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# Arguing from 'Precedent': Modern Perspectives on Athenian Practice

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In recent years several scholars have examined the role of legal argument in Athenian forensic oratory as part of the wider debate over whether the Athenian legal system achieved a rule of law.[1] Many of these treatments focus on the citation and interpretation of laws by lawcourt speakers. This chapter discusses, from a modern legal perspective, a related aspect of legal argument: litigants' reference to previous cases and to the potential effect of the court's verdict on citizens and future judicial decisions.

The Athenians had no notion of binding precedent, and in fact the inappealability of verdicts and lack of accountability of judges made it impossible to enforce any criteria of judgment on an Athenian court. Nevertheless, speakers do cite previous decisions in roughly one-fifth of our surviving speeches, and it is tempting to interpret these references as evidence for a doctrine of persuasive precedent. A close examination of these passages, however, indicates that Athenian litigants cited past verdicts in an entirely different manner from modern lawyers. Both in systems of binding and persuasive precedent, the touchstone of legal consistency is 'treating like cases alike.' Athenian speakers often make no attempt to demonstrate how the legal issues in the previous case relate to the current dispute and generally do not give enough information about the previous decision to provide meaningful guidance to the current court.

A doctrine of precedent is not essential to a rule of law; in fact, many contemporary civil law systems (in theory, if not entirely in practice) do not include previous decisions among the sources of law.[2] The use of precedents is merely one of the possible means to achieve the consistency and predictability normally implied in the notion of a 'rule of law.'[3] Nevertheless, an examination of the use Athenian litigants made of previous cases in their presentations to the court may provide some insight into how they conceptualised their legal system. For this purpose, the common law of Britain and the United States, with its

emphasis on precedent, provides the most obvious source of comparative material and terminology.[4] After examining Athenian discussions of past verdicts in relation to modern modes of legal argument from precedent, I describe how an Athenian litigant might collect information about similar past cases. Finally, I discuss the common *topos* advising judges that citizens will adjust their future conduct to conform to the decision in the current case, and offer some tentative suggestions about the role that citations of 'precedent' may have played in Athenian court speeches.

## I. Discussing past decisions

In twenty-one of our surviving court speeches we meet references to previous cases.[5] However, there are important differences between ancient and modern modes of discussion of precedent. In the contemporary common law, judges attempt to isolate the *ratio decidendi* of a previous verdict and apply it by analogy to the current case.[6] Though modern arguments from precedent are based on decisions written by professional judges, it cannot be said that eliciting a rule of law from judicial decisions is an exact science.[7] An Athenian verdict was determined by a simple tally of individual judges' votes, and never included a statement of their reasoning. In fact, since judges did not formally deliberate, it is likely that different judges could be swayed by very different aspects of a litigant's case. Therefore any discussion of the *ratio decidendi* of a previous verdict by an Athenian litigant was by its nature entirely speculative.

Since legal consistency requires that decisions should not conflict with existing rules or cases, modern legal briefs tend to devote more space to explaining and distinguishing unfavourable precedents to prove that their position comports with previous caselaw than to presenting favourable precedents.[8] Athenian practice was quite different: I know of only one instance in which a litigant mentions an unfavourable precedent *sua sponte*. In the course of Hyperides' defence of Euxenippus, the speaker refers to unfavourable recent decisions, but does not engage in the standard modern forensic tactic of distinguishing this negative authority from the case at hand. Apparently oblivious to the potential implications for judicial consistency, he simply urges the judges to ignore these precedents. Hyperides first observes that public men (orators and generals) were traditionally the only targets of the *eisangelia* procedure, whereas Euxenippus is a private citizen (Hyp. 4.1). He then acknowledges that private citizens have been subjected to *eisangelia* in three recent cases, and rather than arguing that his position is not incompatible with these apparent unfavourable precedents, he blithely states that 'the present practice of the city is absurd' (Hyp. 4.2).[9] In





addition to this lone example of a speaker's mention of an unfavourable precedent on his own initiative, there are three instances in which a speaker apparently felt obligated to respond to his opponent's reference to an earlier decision. In each of these cases, the speaker similarly makes no attempt to distinguish the present case from the precedent cited by his opponent.[10] Athenian litigants do not bother to distinguish unfavourable precedents because there was no expectation, to say nothing of requirement, that their argument should accord with earlier verdicts; as with all types of proof, a speaker could adduce a precedent if he calculated that it would improve his case, but there was no compulsion to do so. For this reason, the citation of favourable precedents is much more common than distinguishing unfavourable precedents in Athenian forensic oratory.

