# Precedent and Legal Reasoning in Classical Athenian Courts: A Noble Lie?

*by* ADRIAAN LANNI*

Athenian law has never been part of legal education. Although a passing acquaintance with the "golden age" of Athenian democracy in the fifth century and the fundamental works of Platonic and Aristotlean political philosophy have been considered desirable propaedeutics for intending lawyers, Athenian law has traditionally been ignored. This neglect is hardly mysterious. First of all, Athenian law has failed to attract professional legal interest because it was run by amateurs and did not produce jurisprudential texts. Recent work on Athenian law, even as it has provoked a renaissance of the specialty among classicists and ancient historians, has in fact exacerbated the prejudice among lawyers by locating Athenian law in the domain of traditional societies. Much recent scholarship has argued that the aims and ideals of the Athenian lawcourts were radically different from those of modern courts. Drawing on the notion of "social drama" introduced by the anthropologist Victor Turner to describe law in primitive societies,[1] these scholars interpret the prevalence of non-legal arguments in the surviving speeches as evidence that the courts did not attempt to resolve disputes according to established rules and principles equally and impartially applied, but rather performed a variety of other social roles. The Athenian legal system has been alternatively described as an arena for socially constructive feuding behavior[2] and as a public stage on which the elite competed for prestige.[3] In one influential study, Ober describes how the interaction in the courts can ease the tensions and conflicts which arise in a society like Athens where the citizens were politically equal—but socially very unequal. According to Ober, the courts provide a forum for ongoing communication and negotiation between elite litigants and mass jurors "in a context which made explicit the power of the masses to judge the actions and behavior of elite

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1. *See* VICTOR TURNER, SCHISM AND CONTINUITY IN AN AFRICAN SOCIETY 91-93, 230-32 (1957).

2. *See* DAVID COHEN, LAW, VIOLENCE, AND COMMUNITY IN CLASSICAL ATHENS 87-115 (1995). Cohen's view of the role of law in Athenian society is more complex than a simple feud model. *See infra* note 22.

3. *See* Robin Osborne, *Law in Action in Classical Athens,* 105 J. HELLENIC STUD. 40, 52 (1985).

individuals."[4]

The dominant view of the courts as social drama has been challenged by two different academic camps, both of which credit Athens with achieving a "rule of law." The first, taking an institutional approach, focuses on fourth-century reforms,[5] in particular the creation of a Board of Lawgivers (the *nomothetai*). The board was designed to prevent the most venerated laws from being overturned by the "unruly mob" of the Assembly. The result, so the argument goes, created a moderate democracy committed to the rule of law.[6] The second camp, noting that lawcourt speakers often praise the laws and remind the jurors of their oath to vote according to the laws, argue that legal reasoning played a much greater role in Athenian courts than is acknowledged by today's *communis opinio*.[7]

This Article will argue that the conflicting evidence adduced by scholars on either side reveals a deep tension underlying the Athenian legal system. The seemingly irrelevant material included in the speeches does not suggest a disregard for the facts of the case in favor of an unrelated social purpose; rather, they provide information about the social context of the dispute in an effort to temper strict legality with equity, and to allow the jurors' general sense of justice to counterbalance the strict application of written laws. The Athenian courts did not achieve the degree of consistency and predictability normally implied by the notion of a "rule of law":[8] an examination of the use of laws and previous verdicts in the speeches indicates that Athenian jurors made *ad hoc* settlements suited to the particulars of individual disputes, instead of straightforwardly applying general laws to cases or perpetuating general principles embodied in previous court decisions. At the same time, the Athenians made extravagant rhetorical gestures to the rule of law and precedent in an attempt to lend an air of authority and consistency to a process which could be all too unpredictable. Athenian society was not too primitive to

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4. JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS 145 (1989).

5. In the fourth century, the Athenians distinguished between general laws (*nomoi*) made by the *nomothetai,* and short-term decrees (*psephismata*) of the Assembly which could not contradict existing laws. For a detailed discussion of the fourth-century legislation, see MOGENS HERMAN HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES 161-77 (1991).

6. *See* HANSEN, *supra* note 5, at 300-04; MARTIN OSTWALD, FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW 497-525 (1986); RAPHEAL SEALEY, THE ATHENIAN REPUBLIC: DEMOCRACY OR THE RULE OF LAW? (1987). Gagarin ends his survey of archaic Greek law with the claim that "among the most important creations of . . . the polis was the rule of law." MICHAEL GAGARIN, EARLY GREEK LAW 146 (1986).

7. *See* Edward M. Harris, *Law and Oratory, in* PERSUASION: GREEK RHETORIC IN ACTION 130, 132-40 (Ian Worthington ed., 1994) (arguing that Athenian jurors conscientiously applied the laws in reaching verdicts). *See also* Christopher Carey, *Legal Space in Classical Athens,* 41 GREECE & ROME 172, 181-83 (1994); Victor Bers, The Athenian Jury in Rhetoric, Theory, and Spectacle, Address at American Philological Association convention (Dec. 30, 1995).

8. *See, e.g.,* JOHN RAWLS, A THEORY OF JUSTICE 235-41 (1971).

form a notion of the rule of law; rather, when weighing the competing claims of consistency and universal legal principles on the one hand, with equity and attention to the particulars of individual cases on the other, the Athenians seem to have valued the latter more than modern societies do. In this respect, the Athenian courts were both more and less removed from modern courts than scholars believe; Athenian courts did not achieve a rule of law, but the fundamental concerns of the Athenian legal system were by no means unique. After a brief introduction to the Athenian legal system, I will discuss the use of laws and arguments from precedent in Athenian courts.

## I. THE ATHENIAN LEGAL SYSTEM

The most distinctive feature of the Athenian legal system is the lack of a professional class of legal experts. Classical Athens was a participatory democracy run primarily by amateurs; the vast majority of state officials, including those with judicial responsibilities, were selected by lot to serve one year terms.[9] In the legal sphere, the Athenian hostility toward professionalism resulted in the requirement that private parties initiate lawsuits and represent themselves in court; there were no public prosecutors or defense lawyers. In private cases (*dikai*), the victim (or his family in the case of murder) brought suit, while in public cases (*graphai*), a man referred to as *ho boulomenos*—literally, he who wishes—was permitted to initiate an action.[10] With few exceptions, litigants were required to deliver their own speeches to the jury.[11] Litigants could obtain the services of *logographoi*, or speech-writers, to help them prepare their case, but orators never mention their *logographos* and generally pretend to be speaking extemporaneously in court.[12] In fact, speakers often boast of their

9. Generalships and some other posts which required expertise were chosen by election. *See* HANSEN, *supra* note 5, at 233-37.

10. Although no ancient source explains the distinction between *graphai* and *dikai*, *graphai* seem to have been cases which affected the community at large. This division is not quite the same as the modern criminal-civil distinction; murder, for example, was a *dike* because it was considered a crime against the family rather than the state. *See* S.C. TODD, THE SHAPE OF ATHENIAN LAW 102-109 (1991).

11. A litigant could donate some of his speaking time to a friend or relative. Speakers exercising this option generally feel the need to explain why they are unable to speak for themselves and emphasize that these *sunegoroi* are not paid professionals but personal friends. *See, e.g.*, Lysias 32.2, 9-10 [hereinafter Lys.]; Demosthenes 36.1 [hereinafter Dem.]. In any case, the use of *sunegoroi* seems to have been rare. *See* TODD, *supra* note 10, at 94-95; *but see* Lene Rubinstein, *Sunegoroi* (1997) (unpublished Ph.D. dissertation, University of Cambridge).

12. It is not clear whether the *logographos* generally wrote a complete text for the litigant to memorize or collaborated with his client in composing the speech. *See* K.J. DOVER, LYSIAS AND THE CORPUS LYSIACUM 160-8 (1968); Sally Humphreys, *Social Relations on Stage: Witnesses in Classical Athens*, 1 HIST. & ANTHROPOLOGY 313, 320 (1985); Stephen Usher, *Lysias and his Clients*, 17 GREEK ROMAN & BYZANTINE STUD. 31 (1976). Logographers may also have assisted in other stages of the proceedings. *See* Dem. 58.19 (logographer arranging a settlement).

inexperience in public speaking and ignorance of the lawcourts.[13] Specialized legal terminology never developed in Athens, and forensic speeches are dramatic recreations of the events told in laymen's terms.

