

*The Rule of Law in Athenian Democracy.
Reflections on the Judicial Oath*

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ABSTRACT

This essay examines the terms of the Judicial Oath sworn by the judges in the Athenian courts during the classical period. There is general agreement that the oath contained four basic clauses: (1) to vote in accordance to the laws and decrees of the Athenian people, (2) to vote about matters pertaining to the charge, (3) to listen to both the accuser(s) and defendant(s) equally, and (4) to vote or judge (*dikasein*) with one's most fair judgment (*dikaiotatê gnômê*). Some scholars believe that the fourth clause gave judges the right to vote according to their conscience and to ignore the law if they found it unjust. The first part of the essay shows that this clause gave judges the right to make decisions solely on the basis of their most just judgment only where the laws gave no clear guidance. It was a default clause invoked only twice in the extant orations; it was never used as justification to ignore the written laws. The second part addresses the view that the courts took political factors into account during trials. Although some trials involved leading politicians, the courts were bound by their oath to decide whether the defendant was guilty of the charge brought by the accuser. The only part of a trial where a defendant might mention his political achievements or his public largesse was at during the assessment of the penalty (*timêsis*) in a trial on a public charge (*graphê*).

0. The rule of law was one of the most important cultural values in Athenian democracy. When delivering the funeral oration for the Athenian soldiers who fell at Lamia in 322 BCE, Hyperides (*Epitaphios* 25) declares: "For men to be happy they must be ruled by the voice of law, not the threats of a man; free men must not be frightened by accusation, only by proof of guilt; and the safety of our citizens must not depend on men who flatter their masters and slander our citizens but on our confidence in the law." (trans. Cooper). In another funeral oration (this one probably not delivered), Lysias (2.19) praises the ancestors of the Athenians because "They thought it characteristic of wild animals to gain power over each other through violence, but that men ought to define what is just by law, persuade each other with reason, and serve both these aims by submitting to the rule of law and being instructed by reason."¹ Thucydides (2.37) attributes a similar idea

¹ All translations of Greek texts in this essay are my own unless otherwise indicated.

to Pericles in the funeral oration he delivered in 430 BCE: “In public life we do not violate the laws because we obey those in office at any time and the laws, especially those established to help those who are wronged.” In the Ephebic Oath, which the young men of Athens swore every year, each ephebe promises to obey the established laws and any laws that may be established prudently in the future.²

The Athenians did not find the rule of law incompatible with the idea of popular sovereignty. In fact, they believed that the two ideals went hand in hand. Aeschines (3.6) asserts that when the Athenians obey the laws, the democracy remains safe. The same orator says that when the courts allow themselves to be distracted by irrelevant charges, the laws are neglected, and the democracy undermined (Aeschin. 1.179. Cf. 3.23). In his *Against Timocrates* Demosthenes (24.215-6) goes so far as to claim that the power of Athens derived from its citizens’ obedience to the laws:

Although you should be angry with everyone who establishes shameful and wicked laws, you should be most angry with those who corrupt the laws that make our city weak or great. What are these laws? Those that punish wrongdoers and grant honors to the just. If all men were eager to do good for the community and ambitious to gain honors and awards for this, and if all were to refrain from criminal acts out of fear for the harm and penalties imposed on them, what prevents our city from being great? Does Athens not have more triremes than any Greek city? More hoplites? More cavalry? More revenue? More possessions? More harbors? What protects and preserves all these things? The laws. When the city obeys them, all these resources serve the common interest.

But the rule of law was not a mere slogan invented only for rhetorical purposes. The Athenians did their best to put this ideal into practice in their daily life and especially in their courts. Every year the six thousand men who were selected to serve as judges swore an oath to cast their votes in accordance with the laws and decrees of the Athenian people. According to Pollux (8.122) and Harpocration (s.v. *Ardeittos*) the judges swore the oath near the Ilissus river in the deme of Ardeittus named after an Attic hero. In the speeches delivered before Athenian courts, litigants often refer to the oath and clearly expect the judges to abide by it.³ Despite the clear implications of the oath, some scholars have claimed that the Athenians did not attempt to establish the rule of law.⁴ In their opinion, the judicial oath did not bind them to follow the law. As a result, they assert (mostly without evidence) that Athenian judges paid more attention to extra-legal considerations than they did to the laws. The courts were thus not “guardians of the laws”

² Rhodes and Osborne (2003) #88, lines 12-4.