It is striking that more than half of the passages referring to previous cases contain no attempt to appeal to the *ratio decidendi* of a previous case. In eight passages the speaker recalls punishments exacted from previous defendants and calls on the judges to treat the current defendant with a similar severity.[11] However, these passages do not recommend a particular approach to the interpretation of the facts or laws involved in the current case derived from the reasoning of the previous verdict. In fact, these references to 'precedents' often involve examples of punishment for crimes completely unrelated to the case at hand. For example, in his speech accusing Demosthenes of corruption in connection with the Harpalus affair, Dinarchus cites three unrelated precedents: Menon the miller, who unlawfully restrained a boy; Themistius of Aphidna, who assaulted a musician; and Euthymachus, who put an Olynthian girl in a brothel (Din. 1.23). In his action against Timocrates, Demosthenes mentions two previous cases brought under the *graphe paranomon* procedure, but does not discuss the details of either case or indicate how they might guide the court's determination of the current case:

> Remember how, no longer ago than the archonship of Evander, you put Eudemus of Cydathenaeum to death, because you held him to have proposed an objectionable statute; and that you were within an ace also of putting to death Philip ... but made him pay a very heavy fine. Treat the defendant today in the same spirit of severity (Dem. 24.138).[12]

Most puzzling are the discussions of the punishments of the Arginusae generals (Lys. 12.35) and Socrates (Aeschin. 1.173) – hardly sterling *exempla* of Athenian justice – used by prosecutors to incite the current court to find a guilty verdict and to impose a severe penalty. In these eight passages, we see nothing beyond a recitation of previous instances of severity to serve as an admonition to the judges that they should not

be, as it were, 'soft on crime.' These inflammatory references to previous cases do not provide enough information about the circumstances of the prior dispute to assist a court in eliciting a *ratio decidendi* or attaining any meaningful consistency across cases. Moreover, a call to reproduce severe punishments voted in earlier trials presuppose the defendant's guilt and thus, from a modern point of view, are relevant only in the penalty phase of the speaker's argument.[13] The illogic of this common practice is explicitly mocked by Andocides, one of the earliest orators of the canon:

> For the speeches of the prosecution – they wailed on those grisly horrors, and they told stories about of how other people previously committed offences and impieties concerning the Two Goddesses, and what punishment each of them suffered. What have those stories and incidents to do with me? ... I ought to be let off because I've done nothing wrong (trans. D. MacDowell) (And. 1.29-30).

In seven instances, speakers refer to previous cases for a somewhat different purpose: the litigants compare the relative social positions of the past and current defendants, but their arguments still draw no analogies between the facts and legal reasoning of the two cases.[14] Apollodorus' argument in *Against Neaera* provides an example of a lost opportunity to apply the reasoning of a previous decision to the case at hand. One aspect of his attack on Neaera involves the marriage of her daughter to the King Archon, resulting in the participation of an alien woman in important religious rituals (Dem. 59.72-86). In the peroration of his speech, Apollodorus speaks of the conviction of the hierophant Archias for violating ritual practices at the *Haloa*. Where a modern lawyer would dwell on the previous court's willingness to convict Archias despite the relative insignificance of his transgression, Apollodorus throws the rhetorical stress on the immense gulf between the social status of Archias and the current defendant: 'Would this not be shocking? You punish a man of the Eumolpidae clan, with ancestors of the highest quality, a citizen of Athens .... Will you then turn around and *not* punish this woman Neaera [a prostitute]?'[15] Similarly, when prosecuting the freedman Phormio, the speaker in Demosthenes 34 notes that a previous court failed to find sympathy for a defendant who was the son of a general (Dem. 34.50), and in prosecuting the Harpalus affair Dinarchus describes the past condemnation of Timotheus despite his distinguished services to the city (Din. 1.13; 3.17). In these seven speeches the speakers do not extract a general rule or line of argument abstracted from the particular facts of the previous case which can be applied to future disputes. These passages seem to reflect rather than rectify the general tendency of Athenian litigants to mix the social





context of a particular case with legal arguments.[16] The discussion of previous decisions does not even approach the level of abstraction which would encourage judges to render verdicts which go beyond *ad hoc* settlements tailored to the facts and social positions of the current litigants.

