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OPEN TEXTURE IN ATHENIAN LAW

In his *The Concept of Law* H.L.A. Hart observes that the law must refer to broad classes of persons or classes of acts, things, or circumstances. The operation of the law therefore depends on the «capacity to recognize particular acts, things and circumstances as instances of the general classification which the law makes»¹. In most cases, this is not a difficult process. From time to time, however, one encounters «fact-situations [...] which possess only some of the features of the plain cases but others which they lack»². One might try to avoid this problem by formulating detailed definitions of key terms that would clarify how they were to be applied in any given situation. Yet, as Hart rightly notes, it is impossible to find a rule «so detailed that the question whether it applied or not to a particular case was always settled in advance and never involved, at the point of actual application, a fresh choice between open alternatives»³. The legislator simply cannot know in advance all the different kinds of situations that will occur in the future («ignorance of fact»). Nor can legislators predict what other interests may come into play in any given situation and possibly take precedence («indeterminacy of aim»). For instance, the word «reasonable» in the phrase «reasonable standards of care» ensures 1) precautions are taken to prevent harm and 2) these precautions are not too burdensome. But «our aim of securing people against harm is indeterminate till we put it in conjunction with, or

¹ H.L.A. Hart, *The Concept of Law*, Oxford 1961, p. 121.

² *Ibid.*, p. 123.

³ *Ibid.*, p. 125.

test it against, possibilities which only experience will bring before us⁴. Or one might attempt to eliminate the problem by formulating canons of interpretation. As Hart observes, however, this approach would lead to similar problems because such canons would likewise be general rules, which one would also have to apply to particular cases of interpretation⁵.

In hard cases, where it is not clear how to apply the general rule to a specific situation, Hart believes «all that the person called upon to answer can do is to consider (as does one who makes use of a precedent) whether the present case resembles the plain case “sufficiently” in “relevant” respects»⁶. One extreme approach to the issue of the «open texture» of the law is formalism, which «seeks to disguise and to minimize the need for such choice once the general rule has been laid down». In this «heaven of concepts» a rule has the same meaning in all situations. The other extreme is an approach that regards all rules as «perennially open or revisable». Hart criticizes this approach because it pays «too little respect to such limits as legislative language, despite its open texture, does after all provide». In his opinion, most legal systems tend to compromise between two needs – first, there is the need for clear rules that everyone can apply to his or her conduct, and second, the recognition that there will arise disputes about the law that only an individual can resolve⁷.

Hart’s analysis of «open texture» is perceptive, but his main observation is not entirely original. The view that the law must provide general rules goes back to Plato and Aristotle. In the *Statesman* (295a) Plato compares legislators to trainers who «cannot do their work in detail and issue special commands adapted to the condition of each member of the group. When they lay down rules for physical welfare, they find it necessary to give bulk instructions having regard to the general benefit of the average pupil». In a similar way, the legis-

⁴ *Ibid.*, pp. 129-130.

⁵ *Ibid.*, p. 123. R. Dworkin appears to be more optimistic about such an approach. In addition to written statutes, Dworkin believes there are rules of interpretation implicit in the law, which can help to determine which of two interpretations is the better one. For Dworkin’s «interpretative concepts» see *Law’s Empire* (Cambridge, MA, 1986), pp. 45-86. For a criticism of this approach see Posner, *The Problems of Jurisprudence* (Cambridge, MA, 1990), pp. 21-26, 197-203.

⁶ Hart, *Concept* cit., p. 123.

⁷ *Ibid.*, pp. 126-127.

lator «who has to give orders to whole communities of human beings in matters of justice and mutual contractual obligation will never be able in the laws he prescribes for the whole group to give every individual his due with absolute accuracy». Instead the legislator will make «the law for the generality of his subjects under average circumstances. Thus he will legislate for all individual citizens, but it will be by what may be called a “bulk” method rather than an individual treatment [...]».

Aristotle (*Politics*, 1292a33) also noted that the laws should deal with all general matters, but that magistrates would deal with particular circumstances (δεῖ γὰρ τὸν μὲν νόμον ἄρχειν πάντων, τῶν δὲ καθ' ἕκαστα τὰς ἀρχάς). This was necessary «because of the difficulty of making a general rule to cover all cases» (*Politics*, 1282b2: διὰ τὸ μὴ ῥάδιον εἶναι καθόλου δηλῶσαι περὶ πάντων). In particular, Aristotle (*Ath. Pol.* 9.2) noted that the laws of Athens were often unclear, leaving the power of decision for any given case in the hands of the court. Some argued that the lawgiver Solon did this deliberately so as to unfetter the judges' power of the judges to decide cases. But Aristotle rightly dismisses this view and argues that the alleged lack of clarity results from the difficulty of «defining what is best in general terms» (διὰ τὸ μὴ δύνασθαι καθόλου περιλαβεῖν τὸ βέλτιστον).

Aware of the «open texture» of law, Aristotle (*Rhetoric*, 1373b-1374a) realized that one of the crucial tasks facing a litigant was to define clearly the nature of the wrongdoing his case involved:

Since people often admit having done an action and yet do not admit to the specific terms of the an indictment Or the crime with which it deals – for example, they confess to having «taken» something but not to have «stolen» it or to have struck the first blow but not to have committed *hybris* or to have stolen something but not to have committed «sacrilege» ([claiming] what they took from a temple did not belong to the god) or to have trespassed but not on state property or to have had conversations with the enemy but not to have committed treason – for this reason [in speaking, we] should give definitions of these things: what is theft? what is *hybris* (outrage)? what is *moicheia* (seduction)? In so doing, if we wish to show that some legal term applies or does not, we will be able to make clear what is a just verdict.

ἐπεὶ δ' ὁμολογοῦντες πολλάκις πεπραχέναι ἢ τὸ ἐπίγραμμα οὐχ ὁμολογοῦσιν ἢ περὶ ὃ τὸ ἐπίγραμμα, οἷον λαβεῖν μὲν ἀλλ' οὐ κλέψαι, καὶ πα-

τάξει πρότερον ἀλλ' οὐχ ὕβρισαι, καὶ συγγενέσθαι ἀλλ' οὐ μοιχεύσαι, ἢ κλέψαι ἀλλ' οὐχ ἱεροσυλῆσαι (οὐ γὰρ θεοῦ τι), ἢ ἐπεργάσασθαι μὲν ἀλλ' οὐ δημόσιαν, ἢ διειλέχθαι μὲν τοῖς πολεμίοις ἀλλ' οὐ προδοῦναι, διὰ ταῦτα δέοι ἂν καὶ περὶ τούτων διωρίσθαι, τί κλοπή, τί ὕβρις, τί μοιχεία, ὅπως ἕαν τε ὑπάρχειν ἕαν τε μὴ ὑπάρχειν βουλώμεθα δεικνύναι, ἔχωμεν ἐμφανίζεῖν τὸ δίκαιον.

Despite Aristotle's discussion of the importance of definitions in forensic oratory, recent scholars have paid little attention to the issue of open texture in Athenian Law⁸. Scholars like H.J. Wolff, H. Meyer-Laurin and J. Meinecke, who take a formalist approach, find little scope for an analysis of «open texture» in Athenian Law⁹. These scholars argue that Athenian litigants based their cases on the actual wording of the laws and do not appeal to general principles of equity. Meinecke points to Demosthenes' list of requirements for the correct kind of law, which includes the need to be «written in terms that are simple and easy for all to understand, not in a way so that it is possible for one man to think says this, another that» (24.68: ἀπλῶς καὶ πᾶσι γνωρίμως γεγράφθαι, καὶ μὴ τῷ μὲν εἶναι ταυτὶ περὶ αὐτοῦ νομίζειν, τῷ δὲ ταυτί)¹⁰. He might have also pointed to statements made by Aeschines (3.199) and Lycurgus (*Leocr.* 9) both of whom compare the law to a ruler, which one can use to measure a

⁸ R. Osborne, *Law in Action in Classical Athens*, «JHS» 105 (1985), pp. 43-44 uses the term «open texture» but confuses it with procedural flexibility. J. Ober, *Mass and Elite in Democratic Athens* (Princeton 1989), pp. 144-145, who appears not to have read Hart, repeats Osborne's mistake. The nature of legal interpretation in Athenian law is discussed by M. Hillgruber, *Die zehnte Rede des Lysias: Einleitung, Text, und Kommentar mit einem Anhang über die Gesetzesinterpretationen bei den attischen Rednern* (= «Untersuchungen zur antiken Literatur und Geschichte», 29) Berlin 1988, pp. 105-120. Hillgruber makes valuable points but does not discuss the open texture of law. As a result, he comes close to regarding most interpretations of law in the orators as misinterpretations (e.g. on p. 116: «Die Gesetzesinterpretationen der Redner haben ihren Ursprung in der Sophistik, sie sind ein Teil der sophistischen Bemühungen, τὸν ἦρτω λόγον κρείττω ποιεῖν»). He also underestimates the potential ambiguity of Athenian statutes and the possibility that arguments about the law may step from honest disagreements about the meaning of various laws.

⁹ H.J. Wolff, *Verjährung von Ansprüchen nach attischem Recht in Eranion fuer Maridakis*, Athen 1963, p. 87 ff.; H. Meyer-Laurin, *Gesetz und Billigkeit im attischem Prozeß*, Weimar 1965; J. Meinecke, *Gesetzesinterpretation und Gesetzesanwendung im Attischen Zivilprozess*, «Revue internationale des droits de l'antiquité» 18 (1971), pp. 275-360. Cf. E. Wolf, *Griechisches Rechtsdenken*, III/2, Frankfurt 1956, pp. 167, 343 ff., 361 ff.

¹⁰ Meinecke, *Gesetzesinterpretation* cit., pp. 354-355.

person's conduct with almost scientific precision and accurately determine whether it is just or unjust. Since the laws provided clear guidance, the duty of the court was to enforce the commands found in the laws. Indeed, the oath sworn by the men who sat on the courts bound them to vote «in accordance with the laws and decrees of the Athenian people»¹¹.

This view has much to recommend it, but it tends to underestimate the amount of «open texture» contained in Athenian laws. Demosthenes' requirements for the right kind of law is the description of an ideal; there is no need to assume that the actual laws of Athens always lived up to this ideal. Indeed, the author of the *Constitution of the Athenians* (9.2) noted that the laws of Solon were often not simply nor clearly written (διὰ τὸ μὴ γεγράφθαι τοὺς νόμους ἀπλῶς μηδὲ σαφῶς), a situation that gave rise to many disputes (πολλὰς ἀμφισβητήσεις), which the court had to decide (βραβεύειν ... τὸ δικαστήριον). Wolff and others point out that the Athenian legal system, unlike the Roman legal system, contained no experts who could develop the law through interpretation of statutes. This is not completely accurate since it ignores the role of the Exegetai and the expertise of the Areopagos¹². Yet even if it were, that would not mean that litigants did not have to deal with the problem of inter-

¹¹ Meyer-Laurin, *Gesetz und Billigkeit* cit., p. 36. S. Johnstone, *Disputes and Democracy: The Consequences of Litigation in Ancient Athens*, Austin 1998, p. 22 with note 4, misrepresents my position in by implying it is virtually similar to that of Meyer-Laurin. He pays no attention to my remarks about open texture in *Law and Oratory*, in *Persuasion: Greek Rhetoric in Action*, ed. I. Worthington, London - New York 1994, pp. 137-140 and in *In the Act or Red-Handed? Furtum Manifestum and Apagoge to the Eleven*, in *Symposium 1993: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, ed. G. Thür (Cologne - Weimar - Wien 1994), p. 180, and my comments on definitions in *When is a Sale not a Sale? The Riddle of Athenian terminology for Real Security Revisited*, «CQ» 38 (1988), pp. 367-370. Though I find much of Meyer-Laurin's analysis of individual cases persuasive, my position is closer to that of Biscardi, an author Johnstone appears not to have read. See note 21.

¹² For consultation of the Exegetai for their legal expertise, see Plato, *Euthyphro*, 4c; Dem. 47.68-70. The Athenian legal system differed from the Roman not only because the former contained no experts while the latter did, but because the Athenian system contained nothing like *ius respondendi*, which made the views of the *iuris prudentes* a source of law. For the *ius respondendi* see *Digest*, 1.2.2.48-49 and for the *responsa* of the *iuris prudentes* as a source of law see Gaius, *Inst.* 1.7 with J.A. Crook, *Law and Life of Rome, 90 B.C. - A.D. 212*, Ithaca 1967, p. 26 with references to the debate about these passages.

preting potentially ambiguous or vaguely worded statutes. In Aristophanes' *Clouds* (1178-1200), Pheidippides, who has just returned from Socrates' Thinkery, shows his father how the law about bringing a summons on the last day of the month can be interpreted in two ways. The argument presented by Pheidippides is meant as a joke, but it reveals that Aristophanes and his audience were familiar with the «open texture» of law and knew that statutes might be ambiguously worded and could be interpreted in different ways¹³. And Aristotle would not have advised potential litigants to pay careful attention to the definition of key terms if the meaning of all terms in every statute was always clear and unambiguous. By the same token, the inevitable presence of open texture in many statutes meant that the courts had sometimes to decide between litigants, each of whom based his case on a different interpretation of the same statute.

Those who have criticized the formalist approach of Wolff and Meyer-Laurin claim that Athenian Law is primarily procedural, that is, it aims primarily to provide a set of mechanisms for getting a dispute into court¹⁴. These scholars believe Athenian Law does not issue commands about what people should and should not do. To support their argument, these scholars often point to the absence of definitions for key terms in Athenian statutes¹⁵. If the Athenians were really interested in substantive issues, they would have surely provided definitions. As a result, they conclude the courts did not seek to impose general rules, but decided cases on an *ad hoc* basis. Christ has gone so far as to claim that litigants paid little attention to the letter of the law¹⁶. In this system trials became contests (*agones*) where litigants, mostly wealthy, competed for prestige in front of hundreds of citizens¹⁷. These contests did not confine themselves to

¹³ Cf. Hillgruber, *Die zehnte Rede des Lysias* cit., pp. 115-116.

¹⁴ For this view see, for example, M.H. Hansen, *Eisangelia: The Sovereignty of the People's Court in Athens in the Fourth Century B.C., and the Impeachment of Generals and Politicians*, Odense 1975, p. 10; S.C. Todd, *The Shape of Athenian Law*, Oxford 1993, pp. 64-66; D. Cohen, *Law Violence, and Community in Classical Athens*, Cambridge 1995, p. 190. C. Carey, *The Shape of Athenian Laws*, «CQ» 48 (1998), pp. 93-109 rightly questions the traditional assumption that «Athenian law was primarily procedural in its orientation».