The forensic speeches of litigants who could not afford a *logographos* were undoubtedly even more informal. Unfortunately none of these orations remain; only speeches which were published and attributed to one of the ten Attic orators later formed into a canon were preserved.[14] As a result our surviving forensic speeches, roughly one-hundred in number, were by and large delivered by upper-class educated elites. Even for the lower classes, presenting a case *pro se* was not as daunting in classical Athens as it may at first appear; most Athenians probably became quite familiar with the workings of the lawcourts both by serving as jurors and by attending trials in the agora.[15]

Each Athenian litigant was allotted a fixed amount of time to present his case. Some private cases were completed in less than an hour, and no trial lasted longer than a day.[16] Although a magistrate chosen by lot presided over each popular court, he did not interrupt the speaker for introducing irrelevant material or permit anyone else to raise other legal objections, and did not even instruct the jury as to the relevant laws. The Athenian laws were inscribed on stone *stelai* in various public areas of Athens; beginning at the end of fifth century copies were kept in the Metroon, though it seems that this building housed a haphazard collection of documents rather than an organized public archive.[17] Litigants were responsible for finding and quoting any laws they thought helped their case, though there was no obligation to explain the relevant laws, and in fact many speeches do not cite any laws at all. There was no formal mechanism to prevent a speaker from misrepresenting the laws, though knowledgeable members of the jury and the crowd could heckle orators

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13. *See, e.g.,* Antiphon 5.1 [hereinafter Ant.]; Lys. 1.5; 12.4; Dem. 27.2; Isaeus 8.5 [hereinafter Is.].

14. *See, e.g.,* R.M. Smith, *A New Look at the Canon of the Ten Attic Orators,* 48 Mnemosyne 66 (1995); Ian Worthington, *The Canon of the Ten Attic Orators, in* PERSUASION, *supra* note 7, at 244.

15. See Adriaan Lanni, *Spectator sport or serious politics?* Hoi periestekotes *and the Athenian lawcourts,* 117 J. HELLENIC STUD. 182 (1997), for an argument that most jurors would know a great deal about the laws and workings of the courts from watching trials held near the public marketplace.

16. A *graphe* was allotted an entire day. *See* Ath. Pol. 53.3; HANSEN, *supra* note 5, at 187. Private cases varied according to the seriousness of the charge and were timed by a water-clock (*klepsydra*). MacDowell estimates the length of various types of suit based on the one surviving Athenian *klepsydra*. DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 249-50 (1978).

17. *See* ROSALIND THOMAS, ORAL TRADITION AND WRITTEN RECORD IN CLASSICAL ATHENS 39-94 (1989); Alan Boegehold, *The Establishment of a Central Archive at Athens,* 76 AM. J. ARCHAEOLOGY 23 (1972). *See generally* 2 A.R.W. HARRISON, THE LAW OF ATHENS 27-9 (1955); E. POSNER, ARCHIVES IN THE ANCIENT WORLD 108 (1972).

whose speeches were misleading.[18]

Cases were heard by mass juries, chosen by lot, which generally ranged from 201 to 501 in size.[19] The composition of the Athenian jury has been debated in recent scholarship, but it seems likely that the poor, the elderly, and city-dwellers were strongly represented.[20] A simple majority vote of the jury determined the outcome of the trial. No reasons for the verdict were given, and there was no provision for appeal from the judgment of the people. While the punishment for some offenses was set by statute, in many cases the jury was required to choose between the penalties suggested by each party in a second speech. It was not permitted to give a compromise punishment. It is through this practice, known as *timesis*, that Socrates virtually signed his own death warrant. After suggesting that the state reward him with free maintenance, he finally agreed to propose a very small fine as a penalty, inducing the jury, which only narrowly voted for conviction, no choice but to vote overwhelmingly for the prosecutors' proposal of execution.[21]

## II. THE USE OF LAW IN ATHENIAN COURT SPEECHES

The rule of law and the related concept of equality before the law (*isonomia*) were central to Athenian democratic ideology.[22] In law court

18. *See* Victor Bers, *Dikastic Thorobos, in* CRUX 1-15 (Paul Cartledge & David Harvey, eds., 1985) (discussing heckling by jurors); Lanni, *supra* note 15 (discussing heckling by spectators). The penalty for citing a non-existent law was death, though there are no attested examples of cases brought under this law. *See* Dem. 26.24.

19. There are occasional examples of panels of 1001, 1501, 2001, and 2501. *See* HANSEN, *supra* note 5, at 187.

20. *See id.* at 183-6; OBER, *supra* note 4, at 122-24; R.K. SINCLAIR, DEMOCRACY AND PARTICIPATION IN ATHENS 124-27 (1988); Minor M. Markle, *Jury Pay and Assembly Pay at Athens, in* CRUX, *supra* note 18, at 277-81; S.C. Todd, Lady Chatterly's Lover *and the Attic Orators,* 110 J. HELLENIC STUD. 146 (1990). *But see* A.H.M. JONES, ATHENIAN DEMOCRACY 36-7 (1957) (arguing that juries were selected predominantly from the middle and upper classes).

21. Plato, *Apology* 36a. Todd estimates from a passage in Diogenes Laertius that Socrates was convicted by a vote of approximately 280 to 220, but sentenced to death by a vote of 360 to 140. TODD, *supra* note 10, at 134 n.12.

22. Plato and Aristotle stress the importance of the rule of law (though not *isonomia*) as a check on the arbitrariness of decision-making in a radical democracy. Aristotle even implicitly praises the Athenian system in the *Politics* when he criticizes the practice of the Cretan *cosmoi* and Spartan *ephors* of judging "at their own discretion" (*autognomonas*) as "dangerous." Aristotle *Politics* 1272a38. He argues, "it would be better if they did not decide cases on their own judgment but by written rules and according to laws." *Id.* at 1270b30. *See* COHEN, *supra* note 2, at 34 (discussing the "different Athenian conceptualizations of the rule of law and the way they are deployed to support competing political theories and ideologies"). Cohen argues that the Athenian notion of the "rule of law" was quite different from modern conceptions because of the strong identification of the law with the people (*demos*) and its institutions and interests. He therefore sees no inconsistency between Athenian claims to revere the laws and their strong proclivity to ad hoc decisions. *See id.* at 181-95. I will argue that the Athenians were well aware of the discrepancy between their practice and the consistency and predictability suggested by their rhetoric.

speeches orators often praise the rule of law. Aeschines' remark is typical: "there are in the world three forms of government, autocracy, oligarchy, and democracy: autocracies are administered according to the tempers of their lords, but democratic states according to established laws."[23] Speakers also commonly note that the law applies equally to rich and poor alike and that jurors should not be affected by the social standing of the litigants,[24] and indeed *isonomia* is eulogized in Pericles' funeral oration[25] and Euripides' *Suppliants*.[26] Litigants seem to appeal to a decidedly positivistic notion of law when they argue that the straightforward application of the laws makes a favorable decision in their case inevitable. Demosthenes, for example, often argues that an adverse verdict would threaten the sovereignty of the laws,[27] and in Lysias 1 Euphiletus makes the preposterous claim that the laws compelled him to exact revenge on his wife's lover. Although these sorts of statements in our court speeches seem to imply that the Athenian legal system strove for predictability and consistency and encouraged jurors to base their verdicts on the laws rather than the social standing of individual litigants, we will see that in practice Athenian court decisions had much in common with the ad hoc settlements of pre-legal Greece. Space does not permit a detailed analysis of the role of legal reasoning in each of the surviving speeches, and in any case it is impossible to know which aspects of a speech an Athenian jury found most convincing. We can, however, make some general observations about the extent to which litigants and jurors relied on the laws in Athenian courts. It seems that legal reasoning was only one—and by no means the most authoritative—of many possible strategies open to an Athenian litigant. Further, the lack of precise legal definitions gave mass juries a great deal of discretion even when they were attempting to reach their verdict on purely legal grounds.

The Athenians were not very strict about insisting that suits which came to court had a firm and clear legal basis. The legal system seems to have aimed primarily at making some form of redress accessible to amateur litigants rather than at making fine legal distinctions. Hagnon's proposal to try Pericles indicates how casual the Athenians could be about the legal basis of a lawsuit: according to Plutarch, he proposed that Pericles be tried before fifteen hundred jurors, "no matter whether it is called a prosecution for embezzlement (*klope*), bribery (*doron*), or a misdemeanor (*adikion*)."[28] In a well-known passage, the speaker in

23. Aeschines 1.4 [hereinafter Aesch.]. *See also* Dem. 24.5, 75-6; 25.11; COHEN, *supra* note 2, at 52.

24. *See, e.g.,* Dem. 21.183; 24.111-12; 45.67; 51.11-12; 19.296; 15.29; 23.86; 26.13; 25.16-17; Isocrates 20.19 [hereinafter Isoc.].