More than half of the passages that discuss previous cases, then, invoke a false impression of a notion of precedent. Eight of the passages, however, show an attempt at the application of the *ratio decidendi* derived from an earlier case.[17] This demonstrates that Athenian litigants could construct an argument by analogy.[18] The relative rarity of arguments from analogy probably reflects the general Athenian reservations about overly legalistic arguments.[19] Offering an example, the *Rhetoric to Alexander* suggests that earlier verdicts can be used in support of a favourable reading of a law: 'Not only do I myself assert that this was the intention of the lawgiver in enacting this law, but also on a former occasion, when Lysitheides put forward considerations very similar to those now advanced by me, the court voted in favour of this interpretation of the law.'[20] However, Anaximenes devotes only a small portion of the treatise to arguments concerning legal issues (*to nomimon*).

Perhaps the most sophisticated use of previous decisions in the Attic orators is Demosthenes' speech *Against Meidias*. Demosthenes discusses several past cases involving the law regulating festivals to support his contention that Meidias' assault on Demosthenes while he was serving as *choregos* at the Dionysia violated the law (Dem. 21.175-84). One such is the case of Evander, who was severely punished for arresting a private debtor during the festival. He lists the features, abstracted from the particular facts and social context of the case, that make Evander's actions less serious than those of Meidias: 'There you have one case of a man, in a merely private matter, with no added circumstances of insolence (*hybris*), paying so heavy a penalty for a breach of the law' (Dem. 21.177), and explains to the court that he provides these precedents 'in order that you may compare their guilt with that of Meidias' (Dem. 21.175). Elsewhere in the same speech, Demosthenes speculates about the *ratio decidendi* of an earlier decision. He tells the jury how a certain Euaeon was condemned by a single vote for killing a man at a public banquet who struck him first (Dem. 21.71-6), and then suggests how the judges at the earlier trial might have interpreted the defendant's action:

> Let us assume that the jurors who condemned him did so, not because he retaliated, but because he did it in such a way as to kill the aggressor, while the judges who acquitted him allowed even this licence of revenge to a man who had suffered an outrage (*hybris*) on his person (Dem. 21.75).

Similarly, Lycurgus turns to precedent to justify his prosecution of Leocrates, who fled Athens after Philip's victory over the Athenians at Chaeronea. He cites the case of Autolycus, who was punished for sending his wife and sons away from Athens in a time of danger, and compares Autolycus' actions to those of Leocrates: 'Yet if you punished *him* when his only crime was that he had sent away persons useless for war, what should your verdict be on one who, though a man, did not pay his country the price of his nurture? (Lycurg. 1.53).' The sophisticated use of previous decisions in these passages is exceptional.

## II. Researching past decisions

Any systematic recourse to precedent requires some means of recovering previous decisions. Only collective memory, or at least a persuasive claim that a certain case was decided as the speaker reports it, could serve as a repository for the necessary information. We cannot accurately assess the depth and extent of judges' knowledge of previous cases, but the volume of litigation over many decades and the relatively short lifespan of the average Athenian make it most unlikely that many judges would have an accurate impression of many earlier cases.[21] If litigants wished to arrive in court armed with knowledge of similar cases already decided, what could they find from written materials? Copies of public indictments were displayed on *sanides*,[22] and, according to post-classical sources, were kept in the Metroon, which served as a public archive from the end of the fifth century.[23] The extent to which the Metroon offered an organised, 'user-friendly database' is controversial.[24] However, even if we assume that indictments were easily accessible from the archive, it is unclear how much information could be gleaned from them. Only five passages, widely disparate in chronology and genre, record the text of an indictment, and they inspire very little confidence.[25] The indictment in Demosthenes 45 merely records the procedure, the proposed damages, and the names of the parties (Dem. 45.46), and the indictment recited in Aristophanes' parody of an Athenian trial is similarly laconic (Ar. *Wasps* 894). The other two examples provide some limited information about the dispute: Plutarch's quotation of the charges against Alcibiades gives a short account of the crime (Plu. *Alc.* 22; Plu. *Mor.* 833E-F), and Demosthenes 37 includes a four-line narration of Nicobulus' alleged plot (Dem. 37.22-5). None of these indictments would be of any use to a litigant unless he had or could come by more detailed information about the circumstances of the case and its outcome. Most important, it is highly probable that verdicts were not regularly recorded in the Metroon or elsewhere.[26]