³ For example, see Antiphon 5.7; Demosthenes 18.2, 249; 19.1; 132, 134, 161, 239, 297; 20.119, 159, 167; 21.24, 177, 211-2; 22.39, 46; 23.96, 101; 24.35, 148-50, 175, 191; 27.68; 29.4; 36.1, 61; 39.37, 41; 43.84; 45.87, 88; 58.17; Isaeus 2.47; 4.31; 8.46; 11.18; Isocrates 18.34; Lysias 14.22, 46;

⁴ E.g. Ober (1989), Lanni (2006).

(Dem. 24.36), but arenas for political ambition or feuding.⁵ In the glossary of one recent collection of essays on Athenian law, one cannot even find any mention of the judicial oath.⁶

This essay falls into two parts. The first part takes fresh look at the judicial oath and studies its basic provisions. In particular, it analyzes the phrase “I will vote with my fairest (or most just) judgment (*gnômê dikaiotatê*)” and corrects some recent misunderstandings of this pledge. The second part examines the role of the laws in judicial decisions in Athenian courts and to what extent judges took extra-legal factors into account.

1. There has been some debate about the precise wording of the oath, but there is general agreement about four basic clauses in the oath.⁷ These are:

1) To vote in accordance to the laws and decrees of the Athenian people (e.g. Aeschin. 3.6; Antiphon 5.7; Dem. 20.118).

2) To vote about matters pertaining to the charge (Aeschin. 1.154; Dem. 45.50. Cf. Aeschin. 1.170).

3) To listen to both the accuser(s) and defendant(s) equally (Aeschin. 2.1; Dem. 18.2; Isoc. 15.21. Cf. Lucian *Cal.* 8).

4) To vote or judge (*dikasein*) with one’s most fair judgment (*dikaiotatê gnômê*) (e.g. Dem. 23.96; 57.63).

The first three pledges are relatively straightforward and have given rise to no major disagreement among scholars. The second pledge appears to have generally been observed: a recent study by Rhodes has shown that litigants in Athenian courts attempt to “stick to the point” and expected the judges to pay attention only to issues relating to the charge brought against the defendant.⁸ This means that if an accuser brought a case of homicide against someone, the court was only to

⁵ The most extreme proponent of this view is Cohen (1995). On the flaws of this approach see now Harris (2005).

⁶ Cartledge, Millett, and Todd (1990) 232 has an entry under Oath, but does not mention the Judicial oath.

⁷ The text of the oath found at Dem. 24.149-51 is not an accurate version but was composed by a later writer and inserted into the text of the speech. One strong argument against its reliability is its omission of the fourth pledge in the oath, which is amply attested in contemporary sources. The document contains some genuine parts of the oath but also elements that are unlikely to have been found in the actual oath. On the oath see especially Fraenkel (1878), Drerup (1898) 256-8, and Bonner and Smith (1938) 152-56, esp. 155: “It is certain that the passage in Demosthenes by no means represents the heliastic oath as it was sworn in any one period, but that various details are included which would be found in the oath at every period: the promise to vote according to the laws and decrees of the Athenian people and the council of the five hundred, the promise not to accept bribes, the promise to listen impartially to both sides of the case and to vote on the subject at issue, the calling of the gods to witness, and the curse.”

⁸ Rhodes (2004).

judge whether or not he had committed the offense of homicide. Litigants might interpret this pledge rather loosely and obviously had a much broader notion of “relevance” than modern courts do. For instance, litigants sometimes discuss the wider context of the case and the motives of their opponents (e.g. Antiphon 6.33-46). In some cases (e.g. Dem. 56.11-7) they discuss previous attempts at settlement as a way of portraying their opponents as difficult and unreasonable; this tactic is strictly forbidden in American courts. In general, however, litigants attempt to make all their statements relevant (either directly or indirectly) to the main charge.

