CONCEPTIONS OF LAW IN CLASSICAL ATHENS

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DECLARATION

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

It does not exceed the prescribed word limit of 80,000 words.

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ABSTRACT

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This thesis investigates the underlying assumptions Athenians had about their laws: it seeks to ask what Athenians assumed their laws were for, and where they thought those laws got their authority. It neither answers nor seeks to answer the difficult question of how Athenian juries made decisions, but by focussing on Athenian conceptions of their laws it offers a tool for those who would study Athenian litigation and legislating.

These questions are first explored through a study of the responses of the restored democracy to the remnants of the Thirty’s attempts at legislating. The various and inconsistent responses made help to frame jurisprudential questions within the actions of democratic Athens.

The modern jurisprudential theory of interpretativism is used to access Athenian ideas on the principles assumed to underlie Athens’ laws, and the thesis argues that Athenians were equally likely to present arguments which rely on polis expediency as the principle underlying Athens’ laws as they were to present arguments relying on justice as that principle.

The same theoretical framework is used to explore the accepted role of morality as the principle underlying Athens’ laws and the thesis argues that though morality could be used for this purpose, such uses were rare. The thesis then explores Athens’ weak enforcement of laws and weak ideal of obedience to law as law and concludes that the enforcement of morality did not form a large part of Athenians’
assumptions about what their law was supposed to achieve or from where it drew its authority.

How far Athens recognised the authority of law via the authority of the person or body which made that law is then explored. Fourth-century Athenians are shown to have held ambivalent views about democratic law making and law makers, and the thesis concludes that democratic Athens’ respect for its ancient lawgivers came to affect its ability to fully realise its own institutions’ legislative authority.

Finally, the thesis looks at Athenian idealised views of Spartan law to clarify the questions raised in the study of Athenians’ conceptions of their own laws.
To Kim, who asked questions.
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PREFACE

Translations are those of the Loeb series unless otherwise stated.

In general, Greek terms are transliterated while names are Latinised. The adjective *drakontian* has been used to refer to the laws attributed to Draco to avoid confusion with the English *draconian*. Similarly, I have used *sykophant* and *sykophancy* to avoid confusion with the English *sycophant*. 
INTRODUCTION

The title of this thesis, Conceptions of Law, carries within it a large and by no means uncontroversial claim – that Athenian law is a legitimate topic for study, in that it is a system which holds some degree of internal coherence and is not a set of unrelated rules.¹ After many years of comparative neglect, when Greek law was studied primarily in terms of either substantive law using concepts drawn mainly from Roman law, or by philologists,² Athenian law has in the past thirty years become the subject of increasingly polarised academic argument. On the one hand, scholars such as Humphreys, Osborne, Todd and Cohen have, to varying degrees, emphasised anthropological and sociological studies of Athenian litigation, and this has to some extent allowed the study of law qua law to become marginalised.³ On the other hand, Harris and Carey have argued that Athens can be considered to have set their law apart from other political or societal concerns. Such work on the nature of Athenian law as has previously been undertaken has drawn primarily on the work of philosophers and did not attempt to understand popular understandings of law.⁴

¹ This is argued by Sealey (1994) p. 55. See Chapter 3 for an exploration of this in Athenian sources.
² See Todd and Millett (1990) for a useful summary of studies of Greek law up to that date.
³ See below p. 2.
⁴ Vinogradoff (1922), Jones (1956), de Romilly (1971). Wolf (1956) included the orators within Griechisches Rechtsdenken, but his work is hard to use. He understands the orators as a ‘school’ in their own right, rather than a way to access popular ideas. His work is primarily a linguistic study of appearances of the words nomos and dikē in different authors across Greek history. Wolff (1970), through a study of the graphē paranomōn and graphē nomon mē epitēdeion theinai, proposed his own version of Athenian law, whereby initially tight boundaries of what was and was not a proper law were allowed in the fourth century to loosen thanks to law’s growing authority, but where law both guarded the polis against the demas and was itself guarded by that demas. Wolff’s book, while often cited, is rarely referred to for his attempts to understand the system of Athenian law. Sealey (1994) attempts a study of the ‘underlying body of thought’ for all of Greek law across a huge span of history. He grounds his work in the theories of Austin (1832) and Savigny (1814) (Sealey 1994 p. 6-10). Austin’s work has long been abandoned by legal theorists. Savigny’s work was born out of nineteenth century German romanticism, and was based on the idea that the law of a nation must reflect the ethos of that nation’s Volk. His work, while influential, is also no longer of primary importance. Sealey gives no explanation of why he chooses these two theorists, and does not stick
Law and society approaches have provided stimulating and often enlightening work which uses the evidence provided by laws and the legal process to provide new insights into the priorities and thought-worlds of ancient societies. These studies have tended to focus on litigation in Athens, looking at its role in Athenian society and at the basis on which Athenian juries made decisions. Given the nature of our sources, this is in part to be expected, since no cohesive body of Athenian law has survived\(^5\) and instead most of our knowledge of Athenian law has been drawn from law court speeches. Humphreys urged that law should be studied as a ‘discourse about the state of society’.\(^6\) Osborne proposed that Athenian law provided a framework for dispute settlement which allowed both litigants and juries to take account of individuals’ status as well as of the substantive offence committed.\(^7\) Todd (1993) enlarged on this, proposing that Athenian law should be viewed as procedural rather than substantive, with laws used to create processes by which disputes could be brought into court, and that classical Athenian law was based more on status than on contract.\(^8\) He suggested that in a non-professional system such as Athens’, the question of how to get a dispute into court was probably more pressing than questions of substantive law.

The procedural model proposed by Todd has been misunderstood by some scholars, who have attempted to rebut it by arguing that Athenian laws did contain substantive provisions. The core of a procedural model of law is the understanding that rights exist only subsequent to there existing some process by which those

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5 For the controversy on whether such a body ever existed, see chapter 5.3.
7 (1985) p. 43.
8 Todd drew this model from Maine (1883) and Milsom (1969), see Todd (1993) p. 65.
rights might be enforced or used. The fineness of this distinction can make it
difficult to apply this model or understand the consequences of such an application
for our understanding of a society and its law. I hope that by exploring in more
detail in this thesis how Athenians viewed their laws, I may be able to develop
Todd’s work on the different role Athenian law played in Athenian society,
compared to the role of law in modern democracies.

As part of his argument that Athenian law was primarily procedural, Todd argued
that in Athenian judging, law was only one piece of evidence, to be weighed along
with all other evidence in the case. Cohen has gone much further, proposing that
in Athens’ highly agonistic society, court action was used not to resolve disputes
but to pursue them, and that the role of law in these judgements was often
negligible. Lanni offers an alternative, whereby Athens’ loose rules of relevance
in most areas of law allowed juries to make decisions which might have been
viewed by Athenians as just, even where those decisions did not adhere closely to
the law, while in tightly limited areas of law stricter rules of relevance compelled
decisions which adhered more closely to the law. By examining in more detail
how law is used and presented in court speeches, I hope to further the
understanding of how Athenians used law when making decisions in courts.

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9 Todd (1990a) p. 32.
11 (2006). Rhodes (2004) also examines the degree to which litigants kept their speeches relevant to
the point at issue. He takes a broad approach to relevance, which allows him to conclude that the
majority of speeches in the corpus of forensic oratory are mainly devoted to matters which are
relevant to the accusation. Rhodes’ broad approach to relevance includes character evidence which
is used to show the likelihood of a defendant having done or not done the wrong of which he is
accused, and, where the speech forms part of an ongoing dispute, the full history of that dispute,
as well as material relating to a person’s political profile where the speech concerns public policy.
Rhodes’ broad approach to relevance allows him to conclude that jurors were generally expected to
vote ‘on the matter to which the prosecution pertains’ (Rhodes 2004 p. 137, translating Dem. 24.151).
Lanni instead sees this as jurors being allowed to take into account matters which, while strictly
irrelevant to the matter at hand, were relevant to coming to a just decision. The line dividing these
two positions is extremely fine. In this study I will be looking specifically at the legal arguments in
speeches and examining how material which might initially seem irrelevant is used to guide
interpretation of law (Chapters 2 and 3).
All this work, while of course closely related to law, had as its focus Athenian litigation. This approach is explicitly argued for by Johnstone, who considers that in the Athenian context it is impossible to separate law from litigation. By this, Johnstone means that in the absence of legal experts, the interpretation of law was always done in the course of litigation, and in the absence of clear rules of precedent each set of jurors in each case could adopt different interpretations of the law. Johnstone’s view that law in Athens was not subject to a single correct interpretation is accepted in this thesis, but his opinion that this makes the study of law and the study of litigation inseparable is not. Athenians did ascribe value to their laws and had aspirations for what their laws should achieve which mean that the study of Athenian understandings of their law holds value. This tendency to treat law and litigation as one and the same, and to allow litigation to dominate questions about the nature of law, has meant that Athenian understandings of their own law have been neglected in modern scholarship. This is not to say that Athens’ laws can or should be studied outside of the context of litigation. Not only is most of our evidence on Athenian law drawn from court speeches, litigation

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12 A further strand of research which touches on Athenian law is the research on the problem of Athenian order. Athens seems to have enjoyed a relatively high level of public order despite a legal system which looks ill-suited to achieving this. Ober (1989a; pp. 305-6) approached this through the institutions of Athens, including the Athenian law courts, and considered the need for the elite to subject themselves to the judgement of the masses to be one of the elements which allowed Athenian democracy to remain relatively stable. Hunter (1994) attempted to explain it by proposing a polis in which high levels of informal surveillance by friends, family, neighbours and slaves contributed to social order. Allen (2000) studied the distinction in Athenian thought between punishment and revenge, and considered it to lie in the authority of the punisher, who in her model primarily remained an individual. Allen’s work touches on the role of the law in constructing this authority, but she considers law not to have been binding on jurors and thinks that it was used in litigation as a ‘guideline that jurors could use to assess a prosecutor’s arguments about anger and justice’ (p. 175). Allen seems mostly to imagine the laws of Athens as drawing authority from the moral norms they express. Lanni (2016) is the latest work to examine it, and proposes a system of deterrence based on the high level of litigation at Athens and the possibility that any past misdeed might be used against you in court (pp. 119-149).

In addition to these works, there is a large amount of research on specific areas of Athenian law. Hansen’s large body of work on details of Athenian process, for example, is invaluable to any researcher. Hansen presents himself as writing without any ideological framework – though see Ober (1989b) for a critique of this.


14 Johnstone does not refer to Dworkin’s work (see Chapter 2), but many of his views appear to have been shaped by it. The close link between law and litigation and the importance of studying law through litigation forms the core of Dworkin’s work.
held, as shall be explored in Chapter 2, an important position for allowing Athenians to discuss and shape their laws.

In response to the law and society work, and particularly to that of Cohen, Carey and Harris have pointed out that Athenian orators do seem to have expected jurors to make judgements according to the laws. Carey draws attention to the way in which law is privileged as a guide to decision making in Athenian courts through the law that citing a non-existent law in court carried the death penalty.

As a prolific scholar on Athenian law, and the scholar who has most forcefully argued that Athenians made judgements according to the laws, Harris has produced the body of work most significant for our study. In The Rule of Law in Action in Democratic Athens Harris adopts a number of concepts from modern legal theory and philosophy of law. Prime among these is the concept of the rule of law, a diffuse idea the strong positive ideological overtones of which make it a phrase which must be used with caution when applied to a historical society. In general, the rule of law is analysed by legal theorists as either ‘thick’ or ‘thin’. Thin rule of law is essentially procedural: trials are fair, laws are transparent and not retroactive. Thick rule of law carries with it not only the procedural rules of thin rules of law but also a range of protections for human rights.

In Harris’s analysis, he accepts that Athens had only thin rule of law, but then seems to expect Athens’ rule of law to carry at least some of the benefits of thick rule of law. He claims that Athens’ laws had two ‘purposes’ – promoting equality before the laws, and shaping individuals’ behaviour.

16 Particularly Harris (2013) and (2006c).
17 (1996) p. 34. Our evidence for this is Dem. 26.24. In contrast, other false information in court could be challenged only through the dikē pseudomarturion, which could not be used against the original litigant.
18 Harris is far from the only academic to make use of the idea of the rule of law in studies of classical Athens. E.g. Ostwald (1986), Sealey (1987), Canevaro (2017).
19 Bingham (2010) offers a useful introduction to this difficult concept in the modern world.
20 Harris (2013) acknowledgement of Athens’ ‘thin’ Rule of Law: p. 10; law having as its purpose the promotion of equality before the laws: p. 5 and 15; law having as its purpose the shaping of behaviour: p. 12 and 16.
Harris’s championing of the rule of law for democratic Athens is surprising. Though, as Harris points out, Athenian orators did on occasion make grand claims for their polis’s respect for its laws, the law and society studies have shown convincingly that in practice, to judge by the arguments which were used in court, Athenians seem not to have lived up to these ideals. Harris rejects the case for the Athenians not living up to these ideals by putting more emphasis on the laws themselves, and on references to those laws in court, than on the broader run of court arguments. He places a great deal of emphasis on the role of the jurors’ oath in requiring jurors to judge according to the laws. He observes that statistically litigants refer to the clause of the jurors’ oath requiring jurors to judge according to the laws far more often than they refer to the clause requiring them to judge by their own best judgement.21 He also argues that the oath required jurors to make their decision on the charge contained in the engklema or graphe, and that since this charge had to have been approved by the magistrate responsible and had to specify the law under which the case was being brought, this ‘compelled them to prove that the defendant had broken a specific law’.22 Harris rejects characterisation of Athenian law as procedural, though he does so based on a practising-law definition of procedural law, rather than the legal-historical definition used by Todd.23

Harris dedicates two chapters of Rule of Law in Action to what he terms ‘open texture’ in Athenian law.24 The term ‘open texture’ comes from Hart’s The Concept of Law,25 and was introduced into the discussion of Athenian law by Osborne (1985).26 Hart argued for a model of positivist law (law which is law because of how it was made) based in popular acceptance of the authority of that law. In positivist models of law, the discretion exercised by judges when making judicial decisions is a problem, since that discretion to interpret law does not come from the

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21 ibid, p. 104. But see chapter 4.3.2.1 below.
22 ibid, pp. 114-136.
23 ibid. p. 139.
25 Hart (1961)
26 Though Osborne seems to use it simply to designate the procedural flexibility offered by Athenian law.
authority of the law itself. Open texture is the answer Hart came up with to explain how it is that judges can legitimately interpret law. He argues that it is impossible to have laws which govern all possible situations, and as such law must be understood to have some degree of ‘open texture’, which allows judges to be able to apply discretion when applying laws in difficult cases, without this causing damage to the system of laws as a whole. Open texture, then, is an answer to a question, but whether this was a question Athenians might have been likely to ask will be explored in Chapter 5 of this thesis. Harris seems to attempt to use open texture to explain such difficult cases as Lycurgus' Against Leocrates, where it is not entirely clear that Leocrates has committed any breach of Athens’ laws. For Harris, open texture allows court decisions to be based on law even where the correct interpretation of the law is in doubt. That Athenian juries were expected to interpret the law cannot be doubted but whether Hart’s model of open texture is a valuable one to apply to Athens is more questionable. The anxiety around judges interpreting law is a problem only if you consider the authority of law to depend on the means by which it was made. I shall discuss where Athenian law got its authority from at greater length below, but it is sufficient here to point out that although Harris relies heavily on the work of Hart, a positivist, Harris seems to expect Athenian law to have depended for its authority on moral ideals. Harris’s work on ‘open texture’ exemplifies the risks inherent in attempting to study Athenian law without thoroughly questioning the assumptions brought to that study by the models adopted.

The division of scholarly opinion as to what jurors took into consideration when they made their decisions has become increasingly entrenched, with persuasive arguments on both sides. This thesis seeks to address only a small part of this difficult question; by investigating how Athenians saw their law, the tensions inherent in their images of law, and the goals they seem to have had for it, it offers a tool for those who would further explore how the law, understood in Athenian

37 See Chapter 2.
terms, might be used in decision making in court, or the nature of the work Athenian legislators understood themselves to be doing.

In modern legal-theory scholarship, there is an ongoing debate on the authority and nature of law. Arguments can be broadly separated into positivist and natural law models. Positivist models argue that law derives its authority from the means by which it was made. In its simplest, and now long-outdated form, it was treated by Austin as the command of a sovereign, backed by force. Though Austin’s formulation has been abandoned, his central argument, that law is a matter of social fact, has held. The most influential legal theorist of the twentieth century, Hart, was highly critical of Austin’s ‘command’ model of law, especially in its failure to take into account the social fact that within British society, as he saw it, people recognised not so much a compulsion to obey the law, as an obligation. People, in Hart’s version of the law, do not obey the law out of fear of the sanctions, but because they recognise that they ‘ought’ to do so. Rather than attribute this to any connection with the moral content of the law, Hart treated this social fact as the basis of the authority of law. Law is law because it is recognised as such by the people who use it. Hart described this as the Rule of Recognition. Hart maintained that a morally bad law might still be valid law, though since in Hart’s model the obligation to obey is social fact, and not moral obligation, a person living within that legal system is still morally free to refuse to obey that law.

This refusal within positivism to recognise the moral role of law within modern societies has been criticised. Hart’s claim that the obligation to obey law is a custom, and not a true obligation, was disputed by Fuller, who viewed the obligation to obey laws as a true obligation. The question of whether the obligation to obey law is a real obligation has come to divide positivists from those who consider that morality has a part to play in the nature of law.

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28 Within this thesis, the term positivist will always refer to this model of law.
29 (1832).
31 ibid. p. 268.
32 (1958).
The most prominent modern criticism of positivism comes from Dworkin, who rejects the whole premise that law is a social fact divorced/divorceable from its moral content. Dworkin considers the legal system to be a use by the state of coercive force against its citizens, and on this basis argues that such use of force has to be justified by moral principles. Dworkin looked at how judges decide cases, and identified their use of principles in making judicial decisions. Whereas within a positivist model, this use of judicial discretion is something which needs to be explained away, for Dworkin it is a central element of the law.

These theories seek to expound a truth of modern law. This is not my goal in this thesis, which instead seeks to understand some of the attitudes and expectations which Athenians might have held towards their own laws. However, these, as the most important modern theories on the nature of the law as we know it today, give useful tools to help modern scholars to unpick our attitudes on the nature of law. Dworkin’s methods were designed to understand Anglo-American courtroom judging, whereas Hart’s methods are far more focused on statutes. As such, Dworkin’s work, used sensitively, is remarkably appropriate to studying Athenian law, given that our sources for Athenian law come primarily from Athenian courts. By bringing Dworkin’s insights into play in a field where Hart’s have previously been the only ones used, we are able to acquire a more rounded view of how Athenians understood their laws.

The first chapter of the thesis looks at the Thirty’s attempts at law-making and the response of the restored democracy to these attempts. By focusing on this crisis-point in the Athenian democracy, it aims to highlight some of the difficulties Athenians had with their own law. Although the Amnesty enabled Athens to avoid some of the self-examination that was seen in Europe immediately after the

34 Though these attitudes have significance for the working of the legal system. Law is a social construct, and Athens, lacking legal experts and relying on idiotai for both legislating and judging, gave more scope than most societies for popular attitudes towards the law to shape decisions within the polis.
Second World War, especially when trying to deal with people who had acted in ways considered by the new government to be wrongful but which were lawful under the previous government, the restored democracy’s reactions to the law-making of the Thirty are nonetheless indicative of some of the ambiguities and difficulties in Athenians’ understanding of their law.

Chapter Two uses Dworkin’s ‘interpretativism’ model to explore some of the principles which Athenians appear to have used to guide interpretation of laws. The chapter focuses on the use of arguments based on justice for the individual and arguments based on community expediency. By concentrating on these two arguments, the chapter aims to bring into focus the distinction between modern conceptions of the purpose of laws and Athenian conceptions. Chapter Three continues with the use of interpretativism to look at how Athenian litigants used arguments based in morality to guide interpretations of laws, and interrogates how widely Athenians accepted that the laws had as their purpose the shaping of citizen behaviour in accordance with popular morality.

Following on from the exploration of morality in Chapter Three, Chapter Four further explores how far morality was accepted as the source of authority for Athenian law by studying Athenian attitudes towards the obligation to obey law. By highlighting some of the problems and controversies within Athenian thinking about the enforcement of law and the obligation to obey law, the chapter aims to show that there existed in Athens no strong sense of duty to obey law, and no strong interest in the enforcement of law, thus further undermining arguments that Athenian law was primarily imagined as a natural law system.

Chapter Five moves on to consider how far Athenian law can be treated as positivist. The chapter looks at the nature of the imagined character of the nomothetēs in classical Athens. It explores the stories about Solon current in the classical period and examines the different versions these offer of the sources of

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35 As best exemplified in the series of articles published in 1958 that have come to be known as the ‘Hart-Fuller debate’ (Harvard Law Review 1958).
the authority of Solon’s law, and how these sources affect our understanding of Athenians’ conceptions of their law. It then looks at the figure of the law-giver within a law-making democracy, and highlights the problems Athenians had with identifying their contemporaries as legitimate law-givers. By questioning how far law made through the proper procedures was accepted and acceptable as law, the chapter brings to the foreground the dangers inherent in assuming modern positivist theories of law are applicable to Athens.

Chapter Six looks through Athenian eyes at the law of Sparta. By highlighting the ways in which Sparta’s laws differed from those of Athens and Athenians’ responses to those differences, it explores the flexibility of conceptions of law.

In a short conclusion, I summarise the original arguments of the thesis and comment on their implications for other areas of study of Athenian law.
CHAPTER 1: THE THIRTY, THEIR LAWS AND THEIR FOURTH-CENTURY RECEPTION

At the end of the fifth century, the Athenian democracy was twice overthrown and replaced by oligarchic regimes, first in 411 by the Four Hundred, and again in 404 by the Thirty. Neither of these regimes was long lived, but the experience of them appears to have triggered a process of legal reform which began after the fall of the Four Hundred, was interrupted by the Thirty, and was resumed under the restored democracy. The Thirty ruled the city for only around eight months, but in the space of that time they expelled all but three thousand citizens from the city, installed a Spartan garrison, and killed possibly as many as 1,500 citizens as well as many metics and confiscated their property. The exiled democrats fought an armed resistance against the oligarchs and seized the Piraeus. The privileged citizens remaining in the city then expelled the Thirty, but did not return the city to democracy, and in 403 the Spartan king Pausanias was instrumental in negotiating a settlement between the democrats and those in the city. After a period of about two years when Athens was democratic and the oligarchs ran Eleusis as an independent polis, Athens invaded Eleusis and Attica returned to being a single democratic polis.

By focusing on the response to the Thirty’s attempts at making law it is possible to highlight key areas of interest in Athenians’ perceptions of what gave law its authority and where the limits of a government’s power to make law lay. The rule of the Thirty brings up a range of questions about Athenian law: how far was law merely the orders of the body in the polis which was kurios, and how far did it have

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1 According to Ath. Pol. 35.4. Though statistics from the ancient world are hard to rely on, the large number of deaths forms a part of the perception of the Thirty, regardless of its truth.
to comply with popularly accepted standards of morality? How far was law given its authority by the limited coercive role of the *polis*? Does a government have to be legitimately appointed if it is to have the capacity to create laws?

The legal reforms at the end of the fifth century have attracted a great deal of scholarly interest, but the law of the Thirty has been comparatively neglected. Writing in 2003, Osborne summarised the ‘orthodox view’ of the Thirty as rejecting the idea that the Thirty made any attempt at genuine constitutional reform.\(^2\) One contributing factor to this may be the ambivalent approach taken by our sources to the use the Thirty made of the law. Another aspect is almost certainly the effects of the Amnesty which ended the civil war and which was so wide in its scope that it prevented fourth-century Athenians for the most part from having to deal with the difficult question of whether people who acted on the orders of the Thirty had in fact been breaking the law or whether they had been complying with it.\(^3\)

Sources for the rule of the Thirty are relatively plentiful. The Aristotelian *Athenaion Politeia* devotes a section to their rule over Athens, the civil war, and their downfall.\(^4\) Xenophon also writes about the Thirty, most likely from first hand experience.\(^5\) Diodorus Siculus includes an account of their rule probably taken from neither Xenophon nor the *Ath. Pol.*\(^6\) In addition, the Thirty are mentioned in many court cases. They are especially prominent in the work of Lysias, whose own family suffered persecution under the Thirty. These sources, however, need to be used carefully, since, despite the Amnesty, the question of one’s behaviour under the Thirty remained so important that how to interpret the actions of the Thirty was a matter of live debate during the fourth century. Pamphleteers seem to have


\(^3\) The Amnesty has been much discussed. For the most recent in-depth work, see Carawan (2011), who gives a history of scholarship on the Amnesty (pp. 21–42) – Joyce (2008) has argued forcefully against many of Carawan’s conclusions on the effects of the Amnesty. Lanni (2011) identifies the Amnesty as a form of transitional justice.

\(^4\) *Ath. Pol.* 34.3–41.1.

\(^5\) *Xen. Hel.* 2.3.1–3 and 2.3.11–2.4.33.

\(^6\) Diodorus Siculus Book XIV. The Oxyrhynchus Historian via Ephorus is the most likely source for Diodorus. Since the Oxyrhynchus Historian seems to have had a particular interest in constitutional matters, they might have given the Thirty special attention.
attempted soon after the restoration of democracy to rehabilitate Theramenes, one of the Thirty, as a moderate and restrained oligarch who wanted only the good of the city, as opposed to the other oligarchs whose greed and brutality caused their downfall, and Diodorus Siculus and the *Ath. Pol.* seem to have depended at least partly on these revisionist accounts.\(^7\) Certainly it is difficult to fix the chronology of when the brutality of the Thirty began.\(^8\) Speeches in court cases similarly serve the ends of the speaker and must be read with caution.

The appointment of the Thirty is one of the areas where the pro- and anti-Theramenes traditions lead to confusion. Whereas Lysias (12.71–7) has Theramenes participating in a plot to keep the Assembly from meeting until a Spartan garrison was in the city, and records Theramenes as urging the Athenians to adopt the proposal of Dracontides and establish the rule of the Thirty, the *Ath. Pol.* (34.3) presents Theramenes as leading a moderate third faction separate from the oligarchs and the democrats.\(^9\) Both Lysias and the *Ath. Pol.* agree that Lysander was present at the Assembly meeting, and that his support on behalf of the oligarchs was decisive, and in Diodorus Siculus the appointment of the Thirty was entirely the fault of Lysander. Lysias deliberately distances the Athenians from the decision of that Assembly, claiming that at first the people in the Assembly protested at Theramenes’ insistence that the proposal of Dracontides be adopted, and then, after Lysander made his threats, ‘those members of the Assembly who were honest citizens recognised conspiracy and compulsion’ and some of those stayed silent and some left. Those who voted the motion through are described as ‘a few evil minded *ponēroi*’.\(^10\) The *Ath. Pol.*’s account, while recognising the effect of Lysander’s support for the oligarchs, does not attempt to split the citizen body into honest men who stayed silent and wicked men who voted, but does report

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\(^7\) Rhodes (1981) pp. 415-22 notes that the *Ath. Pol.* compiler did also seem to make use of documentary evidence, as shown by the use of the names of decree proposers and, perhaps, by the claim that the Thirty initially ruled mildly.

\(^8\) Rhodes (1981) p. 416-19 contains a useful table contrasting the order of events under the Thirty according to the different sources.

\(^9\) Whereas Diod. Sic. 14.3.6 has Theramenes actively oppose the establishment of the oligarchy.

that the demos was forced (ēnagkasthē) to vote for the oligarchy.\textsuperscript{11} Xenophon’s account mentions none of this, only that the Assembly decided to elect Thirty men, and that after their election Lysander left Athens.\textsuperscript{12} Clearly an Assembly meeting was held, and it seems likely that Lysander did attend, or at the very least overshadow it. Nonetheless, the Thirty’s seizure of power was not achieved entirely outside of the laws of the polis;\textsuperscript{13} a meeting was held and a vote passed to establish their authority. Despite this, the vote was not free but occurred in a situation of threat from the Spartans and internal paranoia.\textsuperscript{14} Though it could subsequently be partially disowned, as Lysias shows at 12.71-74, while the Thirty were in power they could have claimed to have been validly appointed under the laws.\textsuperscript{15}

1.1 Legislative acts of the Thirty

It will be observed in this chapter that I take a broad approach to what I treat as ‘law’. In part, this is a reflection of the fact that the distinction created in Athens between nomoi and other legislative acts post-dates the Thirty. There are also questions to be asked about what the Thirty would have imagined themselves to be engaged in. As I explore below (chapter 5.2), it is not entirely clear that fifth-century Athenians fully acknowledged themselves as lawgivers. From what we know of the Thirty, it would be highly surprising if they recognised themselves as creating new laws. More likely, they would have presented themselves as

\textsuperscript{11} Ath. Pol. 34.3.
\textsuperscript{12} Xen. Hel. 2.3.2.
\textsuperscript{13} Contrast the Four Hundred, the rule of which was established by an Assembly which met at Colonus rather than on the Pnyx, probably bearing weapons, and whose first act was a knife attack on the boule, Thuc. 8. 67, 69.
\textsuperscript{14} Lysias 13.6-35.
\textsuperscript{15} The response of the restored democracy to the appointment of the Thirty is notable in its attempts to shift blame away from those present at the Assembly, but as Thucydides’ Diodotus complains in the Mytilenean debate (3.43.5), Athenians are usually quick to hold the proposer responsible, but unwilling to allow the demos to carry any blame for its decisions. This can be seen in the probole passed against those who proposed the execution of the Generals at Arginusae (Xen. Hel. 1.7.35). Perhaps the scale of Athenians’ cooperation with the regime of the Thirty contributed to a greater need to shift blame than could be satisfied by placing all responsibility on the individual proposers. Though there are other occasions where it seems some Athenians might have felt uncomfortable to express dissent in the Assembly (e.g. Thuc. 6.13.1), this is due to pressure from other Athenians and not threats from an occupying military force.
correcting a legal system which had become corrupted, and returning it to its original, Solonian state.\textsuperscript{16} Their opponents would of course have disputed that the Thirty’s vision for Athens accorded with Solon’s, as both democrats and oligarchs at this time seem to have claimed Solon’s support for their own vision for Athens.\textsuperscript{17} The subsequent treatment of the Thirty’s attempts at legal change merit interest, since though the Thirty may not have presented or imagined themselves as legislating, our sources all date from after the fall of the Thirty, when the fourth-century democracy had to grapple with the effects of the legislative activities of the Thirty, without being in any position to treat this activity as a rectification of Athens’ laws.

Xenophon claims that the Thirty did not write, or at any rate publish, any laws, but in context he seems to mean rather that they did not write or publish any ‘constitutional’ laws.\textsuperscript{18} Indeed Krentz identifies from Xenophon two laws which he considers to have been laws of the Thirty.\textsuperscript{19} The \textit{Ath. Pol.} mentions the Thirty reforming Solonian inheritance law and destroying the laws limiting the powers of the Areopagus.\textsuperscript{20} Fingarette considers the erasures on the wall of the \textit{stoa basileios} to have been made by the Thirty in order to make space for their new lawcode.\textsuperscript{21} Osborne argues that the Thirty set out initially to achieve constitutional reform, and only later adopted the violent tyranny for which they are remembered.\textsuperscript{22} Krentz even considers the Thirty to have been in the process of trying to establish in Athens a constitution modelled on that of Sparta.\textsuperscript{23} One could question whether it would have been possible for them to rule at all without making laws of some

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\item[16] \textit{Ath. Pol.} 35.2
\item[18] Xen. \textit{Hel.} 2.3.11 ‘Though they were elected to write down (\textit{sungrapsai}) laws according to which they would govern, they delayed writing down and displaying them; and they appointed a \textit{boulē} and magistrates as they saw fit.’ – translation my own. For the difficulty in interpreting \textit{sungraphein} in the context of legislative activity, see chapter 5.3.
\item[20] \textit{Ath. Pol.} 35.2. The Solonian inheritance law is particularly singled out for its vagueness at \textit{Ath. Pol.} 9.2.
\item[21] Fingarette (1971).
\item[22] Osborne (2003).
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sort, let alone to attempt the constitutional reforms they appear to have embarked on.

When considering the legislation of the Thirty, it is important to remember that the reign of the Thirty predates the creation of a distinction in Athenian law between laws (nomoi) and decrees (psēphismata), though the process of law reform had begun before the Thirty took control.\(^{24}\) This lack of distinction means that under the fifth-century democracy, decisions of the Assembly might be referred to interchangeably as laws or decrees.\(^{25}\) The Thirty purported to be the legally appointed government of Athens, and regardless of the merits of this appointment, were the de facto government, so their decisions should, at the time, have been considered to have the same legal force as those of the Assembly under the democracy.

Although the Thirty quickly made themselves unpopular, both *Ath. Pol.* 35.3 and Lysias 25.19 record that at the beginning of their regime they had the support of much of the city.\(^{26}\) Though their rule was subsequently viewed as illegitimate, at the time it seems that the irregularities in their establishment did not prevent their governmental authority at Athens from being accepted. Krentz assumes a high level of cooperation with the rule of the Thirty, based on the fact that it is remarkable that Socrates limits himself to failing to obey an order, without ever

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\(^{24}\) Lysias 30.2.

\(^{25}\) Hansen (1978a).

\(^{26}\) Lys. 25.19 argues that he should not now be convicted, because under the Thirty people initially consented to the oppression of the sykophants and those who had robbed the treasury, but then became angry when the whole population was held to be responsible for the crimes of a few, and yet by prosecuting the defendant for complicity in the rule of the Thirty that is exactly what the prosecutor in the case is doing.
The *Ath. Pol.* 53.3 similarly comments on the early oppression of sykophants, along with other unsavoury (but not specifically criminal) people, and adds that the polis was delighted at this, until the Thirty began to kill the wealthy to prevent opposition and steal their estates.

Christ (1992) argues that the Thirty used sykophancy as a catch-all term of abuse under which to persecute their enemies, but his argument is not entirely convincing. Xen. *Hel.* 2.3.12-13 very clearly separates the first stage of persecution of sykophants (with which people agreed) from the subsequent descent into brutality. Moreover it is doubtful whether, if *sykophant* had been used as a catch-all term of abuse by the Thirty to allow them to persecute citizens generally perceived as good, it would have retained the power it still appears to have held in the fourth century.
attempting to resist it. On the other hand, Lysias 12.14-17 claims that Damnippus was willing to help Lysias flee to safety, and that Archeneos not only sheltered him and helped his escape, but also went into town to find out what had happened to Lysias’s brother; so a few citizens may have been willing to offer the Thirty some limited resistance. Socrates himself may have refused the order to arrest Leon, but he did obey the Thirty’s instruction to attend the tholos, thus perhaps suggesting that he acknowledged their authority to give some orders.

1.2 Responses of the restored democracy to the Thirty

After the Thirty were deposed the restored democracy responded in various ways to the consequences of the regulatory and legislative decisions made by the Thirty. Some acts of the Thirty seem to have been wiped out and assumed to have been invalid ab initio. Others were deliberately annulled, and still others appear to have been respected by the restored democracy.

One example of the restored democracy assuming a decision of the Thirty to have been void ab initio is the claim, made by both Diodorus Siculus and Xenophon, that the Athenians considered the year the Thirty were in power to have been a year without an eponymous archon, as the archon appointed by the Thirty was not subsequently recognised. Similarly, we see the demand made by the restored democracy that those who had served in the cavalry under the Thirty return the equipment allowance they had been granted, presumably because the Thirty were not recognised to have the authority to disburse public funds. Though this implies an attitude that the legislative acts of the Thirty were void ab initio, since the Thirty never possessed the authority to make such decisions, it does not show clearly why the Thirty could be portrayed as lacking this authority. A consideration of the legislative acts of the Thirty which were not merely disregarded by the

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28 Diod. Sic. 14.3.1, Xen. Hel. 2.3.1.
29 Lys. 16.6, though some motivation for this decision may also lie in the resentment against the cavalry shown by the restored democracy – Xen. Hel. 3.1.4.
democracy might give us more of an idea of how the restored democracy viewed the Thirty’s attempts to make law.

After the Thirty had left the city and the treaty had been made to allow the return of the men from the Piraeus, we are told it was decided that a committee of twenty men was to govern the city until such time as laws should be made (*tetheien*), and that in the meantime the laws of Solon and Draco should be used. This at least suggests that at the time the democrats returned to the city it was not certain whether there was any law operative at all. The important fact here is that a decision needed to be made as to what law governed the city. The laws of Solon and Draco are generally considered to have been the foundation of Athens’ law; had the restored democracy simply continued as if the Thirty had had no capacity to make or change laws at all, one might presume that no such decision would have been needed. The fact that it was suggests the restored democracy recognising that the rule of the Thirty had had some effect on the laws of Athens. Though the returning democrats can be presumed to have considered that effect to have been entirely negative, they did not deny that it existed. Here we see the democracy making decisions to ensure that the laws of the Thirty should be voided, rather than simply assuming them always to have been void. The Thirty was recognised to have had the capacity to have some effect on the laws, despite being a non-democratic government which was not validly appointed.

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30 *Tithemi* verbs in relation to Greek law are difficult to translate well, given the significance in this area of both the *nomothetēs* and *thesmos*.

31 Andoc. 1.81 δοξαντα δε υμιν τατα ειλεοθε άνδρας εικοσι: τοιτους δε ιπμελείθαι της πόλεως, έως άν οι νόμοι τεθειεν: τέως δε χρήσθαι τοις Σόλωνος νόμως και τοις Δράκοντος θεσμοίς. This passage is subject to some textual uncertainty. In Dobree’s edition, the *an* is placed in square brackets, and it is not translated in the Loeb edition’s translation. Stahl proposed instead emending the *an* to *alloi* and this was followed by MacDowell (1962). This emendation changes the meaning of the sentence somewhat. Without *alloi* the implication is that at the time the decision was made, it was at least arguable that Athens had no laws. With *alloi* the implication is that Athens already has the laws of Solon and Draco in place to rely on, but also needs other laws to be made. MacDowell (1962) p. 120-121 suggests that the use of *alloi* might imply that at the time the provision was made the Athenians envisaged that the new laws would come to supersede the laws of Solon and Draco. See Chapter 5 for an exploration of why it is unlikely this was ever intended by the Athenians. Xen. Hel. 2.4.42 claims that on returning to the city, Thrasybulus urged the citizens, both from the Piraeus and from the city, to use the *arkhaioi nomoi*, which may be a reference to the same decision to use the laws of Solon and Draco.

32 See 5.1
From a series of inscriptions, it appears that the Thirty tore down the *stelai* recording various proxeny decrees awarded by the democracy and after the restoration of the democracy these decrees were reinscribed.\(^{33}\) The reinscription of the decrees, however, did not follow normal democratic process\(^{34}\) but instead appears to have been handled entirely by the Council. The most complete surviving reinscription, *IG II\(^2\) 6* (RO 177B), makes it clear that this is a reinscription to replace the *stele* destroyed by the Thirty. It appears that though the reinscription does not take the form of a new proxeny decree, Eurypylos, one of the recipients is nonetheless invited for dinner at the *prytaneion* tomorrow, as is common in new grants of proxeny. Whether this is simply a formulaic repetition of the contents of the original decree, or whether it is a genuine invitation is unclear. The degree to which the invitation is genuine could have importance in asking whether this is a copy of the old proxeny decree, or whether it is a new proxeny decree granted to replace the one annulled by the Thirty. The reinscription could be portrayed as an assertion by the restored democracy of continuity with the pre-404 democracy, but the use of a special procedure and the explicit reference to the Thirty draws attention to the disruption as much as it asserts continuity. Had the Thirty been generally acknowledged never to have had any effect on the law at all, the proxeny decrees could simply have been reinscribed by a workman, but as it is what we see is a new decree, paid for by one of the recipients and not attempting to be a replica of the original decree, which reasserts the validity of the original grant of proxeny. The attempt by the Thirty to annul the grant of proxeny is thus denied any effect, but this denial has to be made explicit. As such, the capacity of the Thirty to create valid law remains in question. Clearly this legislative act has been voided, but that does not mean that all legislative acts of the Thirty are void, nor does it mean that the Thirty never had the capacity to perform any valid legislative acts.

\(^{33}\) *IG II\(^2\) 6, IG II\(^2\) 52, IG II\(^2\) 9, IG II\(^2\) 66c*. Here the fifth-century failure to distinguish between laws and decrees is again worth remembering.

\(^{34}\) Fourth-century proxeny decrees still went through the Assembly – *IG II\(^3\) 1* 390.
The law of Diocles takes a slightly different approach to the problems caused to the democracy by the Thirty’s attempts to create law. This law, which Hansen identifies with the law cited by Andocides in *On the Mysteries* that Andocides tries to use to establish a clean start in the law from the archonship of Euclidean, seems to have been intended to annul all legislative acts of the Thirty, but rather than doing so explicitly it instead asserts ‘that laws enacted under democratic government before the archonship of Euclidean and all laws that were enacted during the archonship of Euclidean and are on record shall be in force.’ This strange, roundabout formulation effectively allowed the restored democracy to annul the laws made by the Thirty while simultaneously ignoring the existence of those laws. Although in the context of modern law the annulment of valid laws by a newer, contradictory law is unremarkable, Athenian legal procedure generally gave priority to the older law. Indeed, at around this time, a new procedure was introduced which required anyone who wished to propose a new law which contradicted an older law first to have that older law specifically annulled. The situation prior to the creation of a distinction between laws and decrees, and the corresponding distinction between the *graphē paranomōn* and the *graphē nomon mē epitēdeion theinai*, is not clear, but the *graphē paranomōn* did exist during the fifth century and may have been used to prosecute new laws or decrees which contravened existing ones. The restored democracy, however, did not annul the laws of the Thirty individually, but instead asserted that they were not and had

35 Dem 24.42.
37 Andoc. 1.88.
38 Shear (2011) p. 239 instead interprets the law as intended to reinstate those laws which had been destroyed by the Thirty. If this is the case it would suggest that the restored democracy was able to completely ignore the existence of those laws passed by the Thirty. Carawan (2002) claims that the law given in Andocides does not apply to the existence of laws, but to their enforcement, such that the stipulation that laws should only be applied from the archonship of Euclidean acts as a sort of statute of limitations. Carawan’s characterisation of the law does not fit with its use by Andocides, nor does it accord with the failure to make use of the law in Isoc. 18 when defending alleged acts committed before the restoration of the democracy. It seems likely the law was generally understood at the time to relate to the validity of laws and not to their applicability.
39 Dem. 20.89, 93 – Though this is presented by Demosthenes as Solonian, the distinction between laws and decrees it assumes is a part of the reforms of the end of the fifth century. The implications of this law are explored in Chapter 5.
40 *Ath. Pol* 29.4 and Thuc. 8.67.2 – the Four Hundred abolished the suit, so it must have existed prior to 411. See Canevaro (2015). Hansen (1974) p 28-29 identifies Andoc. 1.17, 22 as a *graphē paranomōn* which can be dated to 415.
never been laws. One might argue that the formulation of the decree shows the restored democracy asserting that only democratic regimes could be legitimate governments of Athens capable of making laws. This argument would be stronger had the law specified the post-Eucleides regime as democratic, but this might have seemed so self-evident to Athenians at the time that there was no need to include it within the decree. This, then, at least suggests an identification of legislative authority with governmental authority – only a legitimate government is capable of making laws, and only a democratic government can legitimately rule at Athens.

A few governmental acts of the Thirty do seem to have received some recognition from the democracy. Carawan considers there to have been a relatively peaceful handover of the treasury from the tamiai appointed by the Thirty to the democratic tamiai, and Lewis even suggested that the oligarchic tamiai may have remained in post longer than usual until conditions in the city were sufficiently settled to manage an orderly transfer. Unlike the response to the Thirty’s appointment of an eponymous archon, this implies a degree of recognition of the legitimacy of the oligarchic tamiai, but it may reflect a simple practical need; the new tamiai needed a record of what they had taken into their control in order to be able to pass their own euthynai at the end of their term of office.

The fragmentary speech Against Hippotherses shows a clause in the Amnesty which gave at least some recognition to the governmental acts of the Thirty. The Amnesty provided that property confiscated by the oligarchs from exiled democrats should be returned as long as it was still in public hands, but if it had been sold on it could not be recovered. In effect, this meant that the contracts which had been entered into under the Thirty remained valid, but the confiscation itself was rendered invalid. This clause appears to attempt a compromise between

43 frag. 165 lines 38-43 [Carey].
44 See below.
on the one hand denying validity to the original confiscation and on the other
avoiding bringing the ownership of property now in private hands into debate.

The Thirty are commonly characterised as ruling by force.\(^{45}\) As we shall show at
4.3.3, the difference between rule by force and rule by law was significant in fourth-
century Athens, with rule by force rejected as illegitimate. In the fifth century,
however, the debate as to the role and value of force in undermining authority
seems to have been less settled, with \textit{nomos} and \textit{phusis} more often contrasted. This
rejection of force as an aspect of law may play a part in how the rule of the Thirty
is presented in fourth-century court cases. Though the defendant in Lysias 12 on
trial for his actions under the Thirty claims to have acted out of fear,\(^{46}\) he does not
impute any legitimacy to the orders he claims to have been given. As we have
noted, Socrates, who was depicted as so law-abiding that he chose to accept the
death sentence rather than flee into exile, was happy to disregard an order of the
Thirty which commanded him to arrest a citizen.\(^{47}\) The rule of the Thirty came to
be characterised as achieving the opposite of what any just rule should achieve, in
that it rewarded the wicked and punished the good.\(^{48}\) When Athens set up a decree
honouring the heroes at Phyle, inscribed on it was the following epigram: ‘the
ancient people of Athens rewarded these men with crowns for excellence, because
they first began to stop those ruling the city with unjust statutes (\textit{adikois thesmois})
risking bodily danger.’\(^{49}\) The use of \textit{thesmos} rather than \textit{nomos} is interesting.
Ostwald has shown that \textit{thesmos} had mostly fallen out of use by the fifth century,
to be replaced by \textit{nomos}.\(^{50}\) Ostwald considers \textit{thesmos} to designate law which is
handed down and which depends for its authority on the person of the lawgiver.
\textit{Nomos}, by contrast, he interprets as an essentially democratic form of law,
dependent on community acceptance. The use of \textit{thesmos} in this inscription,

\(^{45}\) Consider, for example, the claim in Xen. \textit{Hel.} 2.4.21 that the Thirty killed more Athenians in eight
months than the Spartans did in the whole war, or the \textit{Ath. Pol.} 35.2 assertion that the Thirty killed
1500 people.

\(^{46}\) Lys. 12.25-6, 50, 90-91.

\(^{47}\) Pl. \textit{Cri}, Xen. \textit{Mem.} 4.4.1-3, Pl. \textit{Ap.} 32c-d, though he did respect the oligarchy’s order to attend the
\textit{tholos} to be given the order to arrest Leon.

\(^{48}\) Isoc. 18.16-17.

\(^{49}\) Aeschin. 3.190.

\(^{50}\) Ostwald (1969).
coupled with adikos, may underline the element of force in the rule of the Thirty; rather than ruling by consent as is implied by nomos, they ruled by force, and what little authority their orders held came from the fear of repercussions, not from popular acceptance of the law. All of this combines to undermine the authority of the Thirty’s rule over Athens.51

Some answer to how it is we have so little understanding of the law under the Thirty may lie in the terms of the Amnesty. The Amnesty took the form of an oath sworn between the men of the Piraeus and the men of the city, and forbade anyone to mnēsikakein, or remember wrongs.52 The exceptions to this amnesty can be roughly summarised as the Thirty themselves,53 the Eleven, the Ten, and those who had killed by their own hand. Though court speeches from the fourth-century democracy show that Athenians did not hold perfectly to the Amnesty, they did so well enough to allow Athens to return to political stability. This Amnesty may have limited our understanding of the law under the Thirty for the simple reason that those who had done harm on the orders of the Thirty and who might otherwise have had to claim that they were following the law, thus forcing Athens to confront whether the Thirty really had made law or not, were protected by the Amnesty.

51 It may be observed against this that the Athenians chose to use the thesmoi of Draco alongside the nomoi of Solon- Andoc. 1.81. Draco’s laws were, however, conventionally referred to as thesmoi and notorious for their harshness. The passage of time may have lent them respectability, but they are not a product of the democracy and Draco is never co-opted as a proto-democrat as Solon is.