25. Thucydides 2.37.

26. Euripides *Suppliants* 427-37.

27. *See, e.g.* Dem. 22-46; 21.7. *See also* J. JONES, LAW AND LEGAL THEORY OF THE GREEKS 66-73 (1956).

28. Plutarch, *Pericles* 32.

Demosthenes 22 describes the various legal procedures available to litigants to various abilities and social classes:

> Solon, who made these laws, did not give those who wanted to prosecute just one way of exacting justice from the offenders for each offense but many. . . . for example thieves. You are strong and confident: use the *apagoge* procedure; you risk a 1000 dr. fine. You are weaker: use *ephegesis* to the magistrates; they will then manage the procedure. You are afraid even of that: use a *graphe*. You have no confidence in yourself and are too poor to risk a 1000 dr. fine: bring a *dike* before the arbitrator and you will run no risk. Now none of these actions is the same. In the case of impiety, similarly, you can use *apagoge, graphe, dike* to the Eumolpidai, a *phasis* to the *Basileus*. It is pretty much like that for all offenses.[29]

He then argues that defendants should challenge the substance of the charge against them, rather than the method of prosecution: "a defendant, if innocent, should not dispute the method by which he is brought to justice: he ought to prove that he is innocent."[30] Potential litigants' choice of charges seems to be influenced more by their social standing, age, and extent of their experience than by the legal issues of their case. Ariston, for example, points out that he could just as easily have prosecuted Conon for clothes-stealing or *hubris*, and explains that he chose to bring a private case for assault, not because Conon's actions most closely fit that crime, but because of his own youth and inexperience.[31] In fact, speakers attack opponents who seem to know the laws too well[32] and feel the need to make excuses if their argument becomes too legalistic.[33]

There are, however, three cases in which legal questions seem to have affected potential litigants' framing of their charges. The speaker in Demosthenes 47 is told by the *exegetai* (religious interpreters) that he is not legally permitted to prosecute the murderers of his old nurse because she is neither a relative nor a slave.[34] The passage seems to indicate that the primary function of the *exegetai* was to give advice on religious rather than legal matters,[35] and none of our other homicide speeches mention these interpreters. The speaker in Lysias 13 describes how the Eleven, the board of magistrates in charge of summarily executing thieves caught in the act of stealing, insisted that Dionysius add the words "in the act" (*ep' autophoroi*) to his charge before arresting Agoratus.[36] Although this pas-

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29. Dem. 22. 25-6. For a discussion of the multiplicity of procedures in Athenian law see Osborne, *supra* note 3, at 42. For the procedural nature of Athenian law, see TODD, *supra* note 10, at 147-67.

30. Dem. 22.28.

31. Dem. 54. 1. Indeed, Ariston attempts to characterize Conon's actions as *hubris* throughout the speech. *See, e.g., id.* at 9.

32. *See* Dem. 57.5.

33. *See* Dem. 54.17; Hyperides 3.3 [hereinafter Hyp.]. Carey points out that because Athenian laws were largely procedural rather than substantive, extensive knowledge of the laws creates the impression of litigiousness. *See* Carey, *supra* note 7, at 180.

34. *See* Dem. 47. 68-70. *See also* PAUL VINOGRADOFF, THE JURISPRUDENCE OF THE GREEK CITY 76 (1922) (discussing the role of *exegetai* in Athens).

35. *See* Dem. 47.69.

36. Lys. 13.86.

sage does demonstrate a surprising attention to detail on the part of the Eleven, their addition to his plea was meant to insure that his charge clearly fell within their jurisdiction, not to examine rigorously and define the legal basis of his claim. Finally, the speaker in Isaeus 10 was forced by the magistrate at the preliminary hearing (*anakrisis*) to change his petition before the trial.[37] The preliminary hearing, unlike the construction of the *formula* by the praetor in Roman law,[38] did not frame the legal issues in the case. For this reason, scholars have long found the Isaeus passage puzzling,[39] but it is clear that the addition to the plea required by the archon was factual rather than legal in nature.

The Athenian legal system even allowed complaints which were based on no written law to come to court and to be decided according to the jurors' general sense of fairness. Anticipating this circumstance, the dicastic oath[40] included a provision instructing jurors to vote according to their best judgment (*dikaiotate gnome*) if there were no laws relating to a given dispute. We cannot identify the legal basis of some of our surviving speeches,[41] and in at least one case, Lycurgus' prosecution of Leocrates, it seems that Leocrates' actions were not prohibited by any existing law.[42] The Athenian laws seem to have neglected some fundamental offenses; Diogenes Laertius reports, to take the most startling example, that there was no Solonian law against parricide.[43] For the most part, the Athenians did not seem to regard gaps in the laws as flaws in their legal system. Law court speakers do not call for legislation to cover situations not addressed in the laws.[44] Only one text suggests that the Athenians were uncomfortable with the idea of cases without formal legal grounding coming to court: Andocides states that in 403/2 B.C. the Athenians passed a law that banned magistrates from enforcing any law which had not been publicly displayed.[45] As has often been pointed out, Andocides' discussion of the revision of the laws in 403/2 is highly suspect because his defense demanded that he exaggerate the importance of the revision.[46] In any case, the prohibition of the use of unwritten laws quoted by Andocides

37. Is. 10.2.

38. *See, e.g.* HANS JULIUS WOLFF, ROMAN LAW 76 (1951) (discussing *formulas* in the Roman Republican period).

39. *See* HARRISON, *supra* note 17, at 95; TODD, *supra* note 10, at 127.

40. For a text of the juror's oath, see HANSEN, *supra* note 5, 182-3.

41. For example, the prosecutor in Lysias 30 never states the law under which he is bringing the case. *See* Lin Foxhall & Andrew Lewis, *Introduction to* GREEK LAWS IN ITS POLITICAL SETTING 7 (L. Foxhall & A.D.E. Lewis, eds., 1996); TODD, *supra* note 10, at 108.

42. *See* Lycurgus 1.9 [hereinafter Lyc.].

43. Diogenes Laertius, 1. 159.

44. *See* E. Ruschenbusch, *Dikasterion Panton Kurion,* 6 J. HELLENIC STUD. 257, 259 (1957).

45. Andocides 1.87 [hereinafter And.].

46. *See, e.g.,* Stephen Todd, *Lysias against Nikomachos: The fate of the expert in Athenian law, in* GREEK LAW IN ITS POLITICAL SETTING, *supra* note 41, at 101, 126-131.

applies to magistrates rather than to jurors,[47] and the dicastic oath clearly implies that the Athenians were aware that in practice jurors were expected to use their own discretion when presented with cases, like the one for which Lycurgus 1 was written, not covered in the laws. The two passages, both from prosecution speeches, which attempt to explain the absence of relevant laws in their case argue that their opponent's crime was too heinous for a lawgiver to anticipate.[48] However, the presence of gaps may have more to do with the Athenian conception of law than with the nature of any particular crime. Thomas has argued that written law supplemented rather than superseded customary law, and that in early Greece the inscribing of decrees may have been intended to "confer divine protection and a monumental impressiveness on just those kinds of law which did not receive the time-honoured respect accorded the unwritten laws and customs."[49] The Athenians did not conceive of their laws as a unified code, and it seems likely that classical Athenian laws were intended as much to symbolize "publicity and democratic decision-making"[50] as to provide an authoritative guide for court verdicts; the presence of gaps was a fundamental feature rather than an embarrassing flaw in the Athenian legal system.

Athenian litigants rarely attempt to fill lacunae by reasoning according to analogy from related laws or similar cases. To be sure, Athenian litigants could employ a rudimentary version of legal reasoning in the absence of relevant laws; Lycurgus, for example, discusses previous punishments to argue that Leocrates should be condemned even though his actions were not technically illegal.[51] However, the extension of laws through legal reasoning was an exceedingly rare strategy in Athenian courts. Speakers generally argue that the jurors' best judgment (*dikaiotate gnome*) should compensate for any gaps in the laws.[52] Thus it was widely recognized and accepted that jurors often wielded a great measure of discretion in reaching their verdicts.

Even when a case did have a specific legal grounding, litigants did not consider a simple discussion of the laws relating to the dispute an effective method of presenting a case. Athenian speakers considered laws merely one of many forms of proof to be skillfully manipulated to suit their case, rather than a definitive guide for a verdict. Although litigants did not follow Aristotle's hazardous strategy of explicitly arguing that unfavorable written laws be disregarded,[53] our surviving speeches suggest

47. *See* HANSEN, *supra* note 5, at 170.