The fourth pledge has been the subject of some debate. The orators rarely quote or refer to this part of the oath. When they quote or paraphrase it, they appear to interpret it in two different ways. In his *Against Leptines* Demosthenes (20.118) says: “As for matters where there are no laws, you have sworn to follow your most honest judgment.” In *Against Boeotus* (Dem. 39.39-40) there is a similar version. But in *Against Aristocrates* (Dem. 23.96-7) this pledge appears to have a different meaning: “They have sworn to judge with their most just judgment, but the decision made by their judgment depends on what they hear. Now when they cast a vote in accordance with this, they are righteous. For everyone who casts his vote neither through enmity nor through favor nor any other unjust reason against their judgment, is righteous (i.e. upholds his oath).” In *Against Eubulides* (Dem. 57.63) we find the same view of this pledge: “They have erased from the oath the pledge to vote according to one’s most just judgment, not out of favor or enmity.”⁹

One might therefore infer that the oath only contained the word “I will vote (or judge) with my most fair judgment” and argue that the actual text of the oath did not contain these phrases and that they are only the interpretations invented by litigants.¹⁰ This argument faces two obstacles. First, Pollux (8.122) explicitly states that the phrase “about issues for which there are no laws” was in the oath. Second, there are several parallels for this phrase in oaths from other Greek communities. The closest parallel comes from the Gymnasiarchal Law from Beroia dated to the second century BCE.¹¹ Every year the man elected to serve as gymnasiarch was required to swear: “I will perform the office of gymnasiarch according to the law about the gymnasiarch and regarding all matters not written in the law I will (perform the office) using my own judgment as best I can following the rules of justice and morality (*hosiotata kai dikaiotata*), neither doing favors for a friend nor harming an enemy in violation of justice” (lines A 26-30).¹² Like the judicial oath in Athens, the gymnasiarch promises to obey the law and use his best judgment only in cases where the law gives no guidance. He also pledges to act impartially, without special regard for friends or enemies. The wording is slightly

⁹ Plato *Apology* 35c appears to allude to this part of the oath.

¹⁰ Thus Mirhady (forthcoming).

¹¹ For the date see Gauthier and Hatzopoulos (1993) 35-41.

¹² For the text see Gauthier and Hatzopoulos (1993) 18.

different from the oath in Athens, but the terms of the both oaths correspond very closely.

There is another parallel in an inscription from Eresos dated to the reign of Alexander the Great.¹³ The inscription records a decree from Eresos establishing procedures for the trial of tyrants in accordance with a *diagraphê* of Alexander. The decree instructs the judges in the case to swear: “I shall judge the case, as far as it lies within the laws, according to the laws, and in other regards industriously, as well and as justly as possible” (lines 9-17) (trans. Rhodes). Here a distinction is also made between cases where the laws provide guidance and other kinds of cases, those presumably where the laws do not give answers about how to decide.¹⁴ Another parallel can be found in a decree recording a treaty between Temnos and Clazomenai dated to the early second century BCE: “Let the following be the oath: I will judge cases for the people of Temnos and the people of Clazomenai and the metics and the rest of those dwelling in those cities who have lawsuits according to the treaty (*synthêkai*), but about matters that have not been written in the treaty, with my most just judgment (*gnômê dikaiotatê*).”¹⁵ Here the term “treaty” (*synthêkai*) has been substituted for “laws,” but the general phrasing and ideas are the same. These parallels show that there is no reason to doubt that the phrases “about issues for which there are no laws” and “without hatred or favor” were in the oath sworn by Athenian judges.

In his *Rhetoric* Aristotle appears to allude to this part of the judicial oath in his discussion of the judges’ pledge to “vote with one’s best judgment.” It might be tempting to rely on Aristotle’s analysis of the phrase in his *Rhetoric* for an understanding of this part of the judicial oath, but that temptation should be resisted. Aristotle’s *Rhetoric* is a work of theory; it does not claim to describe the actual discursive practices of the Athenian courts. Its discussion of forensic rhetoric in chapters 13-15 of Book I does outline some arguments similar to those found in the court speeches of the orators. But many of the arguments presented there never occur in these speeches.

