and abused their persons, citizens and long-suffering metics, whom you have treated more abusively than your own slaves», *ἔδεις καὶ ὕβριζες πολίτας ἀνθρώπους καὶ τοὺς ταλαιπώρους μετοίκους, οἷς ὕβριστικώτερον ἢ τοῖς οἰκέταις τοῖς σαυτοῦ κέχρησαι* (54). This *hybris* consists in the improper use of his law-given authority. Thus he distrained the property of prostitutes who owed nothing, apparently claiming that they deserved such treatment (*ἐπιτήδειαι ἐκεῖναι παθεῖν*). But, Demosthenes protests, «this is not what the laws and the character of the *politeia* have to say, the character that you (jurors) must defend», *ἀλλ'οὐ ταῦτα λέγουσιν οἱ νόμοι οὐδε τὰ τῆς πολιτείας ἔθη ἃ φυλακτέον ὑμῖν* (57-58). His self-serving decree is of a piece with Androtion's lawless career, as an offender against «all the laws» (*παρὰ πάντας τοὺς νόμους*, 59).

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Hansen [1974], nr. 6). We find Kinesias, who pretends to be a defender of the laws (τοῖς νόμοις βοηθός), described as *παρانونομώτατον ἄνθρωπον*, as his whole life has been a lesson in lawlessness. Presumably this reverses the argument that Kinesias would make, charging Phantias with *paranomon*.

## 4. «PARANOMON» AND «HYBRIS»

As the speeches of the 350s show, there was an older idea of how the *paranomos* offends «against all the laws», a theme that carried on even as the positivistic construction emerged from a figure of speech. The mover of lawless measures is characteristically lawless, *paranomos* in all his actions; against this sort of offender, the law that must be preserved embraces the body of customary rules – τὰ τῆς πολιτείας ἔθη, Demosthenes calls them<sup>50</sup>. These were seen as largely unwritten rules about asserting authority. The *paranomon* is a violation *ultra vires*, against that relational norm: the great concern is abuse of authority by an official who overreaches. And Demosthenes' characterization suggests that *paranomon* in this sense is practically synonymous with *hybris*.

A similar standard emerges in the fragments of Lysias' speech *Against Theozotides* (fr. 128-130 Carey = fr. 6 Gernet; Hansen, nr. 5), within a year or so after the restoration of democracy. As we saw (above at n. 40), Theozotides proposed that the legitimate sons of those who fought at Phyle be honored and supported by the polis but that *nothoi* and *poiatoi* be excluded. Lysias seems to argue that this would be contrary to custom and civic duty (οὐτε νομίμως οὐ[θ' ὀσίως], ll. 7-8) as it is precisely the disadvantaged who deserve support. We have no way of knowing whether he took a more positivistic line in lost sections of the speech, but there is a sign of his strategy in a section that survives largely intact (fr. 129 Carey). Lysias cannot quite argue that Theozotides' bill contradicts prior statute, but he contends that «it will slander and falsify the finest proclamation in the laws» (τὸ κάλλιστον τῶν ἐν τοῖς [νόμοις] κήρυγμα ... διαβαλεῖ καὶ ψεῦδος [κα]ταστήσει): when the herald proclaims at the Dionysia that «these are the boys whose fathers died in war, ... whom the city has reared», is the herald to explain that only the *gnesioi* are represented, or will he lie and speak of «all the orphans»? «Isn't this *hybris* and a great slander [against the city]?» (Ταῦτα οὐχ ὕβρις καὶ [μ]εγάλη διαβολ[η]ή ...). Later in the speech Lysias charges that

<sup>50</sup> Wolff dismisses this sort of formulation as a purely rhetorical construction (1968, pp. 112-117; 1970, pp. 70-72), by which he seems to mean that such phrasing («laws and customs», «written and unwritten») are simply polar expressions. But the way Demosthenes develops the idea of the lawless character suggests that there is more to it.

Theozotides had shown similar arrogance in his decree cutting pay for the cavalry (fr. 130, col. ii), which has little relevance except to illustrate a lawless career. So the arguments that survive from this lost speech are at least consistent with the traditional line of attack in Demosthenes *Against Androtion*.