52 Carawan (2013) argues that me mnēsikakein was never an overriding amnesty agreement, but rather part of the oath sworn to uphold the reconciliation agreements. Carawan considers there to have been a patchwork of agreements, treaties and laws which together allowed Athens to return to peace and democracy, but which never offered blanket forgiveness (his term) for all wrongs committed in the past (pp. 43-65). In this way, Carawan hopes to address the fact that reconciliation was a multi-stage process, first allowing the oligarchs to retreat to Eleusis and establish a separate community there, before then reintegrating those who had fled to Eleusis back into the citizen body after Eleusis was invaded by Athens two years later. While Carawan’s work does well to ground the Amnesty in legislation, the evidence seems to suggest a wider Amnesty than he will allow for. Andocides’ already thin (yet successful) defence in On the Mysteries would be barely comprehensible outside of an agreement which forbade prosecution for all past wrongs, and while Carawan may be right to argue that forgiveness as a virtue would have been alien to the Athenians, this does not mean that the pragmatic advantages of forgetting were lost to them. See Joyce (2014) for further criticism of Carawan’s argument.

53 Carawan (2013) p. 74 denies that this is a valid term, on the basis that the reconciliation must have been agreed with the Thirty, and it would be odd to see them agree to a term which specifically excluded them from any protection. This overlooks the fact that at the time the reconciliation occurred, the city party had already expelled the Thirty to Eleusis, and it is not at all clear that the Thirty would have had any significant input into the reconciliation agreement.
Only those who were high ranking enough in the oligarchy to be themselves responsible for the laws were excluded from the Amnesty. The exceptions to this would be the Ten and the Eleven, who were magistrates appointed by the Thirty, and any idiotai who killed with their own hand on the orders of the Thirty.\footnote{There is, however, no evidence of this occurring. The usual process seems to have been for private citizens to be ordered to seize the condemned (Pl. Ap. 32c) and take him to the Eleven, where he would then be forced to drink hemlock (Lys. 12.17, 18.24, Andoc. 3.10). See Todd (2000b) on how Athens’ non-contact execution methods may have been intended to avoid Athenians having to kill one another ‘by their own hand’, which may mean that these quasi-judicial murders would not have been excluded from the Amnesty. The only hint that it might have been otherwise is Socrates’ claim that the Thirty tried to ‘infect as many people as possible with responsibility’ by ordering them to arrest other citizens – Pl. Ap. 32c, but it is possible this attempt was defeated by the magnanimity of the restored democracy.}

In addition to the role of the Amnesty in muting discussion about the nature of law, it seems that although the fifth-century democracy had been engaged in legislative activity for a long time, Athenians at the time may not have acknowledged this activity. This is discussed in detail at 5.2. As such, the authority of the Thirty to create law could be doubted, not because of their wickedness or the irregularities in their appointment, but simply because they were not Solon. We are told by Xenophon that the Thirty were supposed to sungraphein the ancestral laws by which they were to govern.\footnote{Xen. Hel. 2.3.2.} This suggests that the work of the Thirty was imagined to be collating law, rather than writing it. Despite this, by attempting to, in their words, rectify the law, it is likely the Thirty would have raised questions for the restored democracy about what law should and should not do, who could make and unmake it, and the role law played in the polis.

What, then, does this tell us about Athenian perceptions of law? The chronology of the Thirty is difficult to fix,\footnote{This is mostly because those who defended Theramenes did not allow the reign of terror in their narratives to begin in earnest until after his death. Shear (2011) pp. 180–85 offers a useful contrast of the different chronologies for the Thirty’s adoption of violence.} and of course we have only the testimony of the triumphant democracy. It is impossible to say whether their rule became commonly seen as illegitimate as they became more brutal, or whether it was only with hindsight that their rule was seen as illegitimate, and most Athenians under
the Thirty, that is, more or less anyone other than Socrates, would have felt just as strong an obligation to obey the commands of the Thirty as to obey the laws of the democracy. The Three Thousand in the city did eventually expel the Thirty to Eleusis, but since this happened following military success by the democrats and since the city remained oligarchic this is not a clear statement against the legitimacy of oligarchic rule, and cannot tell us anything clearly about the degree of popular acceptance of the laws and government of the Thirty.

Though we have little information about the degree to which people accepted the rule of the Thirty, we can identify the democratic response to the Thirty. Following the fall of the Thirty the democracy denied legitimacy to the majority of the legislative acts of the Thirty, either by ignoring them completely or by deliberately overruling them. Though the majority of Athenians in the city must have cooperated to some degree with the rule of the Thirty, that cooperation is deliberately forgotten in the fourth century,57 and all responsibility for the acts of the Thirty put only on the Thirty themselves and the small number of officials who served under them. This distancing of the mass of Athenians from any responsibility for the Thirty further saved Athens from having to think about the Thirty as making law. The Thirty were remembered, not as a government,58 but as an external, occupying force. So Wolpert interprets Thrasybulus’ burial in the public cemetery – ‘the victory over the oligarchs was a victory for Athens. Thus they rendered the democracy the lawful constitution and the actions of the Thirty illegal’.59 The Amnesty, by preventing the Athenians from having to think about whether or not people obeying the orders of the Thirty were obeying law, obscured the question of what made law law.60 Rather than a single approach to the laws of the Thirty, Athenian actions display a range of approaches, from decrees which appear to assert that only a democratic government can be a legitimate government of Athens, to Socrates’ moralist decision that he cannot legitimately

58 Isoc. 21 manages various linguistic tricks to avoid using governmental terms about the Thirty, 21.2, 3, 11 and 12.
60 How far Athenians recognised an obligation to obey law is also questionable – see Chapter 4.
be ordered to assist in the killing of an innocent citizen. What is clear, however, is that the restored democracy was extremely reluctant to acknowledge that the Thirty had ever really made law.
CHAPTER 2: INTERPRETATIVE ROLE OF JURIES – POLIS GOOD

Athens’ system of litigation asked jurors to perform an enormous task. In a single vote, without any independent judicial guidance, without time or space for deliberation, and with not only no requirement but no opportunity to give reasons to explain their decision, Athenians had to pass judgement on the actions of their peers. These juries could at times be very large. In their judging, jurors were required to decide not only which version of facts to believe, but also, with only the legal guidance offered by the litigants themselves, how the law should be applied. Jurors were presented by the litigants with laws which were often unclearly phrased, quoted in part, and which might appear to conflict with other laws. How far jurors based or were expected to base their decision solely on the laws presented to them is disputed, but no one disputes that the laws were supposed to play some role in their decision-making. Given the breadth of the

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1 The social make-up of juries has been subject to dispute. Jones (1956) imagined juries to be populated primarily by the wealthy. Ober (1989a p. 142-4) considers it more likely that juries were dominated by poorer citizens for whom the three obol jury pay was valuable. Todd (1990b) argues that jury service may have been particularly attractive to farmers who worked their own land. It seems persuasive that juries were not dominated by the wealthy, and can be considered to be at least a somewhat popular body. Since the purpose of this study is to explore the attitudes of jurors towards the law not popular attitudes more generally, the degree to which juries were truly representative of the Athenian male citizenry as a whole is not of vital importance. Cases of homicide prosecuted using the dikē phonou and dikē traumatos ek pronoias were heard by the Council of the Areopagus, a body made up of former archons. For the possible effect on cases heard by the Areopagus in contrast to those heard by popular juries, see Lanni (2006 p. 75-114). For a full study of the process of litigation at Athens, see MacDowell (1978) pp. 235-60.

2 Todd (1993) p. 83 n. 9 suggests 500 people as a normal number for judging public suits, with juries of 1,000 and 1,500 securely attested. A reference to a jury of 6,000 (Andoc. 1.17), which would represent the entire pool of sworn jurors, is probably not reliable. Private suits were judged by juries of 200 or 400 people.

3 e.g. Dem. 21.47 – see below p. 47 n. 17.

4 e.g. Dem. 18.121.

5 e.g. Aeschin. 3.35, and see below Chapter 2.3.2.10.

6 Cohen (1995) p. 190 argues that Athenian juries did not engage in legal interpretation, but made their decisions only on their perception of the respective moral positions of the litigants. While we cannot say for certain how juries made their decisions, the appearance of arguments on the
interpretative task facing the jurors, understanding the ways in which litigants sought to have the jurors interpret laws in the litigants’ own favour is essential for our understanding of Athens’ laws and legal system.

Gagarin has proposed this interpretative role of juries as a ‘source’ of Athenian law. He supposes that an Athenian, if asked about the source of their law, would say the dēmos, because of the legislative activity of democratic bodies, but he notes that although Athenians were able to say what the law was, they had less access to information on what the law meant. For this reason, Gagarin proposes that we should recognise not only jury decision-making but also litigants’ speeches as sources of Athenian law. This seems to overstate the power of litigants’ speeches. Though litigants could and did argue for particular interpretations of Athens’ laws, those proposed interpretations, at the time they were made, are unlikely to have been considered authoritative, and were probably competing against alternative interpretations offered by the opposing litigants.

Gagarin seems to suppose that these interpretations could in time become authoritative if the interpretation proffered was accepted by the jury, and then came to be used again and again by other litigants. The problem with this argument is that juries did not, indeed could not, give reasons for their decision. Gagarin gives as an example the arguments made by Euphiletus in Lysias’ On the Murder of Eratosthenes on the interpretation of the laws on adultery and homicide. He supposes that, were the case to have been decided in Euphiletus’s favour, and to have become a cause célèbre, the interpretations Euphiletus offered of the laws might come to be accepted as authoritative. Euphiletus offers two laws in his defence: the first is the Athenian law on adultery, which he claims prescribes death as the penalty and the second is the law on homicide, which states that those who

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7 Gagarin (2014).
8 Questions about how far the Athenian democracy recognised itself as the source of its law are addressed at 5.4.
9 Lys. 1.29 and 1.33.
kill adulterers caught in the act are not to be convicted of homicide.\textsuperscript{10} It appears the reason Euphiletus needs to make use of the law on adultery is because he is being accused by Eratosthenes’ family of having killed Eratosthenes for other reasons, and of having lured him into the house with the intention of killing him.\textsuperscript{11} The Areopagites judging the case have no means by which to signal how or why they have made their decision. If they acquit Euphiletus, it could be because they decided he did not kill at all (a question of fact), or because they did not think the killing was unlawful (a question of law). They might decide the killing was not unlawful because they accept Euphiletus’ interpretation of the law on adultery, and consider that all adulterers should be subject to extra-judicial killing. Alternatively, they might accept Euphiletus’s interpretation of the homicide law and decide that the law does not require that the killing happened in the heat of the moment, but allows the husband to kill the adulterer he catches with his wife, no matter the circumstances of that encounter. None of this will be given in their verdict. As such, the best the case could give as an example for future adulterer-killers would be a suggestion that it may, under certain circumstances, be acceptable to kill an adulterer. Since this was also the situation prior to \textit{On the Murder of Eratosthenes} no step towards an authoritative interpretation can be considered to have been made.\textsuperscript{12}

\section*{2.1 Theoretical framework}

In \textit{Law’s Empire}\textsuperscript{13} Dworkin argued that within the Anglo-American common law system, interpretation of law must be understood as ‘constructive interpretation’, that is, interpreting the law in its best possible light, and not as ‘conversational interpretation’, interpreting in line with the intentions of the author of the law.

\begin{footnotes}
\item[10] Lys. 1.30. See Todd (2007) for commentary on both these provisions.
\item[11] Lys. 1.37.
\item[12] In cases which focus more closely on the issue of interpretation of law, there might have been a little more room for interpretations to become authoritative. Lys. 10 focuses entirely on the interpretation of the law, so the outcome of this case could potentially become first an example and eventually an accepted interpretation of the law on the \textit{aporrhêta}, but this speech’s focus on law is highly unusual.
\end{footnotes}
This constructive interpretation, Dworkin then argues to be taking place within an interpretative community of lawyers and judges who recognise themselves as part of an ongoing tradition of interpretation. This community of constructive interpretation Dworkin argues is based on what he terms ‘integrity’. ‘Integrity’ allows for consistent decision-making which is nonetheless capable of change in response to changing social attitudes, since ‘integrity’ requires that judgements should be made on the basis of the principles which underlie existing laws and legal decisions. Dworkin gives as an example the famous case of Brown v Board of Education, in which the Supreme Court determined that segregation (separate but equal) was unlawful. This case contradicted previous cases in which the concept of separate but equal had been permitted, although it was based on the same laws that had informed the decisions in the prior cases. In Dworkin’s analysis of the case, the law was interpreted in accordance with the principle of equality which informed the laws in question, so although the Supreme Court’s decision overruled pre-existing court decisions, the community continued to maintain its integrity.

Dworkin argues that some element of morality is a necessary aspect of law. If the state is to be justified in exercising force against its citizens, this force must have a moral basis. Morality, for Dworkin, enters into play when laws come to be interpreted by the people who use law. Dworkin’s questions about the permissibility of use of force against citizens are not directly relevant to the Athenian context, since it is not my goal here to defend or destroy the legitimacy of Athens’ laws, but it might be noted that Athenians had qualms about the intersection between law and force, and I will explore those qualms in Chapter 4.3.3.

2.2 Dworkin’s model’s relevance for Athenian law

2.2.1 Role of Athenian juries

In an Athenian context Dworkin’s model must be applied with care, since it is born out of, and seeks to explain, a legal system which would be deeply alien to an
Athenian. The first barrier to using Dworkin’s model to understand Athenian law is that Dworkin is writing about a world of judge-made law. Common Law judges do not simply apply the law; they also state authoritatively what the law is. As such, their interpretative role is at first glance quite different from that of Athenian jurors. While Athenian jurors could be, exceptionally, invited to act as nomothetai, and while the extent to which the jurors’ oath left jurors free to supplant their own best judgement in areas where there were no laws is controversial,14 jury decisions had no formal way to become law. There was no strong doctrine of precedent in Athenian courts,15 and no system by which juries’ decisions could become part of Athens’ laws. Despite this, Athenian jurors were commonly called upon to interpret laws – sometimes in what Dworkin refers to as ‘easy cases’, where ‘since the answers to the questions [the interpretative model] puts are … obvious, or at least seem to be so, we are not aware that any theory is at work at all’,16 and sometimes in much harder cases. One of the accusations which is most often adduced against Dworkin is that his model applies only to so-called ‘hard cases’ – cases where the application of the law to the facts in hand is in some way uncertain or liable to lead to a manifestly unjust outcome. Dworkin rejects this on the basis that even in ‘easy’ cases, the work of interpretation is still being done, it is just simple enough that we do not appreciate the fact. In Athens, an argument could be made that most cases were ‘hard cases’. Athenian laws were often imprecisely phrased,17 and Athenian juries had no authoritative guidance on how the laws

14 see Chapter 4.3.2.
15 Lanni (2006), opposed by Harris (2013). See 2.2.4.1 for an alternative approach to the use of precedents in Athenian judicial decision making.
17 The law against hubris (Dem. 21.47 ‘If anyone commits hubris against another... let anyone who wishes bring a graphē before the thesmothetai’) is often given as an example of imprecisely phrased Athenian laws. Though the quoted nomos is likely to have been inserted by some later writer (see Harris in Canevaro (2013b) p. 224-232), the formulation ‘if anyone commits hubris there shall be a graphē’ also appears in Aeschin. 1.16. The Ath. Pol. 9.2 explicitly rejects claims that Solon deliberately phrased his laws imprecisely to give more scope to juries’ decisions, which suggests that the power juries held to interpret laws was recognised by the fourth century. In the Rhetoric 1373b-74a, Aristotle explores how a litigant can make use of this vagueness. He claims that while a litigant might accept having done the wrongful act in question, he might then dispute the applicability of the relevant law to that act. Aristotle explains that this is why it is important that laws be properly defined. In practice, as with other of the recommendations of the Rhetoric, this is not a strategy we see litigants using often (though it is not unheard of. It is, of course, impossible for Ctesiphon to deny that he made a decree honouring Demosthenes (Dem. 18), and the same is true of all graphai paranomōn and nomon mē epitēdeion theinai. The speaker of Lys. 9 admits that
presented to them should be interpreted.\textsuperscript{18} Even the rule that an older law should be considered to overrule a newer one must have been difficult to apply in court, since as far as we know the prescripts to laws were rarely read out.\textsuperscript{19} While it does seem that jurors might, in some cases, have allowed a sense of fairness to prevail over applying the law, it is unclear whether or not this was viewed by Athenians as a legitimate use of jurors’ discretion.\textsuperscript{20} We will explore specific examples of jurors being called upon to tackle interpretation of laws at 2.3.

\subsection*{2.2.2 Constructive interpretation in Athens}

Dworkin’s constructive interpretation at first glance appears problematic for understanding Athenian interpretation of laws. The ‘intent of the lawgiver’ is one of the most important tools used by litigants to guide jurors’ interpretations of laws.\textsuperscript{21} What must be remembered, however, is that in all the instances in which we see it used, the intent of the lawgiver is fictional. It is most often used to impute.

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\textsuperscript{18} Against this, one might argue that we see relatively little legal argument in the Athenian courts. This is probably best explained by a combination of the facts that, first, we are usually missing one or two stages of legal argument, since we do not see the arguments that take place before the arbitrators, or when persuading the relevant magistrates to introduce the case; and second, the use of highly legalistic arguments seems to have been off-putting to Athenian juries. See Chapter 4.3.2.4.

\textsuperscript{19} We only see this rule referred to in \textit{graphē paranomōn} and \textit{graphē mē epitēdeion theinai} suits. In \textit{Against Ctesiphon} Aeschines has to deal with two contradictory laws, and he implies that the law which favours his opponent is newer than the law he claims should govern the situation, but the comparison is implied, not explicit: 3.33 the law in Aeschines’ favour is referred to as having been made by \textit{ho nomothetēs} – generally understood to mean Solon – whereas 3.44 the law cited by Demosthenes is attributed to \textit{tis nomothetēs} – some lawgiver, and is placed in a more recent historical context. The relative age of the two laws is not used by Aeschines to argue that the law cited by Demosthenes is not a valid law, but to claim that Demosthenes must be misinterpreting the law.

\textsuperscript{20} See Harris (2013) pp. 274 ff.

\textsuperscript{21} See Chapter 5.1.4.
intentions to Athens’ ancient lawgivers, whose intentions could, by the fourth century, no longer be reliably ascertained. Even where it is used in reference to contemporary lawgivers, it is not clear that the speaker’s version of the legislators’ intentions gives any true indication of the actual intentions of the legislators. Although some fourth-century laws bore purpose clauses of a sort, no litigant in the surviving speeches refers unequivocally to the inscribed purpose clause when presenting a law. Given that the intentions imputed to the lawgivers are fictional, what these arguments actually amount to is an attempt to persuade jurors that the interpretation of the law presented by the litigant is the law in its best possible light. This is certainly a rhetoric that relies on the conventions of ‘conversational’ interpretation, but this does not in itself prevent it being, in fact, constructive interpretation.

2.2.3 Interpretative community

Dworkin examines the Common Law system as an interpretative community, in which judges and lawyers are aware of themselves as part of a community and a tradition of interpretation which they have inherited and which they will hand on to others. Similarly, Johnstone identifies Athenian juries as interpretative communities, aware of themselves as a distinct and separate democratic institution with its own rituals, customs and modes of argument: ‘In the courts, male citizens learned and shared certain kinds of knowledge, creating a commonality of interests

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22 Most prominently in Aeschin. 1.33.
23 e.g. RO 25 II. 2-4 ‘to accept Attic silver coin when it is found to be silver and bears the public stamp’; IG II3 1 429 II. 2-4 ‘and those at Etioneia and the rest [of Piraeus] . . . . . . and the defects in the stone walls . . . . . . may be repaired, and the [long walls] may be repaired’; IG II3 1 447 II. 5-6 ‘so that the sacrifice to Athena may be as fine as possible at the Little Panathenaia and the income as great as possible’; RO 26 II. 5-6 ‘so that the People may have grain available in common’ SEG 52.104 II. 1-8 ‘in order that everything in the sanctuary [of the] Brauronian [goddess] may be secure and sound’; Dem. 20.128 ‘to the end that the wealthiest citizens may perform the public services’.
24 Dem. 20.128 presents the law which is being indicted.
25 This is not to claim that the use of the intent of the lawgiver trope left no mark on Athenian interpretation of law. By choosing to frame arguments through the intent of the lawgiver, litigants left themselves unable to present laws in any ‘best possible light’ which was self-consciously innovative. See Chapter 5.1.6.
and abilities. One of these was the ability to interpret laws in an authoritative manner. The laws themselves did not indicate how to do this; rather, proper interpretative skills were learned and handed down in the culture of the courts among an interpretive community.\footnote{ibid. p. 132. Mirhady (2015) p. 242-43 also argues for the jurors as a community with knowledge of how laws should be interpreted. He does not explore how this community educated itself, but does note that the requirement that jurors be over 30 may have meant the jurors were more experienced citizens.} Johnstone does not explore the mechanisms by which this interpretative community worked, but there are indications within our sources that can give some idea of how jurors learned to interpret laws. Aristophanes’ Wasps offers a caricature of jurymen who walk together to the court, discussing on the way how they intend to judge the cases before them.\footnote{Wasps 230-245. Biles and Olson (2015) p. 161-2 note the pathos of the jurors lamenting their deceased fellows, which is itself the act of a group which is aware of itself as such. Similarly, at lines 268-9 Biles and Olson p. 182 note the presentation of the jurors as a ‘formal performance group’, though as a chorus some degree of internal cohesion is forced upon the Wasps by the constraints of the genre.} The jurors know one another’s habitual ways of judging,\footnote{Wasps 270. As a comedy, we cannot expect to see detailed discussion of how jurors habitually interpret laws.} and there is even an indication that they might police their own membership.\footnote{Wasps 1110.} Rubinstein identifies the common trope of warning jurors that their decision might deter or encourage future offenders as a reminder to juries of the dikastic tradition of which they form a part.\footnote{Rubinstein (2007) p. 367.}

Wasps predates changes made to the allocation of jurymen to courts which may have reduced the cohesion of individual groups of jurors,\footnote{see Rhodes (1980) p. 318-9.} but even in the fourth century jurors do seem to have had some opportunity to learn about the interpretations adopted by other courts and other jurors. First, there is the phenomenon of thorubos,\footnote{see Bers (1985).} which is treated by litigants not as a one-way communication from the jurors to the speakers, but as something by which jurors may educate and inform one another. Second, there is the knowledge of previous cases which is commonly assumed by speakers, and which may have arisen from
jurors talking about their judging at home following cases. Court cases might also attract non-juror spectators, and though those litigants who wish to convince the jury that they have led sheltered lives claim never to have visited the courts before, it is quite possible that men would have seen many cases judged before they became of an age to sit as jurors themselves. While to some extent jurors must be assumed to have been educated on the law and its interpretation by litigants’ speeches, those speeches were only one source of information for jurors on how laws should be interpreted.

2.2.4 Principles

In Dworkin’s model, laws are interpreted in line with principles. These principles guide interpretation of laws, and are often themselves drawn from or evidenced by other laws.

2.2.4.1 Use of ‘precedents’ understood as instances of principle

The use made of precedent in Athenian court speeches has been a matter for academic debate. Previous court decisions and other examples of past practice are sometimes cited by speakers, but how far these can be considered precedents is disputed.

Lanni looks at the use of precedent within her analysis of legal insecurity in Athenian courts. She considers Athenian courts not to have had the capacity to issue predictable or consistent judgements, but regards this as a trade-off against the flexibility to make just decisions on the facts of individual cases. Lanni considers judicial decisions to have been made based on such a wide range of factors that it would not have been possible in practice to find cases which were ‘similar enough on all relevant axes’ to serve as precedents. She divides the use of

34 e.g. Dem. 59.110.
35 Isae. 1.1, 19.55.
precedent in the orators into a) citations of past penalties, b) comparisons of social
standing of past and current litigants and c) passages that resemble modern use of
precedent. Lanni’s categorisation is of limited use in understanding how
precedents are used to try to steer jurors’ decision making in Athenian court
speeches.

Harris, responding to Lanni’s arguments,\(^{37}\) claims that use of precedent is much
more common in Athenian speeches than Lanni acknowledges, in part because he
claims her list of precedents is incomplete,\(^ {38}\) and in part because he considers
precedents to be prominent in guiding reasoning in cases where there are
questions of law to be determined. Harris bases this on an analysis of the Lysianic
corpus, of which he says six speeches raise legal issues, and precedents are used in
four of these six. Not only is this a small sample size, but several of Harris’
‘precedents’ are somewhat dubious. He claims Lys. 3.40–43 to be a use of precedent,
though the speaker mentions no cases, but just asserts that the Areopagus has
‘many a time in the past’ interpreted the law in the way he wishes them to interpret
it in the case at hand. Similarly, he claims Lys. 31.34 as a use of precedent, when no
case is mentioned, and the speaker is just asking the boulē to decide whether
Philon is of the same moral character as the current members of the boulē.

Harris’ argument that use of precedent in Athenian court cases should be seen as
a real attempt by Athenians to achieve consistency in their court decisions is not
supported by the evidence he offers. This leaves open the question – what were
these precedents supposed to achieve? They are common enough in court speeches
that we must consider them to have had some weight in decision-making. An
indication of their use may be given by the Rhetoric to Alexander,\(^ {39}\) where litigants
are advised to use precedent in court in a section of the work dedicated to how to


\(^{38}\) Harris’ list cites as precedents several things which are not exactly precedents (see below). As
such, Lanni’s list of precedents, taken from Rubinstein (unpublished) is to be preferred: Dem.
1.86–88, 173; 2.6; 3.252–253, 258; Din. 1.14, 23ff; 2.14, 25; 3.17; Lyc. 1.52ff; 111–116; Andoc. 1.29–30; Hyp.
4col. 1–3, 33–34; 5col. 27; Antiph. 5.67.

\(^{39}\) 1.422b20.
use ‘the just’ to guide interpretation of ‘the legal’. This is not using precedents to establish a point of law in a strict sense, it is using precedents to support an argument that jurors should interpret a law in line with a particular principle.

Rubinstein addresses only the trope of deterrence, but looking at how the idea of deterrence is used in Athenian court speeches despite the fact that it must be considered to have been primarily fictional, given the lack of any systems by which to create or enforce precedents, she identifies this trope as a means by which the Athenian demos could send messages about what behaviour it did and did not condone. Rubinstein draws on the evidence that calls to deterrence are far more common in public than in private speeches to support her argument that this trope relates to the demos’ ability to send messages about how it viewed particular offences. Put in Dworkin’s terms, the trope was used to call on the jury to establish or reinforce principles.

Demosthenes’ Against Meidias makes particularly heavy use of precedents and so I will use it as a case study to show how precedents could be used by a litigant. The speech is probably a probole for committing an offence during the festival, with the offence in question being hubris. Certainly Demosthenes, whether for legal or personal reasons, wishes to persuade the jurors that Meidias’ actions should be considered to amount to hubris and he makes use of previous court decisions as part of his argument to this effect.

At 21.72–76 Demosthenes tells the story of Euaeon, who was so offended at having been struck by an acquaintance when both were drunk that he killed the man who struck him. When Euaeon came to trial, the jury is said to have convicted him by a one-vote majority. This precedent is, strictly speaking, irrelevant to Demosthenes’ case, since it tells us nothing about the law’s treatment of hubris.

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40 Rubinstein (2007).
41 ibid. p. 371.
42 Rowe (1994)
What it evidences is a principle – that jurors consider even a single blow to be an extremely serious insult.

At 21.176-8 Demosthenes records the trial of Euandrus for profaning the Mysteries. Here he does try to increase the relevance of this case to his own by claiming that the law on the Mysteries is the same as that for the Dionysia, but, as Harris points out, Demosthenes’ account of the case suggests that Euandrus must have been tried by a dikē and not a public process, since he had to pay damages to the man he had seized. Demosthenes’ use of the precedent works not as a legal precedent, but to demonstrate a further principle, that those who break the law about festivals should pay high penalties.

At 21.178 Demosthenes discusses the case of a festival official who, when instructing a citizen to leave a seat to which he was not entitled, laid hands on the man. The man brought a probole against the official and gained an initial condemnation, but died before the case could progress any further. It is unclear that the official was treated as having committed hubris, and he may well just have been condemned for breaching the law on the festival. It therefore cannot support Demosthenes’ point on Meidias’ actions having amounted to hubris, but it does serve as evidence of the principle that touching another citizen during the festival was considered wrongful.

The final precedent Demosthenes cites is that of Ctesicles, who was sentenced to death for using a whip to beat an enemy of his with during the festival. The problem for Demosthenes is that the offence committed by Ctesicles was probably sufficiently serious to be treated as hubris at any time of the year.

Demosthenes wants to argue that the additional protection offered to citizens during the festival means that the assault committed by Meidias should be treated more seriously than it otherwise would, and so should be considered to have

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44 Dem. 21.180
amounted to *hubris*. He has apparently been unable to find any law which clearly states this, or any previous case which decided this, but he has been able to assemble an array of cases which evidence the following principles: 1) striking a citizen is seriously offensive to that citizen, 2) breaking the festival laws can lead to elevated penalties, 45) you should not touch citizens during the festival and 4) acts committed during the festival may amount to *hubris*. None of Demosthenes’ precedents constitute precedents in a modern sense, but they all contribute meaningfully to Demosthenes’ arguments about how the jurors should interpret the laws in front of them. Demosthenes’ arguments are not poorly-achieved attempts to achieve consistency in legal decision making, they are meaningful attempts to guide the jury to make decisions which are in integrity with the principles which Demosthenes construes as underlying the decisions made by previous jurors.

2.3 Principles in the interpretation of Athenian law

The final part of Dworkin’s argument is his identification of what he considers to be a principle which underlies the common law on damages to be awarded following a tort. He does so as part of a thought experiment to show how a judge who wished to judge in integrity with the principles underlying that area of law might proceed. His analysis, however, offers a tool for questioning the principles that litigants invoke when guiding jurors towards an interpretation of the law ‘in its best possible light’ (albeit not objectively so, but in the best possible light for the litigant in question). The remainder of this chapter will consist of a study of the principles used to guide interpretation of laws in forensic oratory.

One of the major controversies in studies of Athenian law and litigation is the degree to which jurors were free to decide cases on the basis of public interest, or the good of the *polis*, rather than on the basis of the law. This has set up a false

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45 Though in fact the wrongdoer only had to refund the money he had wrongfully extracted from the claimant and compensate him for the inconvenience – a fairly modest penalty.
confrontation between law and the good of the *polis*.\textsuperscript{46} In many of the surviving forensic orations, the good of the *polis* is explicitly used by speakers to guide interpretation of laws. For my analysis, I have classified arguments on legal interpretation as based on either the good of the *polis* or individual justice.\textsuperscript{47}

Individual justice may itself be divided into arguments of justice as fairness and justice as consistency with previous decisions. Arguments on the good of the *polis*, where they appear in forensic oratory, are generally arguments on expediency which either explicitly or implicitly set the interests of the *polis* against the interests of the individual.\textsuperscript{48} Soft arguments of the good of the *polis*, where the *polis*’s interests are presumed to equate to the good of individuals, (i.e. it is in the interests of the *polis* to respect the freedoms of individuals), are rare in forensic oratory.\textsuperscript{49}

It is noticeable how much more attention has been paid in modern scholarship to the use of arguments based on the good of the *polis* than to arguments based on personal justice. It seems likely this has arisen from the fact that the latter type of argument is an accepted aspect of court decision making in modern law, whereas making decisions on individuals’ cases to serve expediency is viewed as a breach of human rights and a failure to make just decisions. There is no reason, however, to


\textsuperscript{47} I use justice in a modern sense, as a sense of treating the individual’s case fairly, and not in the more complicated ways *dikaiosunê* was treated by Greek philosophers. Mirhady (1990) p. 400 notes Aristotle in the *Rhetoric* using a similar distinction, with *to epieikeías* linked to *to dikaion*, and universal law linked to *to sumpheron*, with either of these two useable by a would-be litigant when arguing his case.

\textsuperscript{48} Wallace (1996) examines how far Athenians can be considered to have had ‘rights’ and offers a useful summary of prior work on the subject. He concludes that although Athens recognised a few limited positive rights (freedom to), they made very little use of negative rights (freedom from), and within the vague confines of Athenian law, these rights could often be rejected in favour of the good of the *polis*.

\textsuperscript{49} Funeral orations, as the genre in which Athenians talked about what it meant to be an Athenian (see Loraux (1986)), could be viewed as an alternative source for ideas on the interaction between law and justice/expedience. A survey of the surviving examples of the genre suggests that its confines meant these difficult ideas tended to be suppressed. Loraux p. 104 notes the tendency for the individual to be subsumed by the community in these speeches. The Athenian war dead are lionised for having willingly placed themselves in danger in service to their city. Far from allowing the interests of the individual to stand against the interests of the *polis*, these speeches imagine the primary interest of individuals to have been the good of the *polis*. 
suppose that this reluctance to use expediency to guide judicial decision making would have affected an ancient Athenian jury.

For my analysis in this chapter I have selected speeches where a point of law which could be subject to the jury's interpretation appears to have been relevant to the dispute. I used a sample of 20 orations, giving representation to public and private cases and within these categories to prosecution and defence speeches. I selected to try to prevent any one area of law from dominating the sample. Of a sample of 20 speeches, 7 of which are private and 13 public, in 15 of the speeches arguments based on public interest are used to guide legal interpretation. Of these, seven use only public interest arguments, while eight use both arguments of public interest and personal justice.

The arguments on the basis of public interest are more prominent in public speeches, where they are seen either alone or in conjunction with arguments on personal justice in 76% of the speeches studied. Arguments based on the good of the polis seem to be equally useable in defence and prosecution speeches; however, arguments which rely on polis good alone are only found in public speeches (and predominantly in prosecution speeches).

The speeches are divided into private and public, and within these categories are presented in rough date order.

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50 **Private:** Lys. 3, Lys. 10, Isae. 1, Isae. 2, Dem. 54, Dem. 39, Hyp. Athenogenes.


51 This analysis is limited to arguments which seek to guide the interpretation of laws. It therefore excludes arguments where a litigant might, for example, argue that it is unlikely he would have committed the offence in question because of his previous good character, as demonstrated by his services to the city. As such, it is not a comprehensive exploration of the use of 'good of the polis' arguments in Athenian court speeches.

52 **Good of the polis only:** Isoc. 20, Lys. 22, Dem. 22, Dem. 23, Aeschin. 1, Lycurg. Leocr. Hyp. Euxen.
2.3.1 Private suits

2.3.1.1 Lysias’ Against Simon

In Lysias’ Against Simon, the speaker addresses the Areopagus and asks that they interpret the law on the *dikē traumatos ek pronoias* to understand the *ek pronoias* element of the offence as requiring active premeditation, and that that premeditation should be to kill, not merely to wound. He argues explicitly for his interpretation of the offence.

I also believed that there could be no premeditation in wounding if somebody wounded without intent to kill: for who is so naïve that he premeditates long in advance the way in which one of his enemies should receive a wound? It is clear that our legislators also did not believe that they should prescribe exile from the fatherland in circumstances where people happen to break each other’s heads while fighting—or else they would have exiled a considerable number. But as for those who wounded others after plotting to kill them, but who did not succeed in killing, it was in the case of people like this that they established such severe penalties, taking the view that in cases where people have plotted and premeditated, they ought to pay the penalty: even if they did not succeed, nevertheless they had done their best. And indeed, on many previous occasions you also have given the same verdict about premeditation. So it would be a terrible thing if, when people are wounded while fighting because of drunkenness or quarrelling or horseplay or insults or over a *hetaira* (these are the sorts of things about which everybody is sorry when they recover their senses), you were to impose such severe and terrible penalties that you expelled some of the citizens from the fatherland.

His first argument is that any other interpretation would make a nonsense of the law, since it would turn it into a law against an offence which, he says, no one

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53 This speech is discussed in more detail at 3.1.1, with particular focus on the moral arguments in the speech.
would commit. Next, he argues on the grounds of justice that the lawgivers would not have set such a serious penalty for such an insignificant offence. Finally, he gives a very vague reference to precedents, which Harris takes to be a recognition of the superior knowledge of the Areopagites, but which could equally be a result of the speaker not having been able to turn up any useable examples. His attempts at using these principles to guide interpretation of the law are striking since, as discussed in Chapter 3.1.1, he works from the assumption that any reasonable plot will be a murderous one. By emphasising the element of planning as the wrongful element of trauma ek pronoias he minimises the element which a modern reader might assume to have had the greater capacity to harm the polis, the element of actual harm. Here, then, we see a speech where the speaker wishes to guide interpretation of a law almost entirely on the basis of arguments about individual justice.

2.3.1.2 Lysias’ Against Theomnestus

Lysias’ Against Theomnestus is a prosecution for kakēgoria. Theomnestus is accused of having made an allegation that the speaker killed his own father. Theomnestus appears to have defended himself before the arbitrator by claiming that the law should be read only as forbidding use of the word androphonos, and since his allegation against the speaker had not used that word he should not be convicted. In response, the speaker has assembled an argument on how juries should interpret laws.

He bases most of his analysis in archaic laws, where the need for interpretation can be assumed to have been apparent to the jurors. This may serve in part to reduce

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56 Though it is not made explicit in this speech, allegations of groups of men plotting violence had a more threatening aspect to them than just the infliction of violence on fellow citizens. Lysias’ career took place in the shadow of two violent oligarchic revolutions against the democracy.
57 This speech is discussed in more detail at 3.7, with particular attention given to the patterns of interpretation in the speech and the role of moral arguments.
58 Lys. 10.6–7 Todd (2007) p. 635 suggests that Theomnestus may have been relying on an older interpretation of the law on kakēgoria which ‘conveyed the quasi-magical or quasi-religious sense that these were words which it was somehow inappropriate to utter’.
the potential for claims that his argument is sophistry, but it also allows him to blur the types of interpretation he is inviting jurors to do.\(^{59}\) The interpretation of archaic words to their contemporary equivalents is very different from the interpretative task the speaker is asking jurors to do when he invites them to include within the *aporrēta* words which are not listed in the law.\(^{60}\) Interpreting a law which forbids use of the word *androphonos* also to ban use of the phrase *apokteinei tina* is not the same as understanding *podokakkē* to indicate *to xulon.* The law bans the use of certain words, and expanding the scope of the law to cover other words is a significant act of legal interpretation. The speaker justifies his own interpretation of the laws on what in Common Law is called the ‘mischief’ principle – that laws should be interpreted to best deal with the wrongful behaviour they were intended to govern. As such, the argument depends primarily on personal justice as consistency – that laws should be interpreted to provide the individual the protection against wrongdoing that they are deemed to have been intended to provide.

2.3.1.3 *Isaeus’* On the Estate of Cleonymus

In *Isaeus’* *On the Estate of Cleonymus,* Cleonymus had left a will, but his nephews complain that the will had been made at a time when Cleonymus was angry with his family, but that by the time he died he was reconciled to his nephews and treated them as his closest kin.\(^{61}\) The jury is asked by the litigants to determine, among other issues, whether a will has validity in and of itself or only as evidence of the deceased’s wishes, and whether family relationships should be allowed to

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\(^{59}\) Todd (1996) notes that by selecting only archaic laws, the task of interpretation is altered, but he notes this to observe that Athenian law was ahistorical, and that though this speech recognises that words could lose their meaning, it does not recognise that meanings might change and what was meant in a statute when it was written might not be how that statute would be read later.

\(^{60}\) These two types of interpretation can be best understood as conversational interpretation, in the case of the interpretation of archaic words to match their contemporary equivalents, vs. constructive interpretation in the case of interpreting the *aporrēta* law to include synonyms of the forbidden words. Todd (2007) p. 635 observes that Athenian juries had no guidance or means by which to establish authoritative interpretations of laws, but does not note the difference between the two types of interpretation the jurors are being invited to engage in.

\(^{61}\) This speech is discussed in some detail by Harris (2013) pp. 192-6, who identifies it as an example of Open Texture in Athenian law. The questionable value of designating such interpretation Open Texture is discussed in the Introduction to this thesis.
outweigh a will that would otherwise have been valid. The litigants invoke the good of the *polis*, framed as the good of the jurors themselves, to support their interpretation of the law, by asking whether it is in the jurors’ interests to ‘force those who are next of kin to share in the misfortunes of their relatives, but, when money has been left, give anyone rather than them the right to its possession’. In addition, the litigants argue based on personal justice that it is fair that if you stand to inherit from a relative, that relative should also stand to inherit from you.

2.3.1.4 *Isaeus’ On the Estate of Menecles*

*Isaeus’ On the Estate of Menecles* again asks jurors to consider whether inheritance should follow kinship or will, though in this case the speaker is urging the jury to accept the will that has been made. Despite the fact that the speaker appears to have been adopted by a process which followed all the proper rules and is able to produce witnesses to attest to this, his claim to Menecles’ estate has been challenged by Menecles’ brother. The speaker suggests that his opponent’s case relies on arguing that the adoption was invalid since it was made under the influence of a woman. Despite the fact that the case should apparently be resolvable by asking, first whether the speaker was adopted and second whether that adoption was valid, much of the speech is dedicated to narrative of the speaker’s family’s long and close relationship with Menecles and of his opponent’s quarrels with Menecles. The suggestion, as in *Isaeus 1*, is that the jury is unlikely to restrain itself to making a decision based on the legal positions of the respective parties, but will decide in accordance with a perceived sense of fairness. This case only makes use of arguments of personal justice to guide reasoning, though this personal justice is owed to both the speaker and Menecles.

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63 *Isaeus* 1.44.
64 2.14-18.
65 2.19.
66 2.2-21.
67 2.27-34.
68 2.27, 35-6, 43, 47.
69 2. 23-4, 27, 37, 42-3, 47.
This prosecution in a *dikē aikeias* relies on a strategy of persuading the jurors that the acts committed should be considered to amount to the more serious offence of *hubris*. The case is analysed in detail in Chapter 3.

Because of the strategy adopted by Ariston of alleging *hubris*, the legal interpretation in the case is around whether Conon’s actions did or did not amount to *hubris*. It appears that Ariston expects Conon to argue on this point that the young men all belong to drinking clubs and this sort of behaviour between such young men is commonplace and so should not be considered to amount to *hubris*. Ariston’s response to this is to deny that he is a member of any such club, and so to try to place himself on the side of ‘ordinary’ people. Given the political implications of these drinking clubs it is possible this may be a veiled argument on *polis* good, but if this is the case the point is not laboured in the speech. At 54.20 he returns to the question of membership of these clubs, but this time his argument is clearly one of fairness: he argues that whether or not they are members of drinking clubs, everyone should be held accountable for their actions in the same way.

In the speech, Ariston offers a justification of sorts for Athens’ legal system, explaining that the reason actions exist is to prevent escalation of disputes. The passage is notable for the way in which justice is not treated as a desirable end in itself, but only as a means to achieve the goal of reducing serious violence within the *polis*.

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70 Dem. 54.14-17
71 Such clubs were probably linked to the affairs of the profanation of the mysteries and the attacks on the herms in 415, both of which events were imagined at the time to have some connection to a planned oligarchic coup.
72 54.20-21
2.3.1.6 Demosthenes’ Against Boeotus I

Demosthenes’ Against Boeotus I appears to have had a weak basis in law, and the speaker Mantitheus is likely to have lost his case. He brought what was probably a dikē blabēs against his half-brother on the basis that his brother’s claim also to be called Mantitheus is causing him harm. This seems to be a case where the story of an ongoing dispute has been warped by the decision to bring the dispute into court. Both brothers want to be called Mantitheus, and at least one of the two wants the other to stop calling himself Mantitheus, but Athenian law lacked any injunction-process and so the speaker in the case has had to use some other action to bring his dispute before the court. Once before the court, he seems to need to demonstrate some actual damage which he has suffered as a result of his brother’s insistence on being called Mantitheus. The speaker uses a mixture of personal justice and polis good arguments to support his claim that the law should be considered to cover his situation. It is worth noting that many of the hypothetical harms he claims he will suffer if his brother is allowed to go on calling

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73 This is generally assumed on the basis that his brother seems to have continued to call himself Mantitheus – IG II² 1622. Since Athenian law lacked an injunction process, it is not impossible that our speaker might have won his case, but his brother might nonetheless have gone on calling himself Mantitheus. The inscription showing both men using the name Mantitheus cannot securely evidence that both men had by this time agreed about the use of the name - it may be that they ran out of remedies for their dispute. This speech is subject to an in-depth study by Harris (2013 p. 223-226), who cites it as an example of a litigant taking a novel approach to interpretation of law and this being rejected. Aside from my hesitation on how certain we can be that Mantitheus lost his case, we cannot know for certain why any Athenian jury made its decisions, so Harris’ claim that the case was lost because of the novel approach taken by Mantitheus to the law must be treated with caution.

74 Carey and Reid (1985) p. 166. MacDowell (1978) p. 60-1 suggests instead that the case may have been brought under a supposed law on the naming of children alluded to at 39.39. Carey and Reid (1985) p. 193 accept this as a law, though it is possible this is an instance where nomos might be better translated 'custom'.

75 See Johnstone (1999). Wohl (2010) pp. 158 ff. adopts a reading of the speech whereby the argument between the brothers centres on the symbol of the name, with the right of the father to name his sons a product of the law, and Boeotus’ challenge to that also a challenge to the laws of Athens. Wohl’s analysis probably goes too far, not least because, as in the anecdote related by Plutarch (De Garrulitate 5) the jurors hear the speech only once.

76 39.13 – he is unable to give instances of actual damage suffered and depends mostly on hypotheticals.

77 39.13-18, where Mantitheus argues that he is at risk of being blamed for Boeotus’s misdeeds.

78 39.7-12.

79 including at 39.20 a simple assertion that it is ou dikaion for him to be robbed of his own name; at 39.29 a claim that it is just that he should bear the name Mantitheus since his father gave it to him before he ever acknowledged paternity of Boeotus; and at 39.41 a final plea that the jurors should decide for Mantitheus as they would decide for their own children.
himself Mantitheus have an impact on polis institutions.\textsuperscript{80} He appears to judge that his attempt to escalate the hypothetical harm he is likely to suffer if his brother continues to call himself Mantitheus into a harm which merits intervention by jurors requires him to allege that the harm is of a public nature.

\subsection*{2.3.1.7 Hyperides’ Against Athenogenes}

Hyperides’ \textit{Against Athenogenes} is a case in which the prosecution appears to have had a very weak case under Athens’ laws.\textsuperscript{81} The speaker has entered into a financially disadvantageous contract and has brought what is likely to have been a \textit{dikē blabēs}\textsuperscript{82} to ask the other party to the contract to make good his costs.\textsuperscript{83} The speaker claims that Athenogenes tricked him into entering into the contract and that, for a range of reasons, the contract should not be valid.