Aristotle’s discussion needs to be placed in context. Aristotle (*Rh.* 1.15.1375a5-b12) advises the potential litigant in two potential cases: one where the written law does not favor one’s case and another where it does. For the first possibility he advises: “If the written law is contrary to our case one must use the common law and arguments based on fairness (*epieikeia*) because they are more just; that to judge according to one’s best judgment is not to follow the written laws in all cases (*pantelôs*).” On this interpretation, the pledge to judge with one’s most just judgment grants the judge the right to ignore the written law. Three points need to be made immediately. First, this interpretation of the oath is never attested in Attic oratory. Second, the actual wording of the oath, confirmed by sev-

¹³ Rhodes and Osborne (2003) #83 iii, lines 9-17.

¹⁴ A similar distinction has been restored in the judicial oath found in an Amphietyonic Law - *IG* ii² 1126, lines 2-3.

¹⁵ *SEG* 1130bis.28030 = Herrmann *MDAI(I)* 29 (1979) 249-71).

eral parallels, restricts the judge's reliance on his most just judgment alone to instances where "there are no laws." Thus this interpretation is actually contradicted by the very terms of the oath. Third, this interpretation of this phrase would place the fourth pledge in the oath in potential conflict with the first pledge ("I will vote in accordance with the laws and decrees of the Athenian people"). It is highly unlikely that the oath would have bound the judge to potentially contradictory pledges.

The arguments about not following the written law that follow support this conclusion. They are:

1) Fairness (*to epieikes*) always remains and never alters nor does the common law (for it is in accordance with nature) but written laws often change.

2) The just is something true and advantageous, but what appears to be just may not be; thus, the written law may not be; for it does not perform the function of law. The judge is like one who tests silver insofar as he distinguishes counterfeit justice from the true.

3) It is the task of the better man to follow and abide by the unwritten laws rather than the written laws.

4) If a law is contrary to a well esteemed law or is self-contradictory (for example, in some cases one law provides that all agreements are binding, but another forbids one to make agreements contrary to the law) [the written law should not be followed].

5) If a law is ambiguous, so that one can twist it and see to which interpretation justice or advantage lends itself, one should then use that one.

6) If the circumstances in which the law was established no longer remain, one should try to make this clear and use this argument to combat the law.

None of these arguments is ever found in the court speeches of the Attic orators. For instance, no litigant in the extant orations ever argues that the court should ignore a law because it is obsolete (argument #6) or that one should rely on fairness (*epieikeia*) because the laws often change (argument #1).¹⁶ The third argument is based on the view that the unwritten laws are potentially in conflict with the written laws and holds that one should give preference to the unwritten laws over the written laws. In the only two passages in the orators where the unwritten laws are mentioned, however, we find a very different view of the relationship between the written and unwritten laws. In his *On the Crown* Demosthenes (18.274-5) discusses three levels of culpability: doing wrong willingly (*hekôn*), doing wrong unwillingly, and lack of success where there is no wrongdoing or mistake. Demosthenes continues by observing that these distinctions are not only found in the laws, but also in the unwritten laws set down by nature (for the distinction between willing and unwilling actions see also Dem. 21. 41-6). In *Against Aristocrates* Demosthenes (23.70) claims that Aristocrates' decree violates both

¹⁶ *Epieikeia* is mentioned only once in the orators at Dem. 21.90 but the argument there does not resemble Aristotle's in this passage. For the role of *epieikeia* in Athenian courts see Harris (2004).

the written and unwritten laws. Thus when Demosthenes mentions the unwritten laws in an argument, he sees no conflict between the two kinds of laws.¹⁷ Indeed, his view of their relationship with the written laws is exactly the opposite of Aristotle's view in this passage of the *Rhetoric*.