48. See Lys. 31.27-9; Lyc. 1.9.

49. Rosalind Thomas, *Written in Stone? Liberty, Equality, Orality and the Codification of Law,* in GREEK LAW IN ITS POLITICAL SETTING, *supra* note 41, at 9, 31.

50. *Id.*

51. Lyc. 1.110-27.

52. *See, e.g.,* Dem. 20.118; 23.96; 39.40.

53. Ar. *Rhetoric 1354a6;* C. Carey, Nomos *in Attic Rhetoric and Oratory* 116 J. HELLENIC STUD. 33 (1996).

that litigants and jurors did not view the legal arguments as dispositive. As has often been pointed out, speakers generally include a host of non-legal arguments such as lists of public services and attacks on an opponent's character in their speeches;[54] in none of our surviving orations do litigants attempt to make their case solely through legal arguments abstracted from the social context of the individual dispute. For example, litigants do not avail themselves of the statute of limitations when it would support their case.[55]

Of all our surviving speeches, one would expect those brought through the *paragraphe* procedure to contain the most legal arguments. The *paragraphe* was a plea challenging an allegedly illegal lawsuit; if the counter-suit was successful, the case was dropped, but if the jury rejected the *paragraphe*, the original suit proceeded as normal and was heard by a new jury.[56] One would, then, expect *paragraphe* speeches to concentrate exclusively on the legal issues of the counter-suit, yet all except one of our nine surviving cases descend to detailed discussions of the original dispute.[57] Indeed, the speaker in Isocrates 18 states, "I intend to prove that Callimachos not only is bringing a suit in violation of the terms of the amnesty agreement, but that he is also guilty of falsehood in his charges;"[58] and the speaker in Demosthenes 45 implies that his opponent brought a *paragraphe* merely to have the advantage of being the first speaker when his case was brought before a jury.[59] We must reject Sealey's argument that the introduction of the *paragraphe* procedure in 403/2 heralded the beginning of the rule of law in classical Athens,[60] for the surviving *paragraphe* speeches clearly demonstrate that Athenian litigants did not engage in autonomous legal arguments and thus did not expect the jurors to base their decision entirely on the legal issues in the case.

The dispute over Demosthenes' crown, one of the few cases in which the speeches of both speakers survive, demonstrates that legal reasoning was not considered the most convincing method of presenting a case. Aeschines, who failed to obtain even one-fifth of the jurors' votes,

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54. *See, e.g.,* Christopher Carey, *Rhetorical Means of Persuasion, in* PERSUASION: GREEK RHETORIC IN ACTION, *supra* note 7, at 26.

55. *See* Dem. 36.25; Paul Millett, *Sale, Credit, and Exchange in Athenian Law and Society,* in NOMOS: ESSAYS IN ATHENIAN LAW, POLITICS, AND SOCIETY 179, 179 (Paul Cartledge et. al., eds., 1990) (discussing statutes of limitations at Athens).

56. For the *paragraphe* procedure, see S. Isager and M.H. Hansen, ASPECTS OF ATHENIAN SOCIETY IN THE FOURTH-CENTURY B.C. 123-32 (1975); HARRISON, *supra* note 17, at 106-24; Todd, *supra* note 10, at 135-8; HANS JULIUS WOLFF, DIE ATTISCHE PARAGRAPHE (1966).

57. For a detailed analysis see HARRISON, *supra* note 17, at 109-19. The one exception is Lysias 23, which, as Todd points out, may be a special case. *See* TODD, *supra* note 10, at 138 n.19.

58. Isoc. 18.4.

59. Dem. 45.6.

60. *See* SEALEY, *supra* note 6, at 134-5.

opens his speech with a long discussion of the laws regarding crowns,[61] while Demosthenes responds to these legal arguments in a mere nine sections, shunted off to an inconspicuous part of his speech.[62] Regardless of which speaker had the more convincing legal argument,[63] the fact that Demosthenes chose to give so little attention to the intricate legal arguments of his opponent seems to indicate that he did not expect that the jurors would consider the legal issues decisive. Indeed, Demosthenes often refers to Aeschines as a clerk (*grammateus*) in this speech, perhaps in part to depict his opponent as a clerk who uses legal documents to obscure the more fundamental issues of the case.[64]

Although the extent to which court speeches used legal arguments seems to have been largely a matter of the logographer's or speaker's personal preference,[65] there are some factors which might encourage or discourage the discussions of laws. Litigants probably had a difficult time finding laws before the establishment of the public archive at the end of the fifth century; indeed, only one decree is cited in the eleven surviving speeches which were delivered before 403 B.C.[66] Although the absence of cited documents in early court speeches does not necessarily imply a lack of legal reasoning,[67] it seems likely that the gradual increase in the use of documents throughout the fourth century made involved legal arguments like those found in Aeschines' speech against Ctesiphon more common. Johnstone has pointed out that our surviving prosecution speeches tend to use more legal arguments, whereas defense speeches (as one might expect) cite laws less frequently and attempt to challenge the appropriateness of the prosecutor's legal perspective.[68] For example, in *Against Callicles*, the prosecutor appears to present a legal argument, while the defense attempts to characterize the case as an excuse to pursue a feud. Similarly, character evidence, the recitation of public services, and

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61. Aesch. 3.8-48.

62. Dem. 18, 111-20. In fact, Libanius and Quintilian argued that Demosthenes placed the legal discussion in the century of his speech in an attempt to hide the weakest part of his case. *See* Harris, *supra* note 7, at 141.

63. The traditional view, explained in detail by Gwatkin, holds that Aeschines was in the right. *See* W. Gwatkin, *Legal Argument in Aeschines'* Against Ktesiphon *and Demosthenes'* On the Crown, 26 HESPERIA 129 (1957). For a recent critique of this argument, *see* Harris, *supra* note 7, at 140-8.

64. *See* Dem. 18.127; 209; 261; 19.70, 95, 200, 249, 314. *See* Gwatkin, *supra* note 63, at 140.

65. Carey points out that some speeches, like Demosthenes 46, cite laws of doubtful relevance excessively, perhaps to add moral authority to the speaker's argument. *See* Christopher Carey, *'Artless' Proofs in Aristotle and the Orators,* 39 BULL. INSTITUTE CLASSICAL STUD. 95, 101 (1994).

66. THOMAS, *supra* note 17, at 87.

67. For example, although no law is cited, both speakers in Antiphon's Second Tetralogy engage in legal reasoning to determine whether a boy who accidentally kills at javelin-throwing practice is guilty of homicide.

68. STEVEN JOHNSTONE, DISPUTES AND DEMOCRACY: THE CONSEQUENCES OF LITIGATION IN ANCIENT ATHENS 49-60 (1999).

appeals to pity are generally more common in defense speeches.[69] There is one exception to the general asymmetry of prosecutor and defense roles: in cases involving family law, particularly inheritance disputes, both litigants appeal to character evidence with equal frequency.[70] In fact, the type of case may have had some effect on the proportional role assigned to legal reasoning in a particular case. Inheritance cases seem to be at one end of the spectrum: scholars have often pointed out that in inheritance cases Athenian courts seem to have been more concerned with distributing the property fairly than with interpreting wills and finding a legal solution to the dispute.[71] Aristotle in the *Problems* asks, "why in the lawcourts do they place more weight on family connections than the written will in giving a verdict?"[72] and suggests that jurors often ignore wills because they, unlike family relationships, are easily forged. Homicide cases, on the other hand, would be likely to contain a relatively high measure of legal argument because they were heard in special courts which excluded irrelevant statements (*exo tou pragmatos*).[73] Unlike all other Athenian procedures, homicide cases were decided by a small jury of older men with considerable legal experience. Most of our surviving homicide speeches predate the creation of the public archive and thus do not contain many citations of specific laws.[74] Lysias 1, our latest surviving murder case, contains perhaps the most skillful manipulation of laws in the Attic orators,[75] and it seems reasonable to assume that this speech is more representative of the lost fourth century homicide cases. Most cases probably fell somewhere between inheritance suits which emphasized informal notions of equity and homicide trials, the arena most congenial to legal reasoning, but in no case did a speaker restrict his arguments to the legal issues in the dispute.

Even ostensibly "legal" arguments left much to the discretion to the jury because Athenian laws were vague in the extreme. Generally, Athenian laws simply state the name of the offence, the procedure for bringing a suit under the law, and in some cases the prescribed penalty; our surviving laws and decrees do not define the crime or describe the essential characteristics of behavior government by the law. The decree of

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69. *Id.* at 94, 111, 115, 118.