The speaker never cites the law under which he has brought the case, but instead constructs an argument to the effect that only agreements which are just should be upheld by the courts. This argument is based on three laws, one forbidding lying in the agora, another requiring sellers to disclose disabilities when selling slaves, and a third forbidding certain debts being excluded from the courts.

\begin{itemize}
  \item \textsuperscript{80} Boeotus’s expected misdeeds: Public: 39.14 – sykophancy; 39.15 – enrolment on list of state debtors; 39.15 failure to pay eisphora; 39.16 astrateia; 39.19 usurping citizen rights. Private: 39.15 dikē exoules; 39.18 pseudomarturion. Both of these ‘private’ misdeeds have a somewhat public nature, since they relate to failure to respect the courts.
  \item \textsuperscript{81} Phillips (2009) looks at the potential variants of the Athenian law on contracts and determines that ‘unlawful and unjust contracts were not voided by the letter of the law’ (p. 97).
  \item \textsuperscript{82} Whitehead (2000) p. 268.
  \item \textsuperscript{83} It is worth noting that, if this is a \textit{dikē blabēs}, the jury does not have the power to decide that the contract should not be upheld, but only to award or fail to award damages. In principle, if the jurors were free to decide their conclusion based solely on their perceptions of justice, they could have decided to award damages to the speaker to cover his losses from the contract, even if the contract had been fully valid under the laws. This is not, however, an argument the speaker attempts to make. Thür (2013) argues that if the speaker were to be awarded the 40 mina price of the perfume shop, the ownership of the shop – and so of the debts – would revert to Athenogenes. He bases this argument on Pringsheim’s (1950) model of ownership which is entirely conditional on payment for goods: ‘the owner is who spent the money for the goods’. Thür does not explain why he considers this to have been the case, or address the argument (which the speaker in Hyperides \textit{Against Athenogenes} does broach) that the liability for the debt is not a part of the transferred property but was taken on as a result of the agreement entered into by the speaker. The attempts to show that the contract should not be considered to be valid in Athenian law would make more sense if they formed part of a defence speech by our speaker against one of his creditors, but this is not the situation here. In effect, the claims that the agreement should not be valid are a defence against Athenogenes’ own presumed defence of \textit{caveat emptor}.
\end{itemize}
and the third specifying that only betrothals made according to the laws can result
in legitimate offspring.\textsuperscript{84} No penalty is specified for telling lies in the agora, but the
law on disclosing slaves’ disabilities apparently allows the buyer to return the slave
to the buyer and presumably get his money back. Though the speaker attempts to
paint the slaves’ debts as analogous to a disability, he undermines this analogy by
claiming that the debts could not have been carried by the slaves to their new
owner as, according to a law of Solon, slaves’ masters were liable for slaves’ debts
at the time they arose.\textsuperscript{85} In this way the speaker tries to argue both that the slaves
carried debts as disabilities, and that those same slaves could never have carried
the debts at all, since debts belong to a slave’s master. The speaker’s larger point,
however, is not that the slaves carried the debts as a disability, but that there exists
a general principle in Athenian law that unjust agreements should not be valid.
Similarly, no penalty is specified for failing to comply with the law on betrothals.
Though such penalties existed, they are not useful to the speaker’s case, since what
he wishes to argue is that these marriages are not legally valid.\textsuperscript{86} The next law he
cites is the law on wills that specifies that wills made by those affected by ‘old age,
ilness or insanity’ and wills made under the influence of a woman or as a result of
coercion shall not be valid.\textsuperscript{87} Again, the speaker attempts to create an analogy with
his own situation, since he claims he only entered into the contract on the advice
of a woman whom he later learned was conspiring with Athenogenes.

In his treatment of the laws on lying in the agora, selling disabled slaves, betrothals
and the validity of wills the speaker seems to assume that jurors will accept it as
legitimate that there should be underlying legal principles which can be applied
across different laws.\textsuperscript{88} These legal principles the speaker tries to ground in an
argument that any and all agreements made must be fair if they are to be valid,
which argument must be presumed to be a rebuttal of Athenogenes’ claim of cavea
emptor. Athenogenes relies in this speech on arguments from personal justice and makes no use of arguments on the good of the polis.

2.3.2 Public suits

2.3.2.1 Antiphon’s On the Murder of Herodes

Antiphon’s *On the Murder of Herodes* is an *apagogē* against *kakourgoi* brought against a non-Athenian for killing an Athenian citizen while outside of Athens. The defendant argues against his opponent’s use of the law, claiming that the prosecution should have been brought as a *dikē phonou* and not as an *apagōgē*.\(^8^9\) The prosecutor appears to be arguing for a broad interpretation of the law that treats any act which can be considered the act of a *kakourgos* as within the scope of the *apagogē* law. The defendant argues for a narrow interpretation of the law and asks the jurors to interpret it as covering only *kleptai* and *lōpodutai*.\(^9^0\) He complains that he is the only person ever indicted by *apagōgē* for homicide, and argues that using this law to prosecute someone for homicide is illegitimate for multiple reasons.

First, he claims it is irrational, since as a person under suspicion of homicide he should be barred from the very place where his trial is taking place.\(^9^1\) Second, he claims that the failure to use the *dikē phonou* has robbed the dead man of his justice, since the prosecutors are apparently seeking financial damages.\(^9^2\) Third, he complains that the failure to swear the *antōmosia* risks wrongs to both the defendant and the dead man, since the narrower rules of relevance applied in homicide cases mean both that the defendant will be tried only on charges of the death, and that the defendant will not have recourse to the kind of mitigation arguments commonly seen in the popular courts.\(^9^3\) Finally, the defendant asserts

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\(^8^9\) Antiph. 5.9.
\(^9^0\) Antiph. 5.9.
\(^9^1\) Antiph. 5.10-11.
\(^9^2\) Antiph. 5.10.
\(^9^3\) Antiph. 5.11.
that the prosecutor is setting himself up as a law-giver by arguing for a more expansive interpretation of the *apagōgē* law.\(^{94}\)

This case is highly dependent on arguments of personal justice, though that justice is shared between the speaker and the deceased. The only hint of ‘good of the *polis*’ arguments is the suggestion of an allegation that the prosecutor has acted in a dangerously hubristic fashion, both by pushing for an unusually wide interpretation of the law on *apagōgē*, and by unilaterally executing the slave who incriminated the defendant.\(^{95}\) It is possible that, as a non-citizen with no share in the *polis*, jurors might not have accepted the speaker arguing on the basis of the good of the *polis*.

### 2.3.2.2 Isocrates’ Against Lochites

Isocrates’ *Against Lochites* makes the strongest argument of all the cases in this sample for interpreting the law in line with the good of the *polis*. The problem for the speaker seems to have been to convince the jurors that Lochites’ assault on him merited a severe penalty, which is in itself an argument of legal interpretation, since he is apparently arguing for it to be punished as an act of *hubris* and not as *aikeia*, the charge actually brought. He does this by arguing that people who assault their fellow citizens pose a serious danger to the democracy. At 20.4 the speaker seems to argue for preventative punishment, and this is made more explicit at 20.12-13: ‘you should punish potential criminals with greater severity than those who have already committed wrongs, in so far as it is better to find how to avert future evils than to exact the penalty for past misdeeds.’ At 20.10, the speaker claims that men who commit *hubris* are the same men who will seek to overthrow the democracy, and at 20.17 he identifies the good of the jurors with the good of the *polis* by claiming that by punishing Lochites they will deter other assaults, and thus protect themselves since all citizens are equally affected by the threat of physical assault. These arguments, in particular the claim for preventative

\(^{94}\) Antiph. 5.12.

\(^{95}\) Antiph. 5.35, 47.
punishment, contrast sharply with justice since they argue for punishment without any wrong or harm having been committed. Success in the speech depends on jurors being willing to set aside any claim to justice for Lochites and instead treating him as a symptom of a societal malaise.

2.3.2.3 Lysias’ Against Agoratus

In Lysias’ Against Agoratus the speaker has several challenging legal problems to overcome. The case concerns a man who, under the Thirty, is alleged to have been an informant and so to have caused the deaths of several citizens. In around 399 an apagōgē⁹⁶ was brought against him for one of these deaths. Agoratus apparently argued that he should not be held liable for the deaths since he acted unwillingly. This personal justice argument is countered by the speaker on the grounds of the good of the polis: ‘But in my view, gentlemen of the jury, when a man has done you such unsurpassable evil— even if it is totally against his will— you still have a duty to defend yourselves on this account.’⁹⁷

At 13.86 we are told that the Eleven insisted on the addition of the words ep’ autophoroi into the original apagōgē. It appears that Agoratus is relying on these words for some of his legal argument, and is presumably claiming that since the prosecution are alleging he was an informant they cannot consider him to have killed ep’ autophoroi. In response, the speaker argues for an extremely wide interpretation of the phrase ep’ autophoroi.⁹⁸ He claims that since Agoratus was witnessed by 500 people denouncing the victims, he must have been caught ep’ autophoroi. The argument here is somewhat unclear, but he seems to support his proposed interpretation on the claim that someone needs to be held liable for the

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⁹⁸ Harris (2006b) pp. 373-90 analyses the phrase ep’ autophoroi and concludes that it should be understood not as ‘in the act’ but as ‘clearly, manifestly’. He bases his analysis on the idea of thieves being caught in possession of stolen goods, and does not identify the significance of this translation for questions of homicide. In cases of theft the distinction between being caught stealing the goods and being caught in possession of stolen goods can be so fine as to be almost non-existent, but this is not the case for homicide. As such, the translation of ep’ autophoroi as ‘in the act’ should probably be retained.
deaths of the men on whom Agoratus informed, and if Agoratus cannot be held liable then no one can. This seems to be based on a principle of personal justice in relation to the justice owed to the dead men.\textsuperscript{99}

A further obstacle to the speaker’s case lies in the Amnesty, which simply understood ought to protect Agoratus from his acts under the regime of the Thirty. The speaker tries for a subtle interpretation of the Amnesty as a contract between the men of the City and the men of the Piraeus.\textsuperscript{100} Since both the speaker and Agoratus were, by the time of the Amnesty, men of the Piraeus, the speaker claims the Amnesty does not cover disputes arising between them. The speaker does not argue in detail for this interpretation of the Amnesty, but simply states it as a fact. This, then, is an interpretation grounded in the coherence of Athens’ legal system.\textsuperscript{101}

\subsection*{2.3.2.4 Andocides’ On the Mysteries}

Andocides’ \textit{On the Mysteries} is Andocides’ successful defence against a charge of impiety. The speech makes unusually substantial use of legal argument. Andocides was accused of entering sacred spaces in breach of Isotimides’ decree of 415BC banning anyone who had confessed to committing impiety from entering such spaces. Andocides had been closely bound up with the scandals of the profanation of the Mysteries and the mutilation of the Herms and had denounced others and possibly himself for participation in these offences,\textsuperscript{102} and so was vulnerable to prosecution under this decree. In the intervening years between the decree of Isotimides and \textit{On the Mysteries}, which was tried in 399BC, Athens had seen two major upheavals in its government and had made significant changes to its laws. On this basis Andocides was able to make a highly complex and legalistic argument...
which claimed that because of the intervening events the decree of Isotimides was no longer valid (akuron) as well as presenting a case that it was not in Athenians’ interests to seek to uphold the decree.

His argument begins with a long explanation (1.10-71) of the events of 415 by which he tries to persuade jurors that he was never liable under the decree of Isotimides to begin with, since he did not admit to having committed any act of impiety. He then, very explicitly, explains that he wishes to address the legal question of the validity of the decree of Isotimides (1.70). The first line of argument Andocides adopts is to claim that the decree of Patrocleides,\(^\text{103}\) which gave back the privileges which had been stripped from atimoi (1.73), had removed any disability he might have been under as a result of the decree of Isotimides. Andocides offers examples of different forms of atimia which were cancelled by the decree of Patrocleides, but atimia for asebeia is not included in his list.\(^\text{104}\) Andocides does not present any argument to the effect that atimia for asebeia should be considered to have been cancelled by the decree of Patrocleides, but instead moves on to the upheavals caused by the rule of the Thirty and the subsequent Amnesty. It seems this argument may be being used in the same way as precedents were used in Against Meidias, to construct an argument that cases somewhat like Andocides’ have been treated in this way, so this is how Athenians think cases of this kind should be decided. Though this is not strictly a precedent, it does appear to be an argument on the grounds of justice as consistency. More importantly, it is the first step towards Andocides arguing that Athenians of the recent past wished all previous offences to be forgiven and forgotten.

Andocides next line of argument is to claim that in the immediate aftermath of the Thirty it was decided that there should be a total revision of the laws of Athens and

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\(^\text{103}\) passed in 405.

\(^\text{104}\) The speech at 1.77-79 purports to present the text of the decree of Patrocleides, which shows different categories of people affected by atimia, but Canevaro and Harris (2012) conclude that the Decree of Patrocleides as presented cannot have been a fifth-century decree and must be considered to be a later forgery. MacDowell (1962) p. 201 notes that if atimia for asebeia or atimia affecting access to temples had been mentioned one would expect Andocides to have highlighted the fact.
the results should be inscribed in the *stoa basileios*. Moreover, a law was made that no archon should use any unwritten law. At 1.86 Andocides claims ‘then if it is illegal to enforce a law which has not been inscribed, there can surely be no question of enforcing a decree which has not been inscribed’. It is not at all clear that this should in fact be the case. While certain decrees were reaffirmed by the post-405 democracy, these appear to have been ones which the Thirty had tried to destroy. These reaffirmed decrees were not passed by the complex process described by Andocides for the establishment of any law other than the laws of Solon and Draco, but were instead approved by the *boulê* acting on its own. Andocides, however, hopes that this measure will be interpreted on this occasion as instructing that all uninscribed decrees should be disregarded, thus nullifying the decree of Isotimides. This appears to be an argument based on a slightly sophistic version of justice as consistency.

To complete his argument, Andocides refers to the law which, as he gives it, provides that only laws made after the archonship of Euclides, that is, after the restoration of the democracy, shall be used. This provision, as given by Andocides, mentions decisions in *dikai* and achieved through arbitration and affirms them as valid, but does not mention *psēphismata*. Andocides argues:

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105 The nature of this revision is discussed in detail in Chapter 5.3.
106 It is unclear whether the law requiring that magistrates should only use inscribed laws (presented in Andocides as meaning laws inscribed as part of the process of legal reform) would have been considered to be universally applicable to decrees. The evidence from the reinscription of honorific decrees suggests that they, at least, continued to be valid. The decree of Isotimides is a much more complex question, since it invokes *asebeia*, which we know was an offence under Athens’ laws through the fourth century, and seems to have been intended to close a loophole which allowed entry to temples for those who had admitted *asebeia* but had been granted *adeia*, such that under the decree of Isotimides they would be vulnerable to conviction for *asebeia* if they did enter the temple, despite being under no formal legal disability. As such, the decree could be considered to be one which in the fourth century should have been a *nomos* and so should have been inscribed. Equally, it is not clear exactly which *nomoi* the inscription requirement applied to, whether it meant that only laws which had been inscribed as part of the process of revision of laws could be used, or whether it was simply a prohibition on the use of unwritten laws more generally, but which allowed continued use of laws which were inscribed prior to the process of revising the laws.
107 1.82. See discussion in chapters 1.2 and 5.3.
108 The veracity of the documents in *On the Mysteries* have been doubted – Canevaro and Harris (2012), but Andocides at 1.88 offers his own gloss on the contents of the laws he has had read out, in which says that decisions in private suits and decisions of arbitrators have been upheld, but that for public suits only laws passed since the archonship of Euclides could be used. If the law had referred to *psēphismata* we would expect Andocides to have referred explicitly to that.
Now you decided that the laws were to be revised and afterwards inscribed: that in no circumstances were magistrates to enforce a law which had not been inscribed: that no decree, whether of the Council or the Assembly, was to override a law: that no law might be directed against an individual without applying to all citizens alike: and that only such laws as had been passed since the archonship of Eucleides were to be enforced. In view of this, can any decree passed before the archonship of Eucleides, whatever its importance or unimportance, still remain in force?\(^{109}\)

Essentially, Andocides is claiming that since nomoi outrank psēphismata, if nomoi from before the archonship of Eucleides are no longer to be used, then it stands to reason that psēphismata should also no longer be used. As we have seen in the case of honorific inscriptions, the case is not as clear as Andocides would like to make out.\(^{110}\) As such, the interpretation of the laws which Andocides wishes the jurors to adopt is not straightforward. He offers no reason for his preferred reading beside a claim that the purpose of the changes to the laws was to ensure that no one could prosecute out of malice any longer (1.86), but the argument seems to lean towards interpreting laws in line with justice as consistency.

Next Andocides turns to the oath which the Athenians swore as part of the reconciliation after the fall of the Thirty by which they promised mē mnēsikakein, not to remember evil.\(^{111}\) Andocides tries to extend this promise, which is likely to have been intended only to cover events during the rule of the Thirty, to any and all events falling before the reconciliation. Not only is this legalistically tricky, since

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\(^{109}\) Andoc. 1.89.

\(^{110}\) Hansen (1990) identifies this as the Law of Diocles cited in Dem. 24.42 'laws enacted under democratic government before the archonship of Eucleides and all laws that were enacted during the archonship of Eucleides and are on record shall be in force'. Carawan (2002), on the other hand, treats it as a sort of statute of limitations which affected both the validity of laws and the capacity of Athenians to prosecute for wrongful acts committed prior to Eucleides' archonship. MacDowell (1962) regards it solely as a statute of limitations. The law seems to relate better to the validity of the laws themselves than to their applicability. Not only is it not cited in Isoc. 18 (which concerns an alleged offence committed prior to the restoration of the democracy), the use Andocides tries to make of it would make no sense at all if it was not understood by the jurors to govern the validity of the laws.

\(^{111}\) The Amnesty is discussed in detail in chapter 1.2.
his alleged offence (entering sacred territory when forbidden by decree) occurred after the reconciliation, the decree against which he is fighting is unlikely to have been covered by the Amnesty. As above, this is probably best read as an attempt to reinforce the principle that Athenians have decided to forget all past offences.

Andocides makes an attempt to show that laws which predate the archonship are no longer valid by using the law against tyranny. Andocides uses the inconsistency between this law, which permits any Athenian to kill with impunity any person who holds public office after the Athenian democracy has been suppressed, and the terms of the Amnesty, which allowed those who had served public office to undergo euthynai to be granted forgiveness, to claim that the law was no longer valid, and that its invalidity was because it pre-dated the archonship of Euclidean (1.99). It seems unlikely that this argument would have stood up to close scrutiny. The decree of Teisamenus determined that Athens should use the laws of Solon. The law against tyranny appears to have been considered to be a law of Solon, and according to the preamble to the law against tyranny quoted by Andocides it may have come out of the process of drawing up of the laws by sungrapheis, further suggesting that it was considered to be one of the laws of Solon. As such, it seems likely that this law would have retained its validity.

At 1.103 Andocides does, finally, admit that the law under which the prosecution brought their endeixis against him is a valid law, but he claims that they based their prosecution on an ‘old decree which was about other things.’ Rather than defending this claim on legal grounds, Andocides instead dwells on the chaos that would be unleashed on Athens if it were to renege on the promises it had made to create the Amnesty, restore exiles, and give back citizens their rights. It is not, however, clear that Andocides’ case should fall into any of those categories. He was

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112 See Chapter 5.3 on the processes of reform and republication of Athens’ laws which began after the fall of the Four Hundred, were interrupted by the Thirty, and continued following the restoration of the democracy.
113 The validity of the decree of Demophantus has been doubted by Canevaro and Harris (2014) but defended by Sommerstein (2014), who nonetheless doubts its original inclusion in Andocides’ speech.
not barred from sacred spaces as a result of acts done under the Thirty, nor as a part of a formal exile, nor did he formally lose his citizen rights. 114 This argument is entirely based on interpreting laws in the interests of the good of the polis.

Andocides made an argument that his novel interpretations of the laws should be adopted by the jurors. He bases these interpretations on a combination of justice as consistency with other laws and previous decisions and polis good. He successfully establishes a claim that for the good of the polis the Athenians decided to forget past wrongs, produces what he claims are multiple examples of this, and argues that his case should be decided in consistency with these previous examples. We know him to have won his case, though as always cannot know whether the jurors favoured his interpretation of the laws, or rejected them but nonetheless accepted his argument that reopening old wrongs risked harm to Athens, or simply pitied Andocides.

2.3.2.5 Lysias’ For the Soldier

The point of law at issue in Lysias’ For the Soldier is under what circumstances it is an offence to insult a magistrate. The speaker claims that the law only treats insulting a magistrate as an offence if that insult took place in certain public spaces. He argues that since he was not in one of the designated spaces at the time he insulted the magistrate he should not be convicted. 115 He does not argue in detail for this interpretation, instead presenting it as a common sense reading of the law. He does, however, state that when the magistrates he had insulted attempted to register the fine they had imposed upon him with the tamiai, the tamiai refused. 116 The reason given for this refusal was not, apparently, that the fine was unlawful, but because the tamiai did not think it right that any citizen should be registered as a public debtor out of personal enmity. This enmity could be a reference to the decision to fine the speaker, but it could equally be a reference to the initial

114 MacDowell (1962) p. 203 concludes that ‘in strict law, the decree of Isotimides was still valid in 400’ and accordingly we must assume that when Andocides entered the sacred space he committed an offence.
115 Lys. 9.6.
116 Lys. 9.6-9.
enrolment as a soldier, which the speaker felt was unjust (9.4-5, 15) and which prompted him to insult the magistrate responsible. Todd suggests that the law on insulting magistrates may not be as simple as the speaker would have us believe, and that in fact two separate laws might be being conflated; one forbidding insulting any person in certain spaces, and another forbidding insulting magistrates anywhere. Nonetheless, since the speaker does not argue for his interpretation of the law it is not possible to get any understanding of the principles on which he might base such an argument.

2.3.2.6 Lysias’ Against the Graindealers

Lysias’ *Against the Graindealers* is a prosecution against a group of metics for buying up more grain than the amount permitted under the laws of Athens. The speaker presents himself as meticulously concerned for the sanctity of Athens’ laws, claiming at 22.2 that he has only brought the case at all to prevent the graindealers from being executed without trial, as the boulē wished to see, in order to prevent the boulē getting into the habit of such practice, then at 22.4 explaining that he did this not to protect the graindealers but ‘in support of the established laws’. At 22.5 the speaker gives an indication of why it is so important to his case that he present himself as the defender of the laws: the graindealers had been ordered to buy up excess grain by the magistrates.

The question of exactly what is meant by *sumpriaasthai*, translated here as ‘buy up’, is subject to debate. Seager identified an ambiguity in the meaning of this key word in the law, which could mean either ‘buy to accumulate’ or which could carry a meaning associated with group buying. He claimed that the law must have been intended to prevent hoarding behaviour - that is, buying to accumulate - the speaker in the case takes advantage of the ambiguity in the meaning of *sumpriaasthai*. Harris (2013) p. 222-3 does not appear to take note of Todd’s suggestion, and claims this as an instance in which a conventional interpretation of law was favoured over an innovative interpretation. It should be noted that when the speaker explains why the Treasurers agreed with his claim that he should not be fined, he justifies this in a claim that the Treasurers did not think citizens should be mistreated by the generals (i.e. a claim based in justice), not that this was the only interpretation open to the Treasurers.
sumpriasthai to have the graindealers’ confession to having bought grain together blur into a confession to having bought grain in order to hoard it.\textsuperscript{118}

Seager’s interpretation of the case was challenged by Tuplin, who argued first that if there had been a dangerous ambiguity in the word sumpriasthai, the graindealer interrogated at 22.5 would have been more careful to explain himself clearly, and secondly that the speaker’s arguments centre around convicting the graindealers of hoarding, and not of combining together.\textsuperscript{119} Seager agreed to Tuplin’s objections, but neither stands up well to scrutiny. The first objection assumes that what we see at 22.5 is a literal transcription of the words of the graindealers. This cannot be securely established with the information we have about the process of publication of forensic speeches, so cannot be relied upon as a basis for argument. The second is more subjective, but Figueira has argued that the speech actually places very little emphasis on hoarding.\textsuperscript{120} Figueira’s reading of the case argues that the law in question is not in fact a law against hoarding, but rather a law against cartelisation. He claims that a limit on grain buying of 50 phormai would mean that Athens would have had to have had absurd numbers of graindealers, and that the mechanics of Athens’ grain trade suggest that the business of storing grain must have been left to the graindealers and not to the emporoi.

Both Figueira and Seager proceed on the assumption that there must have been a single correct interpretation of the law, and they base their attempts to construct the correct interpretation on the presumed intent behind the law. This neglects the fact that there were no rules in Athens on legal interpretation, and while constructing the intent of the lawgiver was a popular method, it was not the only method available to jurors and litigants. Rather than trying to construct for ourselves a single ‘correct’ interpretation of the law, it may be better to address the law simply as presented to us here. There is definitely a level of ambiguity in the

\textsuperscript{118} Seager (1966).
\textsuperscript{119} Tuplin (1986).
\textsuperscript{120} Figueira (1986).
meaning of the word *sumpriasthai*\(^{121}\) and we must assume that this ambiguity would have been an issue for jurors hearing the speech.

As is apparent from the disagreement between modern scholars on how to read this case, the speech itself retains the ambiguity of the word. At times the graindealers do seem to be being accused of hoarding,\(^{122}\) but other sections of the speech only really make sense if the accusation is of cartelisation.\(^{123}\) The question then becomes what advantage there is for the speaker in retaining this ambiguity. It seems likely that the graindealers had formed some kind of cartel on the orders of Anytus as an attempt to artificially reduce grain prices, so it is possible that though the law might be understood by the jurors as against cartelisation, the orders of Anytus had made it questionable whether or not the graindealers had broken the law, so the speaker added in an accusation of hoarding, not because it was against the law, but because it was viewed with hostility so might persuade the jurors that what the graindealers had done was wrong. Equally, it might be that the law was likely to be understood to be against hoarding, but this is not what the dealers had done, so the speaker needed to utilise the ambiguity in *sumpriasthai* to take advantage of the fact that the word also connoted cartelising, which the graindealers had done.\(^{124}\)

As well as the ambiguities in the law, we see in this case a conflict between common sense ideas of fairness, where graindealers might expect that if they were ordered to do a thing by the magistrates they would not later be prosecuted for doing so, and a pedantic insistence on the importance of the letter of the law. At 22.6 the speaker makes it clear that he favours the letter of the law: 'If he can demonstrate, gentlemen of the jury, that there is a law that orders grain retailers to buy grain together if the officials order this, then you should acquit him. If not, it is right that

\(^{121}\) see Figueira (1986) p. 153-55 for a useful summary of instances and contexts of the word in contemporary texts.

\(^{122}\) 22.9, 15.

\(^{123}\) 22.8, 17, 21.

\(^{124}\) This, minus the assumption that there is a single correct interpretation of the law, is Seager's (1966) argument, but as discussed above, neither of the objections made by Tuplin stand up well, so Seager's reading of the case is still of value.
you should convict. We have presented you the law forbidding any of the inhabitants of the city to buy together more than fifty *phormoi* of grain.\footnote{Trans. Todd (2000a)} Nonetheless, the speaker does attempt to refute the claim that the graindealers were validly ordered by the magistrates to buy up excess grain, bringing one of the former magistrates forward to testify that he ordered them to cease competing with one another, but not to buy up grain and hold it in store.\footnote{22.9 trans. Todd (2000a). A wholly rhetorical argument, since the jurors have no means by which to convict the magistrates of anything at this point and would need either to raise it at their *euthunai* (if they have not yet been scrutinised) or wait for some volunteer prosecutor to bring a case against the magistrates.} This brings most sharply into play the question of exactly what behaviour the law should be interpreted as forbidding, but the speech preserves the ambiguity in the law and the speaker moves on to demand that if the jury do believe the graindealers that they were ordered to buy up grain by the magistrates then the jury should convict both the graindealers and the magistrates: ‘In situations where the laws are explicitly written, it is surely necessary to punish both those who disobey and those who tell them to do the opposite of what the law says.’\footnote{22.10 trans. Todd (2000a)}

Unusually for a case where a highly legalistic interpretation of the law is used, the speaker does not offer any justification for this interpretation. His strategy seems to be to depend on the mistrust and dislike of the jurors for graindealers, and to hope that because of this mistrust, when the graindealers admit that they committed the acts in question but claim that they were neither illegal (based on the orders of the magistrates, and possibly the law itself, if it were to be interpreted as forbidding hoarding) nor wrongful (22.11 ‘it was in kindness to the city that they bought up the grain’) the jurors will reject one or both of those justifications and convict them.

The clash of authority between the laws and the orders of the magistrate makes arguments on fairness difficult for the speaker to sustain. Instead, he relies on arguments on the interests of the *polis*, which he construes as upholding the...
laws. It appears he expects that the graindealers themselves will also rely on arguments on the good of the *polis*, probably in order to show that their actions were in accordance with the instructions of the magistrate. This he counters with a long argument to the effect that the graindealers did not act in the interests of the *polis*. He follows this up with an explicit call to protect the interests of the *polis* by using the case to set an example to other graindealers: “So they will find out your attitude toward these cases, in the belief that if you condemn the defendants to death, the other grain retailers will be better behaved”.

2.3.2.7 Demosthenes’ Against Androtion

*Against Androtion* is a prosecution speech for a *graphē paranomōn* brought against the proposer of a decree honouring the members of the *boulē* for their service. There are several points of law raised in Demosthenes’ speech. First, there seems to have been a clash of laws, with one law requiring a preliminary decree from the Council before the Assembly could pass any decree, but another law stating simply that ‘if the Council by its performance of its duties seems to deserve a reward, that reward shall be presented by the people’. Androtion is said by Demosthenes to have argued on the grounds of justice as consistency that many previous Councils had been honoured by the Assembly without any need for a preliminary decree. Demosthenes, on the other hand, relies on a strict interpretation of the law, and argues that the fact of other people having acted contrary to the law only shows that a prosecution like this one should have been brought long before. He alludes to the possibility of deterrence, and this seems to be an argument based mainly on the good of the *polis*.

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128 Lys. 22.6.
129 Lys. 22.11-12.
130 Lys. 22.12-16.
131 Lys. 22.20 trans. Todd (2000a)
132 Dem. 22.5.
133 Dem. 22.6.
134 Dem. 22.6-7.
Demosthenes next cites another law, which forbids any Council which has not built warships from asking for honours. Demosthenes claims that Androtion will argue that the Council have not asked for honours and so cannot be said to have breached this law (22.8). Demosthenes counters that the Council must in practice have asked for the honours since they had to propose the vote to the Assembly (22.9) and additionally that when the grant of honours was queried and members of the Council asked for the honours not to be revoked they must be considered to have been asking for the honours at that point (22.10). This issue of whether the Council did or did not ask for honours is treated here by Demosthenes as a question of fact, but it seems likely that in his opponent’s speech it would have been treated as a question of legal interpretation: his opponent will presumably argue on the basis of justice as consistency with other decisions that other Councils have proposed such votes to the Assembly, and that the fulfilment of this political role should not be treated as ‘asking for honours’ for the purposes of this law.

Demosthenes does not rely solely on arguments that the Council asked for the honours, but tries to persuade the jurors to interpret the law based on its purpose. According to Demosthenes, the purpose of the law is to prevent the demos from being misled into granting honours to any Council which has not built warships, and as such the law should be read as banning both the requesting and the awarding of honours to such a Council (22.11). Demosthenes bases this interpretation of the law on arguments on the good of the polis, specifically the great benefit of possessing a large fleet. Demosthenes then tells the jurors that Androtion will try to argue on the basis of personal justice (though justice to the Council and not to himself) that it would be unfair to deprive the Council of honours because the failure to build warships was not their fault. Demosthenes counters this with a further good of the polis argument: it is not in the interests of the polis, he says, to reward failure.

135 Dem. 22.12-16.
136 Dem. 22.17-21.
There is a separate line of argument in this speech which concerns Androtion’s legal capacity to make proposals in the Assembly. He is accused by the prosecution team of having been a prostitute and so of having lost his right to speak in the Assembly. While Androtion apparently objected to the prosecution charging him with wrongs other than having proposed an unlawful decree, Demosthenes claims that these accusations are relevant. Androtion’s supposed objections to this and his complaint that prosecution should be done through the proper actions (22.21-4) are countered by Demosthenes’ arguments on Athens’ range of processes (22.25-30).

Demosthenes seeks to illustrate what he claims is a guiding principle of Athenian law; that a range of actions should be available to enable people with different levels of capacity to prosecute different actions. Not only is this argument dependent on an assumption that wrongs should be prosecuted, it does not work well for Demosthenes’ case, since even at the date of this case Demosthenes can hardly be said to have lacked the capacity to bring high-risk prosecutions against other public figures. Demosthenes backs this up in more arguments based on the good of the polis, arguing that Solon put the laws on prostitution in place not to punish those who engage in it, but in order to protect the polis from being harmed by men with bad characters. Here, Demosthenes explicitly promotes the interests of the polis over any claim for personal justice. Again at 22.35 Demosthenes places the good of the polis over justice for the boulē. He argues that it is better that the 500 men of the boulē should be deprived of their honour because of the bad actions of a few of them, in order that this should educate and improve the 10,000 citizens.

2.3.2.8 Demosthenes’ Against Aristocrates

Against Aristocrates is another graphē paranomōn speech, but the central point of law in the speech seems to have been suppressed. The prosecution is brought

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137 Dem. 22.21-30.
138 By no means an unproblematic assumption in Athenian law – see Chapter 4.
139 Dem. 22.30-32. For a detailed study of this argument as used in Aeschin. 1 see chapter 3.2.2.
against Aristocrates for having proposed an honorific decree for Charidemus, who had already been granted Athenian citizenship. Aristocrates’ decree declared that if any man killed Charidemus, he would be liable to arrest everywhere. Demosthenes argues that this decree is unlawful since it is in breach of Athens’ ancient laws on homicide. It seems likely that there is a clash of laws. While Demosthenes argues only on the basis of the laws on the dikē phonou, Carawan has argued convincingly that by the mid-fourth century the dikē phonou had effectively been replaced by the more flexible apagōgē process. If this is the case, Aristocrates’ decree might not have appeared controversial to a contemporary casual observer.

Rather than explicitly argue for his version of the law as an interpretation, Demosthenes presents it as the only version of the law available, and supports this primarily in Athens’ respect for ancient laws, as well as in the lawgiver’s supposed desire to prevent cycles of retribution. The circumstances and attitudes which prevailed at the time that Athens’ laws on the dikē phonou were made seem to have emphasised the maintenance of social order, rather than the punishment of the killer. By the fourth century, attitudes may have shifted to become more punitive, but Demosthenes is continuing to argue that these archaic laws are the only ones applicable to any potential violent death that might be suffered by Charidemus.

At 23.61 Demosthenes argues that because Aristocrates’ decree did not make allowances for Athens’ recognised defences to homicide law, it is ‘manifestly

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140 Dem. 23.29-36.
142 The dikē phonou seems to focus on removing the killer from the community as cleanly as possible, with most of Draco’s surviving homicide law focussing on processes of forgiveness and exile; the tighter rules of relevance applied in the dikē phonou (see Lanni (2006 pp.75-114). Rhodes (2004)) meant the Areopagites judging the case could not take into account the broad range of other exacerbating, or mitigating, information that might be taken into account by a dikastic court when judging the wrongfulness of a case, but that might also serve to fuel resentments between families. The dikē phonou builds in non-punishing through the rule that the accused could choose to go into exile before the final speeches were given. Antiph. 5 seems to show a family who are unwilling to make use of the dikē phonou for precisely these reasons – they have imprisoned the accused so he cannot exile himself and have brought their case before a dikastic jury.
contrary to law – I do not only mean written law but to the shared law of all mankind – that I should not be permitted to defend myself against one who violently seizes my goods as though I were an enemy.\(^{143}\) This claim is supported both by a supposed ‘universal law’, which should probably be interpreted as an argument based on justice, and by the threat that without this permission to defend one’s property one becomes vulnerable to hubris and to the damage hubris can do to the safety of the polis.

A further point of law raised in the case seems to have concerned the wrongful act which constituted the offence in the graphē paranomôn. Aristocrates apparently argued that the wrongful act should be interpreted to be the harm caused by a unlawful decree, and that since the decree he proposed was never enacted he should not be liable to any penalty. Demosthenes counters that the wrongful act is the speech-act of proposing the decree, and so Aristocrates became liable for an offence as soon as he made the proposal.\(^{144}\) Demosthenes supports his interpretation of the law with arguments on the good of the polis, claiming that punishing Aristocrates will serve to deter other people from making similarly unlawful proposals.

At 23.95 we are told that Aristocrates will try to argue that his decree follows a standard form and so, presumably, justice as consistency would require that jurors acquit him. Demosthenes counters with the same argument he uses in Dem. 22.5, that other people also having broken the law is no defence, and that this line of argument just shows more clearly the need for deterrence.

### 2.3.2.9 Aeschines’ Against Timarchus

The strategies of Aeschines in *Against Timarchus* will be discussed further in Chapter 3.2.2. The central legal point in dispute concerns the definition of

\(^{143}\) Trans. Loeb, adapted. It should be noted that in the *Rhetoric* 1375a-b Aristotle treats to sumpheron as an attribute of universal law. No trace of this interpretation of universal law is visible in its use in Dem. 23.

\(^{144}\) Dem. 23.92-94. The significance of these two interpretations is discussed in detail at 5.4.2.
prostitution for the purposes of the *dokimasia rhētōrōn*. Aeschines admits that some of Timarchus’ behaviour could be seen as *hētairēkenai*, but claims that since the behaviour was repeated across various relationships it should instead be treated as *peporneumenos*. Aeschines is portrayed by Aeschines as intending to argue for a narrow and highly legalistic definition of prostitution centred on a definition of prostitutes as those who paid the prostitute tax. Aeschines, on the other hand, argues for a wide definition which focuses on the behaviour of the alleged prostitute and is based in ordinary linguistic usage of the term. He supports his preferred interpretation on the basis that it is the acts themselves that the lawgiver objected to, since they were evidence of a character which was not fit to influence decision-making in the *polis*. As such, Aeschines’ interpretation focuses not on personal justice, as is especially evident from the fact that about half the laws he cites have the prostituted body as victim not perpetrator of an offence, but on the good of the *polis*. While it might be unjust to exclude a man from full citizen rights because of what had been done to him in boyhood, in Aeschines’ reading of the laws it is expedient.

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145 1.51-53. The legal relevance of this distinction is uncertain. Aeschines claims (1.32) to be prosecuting under the *dokimasia rhētōrōn*. Lane Fox (1994) has doubted this, but Fisher’s (2001 p. 158-9) arguments that this is the procedure used by Aeschines seem compelling. In Aeschines’ summary of the law on the *dokimasia rhetoron* 1.28-32 he states that it applies to ‘those who have lived shamefully’, and gives examples of this as those who have mistreated their parents, those who have failed to do military service, and anyone who has prostituted himself or served as an escort (‘having been an escort’ is Fisher’s preferred translation of *hētairēkenai*). Fisher p. 158 notes that Aeschines’ additions and comments make it hard here to work out which parts were and were not part of the law.

146 1.119.

147 This is implicit throughout the speech, but particularly at 1.124.

148 Again, this appears at multiple points in the speech, but most explicitly at 1.30.

149 Aeschin. 1.9-18.

150 While Aeschines won his case, we cannot assume that this is an instance where expediency was definitely allowed to outweigh justice, since Aeschines also makes it clear that Timarchus’ prostitution continued into adulthood.
2.3.2.10 Aeschines’ Against Ctesiphon and Demosthenes’ On the Crown

Aeschines’ Against Ctesiphon and Demosthenes’ On the Crown allow us to compare strategies of legal interpretation in a single case. While Aeschines’ speech contains a significant amount of detailed argument about legal interpretation, Demosthenes’ is almost exclusively focused on defending his own record. It is important to remember, however, that Demosthenes was only one of the sunēgoroi supporting Ctesiphon, and other speakers may have given more time to arguing Ctesiphon’s legal position.

Aeschines argues that Demosthenes’ crowning was unlawful since it was done before his euthynai. In response, Demosthenes claims that the act for which he was crowned was not one which was subject to euthynai. Aeschines bases his interpretation on the good of the polis, claiming that the ban on awarding crowns prior to euthynai enables the polis to uphold its laws more effectively by preventing the dēmos from being put in the difficult position of needing to condemn a person they had already crowned.

There is a further disputed point of law on the definition of an archē for the purpose of the law. Aeschines urges a broad interpretation of the term in line with other laws. He anticipates Demosthenes arguing for a narrow interpretation of this term which limits archē to the offices filled by election and by appointment by lot by the thesmothetai. Demosthenes does not argue this point in detail, but instead seeks to separate the act for which he was honoured (the donations) from the office he held, thus rendering his actions exempt from euthynai at any time.

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151 How far the speeches were revised prior to publication is addressed by Yunis (2001) p. 26-7, who considers that though both speeches would have received some revision, this was likely to be small details and that both speeches can be considered to be similar to the speeches delivered at the trial.

152 Harris (2013) p. 225ff, arguing that Aeschines had the weaker position in law, offers a summary of previous opinions that Aeschines had the stronger position. Stating that Demosthenes or Aeschines had a stronger position in law requires us to understand that there did exist a ‘correct’ interpretation of the laws at stake in this case. Given that Athens did not have any authoritative means by which to interpret laws, no such correct interpretation can be said to have existed.


154 Aeschin. 3.10-12.

155 Aeschin. 3.12-16.

156 Aeschin. 3.13.
Demosthenes justifies his interpretation on the basis of both personal justice (‘It would be quite intolerable that it should either not be permissible for a man holding any office to make gifts to the polis, or if, having given gifts, he should receive an audit instead of thanks’ 18.114-115) and justice as consistency with previous decisions. Aeschines rejects this argument on the basis that all Athenian officials, even those who handle no polis funds, are subject to euthynai at the end of their term. Aeschines bases this interpretation of the law as requiring Demosthenes’ donations to have been subject to euthynai in part on consistency with other laws, but also on the good of the polis, since he claims that the purpose of euthynai is to protect the functioning of the democracy.

Aeschines argues another point of law on the permissibility of proclaiming crowns in the theatre. He claims that Athenian law allows crowns to be proclaimed only in the boulē or the Assembly. It appears that the two opposing litigation teams have found contradictory laws. Whereas Aeschines presents a law which states that crowns awarded by the boulē should be presented in the boulē, and crowns awarded by the Assembly should be presented in the Assembly ‘and nowhere else’, Demosthenes presents a law which allows proclamation in the theatre of decrees made by the boulē or the Assembly.

Aeschines pre-emptively rejects the law presented by Demosthenes on the basis that Athenian law cannot have had two contradictory laws on the same subject. He evidences this by discussing the steps taken by the thesmothetai to maintain Athens’ laws. Aeschines argues that the second law should be interpreted in line

157 Dem. 18.112-118.
158 Aeschin. 3.17-22.
159 Aeschin. 3.9-11.
160 Aeschin. 3.32.
161 Aeschin. 3.32 – though it is tempting to believe that the phrase ‘and nowhere else’ is Aeschines’ own gloss on the law, his repeated use of the same phrase (3.34, 48) suggests it may be a quote from the law, especially since the first time he cites it is immediately before he has the law in question read to the jurors.
162 Dem. 18.121.
163 Although in principle Athenian law should not have had contradictory laws, since any newer law which contradicted an old one should not have been allowed (see chapter 5.4), it is worth noting that although Aeschines subtly implies that his law is the older of the two laws (his is attributed to
with the mischief principle, and that the mischief that law was intended to solve was the disturbance that was previously being caused to the theatre by too many people being crowned. He appears to claim that since the law in question was not explicitly intended to introduce proclamation of crowns granted by the boule or Assembly in the theatre, the clause in the law that would appear to allow this should not be read as a valid part of the law, and instead the only part of the law which remained should be read as standing on its own. In this round-about way, Aeschines construes the law as permitting proclamation in the theatre only to crowns awarded by foreign states. This complex interpretation of the laws is based in part on consistency with other Athenian laws, and in part on arguments based on the good of the polis, both since it is that good which Aeschines claims was intended to be protected by the law on proclaiming crowns in the theatre, and since Aeschines claims this law means that people receiving crowns in the theatre will be grateful to Athens for the proclamation, rather than being grateful to the foreign city for the crown. Demosthenes takes a more robust approach to legal interpretation. Rather than arguing in a lot of detail against Aeschines’ interpretation of the clash of laws, Demosthenes accuses Aeschines of being a sykophant about the issue, and claims that the proclamation of crowns in the theatre is both commonplace (justice as consistency with previous decisions) and beneficial for the polis as a whole, since it will encourage other citizens to emulate excellent behaviour.

\( \text{ho nomothetēs}, 3.33 \) while the law cited by Demosthenes is attributed to \( tis \) nomothetēs \( 3.44 \) he does not rely on this for his argument, but instead makes a complicated and ultimately unsatisfying argument based on the mischief principle of interpretation. In effect, rather than arguing that the newer law is unlawful in its entirety, he treats it as a valid law, but in order for it to be valid he is forced to adopt an extremely strained reading of the law.

\( \text{Aeschin. 3.45 ‘So when [the lawgiver] stipulates announcement in the bouleuterion for those who are crowned by the boule, and in the Assembly for those crowned by the demos, and when he forbids announcement at the tragedies for those crowned by the demes and tribes, in order that no one, by gaining crowns and proclamations, should acquire philotimia falsely, and additionally in the law he bans proclamations from any other source, then without boule or demos or tribe or deme, when these things are taken away, what is left but foreign crowns?’}. \)

\( \text{On sykophancy, see Chapter 4.3.1.3.} \)

\( \text{Dem. i8.120-21.} \)
In these paired speeches, we see both sides using arguments based on both the good of the *polis* and justice as consistency or as personal justice to support their preferred interpretation of the law, demonstrating both the flexibility of these arguments and the fact that they are equally useable in defence and prosecution speeches. These are clearly powerful arguments for guiding jurors’ interpretation of the law, and arguments which both sides want to be able to use to support their own proposed interpretation.

### 2.3.2.11 Lycurgus’ Against Leocrates

In this speech, Lycurgus prosecutes Leocrates for having fled Athens during a time of crisis. The speech is explored in more detail in Chapter 3. The interpretative task the jurors are called upon to complete is extremely broad: as Lycurgus himself admits, there is no one law which clearly covers Leocrates’ act, and instead the jurors are called upon to act as *nomothetai*.¹⁶⁷

Lycurgus’ rhetorical strategy is dependent on arguments about the good of the *polis*. Though he makes some use of previous cases, he does this not to encourage the jurors to make fair decisions which are consistent with previous cases, but instead to evidence the idea that Athens treats and has always treated acts of disloyalty to the *polis* very seriously.¹⁶⁸ Though he makes some pretence to fairness by claiming that whereas other speakers stray from the point of their prosecution, he will not do this¹⁶⁹ he quickly moves away from this, and far from wishing Leocrates to have a fair hearing, he reminds the jurors that Leocrates’ hearing should be treated as unlike any other defendants’ because of Leocrates supposed notoriety in the rest of the Greek world.¹⁷⁰ Lycurgus uses arguments about *polis* good to attempt to increase the wrongfulness of Leocrates’ actions, as at 1.63-64, where he argues that Leocrates’ actions must be regarded as more wrongful than any other harm done to a *polis*, since if every citizen were to leave the *polis* would

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¹⁶⁷ Lycurg. 1.8-9
¹⁶⁸ 1.37-55
¹⁶⁹ 1.11
¹⁷⁰ 1.14
cease to exist. This argument on wrongfulness is a part of Lycurgus’ rhetorical strategy to influence the jurors’ interpretations of laws, since he has already urged them that they must act as *nomothetai* if they consider Leocrates’ actions to be more wrongful than other acts which are more clearly covered by Athens’ laws.

2.3.2.12 Hyperides’ In defence of Euxenippus

Hyperides in his speech *In defence of Euxenippus* seeks to present an interpretation of the *eisangelia* law which excludes anyone who is not a *rhetor* from the scope of the provisions on speaking against the best interests of the city and receiving bribes.\(^\text{171}\) He bases this interpretation in part on the need for Athenian laws to be consistent, not as a matter of justice, but as one of structure, as we also saw in Andocides *On the Mysteries*. He also supports the interpretation on the basis of fairness, since, he says, private citizens do not enjoy the same rewards as *rhetors* they should not be expected to share the same risks.\(^\text{172}\)

At 4.27 he comes back to his argument on how the *eisangelia* law should be interpreted and argues on the basis of the good of the *polis* that since private citizens do not have the same power to hurt the *polis* as *rhētōrs* do, the law on *eisangelia* should not be interpreted in such a way as to include them in its scope.\(^\text{173}\)

The speech makes peculiar use of precedents. At 4.3 Hyperides complains about recent trivial uses of the *eisangelia* law, effectively citing precedents for precisely the interpretation of the law he is rejecting. At 4.33-38 however precedents are used to support his argument that Athenian juries are not in the habit of convicting rich men just to gain their estates for the *polis*. It shows one of the rare examples of forensic speeches arguing that private justice serves the good of the *polis* through

\(^{171}\) As noted in Chapter 3.2.4, this speech takes a remarkably narrow approach to interpretation of laws, insisting that each law should be interpreted and applied in isolation. On the meaning of *rhetor* in fourth-century Athens, see Hansen (1983).

\(^{172}\) Hyp. 4. 7-9.

\(^{173}\) Whitehead (2000) p. 158 notes the argument in Curtis (1970 – unpublished dissertation) p. 31-2 that the prosecution is likely to have argued that Euxenippus’ actions had been a threat to the democracy.
the story of a jury rejecting a *phasis* of a mine which was alleged to have exceeded its boundaries, and by respecting the law in their judgements, increasing investment in Athens’ mines as the wealthy felt safe to invest again. Neither of these can be seen as real uses of precedent, since the first explicitly rejects the precedent cited, and the second does not seek to guide interpretation of a law and is probably best understood as a rejection of an argument for aggravated penalties.