Nor does any litigant ever state that a law is ambiguous.¹⁸ On the contrary, the Athenians believed that their laws were easy to understand and that the meaning of their laws was clear (Dem. 20.93). If a word or phrase in a law could be interpreted in different ways, litigants do not say that the meaning of the law was ambiguous, but employ a very different type of argument. For instance, the term *archê* in the law about the award of crowns for public officials could have two different meanings, either "term of office" or "magistrate" (for a quotation of the law see Aeschines 3.31).¹⁹ If one takes the first meaning, the law only forbids the award of crowns to officials who have not yet undergone their audit for performance of their duties in office, but does not forbid crowns granted for other reasons (single acts of valor or generosity, a lifetime of public service). If one adopts the second meaning, the law forbids the award of a crown for any public official who has not yet undergone his audit for any reason. Yet in their speeches at the trial of Ctesiphon neither Aeschines nor Demosthenes states that the law was ambiguous or that one of its key terms could be interpreted in two ways. In his paraphrases of the law, Aeschines (3.11) implicitly interprets it in the latter way, but appears to assume that this is the natural or customary meaning of the law. Demosthenes (18.111-19) likewise does not draw attention to the law's potential ambiguity or that there are two possible ways of interpreting it. Instead he accuses his opponent of twisting the meaning of the law to suit his case (Dem. 18.111). He too takes the "natural" meaning of the law for granted, but is in a stronger position because he has numerous precedents to support his view.²⁰ So when there is an ambiguity in the law, litigants do not say that the judges must apply their own best judgment (as Aristotle advises). Instead they cite precedents or the intent of the lawgiver as it is found in written statutes to show that their interpretation of the law is to be preferred.²¹

The same is true of the sixth argument proposed by Aristotle for ignoring the written law. Nowhere in any extant judicial speech does a litigant say that the

¹⁷ For the relationship between the unwritten and written laws of the *polis* see Harris (2006a) 53-7.

¹⁸ In fact, the word used by Aristotle in this passage to describe an ambiguous law (*ambibolos*) never occurs in all the speeches of the Attic orators.

¹⁹ For an analysis of the legal arguments at the trial of Ctesiphon see Harris (2000) 59-67.

²⁰ For Demosthenes' use of precedents in this speech see Harris (2006b) 362-3.

²¹ For the use of precedents see, for example, Lysias 3.41-3. The defendant disagrees with his accuser about the nature of the intent in the charge of *trauma ek pronoias*. The defendant claims that the intent in *ek pronoias* must involve advance planning, not merely deliberate action. To justify his view, he appeals both to the intent of the lawgiver and previous decisions by the Areopagus. On the use of precedents in Athenian law see Harris (2006b).

judges should ignore a law because it is obsolete. The attitude toward old laws found in the speeches is quite the opposite: speakers often praise old laws either because they were established by a venerable lawgiver like Draco or Solon (e.g. Dem. 20.90, 158) or because they have stood the test of time and have proven their value. The view of Antiphon (6.6. Cf. 5.14) is characteristic: “Everyone would agree in praising the laws governing these matters as the finest and most righteous of laws. They are the oldest established laws and have always remained the same, which is the best sign of well enacted laws for time and experience teach people the faults in things” (trans. Gagarin). Once more, Aristotle’s analysis cannot be used as a guide to the rhetorical strategies employed in Athenian courts.

By the same token Aristotle’s discussion of the phrase “with one’s best judgment” cannot be used as evidence for the way Athenian litigants and judges interpreted the judicial oath. As the wording of the oath makes clear, its pledges bound judges to vote in accordance with the laws and decrees of the Athenian people. Judges were to rely on their most just judgment alone just in cases where there were no laws pertaining to the issue being debated. This was clearly a default clause to be used only in exceptional cases.

But how often did litigants believe that it was necessary to resort to this default clause? Were there so many gaps in the Athenian lawcode that judges often had no choice but to rely on their own judgment? Some scholars assume that Athenian laws were so riddled with contradictions and ambiguities that they provided inadequate guidance, making it necessary to make up their minds on general considerations of justice.²² This assumption is contradicted by the evidence of the extant court speeches: in the roughly one hundred orations written for delivery in court, this default clause in the oath is mentioned only twice. This stands in marked contrast to the pledge binding judges to vote in accordance with the laws and decrees of the Athenian people, which is quoted, paraphrased, or alluded to dozens of times.