And this, I suggest, is the foundation that Euryptolemos built upon, just a few years before the case against Theozotides. Wolff, of course, insisted that the *graphe paranomon* was conceived by the democracy as a means of restraining its own excesses. He found that original intent implicit in the earliest evidence: where the people protest Euryptolemos' challenge as «outrageous for anyone to prohibit the people from doing as they will» (δεινὸν ... εἰ μὴ τις ἐάσει τὸν δῆμον πράττειν ὃ ἂν βούληται), we are to suppose that *graphe paranomon* was understood to serve precisely this purpose<sup>51</sup>. But if that were the acknowledged purpose, we would not expect it to be the rallying cry for the opposition – or surely someone would reply, «Barring the people's will – when demagogues have misled us – is precisely why this procedure was instituted». To be sure, Euryptolemos condemns the rush to judgement (esp. in § 26), but the *nomos* that he defends is not a barrier that the demos has imposed upon itself, to make their decisions fit the body of laws they have made. He seems rather to regard it as an ethological imperative, for the people to be true to their character<sup>52</sup>.

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<sup>51</sup> Consider the case in [Dem.] 59.3-8, from the year 349/348 (Hansen's nr. 18), esp. § 4, κύριον δ' ἡγοούμενος δεῖν τὸν δῆμον εἶναι περὶ τῶν αὐτοῦ ὅ τι ἂν βούληται πράξει. This suggests that even in the mid fourth century the constitutional rationale, that the *graphe paranomon* was a safeguard against the willful errors of the demos was not a universal conviction. Cf. Carey (1992), pp. 152-157 and notes *ad loc.*: Apollodoros authored an 'open' probouleuma for the demos to decide whether to divert surplus from the theoric fund to the *stratiotika*; addressing closed matters by an 'open' *probouleuma* was in itself an irregularity, and the measure, once passed, was indicted on that basis. The speech mentions, only to dismiss, the allegation that Apollodoros had been indebted to the polis and therefore *atimos*; others have emphasized this point as grounds for the *graphe*; cf. Hansen (1976), p. 239.

<sup>52</sup> The phrase «ethological imperative» is meant to suggest something more than ethical obligation. There is a determinism of character at work: a person or a people have a characteristic set of behaviors which they must adhere to: if they depart from that pattern, they risk disaster. Perhaps the most notorious example of this argument is found in Alkibiades' case for the Sicilian expedition (Thuc. 6.18.3-7).

After all, as Ostwald observed (1986, p. 109), the early usage presents its own paradox. The *nomos* in *paranomon* naturally conveys the prescriptive sense that emerged with Kleisthenes: *nomoi* are statutes. Yet, long after the Athenians typically thought of *nomoi* as written laws<sup>53</sup>, even in the last decades of the fifth century, this positive sense of the word is largely overshadowed by the older value: «... the *nomos* violated constitutes a general code of behavior» (1986, p. 115)<sup>54</sup>. This is the prevailing pattern in the usage of Thucydides and his contemporaries. Thus in Antiphon's speech *On the Murder of Herodes* – within a few years of the case against Leogoras – the defendant objects to what he regards as an improper procedure (insisting that the case should be tried by the traditional homicide court), yet he does not claim that any specific statute is violated; rather, as Ostwald observes (1986, p. 125), the *paranomon* consists in «a procedure other than that customary against murderers» (§§ 12, 15). The denial of bail, which this defendant protests as *paranomotata* (§ 17), does not expressly contradict any wording of law but (arguably) goes against customary practice.

This traditional sense of *paranomon*, as violating customary roles rather than specific statutes, is probably the original value of that term in the law for *graphe hybreos* (Dem. 21.47; Aischin. 1.15) and in the law against abuse of widows and orphans (Dem. 43.75). For our inquiry it matters little whether the *hybris* laws were enacted under Solon or Perikles<sup>55</sup>: even as late as 430, *paranomon* would

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<sup>53</sup> Ostwald (1969), esp. 58, regarding the shift as «absolutely certain ... by 442» (noting the distinction implicit in Antigone's appeal to ἄγραπτα νόμιμα).

<sup>54</sup> Cf. Ostwald (1986), p. 119: «... most of the passages ... from the same prose authors who use the concept also with political and legal connotations show that contravention of the statutes is not the only – and not even the dominant – idea associated with *paranomia*. The «chronological overlap of legal and nonlegal usages is more extensive in the case of *paranomos* than in the case of any other νόμος-compound». See esp. Thuc. 3.65-67, with Ostwald (1986), pp. 111-117 (Plataean debate and comparanda); cf. 4.98.2-6 (customary values among the Greeks); 6.15.4 and 28.2, with [Andok.] 4.30 (the «lawlessness» of Alkibiades' lifestyle and ambitions). The persistent sense of *nomos* as customary practice or traditional role is fully documented in Ostwald's *Nomos* (1969), esp. pp. 24-43.