¹⁵ For example, Todd, *Shape of Athenian Law* cit., pp. 65-67.

¹⁶ M.R. Christ, *The Litigious Athenian*, Baltimore - London 1998, pp. 193-224.

¹⁷ Two of the most extreme proponents of this view are Ober, *Mass and Elite* cit., and Cohen, *Law, Violence, and Community* cit.

legal issues, but were frequently won or lost by appealing to «democratic ideology», that is, political or social considerations¹⁸. This approach appears to share many of the assumptions of Critical Legal Studies in its stress on the political nature of adjudication and its skepticism about law as a system of rules that can be impartially and consistently applied. As a result, this school of thought often exaggerates the «open texture» of law and attacks any attempt to formulate rules of interpretation as either dishonest or doomed to failure¹⁹.

There are several general objections brought against this portrait (one is tempted to say caricature) of the Athenian legal system. The oath that judges were required to swear bound them to vote according to the laws and decrees of the Athenian people and to disregard irrelevant material. Not only did they swear this way, but litigant constantly reminded them of their duty to follow the law and clearly expected them to comply. That is not to say that the Athenian courts always lived up to this ideal. But we should not dismiss the oath as mere propaganda. Nor should the absence of definitions in a statute be taken as evidence that a legal system is not interested in substantive matters or does not consider substantive issues when deciding disputes²⁰. For instance, the American Constitution states that Congress can impeach the President if he commits «high crimes and misdemeanors», but does not define these terms nor even give examples of what actions might fit this description. Yet no one would argue that when the Senate voted whether or not to convict President Clinton, it did not consider whether his misconduct with Monica Lewinsky fit the description high crimes and misdemeanors. Nor do the laws of the United States provide a definition of the term «executive privilege». Once again no one would argue that the Supreme Court did not consider the substantive issue of whether or not President Nixon had a right to refuse to hand over tapes relating to the Watergate scandal on the grounds of «executive privilege». And many of

¹⁸ The traditional assumption that Athenian litigants did not «stick to the point» is incisively questioned in a forthcoming essay by P.J. Rhodes.

¹⁹ The views and methods of Critical Legal Studies have been rightly criticized both by liberal theorists such as Dworkin, *Law's Empire* cit., pp. 271-274, and conservative writers such as Posner, *The Problems of Jurisprudence* cit., pp. 153-157, 254-259.

²⁰ On the problem of definitions in modern law, see Leo Katz, *Bad Acts and Guilty Minds*, Chicago 1987, pp. 88-96. On the absence of definitions in Athenian Law and its implications, see Harris, *When is a Sale not a Sale?* cit., pp. 367-370.

the judge-made rules in the law of the United States contain vague and elastic terms like «good faith», «reasonable», and «relevant». Likewise in Athens, we will find that even in cases where the law does not provide a definition or other explanation, the litigants sometimes base their case on interpretation of statute. When they argue for an interpretation of the law, they pay careful attention to the wording of the law. Furthermore, they assume that the wording of the statute provides guidance as to how the court should decide the case. As Hart says, «legislative language, despite its open texture, does after all provide» some limits to judicial interpretation.

In this essay, I will examine several speeches where there is a dispute about the meaning of the law and study how litigants approached the issues posed by the «open texture» of the law. How did they approach the law? Did they strictly adhere to the plain meaning of statutes or ignore letter of the law? The larger aim of the essay is to find a *via media* between the formalist approach of H.J. Wolff and Meyer-Laurin (to which I am sympathetic) and the political approach of recent English and American scholars ²¹.

Before we approach the evidence, however, there is an important point to bear in mind. Athenian legal procedure involved basically three stages. The first stage was the summons, where the accuser invited the defendant to appear before a magistrate on a given day ²². When they met together, the magistrate appointed a day for the *anakrisis* or preliminary hearing. At the hearing, the magistrate took the names, patronymics, and residences of each litigant and heard the main charge and the evidence. The magistrate had the right to reject the case at this point or to insist that the accuser modify his plaint to fit the terms of the statute under which it was brought (e.g. Lysias, 10.10; 13.86; Isaeus, 10.2) ²³. If the magistrate accepted the case, he assigned it to a court for trial or, if it was a private suit, to an arbitra-

²¹ My approach is close to that of A. Biscardi, *Studi di diritto greco* (Milano 1999), p. 90: «Pour ma part, je me propose de démontrer que peut-être la vérité se trouve a mi-chemin». Cf. Hillgruber, *Die zehnte Rede des Lysias* cit., p. 119: «Die Athener sind offensichtlich bei der Lösung juristischer Probleme sehr flexibel gewesen, da sie sich weder an ein juristisches Prinzip der Billigkeit – insofern die Hauptthese von Meyer-Laurin zutreffend – noch an ein starres Gesetzprinzip hielten».

²² On the summons see A.R.W. Harrison, *The Law of Athens: Procedure* (Oxford 1971), pp. 85-94.

²³ On the *anakrisis* see *ibid.*, pp. 94-105.

tor (*diaitetes*). The trial was thus the third stage in the procedure. During the *anakrasis*, the defendant also had the right to bring a *paragraphe*, that is, a motion to dismiss the case on the grounds it was not admissible²⁴. We do not know if the magistrate had the right to accept or reject a *paragraphe*, but this motion led to a trial where the defendant spoke first and argued that the case was not admissible, while the accuser argued that it was. If the court voted for the defendant, that was the end of the matter. We do not know what happened if the court voted for the accuser – either he won his case or the case went forward. This means that there were two stages in the procedure where the interpretation of statute might come into play. The first was at the *anakrasis*, where the magistrate had to decide whether he should accept the charge or not. At this stage the defendant also had to decide whether he would bring a *paragraphe* or not. The second was at the trial where the litigants appealed to the court. Even though we have very little evidence for what happened at the *anakrasis* (we have no speeches that were delivered at the *anakrasis*), we can get an idea of what kinds of cases magistrates were willing to accept because the cases that went to court must have passed the basic test of admissibility. To anticipate my conclusion, I believe magistrates gave accusers considerable latitude when it came to accepting cases, but the courts were reluctant to vote for accusers who relied on new or unusual interpretations of statutes.

I

The first case to be examined concerns the law of succession. In Athens there were three main laws about inheritance. The first was that if there are *gnesioi* sons or daughters, the estate goes to these as «universal successors» or *kleronomoi*, and there is no need for a will (Isaeus, 6.28, 8.34). The *gnesioi* are the offspring of a formal marriage, which is concluded by an agreement called an *engye* or solemn pledge between the husband and the bride's father or guardian. This kind of marriage often included a dowry given to the husband, but a dowry was not legally required for the marriage to take effect²⁵.

²⁴ On the *paragraphe* see *ibid.*, pp. 106-124.

²⁵ See Biscardi, *Studi di diritto greco* cit., pp. 1-22.

This kind of union was contrasted with one with a *pallake*, where there was no solemn pledge. The offspring of this kind of marriage were classified as *notboi* (often translated as bastards, but this is misleading), who have no right to become *kleronomoi*, though they could receive gifts out of the inheritance. Second, if there are no *gnesioi* children, the estate goes to nearest relative in a fixed order (Isaeus, 11.2). Third, the testator can draw up a will to adopt a son in the case he has no *gnesioi* sons. This person can then take the will to a magistrate and lay a claim to the estate. This step was not necessary for *gnesioi* sons, who could simply take over their father's assets upon his death without applying to the courts ²⁶.

The inheritance case I want to examine concerns the estate of Cleonymus (Isaeus, 1). Although we have only the speech given by the plaintiff, there appears to have been general agreement about the basic facts of the case. The plaintiff and his brother were orphans and placed under the guardianship of their uncle Deinias (9). For some reason or other, Cleonymus was angry with Deinias and did not want his property to fall into his hands. Cleonymus therefore drew up a will that gave his estate to other relatives and deposited the will in the public archive. The speaker is rather vague about several details, but Cleonymus must have had no *gnesioi* children and may have used his will to adopt posthumously some relative to serve as his *kleronomos*, who would not have inherited under the normal rules of succession. After Deinias died, Cleonymus brought the plaintiff and his brother into his house, raised them at his own expense, and saved them from their creditors (12). Shortly before his death, Cleonymus wished to alter his will and told a man named Poseidippus to summon the *astynomos*, a magistrate in charge of the archive. When Poseidippus failed to follow his instructions, Cleonymus repeated his request, but died before the magistrate could arrive. The plaintiff provides witnesses for the quarrel and to prove Cleonymus asked Poseidippus to summon the magistrate. There was naturally some dispute about Cleonymus' aim in asking the magistrate to come. The plaintiff argues that he intended to annul his will, while the defendants claim he merely wanted to confirm the existing

²⁶ On adoption in general see L. Rubinstein, *Adoption in IV. Century Athens* (Copenhagen 1993). Rubinstein does not believe it was necessary for the testator to adopt a son in order to make him his *kleronomos*.

provisions. Despite their disagreement here, the plaintiff does not dispute the existence, authenticity, or contents of the will. The plaintiff asks the court to declare the will invalid and to award the estate to him and his brother according to the law that grants control of the estate to the nearest relative when there are no *gnesioi* sons or daughters.

Wyse harshly criticized the speaker's arguments: «All the skill of a practical advocate cannot disguise the weakness of their case. No attempt is made to dispute the meaning or authenticity of the instrument»²⁷. Wyse believes the clear intent of Cleonymus was to leave his property to the speaker's adversaries – he made a will, deposited with the city's magistrates, and did not alter the will for a long time. During his last illness he sent for the will, but the speaker cannot prove that Cleonymus' intent was to annul the will. Opponents present the plausible argument that his aim was to straighten out details, not to revoke it (36). Wyse believes the speaker relies on two arguments: first, that he and his brother are the closest relatives and, second, that «Cleonymus had a greater affection for them than for their adversaries». Both arguments ignore the right of the testator to adopt a son and make him the *kleronomos* of his estate.

Wyse misrepresents the speaker's argument. There are two parts to the speaker's case: first, the law grants the estate of the deceased to the nearest relative, and, second, Cleonymus' will is invalid. The first argument is designed to establish the speaker's claim, the second is designed to refute their adversaries' claim. Both claims are based on the law – the first is on the law of succession, which ranks the claims of relatives in the event there are no *gnesioi* children. *Pace* Wyse the second claim is also based on the law – the law that granted the testator the right to make a will also contained a clause that declared such a will invalid if the testator was either sick, deranged, under the influence of drugs, obeying a woman, senile, locked up in prison or under some duress²⁸. Like many Athenian statutes, the legislator does not use one broad term, then provide a

²⁷ W. Wyse, *The Speeches of Isaeus* (Cambridge 1904), p. 177.

²⁸ For the law see Hyperides, *Ath.* 17; Dem. 48.56; Isaeus, 4.19, 6.9. Cf. Meyer-Laurin, *Gesetz und Billigkeit* cit., pp. 20-22 with references to earlier literature. Note also Rubinstein, *Adoption* cit., p. 76 («alluding to the clause in the Solonic clause on wills which required that the testator be of sound mind when making his dispositions»).

general definition. Instead, he gives a number of specific categories. The problem with this approach is that it is often not clear whether the categories listed are intended to be exhaustive or not. Are they merely examples given to illustrate the general category of acts to which the law applies or are they a complete list of the kinds acts subject to the law? If the latter, we must assume that any acts that do not fall into one of these specific categories are outside the law's provision. Some litigants take the former approach and claim that the law declared invalid those who were not in their right mind. For instance, a client of Demosthenes (46.16) states that the law that a man does not have the right to give away his property even when he does not have children, if he is not in his right mind (μη εἶ φρονῆ). A client of Isaeus (6.9) says there is a law common for all that permits a man to dispose of his property if he has no male *gnesioi* children if he does not make the will when insane (μανείς) or senile or not in his right mind (παρανοῶν) for any of the other reasons found in the law.

The plaintiff also uses the law about invalid wills in his alternative argument (18-21). He asks the court to consider the possibility that his adversaries are right in claiming that Cleonymus actually intended to confirm his will. If their version of events is correct, he argues that they are accusing him of the greatest insanity (19: παράνοιαν αὐτοῦ τὴν μεγίστην οὗτοι κατηγοροῦσι). What greater madness, he continues, could there be than to make a will that deprived his nephews, for whom he had shown great affection, of any share in his property (20: τίς γὰρ ἂν γένοιτο ταύτης μανία μείζων [...]);? What man in his right mind could have acted this way (20: τίς ἂν εἶ φρονῶν [...] τοιαῦτα περὶ τῶν αὐτοῦ βουλευσαίτο; Cf. 21: παραφρονῶν)? Note how closely the plaintiff keeps to the wording of the law while at the same time expanding the meaning of madness (μανία) to cover any senseless act. Further on in the speech he tries to show Cleonymus had fallen out with his opponents (30-33) and repeats his charge that they are accusing the deceased of madness (34: μανίαν κατηγοροῦσι) by claiming in his will he set those whom he detested ahead of those with whom he enjoyed good relations.

In another part of his speech the plaintiff bases himself on the broad interpretation of the law (41-43). He reminds the court how judges often decide in favor of the closest relatives against those who make their claim on the basis of a will. But he does not pretend that they do this on the grounds of equity, an unwritten principle

that the nearest relative ought to inherit²⁹. The reasons why they vote this way are first that wills are often forged and second that testators do not make correct decisions. This is a rather generous interpretation of the law, that stretches the meaning of *mania* beyond its normal limits or attempts to formulate a general standard on the basis of the specific situations listed in the law. What the litigant does not do is ask the court to rule against the letter of the law. Nor does he appeal to general grounds of equity that take precedence over the law. He asks the court to reject the will which was not just and proceeds to remind the judges that Cleonymus was not in his right mind when he made the will, but angry and not making correct decisions when he drew it up. The court should therefore not confirm what he did in anger rather than his true intention. At the end of the speech (50) he emphasizes that even if the judges accept the defendants' version of events, they will pronounce Cleonymus out of his mind (παράνοισιν); if they accept his version, it is clear that Cleonymus deliberated well (ὀρθῶς βεβουλευῆσθαι) when he wished to annul his will.