In this speech we can see the speaker using an interplay of *polis* good and individual justice arguments to persuade the jurors to adopt his interpretation of the law, but placing most reliance on arguments from *polis* good.

### 2.4 Conclusion

By taking seriously the interpretative role of juries in classical Athens, we can get a better understanding of the interplay between considerations of law, justice and expediency. Athenian orators seem to have been equally comfortable using arguments based on justice, whether personal justice or justice as consistency, and arguments based on expediency to guide jurors in how they should interpret law. Apart from the fact that we only see arguments on personal justice used in isolation in private cases, no marked pattern emerges on the use of these arguments across different types of case. Neither does there seem to be any change across time of these arguments. From this evidence, it seems likely that juries were equally willing to accept the principles underlying the laws of Athens as supporting justice or as supporting the good of the *polis*. Far from needing to view these arguments as antithetical to a functioning legal system, they show the accepted purposes of the system, even if they also show that, as in most legal systems, those who lived within and used it were not entirely coherent about what they wanted their legal system to achieve. As such, where we see litigants arguing that the jury’s decision in their

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174 This of course contrasts with Aristotle’s advice in the *Rhetoric* 1358b that to *sumpheron* is a matter only for deliberative oratory. As Mirhady (1990) p. 395 observes, Aristotle does not allow these boundaries to limit his orator, and instead invites orators to push the boundaries of rhetorical genres, making use of tools from deliberative oratory where to do so will strengthen their speech.
favour will serve the interests of the *polis*, we do not necessarily need to see this as a perversion or a misuse of the legal system: serving the interests of the *polis* was one of the accepted purposes of Athenian law.
CHAPTER 3: MORALITY – ROLE IN INTERPRETATION OF LAW

In this section, I continue to apply Dworkin’s model of interpretation according to principles, but I use it to ask a different question. Rather than looking at how far jurors were asked to view individual justice or community advantage as principles underlying the laws of Athens, here I explore the use of morality to guide interpretation of law.¹ Whereas in the previous chapter I adopted a very narrow definition of justice focussed on consistency with previous decisions and arguments of fairness, here I have adopted a wide, values-based definition of morality.² As I explored in the previous chapter, Athenians did not object to arguments about expediency being used in their courts and were probably willing to use expediency as a principle for interpretation of laws. As such, the contrast we might naturally make between justice/right vs expediency/wrong would be less apparent to Athenians. It is likely that Athenians would seek to treat both ta dikaiα and to sumpheron as ‘right’.

Litigants’ speeches generally have three elements to them: 1) I didn’t do it / He did it; 2) It wasn’t wrongful / It was particularly wrongful and 3) It wasn’t against the law / It was against the law. Different speeches, of course, use these elements in different ways and balances, and few if any rely solely on a single line of argument. Here, I seek to look at the interplay between arguments on morality and wrongfulness and arguments on legality to try to understand what Athenian litigants hoped would persuade jurors to adopt their interpretations of the law in

¹ Dover (1974) pp. 288-316 treats individuals’ relationship with the state as part of his study of popular morality, but his model of Athenian morality proved to be unusable for this study, see p. 94 below.
² Greek use of dikaios is difficult here given its very wide range of meanings and contexts. Dikaios can mean just, but also fair, right, and can be a more general positive term.
question. Accordingly, I have disregarded the parts of the speeches which concern the likelihood of the person accused having committed the act in question, and have focussed on the parts of the speech which concern the morality of the alleged act and the laws relevant to the case. This means that some sections of speeches which do have relevance for those who study Athenian morality have not been included here, since they are not directly related to the act of which the defendant is accused but are instead character evidence intended to increase jurors’ perception of the likelihood of the defendant having committed the act in question. This is not to deny the relevance of such arguments in helping Athenian juries to make their decisions, but only to allow me here to focus on the interplay between the wrongfulness of an act and its illegality in the forensic speeches. Given jurors’ freedom to interpret laws (see Chapter 2), if laws were generally considered to have an underlying moral purpose, we would expect to see litigants trying to use this moral purpose to guide legal interpretation.

I have based my selection of speeches here on those used in the previous chapter, and from there have selected speeches which show particularly interesting approaches to the role of morality in judging cases.

A major problem for this section has been to find some adequate definition of morality. I had hoped to adopt the definition of morality used by other scholars who have worked on Athenian morality, but their various definitions have proved difficult to apply outside of their own studies.3

Dover defined morality as ‘the principles, criteria and values which underlie [a person’s responses]’ to the experience of one’s own desires clashing with the desires of another.4 This means that Dover’s definition of morality can only be

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3 In modern scholarship on the relationship between law and morality the focus tends to be on justifying that there must necessarily be some close relationship between law and societies’ moral values (e.g. Dworkin), or between law and a set of moral values based on fundamental freedoms which would have been alien to ancient Greece (e.g. Finnis Natural Law and Natural Rights); and not on defining what those moral values are.

applied where there is a pre-existing conflict of desires, and, more limiting for this study, that it includes a wide range of behaviour where the term ‘morality’ is probably too strong.

Herman appears reluctant to offer any clear definition of how he understands morality, beyond the fact that it concerns the behaviour of those living together cooperatively in societies. This fails to account for any moral expectations that might undermine social cohesion, and as such leads to his conclusion that Athenian morality tended to promote highly cooperative behaviour. For the purposes of this study, Herman’s definition of morality is both too widely inclusive, applicable as it is to good manners, and too restrictive, excluding as it does any moral condemnation that might not promote social cohesion.

Cohen appears to take immoral behaviour as behaviour which diverges from normal behaviour. Though this works tolerably well for his study of Athenian sexual behaviour, attempting to apply it more widely means that it is necessary to ask the question: can a person be exceptionally moral? Cohen does also write on the interconnection between morality and law, but his interest lies in the reality of the role law played in controlling Athenian sexual behaviour. He is looking, as result, at the degree to which law genuinely did govern morality, and is not looking at the role of morality in understandings of law. He does, however, note that if law diverges too far from popular morality, that law will then lose some of its influence. So, for Cohen, some basis in popular morality is required for law to have any effect. This brings into play questions about personal initiative in prosecuting as well as problems in convincing juries to convict. These are, however, questions about an individual law, not the whole system of laws. For Cohen, we can say that some connection with morality is a necessary condition of laws, but not a defining one.

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5 Herman (2006) chapters 1 and 2.
7 Ibid. p. 4.
Adkins examined values, rather than morality, and defined values as ‘what is expressed and revealed by the explicit value judgments of members of the society, which they use to evaluate an individual or a group ... and the actions of either, or when taking decisions, when those judgments are considered in the light of the characteristics which are held to justify passing them.’

Adkins’ approach is the most applicable to this study, but I have also been keen to include elements of moral judgment which express disgust for the act in question. The role of the emotion of disgust in moral judgments is an important one, especially in its ability to ‘other’ the person who is made the object of disgust. Fisher and Spatharas have produced recent studies of the role of disgust in three Athenian forensic speeches (Demosthenes’ Against Androtion and Against Meidias, and Aeschines’ Against Timarchus). Fisher notes that there is no mention in the rhetorical handbooks of the emotion of disgust, and that the Athenians did not use ‘disgust’ as an abstract noun. He observes that the two main words associated with disgust, bdeluria and miaria, have slightly different roles to our term disgust. While bdeluria has an important role for expressing physical disgust, it is rarely used with a moral sense. Miaria, though it carried important moral significance, was rarely used for physical disgust.

In his analysis of Against Androtion and Against Meidias, Fisher argues that the use of disgust in these speeches is strongly correlated with hubristic and anti-democratic behaviours. The association of these behaviours with disgust may highlight the seriousness with which Athenian viewed these types of offences. Spatharas focuses on the use of disgust to ‘perpetuate “comforting fictions of normality”’ and on how disgust is used in Aeschines Against Timarchus to highlight Timarchus’ repeated breaches of normal social boundaries. As such,

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8 Adkins (1972) p. 2.
9 Fisher (2016) p. 103-5 offers a useful summary of some of the modern work on the role of disgust in making moral judgments.
10 Fisher (2016).
11 Spatharas (2016).
both studies show appeals to disgust being used to protect Athens’ social order, and in particular Athens’ democracy.

Though Harris bases much of his analysis of Athenian law on the work of Hart, who as a positivist tends to minimise the role of morality in grounding understandings of law, he nonetheless at times appears to expect law to serve some moral purpose within the polis. Harris brings much of his moral analysis to bear not on Athenian law but on Athenian judging in his work on the use of arguments based on epieikeia.

In this study, I am primarily looking for moral arguments where the speaker does not feel any need to explain to the jurors why the behaviour is morally wrong. In this way, I hope to be able to access shared Athenian assumptions about moral and immoral behaviour. I am also interested to highlight presentations of the laws where speakers argue that a law should be interpreted in the light of others of Athens’ laws, on the assumption that there exists an underlying purpose to all of Athens’ laws (broad interpretation). Equally, I am interested in the arguments used to claim the converse - that each of Athens’ laws exists in a vacuum and should be interpreted independently of anything else (narrow interpretation). Though this is not universal, in general the broad interpretation model also carries with it more explicit appeals to the jurors to interpret the laws as serving a moral end, while the narrow interpretation tends to favour interpretations which exclude moral considerations. As in chapter two, speeches are divided into public and private and presented in chronological order within these categories.

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12 Harris (2013) p. 3 Harris quotes Lord Bingham on the protections afforded by the rule of law, but neglects to observe that Lord Bingham’s favoured definition of rule of law is a ‘thick’ definition, inclusive of a range of human rights, whereas the definition of rule of law Harris adopts is a ‘thin’ one limited to procedural matters.

13 ibid. chapter 8.

14 If asked whether parking on the curb is immoral, most people might be likely to say it is not, but if you then explain the inconvenience and potential danger caused to others by this they might then be willing to concede that it is immoral. On the other hand, we are quick to condemn any form of sexual behaviour with a child as wrong, even where (for example, Japanese manga featuring sexualised images of children) no child is harmed.
3.1 Private suits

3.1.1 Lysias’ Against Simon

Lysias’ Against Simon is a trial before the Areopagus in defence on a charge of trauma ek pronoias. There appears to have been some degree of ambiguity in whether the pronoia in the charge should relate to wounding (intentional wounding) or to murder (wounding with intent to kill). The speaker in Against Simon assumes the latter, claiming ‘I also believed there could be no premeditation in wounding if someone wounded with intent to kill; for who is so naïve that he premeditates long in advance the way in which one of his enemies should receive a wound’. It is to be assumed that the prosecutors were arguing for the opposite interpretation: that the case belonged before the Areopagus as a graphē traumatos ek pronoias, and not before a dikasterion as a dikē aikeias.

The eikos argument that the speaker uses to support this interpretation looks odd to modern eyes, as assuming that any reasonable Athenian’s plots against his enemies will be murderous ones, but may fit within one set of Athenian standards of morality as proposed by Cohen, but opposed by Herman. It is interesting that the speaker does not attempt the sort of defence of narrow approaches to legal interpretation used in In defence of Euxenippus, but instead supports his proposed method of interpretation in assumed norms of behaviour, such that it would be a nonsense to have a law against something which no reasonable Athenian is going to do.

Here, laws are presumed to fulfil a function, but not one which is necessarily aimed at enforcing social norms of behaviour. Rather than the law existing to control a

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17 see below 3.2.4.
18 Phillips (2007) argues by analogy with the law on homicide that in trauma ek pronoias the pronoia element applies to mere intent and not to premeditation, and that intent related to wounding, so the best translation would be intentional wounding. The argument from analogy with homicide law may assume more rigid standards of interpretation than can be securely relied upon. Certainly in both Lysias 3 and Lysias 4 the speakers make claims which suggest that the intent should be considered as intent to kill.
behaviour generally accepted as wrongful, the law is presented as controlling behaviour which is socially normal and to be expected. It must be presumed that the purpose of the law as presented is not to punish behaviour which is universally condemned, but to control behaviour which while deemed to be normal, is nonetheless socially disruptive and harmful.\(^9\)

3.1.2 Lysias’ Against Theomnestus

Lysias’ Against Theomnestus is a dikē kakēgorias concerning the aporrhēta – the unsayable words. From the speech we learn that Theomnestus is accused of having claimed that the speaker killed his own father, and that before the arbitrator Theomnestus claimed that the law forbade the use of the term androphonos, but did not forbid using other words carrying the same meaning. As such, the case is closely argued on grounds of legal interpretation. Theomnestus is presumably arguing for a narrow approach to legal interpretation, similar to that seen in In defence of Euxenippus,\(^20\) where a law should be read in isolation and applied strictly.\(^21\) The speaker, meanwhile, argues for a much wider approach to legal interpretation.

\(^9\) That homicide was considered to be socially harmful in Athens is perhaps best exemplified by the complex attitudes towards the miasma attaching to murderers. See Parker (1983) p. 104 ff.

\(^20\) see below 3.2.4.

\(^21\) Todd (2007) suggests that this may be a misinterpretation of Theomnestus’ argument to allow the speaker a reductio ad absurdum argument. If this is the case, it seems risky for the speaker to have given 15 paragraphs of his speech over to countering an argument which is not core to Theomnestus’ case. There seems to be no doubt about Theomnestus having made the accusation that the speaker killed his father, so Theomnestus’ remaining line of argument is to claim that it was not illegal to say what he said. It appears he can justify this either on the basis that he did not speak one of the aporrhēta (the argument the speaker claims he favours) or that his accusation was true and therefore not unlawful (Lys. 10.30). If Theomnestus had argued his case on the basis that it was true that the speaker murdered his own father, that would be a deeply damaging allegation (Dem. 22.2 claims his enemy prosecuted his uncle for asebeia for being on friendly grounds with him despite his having allegedly murdered his own father - illustrating the degree to which a patricide should be shunned. The speaker in this case does not claim to have brought a dikē kakēgorias against his enemy, but instead to have cleared his name in court when his enemy won less than a fifth of the votes.) and an allegation which one would expect the speaker to spend significant effort rebuffing. As such, it seems likely that Theomnestus’ argument did centre around a claim that his insult did not constitute any of the aporrhēta.
To support his argument, he argues first that laws cannot be expected to cover every possible eventuality: ‘For it was too much of a task for the lawgiver to write all the words that have the same effect; but by mentioning one he showed his meaning in regard to all of them’ (10.7-8). He goes on to give examples of laws where the wording is archaic and this does not affect how the laws are used.  

The leading moral argument in the case is one of reciprocity – that Theomnestus had apparently won a case he brought under the same law against someone who had accused him of throwing away his shield (ῥῖψε τὴν ἀσπίδα), though the law apparently used different wording (ἐάν τις φάσεν ἀποβεβλῆκεν) (10.12). According to the speaker, if Theomnestus had been allowed to win a case based on a wider interpretation of the aporrhēta, then that wider interpretation should be available to him in his prosecution of Theomnestus. At 10.24, this successful prosecution by Theomnestus is even presented as a ‘great and good gift’ given by the jurors to Theomnestus, and a gift which he did not deserve.

In his arguments on how the law should be interpreted, the speaker does not attempt to address the purpose of the law in question. Rather than attempting to argue that the law had certain purposes and interpretation should be in line with those purposes, the speaker argues instead in favour of legal interpretation more generally – claiming that it is always necessary for jurors to interpret laws in their decision making, and that it is normal for terms in laws to be subject to interpretation. The moral arguments he uses are only to support a consistent approach to legal interpretation. As such, the speaker does not engage at all with any moral purpose that might underlie the law.

22 Todd (2007) observes that although the arguments in the case have generally been considered to be weak, in the absence of fixed rules on interpretation of laws, the argument may ‘have been a new one for the jury’ p. 635. See Chapter 2.3.1.2 on the two types of interpretation the speaker blurs together here.
3.1.3 Demosthenes’ Against Conon

Demosthenes’ Against Conon is, legally, a slightly odd case. The prosecution is a *dikē aikeias* against Conon for allegedly assaulting the complainant. Despite prosecuting using the *dikē aikeias*, the speaker works to prove that Conon should be considered to be guilty of having committed *hubris*, presumably on the basis that if he is guilty of the greater offence he must definitely be guilty of the smaller.\(^{23}\) The reasoning used to support the speaker’s decision to prosecute for the lesser offence is social, not legal; as the speaker explains (54.1), he was persuaded by those around him not to take on ‘matters which I should not be able to carry, or to appear to be bringing suit for the maltreatment I had received in a manner too ambitious for one so young.’

The other peculiarity of the case is that Conon’s personal role in the assault appears to have been questionable. It is not clear whether the only witness to the assault, Phanostratus, appeared in court (54.8-9). He is described at 54.8 as having been fallen upon and held down while the speaker was assaulted. Witnesses are not called upon until 54.9, by which time the speaker has also described how passers-by found him lying naked and injured in the street and carried him home to his mother and to be attended by a surgeon. The witnesses called at 54.9 therefore may or may not include Phanostratus. At 54.25 the speaker seems to acknowledge this by attempting to argue that the attribution of guilt to the instigator seen in Athens’ homicide laws\(^ {24}\) should also apply to the *dikē aikeias*. As in other cases, the speaker is trying to imply the existence of a cohesive structure of laws, where provisions from one area of law can simply be carried over as general principles into other areas. There is no evidence that the law on *aikeia* did consider the instigator to be as guilty as the doer.\(^ {25}\)

\(^{23}\) Prosecuting through a *dikē aikeias* but alleging *hubris* is also used in Isocrates 20 (see 2.3.2.2). Todd (2000a) p. 347 suggests that Lysias’ fragmentary speech Against Teisis may have done the same.

\(^{24}\) IG I’ 104 l. 12-13.

\(^{25}\) The choice of Conon as the defendant seems strange. The speaker seems to have a good case against Conon’s sons and a poor one against Conon. It is possible he was motivated by some ongoing dispute we cannot see. Or perhaps, since this is an *agon timētos* where the claimant gets to keep for himself any damages awarded, Conon was just a better target for getting financial
In the speech, the speaker gives an explanation of what he presents as the purpose of Athens’ overlapping laws:

there are actions for evil-speaking; and I am told that these are instituted for this purpose—that men may not be led on, by using abusive language back and forth, to deal blows to one another. Again, there are actions for battery; and these, I hear, exist for this reason—that a man, finding himself the weaker party, may not defend himself with a stone or anything of that sort, but may await legal redress. Again, there are public prosecutions for wounding, to the end that wounds may not lead to murder. The least of these evils, namely abusive language, has, I think, been provided for to prevent the last and most grievous, that murder may not ensue, and that men be not led on step by step from vilification to blows, from blows to wounds, and from wounds to killing, but that in the laws its own penalty should be provided for each of these acts, and that the decision should not be left to the passion or the will of the person concerned.

(Dem. 54.18–19)

As we have seen in other cases, Athens’ laws are presented as forming part of a larger, coherent structure with ascertainable purposes. The purpose here is to prevent escalation of violence from verbal abuse, through physical violence and on to homicide. Here, homicide does seem to be presented as a wrong in itself, with the structure of laws existing to prevent people from feeling the need to resort to that extreme response. On the other hand, the laws are not presented as existing to prevent wrongdoers from committing wrong, but only to offer a non-violent recourse for their victims to seek redress. The law on kakēgoria, for example, is not presented as seeking to reduce the levels of verbal abuse, but only to prevent those redress. Since we are told Conon will argue (54.13–14) that the whole affair was just normal, young male behaviour, it is possible the choice of Conon as defendant was to lessen the impact of this defence (which defence would presumably be an argument to the effect that the behaviour should not be considered wrongful). However, societies’ willingness to turn a blind eye to young male violence can usually be expected to come to an end when the violence becomes too severe, and by the speaker’s evidence we might expect this line to have been crossed in this case.
who are subject to it from using violence against their abusers. The laws do rely on certain social assumptions (i.e. that these acts constitute insulting behaviour, and that those subject to insulting behaviour will want access to redress) but it is not clear how far these are moral positions.

Where Cohen reads this as an acknowledgement of a feuding culture, where feuds may be carried on just as well through legal violence as through physical, Herman instead considers it to embody a system which tries to limit violence and encourage moderate, controlled responses to provocation. As Wohl notes, the speech itself equivocates between these two positions, recognising the existence of some normalised violence, while trying to draw a boundary and place Conon and his sons’ behaviour on the far side of it.

Cirillo notes the emphasis placed in this speech on the disgustingness of Ariston’s beaten body, and seeks to demonstrate that the speech transfers this disgust from the person of Ariston onto the act of Conon. His analysis is not entirely convincing, and the evocation of disgust in Ariston's description of the harm he suffered does not seem to be passed on to Conon or his actions. As such, disgust cannot be used as a useful guide to the moral positioning of the law in this case.

The law is presented not as furthering the moral state of Athenian society, but only as allowing those who have been wronged to seek redress without risking major societal disorder. The law, in effect, is presented as a societal safety valve. The purpose of the laws seems not to be about enforcing a version of morality which condemns the use of violence, but instead acknowledges a social norm that would encourage violent responses to aggression, while controlling those responses to maintain order within the polis. The structure of laws envisioned by the speaker in Dem. 54 does not enforce a social norm that rejects violence, but instead seeks to

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28 Cirillo (2009).
channel expected violence through the system of the courts. Much of the moral argument in Against Conon focuses on characterising Conon and the group around him as habitually hubristic and dishonest, but the accusation of habitually hubristic behaviour, while relevant to the charge in question, is not used to guide the legal reasoning.

3.1.4 Hyperides’ Against Athenogenes

In this case, a weak legal argument is supported by a complex moral argument which is tied closely to the arguments on personal justice we have seen used in Chapter 2.3.1.7. The moral arguments in the case attempt to paint Athenogenes as of bad character, focusing chiefly on accusations that Athenogenes is guilty of desertion (3.29) and of mistreating the citizens of Troezen after they had made him a citizen (3.30), yet these accusations are not simply general character assassination, but are integrated into the main argument of the speaker’s case, which emphasises the importance of reciprocity: ‘after disregarding the agreement which we all make with the polis, he insists on his private contract with me’ (3.31). The speaker attempts to paint Athenogenes’ presumed argument that the jury should uphold the agreement and leave the speaker to suffer his financial losses on his own, as Athenogenes asking the jurors for a favour which Athenogenes does not deserve.

As mentioned above (Chapter 2.3.1.7), the speaker makes use of a law of Solon that slaves’ debts were the responsibility of their masters, and claims that on this basis the debt cannot have been passed to him on the purchase of the slaves since the debt did not belong to the slaves but to Athenogenes. On this basis, the speaker protests that if Athenogenes insists on the terms of the agreement, this will mean that Athenogenes is asking that an agreement should be allowed to override the law, something even ‘fairly drafted’ psēphismata could not do. Here, the speaker

\[29\] Cohen (1995) argues that this is true of all of Athens’ laws.

\[30\] δικαίως ἐγγραφεν ψηφίσματα. ‘Fairly drafted’ is Whitehead’s (2000) translation. Loeb has ‘constitutionally proposed’ – neither quite catches the breadth of dikaios.
makes use of his characterisation of Athenogenes as someone who does not
deserve any favours from the Athenian demos by framing Athenogenes’ request
that the agreement be upheld according to the law as instead a request that the
agreement be upheld over the law.

The interaction between legal and moral arguments in the case is complicated,
with a weak legal case being supported with both subtle arguments on legal
interpretation and a characterisation of Athenogenes as someone who breaches
the norms of reciprocity that are essential in any sale agreement. The laws of
Athens are presumed by the litigant to have a consistent moral purpose to deny
validity to unjust agreements, and his argument depends on the jurors accepting
the existence of such a morally consistent basis for the laws. As such, the speaker’s
argument presupposes an Athenian legal system in which laws serve moral ends
and those moral ends are essential in legal interpretation. The litigant asks the
jurors, based on the moral principle evidenced by other laws, to effectively create
a new law and so makes an argument for a legal system in which the authority of
law is based on the moral purpose it serves. Though this principle is an explicitly
moral one, centring as it does on the idea of an unjust agreement, it does not derive
from off-the-cuff values judgements. It remains unclear whether Athenians would
generally have seen Athenogenes’ behaviour as wrongful, let alone unlawful, but
Hyperides successfully constructs an argument that it should be considered both
wrongful and unlawful. Despite this clear assumption of a consistent moral
underpinning to the laws, the speaker does not attempt to invoke it in his moral-
type arguments, which instead explicitly espouse a social contract model of law
(3.31 ‘after disregarding the agreement which we all make with the polis, he insists
on his private contract with me’) and attempts to argue that because of
Athenogenes’ failure to abide by agreed standards of reciprocity he should be
denied the support of the jury and so the protection of the law on contracts.

31 I give you A if you give me B being the simplest form of any sale.
32 It is also notable that the speaker does not treat the jurors as free to make a solely moral decision
on the case. He does not argue that since the agreement was unjust it should not bind; rather he
argues that since the agreement was unjust the laws do not allow it to bind.
3.2 Public suits

3.2.1 Andocides’ On the Mysteries

As we saw in chapter 2.3.2.4, in this speech Andocides successfully puts forward novel interpretations of the laws and bases his proposed interpretations in polis good and justice as consistency. The moral arguments in this case are less significant than the complex legalistic arguments. Andocides makes a fairly weak argument on grounds of reciprocity that if citizens are to be tried for their past actions his accusers should be much more in danger than he is, but this argument plays much more strongly into the polis-good argument highlighting the dangers that faced Athens more generally if people were to be allowed to rake up past wrongs. He makes allegations of wrongdoing against his accusers, that Callias is bringing the case against Andocides because of a dispute between the two men over an epikleros; that Callias was a dissolute youth; that Agyrrhius is bringing the case because Andocides outbid him and won a tax farming position, which when Agyrrhius held it he used to take money from the polis. None of these arguments are connected to Andocides’ arguments on how Athens’ laws should be interpreted and applied, but are instead very generic arguments intended to cast doubt on his opponents’ motives and so on the likelihood of their version of the justice of the case being the right one.

The major moral argument that Andocides does make, at 1.140, is that Athenians are being admired by all of Greece as ἄνδρες ἄριστοι καὶ εὐθυλότατοι and for their ἀνδρῶν ἀγαθῶν καὶ σωφρόνων ἔργον, and Andocides urges the Athenians to show that they authorised their decree (or vote) by intention, not by chance. Here, Andocides grounds his argument that the jury should uphold the Amnesty in an explicitly value-based argument, and asks the jury to prove in court that they really meant the fine sentiments they expressed in their decree (or vote). This moral claim, that Athenians as andres agathoi and sophronoi must uphold the Amnesty, is of course blurring the terms of the Amnesty itself, but this forgiving approach is exactly what most suits Andocides’ extremely expansive reading of the Amnesty.
At 1.143 Andocides attempts a solely moral argument based on reciprocity. Explaining that the Spartans declined to destroy Athens because of Athens’ role in the Persian Wars, Andocides claims that his family’s benefactions to Athens should be considered in the same light as Athens’ benefactions to Greece, and so Andocides should be shown the same mercy that Athens was shown by the Greeks. In making this argument, Andocides does not attempt to use his family’s history as evidence that he is less likely to have committed the offences for which he is being tried, neither does he use it to mitigate the wrongfulness of the offences. The elegant argument undermines Andocides’ previous arguments that he should be acquitted because he is not guilty of anything, but the tendency to treat conviction or acquittal by Athenian juries as a personal favour is by no means limited to Andocides. It does not attempt to guide the jury’s interpretation of the laws, but simply places Andocides at the mercy of their whim and asks them to look kindly on him.

In the speech we see Andocides using highly complicated legalistic reasoning, including imputing some degree of moral purpose to the laws he seeks to have the jury use in their decision making. Though most of his argument about the purpose of the laws is focused on expediency, he does also praise the Amnesty on solely moral grounds, and those moral grounds are important for his preferred interpretation of the Amnesty and the other laws and decrees which surrounded the transition from the Thirty to the restored democracy. He does not, however, impute any such moral purpose to the wider system of laws. His analysis of Athens’ laws is highly temporally specific, focussing on a short period after the fall of the Thirty which was already being characterised by Athenians as particularly notable for the mercy and moderation shown by the victorious returning democrats. The claim that Athenian laws had a moral underpinning is linked very closely to the spirit of forgiveness which Andocides claims underlay those particular laws. As such, though Andocides’ On the Mysteries shows some evidence that Athenians could consider the moral purpose for which laws were made to be important in

33 As explored at 2.3.2.4
guiding how those laws should be applied, this evidence is very specific to the historical moment in which the laws in question were made.

3.2.2 Aeschines’ Against Timarchus

Aeschines in Against Timarchus presents a set of laws as part of a coherent system with a set purpose: to protect Athens’ democracy from perversion by those whose characters have been corrupted by inappropriate sexual behaviour. From 1.7 onwards, Aeschines presents a large number of different laws which govern the education of boys, and imputes to all of them the underlying purpose of protecting boys from sexual predation, and so protecting those boys’ characters from perversion. None of these laws is directly relevant to Aeschines’ prosecution of Timarchus. Aeschines is not alleging that Timarchus committed any of the offences related to the protection of young boys; far from it, he claims that Timarchus was the victim of such offences. Rather than forming part of his prosecution of Timarchus for sexual offences, the citation of these laws is intended to support an argument which is likely to have been controversial: the argument that it is harmful for adult men to have sex with young boys. To support this argument, Aeschines takes this fairly disjointed selection of laws and claims that they all have as their purpose the prevention of sex between men and boys, and argues that the reason they have this as their purpose is because Athenians had always considered that young boys who had sex with older men would see their characters perverted as a result. Here, we see Aeschines attempting to use the existence of laws which he claims are intended to prevent young boys having sex as evidence to substantiate an argument that Athens considered and had always considered sex between young boys and grown men to be harmful to the characters of young boys. Timarchus was not, according to Aeschines, the perpetrator of this


35 Fisher (2001) p. 37 suggests that these laws, if genuinely Solonian, were more likely to have as their purpose the maintenance of correct status boundaries.
kind of wrongful sex, but its victim, which suggests that Aeschines was trying to present not a moral argument (having sex with boys is wrong), but a pragmatic one (having sex with boys damages the characters of Athens' future citizens). This is borne out by the rest of the speech, as we shall see.

From 1.18 onwards, Aeschines moves from the laws that concern young boys, and onto the laws which determine what a man can do with his own body. The shift from offences with a victim to victimless offences is marked by Aeschines, but in a sense which continues to place emphasis on the body which is subject to penetration: 'But as soon as the young man has been registered in the list of citizens, and knows the laws of the state, and is now able to distinguish between right and wrong, the lawgiver no longer addresses another, Timarchus, but now the man himself.' (1.18-19) Again, we see Aeschines present a selection of different laws with the purpose of demonstrating to the jurors an underlying intention. The first law presented is one which appears to have governed the graphê hetairëseôs and which forbade anyone who had been a prostitute from serving as one of the nine archons, as a state advocate, as herald or ambassador, or in any office whether appointed by lot or elected, or from addressing the Council or the Assembly.

From there, Aeschines moves on to the law governing the arrangements for meetings of the Assembly. Aeschines successfully spins a law instructing the herald to invite men over fifty to speak first into a paean to the orderliness and politeness of Athenians' forbears, and then into a complaint about Timarchus' rude behaviour in giving a speech in which he threw off his cloak (1.26). The laws which Aeschines actually presents about the organisation of the Assembly, however, specify only

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36 It is unclear exactly what forms the core of the act of hetairesis. Fisher (2001) pp. 40-2 is unsure that penetration is the core element, and suggests that living financially off someone else was at least as important. E. Cohen (2016) p. 366-69 argues that a fairly large number of Athenian citizens might have worked in prostitution, and claims that the purpose of the laws restricting the political rights of male prostitutes was to guard against those who would pervert traditional homosexual relationships and gift-giving into business relationships, in line with other Athenian prejudice against money-making activity.

37 1.19-20.

38 A law the validity of which is doubted by Lane Fox (1994) p. 147-8, who observes the conflict between citing an obsolete law while claiming to exist in a state in which laws are sovereign. On obsolete laws, see 5.4.3.
that the sacrifice is to be carried around, that the Assembly is to discuss ‘matters
to do with ancestral religious matters, dealing with heralds and embassies, and
with secular matters’, and that older men should be invited to speak first. Though
many jurors might have agreed that behaving appropriately in the Assembly was
important, Aeschines has not been able to present a law to that effect. Nonetheless,
Aeschines gathered a set of laws which he can convincingly argue have as their
principle the maintenance of order in the Assembly, and successfully argues that
the reason this was considered important was to prevent unsuitable people from
addressing the Assembly.

Finally, Aeschines comes to the law concerning the dokimasia rhetorōn, which
excluded men who have abused their parents, failed to perform military service,
prostituted themselves, or squandered their patrimony from speaking before the
demos. Underlying all these laws, Aeschines claims to find a consistent belief that
men who are disorderly and poorly disciplined should not be allowed to address
the people because they will give unsuitable advice. This claim, that only men with
morally upstanding lives should be allowed to address the demos, is, at heart, an
argument about expediency. It is not that Timarchus must be punished for his
immoral behaviour, but rather that Timarchus’ behaviour shows him to be the kind
of man whom lawgivers considered likely to be damaging to good order in the city.
Despite the moralising arguments used by Aeschines in his speech, his
presentation of the laws relevant to his case depends not on moral arguments but
on practical ones.

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40 1.28-32. Lane Fox (1994) pp. 147-9 identifies this law too as having probably been semi-obsole
ate at the time Aeschines used it in this case.
41 Lanni (2016) pp. 98-117 claims to find the laws on the graphē hetaireseōs and dokimasia rhetorōn
having wider effects among Athens’ elite. She seems to identify the laws as initially embodying a
popular dissatisfaction with the elite practice of pederasty, and argues that this elite practice fell
out of fashion precisely because of these laws. Her argument depends on two unprovable
assumptions: first that the laws were genuinely popular attempts to control elite behaviour, and
second that the laws predate the change in elite attitudes towards homosexual pederasty. Even if
Lanni’s arguments can be substantiated, they do not clearly indicate a moral role for laws in Athens.
Participation in pederastic relationships does not, in her analysis, become morally wrong, but it
may become dangerous for one’s later career. Lanni seeks to identify these laws as signalling that
‘a majority of the Athenian population viewed hetairesis as incompatible with honorable
citizenship’ (p. 109), however this assumes a great deal about how Athenians viewed their laws and
3.2.3 Lycurgus’ *Against Leocrates*

Lycurgus’ *Against Leocrates* takes an approach to both legal and moral arguments remarkably similar to that of Hyperides’ *Against Athenogenes*. Like Hyperides, Lycurgus’ main difficulty in constructing the speech is that it is unlikely that the defendant in the case actually broke any of Athens’ laws, yet he can be considered to have breached Athenian norms of behaviour. As in *Against Athenogenes*, Lycurgus quotes various Athenian laws as he attempts to construct an argument that, by analogy with these laws, the defendant should be considered to have broken the law. Unlike in *Against Athenogenes*, however, Lycurgus openly acknowledges that no law covers this precise situation (1.9).

Lycurgus claims ‘where different offences are not specifically included in the law, being covered by a single designation, and where a man has committed crimes worse than this... your judgement must be left as an example for your successors’ (1.9-10). Here he sets out the model he would like the jurors to apply to their interpretation of the law – that they should look at the already broad scope of the existing law, and then ask if what the defendant did is more wrongful than the acts included within that law. If they find that the acts done by the defendant are more wrongful than those included within the scope of the law, as Lycurgus presents it those acts simply cannot be considered to have been legal, and as such must be covered by the law.

Lycurgus’ speech concerns a man, Leocrates, who fled Athens after Athens’ defeat at Chaeroneia. Lycurgus attempts to use a combination of decrees and precedents from previous cases to show that Leocrates’ flight from Athens should be treated as unlawful. The first decree cited is one which was passed after the battle of Chaeroneia determining that women and children should be brought in from the countryside to the safety of Athens’ walls and that generals should be empowered

\[\text{the role of their laws in society. If laws are not assumed to have moral content or purpose, they cannot give moral signals.}\]

\[\text{Trans. Loeb (adapted)}\]
to appoint citizens and residents of Athens to defence duties.\textsuperscript{43} Though Lycurgus tries to frame this as though it places duties on individuals, it is not clear that this is the case, and it is perfectly likely that this decree simply set out the decision of the Assembly as to Athens’ strategy to handle the crisis.

At 1.52 Lycurgus presents as a precedent the execution of men who tried to flee Athens by the Areopagus during the crisis. It seems that Lycurgus anticipated that this would be a controversial precedent; he first hushes an expected \textit{thorubos}, then presents his opinion that men who sit on the body that tries homicide would not take life unlawfully. The expected \textit{thorubos} and Lycurgus’ defence of the Areopagites suggest that this is not as reliable a precedent as one might hope for, and that there were perhaps allegations that the Areopagus had unlawfully ordered the deaths of these men, which further suggests that fleeing Athens might not have been recognised as treasonous.

The precedent given at 1.53 seems a little more secure. It rests on a jury’s conviction of Autolycus for sending his family out of Athens during the crisis, though he remained in Athens himself. According to Harpocration,\textsuperscript{44} Autolycus was an Areopagite, which may affect the legal situation, or it may be that, as in Against Leocrates, Lycurgus had prosecuted him without a strong legal basis, but had, in that case, been successful. This is the full extent of Lycurgus’ arguments to the effect that Leocrates’ actions should be considered to constitute treason.\textsuperscript{45}

From 1.111 Lycurgus moves away from showing that what Leocrates did constituted treason (that is, making legal arguments), and instead focuses on showing that the offence of treason has always been treated severely by Athens’ laws and courts (that is, persuading the jurors of the wrongfulness of Leocrates’ actions). It is notable

\textsuperscript{43} 1.17.
\textsuperscript{44} Harpocration s.v. \textit{Autolukos}. Harpocration records that it was Lycurgus who prosecuted Autolycus.
\textsuperscript{45} Though he does at 1.76-77 invoke the ephebic oath and claim that Leocrates is guilty either of oath-breaking (\textit{epiorkia} and thus \textit{asebeia}) or of failing to take the oath, presumably for nefarious reasons. Leocrates does not attempt to give the oath legal status in itself.
that it is in this context that Lycurgus refers to the decree condemning to death those who settled at Decelea (1.121). The decree seems, on its face, a perfect example for Lycurgus to use to show that moving away during a time of crisis constituted treason. Lycurgus does not mention in his speech that at the time of the decree Decelea was occupied by Sparta, and from Lycurgus’ presentation of the decree it seems likely that the decree itself did not reference it.\footnote{By the time the speech was given in 330, it is possible many of those listening would not in the moment have realised that around 80 years previously Decelea had been occupied by Sparta and this was the context of the decree.} He describes it to the jurors as a penalty inflicted for moving within the same \textit{xōra} and asks that since Lycurgus travelled much further he should be more harshly treated. The fact that he used it in this way suggests that the settlers at Decelea may have been condemned for some offence other than treason, or that their condemnation may have been solely on the basis of the decree against them.

As the speech progresses, Lycurgus, though painting himself as the defender of the laws,\footnote{1.4.} moves increasingly towards a position where the laws set out only minimum standards of behaviour, but citizens can and should be held to higher standards. Lycurgus offers the evidence of poetry and plays to demonstrate to jurors the high ideals Athenians should hold themselves to, and seeks to present abandoning one’s own country as, if not against \textit{polis} law, then against a natural law which is respected even by animals.\footnote{1.132. For the complex interplay between \textit{phusis} and \textit{nomos}, see chapter 4.3.3.}

Though in 1.9-10 the law seems to be placed on a moral footing, where it must be assumed that where offences are defined by statute, and a man is proved to have committed worse than those, he must therefore be guilty of \textit{something}, later in the speech a much more complex model of law and wrongfulness is presented. At 1.66-7 Lycurgus imputes to the earliest lawgivers the intention that laws should, above all, deter people from committing wrongs, such that penalties should be set according, not to the wrongfulness of the acts, but to their likely harm if they were...
to be adopted by all citizens.\textsuperscript{49} This highly utilitarian model may suit Lycurgus’ case well, since Leocrates seems likely to have presented himself as having broken no law nor done anything wrongful by leaving Athens to become a trader in Megara. In Lycurgus’ version of Athenian emigration, any person leaving Athens to live abroad, at whatever time and for whatever reason, could be considered guilty of a serious harm to the \textit{polis}, given that if all Athenians imitated them the city would soon be empty.

Whereas Hyperides tried to substantiate his claim for moral basis in other Athenian laws,\textsuperscript{50} Lycurgus is much more dependent on the precedents offered by previous cases. Lycurgus cites no laws, and his attempts to guide the jurors’ legal reasoning as to whether the actions of Leocrates constituted treason are based instead on one decree and two precedents. As in \textit{Against Athenogenes}, Lycurgus also raises the question of reciprocity, and claims at 1.143 that Leocrates cannot be permitted to claim the protection of the laws now, since he abandoned them when he ran away. Here again, the protection of the laws is treated as a privilege, and one to which Leocrates, by his desertion of Athens and alleged habitual disloyalty, is no longer entitled. Unlike in Hyperides \textit{Against Athenogenes}, however, the defendant is not relying on the protection of a discrete law, or even the protection of a legal principle underlying one particular area of law,\textsuperscript{51} but rather is relying on the much wider principle that citizens should not receive punishment if they have not broken any law. Lycurgus seems to be trying to push the reciprocity argument even further than Hyperides when he asks that Leocrates should be denied the protection of Athens’ laws since he did not himself protect Athens.

\textsuperscript{49} Putting deterrence above all other ends can lead to morally problematic results. Deterrence works just as well if you convict the wrong person for the crime, as long as the public never find this fact out. Crimes which are most common, on this model, should be the ones most seriously punished, regardless of their relative wrongfulness.\textsuperscript{50} See above chapter 3.1.4.\textsuperscript{51} i.e. contracts should be upheld.
3.2.4 Hyperides’ *In Defence of Euxenippus*

Hyperides’ *In defence of Euxenippus*, a defence in an *eisangelia* alleging bribery, takes the narrowest approach to interpretation of all the cases we have examined here. The case is a defence against an allegation that Euxenippus, apparently an elderly and not especially prominent Athenian, took bribes to falsely report a dream he had had when sleeping in a temple in order to get an indication from the gods about to whom land in Oropos should be granted. The land had, we are told, been shared between the Athenian tribes, but a question had arisen about whether one section, which had been assigned to Acamantis and Hippothontis, should in fact have been part of the land set aside for the hero Amphiaraos. In response to Euxenippus’ dream, Polyeuctus, the prosecutor of Euxenippus, had proposed a decree that would have assigned the land to Amphiaraos and had the other eight tribes compensate Acamantis and Hippothontis for the value of the land, but the decree had subsequently been found to be unlawful. Unfortunately, we do not know how the decree related to Euxenippus’ dream.\(^{52}\)

Hyperides adopts a very limited argument in this case, arguing primarily on the basis that the law under which the *eisangelia* has been brought does not apply to the alleged wrongdoing and is limited to prosecutions against orators, and asks the *demos* for a narrow interpretation of the law on the basis that the *polis* has laid down specific laws for good reasons (4.4) (though sadly those reasons are not stated), and the jurors should respect that. The purpose the speaker claims for this specific law is given at 4.9 and more explicitly at 4.27-8, where the speaker objects to the prosecution of Euxenippus on the basis that the prosecutor should focus only on those with the power to cause real harm to the city, and Euxenippus is not among them.\(^{53}\) There is a suggestion at 4.4 and at 4.35-6 that the prosecutors may

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\(^{52}\) Whitehead (2000) 201-203 summarises the main strands of opinion, either that Polyeuctus’ decree attempted to act on the conclusion of Euxenippus’ dream, or that it was intended to oppose the dream, or that the dream was in some way ambiguous or deficient.

\(^{53}\) On the basis of the evidence of this case, Hansen (1983) argues that Athens recognised two separate definitions of *rhetor* in Athens, the first a legal definition which applied to any person who ‘took it upon himself to address the *ecclesia*, the *boulê*, the *nomothetai* and the *dicasteria*’, and the second a more colloquial definition which ‘designates a small group of regular speakers’. Since he draws his evidence for the existence of the first definition from his modelling of the presumed
be demanding, as Lycurgus does in Against Leocrates, that Euxenippus does not simply rebut the legal charge, but that he show his behaviour was within norms of behaviour. Though at 4.31 the speaker makes reference to various attacks which he claims the prosecutor made on the character of Euxenippus, he does not address these accusations in detail and instead accuses the prosecutor of using this as a cheap trick to confuse the jurors and distract the defence speakers.\textsuperscript{54} The speech relies for its moral force on the idea that it is wrong for a professional and experienced speaker like Polyeuctus to victimise a private citizen like Euxenippus. This is backed up by language invoking disgust (4.1 prosistantai- identified by Whitehead (2000) as coming from medical literature and meaning ‘sicken’) and has significance for the interpretation of the law favoured by Hyperides.

It is necessary for Hyperides’ argument that the jurors accept, first, that Euxenippus is a private citizen and not a politician, and, second, that the eisangelia law should only be applied to politicians. It is this second argument where the identification of the prosecution of idiotai by rhētorai as morally wrong becomes significant. Hyperides seems to be hoping that the jurors, by interpreting the law in isolation from all other laws and with it in their heads that it is wrong for idiotai to be victimised, will come to the conclusion that the narrow interpretation of the law is the correct one.

In this speech, it appears that the speaker is adopting the opposite approach to legal interpretation to that used in Against Athenogenes. Far from treating Athenian laws as each being indicative of broader underlying moral and legal principles, Hyperides argues that each law should be, and indeed must be, considered independently. This, he claims, is necessary to ‘ensure that the laws in a democracy are kurioi and that impeachments and other actions are brought into

\footnotesize{\textsuperscript{54} Though Hyperides in this case is a sunēgoros acting as part of a team of speakers, so these allegations, as well as other points such as whether Euxenippus can be said to have been speaking against the interests of the Athenians, and whether he did or did not take bribes to speak as he did, may have been addressed by other speakers.}
court *kata tous nomous*’ (4.5). This claim that laws must be considered individually in order that they should remain *kurios* gives on the one hand greater prominence and power to individual laws, since there is less risk of their provisions being eroded by other laws, yet at the same time limits the application of the laws as a whole, since under this analysis laws cannot be extended by analogy. Here, laws are assumed to be entirely positivist, and, unlike in many cases, are attributed solely to the *demos* of the Athenians (ὑµεὶς ὑπὲρ ἀπάντων τῶν ἄδικηµάτων ... νόµους ἐθεσθε) and it is solely the *demos’* (imputed) intentions when making the law in question that must, according to the speaker, be used to guide the jury’s interpretation of the law. As contemporaries of the jurors, however, the demos’ priorities in making the law can be understood as equivalent to the jurors’. As such, Hyperides can attempt moral arguments on the correct interpretation of the law based on the idea that it is wrong to persecute idiotai for participating in polis business.

### 3.3 Conclusion

Athenian litigants do not adopt any consistent approach to the role of morality in law. Where it suits their argument to do so, they will ground the law in explicitly moral claims, and attempt to use those moral claims to extend the application of the law to suit the circumstances of their case. Equally, where a narrowly legalistic interpretation of law suits their argument better, that is the version they present. In speeches which appear highly reliant on moral argument, arguments on expediency can become prominent in guiding interpretation of laws. This suggests that there was no strong assumption among Athenian juries that their law was necessarily based on morality. Though moral claims could be used to guide interpretations of the law, implying that the law was understood to serve moral ends and to have some of its legitimacy based on the moral ends it served, at other times litigants seem to have been confident to dispense with moral argument and

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55 See Chapter 5.4
56 4-5.
rely solely on legalistic argument. This suggests that in the minds of Athenians law did also have some authority outside of the system of morality, but that it was also potentially imagined as serving a moral purpose.

Throughout the past two chapters, I have found it convenient to use ideas from modern societies to help to understand where Athenian attitudes towards law differed from our own. For us, communal good is not clearly a moral end, and is much more likely to be contrasted with the human rights of individuals, which are more rooted in moral ideals. For the Athenians, as Dover observes, *polis* interests could be an aspect of morality. As such, the interests of the *polis* and rendering individually just decisions could both be considered moral ends.

In this sense, what we have seen over the past two chapters is that Athenian law could be, but was not consistently, imagined to depend on certain aspects of morality. The strongest evidence we have for any of the principles we have explored is for law being interpreted to serve the interests of the *polis*, but both individual justice and other moral values could potentially be used to guide interpretation of laws.