Public stelae listing the names of a few specific types of offenders[27] left no doubt as to the outcome of the case, but did not provide details about





the underlying charges that might assist a litigant looking for cases similar to his own. Dinarchus actually comments on the material normally included in these inscriptions, and one exception to the norm. Referring to the inscription dealing with Arthmius,[28] Dinarchus says, 'And in his case alone did they inscribe the reason why the people expelled him from the city, expressly stating that Arthmius of Zeleia is an enemy of the people and its allies, he and his descendants, and that he was exiled from Athens because he brought the gold from Persia into the Peloponnese' (trans. Worthington) (Din. 2.25). But, judging from Dinarchus' text, the stele gave a very spare account of his crime. In his speech *Against Leocrates*, Lycurgus requests the clerk to recite names of offenders from a stele (Lycurg. 1.118). To my knowledge, this is the only example where a stele inscription is so used. Speakers' general practice when discussing earlier cases is to appeal to collective memory rather than to documents.[29] It may be that litigants conceal their efforts at documentary research for fear of appearing excessively litigious.[30] Even when it is very much in the speaker's interest to impute documentary research to his opponent as a mark of meticulous pettifoggery, only oral interviews are mentioned as a means of collecting precedents: Demosthenes claims that in preparing his defence, Meidias 'goes around inquiring and collecting examples of people who have at any time been assaulted' (Dem. 21.36).

The limited information available to an Athenian litigant or logographer wishing to consult documentary records of similar previous cases made it impossible for speakers to use past decisions in a manner resembling a modern notion of precedent. It is not the case, however, that the notion of collecting and recording court decisions was beyond ancient imagination and technology. Aristotle suggests that copies of court verdicts and even private contracts should be retained by a magistrate (Arist. *Pol.* 1321b35). Even in the archaic period, if we can trust the evidence of the *Ath. Pol.*, the *thesmothetai* were chosen 'in order that they might publicly record *thesmia* and keep for the deciding of disputes'.[31] According to some scholars, these *thesmia* may have been the verdicts of previous cases used as a sort of precedent by the *thesmothetai*, but were not accessible to the general public.[32] The Gortyn code mentions a *mnemon* whose function was to inform the judge of previous decisions.[33] Indeed, Davies has interpreted the Gortyn inscriptions as not recording a 'code,' but rather as a proclamation issued by each judge 'at the end of their period of office setting out the changes in the law which they proposed/ instigated/ proclaimed/ approved during their period of office'.[34] Under this view, the Gortyn material is no less than an attempt at incorporating generalised case law into the written laws. These three examples, then, manifest an interest in maintaining consistency across verdicts, but there is no evidence of an attempt to

record *rationes decidendi* such as is evidenced in some papyri of Greco-Roman Egypt: here, as Jones observes, the prefect notes the underlying principle (*typos*) behind his decision, and litigants include with their petitions copies of decisions given in similar cases on the assumption that they may have some value as precedents.[35]

### III. The consequentialist topos

Despite the absence of a meaningful system of precedent, Athenian lawcourt speakers frequently appear to imply that their legal system has achieved a high degree of predictability insofar as they operate under the assumption that members of the community will adapt their behaviour in response to court verdicts. Athenian prosecutors repeatedly argue that a conviction will deter crime and that an acquittal will have the opposite effect.[36] For example, the speaker in Lysias 30 warns:

> Those who want to steal public property are paying careful attention to the result of Nicomachus' trial. If you acquit him, you will make them effectively immune from punishment. If, however, you convict him and sentence him to the ultimate penalty, by that single verdict you will punish the defendant and make the others more virtuous (trans. S. Todd) (Lys. 30.23).

Similarly, the speaker in Demosthenes 59 suggests that the court should be motivated by a desire not only to impose justice on the defendants but also to deter future criminals, urging them to punish the defendants 'to make sure that the violators pay the penalty for their crimes, and that the others take heed and be afraid to wrong the gods and the city' (trans. V. Bers) (Dem. 59.77). In a similar vein, we hear of the supposed commercial effects produced by the verdicts of the courts.[37] For example, the speaker in Demosthenes 56 tells the jury, 'do not fail to realise that in judging one case now you will be making law for the whole market, and that men who choose to engage in maritime commerce are standing around watching to see how you will judge the matter before you' (trans. V. Bers) (Dem. 56.48). He argues that unless the contract in this case is upheld, business will suffer as credit becomes harder to come by (Dem. 56.48-50).