We do not know the outcome of the trial – but we can safely assume that the magistrate who accepted the case found the litigant's claim legally admissible. Even though the plaintiff relies on a very broad interpretation of the word *mania*, the magistrates did not see fit to reject the case for that reason. Furthermore, his opponents did not think they had grounds for bringing a *paragraphe* against the charge. When it came to deciding whether to accept cases, therefore, magistrates were willing to let an accuser bring a case that relied on a remarkably broad interpretation of statute.

II

The next area I wish to examine is homicide law³⁰. The Athenians did not have many statutes about homicide, but each one used the

²⁹ Cf. Meyer-Laurin, *Gesetz und Billigkeit* cit., p. 21: «Dann hätte das Argument schon darum nichts mit Billigkeit zu tun».

³⁰ My arguments in this section draw heavily on my forthcoming essay *How to Kill in Attic Greek: The Semantics of the Verb ἀποκτείνειν and their Implications for Athenian Homicide Law*.

verb (ἀπο)κτείνειν. The verb (ἀπο)κτείνειν appears to present no problems with translation; as any standard lexicon states, the verb means «to kill» in English, «tuer» in French, «uccidere» in Italian, and «töten» in German. But the verb to kill in English is an unusual one. For all transitive verbs such as «to hit», «to see», or «to break» there is normally an agent and an object. If John hits Frank, that is strikes him with his hand, we can immediately say «John hit Frank». We do not have to wait to discover whether Frank has been hit by that person or not. If John hits a vase, it either shatters immediately or it does not so we can tell very quickly whether he is responsible for breaking the vase. But it is not so easy with the verb «to kill». If John stabs Frank now and then as a result of his wound Frank immediately dies, there can be no doubt that John has killed Frank. But what if John stabs Frank now, and then as a result of his wound he dies next Thursday? Next Thursday we will be able to assert confidently that John killed Frank. But what are we to say about John between now and Thursday?

The reason why we are uncertain about how to describe John's stabbing of Frank between now and next Thursday is because the verb «to kill» involves essentially three elements: an action by the agent (striking in this case), a change of state in the victim (from life to death), and a causal relationship between the agent's action and the change of state in the victim (the blow brought about massive bleeding, which led to the victim's death)³¹. This change of state in the victim can occur immediately – Frank dies immediately – or at some subsequent point in time – Frank dies next Thursday – or next month. This makes the verb to kill very different from the verb «to break» or «to hit». If John strikes a vase, it either breaks when he strikes it or it does not. We do not have to wait until next week until we can say John has broken the vase. But if John strikes Frank, we may have to be patient and wait until the necessary change of state occurs in Frank to declare «John has killed Frank».

This has major consequences. It means that the verb «to kill» in English means essentially «to be responsible for the death of some other person or animal». Normally we employ the verb in cases

³¹ For these three elements in homicide see G. Fletcher, *Rethinking Criminal Law* (Boston - Toronto 1978), p. 355.

where there is direct physical causality. It is also permissible to use the verb in cases where the action of the agent is more remotely related to the death of the victim. A person who gives another person poison which that person believes to be a harmless drug can be said to have killed. Or we say that «Stalin killed the kulaks». Obviously the General Secretary of the Communist Party did not get his hands dirty liquidating thousands of peasants, but had the work performed by his agents. We say «Stalin killed the kulaks» because we believe Stalin was responsible for the deaths of these kulaks by issuing orders that resulted in their deaths.

This is not merely a *façon de parler*. The German courts recently found Egon Krenz, the former leader of East Germany, guilty of manslaughter for the shooting deaths of people trying to cross the Berlin Wall (*The New York Times*, August 26, 1997, p. A6). Krenz had no direct role in the shootings and «prosecutors presented no evidence that Mr. Krenz or his associates had ordered any shootings or that they had directly supervised activities of the border patrols». Krenz and two associates, Günther Shabowski and Günther Kleiber, were found guilty simply because «they were in charge of overall government policy». The main evidence the prosecutors brought forward proved only «that Politburo members were always informed about shootings at the borders». Beyond that, the prosecutors pointed to «Politburo documents containing praise for the border patrols». Even though Krenz and his associates were only responsible for formulating a policy that led to fatal shootings, they were nevertheless held responsible for these killings and convicted of manslaughter.

What about the verb ἀποκτείνειν? Did it encompass killings only by direct physical causality or did it cover all cases of causing death? Should it be translated by the English verb «to slay», usually employed in contexts where the agent uses direct physical force to bring about the death of the victim? Or should we translate the Attic verb by the English verb «to kill»? This may seem like a fine point of philology, but it has far-reaching consequences, as we will soon see.

Several passages in the orators show that the verb ἀποκτείνειν had the same semantic range as the verb «to kill» in English. Aeschines (1.173) addresses the Athenians, saying «you killed Socrates the sophist» yet we know from Plato's *Phaedo* that Socrates drank hemlock. The members of the court were responsible for the death of Socrates by passing a sentence of death on him. Aeschines (2.77)

says the Thirty Tyrants killed (*ἀπέκτειναν*) 1,500 citizens. The Thirty obviously did not slay all these citizens with their own hands, but sentenced them to death. Aeschines (3.224) says Demosthenes killed (*ἀπέκτεινας*) the alleged spy Anaxinus: Demosthenes (18.137) admits that he was responsible for having him executed because he arrested him and accused him of spying. Aeschines (3.243) says Iphicrates killed a unit of Lacedaimonian soldiers. Iphicrates is unlikely to have dispatched each enemy soldier by himself; he obviously led the troops that defeated the Lacedaimonian troops. In other words, his leadership was responsible for their deaths. Andocides (1.66) addresses the Athenians and says you killed (*ἀπεκτείνετε*) Diocleides by handing him over to a court. In this case the Athenian people was responsible for the death of Diocleides by having him brought to trial. Andocides (2.7) describes the position he found himself in after being denounced for profanation of the Mysteries. If he refused to name those actually guilty, he would kill (*ἀποκτεῖναι*) his own father. On the other hand, if he went to denounce them, he would avoid becoming the killer (*φονέα γένεσθαι*) of his own father. This extended meaning of the verb occurs not only in everyday prose but also in legal texts. Andocides (1.95-98) cites an Athenian law against tyranny containing an oath sworn by all Athenians: I will kill both by word and by deed and by vote and by my own hand (*κτενῶ καὶ λόγῳ καὶ ἔργῳ καὶ ψήφῳ καὶ τῇ ἐμαυτοῦ χειρὶ*) all tyrants. One cannot therefore argue that the verb had one meaning in everyday speech, but a more narrow, technical meaning in Athenian statutes.

Two passages show that the Athenians were well aware of the substantive implications of the meaning of the verb. First, Andocides (1.94) states that the man who planned murder is liable to the same treatment as the man who did accomplished the deed with his own hand (*τὸν βουλευσάντα ἐν τῷ αὐτῷ ἐνέχεσθαι καὶ τὸν τῇ χειρὶ ἐργασάμενον*). Second, Draco's homicide law (IG i³ 104.11-13) begins with the phrase *καὶ ἐὰν [μὲ] κ [π]ρονο[ί]ας [κ]τείνει τις τινα ...* («if anyone kills not deliberately ...») then glosses the verb with the phrase *αἵτ[ι]ον φό[ν]ο* («causing/guilty of killing») in exactly the way Andocides (2.7) explained the verb. According to Stroud's widely accepted supplement, the law goes on to state that its provisions apply to [... *τὸν ἐργασάμενον*] *ἢ [β]ολεύσαντα* (Wolff suggested *ἢ τὸν αὐτόχειρα ἢ τὸν βολεύσαντα*) («the man who does or

plans») ³². This indicates that the Athenians already understood the substantive implications of the verb (ἀπο)κτείνειν in the Archaic period. Contrary to the assumptions of some scholars, this phrase reveals that the early Greek lawgivers were not just interested in procedural questions, but also appreciated the importance of substantive issues when formulating their statutes.

The Athenians carefully distinguished between killing brought about by direct physical action and killing that could be referred to by the verbs κτείνειν and ἀποκτείνειν. The best example is from Plato's *Euthyphro* (4b7-e1). Euthyphro describes how a dependent of his father became drunk and slew (ἀποσφάττει) one of their slaves. His father bound the killer and threw him in a ditch, then sent a man off to the Exegetes to find out what to do. The killer in the meantime died of hunger, cold, and his shackles. Euthyphro consequently brought a charge against his father «since he killed» (ὅτι ἀπέκτεινε). What is interesting is that Euthyphro appears to distinguish between the act of the dependent, who slew, that is, killed by direct physical violence, and the action of his father, who caused the death of the dependent. Although his father did not bring about the dependent's death by bloodshed, Euthyphro still considers his father guilty of homicide and brings a formal charge against him.

A passage from Lysias, *Against Agoratus* (13) shows that Athenians might allow the causal chain to be stretched a good distance when it came to accepting homicide cases. According to the speaker, Agoratus denounced to the Council several men who were later executed. Among these men was the speaker's brother-in-law Dionysodorus (Lys. 13.41-42 – note how the speaker uses the expressions αἴτιος ἦν τοῦ θανάτου and τὸν πατέρα αὐτοῦ Ἀγόρατος ἀπέκτεινε interchangeably). When the speaker accused Agoratus of murder before the Eleven, his charge was accepted. In his speech to the court (Lys. 13.87), the speaker replies to the objection that Agoratus

³² For a clear and sensible discussion of the text see M. Gagarin, *Drakon and Early Athenian Homicide Law* (New Haven - London 1981), pp. 37-41. This clause is alluded to at Antiphon, 4.2.6: ἀπολύει δέ με καὶ ὁ νόμος καθ' ὃν διώκομαι. τὸν γὰρ ἐπιβουλεύσαντα κελεύει φονέα εἶναι. Gagarin, *Drako* cit., p. 17, perceptively notes «the fact that Orestes takes revenge on both Klytaimnestra and Aigisthos» at *Od.* 11.422-430 «seems to indicate that an accomplice or conspirator in a homicide case was considered equally liable» already in the period of the Homeric epics.

did not «clearly» (ἐπ' αὐτφώρῳ) kill his brother³³. «For it is not only a clear case of killing if someone strikes and fells with a club or a knife since on your argument nobody will be found to have killed (ἀποκτείνας) the men whom you denounced. For no one struck them, no one slew them (ἀπέσφαξεν) but they died being forced by your denunciation. Is not this person responsible for death (αἴτιος τοῦ θανάτου)? Is not this person clearly guilty? Who else is responsible (αἴτιος)? So then how did you not kill him (ἀποκτείνας)?». Here the speaker makes a distinction between killing accomplished by direct physical causality (ἀπέσφαξεν) and being responsible for another's death (αἴτιος τοῦ θανάτου). He clearly interprets the verb (ἀπο)κτείνειν in the latter sense. What is significant is that the Eleven agreed with the speaker's interpretation of the verb for otherwise they would not have accepted his case and brought it to trial.

Lysias in his case against Eratosthenes (12) also attempted to take advantage of the open texture of the term ἀποκτείνειν to cover someone who indirectly caused death by his actions³⁴. Lysias recounts how the Thirty selected ten metics for arrest and execution as a way of seizing their property. Lysias was able to escape to Megara (14-17), but his brother Polemarchus was arrested by Eratosthenes (16, 26). The Thirty then ordered Polemarchus to drink hemlock without granting him a trial (17). As a result, Lysias claims Eratosthenes killed his brother (23: τὸν ἀδελφὸν γὰρ μου [...] Ἐρατοσθένης ἀπέκτεινεν). He then says it is an impiety for him to even talk about him, which means he considers Eratosthenes polluted for the murder (24: ἀσεβές). When Lysias questioned him, Eratosthenes asserted he was acting under orders and in fear. He also claimed to have opposed those who proposed in the Council to put his brother to death. In reply to Lysias' question, Eratosthenes admits that Polemarchus' death was unjust (25).

³³ For the meaning of the phrase ἐπ' αὐτφώρῳ see Harris, *In the Act or Red-Handed?* cit., pp. 176-180.

³⁴ One should bear in mind that Lysias probably delivered his speech against Eratosthenes at the latter's *euthynai* whereas the case against Agoratus was brought before the Eleven. The murder charge may thus have been only one of several charges brought against Eratosthenes, and several other speakers may have accused him of other crimes. For these *euthynai* see *Atb. Pol.* 39.6 with P.J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia*, Oxford 1981, pp. 469-471.

Lysias insists that by helping to arrest Polemarchus, Eratosthenes was guilty of murder (26: *συνελάμβανες δὲ ἵνα ἀποκτείνῃς*). Although Eratosthenes says he was acting under orders, Lysias says it was in his power whether to save him or not (*ἐπὶ δὲ σοὶ μόνῳ ἐγένετο σῶσαι καὶ Πολέμαρχον καὶ μὴ*). His speech in the Council did not help – what mattered was the arrest, which led to Polemarchus' death. Since the arrest set off a chain of events that led to his death, Lysias charges Eratosthenes with killing Polemarchus (26: *συλλαβῶν ἀπέκτεινας*). Lysias then attacks his claim that he was forced to carry out the arrest: he argues that a man who was known to have opposed his execution would not have been given the task of arresting him. Second, Lysias points out that Eratosthenes was a member of the Thirty. He was thus not carrying out orders given him by some superior body, but in effect carrying out his own orders (28-29).

Next Lysias states that Eratosthenes did have an opportunity to let Polemarchus go. Since he did not find him at home, he could have denied that he had found him at all, and no one could have proven him wrong (30-31). Because he had a choice, Eratosthenes cannot say he was forced to arrest Polemarchus. Lysias furthermore states that Eratosthenes took pleasure in arresting his brother; were he acting unwillingly, he would have betrayed his reluctance by showing his pain at the arrest (33-34).

What is interesting here is that Lysias implicitly recognizes a set of criteria that he needs to meet in order to prove Eratosthenes was guilty of murder: he has to show that Eratosthenes acted as a result of his own decision and not under someone else's order, that he had a choice, and that he performed the arrest willingly. Lysias is thus working with a definition of wrongdoing that includes: 1) intent, 2) absence of objective circumstances that might mitigate his guilt and 3) subjective attitude³⁵. He also predicts that his opponent will base his defense on a substantive issues, that is, that his action did not fit

³⁵ It is important to note the difference between aspects 1 and 3. Lysias makes a distinction between intention to act and one's attitude toward the resulting action. The two aspects are different since one can act intentionally without having a positive attitude toward one's action. For instance, a ship's crew might throw a cargo overboard in a storm to avoid sinking. The act of throwing the cargo overboard is intentional, but the crew does not willingly lose the cargo, which it would have preferred to keep. For the distinction see G. Rickert, *EΚΩΝ and ΑΚΩΝ in Early Greek Thought*, Atlanta (GA) 1989, pp. 131-139.

the description of «killing». And it is clear from his answers to Lysias' questions that he did not dispute the fact of the arrest. Here we find a debate about a substantive issue, namely, whether Eratosthenes' action constituted «killing» or not. The wording of the law did not provide clear guidance about how to decide this case so the litigants found it necessary to interpret the meaning of the verb ἀποκτείνειν.