70. *Id.* at 98-99.

71. *See, e.g.,* COHEN, *supra* note 2, at 163-81.

72. Aristotle, *Problems* 29.3.

73. *See* Lys. 3.46; Lyc. 1.11-13; Ant. 5-11; 6.9; Pollux 8.117. For a discussion of the relevance rule of the homicide courts and the extent to which this rule was enforced, see Adriaan M. Lanni, "The Court on the Hill: The Arepagos and the Classical Athenian Courts," Address at the annual meeting of the American Society of Legal History (Oct. 1999).

74. None of Antiphon's speeches, for example, call for a reading of a decree or law. At Antiphon 6.38, the King Archon is said to have "read the laws" to potential litigants, but this does not occur in court.

75. For a discussion of the legal arguments in this speech, see James Bateman, *Lysias and the law,* 89 TRANSACTIONS AM. PHILOLOGICAL ASS'N 276, 284-5 (1958); Edward Harris, *Did the Athenians consider seduction a worse crime than rape?*, 40 CLASSICAL Q. 370 (1990).

Cannonus is characteristically vague about the definition of the offence, even though it provides detailed instructions for the method of trial and penalty:

> If anyone should wrong the people of Athens, he shall plead his case in fetters before the people, and if he be adjudged guilty, he shall be put to death by being cast into the pit, and his property shall be confiscated, and the tenth part thereof shall belong to the Goddess.[76]

Similarly, the law against *hubris* does not define this elusive offence: "If anyone commits *hubris* or any unlawful act, any Athenian who desires to do so may bring him before the judges. . . ."[77] The lack of precise legal definitions was by no means limited to extraordinary procedures or offenses that by their nature involve a high degree of subjectivity; indeed, Aristotle in the *Rhetoric* notes the need for precise definitions of theft (*klope*) and adultery (*moicheia*), offences not obviously problematic, as well as *hubris*.[78] Murder is once again the exception to the rule. In the Athenian homicide laws distinctions were drawn between deliberate (*ek pronoias*), unintentional (*akon*), and justifiable homicide and conspiracy to murder (*bouleusis*).[79]

The interpretation of a vague law was left largely to the whim of the jurors on the day of the trial; the surviving speeches show that it was very rare indeed for a speaker to advocate and rely on a specific definition of a law. As Cohen has pointed out, it is surprising to a modern reader that neither Plato's nor Xenophon's Socrates argues that "corrupting the youth" did not constitute impiety.[80] The attempt to discover the defining characteristics of *hubris* in Athenian courts[81] has been, unsurprisingly, futile. Given the general lack of definition in Athenian laws, the fact that potential litigants were primarily influenced by non-legal factors in their choice of procedures, and that cases which had no legal grounding were permitted to come to court, it is highly unlikely that the Athenians had a single, static view of *hubris* and its essential characteristics which a jury could apply to individual cases. In suits of *hubris*, as in many other cases in classical Athens, the primary purpose of the relevant law may have

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76. Xenophon, *Hellenica,* 1.7.20.

77. Dem. 21.47.

78. *See* Aristotle, *Rhetoric* 1374a8. For the vagueness of laws relating to theft, see DAVID COHEN, THEFT IN ATHENIAN LAW 6-7 (1983); Edward Harris, *When is a sale not a sale? The riddle of Athenian terminology for real security revisited,* 38 CLASSICAL Q. 351 (1988).

79. *See* Dem. 23-65-79. *See generally* William Loomis, *The nature of premeditation in Athenian homicide law,* 92 J. HELLENIC STUD. 86 (1972); Raphael Sealey, *The Athenian courts for homicide,* 20 CLASSICAL PHILOLOGY 275 (1983).

80. *See* COHEN, *supra* note 2, at 189.

81. For the many different theories on the nature of *hubris*, see NICK FISHER, HUBRIS 36-86 (1992); LOUIS GERNET, RECHERCHES SUR LA DÉVELOPPEMENT DE LA PENSÉE JURIDIQUE ET MORALE EN GRÈCE 183-97 (1917); Michael Gagarin *The Athenian law against* hubris, *in* ARKTOUROS: HELLENIC STUDIES PRESENTED TO BERNARD KNOX 229 (Bowersock et al., eds., 1979); Douglas MacDowell, *Hybris at Athens,* 23 GREECE & ROME 14 (1976); E. Ruschenbusch, *Hybreos graphe: ein Fremdkorper in athenishen Recht des 4.Jahrhunderts v.Chr.,* 86 Zeitschrift der Savigny-Stiftung 386 (1965).

been to set out a possible procedure for obtaining redress from a broad class of offences; once the case came to court, the jury considered the dispute without regard to the exact definition of the charge and attempted to arrive at a just verdict in the individual case rather than to determine whether the defendant's behavior satisfied formal criteria for *hubris* or the charge at hand.

Athenians were certainly aware that the vagueness of their laws gave the jury a great deal of leeway in deciding cases. Moreover, some regarded this vagueness as a merit: both Plutarch and the author of the *Athenian Constitution* report that some Athenians believed that Solon "deliberately made the laws obscure so that the people would be masters of the decision."[82] Viewing the ambiguity of the laws as a strategic opportunity, the author of the *Rhetoric to Alexander* discusses how a speaker can use ambiguous laws (*amphiboloi nomoi*) to his advantage.[83] However, not all of our texts consider the vagueness of the laws a positive characteristic of the Athenian legal system. We have seen that Aristotle calls for the clearer definition of offences in the *Rhetoric*, and the speaker in Demosthenes 24 expresses a similar sentiment: "I think you would all agree that a good law . . . ought to be drawn simply and intelligently, not in such terms that one man thinks it means this and another that."[84]

This brief survey of the use of law in Athenian courts indicates that verdicts were highly unpredictable and represented ad hoc settlements responding to the particular facts of individual disputes rather than the application of laws to cases. The Athenian system had little patience for legal technicalities. The laws served primarily to assist amateur litigants in getting their case heard. Even in *paragraphe* speeches, litigants did not confine themselves to the legal issues of the suit, and indeed it was possible to bring a case to court with no legal grounding whatsoever. In a study of primitive law, Diamond has pointed out that attention to "technicalities" signals the arrival of autonomous legal reasoning. With the introduction of technicalities, "law passes into autonomy" and operates "by the logical application of an observed underlying principle to new facts, stereotyped."[85] Litigants in Athenian courts do not engage in autonomous legal reasoning; speakers do not attempt merely to reduce the facts of their case to legally meaningful patterns for the straightforward application of laws to their case. Rather, litigants present the jury with a "holistic" view of the dispute, including the relative social standing of the disputants, and the long-term relationship and interactions between the parties, though they often have little bearing on the legal issues in the case.

A detailed analysis of non-legal reasoning in the courts is beyond the scope of this article, but Demosthenes 54, *Against Conon*, can serve to illustrate the point: rather than simply reporting the incident in which he

82. Ath. Pol. 9.2 *But see* Plutarch, *Solon* 18.

83. Rhet. Ad Alex., 1443a30.

84. Dem. 24.68.

85. *See* A. DIAMOND, THE LAW OF PRIMITIVE MAN 354 (1935).

was attacked by Conon and showing that the attack included the essential characteristics of assault (*aikeia*), Ariston treats the jurors to a lengthy and vivid description of the attack;[86] he represents the defendant and his witnesses as violent, wine-soaked aristocrats[87] while presenting himself as a sober man,[88] scion of a family which has performed many public services;[89] and he recounts the history of enmity between himself and the defendant.[90] Rather than cite the law against assault, the actual crime alleged in his prosecution, he quotes the laws against *hubris* and clothes-stealing. If the material covered in our surviving speeches provides any indication of the criteria used by Athenian juries in reaching verdicts, it seems that court decisions were more influenced by the social facts of the individual case than by arguments which attempted to stereotype the suit to fit underlying legal principles or laws. Frier's observations about legal rhetoric in the Roman Republic can easily be applied to classical Athens: Roman courts operated not from "a narrowly defined legalistic perspective" but on a "broader agonistic plane" in which "the narrow legal issue . . . is all but swallowed up in a host of larger issues."[91] Indeed, the lack of precise legal definitions and professional jurisconsults in Athens made it impossible for an Athenian jury to apply the laws straightforwardly to the case, even if they had conceived a desire to reach a verdict on purely legal grounds.