These passages seem to imply that the verdicts rendered by Athenian courts were consistent with each other over time: for a verdict to deter criminals effectively or to alter the behaviour of lenders in the port, citizens must have some confidence that future cases will be treated in a similar manner. Some scholars have accordingly interpreted these passages as 'prospective precedents.'[38] From a modern legal perspective, however, these passages cannot operate as a form of persuasive 'precedent' encouraging consistency across cases unless the speaker assumes that future jury panels will know the verdict in the case at hand and be influenced by it. Though litigants often claim that the verdict will intimidate potential malefactors, I know of only two passages in which the speaker contemplates the putative effect of a decision on a future jury.[39] The speaker in Lysias 14 argues that because this is the first case of desertion since the peace of 404, the judges must be 'not simply judges but lawmakers' and he warns the jury, 'in the future the city will treat such matters in whatever way you decide today' (trans. S. Todd) (Lys. 14.4). Similarly, Lycurgus argues that in the absence of a law that covers Leocrates' situation, in this case the judges 'must be not merely judges of this present case, but lawmakers (*nomothetai*) besides' (Lycurg. 1.9). In both cases, the court faces what contemporary lawyers might call a case of 'first impression,' i.e. one that cannot be settled by reference to existing law, as found either in statutes or previous judicial decisions. In these two instances, the litigants emphasise the unusual character of the task facing the jury: the judges will need to take on a role beyond their normal constitutional function. Thus, this notion that an individual verdict will set a precedent for future courts was most decidedly not the normal expectation.

Despite speakers' claims that verdicts will affect the behaviour of the citizenry, we have seen that potential litigants – to say nothing of the judges – did not have ready access to records of verdicts in previous cases. When litigants do mention such cases, they rarely attempt to elicit a *ratio decidendi* that they apply by analogy to the case at hand. The claim made by the speaker in Demosthenes 56 that creditors would be guided in their business transactions by recent court decisions because they trusted their predictive value strains credibility. It is more likely that the consequentialist topos was almost entirely a rhetorical ploy. This topos may have served a variety of functions, including promoting severity in the interest of deterrence,[40] and encouraging the judges, who faced no formal *euthyna*, to approach their task with the utmost seriousness. There is a wide gap between the elevated rhetoric of consistency and prospective precedent in the extant speeches and the reality of a court system that doled out largely *ad hoc* judgments.[41]

If litigants' discussion of previous cases and the consequentialist arguments recalling 'prospective precedents' in the extant speeches did not promote meaningful consistency across cases, what function did these frequent references serve? The Athenian notion of precedent may not have been as utterly alien to that of contemporary legal systems as it at first appears. Modern legal theory valorises consistency either as requirement of fairness, and thus an end in itself, or merely as a policy that serves to enhance the authority of the law and the predictability of decisions.[42] The extravagant rhetorical gestures towards 'precedent' in

the extant speeches may have served to promote respect for the judicial process and to provide an aura of consistency to a system that was all too unpredictable.[43]

## Notes

**1**. E.g. Christ (1998) 194-6; E.M. Harris (1994a); Johnstone (1999).

**2**. For example, Section 12 of the Austrian ABGB provides: 'The decisions issued in individual cases and judgments handed down in particular legal suits never have the force of law; they cannot be extended to other cases or to other persons.' Despite this apparent prohibition of the use of precedent, the Supreme Court has kept a report of all opinions (*Spruchrepertorium*) since the late nineteenth century: Watson (1981) 168-78; Bydlinski (1991) 501ff. In Germany, only opinions of the Federal Constitutional Court are binding precedent, and courts do not consider previous cases as a source of law independent of statute and custom, yet in practice previous decisions play an important role: Alexy and Dreier (1997) 19-65. In France, Article 455 of the Code of Civil Procedure appears to forbid the use of binding precedent ('A court decision that treats a precedent as binding is void'), and Article 5 of the Civil Code has been interpreted to strictly limit the applicability of judicial opinions to the case at hand ('Judges are forbidden to decide cases by issuing general regulatory provisions'). Nevertheless, previous cases play an important role in French jurisprudence; for example, the law of torts is largely derived from judicial decisions rather than from the rather sparse treatment of the subject in the *Code civile*: Nicholas (1982) 14-16; Troper and Grzegorczyk (1997).