We do not know whether the court sided with the accuser's interpretation of the law, but there is another case where the Areopagus appears to have condemned a man for murder although he did not touch the victim but only encouraged his assailant. In Demosthenes, 54.25 the plaintiff Ariston states that his attacker Conon would have been condemned for murder if he had died as a result of his wounds even though he might not have even touched the plaintiff. Ariston cites the precedent of a case tried before the Areopagus and uses an *a fortiori* argument: he tells how the father of the priestess of Brauron did not touch his victim only encouraged his attacker to strike (τῷ πατάξαντι τύπτειν παρεκελεύσατο). The charge must be φόνος ἐκ προνοίας since 1) the case was tried at the Areopagus, 2) the penalty was exile, which was an alternative penalty on this charge (Dem. 23.70), and 3) the previous sentence compares the father's case to a hypothetical case of φόνος ἐκ προνοίας³⁶. This case reveals

³⁶ Cf. M. Gagarin, *Bouleusis in Athenian Homicide Law*, in *Symposion 1988*, eds. G. Nenci - G. Thür, Cologne - Wien, p. 97; Gagarin *Draco* cit., pp. 111-115. MacDowell, *Athenian Homicide Law in the Age of the Orators*, Manchester 1963, pp. 67-68 objects to this view because in cases for *phonos ek pronotas* the defendant could go into exile voluntarily, but the court could not sentence him to exile whereas the verb ἐξέβαλεν found in the text «cannot mean that he went into exile voluntarily». MacDowell has not taken into account the use of the same verb at Dinarchus, 1.28: οὗτος Φιλοκράτει συναπελογεῖτο τῷ γράψαντι πρὸς Φίλιππον εἰρήνην, δι' ἣν ὑμεῖς ἐκεῖνον ἐξέβαλετε. Here Dinarchus says «you (*i.e.* the Athenian court) banished him», yet we know from Aesch. 2.6 and Dem. 19.116 (cf. «Hesperia» 5, 1936, pp. 399-400, lines 111-115) that Philocrates fled Athens before his case came to trial. The Dinarchus passage confirms the suggestion of C. Carey - R. Reid, *Demosthenes: Selected Private Speeches* (Cambridge 1985), p. 93 (cf. D.M. Lewis, «CR» 40, 1990, p. 358) that at Dem. 54.25 «ἐξέβαλεν is a succinct way of saying that the defendant fled after his first speech». R.W. Wallace *The Areopagos Council, to 307 B.C.* (Baltimore - London 1989), pp. 101-102 does not understand the semantics of the verb and thus cannot understand why this case was tried at the Areopagos. G. Thür, *The Jurisdiction of the Areopagos in Homicide Cases*, in *Symposion 1990*, ed. M. Gagarin, Cologne - Wien 1991, pp. 58-59 has similar difficulties in explaining the case, which, as R.W. Wallace, *Response to Gerhard Thür*, in *Symposion 1990*, ed. Gagarin, Cologne - Wien, p. 78, points out, contradicts his

that the Athenian courts allowed the causal chain to be stretched back rather far. Euthyphro brought an accusation against his father for tying up the *pelates* and leaving him exposed to the elements. In the Agoratus case the Eleven accepted a case where a man caused death by his denunciation. In this case the Areopagus convicted a man for causing his death by encouraging his attacker to strike. Here we find the Athenian courts willing to convict a man who has caused death only by encouraging his assailant to strike. But in this case their willingness to stretch the meaning of the verb appears to have been motivated by a strong public interest in encouraging bystanders to intervene in preventing violence. As Demosthenes (54.25) says, «if bystanders, instead of preventing those who urge others to do wrong when they are under the influence of drink or anger, no one else who falls victim to men who abuse them will have any hope of being rescued, but will suffer insults until his attackers decide to stop».

III

Our next example comes from the law of contract. Although the Athenians developed rudimentary local and regional markets in many commodities and carried on an extensive overseas trade, they came nowhere near to developing anything that resembled the range and complexity of the regulations for sale formulated during the Classical period of Roman Law³⁷. Athenian Law appears to have contained a few simple provisions – the courts promised to enforce agreements willingly entered into by the parties, distinguished among various forms of contracts, and appeared to understand the differences between the incidents of various contracts³⁸. In agree-

view that the Areopagus tried only cases of murder committed by the accused's own hands.

³⁷ The standard work on sale in Athenian Law remains F. Pringsheim, *The Greek Law of Sale* (Weimar 1950).

³⁸ For an implicit awareness of the different incidents of leases and loans and loans see Harris, Apotimema. *Athenian Terminology for Real Security in Leases and Dowry Agreements*, «CQ» 43 (1993). The Athenians use the general terms for security *apotiman*, *apotimema* to apply to security deposit in lease, but not language of sale, whereas in loans, they use both kinds of terms.

ments concerning sale, the Athenians held that the seller and a duty to warrant title (βεβαίωσιν). There were also a law about the sale of slaves that provided a warranty against latent defects and a law against fraud in the marketplace. Finally, there were measures designed to ensure the accuracy of weights and measures. In short, nothing very elaborate, just a few simple measures designed to meet the needs of a small and simple market economy.

The case I wish to analyze is the dispute between Epicrates and Athenogenes known from a speech of Hyperides (3) preserved in a fragmentary papyrus. The beginning and the end of the speech are missing, and there are gaps in the rest of the papyrus, but there remains most of the narration and the legal arguments presented by Epicrates. The preserved portion of the narrative reveals that Epicrates had fallen in love with a young boy, who worked in a perfume shop with his father Midas and his brother, all of whom are slaves owned by Athenogenes. Epicrates wanted to contribute money to emancipate the three slaves (4). At first, it appears that Athenogenes quarreled with Epicrates and refused to go along, but thanks to the intervention of a former prostitute turned madam named Antigone the two men were reconciled (4-5). Athenogenes then proposed that Epicrates buy the three slaves outright and liberate them himself. This way they would owe Epicrates gratitude for their freedom, not Athenogenes. He may imply that if he were to liberate them, he would remain their *prostates*, and they would owe him their loyalty, not Epicrates. In the interests of full disclosure, Athenogenes warns Epicrates that this arrangement would make him liable for all the debts incurred by the slaves (6-7). This is in accord with the general principle in all slave societies that the debts and assets of the slave automatically become the debts and assets of the master. Roman Law had regulations limiting the liability of masters for their slaves' debts, but we know of no similar rules in Athenian Law, a point that is relevant to this dispute³⁹. To reassure Epicrates, Athenogenes claimed the property of the slaves in the shop was enough to cover the various debts. Epicrates says he formally bought the slaves and agreed to accept their debts on the assumption they were

³⁹ For the peculium of slaves in Roman Law see W.W. Buckland, *The Roman Law of Slavery* (Cambridge 1908), pp. 187-238.

small but claims he was distracted when the written agreement was read to him (8). The written agreement was then deposited with Epicrates paid the agreed sum, and the sale took place (we would say the property was conveyed) (8-9). Soon afterwards, creditors began to appear and continued to come forward for three months until the debts claimed amounted to five talents (9). Epicrates grew alarmed and summoned friends and relatives to study the agreement. A close reading revealed the names of two creditors, Pancalus and Polyclus, and next to their names small debts owed to them, which were covered by the value of the materials in the shop. There was also a clause – the ancient equivalent of «the fine print» – that provided for payment of «any debt which Midas owes to anyone». There was also listed one *eranos*-loan, for which three more payments remained (10-11). When Epicrates confronted Athenogenes in public, the latter denied any knowledge of the other debts and claimed that the document for the agreement covered these debts (12). To prove his statements, Epicrates has the agreement read to the court (12), but does not provide witnesses who were present when Athenogenes stated the remaining debts were small and certainly less than the value of the assets in the perfume shop.

When the case came to court, both parties based their claims on the law. Athenogenes cited the law that «whatever agreements one man makes with another are binding» (13). Actually the complete version of the law included the word «willing» but Epicrates omits this word and does not attempt to argue that he entered into the agreement against his will. The reason for this is probably that he could not deny that he was under no duress when agreed to the terms of the sale – Plato in the *Laus*, 920d interprets this law to apply to cases where one of the parties is «forced by unjust compulsion», which suggests violence or the threat of violence, which was not the case with Athenogenes and Epigenes. If this is correct, it would explain why he chooses to rely on another law that declares unjust contracts are not binding (13: τὰ δὲ μὴ τοῦναντίον ἀπαγορεύει μὴ κύρια εἶναι)⁴⁰. It would therefore be wrong to assume that Ep-

⁴⁰ This law may be identical to the law about agreements among members of an association quoted at *Digest*. 47.22.4: ὅτι ἂν τούτων διαθῶνται πρὸς ἀλλήλους, κύριον εἶναι, ἐὰν μὴ ἀπαγορεύσῃ δημόσια γράμματα (= E. Ruschenbusch, ΣΟΛΩΝΟΣ ΝΟ-

icrates asks the court to lay aside the law or appeals to considerations of equity that supersede the written law.

The question immediately arises «what is an unjust agreement?» Here this specific law gave no answer. Confronted with such a statute, students of the Common Law would search through court records for earlier cases brought under this statute and study the verdicts rendered and the reasons given by the courts for their decisions. If the court did not state the principles that guided its decision, they would then attempt to discern the general principles that were implicit in the courts' decisions. These precedents would then help to discover what the law meant and would bind the court to *stare decisis*, rule in accordance with previous legal decisions. But Epicrates does not even consider the possibility of proceeding in this way. There was no rule of binding precedent in Athenian Law and no means of enforcing such precedents⁴¹. The decision of an Athenian court was final and not subject to appeal to a higher court, which could then declare the decision of the lower court invalid because it violated a precedent. Besides, Athenian officials do not appear to have kept records of cases aside from the final verdict and resulting sentence. Even if Epicrates had tried to look for precedents, all he would have found in the public archives would have been a collection of decisions without any record of the facts of the case that gave rise to the decision.

Instead of searching for precedents, Epicrates attempts to interpret the statute by examining other laws to discover general principles implicit in the law that can be used to determine the meaning of the statute. In other words, he seeks to discover the intent of the lawgiver in this one law from what he has written in other laws⁴². This approach strikes us as dubious; we would object that different laws are written by different legislators, each of whom may have had a different intent. But the Athenians believed that all their laws were

MOI: *Die Fragmente des Solonischen Gesetzeswerkes mit einer Text- und Überlieferungsgeschichte*, Wiesbaden 1966, F 76A).

⁴¹ On the absence of binding precedent in Athenian Law, I am indebted to a forthcoming essay by Adriaan Lanni.

⁴² After I wrote this, I discovered that Johnstone, *Disputes and Democracy* cit., pp. 27-30, makes similar point, but does not contrast Athenian legal reasoning with the use of precedents in the Common Law tradition.

the product of one legislator – in fact, Epicrates, like other Athenian litigants, speaks of «the legislator» when he mentions the law about marriage (16), whom he later identifies as Solon (21)⁴³. To discover the meaning of any one law, the litigant could therefore look to the other laws enacted by «the» lawgiver. In fact, the author of the *Constitution of the Athenians* (9.2) explicitly states that one ought to search for the meaning of a law not from what takes place now (ἐκ τῶν νῦν γινομένων), that is, the way it may have been applied by present day courts, but from the rest of his constitution (ἐκ τῆς ἄλλης πολιτείας θεωρεῖν τὴν ἐκείνου βούλησιν), that is, from his other laws⁴⁴.

To discover the meaning of the law about contracts, Epigenes turns first to a law that requires everyone to refrain from lies in the marketplace (14). He then alleges Athenogenes lied to him because he did not declare all the debts and list the names of the creditors. The problem with this argument is that the agreement made no statement about the total number and size of the debts. Athenogenes listed some debts, and the two parties agreed that Epicrates would be liable for any other debts Midas might have contracted. This means Athenogenes admitted the possibility other debts might exist without saying anything about them. Epigenes alleges that Athenogenes said the other debts were small and covered by the assets in the shop, but provides no witnesses to prove he actually made such a statement. The statement certainly could not be found in the written agreement. Epicrates may possibly stretch the meaning of «refrain from falsehood» to cover the deliberate failure to provide relevant information. This would require Epigenes to prove that Athenogenes knew about the other debts. Epicrates appears to have been aware of this requirement since he later does address this very issue.

But the law about refraining from lies does not mention contracts nor the effect a lie would have on the validity of an agreement. To show that a falsehood would render an agreement null and void, he

⁴³ For the figure of Solon see M.H. Hansen, *Solonian Democracy in Fourth-Century Athens*, «Classica et Medievalia» 40 (1989), pp. 71-99.

⁴⁴ Christ, *Litigious Athenian* cit., p. 196, claims that when litigants appeal to the intent of the lawgiver, «they are not engaging in a search into legislative history but attempting to show how their interpretations of laws are consistent with community norms» but analyzes no passages to prove his point. Christ's view is undermined by the fact that litigants cite other laws to infer the intent of the lawgiver and never refer to informal norms of the community when making such arguments.

discusses two other laws (14-16). The first law Epigenes cites concerns the sale of slaves. This law required someone selling a slave to declare in advance any disease the slave might have. If he does not, the buyer has the right to return the slave and demand back his payment, in other words, cancel the transaction, the Athenian equivalent of *restitutio in integrum* in Roman Law. Epigenes constructs an *a fortiori* argument from this law: if the law permits the buyer to cancel the sale if a slave has a disease, how is Athenogenes not liable for the injustices he plotted? Epigenes attempts to argue by analogy from an existing statute: if the law cancels a sale where there is a hidden disease that occurs by chance, it should also declare invalid a transaction where the seller has deliberately plotted to defraud the buyer. In both cases, the item sold contains some hidden quality that renders it less valuable than it might appear. In the case of the slave, this quality comes about by chance, that is, through no action of the seller. *A fortiori*, when the hidden quality is the result of a deliberate action by the seller, the sale should also be cancelled. What Epigenes does is to devise a general warranty against latent defects from the particular statute about the sale of slaves, then applies this general rule to argue for his view of what constitutes a just contract. In other words, to interpret the law about contracts, Epigenes looks for a principle inherent in another law and uses this to discover the meaning of the law about contracts.