<sup>55</sup> See Fisher (1992), pp. 36-82, esp. 53-56, against Ruschenbusch (1965) and Gagarin (1979). For Ruschenbusch (esp. pp. 304-309), the alternative description, *hybris* or *paranomon ti*, indicates a sort of omnibus remedy, for any crimes against the person («Wenn einer gegen jemand frevelt oder etwas Gesetzeswidriges tut»), dating to the

naturally convey an act contrary to customary practice, not against a specific statute. And it is that sense that most plausibly complements the main designation of the crime: in each version, *hybris* and *paranomon* seem to be alternative descriptions of the same act, ἐάν τις ὑβρίζει .... ἢ παράνομόν τι ποιήσῃ (*vel sim.*)

The debate over the *moral range* of *hybris* is beyond our scope<sup>56</sup>, but I think the preponderance of the evidence suggests that *hybris as an actionable offense* involves the demonstrable intent to dishonor (much as Fisher has argued); that is, the violator has asserted his superiority improperly, aiming to humiliate the victim and take satisfaction in it. For the law to describe the targeted offenses as «committing *hybris* or something *paranomon*» has always been problematic: if we assume that *paranomon* essentially refers to any violation of statute, it is tempting to regard it as a later addendum or interpolation in the law. But if we recognize the overlap in these two traditional ideas, the wording makes good sense as a sort of legal hendiadys in the original description of a crime that is difficult to define. Both terms describe a transgression of customary roles, violating the proper power-relationship; a person of greater strength or authority abuses that advantage against a subordinate or vulnerable figure. Even in the mid-fourth century (as we saw in the case against Androtion, § 3), speakers often invoke that linkage between *hybris* and *paranomon*.

This ethological sense of *paranomon*, as an act in conflict with one's proper behavior, would fit the earliest attested cases of the *graphe*. Much as Kahrstedt observed, the common element in Leogoras' case against Speusippos and in the challenge to Kallixenos seems to be that the councilman who moves the decree is taking undue advantage of his authority or stepping outside the proper path for legal proceedings: Speusippos relied upon the information of a slave without the threat of torture that custom required, and apparently without corroborating evidence of a more traditional sort. Thus

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time of Perikles (when otherwise unwritten rules were brought into statute). Gagarin (esp. pp. 233-235) argued that the *nomos* in *paranomon* refers to statute, that the law simply made statutory crimes actionable by *graphe*, and both *graphai* (*hybreos* and *paranomon*), were introduced in the same period, «perhaps during the third quarter of the fifth century».

<sup>56</sup> See esp. Cairns (1996).

Leogoras offered his own slaves for testimony under torture in order to point up the defect; and Andokides insists that, if he (Andokides himself) had incriminated his own father, Speusippos should have invoked that testimony to trump the slave's evidence. Of course that turn of the argument serves Andokides' own case; but it certainly suggests that the way the proceedings were handled was crucial to the case against Speusippos. For a councilman to neglect traditional practices and indict a citizen on the basis of irregular testimony is readily seen as overstepping the bounds of his proper role.

The arguments of Euryptolemos are at least consistent with this model, although he seems to be adapting it beyond its usual scope. As the *graphe* against Kallixenos has been withdrawn and the Athenians are now to decide between the two proposals, the question of *paranomon* is not formally at issue but it remains the strongest argument in his arsenal. The situation now requires that he apply that argument to the Athenians as a body, largely disregarding the conduct of Kallixenos. So, in his assertions about what is *κατὰ τὸν νόμον* or *παρὰ τὸν νόμον*, he focuses upon previous measures that illustrate the ordinary practice of the Athenians – what they have usually and properly done in trying citizens for treason and other high crimes. Much as Wolff observed, Euryptolemos constructs a broader principle from the specific statutes, in a manner that pre-figures the classic cases of the 350s. Thus in § 23, *τούτων ὁποτέρω βούλεσθε, ὦ ἄνδρες Ἀθηναῖοι, τῷ νόμῳ κρινέσθων οἱ ἄνδρες κατὰ ἓνα ἕκαστον διηρημένων, κτλ.*, «by whichever measure» (of the two) refers back to the statutes he has just cited (the decree of Kannonos and the treason law)<sup>57</sup>. But «let the men be judged *by the law*» looks to traditional pattern, of which the two statutes are merely instances. He never quite articulates the principle; he seems to take it for granted that his audience would recognize the nature of their obligation. But at the end of this argument he gives a clear indication of how that imperative was understood (29): *μὴ ὑμεῖς γε, ὦ*