## III. ARGUING FROM "PRECEDENT" IN ATHENIAN COURTS

We have seen that discussion of relevant laws and decrees was only one weapon in an Athenian litigant's arsenal, and a rather feeble one at that; it seems beyond doubt that Athenian juries did not look to legal reasoning as the authoritative guide to a verdict. If Athenian courts did not achieve consistency and predictability through the straightforward application of rules to cases, we should consider the possibility that notions of custom and precedent encouraged jurors to deliver verdicts which not only served as ad hoc settlements for individual disputes, but also perpetuated the general principles embodied in previous court decisions. The Athenians had no notion of binding precedent, and in fact the lack of appealability of verdicts and accountability of jurors made it impossible to enforce any criteria of judgment on the jury. Scholars who argue that the Athenians were committed to the rule of law often point to litigants' mention of previous cases and the topos that the verdict will deter or encourage criminals as evidence for a doctrine of "persuasive precedent" in the

86. Dem. 54. 7-10.

87. *Id.* at 14, 20. 34, 39-41.

88. *Id.* at 16.

89. *Id.* at 44.

90. *Id.* at 3-6.

91. BRUCE FRIER, THE RISE OF THE ROMAN JURISTS 134-5 (1985).

Athenian courts.[92] This section will examine the role of these examples of "legal" reasoning in Attic oratory. As we shall see, although litigants often claim that the verdict in their case will have an enduring effect on the community at large, records of previous cases were not regularly available for consultation. When litigants do mention previous cases, they rarely attempt to elicit a *ratio dicendi* that they apply by analogy to the case at hand. There is a wide gap between the elevated rhetoric of consistency and precedent in the court speeches and the reality of the Athenian system, which made it virtually impossible for litigants or jurors to make individual verdicts consistent with previous cases.

On first reading, the extant forensic speeches seem to imply that the Athenian courts achieved a high level of continuity and consistency. When discussing previous cases, speakers maintain the fiction that the former and current juries are identical. For example, Aeschines could ask a jury in 354 B.C., forty-five years after the event, "Did *you* put to death Socrates. . . ?"[93] The consequentialist arguments warning the jury that the effects of their verdicts will extend beyond the current case is a topos often met in forensic oratory. Prosecutors argue that a conviction will have a deterrent effect.[94] For example, the speaker in Dem. 59 urges the jury to punish the defendants "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,"[95] and Aeschines counsels the jury, "punish one man, and do not wait until you have a multitude to punish."[96] In a similar vein, speakers claim that an acquittal will encourage criminals and promote lawlessness in the city.[97] The speaker in Lysias 30 paints a lurid picture of malefactors poised to strike:

> And the men who seek to rob the public purse are watching closely to see how Nicomachus will fare in these proceedings. If you do not punish him, you will grant them absolute license; but if you condemn him and award him your heaviest sentence, by the same vote you will reform the rest, and will have done justice on this man.[98]

Litigants also tell jurors to be mindful that an individual verdict may have wide-ranging effects on Athens' trade.[99] The speaker in Demosthenes 56 tells the jury, "you must not forget that, while you are today deciding one case alone, you are fixing a law for the whole port, and that any of those engaged in overseas trade are standing here and watching you to see how

92. *See* Harris, *supra* note 7, at 136; Lene Rubinstein, "Persuasive Precedent in the People's Court," Address at the American Philological Association Convention (Dec. 1993).

93. Aesch. 1.173. *See also* Dinarchus 1.13-14 [hereinafter Din.].

94. *See, e.g.,* For a discussion of these passages as example of persuasive prospective precedents, *see* Rubinstein 1993. 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.

95. Dem. 59.77.

96. Aesch. 1.193.

97. *See, e.g.,* Lys. 1.36, 27.7; Dem. 59.112.

98. Lys. 30.23.

99. *See* Dem. 35.51; Lys. 22.21; 56.48.

you decide this question."[100] He argues that if they recognize the written contract in this case lenders will be more ready to risk their money on trading ventures in the future and the business in the port will improve, and warns that an adverse verdict would discourage all lenders in the city.[101]

These consequentialist arguments presuppose a high level of consistency and predictability in Athenian courts: for a verdict to deter criminals effectively or to alter the behavior of lenders in the port, citizens must have some confidence that future cases will be treated in a similar manner. For this reason, it is tempting to interpret these topoi as "prospective precedents" which indicate an awareness that the current verdict may affect future juries.[102] It is important to note, however, that while litigants often claim that the verdict will influence the behavior of the community at large, there are, to my knowledge, only two passages in which the speaker contemplates the putative effect of a decision on a future jury.[103] Because there is no law which directly applies to Leocrates, Lycurgus argues that in this case "you must be not merely judges of this present case, but lawmakers "*nomothetai*" besides."[104] Similarly, the speaker in Lysias 14 argues that because this is the first such case since the peace of 404, the jurors must be "not only jurors but lawmakers" and warns the jury, "your decision upon these cases will determine the attitude of the city towards them for all time."[105] In both cases, the jury is facing a case of first impression; the speaker calls attention to the fact that the case at hand is unusual, so unusual, indeed, that it requires the jurors to take on a role beyond their normal constitutional function. It seems, then, that the Athenians did not have a strong sense that individual verdicts serve as persuasive precedents for future juries. As we shall see, the haphazard recording of verdicts, taken with the way in which litigants discuss previous cases, makes it difficult to believe the speaker in Demosthenes 56 when he claims that traders would carefully note court decisions and alter their behavior accordingly, confident that one verdict was an accurate indication of future decisions. It seems likely that the consequentialist topos was almost entirely rhetorical, designed to encourage jurors to dole out severe punishments in the name of deterrence,[106] to induce the jurors,

100. Dem. 56.48.

101. *Id.* at 48-50.

102. Rubinstein discusses these passages as prospective precedents "on the level of rhetoric," while Harris suggests that individual cases, though not "formally binding, could be appealed to by future litigants and thus have an influence on later cases." *See* Harris, *supra* note 7, at 136; Rubinstein, *supra* note 92.

103. While the speaker in Dem. 56 (quoted above) does use the verb *nomotheuw* ("to make laws") when referring to the jury's decision, the passage discusses the effect of the verdict on the behavior of lenders rather than on future juries.

104. Lyc. 1.9.

105. Lys. 14.4.

106. Rubinstein has pointed out that this topos occurs twice as often in prosecution speeches as in defense speeches. *See* Rubinstein, *supra* note 92. Rubinstein also notes that

who were not accountable in any way for their verdicts, to decide responsibly by emphasizing the importance and wide-ranging effects of their verdict, and to give an aura of consistency to a system that was all too unpredictable. Thus despite the rhetoric of consistency and prospective precedent in the extant speeches, the idea that a jury was setting a precedent to be followed by future juries must be regarded as exceptional.

The lack of organized records of court decisions made it impossible for litigants to conduct thorough research of previous cases that might reveal useful precedents. The Metroon served as a public archive from the end of the fifth century, but there is no evidence that jury verdicts were kept there.[107] Public indictments were written—for temporary display only—on *sanides*, whitened boards at the alter of the Eponymous Heroes,[108] and although we have no contemporary evidence, some late and not very reliable sources suggest that copies of indictments were retained in the Metroon. According to a story in Athenaeus, Alcibiades erased an indictment in the Metroon;[109] Plutarch claims to quote from the indictment of Alcibiades;[110] and Diogenes Laertius writes that Miletus' indictment of Socrates was still in the Metroon in his day.[111] Assuming that indictments were regularly filed in the archive, what information could a litigant derive from them? From the indictments preserved in two of our extant speeches,[112] the charge against Alcibiades quoted in Plutarch,[113] and a parody of a charge in the trial scene of Aristophanes' comedy the *Wasps*,[114] it seems that the information in an indictment could vary widely. The charges in Demosthenes 45 and the *Wasps* merely state the names of the litigants, the procedure, and the amount sought, while the charge in Plutarch includes a short description of the alleged crime. The indictment in Demosthenes 37 tells a suspiciously long tale of the events leading to the dispute. Only if a litigant was already familiar with the case and happened to know the verdict could the indictment be at all helpful. In any case, Thomas has argued convincingly that the Metroon was more a haphazard collection of documents than an organized archive, and that

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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 jury 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.

107. *See* HARRISON, *supra* note 17, at 27-29; POSNER, *supra* note 17, at 108-10; THOMAS, *supra* note 17, at 34-94.

108. *See* Dem. 21.103; R. WYCHERLEY, THE ATHENIAN AGORA III: LITERARY AND EPIGRAPHICAL EVIDENCE nos. 237, 243 (1957).

109. Athenaeus, 9.407b-c.

110. Plutarch, *Alcibiades* 22.

111. Diogenes Laertius II.5.40.

112. *See* Dem. 45.46; 37.22-5.