The second law Epigenes brings forward to show that a falsehood invalidates a contract is the law about the status of children of a woman married by a solemn pledge (16). As we noted above, the law states that the children of a woman who is married in this way are *gnesioi*, those who are entitled to inherit their father's estate. Epigenes points out that if a man pledges a woman who he falsely claims is his daughter the agreement is not valid. Epigenes does not develop his argument in detail, but once again implicitly argues by analogy. In the case of marriage, the man who gives away the bride to the husband cannot misrepresent her relationship to him. If she is not his daughter, he has no right to give her in marriage and the agreement is invalid. Epigenes seems to argue that Athenogenes has misrepresented the debts of his slaves, so the court should declare his contract invalid. Epigenes may be working toward the Roman idea that *error in substantia* cancels a contract of sale. Such an error occurred when the parties are agreed about the physical identify of

the object sold, but are mistaken about some essential characteristic. But there was no such rule in Athenian Law. As a result, Epigenes had to argue that this rule was implicit in the law about just contracts, find the rule in the law about solemn marriage to support his interpretation, and argue by analogy.

Epigenes next looks at law about wills that we have already studied. Epigenes notes the law declares invalid a will made under the influence of a woman and says that he made his agreement under the influence of Athenogenes' mistress Antigone. As he does with the other laws, Epigenes claims to find a general rule about contracts in a law about one type of agreement (wills) and applies it to another type of agreement (sale). Given his assumption that the laws of Athens are the creation of a single lawgiver, this is a reasonable way to discover the meaning of a statute that contains a potentially ambiguous term.

After building his own case, Epigenes anticipates the objection that Athenogenes may honestly not have known about the other debts. Epigenes handles this objection in two ways (18-22). First, he argues it is unlikely that Athenogenes did not know about the debts since he was an experienced tradesman. His father and grandfather had been in this line of business, and he himself spent every day in the market, owned three shops, and received accounts every month. Second, he says that even if Epigenes did not know about the debts, he would still be liable for any debts contracted while he owned them (20-21). To support his point, Epigenes cites the law of Solon that made the master liable for the penalties and wrongs incurred by slaves when working for someone else. The law appears to cover any damages committed by slave whom the master has given to someone else to work on their property. Epicrates says this is only just since the master also benefits from any profit the slave makes. The wording of the law indicates that it applies only to delicts, not contracts, but Epigenes talks as if the law covered debts as well. The other problem with the argument is that Epicrates has explicitly agreed to assume the debts of the slaves he bought.

Epicrates concludes his legal arguments by citing another law of Solon. This law stated that decrees of the Assembly do not take precedence over the laws. The Athenians made a distinction between statutes called *nomoi* that were passed by a cumbersome process known as *nomothesia* and measures called *psephismata* that were

passed by the Assembly at one of its meetings. Solon's law granted priority to the former and made it possible to indict the proposer of an illegal decree on a charge called a *graphe paranomon*. If the proposer was convicted, the decree was rescinded. Epigenes argues that if laws are superior to decrees passed by the entire Assembly, *a fortiori* agreements concluded between two private individuals do not have greater validity than the laws. It is unclear how this argument relates to the previous ones. Epigenes may have included it merely for rhetorical purposes to overcome the judges' natural reluctance to declare a fixed agreement invalid.

Epigenes' arguments are some of the most sophisticated attempts to exploit the open texture of Athenian Law. What is fascinating is the way he does not appeal to precedents or to the opinions of legal experts, but to other statutes. His method of interpretation is eminently democratic; it assumes that the average citizen is capable of finding the meaning of a statute on his own with only the guidance of other statutes. In point of fact, the speech was written for him by a professional speech writer, but to maintain democratic appearances, Epigenes claims he looked all these laws by himself (13). Although Epigenes may exploit the open texture of the law, he is no cynic: he does not draw attention to the potential ambiguity of the law, then boldly assert its wording can be stretched to cover any situation he wishes it to. He implicitly recognizes the need to justify his reading of the law by finding principles inherent in other statutes and using them to guide his interpretation of the law about just contracts. We do not have the reply Athenogenes made to his legal arguments, but Epigenes' own speech indicates he expected him to base his defense on a straightforward reading of the law that enforced agreements willingly entered into. Unfortunately we do not know how the court viewed their respective arguments nor how it ruled on the case. Yet once again, it is clear that the magistrate who accepted the case did not find Epigenes' case without legal merit. And Athenogenes did not think he had grounds for bringing a *paragraphe*.

IV

In all the cases examined so far (except one), we do not know what verdict the court rendered. In the next five cases, however, we either

know or can infer the decision made by the judges (or magistrates). Three of these cases (Lysias, 9, Lysias, 10, and Demosthenes, 39) require only brief discussion, but the remaining two (the case of Ctesiphon [Aeschin. 3 and Dem. 18] and Lycurgus *Against Leocrates*) deserve more extensive analysis⁴⁵.

Lysias, 9 was delivered by a soldier named Polyainos, who had been accused of slandering a general. Polyainos recounts how the generals enrolled him for military duty even though he had recently served in the army (4)⁴⁶. When he objected to one of the generals, the general did not grant his request and insulted him. Polyainos says he kept quiet (ἤσυχίαν εἶχον), then went to consult with another citizen (5). He then discovered that the generals intended to arrest him (5). This conversation took place at Ctesicles' bank (6). The generals heard about the conversation and decided to impose a fine on him (ἐπιβαλόντες) for slandering them (ὡς ἐγὼ λοιδοροῦμι. Cf. 16: ζημιώσαντες μὲν ὡς τὴν ἀρχὴν λοιδοροῦντα). Polyainos reminds the court that the law only forbids slandering magistrates at their offices (6: τοῦ νόμου ἀπαγορεύοντος ἐάν τις ἀρχὴν ἐν συνεδρίῳ λοιδορῇ. Cf. 10: ὁ δὲ νόμος τοὺς ἐντὸς πλημμελοῦντας ἀγορεύει τὴν ζημίαν ὀφείλειν)⁴⁷. The generals did not attempt to collect the fine, then at the end of their term of office recorded the debt on a record they handed over to some treasurers⁴⁸. These officials asked the generals about their grounds for imposing the fine. When they learned what had happened, they tried to persuade them to change their mind, then when that failed, they judged the fine null and void (7: ἄκυρον

⁴⁵ Johnstone, *Disputes and Democracy* cit., pp. 21-45, shows how litigants attempted to interpret the laws of Athens, but does not study how the courts responded to their interpretations.

⁴⁶ For a helpful discussion of the speech, see D.M. MacDowell, *The Case of the Rude Soldier* (Lysias 9), and M. Dreher, *Diskussionsbeitrag zum Referat von Douglas MacDowell*, in *Symposion 1993: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, ed. G. Thür (Cologne - Weimar - Wien 1994), pp. 153-168.

⁴⁷ It is difficult to determine the relationship of this law to the one mentioned at Dem. 21.32-33, which punished insulting and striking a magistrate with total *atimia* (cf. Ar. *Prob.* 952b 28-32). It may be that the law mentioned at Lys. 9.6 gave an official the power to impose a fine, while the one mentioned by Demosthenes created a public charge, for which the penalty was *atimia*. Or both provisions may have come from the same law (compare the law at *Ath. Pol.* 56.7: ἐπιβάλλειν ἢ εἰσάγειν εἰς τὸ δικαστήριον).

⁴⁸ MacDowell, *Case of the Rude Soldier* cit., pp. 161-162 identifies these treasurers with the *praktōres*, and Dreher, *Diskussionsbeitrag* cit., p. 167 accepts the identification.

τὴν ζημίαν ἔκριναν. Cf. 12). Despite this decision, Polyainos was later prosecuted by an *apographe* procedure (21) since his opponents claimed he still owed the fine and had not paid it.

The decision of the treasurers was not the verdict of a court, but it did aim to resolve a legal dispute (note the use of the verb ἔκριναν) arising from an interpretation of the law. The generals clearly took a broad interpretation of the law and applied it to someone who criticized their conduct. They may have argued that the aim of the law was to encourage general respect for magistrates and to punish disrespect. Polyainos relies on a narrow interpretation and keeps close to the actual wording of the law. For Polyainos the aim of the law may have been to enable officials to carry on their duties without interference, but not to discourage criticism⁴⁹. Whatever the reasons for their differing interpretations, the significant point is that the treasurers sided with Polyainos' reading of the law. In other words, these officials, when confronted with two different interpretations of the law, chose to adhere to a literal reading of its language and resisted an attempt to broaden the application of the law to anyone who criticized officials no matter where.

The second case is the one brought against Theomnestus for slander (Lysias, 10)⁵⁰. The plaintiff states that during a trial Theomnestus said he killed his father (1: τὸν πατέρα μ' ἔφασκεν ἀπεκτονέ- ναι). Theomnestus defended himself by drawing attention to the actual wording of the statute, which forbid calling anyone a «murderer» (6: τὸν γὰρ νόμον οὐ ταῦτ' ἀπαγορεύειν, ἀλλ' ἀνδροφόνον οὐκ ἔαν λέγειν). Since he did not use the word «murderer» but just said he killed, Theomnestus argues that the law did not apply to his statement about the plaintiff (οὐκ ἔστι τῶν ἀπορρήτων, ἐάν τις εἴπῃ τὸν πατέρα ἀπεκτονέ- ναι). The plaintiff replies by accusing Theomnestus of misinterpreting the law. He argues that the court ought to examine not just the words, but the meaning of words (7: οὐ περὶ τῶν ὀνομάτων διαφέρεισθαι ἀλλὰ τῆς τούτων διανοίας). Since the lawgiver could not possibly list all insulting words which have the same meaning (πολλὰ γὰρ ἔργον ἦν τῷ νομοθέτῃ ἅπαντα τὰ ὀνόματα γρά- φειν ὅσα τὴν αὐτὴν δύναμιν ἔχει), he chose to show what he meant

⁴⁹ For *parrhesia* at Athens including the right to criticize officials see Dem. 22.31.

⁵⁰ For a thorough discussion of the speech see Hillgruber, *Die zehnte Rede des Lysias* cit.

by using just one word (περὶ ἑνὸς εἰπὼν περὶ πάντων ἐδήλωσεν). Like Epigenes, the plaintiff here bases his interpretation of the law not on precedents, but on his view of the lawgiver's intent.

We do not know how the verdict reached by the court, but the plaintiff refers to what Theomnestos said when the case was heard by the arbitrator (6: ἐτόλμα λέγειν καὶ πρὸς τὸν δῆλαιτῆρην). The plaintiff would only have brought the case to a court unless he had lost before the arbitrator. Since there appears to have been no dispute about the facts, this would indicate the arbitrator must have accepted the narrow interpretation of the law about slander proposed by Theomnestos.

For the next case, Mantitheus' suit against Boeotus (Dem. 39), we know not only the decision of the arbitrator but can also infer the verdict of the court. The dispute arose between two half-brothers, Mantitheus and Boeotus, both the sons of a man named Mantias. Boeotus did not grow up in his father's household, but lived with his mother Plangon. When he reached the age of majority, he needed to have his father acknowledge paternity so he could be registered in phratry and on the list of citizens in his deme (2). Mantias was reluctant to comply, but was finally forced to register Boeotus in his phratry under that name (3-4). Mantias died before he could register him in his deme, so Boeotus took the initiative and had himself registered under the name of Mantitheus (5). Mantitheus naturally resented this and brought an action against his half-brother. When the case came before the arbitrator, Boeotus provided witnesses to prove that Mantias had performed his *dekate* (tenth-day) ceremony after his birth and given him the name of his grandfather Mantitheus (22). Since he claimed to be the elder son, he was entitled to the name of their paternal grandfather (27).

The charge Mantitheus brought appears to have been a suit for damages (δίκη βλάβης)⁵¹. In two places he accuses Boeotus of causing him harm (5: βλάπτει, 13: βλάπτεται. Cf. 18: βλάβην). In his second case against Boeotus ([Dem.] 40.35), Mantitheus says he brought the action not to get money from him but so that he would use the name Boeotus if the court decided he was suffering terribly and enduring great harm (βλάπτεσθαι). Even though he says that his

⁵¹ Cf. Carey - Reid, *Demosthenes: Selected Private Speeches* cit., p. 166.

aim was not to receive money, Mantitheus obviously hoped the court would award him a payment of damages and thereby discourage Boeotus from using his name again in the future. Normally the terms βλάπτειν and βλάβη apply to physical damage to some material object (e.g. Demosthenes, 55.12, 20, 28), but the courts might award a payment for damages to a litigant who proved that a defendant's actions had caused him to incur expenses without doing any physical damage. For instance, Menippus, a man from Caria, lost a suit to Euandros, a citizen of Thespiai. When Euandros could not find Menippus to collect the amount awarded by the court, he grabbed a hold of him during the celebration of Mysteries, when it was illegal for creditors to seize debtors (Dem. 21.176). After initiating his action by *probole*, Menippus brought a private action for damages (τάς βλάβας). The court compelled Euandros to forfeit his earlier award and granted Menippus a payment of damages for the expenses he incurred for having to remain in Athens for the legal proceedings (τάς βλάβας, ἄς ἐπὶ τῇ Χειροτονίᾳ μένων ἐλογίζετο αὐτῷ γεγενηῆσθαι πρὸς ὑμᾶς ἄνθρωπος)⁵².

In this case, however, Mantitheus extends the terms to cover acts that simply cause some annoyance or might cause inconvenience in the future. Mantitheus describes the potential confusion in public affairs that might arise from two men bearing the same name (7-12). For instance, the archon might not know whom to summon to court, the generals whom to call up for duty, assign to a symmory, or select as a trierarch. If the name Mantitheus, son of Mantias, from the deme of Thorikos, was selected for office, who would serve (10)? Or the two men might collude to increase the chances of one to gain an office filled by lot (12). Mantitheus then turns to situations that might cause him harm. He notes that Boeotus associates with Meneclēs and others who bring many public cases. If Boeotus were to use his name, then lose a case and owe a fine to the treasury, Mantitheus might be considered responsible for paying (14). Mantitheus describes several other hypothetical problems the shared name might create (15-18). But Mantitheus provides evidence for only two actual events where Boeotus caused him some irritation, once when his

⁵² For an analysis of the case see E.M. Harris, *Demosthenes' Speech against Meidias*, «HSCP» 92 (1989), pp. 117-136 and Review-Discussion: MacDowell's edition of Demosthenes' *Against Meidias*, «CP» 87 (1992), pp. 71-80.

half-brother was a defendant in a public case and another time when he disputed his right to an office to which the people had elected him (19). Mantitheus claims the first incident damaged his reputation (*συνδιαβάλλομαι*) and implies the second caused him some annoyance (*δυσχερῆ*). Mantitheus does not show that the actions of his half-brother caused him to lose money or otherwise diminished the value of his assets.