<sup>57</sup> In specifying that defendants to be tried separately and with a specific time allotted to their defense, Euryptolemos' proposal appears to follow the decree of Kannonos; cf. Ostwald (1986), pp. 440-444, and see now Carawan (2007) on Krateros F15 (schol. Ar. *Ekkles.* 1089). Similarly in § 25, by deciding the case as *dikastai* in a proper trial, «you will be true to your oath ... and judge according to the law» (presumably) referring to the dicastic oath.

Ἄθηναῖοι, ἀλλ' ἑαυτῶν ὄντας τοὺς νόμους, δι' οὓς μάλιστα μέγιστοί ἐστε, φυλάττοντες, ἄνευ τούτων μηδὲν πράττειν πειρᾶσθε.

This is the clearest assertion that violating the law in this instance goes against the *Rechtsordnung als Ganzes*. The essential sense is, «No, Athenians! Keep guard over the laws that are properly yours – for it is especially on their account that you are (at your) greatest – and attempt no action without them». To describe the laws as ἑαυτῶν ὄντας, suggests that they are seen as an asset or a property (cf. *Hell.* 2.4.38, 7.4.12). The positivistic model, that the law may be whatever the sovereign body decides, is certainly recognized, but that is essentially the position assigned to Kallixenos and his backers. The principle of restraint that Euryptolemos embraces is not positivistic but traditional. There is no suggestion that the sovereign is barred from transgressing its own dictates. Instead the demos is bound by the law as though by some entailed estate.

Leading up to this climactic formulation, Euryptolemos has cited three indicia: the decree of Kannonos, the treason law, and the one precedent of recent memory, the treason-trial of Aristarchos (28). Aristarchos had been involved in the regime of 411 and was accused of betraying Oinoe to the Thebans<sup>58</sup>. In that case, Euryptolemos recalls, «you allowed him a whole day to make his defense however he chose, and in other regards (as well) you disposed of the matter according to law» (κατὰ τὸν νόμον); but the generals «... you will deprive of these very things». Now, the decision about how to try Aristarchos was itself a decree, a third statute that Euryptolemos might have cited if he were indeed constructing *nomos* positivistically. If the body of all the laws derives its authority from enactment by the sovereign demos, we would expect him to emphasize that feature. But instead he treats the decree itself as subject to some prior imperative. And it is that recent precedent that leads to the climactic demand, «keep guard over the laws that are yours ... and attempt no action without them». It is not the law because the people so decided; the people so decided because it is the law. The Athenians have enacted and enforced these rules because they are dictated by the traditional code of rights and duties.

<sup>58</sup> Hansen (1975), nr. 63 (p. 83).

## 5. CONCLUSIONS

The constitutional rationale, that *graphe paranomon* was invented as an instrument of judicial review – for the court to protect the laws from legislative errors – has more to do with the modern parallel than the record of fifth-century cases. It seems rather more likely that the constitutional rationale evolved with the reforms of the fourth century. To be sure, there is a glimmer of it in Eurptolemos' speech, but the singular context of that debate and all the indications of other early cases suggest that Eurptolemos' plea was something of a breakthrough, giving forceful expression to an idea that was still awkward to articulate but which profoundly affected later thinking<sup>59</sup>. Rather than base his argument on a positivistic foundation, such as we find in the 350s, he seems to be invoking something akin to fundamental law: there are certain rules that belong to the Athenians, above and beyond any statute<sup>60</sup>.

The adaptation, from fundamental law to positivism, can be illustrated from the very model of judicial review from which scholars first drew the parallel. John Marshall's opinion in *Marbury v. Madison* (1803) was the formative expression of the principle that the Constitution is the highest statement of positive law and on that basis the court may overturn even federal legislation. That way of thinking is often assigned to the framers of the Constitution, however anachronistically<sup>61</sup>.