113. Plutarch, *Alcibiades* 22.

114. Aristophanes, *Wasps* 894.

the act of making and filing documents did not necessarily mean that Athenians regularly consulted them.[115] Indeed, while speakers do at times note that they obtained copies of the laws from the Metroon,[116] none of the litigants who cited previous cases mention using the archive.

Another possible source of information are the public inscriptions which record the names of certain types of offenders. The names of debtors were recorded on the Acropolis,[117] traitors in the Bouleterion,[118] and murderers on the Areopagos.[119] These stelai generally did not include any details of the charge; Dinarchus notes that the pillar condemning Arthmius, which stated only that he was exiled for bringing Persian gold to the Peloponnese, was highly unusual for its detail: "his was the only case in which they added the reason why the people banished him from the city, explicitly writing it on the pillar . . ."[120] In only one case does a speaker use these public stelai as exempla of previous punishments for the current jury: Lycurgus' *Against Leocrates* has the names of traitors who have been inscribed on a pillar read out.[121] This speech can hardly be considered representative of forensic oratory in general: it is an exceptionally lavish speech which includes, among other things, references to Spartan laws and long quotations from epic and tragedy. For the most part, orators refer to previous cases as though they were part of public knowledge rather than the result of careful research in the Metroon. For example, Demosthenes claims that Meidias collected precedents by talking to people rather than inspecting stelai or visiting the archive: he has heard that as part of his preparation for defending himself from an assault charge, Meidias "goes around inquiring and collecting examples of people who have at any time been assaulted."[122] There was no way to verify a litigant's citation of a precedent,[123] and although citing a non-existent law in court was punishable by death, no decree outlawed the invention of favorable precedents.

The fact that verdicts were not recorded and that the court records which were kept do not seem to have been well-organized or regularly consulted indicates that consistency of verdicts and adherence to prece-

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115. THOMAS, *supra* note 17, at 37. *But see* JAMES P. SICKINGER, PUBLIC RECORDS AND ARCHIVES IN CLASSICAL ATHENS 115-59 (1999).

116. *See, e.g.,* Dem. 25.99; Lyc. 1.66.

117. *See* Dem. 25.4; 37.6,22; 58.16,20,48,50-1.

118. *See* Lyc. 1.117-8, 124-6.

119. *See* And. 1.77-9.

120. Din. 2.25. The authenticity of the arthmius decree has been questioned. For discussion, see IAN WORTHINGTON, AN HISTORICAL COMMENTARY ON DINARCHUS 309-11 (1992).

121. *See* Lyc. 1.118.

122. Dem. 21.36.

123. When discussing previous judicial procedures involving the current litigants, speakers usually ask persons who were present at the trial to testify. *See* Lys. 23-14; 17.8; Dem. 53.18; 30.32. In two cases, litigants have indictments from previous procedures read out, Dem. 38.15; 34.16-7, but there is no indication that they obtained them by consulting court records. *See* Dem. 38.15; 34.16-7; R. BONNER, EVIDENCE IN ATHENIAN COURTS 60 (1905).

dent were not, and indeed could not have been, primary goals of the Athenian legal system. The notion and even the practice of recording court decisions were not unheard of in the ancient world. Aristotle thought that all states should have a magistracy which held written copies of private contracts and of the verdicts of the lawcourts.[124] In archaic Athens, the function of *thesmothetai* was to "inscribe the laws and preserve them for the decision of the disputes."[125] These *thesmia* appear to have been the results of previous cases used by the *thesmothetai* as guides for decisions but not accessible to the general public.[126] In the fifth century lawcode at Gortyn, one of the duties of the *mnamon*, or "rememberer," is to inform the judge of previous decisions.[127] In a recent controversial article, Davies has argued that the inscriptions preserved from Gortyn are not 'codes' at all but that each represents the document issued by judges (the *kosmos* or *dikastai*) "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."[128] If Davies is right, we have at Gortyn an example of an attempt to record and incorporate generalized case law into the written laws. While Aristotle, the archaic *thesmothetai,* and the Gortyn inscriptions all indicate some desire for verdicts to be consistent with previous decisions, in none of these instances are the reasons for individual verdicts given to assist future litigants and judges in properly applying precedents to current cases. That crucial development in the notion of precedent had occurred in Graeco-Roman Egypt by at least the second century AD. Jones points out that on surviving papyri, a prefect records the underlying principle (*tupos*) which determined his verdict,[129] and litigants include with their petitions copies of decisions which had been given in similar cases.[130]

Despite the lack of organized court records in classical Athens, litigants do refer to previous cases in twenty-one of our extant speeches, roughly one-fifth of the total.[131] However, the manner in which speakers discuss precedents differs from modern legal reasoning in some important

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124. Aristotle, *Politics* 1321b35.

125. *Ath. Pol.* 3.4; *see* GAGARIN, *supra* note 6, at 51.

126. *See Id.* at 56; Michael Gagarin, *The Thesmothetai and the Earliest Athenian Homicide Law,* 111 TRANSACTIONS AM. PHILOLOGICAL ASS'N 71 (1981).

127. R. WILLETTS, THE LAW CODE AT GORTYN KADMOS col.ix.31 (1967). For *mnemones* generally, *see* Thomas, *supra* note 49, at 19-22.

128. John K. Davies, *Deconstructing Gortyn: When is a Code a Code?, in* GREEK LAW IN ITS POLITICAL SETTING, *supra* note 41, at 33.

129. P. Ryl. 75, 11.1-12.

130. *Sel. Pap.* ii, no.260. For discussion, SEE J. JONES, LAW AND LEGAL THEORY OF THE GREEKS 134 n.2 (1956).

131. *See* Dem. 21.72-6, 175-84; 24.138; 19.273; 20.146-8; 34.50; 59.116-7; Lys. 12.35ff; 13.56-7; 6.17; 22.16; Aesch. 1.86-8, 173; 2.6; 3.252-3, 258; Din. 1.13, 23ff; 2.14, 25; 3.17; Lyc. 1.52ff, 111-16; Andoc. 1.29-30; Hyp. 4col. 1-3, 33-4; 5col.27; Ant. 5.67. This list does not include references to previous cases involving the current litigants. This list was provided by Lene Rubinstein in her 1993 talk. *See* Rubinstein, *supra* note 92.

respects. The key element in arguing for consistency between cases is isolating the *ratio dicendi* of a previous verdict and applying it by analogy to the case at hand.[132] Even in modern legal systems, in which arguments from precedents are based on decisions written by professional judges, the process of eliciting a clear, valid rule of law from a judge's verdict is far from an exact science.[133] Athenian juries did not announce reasons for their verdicts (and in fact did not even deliberate), and it is likely that different jurors could be swayed by very different aspects of a litigant's case. Therefore any discussion of the *ratio dicendi* of a previous verdict by an Athenian litigant was by its nature entirely speculative.

As one of the basic criteria of legal consistency requires that no individual verdict conflict with existing rules or previous cases, modern lawyers spend more time explaining and distinguishing unfavorable precedents to show that their position is not inconsistent with previous case-law than adducing favorable precedents.[134] In three instances an Athenian litigant responds to his opponent's use of a previous case, but does not distinguish the facts of the current case from the precedent cited by his opponent.[135] There is, to my knowledge, only one example of a speaker discussing an unfavorable precedent on his own initiative, and in that case the litigant merely rejects unfavorable recent verdicts rather than attempting to distinguish his case from the recent decisions. In his defense of Euxenippus, a private citizen, Hyperides notes that the *eisangelia* procedure has traditionally been used only against orators and public men and lists several examples.[136] He goes on to discuss three recent precedents for bringing a private citizen to trial for trivial offences by *eisangelia,* and rather than arguing that his position is not incompatible with these recent decisions, he simply states, "the present practice of the city is absurd."[137] Athenian litigants do not distinguish unfavorable precedents because they were not expected to insure that their speeches were consistent with previous cases; a speaker could refer to precedents, like laws, if they strengthened his case, but there was not compulsion to do so. The lack of reasons for jury verdicts and the fact that litigants could choose to ignore unfavorable precedents indicates that the discussions of previous cases did not greatly encourage consistency in the Athenian legal system.

In more than half of the speeches which include references to previous decisions, Athenian litigants make no attempt to use the *ratio dicendi* of a past verdict as a guide for the proper interpretation and application of the laws in the current case. Eight of our passages record the penalties given in previous cases and urge the jury to treat the current defendant in

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132. *See* NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 60 (1994).

133. *See generally* RUPERT CROSS, PRECEDENT IN ENGLISH LAW (1979); KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA (1989).