It should come as no surprise that Mantitheus lost his case before the arbitrator (22) and appears to have been no more successful before the court⁵³. The effort of Mantitheus to stretch the meaning of the term to cover actions that merely caused some annoyance was a clever attempt to exploit the open texture of the law, but obviously went far beyond the standard meaning of the term. As in the previous cases, both the arbitrator and the court voted against a litigant who attempted to broaden the application of a law beyond its normal limits.

V

Aeschines' speech against Ctesiphon (Aeschin. 3) contains some of the most detailed legal arguments in all of Attic oratory⁵⁴. The dispute began in 336 when Ctesiphon proposed a decree of honors for Aeschines' rival Demosthenes. Aeschines immediately brought a charge of proposing an illegal decree (*graphe paranomon*) against Ctesiphon, but the case did not come to trial until 330⁵⁵. Aeschines makes three main charges against Ctesiphon's decree: 1) it violated the law about the award of honors to magistrates who had not passed their *euthynai* (Aeschin. 3.9-31), 2) it violated the law about the announcement of awards in the Assembly (Aeschin. 32-48), and

⁵³ See IG ii² 1622, lines 435-436 with Carey and Reid, *Demosthenes: Selected Private Speeches* cit., pp. 167-168. One might add that if Mantitheus had won the case, he would certainly have said so when he referred to it in his later speech against Boeotus ([Dem.] 40.35).

⁵⁴ The analysis I present here draws heavily on my discussion of the case in *Law and Oratory* cit., pp. 141-148, but I have changed some points as a result of comments made by L. Rubinstein.

⁵⁵ For an analysis of the reasons why Aeschines delayed bringing his case until 330 see E.M. Harris, *Aeschines and Athenian Politics* (Oxford - New York 1995), pp. 138-142.

3) it contained false statements (Aeschin. 3.49). The third charge dealt mainly with issues of fact, but the first two involve interpretation of law. Both ancient and modern scholars believe that Aeschines, who lost the case by a wide margin, had the stronger legal arguments⁵⁶. Quintilian (7.1.2) thought Aeschines began with a discussion of the law because that was his strong point (*a iure quo videbatur potentior coeperit*)⁵⁷. Gwatkin, the author of the most detailed study of the legal arguments in the case, concluded «the better reasoning is that of Aeschines»⁵⁸. Since Demosthenes was *hypeuthynos* in the legal sense in 336, when the crown was proposed, Gwatkin claims that Ctesiphon's proposal was illegal and that he should have been convicted. Meyer-Laurin believes that «Aischines hatte den Wortlaut der Gesetze auf seiner Seite» («Aeschines had the actual wording of the law on his side») and that the outcome of the trial hinged on political factors⁵⁹.

These scholars appear to assume that Aeschines must have had the stronger legal arguments because he spends so much time discussing the law, whereas Demosthenes devotes little space to legal issues⁶⁰. None of these scholars considers the possibility that the laws cited by each litigant were potentially ambiguous and capable of different interpretations. There is also the possibility that Aeschines had to analyze the laws at considerable length because he was arguing for a new and unusual reading of their contents, whereas Demosthenes was relying on the customary interpretation of their provisions, which did not require elaborate argument.

Let us begin with Aeschines' first charge against Ctesiphon. Aeschines (3.9-10) says that the law forbidding the award of crowns to magistrates subject to audit was passed because of the dishonesty of

⁵⁶ For Aeschines' defeat see [Plu.] *Mor.* 840d; Plutarch, *Demosthenes*, 24.1.

⁵⁷ Cf. Dem. 18. *hyp.* 2.

⁵⁸ W.E. Gwatkin, *The Legal Arguments in Aeschines' Against Ktesiphon and Demosthenes' On the Crown*, «Hesperia» 26 (1957), pp. 129-141.

⁵⁹ Meyer-Laurin, *Gesetz und Billigkeit* cit., p. 32. H. Wankel, *Rede für Ktesiphon über den Kranz*, Heidelberg 1976, p. 17, also believed that Aeschines had the stronger legal case.

⁶⁰ As Lene Rubinstein points out, one must bear in mind that Demosthenes spoke only as a *synegoros*. It is therefore possible that Ctesiphon himself may have spoken first and carried the main burden of the legal argument (cf. Lysias, 14.3, where it is clear the previous speaker Archestratides dealt with the laws and produced witnesses).

corrupt magistrates. These magistrates, knowing they would not pass the examination of their pilfered accounts at their *euthynai*, conspired with friendly speakers in the Assembly to have decrees of praise passed for them during their terms of office. Thus, if they were subsequently prosecuted after their accounts were examined, the members of the court would be reluctant to convict them and thereby condemn men whose conduct in office had already received commendation from the Athenian people. Aeschines (3.11-12) notes that Ctesiphon could have avoided breaking the law by calling for the award to be granted to Demosthenes only after he had successfully passed his *euthynai*, but failed to do so. Aeschines disapproves of the practice of inserting such a clause in decrees of praise but admits it was common at the time, and contemporary inscriptions show that his statement is correct. (We will return to these inscriptions later)⁶¹.

That would appear to be the end of the matter. But one must look at the precise wording of the law. Aeschines first gives the provision of the law at 3.11 where he says it explicitly forbids the crowning of those subject to audit (τοὺς ὑπευθύνους μὴ στεφανοῦν). At 3.26 he paraphrases the provisions of the law with similar language: «If someone is subject to audit for one office, even a very small one, the lawgiver does not allow the crowning of that man before he undergoes his audit» (ἐάν τις μιᾶς ἀρχῆς τῆς ἔλαχίστης ὑπεύθυνος ᾖ, τοῦτον οὐκ ἐᾷ, πρὶν ἂν λόγον καὶ εὐθύνας δῶ). What is rather suspicious is that Aeschines does not have the actual text of the law read out by the court clerk until 3.31, where he gives a slightly different version of the law: «another law forbids the crowning of an *arche*» (ἕτερος δ' ἀπαγορεύει νόμος ἀρχὴν ὑπεύθυνον μὴ στεφανοῦν). The versions of the law he presents at 3.11 and 3.26 are not verbatim quotes but paraphrases, which interpret the key term ἀρχήν as meaning «magistrate». This is a possible interpretation of

⁶¹ Aeschines (3.13-15) predicts that his opponents will claim Demosthenes was not technically a magistrate when Ctesiphon proposed his decree and refutes the argument by proving that Demosthenes' office of *teichopoios* was indeed a magistracy. Despite Aeschines' prediction, Demosthenes does not appear to have used this argument in his speech, but Ctesiphon may have dealt with the matter in his speech – see the previous note. The argument is interesting, however, since it shows that some Athenian statutes did attempt to provide definitions of key terms, in this case the term ἀρχή.

the term ⁶², but it is not the only one: the term could also mean «term of office» ⁶³. These different interpretations of the term may seem minor, but they have major implications for the meaning and application of the law. If we adopt Aeschines' interpretation, the law banned all decrees of praise for a magistrate who had not yet passed his *euthynai*. If we adopt the other interpretation, the law only made it illegal to award a crown for a term of office, that is, for the performance of duties attached to an office before this magistrate passed his audit for that term of office. This means that the law did not prohibit a person who held an office from receiving a crown before undergoing his audit, but only a crown awarded for his performance in that office. In other words, a magistrate still *hypeuthynos* (subject to audit) might still be able to receive a crown for some remarkable achievement, for a generous donation of money, or for earlier public service.

What kind of decree of praise had Ctesiphon proposed? Suspiciously enough, Aeschines never has Ctesiphon's decree read out during his discussion of the laws about crowns, but only quotes a few phrases from it later in the speech (3.49-50). These phrases appear to indicate that Ctesiphon's decree was a general commendation, for Demosthenes is praised for his merit and virtue (ἀρετῆς ἔνεκα καὶ ἀνδραγαθίας) and for continually (διατελεῖ) saying and doing what is best for the people (cf. 237). The only other place where Aeschines refers to the actual contents of the decree is toward the end of the speech (3.236-237). Here he says that Demosthenes was praised for having trenches dug around the walls of Athens. Aeschines recalls how this work resulted in tearing up the public burial grounds, which would place Demosthenes' supervision of the work in late 338, a year before his election to the post of *teichopoios* ⁶⁴. This is one of several 'good deeds' (εὐεργεσίαι) listed in the decree. Demosthenes (18.113-114) in his reply also quotes the phrase «constantly does and says what is best for the people» and adds that he was praised for donating a sum of money toward the building of fortifications.

⁶² For *arche* with the meaning of «magistrate» see Dem. 39.9; Lys. 9.6.

⁶³ For this meaning of the term see for instance Lys. 9.6; *Atth. Pol.* 56.2; Aeschin. 3.11.

⁶⁴ See Lycurgus, *Against Leocrates*, 44.

These passages reveal that Ctesiphon's decree was not a decree of praise for Demosthenes' performance of his duties as *teichopoios* or as administrator of the Theoric Fund, a post he held simultaneously (Aeschin. 3.24). Ctesiphon's decree must have been similar to the one that Eucharès moved for Callias of Sphettus in 270/269 or the one Laches passed for Demochares in 271/270⁶⁵. It was an award for a long record of public service and a general commendation for his consistent devotion to city's welfare.

This makes it possible to make sense of Demosthenes' reply to Aeschines' first charge against Ctesiphon. Demosthenes (18.113) rightly draws attention to the fact that he was praised not for any of the actions for which he was subject to audit (οὐ περὶ τούτων γ' οὐδενὸς ὦν ὑπεύθυνος ἦν, ἀλλ' ἐφ' οἷς ἐπέδωκα), but on the grounds that he had donated money. Demosthenes draws attention to the very issue Aeschines ignores, namely, the nature of the praise contained in the decree. Demosthenes stresses the fact that he was not praised for his performance of his duties as *teichopoios* or as administrator of the Theoric fund. He sums up his argument briefly and forcefully: I made a contribution. I am praised for that reason. I am not subject to audit for what I gave. I was a magistrate. I underwent an audit for my term of office, not for what I contributed (117: ἐπέδωκα· ἐπαινοῦμαι διὰ ταῦτα, οὐ ὦν ὦν ἔδωχ' ὑπεύθυνος. ἤρχον· καὶ δέδωκά γ' εὐθύνας ἐκείνων, οὐχ ὦν ἐπέδωκα). Since Ctesiphon's decree did not praise a term of office, it is therefore not subject to the provisions of the law on which Aeschines relies. If Aeschines thought he had committed an injustice during his term of office, he should have accused him before the Logistai at his audit (νῆ Δί', ἀλλ' ἀδίκως ἦρξα. Εἶτα παρών, ὅτε μ' εἰσήγον οἱ λογισταί, οὐ κατηγορεῖς). To provide evidence for his argument, Demosthenes, unlike Aeschines, has Ctesiphon's decree read out (18.118)⁶⁶. Demosthenes' brevity does not mask a rhetorical bluff. His argument is terse because it bears directly on the legal issue at stake, which is more than we can say for the long-winded Aeschines.

⁶⁵ For Eucharès' decree see T. Leslie Shear, *Kallias of Sphettos and the Revolt of Athens in 286 B.C.*, «Hesperia», Suppl. 17 (1978). For Laches' decree see [Plutarch] *Moralia*, 851d-f.

⁶⁶ The document inserted in the text at 118 is a forgery. See Wankel, *Rede für Ktesiphon* cit., p. 632.

To sum up so far. Aeschines adopts a broad interpretation of the statute about the awarding of crowns and construes it as forbidding nay award to a magistrate currently holding office. Demosthenes takes a narrower interpretation of the statute and holds that it only applies to decrees of praise for the performance of the duties of an office, not to other types of commendation.

Several pieces of evidence indicate that Demosthenes' interpretation was the way the courts normally understood the implications of the law. First, Demosthenes himself adduces the examples of Nausicles, Diotimus, Charidemus, and Neoptolemus, all of whom received the honor of a crown during their terms of office for acts of generosity (114). Demosthenes is not fabricating evidence for he has the decrees praising these men read out by the clerk (115). These decrees do not show that the Athenians ignored the law about crowns. Rather they prove that Demosthenes' interpretation of the law was the customary one and had been followed many times before. More evidence comes from the speech *On the Trierarchic Crown* ([Dem.] 51). The trierarch who delivers the speech addresses the Council and informs its members that shortly before he had received a crown for being the first to launch his trireme (4). Since he claims that after this he was the first to have his trireme fully equipped (1), he must have received the first crown while he was serving as trierarch, that is, while he was still subject to audit ⁶⁷.

Like Nausicles and the others, the trierarch had received a crown for some remarkable achievement during his term of office. Next there are several decrees that call for the award of a crown and contain the clause that the award not be conferred until after the honorand submits his accounts at this audit. All of the decrees that contain this clause are motions praising one or more magistrates for their performance of their official duties, not for single achievements or long-term service to the community ⁶⁸. On the other hand, decrees of praise for long-term service do not contain this clause, which would indicate that they were not subject to the law Aeschines bases his case on ⁶⁹.

⁶⁷ For trierarchs being subject to *euthynai* see Aeschines, 3.19.

⁶⁸ IG ii² 223 (343/342), 330 (336/335), 338 (333/332), 354 (328/327), 410 (c. 330), 415 (330/329), 672 (279/278), 780 (249/248 or 248/247); *Athenian Agora*, XV (328/327); SEG 43.26 (315/314).

⁶⁹ For examples of this kind of decree see note 65.

Finally, if the Athenians followed Aeschines' interpretation of the law, it would have been impossible for a general like Pericles, who was re-elected fifteen times in a row (Plutarch, *Pericles*, 16.3) to receive any crown until he lost an election or decided not to run again since as long as he remained in office, he would have been subject to audit and thus ineligible to receive a crown. But we know that Lycurgus served in an office supervising Athenian finances for twelve straight years, but still received many crowns during that time ⁷⁰.