*Marbury* was a peculiar case that especially invited the positivistic formulation. Mr. Marbury had been appointed a justice of the peace for the District of Columbia in the closing months of the

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<sup>59</sup> Often invoked in this regard is the situation in 411, where *graphai paranomon* and other remedies were heavily penalized in order to allow for changes in the constitution (leading to the regime of the Four Hundred). But no one seems to have protested that *graphe paranomon* was itself a defense of the constitution; at least Thucydides gives us no indication (8.67) nor does *Ath. Pol.* (29.4). If there was any ideological implication, it is the obvious one: *graphe paranomon* was viewed as an obstacle to constitutional reform rather than a safeguard.

<sup>60</sup> For «fundamental rights» in Athenian thinking (illustrated in *Ath. Pol.*), see Arnaoutoglou (2007).

<sup>61</sup> See Snowiss (1990) for detailed analysis of the change in thinking; cf. Corwin (1914), pp. 1-78, largely critical of Marshall's opinion («... frankly, this decision bears many of the earmarks of a deliberate partisan coup», p. 9).

Adams administration, when John Marshall himself was still Secretary of State and so had the responsibility to confirm Marbury as an officer in the federal district. But for some reason Marshall did not confirm him, and when James Madison became Secretary of State under Jefferson, he refused to do so. Marbury then applied to the Supreme Court (where Marshall was now Chief Justice) for a writ of *mandamus*, ordering Madison to carry out his duty. Marbury had good grounds to proceed in this way because the Judiciary Act of 1789 had given this authority to the Supreme Court. But Marshall insisted that the Constitution itself (Article III, § 2.2) excludes the Supreme Court from acting in such cases *as a court of first instance*; it could only rule upon Marbury's case on appeal. That is, by Marshall's reading, the Constitution stands as higher statute defining jurisdiction, which the Judiciary Act simply contradicts.

In earlier opinions, by contrast, the Constitution was chiefly regarded as a document of fundamental law, to be invoked, for instance, where a state takes a citizen's property without due process. The United States Constitution was meant to be a complete and explicit statement of that foundation (whereas the constitutions of Europe were seen as constructions of custom and precedent). Blackstone's model of parliamentary supremacy (describing the British constitution) was invalid in the new republic; here the branches of government would be coequal. On that model, many – including Jefferson and Madison themselves – supposed that the proper model was not judicial review but «concurrent review»; that is, each branch of government could judge the limits of its own power<sup>62</sup>. To be sure, Hamilton's *Federalist* 78 (published in 1788) touches upon the positivistic rationale, that the Constitution is the supreme enactment of the people's will; but the dominant theme is that the Constitution embodies fundamental law which only the court is competent to interpret<sup>63</sup>.

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<sup>62</sup> Snowiss (1990), pp. 98-99. That model was still asserted, as late as 1832, by President Jackson: Corwin (1914), p. 21.

<sup>63</sup> See Scigliano (2000), pp. 498-500. In one argument Hamilton compares the court's authority in judicial review with «judicial discretion in determining between two contradictory laws», but the opposite rule applies: the prior law (Constitution) trumps the later legislation. Elsewhere he speaks of the constitution as an enactment by the people themselves, hence superior to the acts of their delegates (the legislators). But the pre-

By contrast *Marbury v. Madison* asserts at once the idea of the Constitution as the supreme statement of positive law (like the Judiciary Act of 1789, only superior to it) and the authority of the court to read the constitution as statute and void any legislation that is in conflict with the letter of it. Marshall's rationale was anything but conventional. Even a generation later, at the end of Marshall's tenure, there were strong voices holding out against it. But by the end of the nineteenth century that positivistic model of Judicial Review had become part of the fabric of American law and was generally presumed to be the original intent of the framers of the Constitution. It is on that assumption that Goodwin and others adopted the constitutional model of *graphe paranomon*.

We «Americans» may be especially susceptible to that sort of patriotic fallacy; we like to think that the outcome proves the merit of the original design. But the Athenians were certainly not immune to it. So we should be sceptical of their pronouncements in the later fourth century about the proper aims of an institution invented sometime before the democracy was rebuilt. Caution is all the more warranted because, again, we have so great a gap in the evidence for such a crucial period. For nearly fifty years – from the restoration of democracy to Demosthenes' speeches of the 350s – we have no way to gauge the prevailing arguments in *graphai paranomon*; but we know that it was a time of great change in the way the law itself was constructed.