134. *See* MACCORMICK, *supra* note 132, at 121.

135. *See* And. 1.29; Aesch. 2.6; Dem. 21.36.

136. *See* Hyp. 4col.1.

137. Hyp. 4col.2.

the same spirit of severity.[138] These passages do not shed light on how the jury should interpret the facts or laws involved in the current case, and often involve examples of punishment for crimes completely unrelated to the case at hand. For example, when prosecuting Demosthenes for corruption, Dinarchus cites three unrelated precedents: Menon, who kept a free boy in his mill; Themistius of Aphidna, who committed hubris against the Rhodian lyre maker at the Eleusinian festival; and Euthymachus, who put an Olynthian girl in a brothel.[139] In his action against Timocrates for an illegal proposal (*graphe paranomon*), Demosthenes mentions two previous decisions involving illegal proposals, but does not discuss the circumstances of these cases or attempt to relate them to the facts of the current case in any way:

> 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.[140]

Similarly, Hyperides notes the harsh penalties doled out in two previous cases to citizens who stole public money without relating these cases to Demosthenes' alleged crime,[141] and Lysias mentions the severity with which the Athenian people have treated corrupt grain-inspectors (*sitophulakes*) in the past, though his case actually concerns grain-dealers (*sitopolai*).[142] Most puzzling are the discussions of the punishments of the Arginusae generals[143] and Socrates[144]—hardly sterling exempla of Athenian justice—used by prosecutors to incite the current jury to find a guilty verdict. In all these passages, the speaker is simply providing past examples of severe punishments and encouraging the current jury not to be lenient in the current case. His inflammatory references to previous cases in no way assists the jury in reaching an appropriate verdict in the matter before them. In any case, arguments concerning previous punishments are very weak when used in the main speech of a case rather than in the assessment of penalties[145] because they presuppose that the defendant

138. *See* Dem.24.138; 34.50; Lys.12.35; 22.16; Din.1.23; Hyp.5.col27; Aesch.1.173; 3.252.

139. Din. 1.23.

140. Dem. 24.138.

141. Hyp. 5col.27.

142. Lys. 22.16.

143. Lys. 12-35. In 406 B.C. the Athenians put eight generals on trial for failing to rescue the bodies of their dead after the sea battle of Arginusae because of a storm. In a special judicial procedure, the entire Assemble condemned the generals to death. Xenophon tells us that the Athenians regretted this impulsive verdict almost immediately and scholars generally cite the loss of Athens' most experienced generals as one of the reasons for Sparta's victory just three years later. *See* Xenophon *Hellenica* 1.7.7-35. *See generally* DONALD KAGAN, THE FALL OF THE ATHENIAN EMPIRE 325-54 (1994).

144. Aesch. 1.173.

145. 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

is guilty. Indeed, Andocides points out this weakness in his accusers' discussion of previous punishments for impiety:

> The stories told you by the prosecution, who treated you to so shrill a recital of blood-curdling horrors, with their descriptions of past offenders who have made mock of the Two Goddesses and of the fearful end to which they have been brought as a punishment—what, I ask you, have such tales to do with me? . . . They have been guilty of impiety . . . I, on the other hand, have done no wrong, and therefore I deserve to go unharmed.[146]

In addition to citing previous penalties which do not assist the jury in deciding questions of guilt in a manner consistent with past decisions, in seven of our "precedents" the litigant does not attempt to reason by analogy from the circumstances of the previous case but simply compares the relative social positions of the past and current defendants.[147] The speech *Against Neaira*, for instance, describes a case in which a priest was convicted for impiety and offers this comment: "It is, then, a monstrous thing that a man who was of the race of the Eumolpidae, born of honorable ancestors and a citizen of Athens should be punished. . . . And this Neaira [a prostitute] . . . shall you not punish her?"[148] In a similar vein, the prosecutor in the Demosthenes 34 notes that a previous jury failed to find sympathy for a defendant who was the son of a general,[149] and in prosecuting the Harpalus affair, Dinarchus describes the past condemnation of Timotheus despite his distinguished services to the city.[150] 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.[151] The discussion of previous decisions does not even approach the level of abstraction which would encourage jurors to render verdicts which go beyond *ad hoc* settlements tailored to the facts and social positions of the current litigants.

Although more than half of the passages which discuss previous cases give a false impression of a notion of precedent, in eight of our one-hundred and three speeches litigants do attempt to apply *ratio dicendi* of

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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, *supra* note 16, at 254-8.

146. And. 1.29-30.

147. *See* Dem.20.146-8; 34.50; 59.116-7; 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.

148. Dem. 59.117.

149. Dem. 34.50.

150. Din. 1.13; 3.17.

151. 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." Sally Humphreys, *The Evolution of Legal Process in Ancient Attica,* in TRIA CORDA 229, 248 (E. Gabba, ed., 1983).

an earlier verdict.[152] Athenian litigants were certainly capable of reasoning by analogy,[153] but rarely chose to do so, presumably because such legal arguments were not very effective with a mass jury. Indeed, if Aristophanes' *Clouds* in any indication of popular sentiment, a wise litigant would probably avoid overly legalistic arguments.[154] The *Rhetoric to Alexander*, generally attributed to Anaximenes in the mid-fourth century, notes that earlier verdicts can be used to substantiate a speaker's interpretation of a vague law and provides a sample argument: "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 favor of this interpretation of the law."[155] However, only a small part of the treatise relates to arguments concerning legal issues (*to nominon*). In his 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 *choregus* at the Dionysia violated the law.[156] One such is the case of Euandrus, 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, which make Euandrus' 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 (*hubris*), paying so heavy a penalty for a breach of the law,"[157] and explains to the jury that he provides these precedents "in order that you may compare their guilt with that of Meidias."[158] Elsewhere in the same speech, Demosthenes speculates about the *ratio dicendi* of an earlier decision. He tells the jury how a certain Euaeon was condemned by only one vote for killing a man at a public banquet in revenge for one blow,[159] and then suggests how the jurors 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 him this license of revenge to a man who had suffered an outrage (*hubris*) on his person.[160]

We have seen that Leocrates, the defendant in Lycurgus 1, does not seem to have been charged with violating any specific law. Compensating for

152. *See* Dem. 21.72-6; 175-84; 19.273ff; Lys. 6.17; 13.56; Din. 2.25; Aesch. 1.86-8; Isoc. 18.22; Lyc. 1.52.

153. Reasoning by analogy is a common feature of sophistic writings. *See, e.g.,* Democritus 68B164. For discussion see G.E.R. LLOYD, POLARITY AND ANALOGY: TWO TYPES OF ARGUMENTATION IN EARLY GREEK THOUGHT *passim* (1966).

154. MATTHEW R. CHRIST, THE LITIGIOUS ATHENIAN 203-08 (1998).

155. *Rhetoric ad Alexandrum* 1422b20.

156. *See* Dem. 21.175-84.

157. Dem. 21.177.

158. *Id.,* at 175.

159. Dem. 21.71-6.

160. *Id.* at 75.

this embarrassing deficiency in his case, Lycurgus turns to precedent to justify his prosecution. He cites the case in which Autolycus was condemned for secretly sending his wife and children away when the city was in danger, carefully comparing his 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?"[161] The sophisticated use of previous cases in these passages is exceptional.

We have seen that although speakers pay lip-service to notions of consistency and precedent, in practice the lack of court records and the rarity of abstracted discussions of earlier verdicts in our extant speeches indicates that Athenian court decisions were primarily ad hoc judgments. Although the Athenian legal system did not achieve even a moderate level of consistency and predictability, the Athenian notion of precedent is not as removed from that of modern courts as it may at first appear. In modern legal theory judicial consistency is generally justified either as a requirement of fairness, and thus an end in itself, or merely as a policy which serves to enhance the authority of the law and the predictability of decisions.[162] The extravagant rhetorical gestures to the rule of law and precedent in Athenian lawcourt speeches seem to indicate that the Athenians recognized the value of promoting respect for the judicial process but were not prepared to sacrifice the broad discretionary powers of the Athenian juries for predictability. To borrow a famous phrase from Plate, the Athenians chose to tell themselves what they knew as a "noble lie."[163]

161. Lyc. 1.53.

162. For deontological theories of precedent, *see* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33-4 (1921); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1978); *see also* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 60-66 (1961) (examining the argument from predictability); Martin Shapiro, *Toward a Theory of Stare Decisis,* 1 J. LEGAL STUD. 125, 125-30 (1972) (discussing the importance of strengthening the authority of the law).

163. Plato, *Republic* 414b-c.