Our analysis so far reveals that there were two possible ways of interpreting the law about awards to magistrates, a broader one proposed by Aeschines and a narrower one followed by Demosthenes. All the available evidence about how the law was applied shows that the Athenians shared Demosthenes' interpretation of its provisions.

The second law Aeschines claims Ctesiphon violated is one that provides that a crown awarded by the council can receive an announcement in the Council, a crown awarded by the Assembly in the Assembly, and «nowhere else» (3.32-34). Aeschines lays great stress on this last phrase. In his opinion, the law implicitly forbids the announcement of a crown in the theater of Dionysus. He then acknowledges that there is another law about crowns, which he calls the Dionysiac law (3.36). This law permits the announcement of crowns in the theater if the Assembly votes to allow it. Aeschines predicts (accurately in this case) that his opponents will rely on this law, but asserts that it is not relevant to Ctesiphon's decree. But he argues that this law could not contradict the one he relies on since the procedures for reviewing the laws make this impossible (3.37-40). Since this second law cannot apply to crowns awarded by the Assembly, Aeschines infers that the law must apply only to crowns awarded by demes or foreign communities.

To support his interpretation, Aeschines (3.41-43) recalls the circumstances that gave rise to the law. Although he provides no evidence for his account of the background to the law, his method of argument is significant. Aeschines places the creation of the law in its historical context and attempts to discern the intent of the law by describing the abuse it was created to correct. As further support for his view, Aeschines (3.46) then appeals to another law. This law requires that any crown announced in the theater must be dedicated

⁷⁰ [Plu.] *Mor.* 852b.

to Athena. Aeschines infers that this cannot apply to crowns awarded by the Assembly: why would the people award a crown only to demand that the honorand surrender it soon afterwards? Such a stingy regulation would be unworthy of the Athenian people. On the other hand, the Athenians rightly insisted that a crown awarded by a foreign community and announced in the theater should be given to Athena. The aim of this practice was to make the honorand more grateful to the Athenian people for granting the announcement than to the foreign community for the crown (Aeschin. 3.47).

Aeschines may deliberately misunderstand the complex economy of public honors. The Athenians understood the need to reward their benefactors, but they were also concerned that such honors might lead them to consider themselves superior to the city and its laws. Thus when the Athenians granted more honor to a citizen, they often required that this individual at the same time make a display of his loyalty to the city and its laws. By requiring that the crown be dedicated to Athena, the city was not taking away the honor it granted, but merely asking the honorand to display his loyalty to Athens by dedicating the symbol of that honor to their divine protectress. What is significant for our topic is the way Aeschines argues for his interpretation of the two laws about announcing crowns. He argues that each law applies to a different type of crown and justifies his interpretation by appealing to the intent of the law. He attempts to reconstruct the intent of the law first by placing the law in its historical context, then by examining another law, and finally by an appeal to the «Athenian character». The final argument is similar to an argument found in Demosthenes' speech *Against Leptines* (20.11-14), where he argues that contrary to the character of the Athenian people to take away an award once it has been given.

Demosthenes (18.120-121) replies to Aeschines' second argument by having the clerk read out the law that permits the Council and Assembly to hold a vote about whether to have the award announced in the theater. Demosthenes thus interprets the second law as providing an exception to the provisions of the first. Although he claims that thousands have received this honor in the past, he provides no evidence to back up his assertion, but there is no need to doubt him since several inscriptions show he is correct⁷¹. Once

⁷¹ See Gwatkin, *Legal Arguments* cit., p. 138 note 57.

again, Demosthenes relies on a more straightforward reading of the law, one that the Athenians had consistently followed.

If the court had voted for Aeschines, it would be difficult to know which of his three arguments the judges had found convincing. If that had happened, the court might have rejected two of the charges, but have decided that the remaining one was strong enough to justify conviction. But since the court sided with Demosthenes and rejected Aeschines' case by a large margin, we are safe in concluding that the judges did not find any of Aeschines' arguments persuasive. One might argue that the judges voted on purely political grounds, but that is unlikely: several orators give examples of courts that voted to convict famous leaders despite their impressive political achievements (*e.g.*, Aeschines, 3.195-196; Dinarchus, 1.14; 3.17). As will be obvious from the next case, a politician could not rely on his reputation to gain a favorable verdict. Besides, if Athenian courts paid little attention to legal arguments, why would Aeschines, who was an experienced speaker, have spent so much effort on discussing the laws if they were irrelevant? On the other hand, if we assume most of the judges took their oath to uphold the laws seriously, their verdict in the case falls into the pattern we noted in the previous cases: the courts appear to have been unwilling to side with litigants who based their cases on novel and unusual interpretations of the law and preferred to stick to the standard meaning of legal provisions.

VI

The final case I would like to examine is Lycurgus' prosecution of Leocrates for treason in 331. Lycurgus was a leading politician at the time and held a powerful position supervising Athenian finances⁷². Lycurgus brought a charge of treason (*prodosia*) against Leocrates and used a procedure called *eisangelia*, which was available only for the most serious crimes. The law about *eisangelia* did not provide a definition of what constituted a «serious crime» but listed various offenses under three main rubrics - subversion of the democracy, trea-

⁷² For Lycurgus and his administration see M. Faraguna, *Atene nell'età di Alessandro: problemi politici, economici, finanziari* (Roma 1992).

son, and making speeches against the public interest in return for gifts. According to Hyperides (*Eux.* 8), one could employ this procedure «if anyone overthrows the democracy of the Athenians [...] or conspires for the overthrow of the democracy or forms a group of conspirators (*betairikon*), or if someone betrays some city or ship or infantry or naval force, or when a public speaker does not give the best advice while accepting money». Information derived from Theophrastus' *Laws* preserved in Pollux and the *Lexicon Cantabrigiense* lists similar types of offenses as subject to *eisangelia*. Under treasonable activities, Pollux (8.52) includes «those who go to the enemy without being sent, or betray a fort, or a military force or ships». The lexicon gives a slightly different list: «if anyone betrays some territory or ships or an infantry force or if anyone goes to the enemy or changes residence (to live) with them or serves in the army with them or accepts gifts»⁷³.

Whatever the specific offenses, the statute obviously attempted to cover treasonable acts in general, but did so by listing various kinds of treasonable activities instead of offering a comprehensive definition of treason. Thus the law attempts to provide some guidance about the type of actions the lawgiver had in mind when he provided this special procedure against treason. The problem with this sort of list is that the lawgiver does not make clear whether he intended the specific actions listed to form a comprehensive list or to provide representative examples of treasonous actions. If the former, this meant that one could not bring a case against someone or win a conviction unless his action fit one of the activities named in the statute. If the latter, all one had to do was to claim that the defendant had committed treason and leave it to the court to decide whether the action deserved punishment or not.

This problem arose at the trial for the murder of Herodes for homicide (Antiphon, 5). The relatives of Herodes did not use the standard action for homicide, the *dike phonou*, against the defendant, but employed the procedure of *apagoge*, which was available against a special class of «wrongdoers» (κακούργοι). Instead of leaving this general term unclear, the law attempted to define it by listing

⁷³ For the relationships among the three sources with good discussion see Hansen, *Eisangelia* cit., pp. 12-14.

three groups that were subject to the procedure: thieves, «clothes-stealers», and enslavers (*Ath. Pol.* 52.1)⁷⁴. The defendant claims that their use of the procedure is illegal since murder does not fall into one of these categories; his opponents claim that he is subject to the procedure because murder is a «serious wrong» (Antiphon, 5.10: φασὶ δὲ αὐτὸ τό γε ἀποκτείνειν μέγα κακούργημα)⁷⁵. The defendant thinks the list of wrongdoers listed in the law was intended to be exhaustive; his opponents argue that his offense fell under the general category of «serious wrongs» covered by the law.

Like the law about *eisangelia* with treason, the law about *apagoge* to the Eleven attempted to define a general term. But the «solution» may have created more problems than it solved. Instead of trying to express the precise meaning of the word, the lawgiver simply gave examples, which provide some, but not, complete guidance about how to use the term. The lawgiver is similar to several of Socrates' interlocutors, who, when asked to explain the meaning of a term, give a set of examples⁷⁶. When Socrates asks Theaetetus what knowledge is, he replies «Knowledge is the subjects one can learn from Theodorus – geometry and all the sciences you mentioned just now, and then the skills of cobbler and other craftsmen». Socrates makes fun of Theaetetus for giving him several things when he asked for one. This is like being asked what clay is and answering that it is potter's clay, and ovenmaker's clay, and brickmaker's clay. Such an answer does not help us to understand the term (Pl. *Tht.* 146c-147b). Theaetetus does a better job with the terms «square number» and «oblong number», for which he can give a simple formula (Pl. *Tht.* 147e-148d). Euthyphro has similar difficulty with the term «holy» (Pl. *Euthphr.* 5d-6b), and Meno has the same trouble with «virtue» and «shape» (Pl. *Meno*, 71d-75b) In each case Socrates complains that the examples do not show him the one quality or set of qualities all the examples have in common. Since the Athenian lawgiver was no Socrates, his only attempt to clarify key terms was to offer a list, but this did little to make the court's decision any easier in the case of Leocrates.

⁷⁴ For the rationale behind grouping these felons together see Harris, *In the Act or Red-handed?* cit., pp. 179-180.

⁷⁵ Cf. M. Gagarin, *Antiphon: The Speeches*, Cambridge 1997, pp. 179-182.

⁷⁶ This is also true for the term «just homicide» – see Dem. 23.53; *Ath. Pol.* 57.5 with MacDowell, *Athenian Homicide Law* cit., pp. 70-81.

The facts of the case of Leocrates were not in dispute. After their disastrous defeat at Chaeronea in 338, the Athenians expected the victorious Philip to invade Attica at any moment. The Assembly voted to bring all women and children inside the walls of Athens and instructed the generals to assign any Athenian or foreigner resident in Athens to guard the city (16). During the crisis, Leocrates left Athens and sailed to the island of Rhodes. Lycurgus claims that Leocrates left Athens with the intention of moving away permanently since he took the belongings he had and his mistress (17). A later portion of the narrative reveals that Leocrates left slaves behind in Athens and did not sell his house until sometime later, thereby casting doubt on this claim (21-23). After arriving in Rhodes, Leocrates told people about the situation in Athens (18). Witnesses testified at the trial that Leocrates left Athens during the war and reported news about Athens in Rhodes. Another witness, Phyrinus, had accused Leocrates in the Assembly of «harming one-fiftieth tax», which was a tax on imports and exports (19). His charge was probably that by spreading news about the crisis, Leocrates discouraged merchants from bringing their cargoes to Athens, which would have reduced the amount of tax Phyrinus could have collected. One should not place too much weight on the testimony of Phyrinus, who had invested in the contract for collecting the tax and must have lost money during the crisis when imports were scared away. With an obvious motive to find a scapegoat, Phyrinus had a reason to exaggerate the impact Leocrates' news had on merchants in Rhodes. But the other witnesses do not appear to have had a similar bias. Besides, Lycurgus appears to have assumed that his opponents would not deny his journey to Rhodes and expected them to base their case on other grounds.

After leaving Rhodes, Leocrates went to Megara, where he took up residence (21). From there he asked his brother-in-law to buy his house and slaves, settle his debts, and send the remaining money to him. Leocrates then invested this money to buy grain in Epirus and to ship it to Leucas, and thence to Corinth. Lycurgus called witnesses to prove the sale took place, but provides no evidence about his trading in grain (23-24). After living in Megara for six years, he returned to Athens in 331 and was indicted by Lycurgus for treason.

Lycurgus bases his case on the law, but admits that he is asking the court to innovate by applying it to an action that was not listed in

the law. The lawgiver formulated the law for a general category designated by a single word, treason (9: ἐνὶ ὀνόματι προσαγορεύσας), then listed several offenses in the law under this general category. Lycurgus argues that the offense of Leocrates falls under the general category, though it does not fit one of the specific examples listed in the law (9: ὅσα δὲ μὴ σφόδρα περιείληφεν). Since Leocrates' offense is far worse than any of the specific offenses listed in the law, it should be subject to the same penalties. Lycurgus does not devote much space to discussing the meaning of «treason» until he deals with the objections he predicts his opponents will bring. He notes that the court of the Areopagus seized men who fled during this crisis and executed them, but does not name any names or describe the specific circumstances surrounding their cases (52). He does however remind the judges that the courts condemned a man named Autolycus for sending his wife and children during the crisis after Chaeronea abroad even though he himself remained in Attica (53). If a man was convicted for this reason, all the more reason to find Leocrates guilty. Finally, he mentions a decree of the Assembly (ὁ δῆμος ... ἐψηφίσασατο) that made those who fled during the emergency liable to a charge of treason (ἐνόχους εἶναι τῇ προδοσίᾳ τοὺς φεύγοντας). Although the law about *eisangelia* did not list Leocrates' offense, Lycurgus adduces other decisions where the Athenians considered merely leaving Attica an act of treason.

A little over one third of the way through his speech, Lycurgus declares he has proven his case and turns to meet possible objections. The main line of defense he predicts his adversaries will take is that Leocrates sailed as a merchant, not to flee Athens (55-58). The argument is significant for it reveals that to convict on a charge of treason a prosecutor could not only look at the defendant's actions but must also prove that he had the intent to betray the city. What Lycurgus does not say is that the Athenians desperately needed large supplies of grain in 338 to withstand the long siege they anticipated from the Macedonian army. Leocrates could easily have alleged he intended to sail to Rhodes to buy grain and ship it back to Athens, then changed his mind after he heard that peace was concluded.

Lycurgus tries to refute this objection on the grounds of lack of intent in three ways. First he draws attention to the manner in which Leocrates left the city, not openly by the harbor, but through a small gate in a surreptitious fashion. Second, he left with his mistress and

her slave attendants. Merchants, on the other hand, normally took only their own personal slave attendant. Finally, Lycurgus asks why Leocrates then spent five years working as a merchant in Megara. He contrasts Leocrates, who aimed at increasing his wealth, with other Athenians, who thought only about preserving what they had. The most useful thing Leocrates could have done was to report for duty - what more valuable cargo could he have brought to the city? Lycurgus passes over the city's need for grain at the time and attacks his story as implausible since Leocrates had never sailed as a merchant before, but had made money from slave working as smiths. But his reply to these objections does yield to his adversaries on one point: Lycurgus implicitly acknowledges that is not enough to prove that Leocrates left Athens during a crisis. He must also prove that he intended to harm the city.