The passages where the clause is found deserve scrutiny. The first occurs in Demosthenes’ speech *Against Leptines* (20.118-9). Just before mentioning this clause, Demosthenes reminds the judges about the first clause: “You have come here having sworn to judge in accordance with the laws, not those of the Spartans or the Thebans, nor even those that your earliest ancestors followed, but those under which they received the exemptions that this man here is taking away through his law.” Up to this point, in fact, Demosthenes has built his case against Leptines’ law in part on its procedural violations of the existing statutes. In particular, he discusses the law that requires anyone wishing to propose a new law first to repeal any opposing statutes (Dem. 20.92). He charges Leptines with having violated this law by failing to repeal the law making all awards granted by the people irrevocable before enacting his own law abolishing the exemptions (Dem. 20.95-7). He then continues:

²² E.g. Christ (1998) 195-6.

As for matters where there are no laws, you have sworn to follow your most honest judgment. Apply this kind of judgment to the entire law. Is it not then right to give honors to your benefactors? It is right. What next? Is it not right to allow people to keep what someone once has given them? It is right. Then do this in order to abide by your oath, and show your anger if anyone claims that your ancestors acted differently. If anyone should cite examples of cases where those men did not grant an honor to someone after receiving an important benefit, you should consider them dishonest and uncouth, dishonest because they tell lies about your ancestors and misrepresent them as ungrateful, uncouth because they are unaware that even if that was the way things were, it is their duty to deny it rather than to repeat it. (Dem. 20.118-19).

In this passage Demosthenes does not ask the judges to rely only on their most just judgment. He uses this clause to introduce another argument based on general considerations of justice in addition to (and not as a substitute for) arguments based on the written laws.

The clause is used in a similar way in the other passage where a litigant appeals to it in Demosthenes' speech *Against Boeotus I* (39.39-40). The accuser is a man named Mantitheus who has brought a suit against his half-brother Boeotus for using his name.²³ He claims that if Boeotus continues to use the name Mantitheus, it will cause him enormous hardship. In the final part of his speech, Mantitheus challenges Boeotus to find a law that gives children power over their names. To anticipate his reply, he reminds the court that the law gives parents the power to give their children names and also to erase these names and disinherit them if they wish. Here he says that the judges "have sworn to vote with their most just judgment so that if there is no law laid down about the topic, even in this case, they would rightly cast their vote for him." He next asks the judges if any of them have given his child two names or if those without children will do so. "No, of course," he replies for them. If in their opinion this is right for their children, then it is right (*hosion*) for them to decide this way in his case. In the final words of the speech, Mantitheus concludes that the judge should vote for him both on the grounds that such a decision is in accordance with their most just judgment, the laws, and their oath. Thus Mantitheus does not invoke this part of the oath because he has no laws to support his case and must resort to the judges' most just judgment alone. Nor does he use this clause to undermine the validity of the existing laws. Like Demosthenes in *Against Leptines*, Mantitheus uses this part of the oath to introduce a supplementary argument in addition to his arguments based on the written laws. One should not therefore use this clause of the judicial oath as an argument that the laws of Athens were full of gaps and that as a result judges relied on their own judgment.²⁴

²³ For an analysis of the legal issue in the speech see Harris (2000) 54-59.