**3**. On the importance of consistency in a rule of law, see Rawls (1971) 235-41. Another common means to achieve consistency is the direct application to cases of rules embodied in statutes or codes. In the Athenian system, speakers occasionally appeal to the intent of the lawgiver to provide some guidance in interpreting laws in a consistent fashion. For discussion of the lawgiver in forensic speeches, see Johnstone (1999) 25-33.

**4**. More generally, I would argue that comparisons with the common law are more fruitful than with civil law, which is predicated upon an academic legal tradition and professional expertise among judges and practitioners.

**5**. Dem. 21.72-6, 175-84; 24.138; 19.273; 20.146-8; 34.50; 59.116-17; Lys. 12.35ff; 13.56-7; 6.17; 22.16; Aeschin. 1.86-8, 173; 2.6; 3.252-3, 258; Din. 1.13, 23ff; 2.14, 25; 3.17; Lycurg. 1.52ff, 111-16; And. 1.29-30; Hyp. 4.1-3, 33-4; 5 col. 26; Antiphon 5.67. This list does not include references to previous cases involving the current litigants. This list is taken from the handout accompanying Rubinstein (1993). For general discussions of precedent in Athenian courts, see Bonner (1927) 181-83; Dorjahn (1928).

**6**. MacCormick (1994) 60.

**7**. See generally Cross (1977); Llewellyn (1989).

**8**. MacCormick (1994) 121.

**9**. Unless otherwise noted, all translations are taken from the Loeb Classical Library.

**10**. And. 1.29; Aeschin. 2.6; Dem. 21.36.





**11**. Dem. 24.138; 34.50; Lys. 12.35; 22.16; Din. 1.23; Hyp. 5 col. 27; Aeschin. 1.173; 3.252.

**12**. Similarly, Hyperides refers to severe punishments imposed on two defendants also charged with theft of public funds, but does not compare the facts of these precedents to Demosthenes' deeds (Hyp. 5 col. 27). Lysias refers to harsh penalties doled out to corrupt *sitophylakes* in past cases, even though the case at hand involves *sitopolai* (Lys. 22.16).

**13**. We do not know whether litigants often discussed previous punishments in their speeches for the assessment of penalties. Socrates does not cite precedents in his assessment speech in the *Apology* – the only example of an assessment speech we have – but this text is hardly representative. For a discussion of the length of assessment speeches, see MacDowell (1985).

**14**. Dem. 20.146-8; 34.50; 59.116-17; Din. 1.13; 2.14ff; 3.17; Hyp. 4.33-4. Social facts are also included in a more detailed discussion of precedents in Dem. 19.273.

**15**. Dem. 59.117 (trans. V. Bers).

**16**. As Humphreys points out, classical speeches include a 'quasi-dramatic presentation of the character and social milieu of the litigants' as well as legal arguments in an attempt to resolve the 'tension between the egalitarian law of the city and the adjustable *praxis* of the community': Humphreys (1983) 248.

**17**. Dem. 21.72-6, 175-84; 19.273ff; Lys. 6.17; 13.56; Din. 2.25; Aeschin. 1.86-8; Isoc. 18.22; Lycurg. 1.52.

**18**. Democritus 68B164; G.E.R. Lloyd (1966).

**19**. E.g. Hyp. 3.13; for discussion, see Christ (1998) 203-8.

**20**. *Rhetorica ad Alexandrum* 1422b20.

**21**. The *locus classicus* for the unreliability of Athenian historical memory is Thucydides 1.20. For discussion of the volume of litigation in Classical Athens, see Christ (1998) 43-7.

**22**. Dem. 21.103; Wycherley (1957) nos 237, 243; Rhodes (2001) 34-5.

**23**. According to a story in Athenaeus, Alcibiades erased an indictment in the Metroon (Athen. 9.407b-c); Plutarch claims to quote from the indictment of Alcibiades (Plu. *Alc.* 22); and Diogenes Laertius writes that Meletus' indictment of Socrates was still in the Metroon in his day (D.L. 2.5.40). For a sceptical discussion of these passages, see Sickinger (1999a) 131-3. For discussion of the Metroon as an archive, see Thomas (1989) 34-94; Harrison (1971) 27-9; Posner (1972) 108-10; Sickinger (1999) 115-59.