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CHAPTER 4: OBEYING AND ENFORCING THE LAW AT ATHENS

4.1 Introduction

Modern theories on law, given their diverse stances on what underpins laws, unsurprisingly take different approaches to the obligation to obey law. Whereas ‘hard’ positivists adopt Austin’s definition of law as commands backed by force, both Hartian positivists and theorists who take a more natural law approach contend that this does not reflect the role law plays in modern day society.¹ Hart explains this in his thought experiment whereby we are invited to imagine a person caught up in an armed robbery and ordered by the robber at gun point to hand over his money. Hart argues that while we are comfortable to say that this person had no choice but to obey, we do not recognise him as having had an obligation to obey.² In contrast, Hart argues, we do recognise a social obligation to obey law. Hart’s model of law, based on primary and secondary rules,³ is dependent on the rule of recognition, which in turn relies on a socially recognised obligation to obey those rules. Hart’s model of law could be characterised as observational, rather than prescriptive, in that in his 1994 postscript to Concept of Law in which he addressed some of the criticisms of his work, Hart claimed that whether or not something is formally law has no bearing on whether, from a moral standpoint, people should obey it. Although Hart recognises that in fact there exists a perceived obligation to obey law, he does not allow that to carry over into a genuine moral obligation to obey a law that might be morally objectionable.

² Hart (1961) p. 82.
³ Primary rules are those easily recognised as laws (e.g. the Offences Against the Person Act 1861 is a primary rule. Secondary rules are the set of rules, in English law mainly informal, which govern whether a particular rule is or is not treated as a law by those in a position to make use of laws.
Whereas Hart bases law on the obligation to obey, natural lawyers assume the obligation to obey the law rests largely on the moral goals of the law: obeying law is right because the law itself is right; where the law is wrong, no obligation exists to obey it.\(^4\) As such, natural lawyers are much more comfortable with the idea that there does exist a genuine moral obligation to obey law.

As well as these two models there exists the ‘bad man’ theory, which is generally associated with the realist school of law.\(^5\) Under this model, people do not have any obligation to obey the law; they act instead as rational actors,\(^6\) and obey the law only so long as the burden of obedience does not outweigh the unpleasant consequences of being caught in disobedience.

The degree to which there existed at Athens a perceived sense of obligation to obey the law may tell us a great deal about Athenian perceptions of law itself. Where law is understood to rely for its authority on the moral principles which underlie it, we can expect to see higher levels of social pressure to obey law as law. Enforcement of law is more complex, as it relates to both the social expectation that people should obey law, and a recognition that by failing to do so they have behaved wrongfully and merit punishment, and to the interest a society holds in compelling obedience to law in order to maintain social order.\(^7\)

\(^4\) see, e.g. Fuller’s (1958) objection to the conclusions of Hart on Germany’s attempts to grapple with the legacy of Nazi law, where Fuller’s objections are posited on an understanding that law creates moral obligations, see particularly p. 656.  
\(^5\) The bad man theory originates from Oliver Wendell Holmes’ 1897 essay ‘The Path of the Law’.  
\(^6\) The term ‘rational actor’ is drawn from social sciences, and denotes an imagined actor who always acts solely to his own economic benefit. The construct has been carried across from economics into other social sciences. It has been criticised, in economics, by behavioural economists such as Kahneman and Tversky (1979).  
\(^7\) Some of the strongest calls for rigid enforcement of law come from societies where that law has become far detached from ordinary notions of moral behaviour. Consider, for example, Nazi Germany, or the recent claims by the Trump administration that rigid enforcement of law, even to the point of separating young children from their parents, is necessary to protect the state.
4.2. Social obligation to obey

In depictions of Athenian society, the social obligation to obey the law appears to be weak. In Plato's *Crito*, for example, Crito shows a startling disregard for the law. He wishes to persuade Socrates to disregard the death sentence passed by the Athenian court and flee into a self-imposed exile with Crito's help. Rather than arguing on legal terms, that perhaps the laws used to convict Socrates were invalid, or the vote fallacious, Crito uses arguments based on Socrates' social obligations to his friends and to his sons.\(^8\) These, as we know, fail to convince Socrates, who argues for total obedience to the laws. Crito's only apparent concern for the law, by contrast, is that he is likely to be harassed by sykophants\(^9\) if it is known that he has broken the law by helping Socrates to escape punishment, but this he brushes off contemptuously, describing the sykophants simply as 'cheap'.\(^10\) Crito is much more concerned that he will be badly thought of if it is learned that he failed to help a friend in need, regardless of the legal situation. He considers himself much more likely to face social censure for failing to help a friend than for breaking the law.\(^11\) In the dialogue, Crito does not seem to recognise himself as holding any obligation to obey the laws, and even Socrates, as noted by Sauvé-Meyer,\(^12\) does not treat law-breaking as automatically unjust, but as something which merits investigation as to whether it is or is not unjust.

Crito is not Plato's only law-disregarding character. In the *Republic*, Glaucon gives an unremittingly 'bad man' narrative of the origin and function of law in society: 'It lies between what is most desirable, to do wrong and avoid punishment, and what is most undesirable, to suffer wrong without being able to get redress'.\(^13\) Glaucon goes on to imagine what would happen if both an unjust and a just man were to be given rings which made them invisible, and concludes that both men

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\(^8\) Pl. *Cri.* 45c-46b.
\(^9\) Pl. *Cri.* 44e-45b. The *Crito* of Xen. *Mem.* 2.9 is not quite so sanguine about sykophants, finding them enough of an inconvenience to merit hiring his own sykophant to protect himself against their attacks.
\(^10\) Pl. *Cri.* 45b.
\(^11\) Pl. *Cri.* 44c.
\(^12\) (2006) p. 374.
would commit wrong in their own self interest.¹⁴ Glaucon’s primarily hypothetical argument is followed up by Adeimantus, who emphasises what are presented as common views of justice and injustice, where although justice is praised in theory, in fact people admire those who are unjust and successful. Both stress the role of outward appearances of justice, and claim that this is why people value justice, and that no one values justice for justice’s sake. Unlike Crito, however, Glaucon and Adeimantus are both distanced from these approaches and are presented as putting forward the (flawed) views of others, rather than their own views of the law.¹⁵ By the time Socrates gets round to discussing what, in his opinion, justice is,¹⁶ he has already laid out the basics of his ideal state, so whereas Glaucon and Adeimantus’ discussion of justice was predicated on the ‘bad man’, Socrates’ is based on the ‘good man’ who has been created by the Republic’s systems of education and government. Thus, Socrates can define justice as ‘minding your own business and not interfering with other people’.¹⁷

Some evidence of the degree to which Athens expected its citizens to obey law may be drawn from court narratives. As Herman shows, these can at times indicate that Athenian social expectations of obedience to law were high, but allowance must be made for the fact that these are speeches to be given in court, where the jurors are being asked to apply the law and in these circumstances law might naturally be expected to have a higher value.¹⁸ Wohl notes that court narratives, particularly those relying on eikos arguments, require Athenians to present themselves as rational characters highly aware of and anxious to conform to the legal requirements placed on them.¹⁹ In this light, it is understandable that the laws are often described by litigants as ‘ordering’ (keleuein) or forbidding (apagoreuein). Even within this, many of the actions described as being according to the orders of the laws are not actions guiding the relationships or behaviour of citizens towards

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¹⁴ Pl. Resp. 359c ff.
¹⁵ Pl. Resp. 361e.
¹⁶ 443a ff.
¹⁷ Pl. Resp. 443d.
¹⁸ Herman (2006).
each other, but are instructions to magistrates, or instructions on penalties to be applied.

Even within the lawcourts, despite the narrative requirements for litigants to present themselves as highly law abiding, some indications of other standards of behaviour can be identified. The speaker of Isocrates' *Trapeziticus* comes to court expressly to ask jurors to uphold a deliberately fraudulent contract. The speaker is a citizen of Pontus whose father had a dispute with Satyrus, the ruler. At the time of this dispute, the speaker was in Athens. Satyrus, according to the speaker, ordered the citizens of Pontus living in Athens to seize the speaker's money and to tell him to return to Pontus. If the speaker did not return to Pontus, the citizens of Pontus in Athens were instructed to ask the demos to return him home (17.5). The speaker, not wanting his wealth to be seized, but afraid of defying Satyrus, conspired with the banker Pasion to hide his wealth by pretending he owed large debts to Pasion (17.6-7). This pretence included the speaker issuing a formal denial of his wealth before witnesses (17.8).

Once the dispute between his father and Satyrus was over, the speaker tried to reclaim his money from Pasion but was refused (17.12). The speaker now asks the jurors to return his money to him, though the deposit of the money with Pasion was fraudulent and conducted in order to evade the orders of the ruler of his home territory. It seems likely that Athenians would have been comfortable to deny the status of law to the orders of Satyrus, but it is less clear from the speech how far those orders were also the instructions of the Athenian demos. Satyrus appears to have been confident to order the citizens of Pontus resident in Athens to request that the speaker be sent back to Pontus. It is possible that a request for confiscation of the speaker’s wealth could have been passed to the demos in the same way. This, then, does suggest that the speaker was attempting to subvert not only the will of Satyrus, but also the will of the Athenian demos. As such, his request that the jurors ignore the witnessed but fraudulent assertion that he owed

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20 In the same way, Athenians denied that Persian law was law – see below p.206 n. 23.
21 Isocrates 17.5.
Pasion money and instead abide by the terms of the secret contract does show a disregard for the legislative actions of the Athenian demos.

Demosthenes’ Against Boeotus I shows some traces of a similar attitude to the law, though not on the part of the speaker. The speaker of Against Boeotus I is disputing with his half-brother which of them should get use of the name Mantitheus. Mantitheus, the speaker, complains that his half-brother should never have been acknowledged as his father’s son anyway, since his father was tricked into the acknowledgement. Mantitheus explains that Boeotus brought a lawsuit against Mantitheus’ father on a complaint that he was being deprived of his patris. According to Mantitheus, his father did not wish to defend this case because he was too afraid of being confronted with complaints about how he had treated people in his public life. Mantitheus does not attempt to cast these claims as untrue, but treats the possibility that public service will earn you enemies likely to make claims against you in court as entirely probable. Because he did not feel able to access the legal system, Mantitheus’ father entered into an oath challenge with Boeotus’ mother, with the intention that she should withdraw, but she did not and so was able to force Mantitheus’ father to enrol Boeotus as his son. Both Isocrates’ Trapeziticus and Demosthenes’ Against Boeotus show litigants treating the law not as a guide to correct and incorrect behaviour which carries with it an inherent obligation to obedience, but one solution for resolution of disputes.

It is hard to say what, in Athens, proper obedience to law would look like. Xenophon wrote a dialogue in which Alcibiades asks what it means to be nomimos, or law-abiding, then ties Pericles in knots when he tries to answer. Lycurgus could complain in court that laws set out only a minimum standard of behaviour,
and a good man should go far beyond that standard, implying that for him there was no specific obligation to obey law as law.

4.2.1. Ephebic oath

In a context of a society which appears to show a weak sense of any obligation to obey laws, the oath sworn by ephebes is striking. This oath, which formed a part of a young man’s transition into full citizenship status from at least the 330s onwards, contains both military and civil matters. It was sworn as part of young men’s compulsory military service and survives in an inscription found in Acharnae and dated to the mid-fourth century. There are also versions preserved in Pollux and Stobaeus.

The different texts of the section of the oath which relates to the laws are as follows:

Inscribed stele from Acharnae - Ephebic Oath SEG 21.519 ll. 11-16
Rhodes and Osborne 88

καὶ εὐηκοήσω τῶν ἄει κραινόντων ἐμφρόνως καὶ τῶν θεσμῶν τῶν ἱδρυμένων καὶ οὕς ἀν τὸ λοιπὸν ἱδρύσων νται ἐμφρόνως. ἐὰν δὲ τις ἄναιρε, οὐκ ἐπιτρέψω κατὰ τε ἐμαυτὸν καὶ μετὰ πάντων

And I shall be willingly obedient to whoever exercise power reasonably on any occasion and to the laws currently laid down and any reasonably laid down in future. If anyone destroys these I shall not

26 Lycurg. 1.132
27 Though there is no explicit evidence of the oath being used in the fifth century, Siewert (1977) argued that there are echoes of the oath to be found in fifth-century material, and as such the oath may have existed in some form during the fifth century. His arguments are not entirely convincing, and it is probably safest to treat the oath as an artefact of the fourth century.
give them allegiance both as far as it is in my own power and in union with all.\textsuperscript{28}

\textbf{Pollux viii 105}

Καὶ συνήσω τῶν ἀεὶ κρινόντων, καὶ τοῖς θεσμοῖς τοῖς ἱδρυμένοις πείσομαι καὶ οὐστίνας ἄλλους ἰδρύσεται τὸ πλήθος ἐμφρόνως
Καὶ ἀν τις ἀναφῇ τοὺς θεσμοὺς ἢ μὴ πειθῇ, σὺκ ἐπιτρέψω, ἀμυνὼ δὲ καὶ μόνος καὶ μετὰ πάντων

And I shall take notice of whoever exercise power on any occasion, and shall obey the laws laid down, and whichever other laws the \textit{plethos} reasonably lays down.

\textit{And if anyone destroys the laws or does not obey them, I shall not give them allegiance, but shall defend against them both alone and in union with all.}\textsuperscript{29}

\textbf{Stobaeus iv 1.8}

Καὶ εὐηκοῆσω τῶν ἀεὶ κρινόντων ἐμφρόνως, καὶ τοῖς θεσμοῖς τοῖς ἱδρυμένοις πείσομαι καὶ οὐστίνας ἄν ἄλλους ἰδρύσεται τὸ πλήθος ὁμοφρόνως
Καὶ ἀν τις ἀναφῇ τοὺς θεσμοὺς ἢ μὴ πειθῇ, σὺκ ἐπιτρέψω, ἀμυνὼ δὲ καὶ μόνος καὶ μετὰ πάντων

And I shall be willingly obedient to whoever exercise power reasonably on any occasion, and shall obey the laws currently laid down, and whichever laws the \textit{plethos} unanimously lays down.

\textit{And if anyone destroys the laws or does not obey them, I shall not give them allegiance, but shall defend against them both alone and in union with all.}\textsuperscript{30}

\textsuperscript{28} Translation: Rhodes and Osborne (2003), adapted to mark the different verbs for obeying used in the different versions.

\textsuperscript{29} Translation my own, using the translation of RO 88 as a model.

\textsuperscript{30} Translation my own, based on the translation of RO 88.
The version in Pollux lacks the first emphronos, though the verb implies a slightly weaker agreement to obey those holding power, while the version in Stobaeus retains the first emphronos, but changes the second to homophronos. Daux favours Stobaeus, suggesting that the repetition of emphronos on the stele may have been a mistake, and that homophronos may have been an ‘expression de l’idéal démocratique d’unanimité populaire’. Siewert rejects this amendment of the stele’s text on the basis that it makes sense without emendation. A further possibility is that the oath recorded in Stobaeus is a later version of the oath recorded on the stele.

Because the other oath on the same stele appears to form part of fourth-century Athenian reconstructions of their fifth century past, the historicity of the ephebic oath has also been doubted. Robertson suggests that the ephebic oath as inscribed may have been a combination of an archaic ‘citizens’ oath’ and a newly created soldiers’ oath. Siewert argues that it is possible to identify references to the ephebic oath in fifth-century material. Rhodes and Osborne highlight the archaic character of the inscribed oath, not only linguistically, but also in its approach to the law, which they consider the oath to envisage as being the responsibility of magistrates rather than the demos. For our purposes, the antiquity of the oath is not relevant. It seems likely that the oath inscribed on the stele would have been the oath used by the ephebes of Acharnae in the mid-fourth century.

How to translate this oath seems to cause people problems. Part of the problem may be highlighted by Siewert, who translated emphronos as ‘reasonably’, but

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31 Daux (1971).
32 ibid. p. 374, quoting Marrou. It might be added that the fourth-century nomothetai voted by show of hands – Hansen (1985), which could have increased the chances of unanimous decision making.
33 Siewert (1977) p. 103.
37 Rhodes and Osborne (2003) p. 449. Though the ‘Oath sworn at Plataea’ on the same stele is apparently an invention of the fourth century, we know the ephebic oath to have been sworn annually, and there would be no advantage to creating a different, more archaised, version of the traditional oath, as doing so would then place suspicion on what would then come to be understood as the ‘new’ ephebic oath.
could not believe it was left up to each individual to decide what is reasonable, and
instead suggested an otherwise un-attested role for the Areopagus to decide what
laws were and were not reasonable, on the basis that 'government could hardly
work if everyone could interpret according to his own discretion'.\(^{38}\) Lambert on
Attic Inscriptions Online\(^ {39}\) translates *emphronōs* as mindfully, and Daux\(^ {40}\) favours
*en tout conscience*, with both treating the adverb as governing the act of obedience,
and not the rule. Siewert rejects this on the basis that ‘*euēkoēsō* (equivalent to *eu
akouein*) has an adverb of its own, and an additional *emphronōs* would sound
somewhat pleonastic.'\(^ {41}\) Lambert does not offer any reasoning for his translation,
and Daux merely suggests it as one option, before moving on to other discussions.

Siewert’s hesitation about the translation ‘reasonably’ is worth addressing in more
detail. He expressed concern that a society could not function if everyone could
interpret the laws according to his own discretion, but in fact wide discretion on
interpretation of laws is well attested in other areas of Athenian law.\(^ {42}\)

Moreover, it is necessary to take into account the fact that the oath has a three-
fold structure. The ‘reasonableness’ condition can be interpreted to apply only to
‘those holding power’ and to new laws.\(^ {43}\) This recognition that the institutions of
the democracy could be vulnerable to abuse, as indeed happened during the
oligarchic revolutions at the end of the fifth century, may also be seen in the
inscription from 337 threatening penalties against the Areopagus Council in the
event that the councillors continue the work of the Council under a non-

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\(^ {38}\) Siewert (1977) p. 103-4.
\(^ {39}\) https://www.atticinscriptions.com/inscription/SEG/21519.
\(^ {40}\) Daux (1971).
\(^ {41}\) Siewert (1977) p. 103.
\(^ {42}\) see 4.32.1 on the jurors’ oath.
\(^ {43}\) This is how it is translated by Rhodes and Osborne and Siewert. For the presumption of excellence
for the established laws, see Aeschin. 1.6 ‘It is my view that it is our duty, when we are making laws,
to have as our aim that we create laws that are well framed and suitable for our type of government;
but it is equally our duty, when we have enacted the laws, to obey the established laws and to
punish those who do not obey them, if the city’s affairs are to be in good order.’ Trans. Fisher,
adapted. See further Lys. 1.48, 10.32, 22.3; Dem. 24.24, 24.29. The phrase οἱ κείμενοι νόμοι is common
in the orators.
For suspicion of new laws, see Allen (2000) pp. 29 and 92-93.
democratic regime. Meanwhile, the established laws are presumed to be reasonable and the promise to obey them is unconditional.

The requirement that new laws and those holding power must be reasonable may be connected to the next clause of the oath, a promise not to give allegiance to anyone who would destroy the laws. If Stobaeus does record a slightly later version of the oath, but an oath which was used in democratic Athens, the change is interesting. The oath as inscribed has ephebes promise only not to offer allegiance to anyone who would destroy the laws. The oaths recorded in Stobaeus and Pollux instead require the ephebes to swear that if anyone destroy the laws or does not obey them, they will refuse him allegiance and will defend (presumably the laws) against him. Depending on the date of this change, this could have important consequences for how Athenians viewed their relationship to the law. Whereas the older oath only requires the individual citizen to comply with the law, the newer oath places on him a new responsibility to protect the laws, not only against those who would overthrow them, but against anyone who might break them. Each Athenian male is asked to swear to fight against anyone who breaks Athens’ laws. It is not possible to date the development in the oath conclusively, but if we accept the conjecture of Rhodes and Osborne that the inscribed stele predates the reorganisation of the ephebeia in the 330s, it is possible the versions recorded in Stobaeus and Pollux come from this reorganised ephebeia.

If this reconstruction is correct, it seems to show a development in Athenian understanding of their laws, with the earlier version of the oath asking uncritical obedience only to the established laws, while the later version of the oath asks obedience to all laws created by the plethos as well as placing on individual citizens the duty to protect the laws against lawbreakers. This seems to indicate a growing dedication to the role of law in the polis, but of course this is all speculative,

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44 RO 79.
45 For more on the distinction in fourth-century Athens between established and new laws, see Chapter 5.
predicated as it is on the assumption that Stobaeus did record a genuine version of
the ephabetic oath, and this oath post-dated that inscribed on the stele at Acharnae.

4.3 Enforcing law

4.3.1 Bringing a case to court

4.3.1.1 Volunteer prosecutors

Athens never had a professional police system, outside of the very limited role
played by the Scythian slave archers. It did, however, possess court procedures
which enabled citizens who were not the victims of the harm in question to
prosecute wrongdoers for certain types of wrongdoing.47

The rationale behind the distinction between graphai (public suits) and dikai
(private suits) is hard to identify precisely. Osborne argues for a procedural
distinction based on whether or not there existed an individual capable of
prosecuting the wrongful act as its victim.48 Todd argues instead for a looser
distinction broadly reflecting who could be considered to suffer from the wrongful
act, whether an individual or the polis as a whole.49 Where the victim is considered
as the polis as a whole, there is generally no single identifiable victim, so the two
arguments both cover the available evidence well.50

47 These processes were primarily graphai, but see Todd (1993) p. 112-122 for other public procedures.
50 The graphē hubreōs could be considered an offence with an identifiable victim capable of
prosecuting, though it is possible that since hubris was an offence governed by status distinctions,
the lower status victim might usually be assumed not to have been capable of prosecuting.
The graphē pseudoklēteias, for fraudulently attesting delivery of a summons, could be interpreted
as an action where it is clearer that though an individual and not the demos is harmed, the
individual concerned would usually be unable to prosecute the case since he would have been
convicted in absentia on the original summons. Though lying to the demos in the Assembly was
subject to public actions (Hesk (2000) p. 56), giving false evidence in court was subject only to the
private dikē pseudomarturion. It seems likely that there was no strong consistency in how Athens
used private and public actions.
The use of graphai, on the face of it, appears to show a genuine concern to hold people to the law, but in practice this seems not to have been how the procedures were treated, or even conceived of. The creation of graphai was ascribed to Solon and is often interpreted by modern scholars as a way to promote the enforcement of the law, but this is not necessarily how it was understood in antiquity. Plutarch attributes Solon’s creation of the graphē to his desire to promote a sense of solidarity among Athens’ citizens:

‘The law-giver in this way rightly accustomed the citizens, as members of one body, to feel and sympathize with one another’s wrongs. And we are told of a saying of his which is consonant with this law. Being asked, namely, what city was best to live in, ‘That city’ he replied, ‘in which those who are not wronged, no less than those who are wronged, exert themselves to punish the wrongdoers.’

The Ath. Pol. assesses the creation of graphai as one of Solon’s most democratic reforms, but it is unclear from the context whether its democratic merits come from its capacity to hold all citizens to the law, or its offer of retribution against wrongdoers to the weak as well as to the strong. Demosthenes, when describing the multiplicity of Athens’ legal procedures, focuses on the need to provide to the weak the opportunity for retribution even when wronged by the strong.

The graphē procedure, because it was open to any citizen to prosecute, is generally understood to have been vulnerable to misuse, and therefore to have had restrictions placed on it. An unsuccessful prosecutor in a graphē who failed to win

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51 e.g. MacDowell (1978) p. 53 incorrectly paraphrases Plutarch on Solon: ‘He said it ought to be everyone’s concern to see that the laws were obeyed’.
52 Plutarch Solon 18.5.
53 Ath. Pol. 9.1.
54 Dem. 22.25 ‘If, then, he was going to frame the laws to satisfy the moderate man’s claim to redress, many wicked people, he reflected, would receive indemnity, but if he framed them in the interests of the bold and the clever speakers, the plain citizen would not be able to obtain redress in the same way as they would.’ It is unclear exactly what Demosthenes means by this. It is possible that it relates to how precisely laws define offences, as a precisely termed law could be considered easier for a prosecutor to use, while also being easier for a clever defendant to argue his way out of, whereas a loosely defined law might suit a more experienced prosecutor who had the confidence to argue widely.
at least a fifth of the jurors’ votes was subject to a 1000 drachmae fine, and possibly also some limited form of atimia, or loss of citizen rights. There were similar penalties for unsuccessful phasis and apographē prosecutions. The only types of public cases we know to have been risk-free are eisangeliai.55 Eisangelia actions could only be brought against those who subverted the democracy, committed treason, took bribes to speak against the interests of the demos, maltreated orphans, or misbehaved in public office.56 The fact that until the 330s Athens continued to allow these cases to be brought without any risk suggests that, in these limited areas, it was felt to be disadvantageous to the polis to do anything that would potentially discourage would-be prosecutors who would uphold these laws in protection of the state or of those unable to prosecute for themselves. Nonetheless, from the 330s even these categories of case came to carry risks for the prosecutor. The potential for large penalties in the event of unsuccessful cases created a structural disincentive to prosecute, even where someone did know his opponent to have committed legal wrongs. Rather than prioritising enforcement of law, Athens here appears to prioritise the maintenance of social order – which could be disrupted by people bringing unwinnable lawsuits.57

4.3.1.2 Menusis and denunciation

Similarly, the use of the process ofmenusis, which allowed slaves to inform on their masters, was very tightly restricted. Menusis may only have been usable at all in

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56 Hansen (1975) pp. 21-9. Rhodes (1979) argues that eisangelia could also be brought for other, undefined harms to the public good.
57 Athens did have some public lawsuits which allowed rewards to be given to the successful prosecutor. Though in principle they could be seen as intended to promote prosecution and enforcement in these areas, in practice the possibility for reward seems to have clashed with the disincentives against prosecution. Osborne (1985) p. 46 notes that there appear to be no recorded apographai which were clearly brought for financial reward. Christ (1998) pp. 139-143 argues there is no greater association with sykophancy in suits carrying rewards and those that did not. Lanni (2016) p. 52 argues that ‘the financial rewards offered to volunteer prosecutors seem to have reflected, not rectified, under-enforcement in those types of suit’. Rubinstein (2016) has studied use of rewards for denunciation across the Greek world and identifies Athens as anomalous in its restricted use of rewards.
Athens for religious offences. Slaves’ evidence could be admitted in court, but only if it had been extracted through use of judicial torture. We do not have any cases in which slave evidence extracted through torture is adduced by speakers, though references to use of the process are reasonably common. We do know that submitting one’s slave to torture was entirely voluntary. Mirhady argues that acceptance of a challenge to torture was an agreement to settle one’s case out of court, entirely on the word of the slave. If this is correct, Athens’ legal system placed slaves’ evidence of wrongdoing entirely outside of its own enforcement mechanisms. Even if slave evidence could be produced in court, the facts that the decision to torture or not torture slaves is left entirely up to the litigants and that Athens possessed no mechanism to compel a slave-owner to allow his slave to be tortured suggest a choice not to prioritise enforcement of Athens’ laws. Given the almost universal presence of slaves, use of slave denouncers and slave evidence could have given Athens enormously greater capacity to enforce its laws, but again social order is given priority over enforcement of laws.

In On the Mysteries Andocides tries to defend his behaviour at the time of the profanation of the mysteries and the mutilation of the herms. It appears that one of the charges he was defending himself against was that he acted as an informer. Even in so grave a matter, Andocides presents himself as extraordinarily unwilling to come forward with what he knew. Andocides depicts himself as giving up the wrongdoers only after he and his family have been thrown in jail and placed in fear of their lives. Far from wishing to allow the law to be enforced, Andocides

58 Osborne (2000). Osborne suggests that the use of slave denouncers in the Kean Ruddle Decree RO 40 suggests Athens recognised the potential for using slave denouncers to police the laws, but made a conscious choice not to allow it in Athens.
62 The profanation of the mysteries and the mutilation of the herms were not only serious acts of asebeia, but were associated at the time with attempts to overthrow the democracy (Thuc. 6.27.3). Although by the time Andocides gave his speech in 399 the immediate panic around the original acts must have died away, Andocides was contending with ill feeling from the overthrow of the democracy in 411 and in 403. As such, the identification of the acts with anti-democratic plotters could be said to have made his position even more dangerous than it was in the first trials in 415.
63 Andoc. 1.48-57.
finds it necessary instead to defend himself from accusations that he too willing gave up the wrongdoers.

4.3.1.3 Sykophancy

Perhaps the most striking mark of Athens' lack of interest in society-wide enforcement of law is the degree to which sykophants appear to have been reviled. Sykophancy is difficult to define precisely, but has long been seen as an abuse of Athens' legal system. Sykophants are variously presented as people who bring groundless lawsuits, people who bring too many lawsuits, blackmailers, or, generally, a useful insult to throw at one's opponent in a lawsuit. As Osborne shows, in metaphorical uses of 'sykophant' words, dishonesty is not an essential element of sykophancy, and the word can best be translated as 'quibbling'. Sykophants then are people who are hated for bringing legal cases, even where those legal cases may not be groundless. If we follow through the idea of 'quibbling', sykophants could be seen as people who attempt to enforce laws against people who are not, apart from having happened to break these particular laws, otherwise bad people. This seems to tally with Crito's dismissal of those who would try to convict him of helping Socrates to escape as mere sykophants, and cheap to buy off. This despite the fact that Crito, had his plan come off, would have been guilty of the accusations made by the sykophants. The sykophant in Aristophanes' Wealth 914–5 even defends himself by claiming that the polis is 'served by watching that the established law is observed — by allowing no one to violate it.' Although the other characters reject his claim for pity, they do not refute his claim that he enforces the laws of the city.

Sykophants were not only hated – sykophancy was also an offence. It appears to have been possible to prosecute sykophants using either a graphê or a probole. In

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64 Osborne (1990) gives a short history of the scholarship on sykophancy, and argues that sykophancy, while used as an insult, could be understood in a more socially valuable light as a means of driving wealthy Athenians to comply with the democracy's expectations.
65 Ibid.
66 Though vexatious litigation might seem a tempting comparator, there are some important differences. Vexatious litigation is handled within the narrow bounds of the Civil Procedure Rules.
addition, the penalties suffered by those who fail to win more than 1/5 of the votes in a *graphē* are linked by orators to sykophancy. Crawley (1970) denies the existence of a *graphē sykophantias*, but his arguments are unconvincing. Crawley rejects the clear evidence of *Ath. Pol.* 59.3 (‘Also they [the thesmothetai] hear *graphai* for which a fee is paid, on charges of xenias, doroxenias,... sykophantias, doron, pseudengraphes, pseudokleteias, bouleuseos, agraphiou and moikheia.’) on the weak grounds that sykophancy does not fit in the list because it is harder to prove to a jury than the rest of the list. There is no evidence that Athens grouped its procedures by proveability. Instead, the *Ath. Pol.* groups procedures by the archon in charge, and there was commonly some thematic unity in which procedures were overseen by which archon. Here, one could make an argument for a thematic list based around behaviours which are harmful to the functioning of the democracy. Moreover, the evidence in the *Ath. Pol.* is supported by Isoc. 15.314 ‘but against sykophants they provided *graphai* before the *thesmothetai*....’

Crawley, having dismissed the evidence of the *Ath. Pol.* argues from absence that there cannot have been a *graphē sykophantias* or we would see evidence of it having been used, but here again his argument remains unconvincing, since one could say much the same thing for the *graphē hubreos*. If we assume that a *graphē sykophantias* did exist, it is worth imagining what a prosecution for sykophancy would entail. Presumably, any prosecution would have to come out of an original case, much as with the *dikē pseudomarturias*. If in the original case the sykophantic prosecutor failed to win the necessary proportion of the votes, he would already...
have been subjected to penalties as discussed above. If the sykophantic prosecutor had won the original case, the loser would be in a poor position to bring a *graphē sykophantias*, having lost at best money and prestige, or at worst his life or right to speak. A volunteer prosecutor in this instance would also face barriers: the risk of his own case being regarded as sykophantic, the fact that in the original case the alleged sykophant was able to convince the jury, showing both his own skill at speaking and his enjoyment of popular support, and the fact that by bringing an unsuccessful *graphē* against the alleged sykophant and losing, the volunteer prosecutor risks further reinforcing the outcome of the original case. Only in a scenario where the alleged sykophant lost the original case, but not by so large a margin as to attract penalties, does it seem practical to bring a *graphē*, and even there the risk of confronting a skilled speaker on a charge which, relating as it probably did to intention, would have been difficult to prove to a jury, may well have outweighed any potential advantage. Given the inherent barriers to bringing a *graphē sykophantias*, any argument based on the absence of their use must be treated with caution.

There was also the option of bringing a *probolē* against sykophants. A *probolē* was a public denunciation of an offender, but while it certainly had symbolic importance, the degree to which *probolai* had legal consequences is unclear. The *Ath. Pol.* groups together sykophancy and deceiving the demos, and the latter appears to have had legal penalties attached to it, as in the case of those who were convicted of deceiving the demos over the execution of the generals at Arginusae and were held pending trial, until they escaped. MacDowell, on the evidence of Demosthenes *Against Meidias*, thinks that a *probolē* could be turned into a full trial, and gives the analogous example of how *apagōgē* lent its name both to the mode of introducing the case and the procedure for trial. Rowe assesses the various

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69 Christ (1992) p. 339 describes *probolē* as ‘an expression of public opinion without binding force’. MacDowell (1990) p. 16 argues that *probolē* was the term used for both the initial, non-binding *ecclesia* vote and the subsequent action before the dikastic courts.

70 Ath. Pol. 43.5.

71 Xen *Hel* 1.7.35. Hesk (2000) p. 55-7 considers whether there may have been other procedures for prosecution for deceiving the demos, and concludes that there were not.

arguments about what process was used in Against Meidias and agrees with MacDowell that the case was itself a probolē.\textsuperscript{73} Given the evidence that it may have been possible to continue a probolē into a trial, and the absence of evidence for any process other than a probolē by which to convict people of deceiving the demos, it seems likely that a probolē could carry a penalty. The probolē may have offered certain advantages over a court trial. Hearings in the Assembly appear to have been less formalised than in the courts,\textsuperscript{74} and did not carry the same risks for a prosecutor as a graphē.

What is particularly interesting about the probolē against sykophants is that the number of persons who could be indicted by probolē each year was limited to three citizens and three metics. Osborne argues that this is a mistranslation and the limitation is not on the number who can be indicted, but on the number who can bring indictments.\textsuperscript{75} Christ (1992) rejects this and argues that the limit on prosecutions was intended to prevent abuse in wake of the damage caused by what he argues is the Thirty’s use of sykophant as a catch-all term to enable them to persecute their enemies. This seems unconvincing, since there is no evidence that the restriction was introduced after the Thirty and in fourth-century discourse about the Thirty the progression is quite clear – first they came for the sykophants, then they came for the good people (Ath. Pol. 35.3). Sykophancy was not rendered invalid as a term of abuse after the Thirty, which would be expected had they used it as Christ argues. Osborne’s proposed translation seems most convincing, despite

\textsuperscript{73} Rowe (1994).
\textsuperscript{74} E.g. the execution of the Generals at Arginusae, and Euryptolemus’ request that they be tried in the courts Xen. Hel. 1.7.12-16, Lys. 22.2 the speaker claims to have forestalled the attempt by the boulē to put the graindealers to death without a trial only to bring them to trial on the same charges in the case at hand.
\textsuperscript{75} (1990) p. 94-5 n. 37. Accepted by Harvey (1990) p. 106 n. 13. How this would work in practice is hard to imagine. It is easy to see how a large number of people accused of sykophancy could be reduced to three, in the same way that a field of candidates for ostracism is reduced to one, it is not clear how the number of indictments accepted could be kept to three. It is possible that, were e.g. seven citizens initially to make accusations of sykophanity (against seven different sykophants), there could be an initial vote held to reduce that to three (though the mechanics of this are hard to work out – perhaps if each voter were permitted to submit three ostraka with names of those to be tried through probolē? Voting in the ecclesia was usually by show of hands, but this would not be practicable for a decision like this), before a second, third and fourth round of voting to result in three probolē decisions.
the logistical problems, and though to us the mismatch between the size of the
citizen and metic populations means that giving each group the same number of
indictments looks strange, an equal split between Athenian and non-Athenian
might have seemed more reasonable to Athenians.

Limiting the number of indictments that could be brought for *probolē* must be
assumed to have limited its efficacy as a tool to punish sykophants, since regardless
of the number of sykophants active in Athens only six people could make
indictments. This structural barrier to prosecution may highlight some of the
difficulties Athenians had with managing accusations of sykophancy. Though
Athens had decided that sykophancy should be punished, allowing an unlimited
number of risk-free indictments for sykophancy to be aired in the Assembly could
have been disruptive and harmful. It seems likely that by limiting the number of
indictments that could be brought, the *dēmos* could choose to select only
indictments brought by the type of citizen who would not be perceived as likely to
try to abuse the system; meanwhile the people who might otherwise have found
themselves subjected to accusations of sykophancy did not have to face the
reputational damage of being discussed in this context in the Assembly, nor the
risk of having to face a potential trial.

The legal procedures against sykophancy, then, show Athens allowing prosecution
against people bringing lawsuits which even if not legally baseless, are nonetheless
considered an abuse of the democracy’s courts and legal processes, because they
concern quibbling, small illegalities rather than behaviour that was recognised as
being in some sense more harmful to the community. In this way, Athens
prioritises other *polis* interests over the enforcement of its laws.
4.3.1.4 Arbitration

Another barrier to enforcement of the law at Athens was the pressure in dikai\textsuperscript{76} to use arbitration rather than the courts to settle disputes.\textsuperscript{77} In the fourth century, litigants in dikai were required to make use of non-binding arbitration processes, and there also seems to have been social pressure for litigants to use binding, voluntary arbitration. In court speeches we see litigants complaining of their opponents’ intransigent and unreasonable behaviour during the arbitration proceedings, such as in Demosthenes 33.16-19, where the speaker complains that his opponent abused the arbitration proceedings. This is of interest when thinking about law enforcement precisely because, according to Aristotle, whereas courts are supposed to judge according to the law, arbitration should be based on fairness (epieikēs).\textsuperscript{78} Arbitration is thus marked out as an area where relying too much on the laws is inappropriate.

The expectation that litigants should use arbitration seems to have applied only to dikai, which could be seen only to have a limited effect on enforcement of law, if dikai are understood as private suits, between individuals, and it is better that those individuals resolve their quarrel to their mutual satisfaction if at all possible, while graphai are public suits, prosecuting people for committing wrongs which are, in some way, harmful to the polis, and so of course cannot be settled, but must be dealt with through proper legal process. This distinction, however, seems to have applied only fairly loosely in Athens,\textsuperscript{79} and often the same wrongful act could lead to a variety of responses – some public and some private. Dikai were not limited to insignificant matters, but covered a wide range of socially harmful

\textsuperscript{76} In graphai there was no such pressure and prosecutors could be subject to penalties for withdrawing suits before going to trial. Wallace (2006) argues that penalties only applied where the suit was withdrawn in exchange for payment, except in the graphē hubreōs and the graphē lipotaxiou. Harris (2006d) refutes this, arguing that Wallace makes too much of an argument from silence. In the absence of clear evidence to the contrary, it seems safer to assume that withdrawing a graphē was subject to some sort of penalty.

\textsuperscript{77} Hunter (1994) p. 57 on pressure to submit disputes to arbitration.

\textsuperscript{78} Arist. Rh. 1374b. It is possible that this demarcation of arbitration away from law applies only to voluntary, binding arbitration, since we know that at the compulsory arbitration the litigants were required to disclose the laws they intended to rely on at the trial.

\textsuperscript{79} See above p. 128.
behaviours, including assault, giving false witness in court and theft, as well as the special dikai in the homicide courts.

4.3.1.5 Court closures

As well as keeping dikai out of court through arbitration, at times Athens shut down its courts altogether. This probably happened immediately after the restoration of the democracy in 403,\textsuperscript{80} then again in the 360s, possibly for some years,\textsuperscript{81} and again in the 340s.\textsuperscript{82} The shutdown in 403 could have been as a result of the need to regain social order after the civil war under the Thirty, but the fourth-century shut downs were both for economic reasons. These closures almost certainly did not affect the usual democratic court processes of euthynai, eisangelia and dokimasia, and probably did not affect graphai either.\textsuperscript{83} It is nonetheless remarkable that Athens was willing and able to shut down its courts, and moreover that the shut downs receive so little attention in sources. Apart from individual litigants complaining about the inconvenience caused to them by the delay in prosecuting the case,\textsuperscript{84} the closures are not remarked upon. There is no evidence of any consequent break down in law and order or social relations at the time. This at least suggests that the role of the courts, at any rate in judging dikai, was not a social priority for Athens, and that without courts to judge according to the law Athenians were assumed to be able to settle their disputes in a way that was not socially harmful.

\textsuperscript{80} Lys. 17.3. Possibly also Isoc. 21.7 – which refers to a litigant having been unable ‘while conditions in the city were unsettled and the courts were suspended’ to bring his case regarding return of money deposited during the regime of the Thirty. The litigant Nicias would have been unable to bring his case to court while the Thirty were in power, not because the courts were suspended (Lysias 13.37 complains of what is alleged to be an unjust trial help under the Thirty. Demosthenes 24.57-9 contrasts the democratic dikasteria of the fourth century with the wrongs done by the dikasteria under the Thirty) but because he had deposited the money to hide it from the Thirty. The reference to courts having been suspended must therefore relate to the period immediately following the restoration of the democracy.

\textsuperscript{81} Dem. 45.3.

\textsuperscript{82} Dem. 39.17.

\textsuperscript{83} Hansen (1991) p. 189.

\textsuperscript{84} Dem. 39.17 and 49.99.
4.3.2 Law in the courts

4.3.2.1 Jurors’ oath

Even when the courts were functioning, the degree to which court processes enforced the law is controversial. Athenian jurors were required to swear an oath once a year concerning their conduct as jurors. Though there is no complete copy of the oath surviving, there are many references to the oath and it is possible to piece together its main terms. Concerning the laws, the jurors swear to vote in accordance with the laws and decrees of the Athenian people, and to vote with their most just judgement about matters for which there are no laws and without favour or hostility. How far jurors were bound by this oath and what effect it had on jury voting behaviour are controversial questions. Harris points out that the part of the oath requiring jurors to judge according to the laws is referred to much

85 Fraenkel (1878) first reconstructed the oath to contain four clauses: 1) To vote in accordance with the laws and decrees of the Athenian people. 2) To listen to the accuser and defendant equally. 3) To vote or judge with ones most just judgement about matters for which there are no laws and without favour or hostility. 4) To vote about matters pertaining to the charge. Harris (2013) p. 101-102 accepts these four clauses and adds a fifth clause applicable after 403; to respect the Amnesty.

86 Additionally, jurors swear to vote on the matter to which the prosecution pertains (Dem. 24.151). How far this was the case, and how broadly defined this requirement of relevance was, are disputed. By taking a broad approach to relevance which allows him to consider character evidence pertaining to the likelihood or otherwise of the defendant having committed the alleged wrong, and information relating to ongoing disputes that were conducted through litigation, Rhodes (2004) is able to conclude that most Athenian forensic oratory was mostly relevant to the charge. Lanni (2006) takes a different approach, whereby Athenians are considered to have used material which, while legally irrelevant, nonetheless allowed juries to come to decisions which were felt by Athenians to be more just. Where Lanni and Rhodes treat this requirement as primarily related to litigation, Harris (2013) pp. 114 ff. links it to the role of the law in the Athenian courts. Harris argues that the jurors, by swearing διαψηφιοῦ?εις ἀνὴρ ὕψων ὰμιτῶν ἄν ὰδιωκῶν ἡ, (Dem. 24.151) promise to judge only on matters included in the έγκλημα or graphē. Harris further argues that the form of the έγκλημα required the litigant to specify how the acts he alleges the defendant to have done constitute breaches of the law. Harris considers this to have meant that all prosecutions brought before the Athenian courts had to be brought for acts defined or definable as offences under Athens' laws. The problem with this is that the only check on what could be included within the έγκλημα is the opinion of the archon responsible for that type of suit. Athens was usually resistant to giving a lot of discretion to officials, and archons were appointed by lot so cannot be considered to have had any specialist knowledge of law, so the effectiveness of this check is doubtful. There are two instances in the orators of archons rejecting suits. In Antiph. 6.37-8 the suit is rejected because there is no time for the basileus to fulfil all the necessary processes before the end of his term of office. The family of the dead boy are able to introduce their suit with his successor. In Lys. 13.86 the Eleven compel the man requesting the apagoge to add the words επ’ αὐτοφόροι to the charge, but do not appear to have checked the legitimacy of this charge. The work of the archons in policing the charge seems to have been limited to requiring that it be made through the proper processes.
more often than the part requiring them to judge by their most just judgement, and considers jurors to have generally voted conscientiously in a way which applied the laws of the city.\(^{87}\) Scholars such as Lanni\(^{88}\) argue against this that in some cases, such as Against Leocrates, Against Boeotus, or Against Athenogenes, it is not at all clear that the defendant has actually breached any laws at all. Some cases contain little or no legal argumentation\(^{89}\) and it is common for litigants to bring in much material which appears irrelevant to the case at hand.\(^{90}\) As Todd notes,\(^{91}\) there are even instances of litigants asking jurors to uphold agreements which were made in order to exclude the operation of law.

The significance of the clause requiring that jurors judge by their most just judgement (\(\text{gnömē dikaiotatē}\)) when there are no laws has been studied extensively and its application in Athenian courts is disputed. Biscardi identified two schools of thought. The first considers \(\text{gnömē dikaiotatē}\) to be useable to help jurors interpret the law, to fill in any gaps in the legislative system, and to resolve conflicts between law and equity in favour of equity. The second takes a much more narrow interpretation of the clause, and considers that it was only applicable where no law existed on the question at hand.\(^{92}\) Scafuro applies Biscardi’s analysis to Todd’s work on the procedural orientation of Athenian law,\(^{93}\) and concludes that the broader approach to the \(\text{gnömē dikaiotatē}\) must be considered to be correct, since the Athenian jury would not have expected, nor had the capacity, to make decisions which stuck closely to the letter of the law.\(^{94}\) Mirhady has proposed a different approach to the clause on the \(\text{gnömē dikaiotatē}\). He argues that the clause was intended to govern decisions on facts, and so was in symmetry with rather than

\(^{87}\) Harris (2013) p. 104.
\(^{88}\) Lanni (2006).
\(^{89}\) Of the roughly 100 speeches in the corpus, 44 cite no laws.
\(^{90}\) See Lanni (2006), Johnstone (1999), Rhodes (2004) for different models of relevance in the courts. Wohl (2010) through close reading of certain speeches, argues for a model where apparently irrelevant evidence is used as part of a complex rhetorical strategy.
\(^{91}\) (1993) p. 59, observing that one of these instances, Dem. 48, involves the jury being asked to uphold an agreement to commit a ‘crime’.
\(^{92}\) Biscardi (1970).
\(^{93}\) Todd (1993)
complementary to the clause requiring jurors to judge according to the laws. Harris accepts that the clause governs jurors’ decision on the law, but says that it must have been an exceptional measure, to be used only where there truly was no law which could be applied to the situation. All of these arguments start from the presumption that there must be one correct interpretation of the oath, but like the rest of Athenian law, Athens lacked any process by which one interpretation of the oath could become authoritative. The question of the meaning of this clause must accordingly be left open.

Despite it being impossible to select a single correct interpretation for the clause requiring jurors to judge by their most just judgement, its existence can tell us something about the role of law in Athenian judging. By including a requirement that jurors judge by their most just judgement, the oath emphasises the role of the court in achieving equitable outcomes. If jurors really did swear to judge cases according to the law, and if they upheld this oath in their decision making, arguments which fail to dwell on the legal status of the case would appear to have been extremely weak. Since we know these speeches to have been written by skilled logographers, the evidence we have seems better explained by the hypothesis that that, like the ephebic oath, the jurors’ oath, while emphasising the importance of the laws in judicial decision making, did not go so far as restricting citizens’ liberty to exercise their own judgement.

4.3.2.2 Deterrence

The use of the idea of deterrence in Athenian court speeches at first glance seems to suggest some attempt at society-wide enforcement of law. Of the four explicit references in Athenian court speeches to deterrence, three come from speeches prosecuting in public cases, while the fourth comes from Lysias 1, where the rhetorical strategy tries to turn a defence in a private suit for homicide into a prosecution under a public suit for adultery.