The potential objection and Lycurgus' reply show that both sides expected the court to take Leocrates' intention for leaving Athens into consideration. This was not an unreasonable expectation. Dinarchus (1.58) recalls a case where the Assembly had ordered the Areopagus to investigate whether Polyuctus of Cydantide had met with exiles in Megara. After the Areopagus reported that he had, the Assembly elected prosecutors, and the case came to court. Polyuctus admitted that he had gone to Megara to meet Nicophanes, because he was married to his mother. The court acquitted him for the reason that there was nothing unusual or dangerous about speaking to a step-father who had fallen on hard times and trying to help him after he had been driven into exile. The court clearly examined Polyuctus' intent and concluded that his aim was not to help the enemy but to assist a poor relative. Since he did not intend to harm Athens, the court did not convict him of treason. Although the law did not provide a definition of treason (as opposed to a list of examples), the courts clearly understood that the *Tatbestand* of the offense required the intent to harm Athenian interests; simply communicating with the enemy was not treason (cf. Aristotle, *Rhetoric*, 1373b-1374a: διειλέχθαι μὲν τοῖς πολεμίοις ἀλλ' οὐ προδοῦναι).

The next argument Lycurgus (1.59-62) anticipates is that Leocrates may say he was not responsible for the dockyards, gates or camps. This argument relies on the standard use of the terms *prodo-sia* and *prodidonai*. In most of the cases where the terms are found, the traitor betrays the city by opening gates in the defenses or allow-

ing the enemy to gain control of the dockyards or a camp in a similar way. For instance, Dinarchus (3.8-10) calls Philocles a traitor and says the he is the sort of person who will sell strategic parts of the city, betray triremes and their shipsheds, sell Munychia, make signals to the enemy and reveal secrets, or betray the army and the fleet. In fact, the law about *eisangelia* appears to envisage precisely these kinds of treasonous actions. Thus this objection relies heavily on a close reading of the law and assumes that any treasonous action not enumerated in the law is not subject to its provisions. If the defendant did not place, or attempt to place, some strategic point in the hands of the enemy, the law does not apply. Lycurgus interprets treason more broadly as any simply abandoning the country or not taking up a position to defend it.

The third objection Lycurgus expects to hear is that the action of one man would not have done any serious harm to the city (63-67). The point of this objection is that Leocrates' departure did not place the city in jeopardy in the same way that opening a gate to the enemy would have. The absence of a single person would not have made any difference for the city's survival. Lycurgus will have none of this: he appeals to the ancient lawgivers, who did not vary penalties according to the harm done, but assigned the death penalty for many offenses great and small. They considered one factor alone: what would the impact be on other people if the crime grew more widespread? As in the case *Epigenes vs. Athenogenes*, Lycurgus justifies his interpretation of the statute by appealing to the intent of the lawgiver and uses one statute to justify his interpretation of another. He then draws a parallel to a man who walked into the Metroon and erased one law, then sought refuge in the excuse that the loss of one law would not do great damage.

A further objection is that the act of leaving Attica is not in itself treason (68-74). After all, the Athenians deserted Attica and went to Salamis in 480, then defeated the Persian invaders and helped to liberate Greece. Lycurgus ridicules this argument and denies that the Athenians abandoned Attica during the Persian Wars; they merely changed place as part of their plan to face the danger confronting them. Once again, Lycurgus expects his opponents to raise the question of motive and to stress that the act of leaving is not sufficient ground for conviction. Lycurgus also recognizes the need to prove Leocrates' intent: he contrasts the aim of the Athenians in 480, which

was a strategic withdrawal to place themselves in a better position to attack, with Leocrates' aim, which was the to avoid danger altogether.

Lycurgus' own view of treason is closely linked to his view of citizenship. In his opinion, every citizen must do all in his power to defend their country. Although Leocrates may not have received an order from an official to perform a specific duty, Lycurgus maintains that all citizens have an implicit duty to remain in Attica during a crisis and take part in her defense. His main evidence for this view is the Ephebic Oath, which he claims all citizens swore.

I shall not disgrace my sacred weapons nor shall I desert my comrade at my side, wherever I stand in the line. I shall fight in defense of things sacred and holy and shall hand down to my descendants a fatherland that is not smaller but larger and stronger to the best of my ability and with the help of all, and I shall obey those who on any occasion are governing prudently and the established laws and any that may be established prudently in the future. If anyone tries to destroy them, I shall resist to the best of my ability and with the help of all, and I shall honor the ancestral sacred rites.⁷⁷

Lycurgus' argument depends heavily on these promises (77-78):

Gentlemen, this is certainly a fine and sacred oath. All of Leocrates' actions have violated it. Indeed how could a man be more sacrilegious or more of a traitor to his country? How could anyone disgrace his arms more than by refusing to take them up and repel the enemy? How has the man who has failed to report for duty not abandoned his comrade and his post? How has the man who did not face danger defended what is holy and sacred? With what greater treason could he have abandoned the country? For his part, the country was deserted and left in the hands of the enemy. Well, then, won't you put to death this man who is guilty of every crime?

For Lycurgus any failure to live up to the duties of the oath constitutes treason and deserves serious punishment.

Aeschines (3.252) informs us that Leocrates escaped conviction by one vote. It was in Aeschines' interest to exaggerate the closeness of the vote, but speaking only a year after the trial, he could not have misrepresented the outcome. If the Athenian trial was an *agon*

⁷⁷ See M.N. Tod, *Greek Historical Inscriptions*, II (Oxford 1984) #204.

(contest) where two Athenians competed to prove who was the better citizen and thus deserved to win regardless of the merits of his case, Lycurgus should have won hands down. He was one of the most powerful politicians in Athens at the time and had an impressive record of public service. He had secured the conviction of Lysicles, one of the generals who lost the battle of Chaeronea and persuaded the court to put him to death. He increased Athenian revenues and kept the fleet strong⁷⁸. Leocrates by contrast had been living in Megara as a resident alien for five or six years and had no public service to boast about. But Lycurgus lost, and Leocrates went free. If the court paid attention to the legal issues of the case, it is easier to make sense of the verdict. Lycurgus was obviously stretching the meaning of the term *prodosia* (treason) beyond its normally accepted sense. Although he succeeded in convincing almost half of the judges (who may have been swayed – or intimidated – by his prestige), the majority reasonably rejected his attempt to press the limits of the law's open texture. The plain language of the statute did provide some guidance. Since the facts of the case did not fit one of the situations enumerated in the law, the court sided with the defendant. We cannot know what weighed most heavily in the mind of the judges. But it is unreasonable to assume that the arguments Lycurgus feared his adversaries might make did not influence their decision⁷⁹.

VII

Although we are dealing with only a handful of cases, I think it is possible to discern some patterns in the Athenian method of dealing with the law's open texture. First, magistrates appear to have been willing to accept cases that relied on unusual interpretations of statutes that pressed against the edges of open texture. Or perhaps we should say they were afraid to reject cases as long as they met the minimum requirement that the charge employed the language of the

⁷⁸ For Lycurgus' achievements see [Plu.] *Mor.* 852b.

⁷⁹ D.S. Allen, *Changing the Authoritative voice: Lycurgus' Against Leocrates*, *CA* 19,1 (2000), pp. 5-33, does not analyze the arguments of Leocrates' supporters nor analyze the problems involved with the law on *eisangelia* in her study of the case. In general, I find her arguments unconvincing – I plan to discuss this essay in another place.

statute on which it was based. This may have been because they knew they would have to submit to a process of review after they left office⁸⁰. At this review a disgruntled litigant who had had his case dismissed might lodge a charge against them for failure to do their duty. For this reason, the magistrates who presided at the *anakrisis* confined themselves mainly to procedural matters, such as taking the names of the litigants, ascertaining their status, and determining the nature of the dispute⁸¹. This enabled them to fulfil their main task, namely, deciding which court would hear their case. For instance, if the charge were deliberate homicide, the case would go to the Areopagos, but if the victim were a foreigner, it would go to the Palladion (*Ath. Pol.* 57.3). If the plaintiff brought a private charge, the case would go before an arbitrator. The magistrate at the *anakrisis* did not evaluate the merits of the case as far as we can tell or deliver summary judgment if he thought the alleged facts did not meet the threshold criteria for conviction. This is in keeping with the Athenian reluctance to place major decisions in the hands of magistrates when it was possible to refer them to larger bodies, which were less susceptible to corruption.

Perhaps the best evidence for what happened at the *anakrisis* is found in Aeschylus' *Eumenides*. When both the Erinyes and Orestes come before Athena, she first asks the accusers who they are (408), and the Erinyes give their name, their parent, their place of residence (416-417), and their status (419, 421). They then give the charge (425). Athena then asks if there were any mitigating circumstances (426), and the Erinyes deny there were (427). Here Athena attempts to determine what kind of homicide the defendant is charged with just as the King Archon found out whether the accusation was *phonos ek pronoias*, *phonos akousios*, or *phonos dikaios* so he could assign the case to the right court (*Ath. Pol.* 57.2-3). The Erinyes ask her to demand Orestes swear an oath he did not do it, but she refuses to decide how to try the case until after hearing from the defendant (428-432). After getting all the information she needs from the accusers, she turns to the defendant and asks him for the

⁸⁰ This point was made to me by S. Todd and C. Carey. For the principle that all magistrates must undergo review see Aeschines, 3.17-22.

⁸¹ In the case of Leocrates, however, Lycurgus initiated the procedure in the Assembly. Lene Rubinstein believes the plaint would have taken the form of a *psephisma*.

same information (436-437: λέξας δὲ χώραν καὶ γένος καὶ ξυμφορὰς / τὰς σάς) and for his version of the facts. Orestes prefaces his answer by assuring Athena he is not polluted (445-453), which is equivalent to saying he is innocent⁸². Orestes complies by giving his place of residence and his father's name (455-456), then presents his case (456-467), and asks her to judge it (468).

Like the King Archon, Athena does not presume to judge the dispute (470-472) or even require the Furies to make a *prima facie* case by asking for witnesses or other evidence. She simply takes the names of the plaintiff and defendant, hears the nature of the charge, and assigns the case to the appropriate court (480-490). This meant all the plaintiff or prosecutor had to do at the *anakrisis* was to select the charge and procedure he wished to follow and draw up his plaint in the correct terms. He did not have to make a *prima facie* case for conviction.

In a similar fashion, the defendant did not initiate a *paragraphe* because the plaintiff's case did not fit the substantive requirements of procedure he had chosen. The *paragraphe* was designed to deal with purely procedural matters like the status of the suit, whether it qualified as a maritime suit or not (Dem. 32, 33, 34, 35), whether the defendant was an Athenian citizen (Lysias, 23), or whether the dispute had already been settled by a release (Dem. 36, 37, 38), or was brought after the stipulated period of time (Dem. 36)⁸³. The result of these features of the Athenian system of justice was that it was easy for plaintiffs and prosecutors to get their case into court provided they could find an offense and a procedure that arguably covered the actions committed by the defendant. Since crucial legal issues were not addressed by the magistrate at the *anakrisis* or subject to the *paragraphe* procedure, they fell into the hands of the arbitrators or the courts that tried the cases. These features of the system also meant that magistrates did not have the power to deliver summary judgments and throw out frivolous suits before they reached the courts. Nor did defendants have the right to lodge a demurrer and ask the judge to reject the case because it did not fit the parameters

⁸² For innocence and purity as equivalent see R. Parker, *Miasma: Pollution and Purification in Early Greek Religion*, Oxford 1983, pp. 366-369.

⁸³ I share the view of H.J. Wolff, *Die attische Paragraphe* 136-146, Weimar 1966, about the rationale for the *paragraphe* procedure and its relationship to the *anakrisis*.

of the offense as they were generally understood by the courts. The Athenian reluctance to trust magistrates with this authority must have contributed to increasing the case load of the courts. One should therefore not argue that the volume of litigation was the result of an agonistic ethos; it was in part the consequence of the way the Athenians constructed their legal system, which reflected their distrust of magistrates and their fear of bribery⁸⁴.

While the magistrates at the *anakrisis* had to accept any case where a litigant could name an available procedure and thus gave litigants broad latitude, the courts took a different line. At the trial of the father of the priestess at Brauron, the court convicted a defendant who merely encouraged an assailant to strike on a charge of deliberate homicide. If we can trust the litigant's analysis, this unusual interpretation of the term *apokteinein* «to kill» was apparently justified by a compelling public interest in discouraging bystanders from such conduct. On the other hand, in the five other cases I have discussed where the verdict is known, the court was unwilling to apply broad and unusual interpretations of the law.

We should also not draw the wrong conclusion from the absence of definitions in Athenian statutes. In all the cases we have examined, the litigants pay careful attention to substantive issues and questions about the interpretation of law; they would only have done so if they considered themselves bound to adhere to the letter of the law⁸⁵. Despite the absence of definitions to guide their decisions, the Athenian courts showed some concern for applying statutes fairly and consistently by rejecting unusual interpretations of

⁸⁴ Needless to say, I find the claim of Cohen, *Law, Violence, and Community* cit., that Athenian litigiousness was caused by an agonistic ethic completely unconvincing. As Christ, *The Litigious Athenian* cit., pp. 160-192, has shown, the Athenians were hostile to people who pursued vendettas in court for merely personal gain. For Athenian measures to restrain frivolous suits, see Harris, *The Penalties for Frivolous Prosecution in Athenian Law*, «Dike» 2 (1999), pp. 123-142.

⁸⁵ A careful analysis of the legal arguments in the orations thus refutes the assertion made by Christ, *Litigious Athenian* cit., p. 195, that the courts did not feel «bound to apply individual laws to the letter». Christ further claims that the judges «determined how and whether to enforce laws on the basis of a more fundamental standard – namely, the sense of “what is just” (*ta dikaia*)». But as C. Carey, *Nomos in Attic Rhetoric and Oratory*, «JHS» 116 (1996), p. 41, has noted, the orators generally do not consider law and justice as differing standards, but tend to use the two words as virtual synonyms.

the law. But that is only what we should expect from a community that took the rule of law very seriously⁸⁶.

⁸⁶ I owe an enormous debt of gratitude to Lene Rubinstein, who read over a draft of this essay and offered several criticisms and suggestions for improvement, many of which I have incorporated in the final version. As always, my work is better as a result of her ideas. She is not to be held responsible for any gaffes, howlers, or blunders that remain. I would also like to thank the editors for sending me a copy of Biscardi's *Scritti di diritto greco*. An earlier version of this paper was presented to a group of legal historians at New York University Law School. I would like to thank William Nelson for inviting me and the members of the group for an hour of stimulating and helpful discussion.