**24**. See Thomas (1989) 37; cf. Sickinger (1999a) 147-57; Posner (1972) 112-14. See also Chapter 4 in this volume.

**25**. Dem. 45.46; 37.22-5; Plu. *Alc.* 22; *Mor.* 833E-F; Ar. *Wasps* 894. Three other purported indictments are preserved (Dionysius of Halicarnassus *Dinarchus* 3; D.L. 2.40; Dem. 18.54), but these three passages are probably not authentic records of original pleas. For discussion of these passages see Harrison (1971) 91-2.

**26**. In a few cases, court verdicts were preserved on stone stelae, though, as Todd points out, these inscriptions tend to have 'an administrative subtext', and do not suggest the regular recording of legal decisions for use in future cases. For discussion see Todd (1993) 46-7; *cf.* Rhodes (2001). For a list of these inscriptions see Boegehold (1995) no. 148. In a papyrus from the second century

AD (*P. Oxy.* 2087), there may be evidence for the temporary posting of *dikai*, which may refer to indictments or results of cases, but the reading and interpretation of the fragment are far from clear. See Stroud (1998) 90-1.

**27**. Lists of traitors were placed in the Bouleuterion (Lycurg. 1.117-18, 124-6), murderers on the Areopagos (And. 1.77-9), and debtors on the Acropolis (Dem. 25.4; 37.6, 22; 58.16, 20, 48, 50-1).

**28**. The authenticity of the Arthmius' decree has been questioned. For discussion, see Worthington (1992) 309-11.

**29**. There was no way to verify a litigant's citation of a precedent, and although citing a non-existent law in court was punishable by death, no decree outlawed the invention of favourable precedents. When discussing previous judicial procedures involving the current litigants, speakers usually ask persons who were present at the previous trial to testify. Lys. 23.14; 17.8; Dem. 53.18; 30.32. In two cases, litigants have indictments from previous procedures read out, but there is no indication that they obtained them by consulting court records. Dem. 38.15; 34.16-17; Bonner (1905) 60. It seems more likely that the speakers in these instances were using copies from their personal or family records.

**30**. Christ (1998) 200, 271 n. 39.

**31**. [Arist.] *Ath. Pol.* 3.4 (trans. M. Gagarin). For discussion, see Gagarin (1986) 51.

**32**. Gagarin (1986) 56; Gagarin (1981) 71; cf. Sickinger (1999a) 10-14.

**33**. Willetts (1967) col. ix.31. For *mnemones* generally, see R. Thomas (1996) 19-22.

**34**. Davies (1996) 33.

**35**. *P. Ryl.* 75, 11.1-12; *Sel. Pap.* ii, no. 260; cited and discussed in J. Jones (1956) 134 n. 2.

**36**. Lys. 1.36, 47; 12.35; 14.12; 22.21; 27.7; 30.23; Dem. 34.50; 50.64; 54.43; 56.48; 59.112. For a discussion of these passages as examples of persuasive prospective precedents, see Rubinstein (1993).

**37**. Dem. 35.51; Lys. 22.21.

**38**. Harris (1994a) 136; Rubinstein (1993).

**39**. While the speaker in Dem. 56.48 does use the verb *nomotheteite* when referring to the court's decision, the passage discusses the effect of the verdict on the behaviour of lenders rather than on future courts.

**40**. Indeed, Rubinstein (1993) has pointed out that this topos occurs twice as often in prosecution speeches as in defence speeches. Rubinstein also notes that this topos is more common in public cases, and argues that while in private suits the function of the court is primarily to settle an individual dispute, in public cases the court took on the additional function of upholding general principles embodied in previous decisions. I would argue that even in public cases notions of precedent were very weak. The uneven distribution of our topos may indicate that while consequentialist arguments could be effective, if somewhat dubious, in public cases, in private suits they became absurd.

**41**. It is of course possible that the Athenian legal system achieved consistency and predictability through a mechanism other than precedent, such as the regular, equal application of rules and principles to cases. My own view, to be developed elsewhere, is that the decisions handed down by Athenian courts





were very largely *ad hoc*, and reflect an Athenian preference for contextualised justice.

**42**. For deontological theories of precedent, see Cardozo (1921) 33-4; Dworkin (1978) 81-130. Wasserstrom (1961) 60-6 examines the argument from predictability, while Shapiro (1972) 125-30 discusses the importance of strengthening the authority of the law.

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