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95 Mirhady (2007).
The use of the deterrence argument in Demosthenes *Against Neaira* looks straightforward, until you realise that the behaviour which he is urging should be deterred is not the offence for which Neaira is being tried. This section of the speech actually refers to a law regulating the behaviour of the wife of the *archon basileus*, which Neaira herself never was. Lysias 1 tries a similar move, arguing that if the court fails to condone what he presents as his enforcing of the law on adultery, homeowners will also no longer be able to protect their property against thieves, since the thieves will claim to be adulterers and so claim the supposed protection of the court’s decision to punish those who kill adulterers.

A second use of deterrence in *Against Neaira* is much more interesting in what it could tell us about the degree to which Athenians might be expected to conform their behaviour to the laws than in its approach to enforcing law. According to the rhetoric here, wicked women will no longer have to fear the laws and so will behave in all sorts of socially unacceptable ways, knowing that the law has no further effect. This idea that failure to enforce the law in a single case will lead to that law becoming no longer effective is something Demosthenes makes much more

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97 Dem. 59.77 ‘These sacred and holy rites for the celebration of which your ancestors provided so well and so magnificently, it is your duty, men of Athens, to maintain with devotion, and likewise to punish those who insolently defy your laws and have been guilty of shameless impiety toward the gods; and this for two reasons: first, that they may pay the penalty for their crimes; and, secondly, that others may take warning, and may fear to commit any sin against the gods and against the state.’

98 Lys. 1.36 ‘So I beg you now to reach the same verdict as the law does. If not, you will be giving to adulterers such security that you will encourage thieves to call themselves adulterers too. They will realise that if they describe adultery as their object and claim that they have entered another’s house for this purpose, nobody will dare to touch them. Everyone will know that we must say good-bye to the laws on adultery and take notice only of the jury’s vote— which is of course the most *kurios* over all the city’s affairs!’ (trans. Todd 2007, adapted).

99 Dem. 59.111-112 ‘At this point [if you acquit Neaira] the most virtuous of the women will be angry at you for having deemed it right that this woman should share in like manner with themselves in the public ceremonials and religious rites; and to those who are not women of discretion you point out clearly that they may do as they please, for they have nothing to fear from you or the laws. For if you treat the matter with indifference or toleration, you will yourselves seem to approve of this woman’s conduct. It would be far better, therefore, that this trial should never have taken place than that, when it has taken place, you should vote for acquittal; for in that case prostitutes will indeed have liberty to live with whatever men they choose and to name anyone whatever as the father of their children, and your laws will become of no effect, and women of the character of the courtesan will be able to bring to pass whatever they please’. Cf. p. 166 below on the different way Solon’s law-giving for men and for women is imagined in the fourth century.
explicit in *Against Meidias* where he asks ‘And what is the strength of the laws? If one of you is wronged and cries aloud, will the laws run up and be at his side to assist him? No; they are only written texts and incapable of such action. Wherein then resides their power? In yourselves, if only you support them and make them all-powerful to help him who needs them. So the laws are strong through you and you through the laws.’

This idea that without the law in place and rigorously enforced people will behave in socially unacceptable ways reflects the ‘bad man’ model of law. To be under a legal duty, for the bad man, is simply to be aware of the likely negative repercussions as a result of not complying with the law. This seems to contrast sharply with the wide discretion given to Athenian citizens to interpret law, and it is not reflected in many of Athens’ judicial institutions. It seems rather to be used in rhetoric by prosecutors to give the impression that a failure to convict the defendant will lead to catastrophic social ills. Where speakers do try to use deterrence arguments, they give as their imagined consequences of not enforcing the law the very most serious outcome imaginable. Indeed, they go so far as to look almost ridiculous to a modern reader, and this need to exaggerate may be indicative of the inherent weakness of deterrence arguments. The consequences envisioned in these examples, such as the idea that men would, if they could, marry only prostitutes, or the preposterous image of a thief caught in the act claiming protection on the basis that he is not a thief but an adulterer, is perhaps a sign that in questions of enforcement of law, the argument from deterrence is relatively weak, and to try to persuade a jury of it the speaker needs to go to the furthest possible extreme to give his argument any weight.

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100 Dem. 21.224. Similar ideas can be seen in Aeschin. 1.192-3 and Lys. 27.6-7.
101 Lanni (2016) argues that in fact Athenian social order can be attributed to the deterrent effect of the fact that Athenians could consider themselves quite likely to need to defend themselves in court, and because of Athenian courts’ wide approach to relevance might find any past misdeed brought up against them. Though modern studies on deterrence focus more on the effect of marginal deterrence (that is, increases to sentencing), the largest meta-study (von Hirsch et al. 1999) showed that deterrence is primarily effective where consequences are highly certain and immediate, neither of which Athens satisfied. Despite this, deterrence is popularly imagined in modern society to work, and it is this imagined role of deterrence I am interested in here.
4.3.2.3 Praising the laws

As well as asking the jurors to enforce the laws by threatening terrible consequences if they fail to do so, orators frequently praise the laws they are asking the jurors to enforce. This trope appears 51 times in the corpus of forensic oratory,\(^{102}\) of which 20 instances come from *graphai paranomôn* and *nomon mē epitēdeion theinai*. It appears in both public and private suits, and across the whole span of time covered by the forensic orators. Orators will sometimes simply offer their own opinion of the law;\(^{103}\) at other times they will offer explanations for why this law is good. As such, there is some overlap with the trope of construing the intention of the lawgiver,\(^{104}\) but whereas the intention of the lawgiver is used as justification for the interpretation the speaker wishes to put on the law in question, the trope of praising the laws seems to have as its purpose quite simply to persuade the jurors to actually enforce the law.

Of the 51 instances of this trope, 22 offer no justification for the praise at all. In 7 of the 51 instances the praise includes a claim that the law is democratic, but since praise of a law as democratic was likely to be being used as a 'hurrah-word' (to use Hansen's term) in this context, some of these 7 are instances where I have treated the speaker as offering no justification. 11 of these 51 praise the law for promoting justice (understood as fairness), and 2 for promoting justice (understood as consistency with other Athenian laws or decisions). 10 praise it for promoting expediency, and three praise it for promoting some moral end outside of achieving justice. Out of 51 instances, 4 seem to envisage the law as likely to effect behavioural change. This pattern of praise echoes the evidence we have explored in chapters 2 and 3 of this study that Athenians were as likely to view their laws as

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103 e.g. Aeschin. 3.33 ‘This, men of Athens, is an excellent law’.
104 see Lanni (2006) p. 69 on the use of this trope and chapter 5 for its significance in understanding Athenian law.
intended to fulfil expedient purposes as to consider them aimed at achieving justice. Similarly, it echoes the weak role of morality in interpreting Athenian laws.

The fact that litigants find the need to praise the laws they wish the jurors to use in judging the case suggests that the jurors had considerable discretion as to which laws they should use, and how far they should base their judgement on those laws. Even the praise which comes from *graphai paranomōn/nomon mē epitēdeion theinai*, where a higher degree of praise might be expected given that litigants are trying to defend laws from legislation that they claim would contradict them, should not be discounted, since the formal legal matter at stake in these cases is not whether the older law is better than the newer one, but merely whether it existed at all. Even in cases which were supposed to judge legalistic matters, speakers could not trust that the jurors would enforce the law.

### 4.3.2.4 The paragraphē

The reluctance of Athenian juries to enforce law simply by dint of being law may be best seen in the arguments used in paragraphē cases. Paragraphē was a process introduced following the restoration of the democracy after the regime of the Thirty which allowed a person who was being prosecuted for an offence to bring a claim that the case against him was inadmissible. What the jurors were asked to decide in paragraphē cases is disputed. Wolff argued that paragraphē was a two stage process, with an initial vote solely on the admissibility of the case, followed, if the case was held to be admissible, by arguments and voting on the merits of the case.\(^\text{105}\) Wolff was arguing against Paoli, who understood there to be a single vote on both the admissibility and merits of the case.\(^\text{106}\)

Wolff’s view was accepted by Harrison (1971) and MacDowell (1978), but the question remains, why litigants spend so little of their speech-time on the technicalities of the admissibility of their case and so much on the merits. This has

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\(^\text{105}\) Wolff (1966).  
\(^\text{106}\) Paoli (1933).
prompted Carawan to argue that Paoli’s view is to be preferred, and we should understand *paragraphē* to have allowed jurors to decide the admissibility and merits of a case by a single vote. Carawan’s argument against Wolff relies heavily on arguments from silence, pointing out that despite the relatively rich evidence we have of the process, we never see speeches from or explicit reference to the second stage. This absence is not entirely surprising, especially if Wolff was right that voting on the merits usually took place shortly after voting on admissibility. If this is the case, litigants would not have enough time to commission and have prepared a second speech, so, as with *timesis* speeches, we would not expect to see copies of these speeches preserved. It seems more likely that the *paragraphē* speeches we have were intended for hearings on the admissibility of the case, where the would-be defendant had the opportunity to have the case against him ruled inadmissible by the jurors. If this is the case, there remains the question why the speeches are so much wider in content than that would lead us to expect.

Of the seven *paragraphē* cases in the Demosthenic corpus, five are for litigants who, had the case gone ahead, would have been defendants, and two for litigants who would have been prosecutors. The *paragraphē* speeches are notably different from other speeches in Athenian jury trials. Whereas most speeches start with a proem which does not immediately address the law applicable to the case in hand, five of the seven *paragraphē* speeches have as their first paragraph a reference to the law on *paragraphē*. Similarly, four of the seven speeches return explicitly to the law on *paragraphē* at the close of the speech. This could give the impression that the *paragraphē* speeches show more regard for relevance than Athenian forensic oratory in general, but this would be misleading. All the speeches examined here are based either on the argument that maritime suits are not admissible if there is no written contract, or on the argument that a dispute once

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107 2011.
108 Dem. 32–38 and Isocrates 18.
110 Dem. 32–38.
111 Dem. 32, 33, 36, 37 and 38. Dem. 34 and 35 are the two speeches in which the speaker would have been the prosecutor were the case to have gone ahead.
112 Dem. 34, 36, 37 and 38. The end of Dem. 33 is missing.
settled, with valid release given, cannot be reopened in the courts.\textsuperscript{13} None of the speakers rely solely on arguments relating to the admissibility of the suit.

In Demosthenes’ \textit{Against Zenothemis}, the speaker Demo claims the suit should not be admissible because there is no written contract. Although this is the basis of his claim that the suit should not be admissible, the bulk of the speech is about the material dispute between the parties, with 32.11-19 given over to narrative of Demo’s business dealings. A maximum of 10 paragraphs out of 33 are relevant to the argument on whether the suit is or is not admissible.\textsuperscript{14}

In Demosthenes’ \textit{Against Apaturius}, the speaker narrates two entirely separate disputes in which he and Apaturius were involved. In the first of these, the speaker stood surety for Apaturius regarding a loan and the dispute was resolved.\textsuperscript{15} In the second, Apaturius and Parmenon were involved in a dispute and required guarantors for an arbitration. The speaker claims not to have acted as guarantor for this, but was subsequently sued as the guarantor for the arbitration.\textsuperscript{16} Of 38 paragraphs, 10 are completely irrelevant, and only 13 are directly relevant to the \textit{paragraphe}.

In Demosthenes’ \textit{Against Phormio}, the case seems to have revolved around whether Phormio did or did not pay the money he owed the speaker to the speaker’s agent in Bosporus, thus settling his obligations.\textsuperscript{17} As such, most of the events related in the case as presented by the speaker are relevant to his attempt to rebut Phormio’s \textit{paragraphe} claim, but this seems to be because Phormio’s \textit{paragraphe} suit was brought on a daring interpretation of the law on \textit{paragraphe}.

\textsuperscript{13} 32, 33 and (probably) 35 are for absence of written contract; (probably) 34, and 36, 37 and 38 are for the case having already been subject to a valid release. Isager and Hansen (1975) pp. 126-129 categorise the types of objection which could be brought using a \textit{paragraphe}.

\textsuperscript{14} Dem. 32.1-2, 24-31. Though the speech is incomplete.

\textsuperscript{15} Dem. 33.4-12.

\textsuperscript{16} Dem. 33.13-22.

\textsuperscript{17} Isager and Hansen (1975) p. 158.
which would allow paragraphē to be brought where one party to an agreement claimed to have fulfilled all his obligations under that agreement.\textsuperscript{118}

In contrast, almost all the speech of Demosthenes’ Against Lacritus is irrelevant to the question of the admissibility of the case. The paragraphē is likely to have been brought on the basis that there was no written contact between the two parties. The speaker loaned money to Lacritus’ younger brother, who has since died. Lacritus denies having inherited the estate, but the speaker wants to hold him liable for his brother’s debt nonetheless. Isager and Hansen\textsuperscript{119} consider that of this speech, only 35.3, 4 and 44 (out of 54 paragraphs in total) are relevant to the case.

Demosthenes’ For Phormio, which concerns the admissibility of a suit which has already been subject to a release, fares little better, with only 14 of 62 paragraphs relating to the issue of admissibility.\textsuperscript{120} Even in a case which is observed by Isager and Hansen to have rested on weak grounds were the case to have gone to trial, but to have had a strong argument to make at paragraphē,\textsuperscript{121} we do not see the speaker resting on arguments on admissibility. At 36.21, the speaker explicitly tells the jurors that he does not want them to think that he is at ‘any disadvantage regarding the rights of the matters at issue’, and that accordingly he will go through the charges brought against him one by one to show that they are untrue. Even in this perfect example of where paragraphē should have worked well for the litigant, less than a quarter of the speech is about the admissibility of the suit.

Demosthenes’ Against Nausimachus and Xenopeithes concerns the recovery of a debt owed to the estate which the two would-be prosecutors inherited. The speaker in the paragraphē claims that all disputes regarding the estate were settled many years ago, but Nausimachus and Xenopeithes claim a further debt owed to the estate by a third party was paid into the estate but never passed on to them.

\textsuperscript{118} Isager and Hansen (1975) express their hope that the jury rejected Phormio’s interpretation of the law.
\textsuperscript{119} (1975) p. 173.
\textsuperscript{120} Dem. 36.2-13, 23-25 and part of 60.
\textsuperscript{121} (1975) p. 194.
The *paragraphē* claims that all disputes were settled and so the suit is not admissible. Of 28 paragraphs, only 8 are relevant to the admissibility of the suit.

Isager and Hansen note that although a time limit for bringing prosecution may have been a ground for *paragraphē*, it is never used as the primary ground.\(^{122}\) What they do not note is how it is used in the *paragraphē* speeches. In three of the seven *paragraphē* speeches in the Demosthenic corpus, time limits are mentioned. In two of these, however, they are not mentioned to support the claim for the inadmissibility of the suit, but are rather used as evidence that the suit itself is baseless.\(^{123}\) In Demosthenes 37.57, even the release which forms the grounds for the claim of inadmissibility is used as evidence that there cannot have been any real dispute.

Isager and Hansen propose that jurors may have been reluctant to release people on the basis of formalities, and this is why we see so much argument in these speeches on the substance of the original claim which is being blocked by the *paragraphē*.\(^{124}\) Their interpretation seems plausible, but they do not explore what this means for Athenian law more widely. Even in this process which was created expressly to allow decisions to be made on formal failures, both prosecution and defence acted on the assumption that juries were unwilling to allow their decision-making to take into account only questions of law.

4.3.3 Ideology of law which rejects compulsion

In fourth-century writing about law, there is clear evidence of a line of thought which rejected the idea that law could or should be backed by force. One of the strongest pieces of evidence for this line of thought comes from Xenophon's

\(^{122}\) (1975) p. 126, 227.

\(^{123}\) Time limits are mentioned in Dem. 33.27, 36.26 and 38.17. In Dem. 33 and 36 the time limits are used to provide evidence that the suit is baseless. In Dem. 38 they are used to support the argument on the admissibility of the suit.

\(^{124}\) Ibid. p. 130.
Memorabilia 1.2.4-46. In this section, the only elenches in the whole of the Memorabilia, in the context of showing how Socrates’ pupils (mis)used Socrates’ teachings, Xenophon presents Alcibiades as engaging Pericles in philosophical (or perhaps sophistic) debate:

Tell me, Pericles,” he said, “can you teach me what a law is?”

“Certainly,” he replied.

“Then pray teach me. For whenever I hear men praised for keeping the laws, it occurs to me that no one can really deserve that praise who does not know what a law is.”

“Well, Alcibiades, there is no great difficulty about what you desire. You wish to know what a law is. Laws are all the rules approved and enacted by the majority in assembly, whereby they declare what ought and what ought not to be done.”

“Do they suppose it is right to do good or evil?”

“Good, of course, young man, — not evil.”

“But if, as happens under an oligarchy, not the majority, but a minority meet and enact rules of conduct, what are these?”

“Whatsoever the sovereign power in the State, after deliberation, enacts and directs to be done is known as a law.”

“If, then, a despot, being the sovereign power, enacts what the citizens are to do, are his orders also a law?”

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125 Dorion (2000) argues that the reason the Socrates of Xenophon’s Memorabilia does not use elenches arguments is because Xenophon wishes to protect Socrates from Cleitophon’s accusation that though Socrates could point out a man’s faults, he could not lead him to virtue. By presenting Alcibiades as using elenches arguments, Dorion suggests Xenophon is criticising Alcibiades.
“Yes, whatever a despot as ruler enacts is also known as a law.”

“But force, the negation of law, what is that, Pericles? Is it not the action of the stronger when he constrains the weaker to do whatever he chooses, not by persuasion, but by force?”

“That is my opinion.”

“Then whatever a despot by enactment constrains the citizens to do without persuasion, is the negation of law?”

“I think so: and I withdraw my answer that whatever a despot enacts without persuasion is a law.”

“And when the minority passes enactments, not by persuading the majority, but through using its power, are we to call that force or not?”

“Everything, I think, that men constrain others to do ‘without persuasion,’ whether by enactment or not, is not law, but force.”

“It follows then, that whatever the assembled majority, through using its power over the owners of property, enacts without persuasion is not law, but force?” 126

Alcibiades’ killer argument here is the apparently self-evident fact that force (bia) is the negation of law. Unfortunately, Pericles and Alcibiades do not continue their conversation or discuss why force should be considered to negate law, instead trailing off into congratulating each other on their cleverness, but the use of the argument is indicative of an Athenian attitude which rejected the role of force in law.

Lysias’ Funeral Oration, similarly excludes any use of force from the law, claiming that the noble Athenians of the past ‘honoured according to nomos those who were good, and punished those who were bad, in the belief that to be ruled forcibly (biai) by each other was an ergon for animals, but that it was fitting for humans to determine justice by means of nomos, to persuade by using logos, and to serve those purposes by their ergon, while being ruled by nomoi and taught by logos. It is striking that Lysias here remarks on the use of punishment, which necessarily involves force, while denying the role of force in law.

The idea that rule by law involves logos is echoed to some extent in Plato, who, while rejecting existing states’ use of law simply to compel, suggests that law can be used either to compel or to persuade people to behave well. Though he does not go as far as to claim that force negates law altogether, Plato’s emphasis on persuasion as preferable to force informs his recommendation that laws should have preambles explaining the purpose of the law, in order that citizens should be encouraged to comply with the law voluntarily, rather than compelled to obedience. For Plato, this emphasis on persuasion is a moral matter, based on the assumption that it is morally better for men to choose to obey the law than to be forced to do so.

The rejection of the role of force in law is particularly striking when considered against the background of the fifth-century concern with the distinction between nomos and phusis. There are a range of fifth-century approaches to the competition between law and nature, which Guthrie divided into three rough categories. Firstly, there are those who presented nomos as a necessary civilising influence on base human nature. Next, there are the realists, who recognised the tendency of humans to look first to their own advantage, whether this aligns with morality and justice or not, and consider that those who have power will make the laws to suit their own interests. Finally, Guthrie identifies the upholders of phusis, who think

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127 The authenticity of this speech has been doubted, but Todd (2007) tentatively identifies it as a speech by Lysias but written as a display piece rather than for delivery.
129 Pl. Laws 720a.
130 (1971).
that the tyranny of the strong over the weak is right, and that law merely holds back those who should rightly hold total power. Guthrie is concerned only with arguments marshalled by philosophers and sophists, but enough of their arguments seems to have penetrated public consciousness for Aristophanes to successfully mock and parody the works of the sophists. In particular, the scene in *Clouds* where Pheidippides beats his father makes exaggerated use of some of the arguments about the value of *nomos* made by the sophists. Indeed, Antiphon the Sophist’s treatise *On Truth* even uses as an example beating one’s father.

What unites the three approaches distinguished by Guthrie is that they all recognise the power inherent in *nomoi*. Those who consider it a civilising influence see the force of the law as successfully holding back man’s baser nature. The realists see law as inevitably supporting the position of those in power, but recognise the force that lies behind the law in making such support valuable. Finally, those who bemoan *nomos* as holding back *phusis* recognise its force to such a degree that they consider it capable of limiting the actions of even the strongest, albeit in what they consider to be an unhelpful fashion.

The *nomos-phusis* debate seems to have been particularly active during the last third of the fifth century, but in the fourth century drops out of view. Rather than focusing on the contrast between human nature and law, Aristotle and Plato instead view law as a part of the nature of humans. By doing so, fourth-century philosophy denies the significance of force in underpinning the law. This could be considered an evasion, but given Athens’ weak enforcement mechanisms and distaste for

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131 Aristophanes *Clouds* 1399-1436.
132 Antiphon *On Truth* frag. 44 (a)v lines 4-8 [Pendrick]
134 Derrida (1992) identifies *nomos-phusis* debate as an early iteration of positivist/natural law debate. This makes it even more interesting that in the fourth century, when Athenian law in some ways seems to become more self-consciously positivist (though see chapter 5 on how far this was the case) debate on *nomos-phusis* falls out of fashion.
excessive enforcement of law, it is perhaps more indicative of Athenian society than might at first glance be imagined.\(^{136}\)

4.4 Conclusion

In the absence of professionalised state power, and without forces to compel obedience to law, Athens' laws probably did not have the capacity to become tools that a minority could use to oppress the majority.\(^{137}\) As such, Nazi or Soviet models of law enforcement need not be considered here. Instead, Athens' approach to enforcement of law raises questions about how far obedience to law was valued in Athenian society. A society which expects high levels of obedience is more likely to enforce the law against those who do not obey. On the other hand, a society in which law is one tool among many for settling disputes is less likely to prioritise enforcement of the law where another acceptable response to the dispute has been found.\(^{138}\) From our exploration, Athens appears not to have prioritised the enforcement of law as law. This supports the evidence that Athenians appear to have experienced only a weak sense of obligation to obey laws as laws.

This weak sense of obligation to obey laws as laws is indicative of how Athenians understood their laws. As discussed above, where laws are understood to be

\(^{136}\) There may be a hint of this distaste visible in Demosthenes' complaint 22.51: ‘Let no one understand me to say that the money ought not to have been wrung from the defaulters. It ought; but how? Even as the law enjoins, for the benefit of the other citizens. That is the spirit of democracy. For what you, men of Athens, have gained by the exaction of such paltry sums of money in this way, is nothing to what you have lost by the introduction of such habits into political life. If you care to inquire why a man would sooner live under a democracy than under an oligarchy, you will find that most obvious reason is that in a democracy everything is more easy-going’. Demosthenes appears to object that the enforcement of taxation has been excessive.

\(^{137}\) It must be remembered that the Thirty had access to a Spartan garrison. Xen. Hel. 3.14; Ath. Pol.

\(^{138}\) In Dem. 47.68-71 we are told of the response to the murder of an elderly freed woman. She is said to have been killed by the speaker’s enemies when they were seizing goods from his home. After she died, the speaker went to exégetai for advice on what he should do. He tells the jurors that the exégetai told him he should not prosecute, because the laws did not allow it because he did not have the right relationship to the dead woman, and because if he were to prosecute successfully he would be resented. That he might risk resentment for prosecuting the killer of a woman under his protection suggests a model of law which is not intended to enforce moral behaviour, but instead is supposed to offer a means by which Athenian citizens can manage their disputes.
grounded in morality, one should generally expect high levels of obligation to obey laws. Despite this, as we have seen in chapters 2 and 3 Athenians could at times treat their laws as serving certain moral ends. As we shall see in Chapter Five, this weak obligation to obey law does not necessarily point to a society which has embraced positive law. Instead, the weak obligation to obey law and the decision not to prioritise enforcement of law suggest that Athenians had a radically different view of what they expected their law to achieve in their society – they expected law to settle disputes, but did not expect it to serve as a general means of social control.
CHAPTER 5: LAWGIVERS AND LAW-GIVING IN CLASSICAL ATHENS

In fourth-century Athens, Solon was recognised as Athens’ lawgiver, and his authority and prestige were regularly invoked by speakers in the law courts. Here, I explore the role Solon the lawgiver played in fourth-century perceptions of law, and contrast that with nomothesia in the fifth and fourth centuries.

The question of where Athenian laws derived their authority is under-researched. Sealey raised the question of where Athenian laws derived their authority, but concluded that this was a question Athenians did not ask.¹ He argued that Athenians accepted their laws as having been given to them by Solon and as having been from there on ‘static’. Sealey failed to interrogate the consequences of this approach for the work of the nomothetai of the fourth century, or the wider consequences for Athenians’ understanding of their own law. It is these wider questions which I explore here.

5.1 Solon

In Athenian oratory of the fourth century, it is common that Athens’ laws are attributed to a single lawgiver, usually identified as Solon. The importance of this narrative for Athenian political discourse has received considerable scholarly attention, particularly in terms of the disputed ownership of Solon and the ancestral, or ancient, constitution between oligarchic and democratic thinkers of the fifth and fourth centuries.² The role the attribution of Athens’ laws to Solon

played in Athenians’ understanding of their legal system has, however, been under-
examined by researchers.

By the fourth century, Solon the historical figure had been obscured to a large
degree by his myth, but it is this myth which is relevant to attitudes towards and
perceptions of the law in the fourth century, and accordingly it is on this myth
which we will focus here.

5.1.1 Solon’s fifth- and fourth-century prominence

Solon’s prominence is not a purely fourth-century phenomenon, and if we had
more fifth-century court speeches it is likely we would see Solon appear in them.
Solon appears in Herodotus as the man who ‘had made laws for the Athenians at
their bidding’, and in several fifth-century comedies, sometimes taking a leading
role, as in Eupolis’ Demes and Cratinus’ Cheirons. The trope of using Solon’s
intentions to guide the interpretation of laws is apparently sufficiently familiar by
the late fifth century for Aristophanes to base a joke in the Clouds on it. Although
it is commonly claimed that the accretion around Solon of all of Athenian law is a
product of the fourth century, evidence from comedy suggests that by the latter
half of the fifth century Solon would have been widely recognised by the Athenians
as at least a lawgiver, even if not as the lawgiver.6

By the fourth century, there are some core elements of the Solon myth which seem
to have become commonplace.7 The most central of these is that Solon was an

3 Hdt. 1.29.1.
5 Aristophanes Clouds 1187-1190 ‘Solon was demos-loving by nature’. The joke also depends on the
idea that certain of Solon’s laws have come to be ignored by the fifth century.
6 Szegedy-Mazsak (1978 p. 201) thinks that lawgiver myths are a fourth-century phenomenon.
Hansen (1989a) identifies them as part of a wider tendency in Greek thought to try to identify a
protos heurétēs. Todd (2007) p. 678 takes a similar approach. Thucydides is not much interested in
Solon, nor does he appear in tragedy (where Theseus takes the role of lawgiver for the Athenians).
7 Evidence from the fifth century is too sparse to be able to identify particular tropes.
excellent lawgiver, and he created a *politeia*\(^8\) for the Athenians. The excellence of Solon as a lawgiver was so established that his legacy came to be disputed between those who favoured oligarchy or moderate democracy and those who favoured greater democracy, and there is only a hint of any criticism of Solon.\(^9\) The use of Solon in fourth-century speeches aimed at the Athenian public shows no trace of these tensions, and Solon is simply presented as the founder of the democracy, but given the tendency of forensic oratory to suppress class differences,\(^10\) this is not surprising.

5.1.2 Reception of original authority of Solon’s laws

Interpreted through a jurisprudential lens, Athens’ stories about the authority of Solon’s laws show a confusion of different potential sources of authority. One source they do not show, however, is divine authority. Szegedy-Maszak identifies some degree of divine instruction as a common element in myths of lawgivers in ancient Greece, but Solon’s laws do not receive any divine authority.\(^11\) We are told that Solon was chosen and appointed to make laws for the Athenians.\(^12\) We must assume some sort of quasi-legal appointment, and from this we could be led to believe that his laws gained their authority by means of having been passed by a person authorised by Athens’ governmental structures to make laws. The story, however, is not so simple.

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\(^8\) Though it was widely accepted that Solon created a *politeia* for Athens, what was meant by a *politeia* is more nebulous. Though studies of Solon’s laws separate ‘constitutional’, or ‘political’ laws from other laws, the laws identified by Leao and Rhodes (2015) as Solonian fall, in general, within the areas studied by Xenophon in his *Lakedaimonian Politeia*, which may have significance for Hansen’s (1989a) argument for an imagined ‘Solonian constitution’ characterised by moderation.\(^9\) As observed by Hansen (1989a), *Ath. Pol.* 9.2 defends Solon against criticism for empowering juries too far. Similarly, Aristotle *Pol.* 1274a claims that the power given to the lower classes through the jury courts was an inadvertent result of Solon’s reforms.\(^10\) Ober (1989a).

\(^11\) (1978) p. 205. Similarly, most lawgivers are said to have learned their skills from other lawgivers, such as Lycurgus having learned law in Crete, Egypt and Ionia (*Ephorus FGrH 70 f 149*), but Solon’s travels only occur after he has given laws to the Athenians.

\(^12\) *Hdt.* 1.29; *Ath. Pol.* 2.2, 5.2.
The stories about Solon make it clear that these laws are not imagined as standing on their own authority, subject to the usual structures of Athenian government, but were closely tied to the personal authority of Solon. It is for this reason that Solon, in the stories, chooses to leave Athens, because otherwise the Athenians will ask him to change the laws he has made. By leaving Athens, Solon cannot be asked to change his laws, and the implication is that no one but Solon could change his laws. Here, then, the laws seem automatically to depend on the personal authority of the lawgiver.

It is this personal authority that Solon tries to abandon when he has the Athenians swear an oath to use his laws. Based on this oath, the laws of Solon could be determined to rely on a contract-theory model of law, where the law’s authority comes about as a result of the agreement, implicit or explicit, we make with others in our society to act on the basis of the laws.

An unusual element of Solon’s myth, compared to those of other lawgivers, was that Solon was not generally viewed as having created laws in a state which previously had none. Whereas other Greek lawgivers are the first named lawgiver in their state, laying down laws for communities which are poorly governed or experiencing crisis, Solon was remembered as Athens’ second attempt at a lawgiver. The *Ath. Pol.* very clearly regards Solon as replacing an earlier constitution drawn up by Draco. In popular sources, Solon and Draco are

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14 For either 10 or 100 years, depending on the source. Hdt 1.29 records a 10-year oath, *Ath. Pol.* 7.1-2, 100 years.
15 In his study of the linguistic developments in Athens’ terms for its laws, Ostwald (1969) claims that the shift from *thesmos* to *nomos* suggests that the authority for laws shifted from the personal authority of the law-giver to community acceptance of the law in the late sixth or early fifth century, possibly under the influence of Cleisthenes. As we shall see, the shift from reliance on the authority of the individual to reliance on the law as a system in itself was not as complete as Ostwald would claim. Humphreys (1987) p. 217 suggests that the more important divide is between new and old enactments, and observes that Athenians called Solon’s laws *nomoi* long before they were willing to apply the term to contemporary enactments.
16 Szegedy-Maszak (1978 p. 201-3) observes the tendency for lawgivers to make laws in states which have none, but does not comment on the fact that Solon does not match this pattern.
17 *Ath. Pol.* 7.1 The idea that there genuinely was a Drakontian *politeia* is generally considered to have been a myth, but its reception in fourth-century Athens still has significance. Scholars generally identify the idea of a Drakontian constitution (and probably the text alleged to be Draco’s
sometimes tied together as lawgivers, and at other times in the orators Solon is recognised as later than Draco, so it seems reasonable to suppose that the Ath. Pol.’s report of Solon’s laws replacing those of Draco might have been commonly recognised by fourth-century Athenians.

This raises two major areas of interest for his reception in the fourth century. The first is that this tradition means that Solon cannot have been understood by fourth-century Athenians as having formalised existing custom: Solon was replacing a constitution, and as such he needs to be recognised as making entirely new laws to replace the ones that had been found unsuitable. Solon, viewed in this light, is a legal innovator, something which by the fourth century seems generally to have been viewed with suspicion.

In narratives about Solon’s laws at the point at which they were made, his laws could not depend on long usage or tradition for their authority, which leads us to the second area of interest: although Athens’ laws in the fourth century gave precedence to older over newer laws, the tradition does not record anything about a formal withdrawal of the laws of Draco. The Ath. Pol. simply records that during a period of disorder, Solon was chosen to mediate between the interests of the rich and the poor. Solon seems to be presented as free to work off a blank sheet.

Nevertheless, what we are told about the work Solon did implies a process closer to review. Solon is remembered as having inherited an existing lawcode which was not serving Athens’ purposes. Solon then replaces most of that lawcode but keeps the parts which are still suitable. This, viewed in isolation, looks like a process of

constituency in the Ath. Pol.) to have developed between 415 and 404, so before then Draco may just have been recognised as having made certain specific laws, and not to have legislated on what we would see as constitutional matters. Dem. 23.62 records what purports to be a Drakontian entrenchment clause – ‘You have heard the statute, men of Athens, declaring in plain terms that “whosoever, whether magistrate or private citizen, shall cause this ordinance to be frustrated or shall alter the same, shall be disfranchised with his children and his property”’.

Andoc. 1.81, Dem, 24.211. 
19 Leao and Rhodes (2015) fr 66/1f= Lex Rhet Cant, ἈΡΓΙΑΣ ΔΙΚΗ – ‘Lysias in the speech against Ariston says it was Draco who enacted the law and Solon again used it’. 
20 Ath. Pol. 5.2 ff.
review. This, however, is not how Solon comes to be remembered. Solon is not used to legitimate calls for law reform that aim to change Athens’ laws to suit current conditions, but only for arguments aimed at returning Athens to ‘the laws of Solon’. It is interesting that this element of Solon’s work was not picked up on by classical Athenians. It is possible that the idea of law reform was so inherently dangerous that there was a reluctance to acknowledge Solon as a legal reformer. Although Solon’s life story indicates laws which were created to solve a specific crisis, in his presentation in the fourth century, Solon is presented as creating laws which were new and which served a specific purpose, but never a purpose that could be considered to be historically contingent.21

5.1.3 How Solonian is Solonian?

It can be unclear, when orators in the fourth century refer to a law as Solonian, how literally they mean this. It has often been observed that fourth-century orators describe recent innovations as Solonian. Schreiner22 considered these references to be, not to Solon’s original laws, but to the ‘Solonian Code’ drawn up by committees at the end of the fifth century. Ruschenbusch, optimistically, considered that Athenians successfully differentiated between the new ‘Solonian’ laws from the lawcode, and Solon’s ‘old’ laws.23 Hansen doubts this, since speakers explicitly use the person of Solon in their discussion of even new ‘Solonian’ laws, and as such cannot expect their audience to be aware of these laws as part of a new Solonian code, and not associated with the historical Solon.24 Hansen considers that although genuinely Solonian laws had survived and may have been accessible

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21 This presentation may be an example of the phenomenon identified by Westbrook (2000) whereby legislators establish written law which is historically contingent (codification), but by the time it later comes to be interpreted it is being used by a society which has radically different ideas of law, and so the lawgiver, who was likely working in a casuistic system with little expectation that the law might outlast their personal authority (or in Solon’s case, perhaps the lifetime of the oath) is then interpreted to fit within a radically different system which expects comprehensive legislation independent of the person of the legislator.

22 1913, as cited by Hansen (1989a).

23 1966.

to Athenians, Solon did not make ‘constitutional’ laws, and up until the reforms at the end of the fifth century most Athenian ‘constitutional’ law was oral. Subsequently a consensus emerged as to the Solonian constitution which Hansen identifies as being characterised by a removal of power from the Assembly to the courts, and a tempering of what could be discussed in the Assembly and of the tone of Assembly discussions. This version of Solonian democracy Hansen considers to have been a widely recognised ideal of democracy, and he thinks that he can identify a law which he considers to have been made in emulation of this imagined Solonian constitution.

Fascinating as it would be to identify laws which had been made in emulation of an imagined Solonian constitution, the passages Hansen cites in support of this claim do not provide sufficient evidence to support it. Hansen identified sections in Dinarchus’ Against Demosthenes which refer to the law proposed by Demosthenes that gave investigative powers to the Areopagus. At 1.62 the text specifies that the boulê is to have authority to enforce the patrioi nomoi, and it seems to be on the basis of this reference to the ancestral laws that Hansen makes his claim. These ancestral laws, however, are not the ones authorising the Areopagus to investigate, but the ones the Areopagus is to use. Naturally enough, given the thrust of Dinarchus’ argument, the law is clearly and unequivocally attributed to Demosthenes in his speech, but the phrasing of the law given by Dinarchus indicates not that it was made in emulation of Solonian law, but that

25 The survival of the axones and kurbeis, as well as what these objects were, is controversial. Davis (2011) offers a useful summary of the academic work on this issue. Davis proposes that the kurbeis were wooden objects which bore laws, some of which were genuinely Solonian and others which came to be absorbed into the Solonian tradition, and that these laws were then copied onto axones at the end of the fifth century. This mixture of Solonian and non-Solian legislation on wooden objects makes sense of how there could have been confusion about what was and was not Solonian despite the apparent evidence that copies of Solon’s laws were present and available for consultation in the fifth century.

26 If Solon’s laws were organised by magistrate, this could suggest that they (at least to some degree) did set out the powers and responsibilities of the different magistrates, which could suggest that they were constitutional laws in Hansen’s sense of the word, though it is impossible to tell to what degree Solon placed his laws into a pre-existing structure of magistrates and to what degree he innovated in this area. He is not credited with creating the system of archonships.

27 Χρωμένην τοις πατριώις νόμοις. Hansen also cites Din. 1.6, 9, 83 and 112, all of which simply attribute the law to Demosthenes.
the body of Solonian law was what the Areopagus Council was to use in conducting its investigations.

Given the limited access Athenians had to historical records, and the limitations seen in other uses of history in Athenian oratory\(^\text{28}\) it seems likely that orators had little real knowledge of what was and was not genuinely Solonian, but Hansen’s claim that there was some degree of consensus as to what a Solonian constitution should have looked like does seem plausible.\(^\text{29}\) Nonetheless, it is necessary to consider what a claim for a new law as Solonian meant – had Solonian come to be simply a synonym of ‘moderate democracy’, so that by claiming a law as Solonian one made no claim on the personal authority of Solon? Hansen’s own argument would suggest not, since he points out that arguments about the person of Solon can be attached to these new Solonian laws. As such, the claim that a new law was Solonian must be understood as claiming, at a minimum that this is the sort of law of which the man Solon would have approved,\(^\text{30}\) and at a maximum that this law recreates an original law passed by Solon the man.

Both of these mean that this new law is entirely dependent on the personality of Solon for its authority, and as such Hansen’s claim for a consensus ‘Solonian constitution’ has enormous significance for our understanding of Athenians’ perceptions of their own laws. These were, after all, laws passed by and for the democracy, and yet rather than claiming their own authority for these laws Athenians reach far into their own history, to the personal authority of a single man, a man who, no less, put measures in place designed to sever his laws from his personal authority.\(^\text{31}\)

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\(^{28}\) See Nouhaud (1982).

\(^{29}\) The laws attributed to Solon fall into at least a model of what a politeia looked like, if Xen Lac. Pol. and Aristotle Politeia can be considered models - with an emphasis on moral education of the citizens, particularly the young, and laws on family arrangements, but not much law on commercial arrangements.

\(^{30}\) Canevaro (2013a p. 159) observes that one line of argument available in a graphê nonon mē epitēdeion theinai is that the law in dispute contradicts the ‘aim and spirit of another ancient and revered law’.

\(^{31}\) See Westbrook (2000) and Harris (2006a).
5.1.4 Coherent programme of laws

An important element of the myth of Solon in fourth-century oratory is the assumption that Solon’s laws formed part of a coherent, and at least somewhat comprehensive, programme of legislation.32 This imagined code of laws then allows fourth-century orators to engage in reasoning by analogy,33 but on the basis of something which, by the fourth century, must be considered to be almost entirely fictional.34 Analogies were generally presented and defended, not using the inherent authority of the law as a basis for argument, but based on the intentions imputed to Solon. The development of the ability to argue from analogy with other laws is an important one, as it allows a legal system the capacity to become increasingly comprehensive, but because Athenians linked their reasoning by analogy to the person of Solon they limited the extent to which their legal system could become autonomous. As long as laws continued to be linked so closely to Solon the man, Athens would not have been able to develop a legal system where the authority of the law was embedded solely in its status as law, and therefore the extent of Athenians’ capacity to analogise must be assumed to have been limited. If norms of behaviour were to shift further from those Solon and his society were imagined to hold, it would become increasingly hard to interpret laws in a way that allowed for an outcome that contemporaries would view as just, but that could still be presented as according with the intentions of Solon.35 Although Solon was by the fourth century more myth than man, the fact that Athens’ laws

32 see Chapter 3. The actual process of formulating archaic law codes is not relevant to their reception in the fourth century. Gagarin (1986) offers a useful introduction to archaic law-making.
33 Something which anthropologist Fernanda Pirie (2013) uses as a definition of legal reasoning. Legal reasoning, in Pirie’s analysis, depends on a society being able to develop core principles which can be applied across apparently dissimilar disputes and events, in order to achieve some degree of fairness.
34 Harris (2013 p. 270-271) argues that the use of appeals to the intent of the lawgiver shows a concern that the administration of justice should be consistent. This risks confusing law and court judgements. The appeals to the intent of the lawgiver do not betray a concern that two similar cases should be decided the same way, but do demonstrate an assumption that Athens’ laws should be consistent. It must also be remembered that the imputing of intentions to the lawgiver was entirely fictional, and as such could not in fact have formed a strong basis for predictability or consistency, except to the limited extent enabled by shared beliefs as to what Solon would have intended.
35 As the modern United States of America is demonstrating now, with the determination of some judges and legal scholars to limit the application of the constitution to the ethics and beliefs of its makers.
were and had to be backwards looking would have had an impact on any Athenian who wished to persuade Athenians to adopt a self-consciously novel interpretation of a law, or indeed as we shall see in 5.4 wanted to pass a radically new law.

The most consistent characterisation of Solon’s laws in the orators is that they were made in order to protect the democratic politeia. He is described as having instituted swifter punishments for officials in order to protect the constitution and as having legislated with more care for the politeia than for the matters on which he was legislating. He is said to have made his laws with a recognition that force belongs to a few, but law to all alike and to have wanted the laws to be simple and clear so ordinary citizens should not be at any disadvantage.

At times, Solon appears to be presented as placing the good of the polis over justice to individuals, as when Aeschines explains why Solon made laws against cowardice, an inborn defect, that each man should fear the law more than he fears the enemy, or when the ancient lawgivers are said to have set high penalties for even minor crimes on the basis that if a crime became widespread it would be harmful to the polis. As well as this, Solon’s laws are said to have been intended to educate citizens. Aeschines Against Timarchus makes extraordinary use of this trope, starting with the laws on the education of young boys, and moving through into the laws for adults.

While Solon’s laws on male sexual behaviour are characterised by Aeschines as having had as their purpose the protection of the democratic order from the sort of unruly people who would engage in excessive sexual behaviour, the laws regulating women’s sexual behaviour are said by Aeschines to have been intended

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36 Dem. 26.4.
37 Dem. 22.30.
38 Dem. 21.45.
39 Dem. 20.93.
40 Aeschin. 3.175.
41 Lycurgus Against Leocrates 64-66.
42 See 3.2.2 above.
by Solon to disgrace the wrongdoing woman. Solon’s laws for men are intended to educate the young and protect the *polis*; only his laws for women are said to enforce morality. This idea, that Solon thought that the laws of the *polis* should offer moral education, is by no means confined to the orators; but the extent of the use made of it by fourth-century orators, and the way in which arguments can hinge on jurors accepting the premise, suggests that this idea was widely accepted among fourth-century Athenians.

5.1.5 Stability of Solon’s laws

The stability of Solon’s laws came to form a part of his myth, and this stability is presented in various ways in our sources. Herodotus and the *Ath. Pol.* both record Solon arranging that the Athenians should use his laws for a certain period of time, Herodotus by means of an oath, the *Ath. Pol.* by his own authority, and both claim that Solon left Athens in order not to be asked by people to change his laws. Athenian law gave priority to older laws over newer ones, and in principle in the fourth century it should not have been possible to pass any law that contradicted an earlier one without first repealing the earlier law. The rhetoric used by Demosthenes in his prosecution of Leptines gives a taste of the difficulty any would-be lawmaker might experience when trying to repeal a law which could plausibly be dated back to Solon. One aspect of this emphasis on the stability of Solonian law that emerges is the difficulty Athenians had with obsolete laws. There are numerous references in our sources to laws which were still *kurioi*, at least as far as the writer was concerned, but which were no longer being used by the Athenians.

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43 Education of boys 1.8-18, young men 1.18-24, women 1.183. For Solon as educator, see also Dem. 24.106, 26.26.
44 Hdt. 1.29 oath to use the laws for 10 years, *Ath. Pol.* 7.2 has Solon ‘make the laws fast’ –*katekleisen* for 100 years. *Ath. Pol.* 11.2 – Solon leaves to avoid being asked to change his laws.
45 See Chapter 5.4.
46 Dem. 20.102-5. See also e.g. Antiph. 6.2.
47 See Chapter 5.4.3.
A further complicating aspect of the emphasis on the unchangeability of Solon’s laws is the decision taken in the late fifth century to seek out and republish the laws of Solon. This gives Athens a set of laws which have, in effect, two sources of authority: first their age and association with Solon, and second the legal authority they gained from their republication.⁴⁸

Not only does a requirement for explicit withdrawal of older laws before new ones can be passed create a slow and, most likely, still contradictory system of laws, it affected the development of legal thought in Athens. What modern legislative committee could challenge the authority and wisdom of Solon? Yet without reliable access to Solon’s intentions, or even a reliable Solonian code, juries’ use of the intentions imputed to Solon in making his laws meant that Athens, far from respecting Solon’s demand that Athens use his laws and do without his person, came to rely on Solon’s own personal authority as a lawgiver.

Aristotle was confident that the advantage of an unchanging legal system was the authority it gained from long use.⁴⁹ That opinion is also visible in the orators but it is mixed up with the emphasis orators choose to place on the person of Solon. Nevertheless, this emphasis should not be overstated. Solon was clearly a valuable rhetorical tool for orators, and yet there are laws that appear in some sources as Solonian, but in other sources are cited either as ancient, or without comment as to their origin.⁵¹

5.1.6 Why did the fourth century need Solon?

Thomas (1994) identified appeals to the intent of the lawgiver (usually, but not exclusively, Solon) as extra-legal arguments, and viewed these appeals as potentially un- or anti-democratic. While Thomas is right to identify the use of

⁴⁸ See Chapter 5.3.
⁴⁹ Aristotle Politics 1269a12-14.
⁵⁰ E.g. Dem. 24.139-141.
⁵¹ Leão and Rhodes fr. 66/1 a-f; fr. 58c, frr. 55-7.
Solon made by anti-democrats in the fifth century, by the fourth century Solon’s legacy seems to become widely accepted as democratic (see Hansen 1989a). Moreover, it would be surprising to see regular use of a trope which risks being interpreted as anti-democratic in a genre where speakers generally seek to portray themselves as good democrats. As such, it seems unlikely that in the fourth century appeals to the lawgiver were still viewed as anti-democratic; nevertheless, Thomas is right to identify these appeals as significant for our understanding of Athenian law. For Thomas, appeals to the lawgiver’s intentions portray a ‘failure of nerve’ within the fourth-century democracy.