Of course, looking back to the era of the earliest cases, Wolff could point to other reforms introduced to safeguard the constitution, particularly the institution of *probouloi* in 413. But the implication is misleading for two reasons. First, the timing is wrong. The institution of *probouloi* represents a reaction to the Sicilian disaster. There is no indication of a similar reflex in the decade or so preceding, when *graphe paranomon* first appears – indeed, this was the period of greatest confidence in the imperial demos. What crisis could have prompted the institution of *graphe paranomon* in the 420s? Or even as late as 416? Wolff offered no specific suggestion,

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vailing principle is this: «A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning».

only the general supposition that the dangers of demagogy were ever more apparent. But the usual Athenian response to that development was not to bridle the demos but to sharpen their weapons against official misconduct.

Secondly, the constitutional reforms that were actually implemented point to a disparate mechanism with a different rationale. The introduction of *probouloi* was a first step in the direction of the Four Hundred, leading ultimately to the Thirty. These were institutional reforms, yoking the democratic institutions to an oligarchic partner. When the Athenians looked to restrain the demos and defend the constitution against the people themselves, they resorted to a board of overseers: the *probouloi* were to intervene when the demos needed guidance. And, let us not forget, the boards created in 411 and 404 began as committees to reform the *politeia*. There is no indication in these events that the Athenians thought that a democratic remedy could suffice, that concerned citizens could defend the constitution by individual initiative. Indeed, the prevailing thinking seems to be just the reverse: when the constitution is in danger, *limit* the initiative of ὁ βουλόμενος.

Moreover, as the preceding sections have argued, the evidence suggests a significant change in the concept of higher law from the fifth century to the fourth, not just a further development along the same line but a different way of understanding the system of rules that *paranoma* violate. In the fifth century it is a matter of fundamental law, a set of traditional rights and duties. In the fourth century, by contrast, the positivistic theme prevails: the measures indicted stand in conflict with the corpus of written law that the people have enacted. This sacrosanct entity is clearly envisioned as a closed set. The Athenians now see the official texts of the law, inscribed in various public installations and collected in the archive, as one integral body of rules; the established laws form a complete catalogue to which nothing extraneous can be added. Any change in the laws must be a zero-sum process. This way of seeing the laws was guided by the procedures that developed after 403, for repealing or amending the law. The basic mechanism is first envisioned (in a rough form) in Teisamenos' decree (c. 403/402), and the inclusive picture of «all the laws», as a fixed set, is then developed in Diokles' measure (soon thereafter) calling for the secretary of the council to mark all the laws in the archive as (applying) before or

after Eukleides<sup>64</sup>. That body of «all the laws» has little to do with the *nomoi* that Euryptolemos defends.

If we put aside the constitutional model and simply consider the implications of the speech that Xenophon has given Euryptolemos in its proper context, there is nothing to suggest that the positivistic rationale was already the standard way of thinking about *paranoma*. The *nomos* that he invokes is the traditional practice one should follow in prosecuting official crimes; it is reflected in various statutes but he never says that Kallixenos's decree is illegal because it contradicts the wording of prior statute or goes against «all the laws» enacted.

After all, Kallixenos was not the first to devise such remedies. When (in 411) the chorus of old men in *Lysistrata* condemn the women who have seized the acropolis, they vow to punish instigators and followers alike, «by one vote» (*Lys.* 268-270); that parody probably reflects recent events. Antiphon (5.69-70) mentions a rush to judgement some years earlier, in the case of the *hellenotamiai* who were executed (all but one) before evidence could be brought to light proving their innocence. Both passages suggest that the Athenians faced recriminations for proceeding in this way, but it is probably mistaken to suppose that such acts were plainly *paranoma*.

Euryptolemos' appeal to the demos, to preserve «the laws that are properly yours», draws upon traditional ideas, but the way he applies that principle does not appear to be typical of reasoning in that period. To the contrary, Xenophon recognizes how historic an argument it was. What seems to have made Euryptolemos' construction memorable was the way he applied a traditional principle in a new way. The *paranomon* was conventionally understood as a relational crime, like *hybris*: the act of a man in power abusing his legitimate authority over others. Euryptolemos suggests that the same principle applies to the sovereign demos.

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<sup>64</sup> Cf. «Normenkontrolle», p. 72, and see Carawan (2002), pp. 19-22.

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