Mossé (1979) suggests that the reason why Solon becomes so prominent in the fourth century is because of the tradition, supported by Solon’s own poetry, that Solon balanced the interests of the rich and the poor. For the democrats who needed to reconcile the city after the upheavals of the two oligarchic revolutions at the end of the fifth century, this tradition was hugely valuable, and it was by using Solon as a proto-democrat that the democratic party were able to restore democracy to Athens. It is unclear, however, that the tradition of Solon as mediating between rich and poor would have been recognised by most Athenians. The trope does not appear in popular fourth-century depictions of Solon, but only in the work of historians and philosophers. As Thomas suggests, this seems to indicate that the reason Solon was needed in the fourth century was because of the crisis of legitimacy in Athenian democratic government. The returning democrats could not rely on the will of the people as the basis for their laws, and instead looked to Athens’ glorious past.

Hansen considers the role of this past in his discussion of the use of Solon in the fourth century, arguing that though generally the narrative of progress showed a gradual improvement from bestiality towards civilisation, with the introduction of

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52 *Ath. Pol.* 11.2; Aristotle *Politics* 1274a. *Ath. Pol.* 12.1 cites poems attributed to Solon which express this position. Though elegiac poetry was not necessarily a popular medium, being associated with performance at the *symposion*, Demosthenes does quote a poem by Solon in *On the Embassy* (19.254-6), suggesting that it may have been somewhat familiar to a popular audience.
laws an essential element in this progress, by the fourth century there was a
marked narrative of recent decline.\textsuperscript{53} He considers, however, the ‘patrios politeia’
language of the fourth and fifth centuries to have been just a ‘hurrah-word’ –
meaningless, yet hard to challenge. There was no set point in history which could
be pinned down by it, and it could be deployed by both oligarchs and democrats.
Use of Solon in the fourth century cannot be clearly identified as anti-democratic,
but Thomas is right to identify the strangeness of a democracy, with its own modes
of legislating, choosing instead to pin so much of its law on a single lawgiver.

\textbf{5.2 Law-making in the fifth century?}

It is not entirely clear whether the Athenians of the fourth century recognised their
fifth-century\textsuperscript{54} counterparts as having been makers of laws. Prior to the creation at
the end of the fifth century of a distinction between nomoi and psēphismata, the
enactments of the demos could not be unequivocally categorised as laws.\textsuperscript{55} In
references to the great politicians of the past in fourth-century oratory, it is rare to
find them referred to as lawmakers. In total, Themistocles is referenced 24 times,
Pericles 12, Miltiades 13, Aristeides 13, Cimon 3, Ephialtes not at all (though he had
appeared in a speech by Antiphon), and Cleisthenes 3 (all by Isocrates).\textsuperscript{56} Of these
references, the majority do not treat the men referred to as lawgivers, but play on

\textsuperscript{53} Hansen (1989a).

\textsuperscript{54} For the purposes of this analysis, I have adopted a short fifth century, preceding the changes
made to the laws at the end of the fifth century, for which see 5.3 and 5.4. For the response of the
restored democracy to the legislative acts of the Thirty, see chapter 1.

\textsuperscript{55} Sickinger (1999) p. 242 n. 45 attempts an estimate of the types of inscriptions published in the
fifth century.

\textsuperscript{56} Themistocles: Dem. 13.21, 13.22, 13.29, 18.204, 19.303, 20.73, 20.74, 23.196, 23.198, 23.205, 23.207;
Aeschin. 1.25, 2.9, 3.181, 3.259; Din. 1.37; Hyp. Orat. Epitaphius col 12 line 43; Isoc. 4.154, 8.75, 12.51,
15.233; Lys. 2.42, 12.63, 30.28.

Pericles: Aeschin. 1.25; Dem. 3.22, 26.6; Isoc. 16.28, 8.126, 15.111, 15.234, 15.235, Lycurg. Frag. 14 [Blass],
Lysias 6.10, 12.4, 30.28.

Epitaphius Col 12 Line 42; Isoc. 8.75.

Aristeides: Aeschin. 1.25, 2.23, 3.181, 3.258; Andoc. 4.11, 4.12; Dem. 3.21, 3.26, 13.29, 23.209, 26.6; Din.
1.37; Isoc. 8.75.

Cimon: Andoc. 4.33; Dem. 13.29, 23.205.

Ephialtes: Antiphon 5.68.

other aspects of their legacy. Unsurprisingly, Themistocles and Pericles are most often remembered as generals, for their building works, and more vaguely as exemplary citizens. Miltiades similarly is mostly referred to in his role as a general, rhetor and exemplary citizen. Aristeides is referred to for his work as assessor of tribute, as a rhetor, and as an exemplary citizen, and Cimon is referred to only as an exemplary citizen. Ephialtes is referenced by Antiphon in a speech delivered towards the end of the fifth century, not as a reformer, but only as a notable murder victim, while Cleisthenes is referred to only by Isocrates, where he is a political leader and the man responsible for re-establishing Solon’s constitution. Since Isocrates seeks to create a continuity between the work of Solon and the constitution established by Cleisthenes, Cleisthenes cannot, in his analysis, be a lawgiver, since it is essential to Isocrates’ argument that Cleisthenes made no changes but simply re-established the politeia created by Solon.

The only explicit reference to past leaders as lawgivers comes from Lysias Against Nicomachus, where the speakers complains that ‘whereas your ancestors chose as lawgivers Solon, Themistocles and Pericles, in the belief that the laws would accord with the character of their makers, you have chosen Teisamenus, son of Mechanion, and Nicomachus, and other persons who were under-clerks’. Though here Pericles and Themistocles are explicitly bracketed with Solon and described as lawgivers, the narrative of the speech problematises law-giving, and so any reference to law-giving in the speech must be treated with caution. This comparison is in the form of an accusation against the demos, an accusation the demos can only rebut by convicting Nicomachus, and the weight of Lysias’ speech strongly implies that all of Nicomachus’ lawgiving was done illegitimately. The weight of the argument is about the personalities of these former lawgivers, and as such the reputation of Themistocles and Pericles as exemplary citizens is what

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57 Lys. 30.28.
58 Lys. 30.17 ἐγὼ δ’ εἰ μὲν νόμους ἐπίθην περὶ τῆς ἀναγράφης is a good example of the problematisation of lawgiving in this speech. The speaker casts his enemy’s accusation back at him ‘If I had been making laws in relation to a writing-up’. The speaker denies being in such a position of authority, and casts doubt on the legitimacy of any law-making done by Nicomachus.
Rather than arguing for these men as lawgivers per se, they are presented as honourable and high status men, to be contrasted with the under-clerks Teisamenus and Nicomachus.

Less explicitly, Miltiades and Themistocles’ legislative work is referred to in Demosthenes On the False Embassy 19.303, where Demosthenes reminds the jurors of Aeschines’ past speeches opposing Philip, in which speeches Aeschines is said to have read out the psēphismata of Themistocles and Miltiades. These legislative acts are specifically referred to by Demosthenes as psēphismata, however, and not nomoi, so cannot give us any indication of whether the fifth-century political leaders could be identified as lawgivers. The only other possible instance in the orators of a fifth-century political leader being referred to as a lawgiver is in Aeschines’ Against Ctesiphon, where Aeschines asks the Athenians to imagine, arrayed as witnesses on his side, the benefactors of Athens; Solon the lawgiver, and Aristeides. Though Aristeides here is bracketed with Solon, it is clear from Aeschines’ speech that his role is not as lawgiver, but only as excellent citizen of Athens. As such, we can see that in fourth-century oratory there is no simple reference to leaders subsequent to Solon as lawgivers.

The best-known legislative product of the fifth century is probably Pericles’ citizenship law. The Ath. Pol. reports that ‘Pericles proposed, and it was decided, not to share citizenship with those who are not born of two citizen parents’. The measure is never explicitly described as a nomos by the writer of the Ath. Pol., either at its introduction at 26.2, or at 42.1, where the writer sets out the contemporary state of affairs in Athens. Pericles’ Citizenship Law does not get described as a nomos in any fourth-century source, and only acquires that description in later references to the law, such as in Plutarch’s account of Pericles’

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59 ‘This may also explain why Draco, unequivocally an Athenian lawgiver, is left out of the list of lawgivers.
60 Ath. Pol. 26.2.
request to the Athenians that his son should be exempted from the requirements of the law and be allowed to become a citizen.\textsuperscript{61}

A law with the same contents is cited twice in fourth-century speeches, both of which treat the law as having been valid only for people born after the archonship of Eucleides, but in neither case is the law linked to Pericles.\textsuperscript{62} In Demosthenes 57, there is rhetorical advantage in not linking the law back to Pericles, since the speaker Euxitheus is explaining that, even if one of his father’s parents had not been a citizen, his father was born prior to the archonship of Eucleides, and as such the restriction of citizenship to those with two citizen parents did not apply to him. The case may not be as clear-cut as Euxitheus tries to make out, since there is some evidence that Pericles’ citizenship law may still have been in force in 414,\textsuperscript{63} giving a maximum period of around ten years of non-use of the law until the law’s reinstatement as from the archonship of Eucleides.\textsuperscript{64} Under these circumstances, it is understandable that Euxitheus would have no interest in presenting the law as having roots older than the archonship of Eucleides.

The rhetorical use of the law in Isaeus 8 is more difficult to understand. The speaker is trying to claim an estate through his mother’s line of descent, and it appears that his opponent has made an allegation that the speaker’s mother was

\textsuperscript{61} 37.2-5.
\textsuperscript{62} Dem. 57.30, Isaeus 8.43. Lys. frag. 308 col. ii. lines 35-6 and 39-40 [Carey] may show two more cases using this law.
\textsuperscript{63} Aristophanes \textit{Birds} 1641-70.
\textsuperscript{64} There are different proposers given for the re-instated law. Schol. Aeschin. 1.39 names Nikomenes as the proposer of a decree ‘that no one of those [born] after the archonship of Eucleides have a part in the state unless he could demonstrate that both his parents were citizens’. Athenaeus 577 b-c records that ‘the orator Aristophon introduced (eisenegkein) a law (nomos) during the archonship of Eucleides that anyone not born of a citizen should be a nothos’. These two formulations have generally been taken to refer to a single law. It is unclear from the sources whether the renewal of the requirement that citizens be born of two parents was the result of a decree or a law (which could otherwise have given some indication of the likely date of the enactment) or of who proposed the motion. It may be worth noting that in Demosthenes 57, immediately after discussing the law requiring citizen descent on both sides the speaker moves on to discuss the re-enacted Solonian law banning foreigners from selling in the agora, the decree re-enacting which is attributed to one Aristophon. This could indicate a source of confusion for the compiler of the \textit{Deipnosophistae}, but it is too common a name to be conclusive of anything. It is likely, given the date of effect of this law, that the law was reinscribed or re-enacted as part of the law-reform process which followed the fall of the Thirty (see below Chapter 5.3). Leao and Rhodes (2015) identify Dem. 43.51 on inheritance as also having been part of this process.
either not a citizen, or not legitimate (or possibly both). The speaker rebutts this allegation by claiming that if his mother was not a citizen then, since he and his siblings were born after the archonship of Eucleides, they are not citizens either. We must presume that the speaker felt secure enough in his obvious status as a citizen to be able to play with this (apparently risky) argument so casually. In this case, there is no advantage to the speaker in concealing any older roots of the law, but there is also no purpose for him to do so, since his argument depends only on the law being older than himself and his siblings. Nonetheless, the fourth-century references to this law provide no evidence of fourth-century acknowledgement of fifth-century law-giving. This, in combination with evidence that fourth-century references to the great leaders of the fifth century do not generally treat these leaders as lawgivers, suggests that there may have been a belief in the fourth century that no new laws had been made for the Athenians in the fifth century.

Against this claim, one could present evidence that the writer of the Ath. Pol. does identify some decisions of the fifth-century democracy by their archon year, however none of the measures identified by Sickinger are referred to in that text as nomoi, and the writer of the Ath. Pol. is not a good representative of ordinary Athenians’ attitudes towards their laws. A stronger argument could be drawn from the law of Diocles, which sets down which laws are to be used by the post-403 restored democracy. The law specifies that laws enacted under the democracy prior to the archonship of Eucleides shall be kurioi. This does seem to indicate an acknowledgement of fifth-century democratic law-making, however as we shall see in the following section, there existed no mechanism under the fourth-century democracy to recognise these laws as nomoi and treat them accordingly. In the fourth century, Rhodes’ argument that this should be considered to refer to the laws drawn up by the anagrapheis must have turned out in practice to be correct.

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65 As noted by Sickinger (1999) p. 87, referencing Ath. Pol. 22.5; 26.2-4; IG I 46, lines 18-21.
66 Dem. 24.42 τοὺς νόμους τοὺς πρὸ Εὐκλείδου τεθέντας ἐν δημοκρατίᾳ ... κυρίους εἶναι.
67 Rhodes (1991) p. 91 limits ‘the laws enacted under the democracy’ to those created by the first commission of anagrapheis which ran from 410-405. Though this might have been the intention of Diocles’ law, it seems likely that the work of both periods of republication would have been treated together in the fourth century.
The record of the decision by the Thirty to remove the laws of Ephialtes and Archestratos from the Areopagus could be seen as a recognition by the fourth-century writer of the *Ath. Pol.* that these early-fifth century figures had made laws, though it also appears that there may have been some disagreement at the time of their abolition about the validity of these laws, since the Thirty apparently justified the removal of these laws as a rectification (*epanorthountes*) of the constitution.  

As discussed above, the writer of the *Ath. Pol.* created a history of the Athenian constitution and was attuned to the reality of legal and constitutional change, which may not be representative of wider Athenian understandings of their law.

This failure to engage with the role of the fifth-century democracy in making law may help to explain why, following the revolution of the Thirty in 405, Athens decided to return to the laws of Solon and Draco. By this decision, Athens annulled centuries of democratic lawgiving in a moment, apparently without significant controversy. Once we recognise how reluctant fourth-century speakers are to acknowledge the lawgiving of the fifth century, we can better understand how this decision came to be taken.

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69 Andoc. 1.82. Canevaro (2015) supposes that the *nomothetai* referred to by Andocides 1.84 are a different institution to the later bodies of *nomothetai* (see 5.4.1). He proposes that these *nomothetai* were elected to resolve the crisis in the laws, and that they were the ones to create the fourth-century process of *nomothesia*. The evidence from Andocides on this supposedly separate body of *nomothetai* is too scanty to give certainty on this point. If Canevaro is correct, the institution of this body of *nomothetai* further evidences the failure to acknowledge fifth-century democratic lawmaking, since even before the creation of a distinction between *nomoi* and psēphismata, when the restored democracy realised there was a need for new laws they did not put these through the Assembly but created a separate body to legislate for Athens. This may be further supported by the constitutional arrangements of the Five Thousand, the government that briefly took power after the fall of the Four Hundred. Thuc. 8.97.2 describes *nomothetai* being elected, who are apparently to fulfil a different role from the Assembly. The *Ath. Pol.* does not refer to these *nomothetai*, but does explicitly state that the Four Hundred did not have the power to change or make laws (31.2).

70 Sealey (1982) p. 299 seems to agree with this position: Athenians in the fifth century 'adhered to the increasingly unrealistic supposition that the *nomoi* of Solon were the whole body of current law'. Canevaro (2015) notes that the institution of *nomothesia* in the fourth century represents the first time Athens formally recognises the capacity of the *demos* to create legitimate legal change.
5.3 Republication at the end of the fifth century

At the end of the fifth century the Athenians appear to have made an attempt to assess their existing laws. A board of anagrapheis was established, and certain laws were republished. This process was not complete at the overthrow of the democracy in 405/4, and was recommenced on the restoration of the democracy in 403, with at least some continuation in the make-up of the board of anagrapheis. The extent of the remit of the anagrapheis appears, from a speech given in 399 against one of the board, to have been contentious even at the time, and the debate has not been resolved in modern scholarship.

A great deal of this debate has revolved around whether the anagrapheis were empowered to revise the laws or only to republish them. Either claim has inherent problems: the revision of Athens’ greatly respected ancient laws must always have been a contentious and difficult matter to address, especially when Athens was itself experiencing a crisis in the legitimacy of its law; but the simple republication of Athens’ ancient laws seems redundant, since those laws were apparently still visible and available to the Athenians in some archaic style of publication.

For our purposes, the question of revision or republication has significance for the authority of the republished laws as Athens moved into the fourth century. A process merely of republication would suggest that the laws had the same authority they had always had, whether we accept that to be the personal authority of the lawgiver, or the accumulation of years, or some combination of these. Under a process of republication, the perception of the changelessness of Athens’ laws would remain unchallenged. Under a process of revision, however, the authority of these laws changes somewhat. Rather than holding unquestionable authority by

71 Though the project to re-publish laws was not a solely democratic one; the Thirty were installed as a committee to sungrapsousi the patrious nomous (Xen. Hell. 2.3.2) and they removed the laws of Ephialtes and Archestratos (Ath. Pol. 35.2), which, since these are identifiable non-Solonian laws, could indicate that the Thirty were somewhat serious in their attempt to return Athens to the laws of Solon.
72 Lysias 30.
73 For a summary of the debate on the axones and kurbeis, see Davis (2011).
dint of the age or origin, the authority of laws can be questioned, and even removed, by their being assessed as unsuitable for the world as it exists in the moment. Laws which survive this revision process gain a different authority, as laws assessed as valuable and affirmed as such by the democracy.

The republished law of Draco (IG I² 104) and the republished laws on the Council (IG I² 105) show signs of careful and exact copying as seen by the archaic language of Draco’s law and copying of ‘first axon’ and ‘second axon’ (see OR 183 notes on IG I² 104) and by Lewis’s74 suggestion that the inscriber of IG I² 105 may have copied a space where a word was missing off the original stone, rather than amending the text. This strongly indicates that the process was one of republication and not of revision; the laws are not updated to suit contemporary legal language, nor do the anagrapheis attempt to complete damaged sections in laws to make them more useable. Similarly, Dow identified rubrics in the sacrificial calendar as identifying the sources of the sacrifices listed, further suggesting that the work that went into the calendar was intended as republication, and that the authority for these sacrifices came not from the new inscription, but from the original sources.75

The process of the publication of these inscribed laws could give more indication of the source of their authority. A republication did not always need full, formal permission,76 whereas it would be surprising to see Athens, always wary of officials taking too much power to themselves, and in the aftermath of 411/10 likely to have been more wary than usual, empowering a board of officials to revise law without being subject to close oversight. The prescript to Draco’s law seems to suggest that the Assembly approved reinscriptions on a case-by-case basis:

Diocles was archon.

The Council and the People decided. Acamantis was in prytany.

Diognetus was secretary. Euthydicus was chairman. –phanes proposed:

anagrapheis of the laws shall inscribe Draco’s law on homicide,

74 1967.
75 Dow (1953).
76 IG II² 6.
taking it over from the king, with the secretary
of the Council, on a stone stele and set it down in front of the
royal stoa.\textsuperscript{77}

Here we see a decree which has gone through both the council and the Assembly
to instruct the \textit{anagrapheis} to set up the law of Draco, specifying which law the
\textit{anagrapheis} are to write up, where they are to find this law, and where they should
set it up once inscribed. This suggests not only a process of republication (no
instructions are given as to revision) but a process which is nonetheless being
closely overseen by institutions of the democracy.\textsuperscript{78} Robertson assumes that a
similar process of oversight must have been followed for all of the laws reinscribed
during this period, even if we do not always see explicit instructions in the
surviving inscriptions.\textsuperscript{79} It could be argued against Robertson that if such oversight
had been exercised over Nicomachus’ work, the speaker of Lysias 30 would have

\begin{itemize}
  \item \textsuperscript{77} IG I\textsuperscript{1} 104 ll.2-8.
  \item \textsuperscript{78} Gallia (2004) argues that the republication of Draco’s law was handled separately from the other
    law reform activities happening at the time. His argument, however, rests on the argument that
    Draco’s original law on homicide must have included a section on tyranny, and this claim cannot
    be supported. He bases his claim on the argument that the tyranny law must have preceded Solon
    since Solon is reported as having excluded from his amnesty those who had been exiled for tyranny,
    but this is not as secure as it might be. Though Solon is subsequently remembered as having
    removed all Draco’s laws besides those on homicide, it seems unlikely that this was the case at the
time, so cannot be used as evidence that the preserved copies of Draco’s laws contained provision
on tyrants. Gallia further argues that the law on tyranny should be identified as Drakontian because
of the self-help nature of the law’s provision that anyone who kills a tyrant shall be \textit{hosios}. While
this seems initially more persuasive, the nature of a tyranny inherently requires that the
punishment for the tyrant should not have to go through the normal courts system, since the tyrant
will presumably not submit to this. It is this very dependence on the court system which has caused
scholars to puzzle over the fourth-century law regulating the Areopagites in the event of a tyranny
\textit{IG II\textsuperscript{1}} 320. Davis (2011 p. 20-21) also proposes a separate publication process for Draco’s law, but
only inasmuch as it, unlike the other laws collected by the \textit{anagrapheis}, is to be inscribed on stone.
As such, the decision by Council and Assembly might only have been the exceptional inscription
on stone of this particular law.
  \item \textsuperscript{79} Robertson (1990). Canevaro (2015) builds on this to suggest that by subjecting the reinscribed
    laws to the approval of the \textit{demos} the post-Thirty democracy was for the first time asserting
democratic authority over the laws. Canevaro does, however, imagine the \textit{anagrapheis} to have been
engaged in reform of laws, so the assertion of democratic authority is a real authorisation of the
legitimacy of the content of each law. If the \textit{anagrapheis} were only supposed to be publishing the
laws, the approval by the Assembly could be an approval just of the expenditure for the inscription,
or of this law being legitimately Solonian. Draco’s Law on Homicide is the only product of the
\textit{anagrapheis} to bear a prescript. Neither the Sacrificial Calendar nor the Trierarchic Law bear any
prescript. The Trierarchic Law begins close to what appears to have been the top of the monument,
which at least suggests that though the law is fragmentary, there probably was not a prescript,
though we know too little about the layout of the reverse of the wall to say for certain that there
was no prescript.
\end{itemize}
had much less scope to attack Nicomachus personally for the work of the board of *anagrapheis*, though against this one could point out that in a *graphē paranomôn* the individual proposer is found responsible for the errant decision-making of the Assembly.

Robertson further argues that there must have been a process which we cannot see whereby another board of officials of some kind examined the laws compiled by the *anagrapheis* and decided which of them should be retained and which discarded. While he argues persuasively that it would be surprising to see *anagrapheis* entrusted with this responsibility, Robertson has not taken into account the degree to which people, at any rate in the fourth century, seem to have been unwilling to engage with the law-making of the fifth century. While in practice the project of compilation of the laws must be assumed to have required the *anagrapheis* to engage in significant editorial decisions about what should be included and what excluded, we cannot assume that this would have been recognised by their contemporaries. This then allowed the uncertainty as to the extent of the *anagrapheis*’ role which was exploited by the speaker in Lysias 30.

The remains of the sacrificial calendar provide similarly equivocal evidence on the question of whether the work of the *anagrapheis* was to revise or to republish the laws.\(^{80}\) The opisthographic wall bears inscriptions in Attic letters on the side believed to be the reverse of the wall, and ionic letters on the side believed to be the front. The reverse of the wall bears inscriptions concerning sacrifices and fragments of a trierarchic law or decree. The front of the wall bears an inscribed sacrificial calendar, and shows signs of having been subject to erasure and reinscription. This erasure is open to interpretation. Robertson has argued that we should recognise the erasure as a removal of Nicomachus’ sacrificial calendar and its replacement with a more conservative one.\(^{81}\) Assuming that the space had always contained a sacrificial calendar, the timing of the erasure and re-inscription

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80 Lambert (2002) collects, re-examines and translates the surviving fragments of the sacrificial calendar.

81 Robertson (1990).
becomes important. The Attic letters of the reverse of the wall suggest it was inscribed before 403; probably in the first period of law reform. The ionic letters on the front of the wall suggest that the re-inscription took place after 403, but this does not give any indication as to whether the re-inscription took place before or after the trial of Nicomachus. Given that we are informed in Against Nicomachus that the new calendar has been in use for two years, and that Nicomachus has worked as an anagrapheis both before and after the rule of the Thirty, we must presume that under Robertson’s argument the front side of the wall had been kept empty until 401 waiting for the calendar, while the back had already been filled. This seems unlikely, but cannot be proven either way.

Alternatively, we could consider that prior to 405 a sacrificial calendar was inscribed on this wall, and this calendar was then removed and replaced with a new calendar, which was the one for which Nicomachus found himself prosecuted. This implies that Nicomachus’ calendar was consciously intended to be a revision; it replaced a pre-existing inscribed calendar with something new and different. Unfortunately, neither alternative can be securely proven from the evidence we have.

Andocides in On the Mysteries suggests that there was a full revision of the laws of Athens following 403. He claims

you elected a commission of twenty to govern Athens until a fresh code of laws had been authorised; during the interval the code of Solon and the statutes of Draco were to be used. However, after you had chosen a Council by lot and elected, you began to discover that there were not a few of the laws of Solon and Draco under which

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82 Dated by Todd (1996) to 399.
83 Dow (1953) argues persuasively that the unusual mode of display for these inscriptions must have been chosen because it was most suitable for the display of a sacrificial calendar.
84 Dow (1960) p. 291-2 suggests that Nicomachus’ calendar was self-consciously democratic, and that it was intended to divert resources towards festivals celebrated by the mass of the Athenians and away from festivals which served smaller, elite groups.
85 Other interpretations have been offered: Fingarette (1971) suggests the erasure may have been the work of the Thirty, in which case Nicomachus could be considered to have been re-constructing what had been destroyed; Clinton (1982) considers it the work of the restored democracy.
numbers of citizens were liable, owing to previous events. You therefore called a meeting of the Assembly to discuss the difficulty, and as a result enacted that the whole of the laws should be subject to *dokimasia* and that such as were approved should be written up in the Stoa.\textsuperscript{86}

Andocides tries to link the decision to subject the laws to *dokimasia* to the amnesty that was agreed when the democrats regained control of Athens by claiming that the reason for the *dokimasia* was because ‘there were not a few of the laws of Solon and Draco under which numbers of citizens were liable, owing to previous events’.\textsuperscript{87} This claim by Andocides seems unlikely to be true. We know the process of republication of the laws to have pre-dated the Thirty, besides which, reforming the laws to exclude wrongs committed under the Thirty does not make sense, since the Amnesty itself prevented most prosecution for wrongs committed under the Thirty. As such, Andocides’ claims about the *dokimasia* of the laws must be treated with caution. Nonetheless, for him to have presented the process of republication as a full *dokimasia* and revision of laws certainly suggests that the scope of the task entrusted to the *anagrapheis* was much wider than the speaker of Lysias 30 would lead us to believe.

Lysias Against Nicomachus\textsuperscript{88} is explicitly premised on the distinction between republication and revision. The core of the accusation against Nicomachus is that he was supposed to republish some of the laws, but that in fact he took it upon himself to revise all of the laws. The speaker claims that Nicomachus ‘usurped the place of Solon as lawgiver’, that he ‘inserted some laws and erased others’,\textsuperscript{89} and that ‘although boundaries were set out as to the texts he had to transcribe, he made

\textsuperscript{86} Andoc. 1.82.
\textsuperscript{87} ‘Previous events’ must be taken as a euphemistic reference to the wrongs that took place under the Thirty.
\textsuperscript{88} Todd (1996) analyses this speech, and suggests it is likely to have been an *eisangelia* brought in 399. He suggests that it may have been brought at a time when the courts were being used in an unusual way, as evidenced by the trials of Socrates, Andocides and Agoratus in the same year.
\textsuperscript{89} Lys. 30.2 προστασίαν γὰρ αὐτῷ τεττάρων μηνὸν ἀναγράψαι τοὺς νόμους τοὺς Σόλωνος, ἀντὶ μὲν Σόλωνος αὐτὸν νομοθέτην κατέστησεν. ἀντὶ δὲ τεττάρων μηνὸν ἔξετη τὴν αρχὴν ἐποίησατο, καθ’ ἐκάστην δὲ ἠμέραν ἀργυρίων λαμβάνων τοὺς μὲν ἐνέγραψε τοὺς δὲ ἐξέχεισεν.
himself kurios over everything’. All of these, however, are framed as accusations against Nicomachus. We must assume that there was at least some degree of ambiguity in the instructions given to Nicomachus to begin his work as to whether he was to republish Athens’ laws, or to revise them, but as discussed above, given the fourth-century unwillingness to engage with Athenian lawgiving from the fifth century, it is likely that Nicomachus’ work proved to be more complicated than had been envisioned. Again, from Lysias Against Nicomachus it is hard to find a clear answer on whether the work of the anagrapheis was a republication or a revision. It is possible the best answer that can be proposed is that favoured by Rhodes, that the process was intended as a republication, but quickly became in fact a revision.

The ambiguity about what the process of revision of Athens’ laws at the end of the fifth century meant for Athens laws was still alive in the fourth century. In around the year 345 Euxitheus gave a speech before a jury protesting his exclusion from his deme. In the course of that speech he presents a ‘law of Solon’ forbidding foreigners to trade in the agora. He first has this Solonian law read to the jury, then he says ‘now take also the law of Aristophon; for, men of Athens, Solon was thought to have enacted in this instance so wise and democratic a law that you voted for it again.’ This double citation of a law is unique in the orators, but it shows Demosthenes playing with the possibilities afforded by the double-enactment of these Solonian laws. He could invoke the authority for this law not only of Solon,

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91 Dem. 57.32. λαβὲ δὴ καὶ τὸν Ἀριστοφώντας: οὕτω γάρ, ὡς ἄνδρες Ἀθηναίοι, τὸν ἑδίκεν ἐκεῖνος καλὸς καὶ δημοτικὸς νομοθέτησα, ὅστ᾽ εὐφημίσασθε πάλιν ἀνανεώσασθαι. It is a little unclear from the language used whether this second enactment was in the form of a nomos or a psēphisma. The use of ton at the beginning of the sentence refers back to a previous instruction to read ton nomon, but the use of epsēphisasthe suggests a decree. It has been supposed that the re-enactment of this measure formed part of the republication of laws at the end of the fifth century – Hansen (1979), on the basis that he thinks it is a decree and must date to before the distinction between laws and decrees was created. Whitehead (1986) 315-6 considers the measure to be undatable.
92 Though And. 1.94 ‘the law not only existed in the past but exists and is still applied even now because it is a good one’ (referring to a law which was valid before the Thirty and has retained validity following the restoration of the democracy) and Dem. 24.43 [the law of Diocles] ‘defines and shores up the existing laws’ may both explore a similar idea - that those laws which had passed through the republication process were in some way more authoritative by having done so.
but also of the law’s own adjudged excellence, as evidenced by the decision of the Athenians to renew this law.

The re-publication of the laws at the end of the fifth century had a further impact on laws in the fourth century, which was in effect to solidify the failure to imagine the fifth-century democracy as engaged in law giving. As a result of the failure to distinguish between *nomoi* and *psēphismata* until the end of the fifth century, when the *anagrapheis* came to republish Athens’ laws they were faced with a choice: either to treat Athenian law as solely made up of the laws of Solon and Draco and republish only these laws, or to try to sort through all the records of all the decisions taken by the Assembly and try to decide which of them should be treated as *nomoi* and which as *psēphismata*. The reinscription of a law on the trierarchy on the pre-403 side of the wall which may be the work of Nicomachus’ commission suggests that some attempt must have been made to identify post-Solonian decisions which could be considered to be *nomoi*, but equally the prosecution of Nicomachus suggests that doing so was not an uncontroversial choice to make. In reality, we must presume that a majority of fifth-century law-making was never identified as such, and as a result the fourth-century democracy had no means by which to identify this as law.

This may help us to understand the agreement in the Prospectus of the Second Athenian League\(^94\) to authorise the Council to destroy any *stelai* which are unfavourable to cities who join the League. It is likely that any such *stelai* would date to the fifth century, since this was the last time Athens was in a position to make and record decisions which could be unfavourable to her potential allies. If these decisions were to be recognised as *nomoi*, it seems unlikely that they could be removed based only on the provisions of a treaty and bypassing the usual process of repeal by the *nomothetai*. It is unlikely, however, that the decisions would have been recognised in the fourth century as *nomoi*, since they pre-dated the distinction between *nomoi* and *psēphismata*, so could only be carried forward

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\(^94\) RO 22 ll. 25-35 dated to 378/7.
into the fourth century as nomoi if they were among the fifth-century enactments reinscribed by the anagrapheis

5.4 Law-making in the fourth century

5.4.1 Fourth-century nomothesia

At the end of the fifth century, Athens adopted a system for legislating which distinguished between psēphismata and nomoi and allowed bodies of the Athenian democracy for the first time to create new nomoi which would be recognised and treated unambiguously as such. The details of how the new process of nomothesia worked are disputed among modern historians, as is the reliability of our sources. What does seem evident is that Athenians in the fourth century did not pass many nomoi. There are only around a dozen surviving inscribed nomoi from the fourth century, and in the speeches there are references to a further four laws which were passed by the demos, as well as six laws which were indicted as mē epitēdeios.

The key passages on nomothesia are Dem. 20.89-95 (355), Dem. 24.20-23 (353), Dem. 24.33, and Aeschin. 3.38-9 (330). These overlapping and partially contradictory provisions have been subject to different interpretations by modern historians.

MacDowell divided the processes into what he labelled the Old Legislation Law (Dem. 20.89), the New Legislation Law (Dem. 20. 91), the Review Law (Dem. 24.20), the Repeal Law (Dem. 24.33), and the Inspection Law (Aeschin. 3.38). According to MacDowell’s analysis, the Old Legislation Law was in force from about 403/2 until around 370. From 370, there was no longer a requirement that

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95 As listed by Lambert (2017) p. 62 n. 31.
96 Din. 1.62, Aeschin. 1.33, Dem. 57.32 – re-enacting a Solonian law, Dem. 18.102-7.
98 MacDowell (1975).
nomothetai should have sworn the jurors’ oath and the process of nomothesia was simplified and allowed to be faster. Both the Old and the New Legislation Laws covered the processes for initiating new laws. The Review Law instructed that there should be an annual appraisal of the laws by the ecclesia and if any areas of law (bouleutikoi, koinoi, laws for the nine archons, and laws for other officials) were decided to be unsatisfactory, any Athenian who wishes should propose replacements; these proposed replacements should then go to the nomothetai. MacDowell considers the Old Legislation Law and the Review Law to have been intended to work together, but when the Old Legislation Law was repealed the Review Law was not. The Repeal Law MacDowell considers to have worked in conjunction with the New Legislation Law, to have allowed for the repeal of laws through a simpler process than an annual vote by the ecclesia. The Inspection Law is dated by MacDowell to around 355 and allows for the correction of laws found to be invalid, inconsistent or overlapping. MacDowell interprets the Inspection Law as allowing for the removal of laws without a decision of the nomothetai, but this is not clear from the text.

Hansen considers the process of nomothesia to have remained static throughout the fourth century, with the overlapping processes allowing different methods to achieve the same outcome, in analogy with the model proposed by Osborne (1985). He considers there to have existed three laws on nomothesia: the Repeal Law, initiated by ho boulomenos, the Review Law, initiated by a vote of the ecclesia, and the Inspection Law, initiated by the thesmothetai. According to Hansen’s analysis, once the action was initiated all these laws followed the same process: approval in the boulē, publication at the eponymous heroes, preliminary debate in the ecclesia, election of advocates to argue before the nomothetai, presentation of the laws before the nomothetai. Boards of nomothetai are always established by the ecclesia and throughout the fourth century are made up of men who have sworn the dikastic oath.

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Rhodes adopts a subtle approach to the question of the various laws on *nomothesia*, rejecting MacDowell’s Old Legislation Law and New Legislation Law and suggesting that the Review Law and Repeal Law had been subject to reinterpretation through the course of the fourth century. He argues that the Repeal Law had originally been intended as a supplement to the Review Law, but had subsequently come to be reinterpreted as a stand-alone law, since it allowed for more convenient *nomothesia*. As such, laws could be made either by the sworn *nomothetai* or by *nomothetai* appointed from among the whole citizen body.

Arguments that the *nomothetai* were no longer necessarily chosen from among those who had sworn the jurors’ oath are based on Demosthenes’ complaint that under the old process the first stage of legislating was ‘in your courts, before men under oath’; Demosthenes goes on to list two further requirements (repeal of contradictory laws, and display of proposed laws at the eponymous heroes) then complains that Leptines’ law is in breach of all of these requirements. This claim that the *nomothetai* are no longer drawn from among those who have sworn the jurors’ oath is contradicted by the decree of Epicrates from two years later, which states that the *nomothetai* are to be drawn from ‘those who have taken the oath’. It seems likely that *nomothetai* continued to be from among those who had sworn the oath, and Demosthenes’ claim that Leptines had not complied with any of the requirements for making a law was an exaggeration.

Rhodes’ argument that it is unlikely that Demosthenes would have presented a law which had been repealed, but that he might well have presented a valid law which had fallen out of use, seems persuasive, so this gives us the Review Law, which mandates an annual vote on the suitability of Athens’ laws followed by amendment.

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100 Rhodes (1984).
101 Dem. 20.93.
102 Dem. 24.27.
103 Hansen (1985) considers this claim to be part of Demosthenes’ attempts to conflate *graphê nomon mé epitêdeion theînai* and *nomothesia*, as part of special pleading to deal with the time limit for bringing a *graphê nomon mé epitêdeion theînai* having elapsed. The argument that in general a *graphê nomon mé epitêdeion theînai* could not be brought against a law after a year has not been accepted by other scholars.
to any areas of law found to be unsatisfactory; the Repeal Law, which initially filled gaps in the process for repeal of laws set out in the Review Law, but which was subsequently repurposed to allow for the *ad hoc* repeal and replacement of unsuitable laws; and the Inspection Law, which instructed the *thesmothetai* to make an annual examination of the laws.

This has been called into question by Canevaro, who rejects the authenticity of the documents inserted into Demosthenes 20 and 24.\(^{104}\) He rejects the Review Law and claims that the information in Demosthenes 20 and 24 outside of the inserted documents is consistent. His reconstructed process gives an initial vote in the *ecclesia* which Canevaro claims was analogous to the grant of *adeia* needed before the *ecclesia* could discuss *atimoi* and public debtors. After this, *nomothetai* are appointed and people can start posting bills at the eponymous heroes, and following the display of the bills *sunëgoroi* are elected to defend the existing laws.\(^{105}\) Hansen rejects Canevaro’s arguments, on the basis that we do not know enough about the initial publication of the speeches to rely confidently on stichometry.\(^{106}\) Canevaro appears to consider that *nomothetai* were drawn from those who had sworn the jurors’ oath.\(^{107}\) Canevaro’s model gives us a single law governing the passing of new laws, and the Inspection Law, which is not drawn from documents and so is not questioned by Canevaro.

Whether Rhodes or Canevaro is correct, it appears that there was a single set of laws made at the end of the fifth century governing law-making, which instructed that laws should be made by the *nomothetai* and not the *ecclesia*, that the laws proposed should be displayed for public inspection, and that *nomothetai* should be drawn from people who had sworn the jurors’ oath. In Rhodes’ model, the law

\(^{104}\) (2013b).

\(^{105}\) Canevaro identifies the use of election as a recognition that this was an office requiring expertise, which could suggest an emerging recognition in Athens of law as an expert skill, along with the *anagrapheis* – Todd (1996).

\(^{106}\) Hansen 2016a + b.

\(^{107}\) Canevaro (2013b) p. 141, 148.
was initially more restrictive, but certain aspects of it fell out of use in the course of the fourth century.

The restriction of nomothetai to those who had sworn the jurors’ oath is significant. The jurors’ oath could only be sworn by men over the age of thirty, and while the precise terms of the oath are disputed, it did specify that jurors swore to vote ‘according to the laws and decrees of Athens.’

By limiting the nomothetai to those who had sworn the oath, Athens chose to place legislative power in the hands of those who were also in charge of administering the law. To modern eyes, informed by the model of separation of powers first proposed in the eighteenth century by Montesquieu, this might seem unwise, but to Athenians it probably made a certain sense. In addition, by requiring the nomothetai to be over thirty, Athens removed legislative power from the young men who were considered to be more volatile and less thoughtful and made the nomothetai to some extent similar to the boule, which was also made up of men over thirty who had sworn an oath.

Moreover, by placing legislative power in the hands of the jurors, Athens gave this power to those who could be considered the most experienced and invested in the usefulness and authority of Athens’ laws. Piérart argues that the nomothetai should be considered a sort of specialised ecclesia, against the prior prevailing view that the nomothetai functioned like a jury court. Rhodes is not fully convinced by Piérart’s arguments, but acknowledges the nomothetai to be a ‘thoroughly hybrid body’ incorporating elements from both the ecclesia and the courts. The discussion of the nomothetai as court/Assembly is important in the debates about where sovereignty lay in the fourth century democracy, but these debates are predicated on the assumption that the power to create nomoi was taken from the

\[\text{108 See 4.3.2.1.}\]
\[\text{109 Rhodes (1972) p. 194-9.}\]
\[\text{110 With the possible exception of the Areopagus, though bestowing additional powers on the Areopagus in the immediate aftermath of the Thirty would have been a contentious proposal, given the evidence that the Thirty deliberately expanded the powers of the Areopagus. Concerns about the Areopagites’ democratic loyalties appear to have continued into the fourth century, as evidenced by IG II1 320.}\]
\[\text{111 Piérart (2000).}\]
\[\text{112 Rhodes (2003).}\]
ecclesia and given to the nomothetai. If instead we acknowledge the difficulty Athenians seem to have had with recognising the fact of law-making by the fifth-century democracy, we can understand the creation of the nomothetai, not as a removal of power from the ecclesia to the courts, which must then be justified, but as a creation of a new body with a new power. The hybrid aspects of the nomothetai’s processes make sense in this context, where a body of people primarily understood as jurors and accustomed to trying graphai paranomôn are given the power to make laws in analogy with the ecclesia’s power to make decrees.

5.4.2 Graphai paranomon and nomon mē epitēdeion theinai

Fourth-century Athens possessed two legal processes, often presumed to be parallel, for the judicial examination of legislative acts. The graphē paranomôn, which was used for the examination of decrees,113 existed during the fifth century, though the date of its invention is hard to ascertain.114 The graphē nomon mē epitēdeion theinai must have been introduced concurrently with or following the introduction of nomothesia. Both processes enabled anyone who wished (ho boulomenos) to indict the proposer of the disputed law or decree. Much has been published on the form and function of these two processes in Athens’ fourth-century political system, particularly on the sovereignty of different bodies of government,115 but here I intend only to engage with a few features of the two processes and their role in illuminating and shaping Athenian conceptions of their laws.

113 The graphē paranomôn is often compared to the modern practice of judicial review – Hansen (1991), Carawan (2007), Lanni (2010a), Schwartzberg (2013). Given the significant differences between Athenian constitutional arrangements and those of any modern state, the value of this comparison is to be doubted.

114 Canevaro (2015) suggests that it was created in the late fifth century, and that its establishment implicitly recognises law-making by the fifth-century democracy. This conflates its later use with its earlier. In a fifth-century mindset in which Solon’s law are imagined to be the laws of Athens and are thought of as broadly comprehensive, and prior to the creation of any means by which to repeal laws, this does not recognise the capacity of the fifth-century democracy to legitimately legislate, it merely recognises that the fifth-century democracy can create enactments which may breach the requirements of Athens’ laws.

The wrongful element in the two offences is disputed in modern scholarship, though there is a general agreement that at least procedural irregularities (e.g. the measure not conforming to existing law) would render a measure para tous nomous or mē epitēdeios. Kremmydas observes that the designation mē epitēdeios may have given orators a little more scope for making wide arguments about the suitability of a measure, but that wide arguments are also commonly seen in graphē paranomōn speeches. ¹⁶ Understandings of what made a measure para tous nomous are of course enormously important for any account of Athenians’ understanding of their own law.

Wolff identified paranomia as including not only measures that contravened existing laws, but also measures that were in breach of the legal principles underlying those laws. ¹⁷ Hansen considers the dikasterion hearing the case to have had both a judicial and a legislative role, so he argues that the jurors’ decision can be based either on whether the decree is constitutional or on whether it is expedient. ¹⁸ In this way, Hansen is able to dismiss many of the lines of argument in speeches as political and not legal, though nonetheless relevant to the jurors’ decision-making. Yunis argues that a decree could not be declared unlawful for solely political reasons. While arguments about the suitability and expedience of a decree are commonly seen in the orators, Yunis considers these to have been insufficient on their own for a finding of paranomia and argues that a decree had to be found to breach existing law for it to be considered para tous nomous. He does, however, argue that nomos, for these purposes, encompassed not only the letter of the law, but also the principles which could be treated by speakers and jurors as underlying the law. ¹⁹ In this way, the nomoi come to be both evidence and product of Athens’ imagined democratic constitution, and it is for this reason we see the Athenian belief that the graphē paranomōn was the defender of the constitution.

¹⁹ Yunis (1988).
Lanni argues that the balance between the significance of legal and political arguments was not agreed upon in classical Athens, and that litigants would try to persuade jurors that the law on the graphē paranomōn/graphē nomon mē epitēdeion theinai should be interpreted in whatever way would best suit the strengths of the litigants’ arguments.¹²⁰ Lanni does not consider juries to have been bound to make decisions in accordance with law, and in addressing the mismatch between this and the existence of a process for prosecution of a person who proposed a measure which did not comply with existing law, Lanni argues that ‘in practice only statutes that were perceived to threaten democratic procedures were considered paranomos.’¹²¹ This may be an overstatement of the case. The graphē paranomōn was certainly understood by Athens to have an important role in guarding the democracy, and it is likely that the preponderance of speeches emphasising the danger to the democracy of the proposed measure was in part a reaction to this perception of the purpose of the graphē paranomōn, but in part an aspect of the tendency of the orators to exaggerate the dangers posed by the jury failing to side with the speaker’s argument.

Wolff’s characterisation of paranomia as including both proposed decrees which breached existing written provisions of Athenian law and proposed decrees which could be construed to breach the principles underlying those laws seems to fit our evidence best, however it must be remembered that like all terms in Athenian law there was no single authoritative interpretation of paranomia, and a sufficiently clever speaker might be able to persuade the jury that, for his case at least, paranomia should be understood to be restricted to clear-cut breaches of Athens’ existing, written laws.¹²²

¹²⁰ Lanni (2010a).
Yunis seems to treat the wrongful act prosecuted in the *graphē paranomōn* as the *paranomon legein*, the speech-act of proposing the decree. Carawan, on the other hand, treats the wrongful act as the outcome of such a speech act – namely an unlawful decree being passed. This may appear a dry argument, but the different interpretations lead to different interpretations of the law on *graphē paranomōn*. Carawan treats *psēphismata* indicted at the probouleutic stage as inchoate offences, and so is reluctant to admit that their perpetrators might be punished where the man who passed an unlawful decree which stood for a year without being indicted might be spared punishment. Though in speeches the emphasis is often placed on the wrongfulness of the proposed decree, and not on the wrongfulness of the individual proposing it, this may be a product of the fact that most of our cases of *graphai paranomōn* and *mē epitēdeion theinai* are highly political and are used as a way to attack more a prominent citizen than the person who actually proposed the decree. In Demosthenes *Against Androtion*, where the proposer of the original decree was a prominent citizen, we do see an extended attack on the personal character of the proposer. Yunis’ model seems to fit some structural elements of the process better, in particular the penalty of *atimia* for anyone who is convicted three times in *graphai paranomōn*. If we treat the wrongful act as the proposing of the decree, we can see that the wrong has been committed whether or not the decree gets as far as being passed by the *ecclesia*. To fully evaluate the significance of this, it is necessary first to explore the role of the time limit for bringing prosecutions against the original proposer.

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123 Yunis (1988). This appears to have been one of the points at issue in Demosthenes *Against Aristocrates*. Dem. 23.92-94 Demosthenes warns that Aristocrates will try to argue that he should not be punished as, since his decree never came into effect, no harm was done. Demosthenes urges the jury to reject this on the basis that the speech-act of proposing the decree was in itself wrongful.  
125 That is to say, offences of preparation, for example attempted burglary, where the wrongful act has not yet been committed. Contrast going equipped to commit burglary, where the wrongful act (acquiring and carrying the tools necessary to commit burglary with the intent of committing burglary) has already been committed. Offences with a mental element, for example intentional wounding, are not inchoate. The only inchoate offences I know of from Athens are attempting to establish a tyranny, (Plut. Sol. 19.3, Ath. Pol. 16.10) and possibly (depending on interpretation – see Phillips (2007)) *trauma ek pronoias*.  
126 Dem. 22.47-78.  
128 This creates a possible analogy with the offence of deceiving the demos – Xen. Hel. 1.7.35, Ath. Pol. 43.5.
The *graphē nomon mē epitēdeion theinai* appears to have been subject to an unusual time limit. Cases could only be brought against the proposer of the law for the first year after the law is made; thereafter anyone could still indict the law, but the proposer would no longer be subject to any penalty if the law was quashed. This time limit has been extended by analogy to the *graphē paranomōn*, though this is disputed.

Hansen disputes the possibility of bringing cases against either laws or decrees outside of the one-year time limit, and considers Demosthenes *Against Leptines*, where this did happen, to be an outlier permitted only because of Demosthenes’ special pleading.129 This seems unlikely, not least because by agreeing to introduce the prosecution despite the law’s time limit the *thesmothetai* put themselves at significant personal risk of being attacked by Leptines and his *philoi* at their *euthynai*. There are enough indications in other *paranomōn* and *nomon mē epitēdeion theinai* speeches to suggest that the time limit of one year would have applied to the *graphē nomon mē epitēdeion theinai* and that after the one-year time limit had passed the law itself could still be indicted.

Carawan disputes the existence of any time limit for bringing *graphē paranomōn* cases, on the basis (discussed above) that if a person could be punished for proposing a decree which never took effect, it would be absurd to allow those who proposed decrees which did take effect to escape punishment, and because he considers the nature of decrees in the fourth century (as one-off decisions) to render the bringing of late *graphai* against them irrelevant.130 Neither of Carawan’s arguments is convincing. As well as the questions around Carawan’s definition of what the wrong in the *graphē paranomōn* was, we must acknowledge that time limits on prosecution can lead to uncomfortable results, even today, but are valuable to judicial systems all the same, while even long after the fact, a democratic decision that a former decision was wrong may have powerful effects.

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Consider, for instance, the impact of a post-hoc decision that a grant of honours was unlawful – the recipient of the grant is humiliated, his ongoing pride in the stēlē displaying his honours lost. The conventional view that there was a one-year period during which the proposer of the decree or law could be subject to prosecution, and thereafter the decree or law could be indicted but its proposer would not be subject to any penalty, appears to be the correct one.

The intended purpose of this time limit cannot be confidently ascertained. Giannadaki accepts the claim of Dem. 36.26-7 (a case about contracts) that time limits give adequate time for the wrongdoing to be identified and a case lodged. She fails, however, to engage with the fact that the time limits for the graphē paranomōn and graphē nomon mē epitēdeion theinai still leave the decree/law subject to indictment. The limit of one year for prosecution of the proposer seems to be indicative of the complicated relationship the fourth-century democracy had with contemporary law-making, and in particular whether a contemporary Athenian could be identifiable as a lawgiver. The answer suggested by the time limit for prosecutions for graphai nomon mē epitēdeion theinai seems to be that for the first year, the proposer of the law remains responsible for that defective law, but after a year the responsibility becomes diffuse and the law becomes a part of the common property of the Athenians.

This can be combined with the evidence that the wrongful act prosecuted in the graphē paranomōn appears to be the speech act of proposing the decree and not the act of having the decree passed by the demos. The suggestion that the wrong lies in the speech and not in the act implies that the proposer is not envisaged as a lawgiver. His wrong is not making a bad law, but speaking against the interests of the polis. In analogy with the time limit on personal prosecutions for graphē paranomōn, the capacity of a fourth-century Athenian to be recognised as a lawgiver is lessened.

13 Giannadaki 2014.
Much work has been done on which of Athens’ democratic bodies was sovereign in the fourth century, and this work has tended to proceed on the assumption that when a dikasterion declared a measure to be para tous nomous/ mē epitēdeios this amounts to the court having the capability to override the decisions of the Assembly. There are some indications that this might be the case, in particular the evidence (see Hansen 1987) that where a decree was indicted at probouleutic stage but was then approved by the court, the decree did not have to go back to the Assembly for ratification, but would have immediate effect. Here, the court’s decision does appear to have had legislative effect, though given Athens' lack of any concern about separation of powers it is possible that the court process was simply felt to constitute sufficient public approval of the measure.

On the other hand, where a decree which has been approved by the Assembly is then indicted and is rejected as unlawful by the dikasterion, it is unclear whether that decree is made ineffective by that decision, or whether in principle it might be considered always to have been ineffective because of its inherent paranomia. There is at least an indication to the latter effect in Demosthenes Against Aristocrates:

For instance, suppose that one of those decrees which have in fact been disallowed had never been impeached in this Court. It would certainly have been operative (kurios); nevertheless it would have been moved contrary to law (para tous nomous). Or suppose that a decree, being impeached, was pronounced flawless, because the prosecutors, either collusively or through incompetence, had failed to make good their case: that failure does not prevent it from being unlawful (paranomōn). As such, by declaring a decree to be unlawful the court is, to some extent, not rendering it ineffective, but highlighting the fact that it was always too flawed to be able to take effect. The Assembly does not lose ‘sovereignty’, but never had the authority to create unlawful/mē epitēdeios measures.

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133 Dem. 23.96.
The introduction of the *graphē nomon mē epitēdeion theinai* at the end of the fifth century may have had a further effect on Athens’ structure of laws. As we have discussed above, at the end of the fifth century Athens created a body of laws which were linked to Solon and treated as ancient and respected, and which had the effect of obscuring fifth-century law-making. At the same time, Athens created a new process for democratic law-making. The *graphē nomon mē epitēdeion theinai* could in principle be used to indict any law, but given the respect shown to laws that were or could be claimed as Solonian, it seems highly unlikely that it would have been used to indict any of the laws that emerged from the late fifth-century republication of ‘Solon’s Laws’. As such, the introduction of the *graphē nomon mē epitēdeion theinai* must in practice have given Athens a two-tier body of laws, with pre-400 laws respected and safe from challenge, and laws which could be identified as post-400 vulnerable to prosecution under the *graphē nomon mē epitēdeion theinai*. Given the limited number of nomoi that appear to have been passed by the fourth-century democracy, it is perhaps not surprising that this two-tier structure does not appear in our sources.

5.4.3 Obsolete laws

In the fourth century, Athens appears to have lacked any structure by which laws could be declared to be obsolete. Since older laws had authority over any new law which contradicted their provisions, in principle no law could have become obsolete. However, this is likely to have led to Athenian law containing laws which were, in practice, obsolete.

The only system which could be used for the removal of obsolete laws for which we have evidence is the inspection of the laws by the *thesmothetai* discussed by Aeschines in his prosecution of Ctesiphon. Demosthenes, we are told by Aeschines,

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134 Provided we accept the claim that after the one year time limit on prosecuting the proposer the law itself could still be indicted.
will try to claim that there is another law allowing the presentation of crowns in the theatre, so Aeschines is attempting to prove to the jurors that Athenian law does not permit contradictory laws to exist. He claims ‘[the lawgiver] has expressly laid upon the thesmothetai the duty of making an annual revision of the laws in the presence of the people, prescribing sharp investigation and examination, in order to determine whether any law stands written which contradicts another law, or an invalid law stands among the valid, or whether more laws than one stand written to govern each action.’ The part that concerns us here is the instruction that the thesmothetai should examine whether ‘an invalid law stands among the valid’. If we had evidence that Athenians recognised the possibility that their laws might become akuros through obsolescence, this could be considered to be intended to deal with the problem of obsolete laws; however, in general Athenian thinking seems not to have recognised this. Not only did older laws take precedence over newer, Hansen (1979) observes that in contemporary Athenian philosophy an essential difference between a law and a decree was that a law should be enacted for something permanent, a distinction Hansen considers fourth-century Athenian nomothesia to have respected. In this sense, laws should not have any capacity to become obsolete.  

Despite this, there are a couple of signs that some capacity for obsolescence in laws might have been recognised in Athenian thought. Aristotle Rhetoric 1375b11 suggests that where the written law is not on the pleader’s side, ‘if the conditions which led to the enactment of the law are now obsolete, while the law itself remains, one must endeavour to make this clear and to combat the law by this argument’. Harris observes that no litigant in the surviving corpus of forensic oratory actually uses this strategy. In the Rhetoric, laws are obsolete because they were created to deal with specific circumstances, circumstances which no longer pertain. As such, any nomos vulnerable to this argument should, according to

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135 Aesch. 3.38.
136 This model may be supported by the evidence that entrenchment clauses, which were common in fifth-century Assembly decisions, seem to have fallen out of use in the fourth century – see Lewis (1997).
137 (2006b) p. 163.
Hansen, have been passed not as a nomos but as a psēphisma in the fourth century. Most of Athens’ older laws had no contextualising information, but as we have seen the trope of the intent of the lawgiver was well-recognised in Athenian oratory, so imputing some historically contingent intent to the lawgiver might not have been impossible for a speaker. This would, however, have been a difficult argument to make given the significance given to pre-fourth-century laws, and it is not surprising we do not see speakers using it.

In addition, *Ath. Pol*. 22.1-2 claims that the reason Cleisthenes needed to make new laws was because ‘the tyranny had obliterated the laws of Solon by disuse’.\(^\text{138}\) It is hard to make sense of what is meant by this, since Cleisthenes is treated by the *Ath. Pol.* as trying to re-establish a Solonian democracy, so the circumstances for which Solon created his laws would be likely to be considered still to be relevant. It is possible that the obliteration caused by the disuse could refer to laws being lost or forgotten. Rhodes observes that the claim that the tyrants did not use the laws of Solon is widely contradicted by other sources, but the factual accuracy of the claim is less important here than the idea that a law could become obsolete through disuse.\(^\text{139}\) Despite this, the republication of the laws at the end of the fifth century suggests that Athens would go to significant lengths to find and preserve old laws, rather than letting them fade into obsolescence through disuse. The idea that a law might become *akuros* through disuse may appear in the orators, such as when Aeschines claims that if jurors punish Timarchus their laws will be ‘good and kurios’ but if they acquit him their laws will be ‘good, indeed, but no longer kurios’.\(^\text{140}\) As such, it is possible the inspection referred to in Aeschines 3.38 could have allowed for the removal of laws that had become obsolete, but there would nonetheless have been barriers in place to recognising very old laws as obsolete because of the preference given to old laws, while in theory newer laws should not have had the capacity to become obsolete.

\(^{138}\) Καὶ γὰρ συνέβη τοὺς μὲν Σόλωνος νόμους ἀφανίσαι τὴν τυραννίδα διὰ τὸ μὴ χρῆσθαι.


\(^{140}\) Aesch. 1.36, though he may only mean that it would no longer have force.
There is some evidence to suggest that at least some obsolete laws did remain in existence in the fourth century. The clearest evidence of obsolete laws comes from the information in the *Ath. Pol.* about the Solonian groups *pentakosiomedimnoi, hippeis, zeugitai* and *thètes*. By the time the *Ath. Pol.* was written it appears these groups were more or less obsolete, but we are told that ‘even now when the presiding official asks a man who is about to draw lots for some office what rate he pays, no one whatever would say he was rated as a thete’.

Here, then, we see a law which is so widely recognised as obsolete that it is habitually ignored by the people it should govern, but which nonetheless has not been repealed.

The law on ostracism could be considered to have been obsolete by the fourth century. This law, which had been used regularly in the early fifth century, fell out of use by about 440. Nonetheless, in the fourth century there was still an annual vote held on whether to conduct an ostracism.

No speaker in forensic oratory ever declares a law to be obsolete, but nonetheless some laws cited in speeches could be considered to have fallen out of use. The speaker of Lysias’ *Against Theomnesteus* cites multiple laws which contain outdated language, but it is important for the argument in the case that the laws cited should still be valid at the time of the speech. The speaker in Demosthenes’ *Against Aristocrates* quotes extensively from the Drakontian law on homicide, and as in Lysias’ *Against Theomnesteus*, encounters archaic language. In *Against Aristocrates*, however, the archaic language does have some effect on the functioning of the law. At 23.37-40 he discusses the provisions protecting an exiled killer from retaliation, ‘as long as he stays away from the frontier-markets’. From the explanation given by the speaker of what the frontier markets were, it appears these no longer existed. As such, this provision of law could be considered obsolete, but the speaker does not appear to consider this obsolescence to impede his case. More

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142 Apart from a brief, ill-fated resurrection in 416, when Alcibiades and Nicias attempted to use ostracism against one another, and instead a third person, Hyperbolus, was ostracised. See Forsdyke (2005) on the institution of ostracism and its significance for Athens.
143 *Ath. Pol.* 43.5.
generally, Carawan has argued that the provisions relied on by Demosthenes in this case had been replaced by the more flexible process of *apagoge*.  

In both Demosthenes’ *Against Aristocrates* and Lysias’ *On the Murder of Eratosthenes* a law is cited giving a defence to homicide to anyone who kills a person who is engaged in intercourse with the killer’s ‘wife, mother, sister, daughter, or concubine (*pallake*) kept for the procreation of *eleutheroi* children’. Getting *eleutheroi* children from a concubine has generally been considered by scholars to have been obsolete by the fourth century, though Ogden considers that it was possible to get children on a concubine who would be free but not citizens. As such, it remains unclear whether or not this law was obsolete in the fourth century.

*Aeschines’ Against Timarchus* 22-24 refers to a law which instructs the herald to invite men over fifty to address the Assembly first. Lane Fox (1994) considers it likely that this law was obsolete in the fourth century, and observes the incongruity of Aeschines citing an obsolete law in a speech so concerned with the sovereignty of the laws. This incongruity only exists, however, in a system which recognises that laws can become obsolete. If laws are not admitted to have the capacity to become obsolete, citing laws which are no longer in use does not diminish Aeschines’ argument so much as strengthen his nostalgic presentation of the good order and excellent behaviour of Athens’ forefathers.

If fourth-century Athens possessed a process for recognising and repealing obsolete laws, it appears to have left at least some obsolete laws in place. The continued existence of these laws seems not to have caused significant disruption to Athens’ legal system, and while we see complaints that an old law is no longer

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144 Carawan (1998) pp. 313-373 and chapter 2.3.2.8 of this thesis.
being used correctly we see none arguing that old, obsolete laws are holding Athens back or causing confusion.

5.5 Conclusion

Though Athens had been engaging in democratic law-making throughout the fifth century, and by the early fourth century had explicitly recognised this and created systems by which new laws could be made for the polis, the laws of Athens continued to be closely bound up with the identity of Solon. The laws passed in the fourth century were vulnerable to indictment at any time as mē epitēdeios, creating in effect two tiers of law in Athens: pre-400 laws, which were deemed to be Solonian and likely to have been safe from indictment, and post-400 laws, which were vulnerable. Because the figure of the lawgiver became so important for Athens' understanding of its laws, the image of a contemporary Athenian as a lawgiver was a difficult one to accept, as can be seen in the process of graphē paranomōn. The figure of the lawgiver also meant that Athens' law could not develop to carry its own authority, but remained bound up with the personal authority of Athens' long-dead lawgiver. As such, Athens cannot be said to have developed positivist law; in the fourth century, Athens' law did not, primarily, draw its authority from having been made by legally recognised structures and systems.
CHAPTER 6: RECEPTION OF SPARTAN LAW

In this chapter I intend to explore Spartan law though Athenian eyes. It is not my intention to try to analyse Sparta’s legal system here, or even to take a position on whether it possessed one. Rather I wish to examine how Athenian attitudes towards Spartan law may shed light on their underlying assumptions about what law was and what role it ought to play in a polis and in people’s lives. Popular Athenian sources on Sparta’s law are limited, so in this chapter I have drawn on elite sources. Where possible, I have checked against popular sources to explore how far these elite perspectives might be considered representative of popular attitudes.

6.1 Status as law

In 1986 MacDowell published a book focussing on Spartan law. In the reviews of his book, reviewers commented that the book suffered from a fundamental flaw which MacDowell had not adequately addressed: they were not convinced that Sparta possessed law. For Thür this fatally undermined MacDowell’s work.1 Similarly, Osborne remarks that MacDowell’s decision to treat as law whatever the Spartans are reported as having ascribed to Lycurgus ‘elides important distinctions between written and unwritten law, between statutes and prevailing, ideologically charged custom’.2 In this regard, the first thing to note is that, unlike modern academics, Athenians never questioned the status of Spartan law (nomos) as law. Sparta’s law was written about in detail by Xenophon,3 Aristotle,4 and Plato5 and

3 Most extensively in his Constitution of the Lacedaimonians (Lac. Pol).
4 Aristotle Politics 1269b-1271b. Aristotle also wrote a lost Constitution of the Lacedaimonians.
5 Spartan law plays a particularly important role in Plato’s Republic and Laws.
was mentioned in passing by various other Athenian writers, but the question of whether Sparta’s law could be considered law seems not to have troubled any of them.

6.1.1 Agraphoi nomoi

The degree to which Spartan nomos was entirely unwritten is unclear. Plutarch Lyc. 13.1-4 claimed that Sparta forbade the writing of laws, but Millender and MacDowell both consider Sparta to have used a combination of written and unwritten law.\(^6\) Millender points out that there is no evidence pre-dating Plutarch that Sparta’s laws were entirely unwritten.\(^7\) As noted above, the use by Sparta of unwritten law is one of the aspects which have caused scholars to doubt its status as law. Athens made a law at the end of the fifth century specifying that unwritten law could not be used by magistrates, and as such it is reasonable to assume that Athens did distinguish between written and unwritten law.\(^8\) Nonetheless, Athenian writers examining Sparta’s legal system did not dispute the legal status of Sparta’s unwritten laws, but, much like MacDowell, just considered anything that was ascribed to Lycurgus, or anything that seemed to govern Spartans’ way of life, to be law.

6.1.2 Nomothetai

A further concern expressed by Thür about MacDowell’s book is that MacDowell does not address how Sparta’s established laws arose.\(^9\) Essentially, Thür’s question is one of legal positivism – which authority made these laws. Fourth-century

\(^6\) Millender (2001); MacDowell (1986) p. 4-5.

\(^7\) (2001) p. 133.

\(^8\) see Ostwald (1973) on agraphos nomos.

Athenian writers were interested in Sparta’s legendary lawgiver Lycurgus.\(^\text{10}\) Herodotus has Lycurgus as lawgiver to the Spartans, as does Plato’s *Laws*.

The legends of Lycurgus are markedly different from those of Solon. Whereas Solon is remembered as having been appointed by some quasi-legal process,\(^\text{11}\) Lycurgus appears not to have been appointed at all. Herodotus 1.65 records that he was guardian to the infant king of Sparta, and enacted law reforms in that role. Plutarch’s *Lycurgus*, probably drawing from earlier sources,\(^\text{12}\) reports that Lycurgus was initially guardian for the child king, but left Sparta and travelled and learned about law. He then came back at the invitation of the Spartans and was welcomed back by the kings, but is not clear that he was invited back as a lawgiver. He appears to have been invited back as a charismatic leader, not for the express purpose of making laws, and then to have appointed himself as a lawgiver.\(^\text{13}\) In Plutarch’s narrative, having decided to make laws he goes first to the Delphic oracle for advice,\(^\text{14}\) and then begins a conspiracy among the Spartans to begin using his laws. This conspiracy culminates in the group around Lycurgus going armed to the market-place to put down all opposition to Lycurgus.\(^\text{15}\) When his laws were introduced, Plutarch claims that they were resented by the wealthy and a group of rich men attacked Lycurgus. This uprising was not resolved by the application of the law, however, but by the personality of Lycurgus. When the men saw they had injured him they were ashamed and gave up the youth who had caused the injury to Lycurgus, but Lycurgus did not punish him and instead the youth became his devoted follower.\(^\text{16}\) According to Plutarch’s narrative, Lycurgus does eventually have his laws secured by oath, but not until they were already established and had been in use for some time.\(^\text{17}\) He then tricks the citizens and kings of Sparta into

\(^{10}\) Ollier (1933) p. 106 observes that in the fifth century Lycurgus was little known outside of Sparta and Sparta’s laws might be attributed to other figures.

\(^{11}\) See Chapter 5.1.2 for fourth-century conceptions of the original authority of Solon’s laws.

\(^{12}\) MacDowell (1986) p. 18 considers it likely that Plutarch drew extensively on Aristotle’s *Constitution of the Lacedaimonians*.

\(^{13}\) Plut. Lyc. 5.1-2.

\(^{14}\) Plut. Lyc. 5-3.

\(^{15}\) Plut. Lyc. 5-4-5. This details fits so badly with the characterisation of Lycurgus in the rest of this work it is tempting to presume that this at least came from older sources.

\(^{16}\) Plut. Lyc. 11.

\(^{17}\) Plut. Lyc. 29.1-3.
swearing an oath of perpetual obedience by having them swear not to change his laws until he should return from a trip to Delphi, and then failing ever to return to Sparta.  

Where Solon is appointed by a quasi-legal, consensual process, Lycurgus is self-appointed and uses violence to secure acceptance of his laws. Where Solon’s laws depend on no god for their authority, Lycurgus’ are either given by Apollo, or are approved by the god. Where Solon’s laws secured obedience in themselves, uprisings against Lycurgus’ laws were quelled by the personal authority of Lycurgus. Where Solon had the Athenians knowingly swear an oath to abide by his laws for a set time, Lycurgus tricks the Spartans. Though, as we have seen, Solon’s laws remained closely bound up with the person of Solon, they had some greater chance of developing into a full legal system; Lycurgus’ laws were much more closely bound up with the person of Lycurgus.

6.1.3 Law in the courts?

As well as the concerns raised by Thür and Osborne, there is a further marked strangeness in Spartan law, which is that one of its major judicial bodies, the ephors, is explicitly reported by Athenian sources to have judged certain cases without regard to law. Cartledge attempts to argue that the ephors’ power to judge without regard to the law was a version of the power of the Athenian jury, but this claim is unconvincing. An Athenian jury was expected to use the law at least to some extent in judging, and the power of the ephors to judge without regard to the law is presented by Aristotle as something exceptional and worthy of criticism. Law in Sparta, as portrayed by Aristotle, did not relate to the judging of

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18 Plut. Lyc. 29.4-5.
19 Aristotle Pol. 1270b. It is not clear from Aristotle whether he objects generally to judging without regard to laws, or whether he objects to the ephors, as a body drawn from the general population and holding no special wisdom, judging without regard to laws.
21 And maybe by Xenophon Lac. Pol. 8.3-5, who describes the ephors as holding tyrannical power – see below for a discussion of the implications of this.
cases. Law had constitutional significance, and guided the everyday lives, the *epítêdeumata*, of individuals, but dispute settlement could be done without regard to law. This stands in contrast to Athens where, at least in principle, jurors swore to judge cases according to the laws.\(^{22}\)

6.1.4 Conclusion

A number of Athenian writers commented on Spartan law, and some did so in considerable detail, but despite the many eccentricities of Sparta’s laws and legal structures, no surviving Athenian writer ever denied that Sparta’s laws did constitute law. What appear to us to be factors which bring into question its status as law – its unwritten character, the absence of clear law-making functions,\(^{23}\) its different role in society – to the Athenians appear to have been worthy of comment, perhaps, but not fatal to its status as law. The difference between modern academic concerns about the status of Spartan law and Athenian acceptance of it is instructive. It suggests that fourth-century Athenian understandings of law were still easily flexible enough to incorporate a system of laws which seems to have been based very largely in tradition.\(^{24}\) Spartan law did not depend on having been written, and it was not derived from structures of legislative authority. Much like MacDowell, Xenophon seems to have treated as law anything which the Spartans attributed to Lycurgus. An example of this can be seen in Xenophon’s *Constitution of the Lacedaemonians*, where Xenophon treats as law and attributes to Lycurgus the tradition of shunning cowards.\(^{25}\) This

\(^{22}\) See Chapter 4.3.2.1.

\(^{23}\) See Chapter 6.2.2.

\(^{24}\) By contrast, ancient authors seem to have been comfortable dismissing Persia as without law. Hdt. 7.104. This is not universal; the fictionalised account of Xen. *Cyropaedia* 1.16-18 contrasts Median and Persian law: while Persia is said to be governed by laws, Media is governed by the will of the despot. Cyrus, Xenophon’s hero, seems to favour the type of justice associated with the despot. The revolutionary effects of this are noted by Nadon (2001). Salehi-Esfahani (2008) accepts uncritically the claim that Ancient Greece had and Persia lacked the rule of law, and seeks to explain this through geography.

\(^{25}\) Xen. *Lac. Pol.* 9.4. By attributing this to Lycurgus, Xenophon treats it as an enactment made by the Spartan lawgiver, and so by extension as a law, rather than as a matter of custom.
shunning contains no form of legal sanction or judgement, and more closely resembles the forms of Athenian non-legal social control examined by Hunter.\(^\text{26}\)

**6.2 Excellence of Spartan law**

Athenian writers went further than simply acknowledging Spartan law as law; it seems to have been a recognised idea\(^\text{27}\) that Spartan law was particularly excellent. This excellence seems to have been so acknowledged that it is often offered without any form of justification, and it can be difficult to work out exactly why Spartan law was considered by Athenian writers to be so good.\(^\text{28}\)

One simple explanation may be that Spartan law was considered to be good because it produced a successful *polis*. Although Spartan law receives little interest until the end of the fifth century, despite Sparta’s long eminence in the Greek world, this is not entirely surprising since it matches a general absence of evidence of people considering law in the abstract until the late fifth century. From the beginning of the fourth century, however, many sources praise Sparta’s laws, and continue to do so even after Sparta’s defeat at Leuctra and subsequent decline.

\(^{26}\) (1994).

\(^{27}\) Though there is little evidence that this preceded the fourth century. Euripides seems to criticise Sparta’s laws, according to Tigerstedt (1965) p. 114. This, Tigerstedt attributes to the popular anti-Spartan feeling among the masses in Athens at the time. Similarly, Tigerstedt comments (p. 135) on Thucydides’ characterisation of Spartan and Athenian laws ‘the Spartan... fell into the *hubris* of the tyrant, is contrasted with the Athenian who maintained his balance in all situations since he is not dependent on external discipline’. Tigerstedt considers Thucydides to have deliberately resisted what Tigerstedt considers to have been a pre-existing tendency to mythologise Sparta. Critias’ lost *Constitution of the Lacedaimonians* is presumed to have praised Sparta.

\(^{28}\) Many of our sources on Spartan law are from notably laconophile wealthy writers who were critical of Athenian democracy. A suggestion that the perception of Spartan law as particularly good might have been held more widely is found in Lycurgus *Against Leocrates* 128 ‘We shall be well advised to take examples of just conduct from a city which has good laws’, where Lycurgus feels confident to cite a Spartan law before an Athenian jury and assumes that his audience will agree with him that Sparta did possess good laws. The perception that Sparta had good laws may have been coloured by the association of Sparta with *eunomia* – see Andrewes (1938) and Ostwald (1969). Ostwald considers *eunomia* to refer not to possessing good laws, but to a state of good order. Raaflaub (2006) proposes a sixth-century meaning for *eunomia* as reflecting a society with well maintained status hierarchies and prevention of abuse of the lower classes by the upper classes. In the fourth century, Aristotle understands *eunomia* to mean obedience to law (*Politics* 1294a), perhaps reflecting the fact that *eunomia* continued to be linked to Sparta, and the most distinctive feature of Sparta’s law was the high level of enforcement.
Sparta’s decline is portrayed by Xenophon as being the result of Spartans’ failure to abide by their own laws.  How this should be interpreted is a matter for considerable debate. Christesen offers a useful summary of the main lines of argument, dividing them into three categories: those who take Xenophon at face value here; those who think that Xenophon changed his mind on the excellence of Sparta; and those who think Xenophon’s admiration of Sparta was always more nuanced than has been acknowledged. If Xenophon had changed his mind about Sparta by the time he came to write chapter 14, he nonetheless continues in this chapter to defend its legal system. Christesen argues that Xenophon identified key weaknesses in Spartans, one of which was their lack of willing obedience to law. If that were the case, it is possible to construct an argument that Sparta’s decline was inevitable. Christesen argues that in Xenophon’s ideal of obedience to law, the obedience is inculcated through education and respect for the rulers. In this sense, one could argue that though Xenophon criticises the Spartans for abandoning their laws, this criticism is a matter of education and the laws themselves remain admirable.

Plato’s *Laws*, meanwhile, completely ignores the changes in Sparta’s fortunes and continues to treat Spartan law as one of Greece’s foremost systems of law. The tendency to continue to admire Spartan law even after the decline of Sparta suggests that admiration for Sparta’s laws may have been based on something more than the simple fact of Spartan success. Even in Isocrates’ attacks on Sparta in the *Panathenaicus*, Isocrates does not attack Sparta’s law directly. Instead he claims that while Sparta’s institutions might be praiseworthy, they never did anything to help the other Greeks. More tellingly, Isocrates adopts Lycurgus’ laws for Athens,

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29 Xen. *Lac. Pol.* 14
30 Pl. *Laws* 625a.
31 This may be supported in the fact that the other system of laws considered to be excellent was that of Crete, which did not enjoy the prominence of Sparta or Athens during the classical period.
32 Isoc. *Panath.* 47.
claiming that Lycurgus copied Spartan law from the ancient Athenian constitution that Isocrates argues should be reintroduced.\textsuperscript{33}

\section*{6.2.1 Obeying and enforcing the law in Sparta}

The main area for which Spartan law is praised is Spartans' high levels of obedience to their laws. This is prominent throughout Xenophon's \textit{Lac. Pol.} and appears in Aristotle,\textsuperscript{34} as well as being referred to by Isocrates.\textsuperscript{35} MacDowell assumes that the longevity of Spartan law can be attributed at least in part to a high level of social acceptance for it, which would also imply a high level of social adherence.\textsuperscript{36} Several ancient writers, however, seem to claim that Sparta’s reputation for high levels of obedience to law can be attributed to high levels of policing in Sparta.

Xenophon \textit{Lac. Pol.} emphasises the extraordinary degree of control exercised over Spartan citizens. In Xenophon’s account, young adult males are subject to control by the magistrates and by their families.\textsuperscript{37} They are subject to the authority of any passer-by, and can be punished by the ephors for failing to obey the orders of the passer-by.\textsuperscript{38} Xenophon emphasises the role of fear in Sparta’s system of laws\textsuperscript{39} and Lipka comments on this that Sparta had a cult of \textit{phobos} which occupied a temple next to the \textit{syssition}.\textsuperscript{40} Xenophon in the \textit{Lac. Pol.} twice implies that Spartan authorities may have possessed the authority to investigate and uncover breaches of the law. Xenophon claims that the ephors had the authority to punish ‘anyone whom they perceive to be breaking the law in any way’,\textsuperscript{41} and suggests that Spartans

\begin{footnotesize}
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    \item Isoc. \textit{Panath.} 153.
    \item Aristotle \textit{Eth. Nic.} 1102 a 9.
    \item Isoc. \textit{Archidamos} 61.
    \item MacDowell (1986). Contrast Link (2014) who suggests that Spartan law was unpleasant to abide by because, rather than trying to align the interests of the individual with those of the group, it instead depended on heavy enforcement.
    \item Xen \textit{Lac. Pol.} 3.3-4.
    \item Xen \textit{Lac. Pol.} 4.5-7.
    \item Xen \textit{Lac. Pol.} 8.1-3.
    \item Xen \textit{Lac. Pol.} 8.3-5. Xenophon compares the power of the ephors to that of tyrants: ‘like tyrants and judges at athletics contests, they punish there and then anyone whom they perceive to be breaking the law in any way’. The comparison to tyrants is remarkable, even presented here in a
\end{itemize}
\end{footnotesize}
may have been subjected to house searches to seek out anyone breaking the law by possessing gold or silver.\textsuperscript{42}

In addition, the \textit{hippeis}, an elite body of young men, appears to have had some role in maintaining order within Sparta.\textsuperscript{43} Figueira considers them to have performed some semi-regular policing role, based on Xenophon's account of a conspiracy that was put down.\textsuperscript{44} First, the conspiracy is reported to the ephors by an informer. The ephors then send Cinadon, the lead conspirator, out into the countryside with some \textit{hippeis}, Cinadon thinking he has been sent out to round up some Helots. Xenophon writes that Cinadon believes this since he 'had performed other services of a like sort for the ephors in the past'.\textsuperscript{45}

This high level of enforcement of law is portrayed sometimes as praiseworthy, as in Xenophon, but at other times as it is criticised. Christesen argues that the failure of Sparta to develop willing obedience to law was seen by Xenophon as a weakness, and one which inevitably led to Sparta losing its position as \textit{hegemon}.\textsuperscript{46} Plato accuses Spartans of obeying law only in appearance, and disobeying it in secret, ‘running away from the law as boys from a father, since they have not been educated by persuasion but by force’.\textsuperscript{47} Thucydides' observation that outside of Sparta, Spartans abandon their own laws may reflect a similar criticism that Spartans obeyed law solely in fear of punishment for disobedience.\textsuperscript{48} This trope also appears in Isocrates' \textit{On the Peace} 96.

\begin{itemize}
\item value-neutral way, bracketed as it is with judges at athletics contests. Tyranny was generally presented as an unmitigatedly bad form of government, but here Xenophon, who admired Sparta, seems to compare the power of ephors positively with that of tyrants. It is possible that the major linking factor between all of these figures is that there was no need for them to conduct trials on the basis of laws, but instead all possessed the authority to make punitive decisions based solely on their personal opinion of the situation.
\item \textsuperscript{42} Xen. \textit{Lac. Pol.} 7.6.
\item \textsuperscript{43} The \textit{krypteia} could be seen as a type of police force, but since they were only used against non-Spartiates (Aristotle fr. 538 Rose), their role is not strictly relevant to a section on Spartan law, since the people they terrorised were not subjects of law.
\item \textsuperscript{44} Figueira (2006) 59ff.
\item \textsuperscript{45} Xen. \textit{Hel.} 3.3.4-11.
\item \textsuperscript{46} Christesen (2016).
\item \textsuperscript{47} \textit{Republic} VIII 548.
\item \textsuperscript{48} Thuc. 1.77.6.
\end{itemize}
Millender reads Herodotus 7.101-5, where Demaratus explains to the Persian king that Spartans are ‘free, but not wholly free; for law is their master (despotes) and they fear it more than your men fear you’, as a criticism of Spartan law, observing that a defence of Hellenic law delivered by Demaratus would be very surprising, given his personal history.\textsuperscript{49} Millender takes particular note of the use of the word \textit{despotes}, and argues that ‘by using this unusual term to describe the rule of law... Herodotus suggests that the Spartans are lawful only under duress’.\textsuperscript{50} Millender, far from seeing Sparta’s dedication to law as an exemplary version of general Hellenic patterns, instead claims that the element of compulsion and fear in Spartan behaviour link Sparta in Herodotus’ presentation more closely to barbarian autocracies, and she contrasts this with Herodotus’ portrayal of Athenians as eager for battle.

6.2.2 Unchanging laws

Sparta’s laws also receive praise for being unchanging. In the fourth century, law being unchanging does seem to have been regarded by Athenians as preferred.\textsuperscript{51} Sparta’s reluctance to change its laws therefore fits into a larger narrative of what laws should be. It is notable that Xenophon begins his study of Sparta’s constitution by claiming that Spartans obey the laws of Lycurgus, and when Xenophon does claim that Lycurgus’ laws are no longer used in Sparta, he does not claim that the laws have been changed, but instead that those laws are no longer enforced.\textsuperscript{52} In Plato’s \textit{Laws} the Athenian claims that originally Sparta, Argos and

\footnotesize{\textsuperscript{49} Millender (2002).}  
\textsuperscript{50} ibid. p. 40.  
\textsuperscript{51} Dem. 24.139 claims that the Locrians were so averse to legal change that any Locrian who wished to propose a new law was obliged to do so with a noose around his neck, and that for this reason the Locrians have passed only one new law in 200 years. Demosthenes encourages the Athenians to adopt this example. Antiph. 6.14 defends the excellence of Athens’ homicide laws on the basis that ‘Not only have they the distinction of being the oldest in this country, but they have changed no more than the crime with which they are concerned; and that is the surest token of good laws, as time and experience show mankind what is imperfect’.  
\textsuperscript{52} Lac. Pol. 1.2 on Spartans obeying Lycurgus’ laws. Lac. Pol. 14 on Spartans having ceased to enforce their laws. See above for discussion of the significance of this claim.}
Messene had all had the same laws, but only Sparta had retained its laws unchanged and so only Sparta had been truly successful. This is attributed to Sparta’s constitution, which limited the power of the kings and so prevented them from disobeying the laws.\textsuperscript{53} Ollier claims that Aristotle considered the stability of Spartan law to be evidence of Sparta possessing good laws, since the stability indicated that everyone in the state had an interest in maintaining the laws.\textsuperscript{54} Thucydides’ characterisations of Spartans as rigid and too incapable of change could be seen as a critique of Spartan reluctance to make changes to their laws, but if this is the case, by the fourth century Sparta is criticised not for failing to make necessary changes to its laws, but instead for failing to uphold its unchanged laws. Though there was some acknowledgement of legal change in Sparta,\textsuperscript{55} and thus a recognition that it was possible, in general the Athenian perception of Spartan law seems to have been that it was resistant to change. By treating Spartan law as unchanged and unchangeable, Athenian writers remove law from any sort of governmental control. In their perception of Spartan law, law is entirely removed from other structures of authority within the \textit{polis}. Law becomes something which does not acquire its status through any legislative process, but instead something which possesses an unalterable status. Despite the fact that by the fourth century Athens possessed complex and well publicised modes of legislating, the perceived absence of any such systems at Sparta is not commented on by the ancient writers.

Why unchanging laws are a good thing receives different treatment in our sources. While the laws remaining unchanged can be treated as evidence that the laws are in themselves good,\textsuperscript{56} at other times the unchanging nature of the laws can be treated as a good in itself.\textsuperscript{57} Aristotle gives the most nuanced example of this, where

\textsuperscript{53} Pl. \textit{Laws} 683 ff.
\textsuperscript{54} (1933) p. 312 on Aristotle \textit{Pol.} 1270b. It should be noted that while Aristotle notes that the ephorate is a stable and consistent aspect of the Spartan \textit{politeia} thanks to its widespread acceptance, Aristotle in this section explicitly criticises the workings of the ephorate. This may be usefully compared to the Old Oligarch’s attempts to explain the regrettable stability of Athens’ democracy Ps.-Xen. \textit{Ath. Pol.} 1.1.
\textsuperscript{55} MacDowell (1986) pp. 5-8 attempts to show Spartan rules for creating new laws, though all MacDowell’s sources on this are drawn from Plutarch.
\textsuperscript{56} Antiph. 6.14.
\textsuperscript{57} Dem. 24.139.
he defends even retaining imperfect laws unchanged, since the damage caused by accustoming people to distrust their rulers\textsuperscript{58} is greater than the damage caused by an imperfect law. Aristotle considers that obedience to law is a matter of custom and as such can only develop through a long period of time, and for this reason laws should as far as possible be left unchanged.\textsuperscript{59}

\section*{6.3 Conclusion}

Though the material drawn on in this chapter has mainly come from elite, rather than popular, sources, these elites are all men who wrote primarily from an Athenian standpoint. The aspects of Spartan law they see are remarkable are likely to be those they consider to contrast with the laws of Athens. Though the value judgements they make on Sparta’s laws might be expected to differ in some ways from the opinions of ordinary Athenians, there is some evidence from popular sources that ordinary Athenians did consider Sparta to have excellent laws.

Ollier’s observation that Isocrates’ criticisms of Sparta could from another perspective be seen as praise is applicable more widely.\textsuperscript{60} The presentation of Sparta’s laws in Athenian sources is remarkably uniform, emphasising high degrees of conservatism, obedience and compulsion. The opinion of the writers may vary, but a clear picture of how Athenians viewed Spartan law does emerge. Criticism of MacDowell emphasised the fact that the writers on Spartan law were all reporting what they saw as oddities, but this for our purposes is instructive. Sparta’s high levels of social obedience to law and structures for compelling this obedience are seen by Athenian writers as something on which to comment, suggesting that, to their minds, these are not features of Athens’ system. Meanwhile, Sparta’s failure

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\textsuperscript{58} It is unclear from the Greek whether Aristotle meant by ‘rulers’ the laws, or the lawgivers and magistrates responsible for making and administering the laws. In the \textit{Politics}, Aristotle sought to understand all constitutions, not only Athens’ democratic governance. In Athens, the laws are often imagined as ruling (though see p. 120 above for the limitations of this), but outside of a democracy it is more plausible that the ‘rulers’ might have been individuals. A full exploration of the implications of Aristotle’s claim are beyond the scope of this thesis.

\textsuperscript{59} \textit{Aristotle Pol.} 1269a.

\textsuperscript{60} Ollier (1933) p. 347-8.
to distinguish between written and unwritten law and its lack of legislative processes are accepted by Athenian writers and not treated as undermining Sparta's law.
CONCLUSION

As has often been pointed out, Athenian law lacked professionals. The implications of this for Athenian judging have been studied in detail, but the implications for Athenian law have not. Without professionals, every *idiotes’* preconceptions about what he thought the law should and should not do, where it came from, and what set it apart from other rules became of vital importance. It is these conceptions of law that I have attempted to explore in this thesis. In doing so, I have framed questions about Athenian law through the lenses of modern jurisprudence, in order that while questioning the baggage borne by the ancient audience, I can also highlight that borne by the modern reader.

In his speech against Leocrates, Lycurgus in a few sentences touches on many of the areas that have been explored in this thesis, and it is perhaps returning to him here.

So dangerous is the wrong which has been done and so far-reaching that no indictment adequate could be devised, nor have the laws defined a punishment for the crimes. What punishment would suit a man who left his country and refused to guard the temples of his fathers, who abandoned the graves of his ancestors and surrendered the whole country into the hands of the enemy? The greatest and final penalty, death, though the maximum punishment allowed by law, is too small for the crimes of Leocrates. The reason why the penalty for such offences, gentlemen, has never been recorded is not that the legislators of the past were neglectful; it is that such things had not happened hitherto and were not expected to happen in the future. It is therefore most essential that you should be not merely judges of this present case but *nomothetai* besides. For where a
crime has been defined by some law, it is easy, with that as a standard, to punish the offender. But where different offences are not specifically included in the law, being covered by a single designation, and where a man has committed crimes worse than these and is equally chargeable with them all, your verdict must be left as a precedent for your successors. I assure you, gentlemen, that if you condemn this man you will do more than merely punish him; you will be giving all younger men an incentive to right conduct. For there are two influences at work in the education of the young: the punishments suffered by wrongdoers and the reward available to the virtuous. (Lycurg. Against Leocrates 1.8-10)

In this short passage, Lycurgus urges jurors to use law to achieve explicitly moral ends (‘the greatest and final punishment... is too small’), asserts that this is expedient as well as just (‘you will be giving all younger men an incentive to right conduct’), questions the source of Athenian laws (‘where different offences are not specifically included in the law... and where a man has committed crimes worse than these’) and encourages the jurors to take on the role of *nomothetai*, a power they should not formally have in this situation. The passage exemplifies the flexibility of Athenian conceptions of law. Despite Leocrates having broken no known law, we are told he escaped conviction by only a single vote.¹

Unlike most studies of Athenian legal thought, I have focused on popular material rather than on the work of the philosophers, since it is that popular material that offers an insight into the contradictory and complex set of aims, purposes and sources which Athenians held for their own laws. Studying Athenian court speeches only with regard to the legal argumentation is, to some extent, inherently artificial, but it is this legal argumentation which has been allowed to take a back seat in studies of Athenian litigation, and so it is this which needs to be re-examined with attention paid to the nuances and complexities with which Athenian forensic oratory made use of law. The study is incomplete as a study of

¹ Aeschin. 3.252
Athenian law, since it studies only the law of the *polis* and disregards both sacred and deme law. Both were bodies of law with their own systems of authority and interpretation, and their omission is a flaw. It is, however, a flaw which this study shares with most other major studies of Athenian law.

By using material from outside of the orators, including the democratic responses to the regime of the Thirty and Athenian views of Spartan law, to study Athenian attitudes to law, I have been able to offer new insights into how Athenians used their laws and what they aspired to for their laws. Studying material from the orators through explicitly jurisprudential models has allowed me to highlight the dangers and drawbacks of relying too much on our own attitudes towards law when studying that of Athens, as well as offering fresh perspective on how Athenians used their laws in court decision-making.

I have argued that although the Thirty did purport to make law, the restored democracy responded to the attempts at law-making in various ways, treating some as void *ab initio*, but deliberately voiding other legislative decisions, and even allowing some to stand. Though the use made of the law by the Thirty could have had the potential to trigger a process of questioning the authority and role of law, as did Nazi law in post-1945 Europe, the wide effect of the Amnesty served to stifle the need for this self-examination.

I have examined Athenian courts speeches through the interpretative method set out by Dworkin, trying to understand how Athenians’ used principles to guide legal interpretation. I have concluded that Athenians were comfortable treating *polis* expediency as one of the guiding principle underlying Athenian law. This has significance for those who would claim that Athenian orators’ appeals to *polis* interest were in conflict with the requirements of a functioning legal order. Using this same method, I have explored the extent to which orators treated the enforcement of morality as one of the principles for Athenian law, and have concluded that although morality could be used in this way, the use of it is inconsistent and orators could perfectly well argue that law and morality were
entirely separate. This conclusion is reinforced by the evidence that Athenian society placed only weak value on obedience to and enforcement of laws as laws. This was a surprising conclusion to come to, given the mass of material in speeches on values, but this material is rarely used to guide interpretation of laws and is more often seen being used either to undermine the trustworthiness of the opponent’s story, or to act as mitigating/aggravating evidence in what appear to be arguments touching on sentencing.

This evidence has particular importance when considering Todd’s characterisation of Athenian law as primarily procedural.\(^2\) Once we recognise that Athenian law was not unquestioningly accepted as intended to promote or enforce Athenian morals, it becomes easier to understand how it can be seen as a system which had as its primary purpose the introduction of disputes to a process of authoritative resolution.

Moving away from Dworkin, I have examined Athenian attitudes towards law-making and lawmakers in order to better understand how far fourth-century Athenian law can be meaningfully viewed as a positivist system. In Hart’s analysis of law, much depends on the rule of recognition; that people should accept the status of law as law through the routes by which it is made. By studying the attitudes fourth-century Athenians held towards both their ancient and their contemporary lawgivers, any idea that Athenians accepted law simply through it having been made through the proper processes becomes untenable. Long after instituting the nomothesia process, Athenians continued to resist the capability of their contemporaries to make truly good, valid law. Athenians preferred their law to be old and of long use. These questions have importance for studies of Athenian litigation, but also for studies of Athenian legislating and the political order of fourth-century Athens. Though the nomothetai had the power to make new laws, those laws were to some extent inferior to laws which could be identified as Solonian (in practice, pre-403 laws). The preference Athens held for Solonian law

and the weight placed on the figure of the lawgiver in popular thinking about Athenian law must be taken into account in any study of Athenian law of the fourth-century.

The extent to which Athens can be said to have enjoyed the rule of law has received outsized academic attention considering how far outside of Athenian interests this question seems to have lain, and how contested and difficult a concept the rule of law is in modern times. By recognising the flexibility of Athenian law and the conceptions Athenian held of their laws, questions about the rule of law in Athens of the fourth century become even less relevant. When law can be asked to fulfil such a range of contradictory purposes, can be seen as drawing its authority from so many sources, the question of placing it above, for example, decisions made by the *demos* outside of the guidance of law, becomes even less useful for any study of Athenian society or politics. Outside of its technical meaning, the idea that law and not the *demos* ruled Athens in the fourth-century also becomes hard to sustain when the evidence of the complexities of interpretation of law in the courts is taken into account.

This study in many instances serves to support arguments made by those who have taken a law and society approach to studying Athenian law. Its implications for identifying Athenian law as primarily procedural have been noted above. The evidence that the good of the *polis* appears to have been an accepted principle for legal interpretation gives weight to those who have identified the importance of *polis* good in other court reasoning. By re-centring the nature of law in these discussions, I hope to show that for Athenians, making decisions based on the good of the *polis*, or on moral considerations, or interpreting the law in line with the imputed opinions of long-dead lawgivers, was not antithetical to good legal decision-making. Athens’ laws were sufficiently flexible that a juror could take all these considerations into account within his interpretation of the laws, and so make a decision which abided by his oath to judge by the laws of Athens which

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3 see Introduction.
nonetheless incorporated many non-legal considerations. Though the maintenance of public order has not been studied in detail, those who would study the role of Athenian law in maintaining public order in Athens may consider using the methods employed in this study to question how far this was accepted as a goal of Athens’ law.
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