²⁴ As, for example, does Harrison (1971) 48: "The general tenor of the oath suggests that the juror (*sic*) is to vote according to his conscience; there would certainly have been many cases not completely or not at all covered by law or decree." Harrison does not examine

Nor should one claim that the laws and justice represented two different standards with the latter superior to the former and that the clause about using one's must just judgment gave judges the right to follow their judgment if they believed that justice was in conflict with the laws.²⁵ As noted above, this would place the two clauses of the oath in opposition to each other. Second as we have seen this clause is never used this way. Third, there is no reason to think that litigants and judges regarded the laws and justice represented two different standards. In fact, litigants used the terms law and justice as virtual synonyms and never view the two as in conflict. The following passages illustrate the point:

Aeschines 3.199-200: "For *justice* is not left undefined, but has been defined in your *laws*. As in carpentry when we would like to know what is straight and what is not, we set the ruler, which we use as a standard, next to it, so in public actions against illegal proposals there is available as a ruler of *justice* this tablet with the decree proposed and the *laws* written next to it."

Antiphon 5.7: "For you it is just and in accordance with your oath, for you swore to judge the case according to the laws (*nomous*).

Antiphon 5.87: "If you convict me, I am compelled by necessity to submit to *justice and the law* even if I am not the murderer and no responsibility for the crime."

Isaeus 2.47: "Remember the law and the oath that you have sworn and what has been said about the case and cast a vote that is *just*, true to your oath, and in conformity the *laws*."

Isaeus 4.31: "Remember the *laws* and the oaths that you swore, and also the testimony that we have provided and cast a *just* vote."

Isaeus 6.65: "If you order him to prove the allegation made in his claim, you will cast a righteous vote in accordance with the *laws*, and *justice* will be done for these men."

Isaeus 8.46: "Remember, therefore, the oaths that you swore when serving as judges and the arguments that we have made and the *laws* and casts a vote as *justice* requires."

Isaeus 9.35: "Therefore lend me your support, and if Cleon is more talented at speaking than I am, do not let this talent, which is without *law* and *justice*, prevail, but make yourselves arbitrators of the entire case."

the passages where the default clause is cited and provides no evidence at all to support his sweeping statement. For a similar view see Ruschenbusch (1957), who claims that there were gaps in Athenian law, but most of the evidence discussed pertains to the alleged lack of clarity of Athenian statutes, a very different issue.

²⁵ For the view that law and justice represented two different standards see Christ (1998) 195: "While law was in a certain uncontroversial sense a standard (*kanôn*: Lyc. 1.18-9; cf. Aeschin. 3.199-200) of the courts, jurors (*sic*) determined how and whether to enforce the laws on the basis of a more fundamental standard - namely their sense of "what is just: (*ta dikaia*)." The passages cited below decisively refute Christ's assumption that the Athenians believed that their laws and justice were two different standards.

Isaeus 11.18: "...those who were judging the case considered *justice* and their oaths very important with the result that they voted for me because my case was in accordance with the *laws*."

Isaeus 11.35: "This is what is most *just*; this is also what the *laws* command..."

Lysias 9.19: "Their action was completely in accordance with the *laws* and fairness (*eikos*), and they clearly committed no injustice, but paid most attention to what is *just*."

Lysias 14.22: "So that if *justice* is not on their side, and they demand that you do them a favor, you must bear in mind that they are telling you to violate your oath and disobey the *laws*,..."

Lysias 14. 42: "Have they not acted contrary to *justice* and *law* both toward other people in public and in their personal relations?"

Lysias 14.46: "Read the *laws*, the oaths, and the charge to the judges. Let them keep these in mind and give a *just* verdict."

Demosthenes 43.34: "Whoever of these two you think speaks more *justly* and more in conformity with the *laws*, it is clear that you will take his side."

Demosthenes 43.52: "This is what the *law* states, and this is what is *just*."

Demosthenes 43.60: "But if Theopompus has died, the *laws* have not died, nor has *justice* died, nor have the judges who decide the case."

Demosthenes 43.84: "Defend the laws and take care of the dead so that their house does not become abandoned. By doing this you will cast a *just* vote, one that is in conformity with the *laws* and in your interests."

Demosthenes 46.28: "I implore and beg all of you, men of the court, to defend me and to punish those who so readily give false testimony for your own sake, for mine, for *justice*, and for the *laws*."

Note that in many of these passages, the litigant explicitly states that a just vote is one cast according to the laws. One should also bear in mind that several of these passages are the last words in a speech. They thus are found in a very prominent place, which amply demonstrates how much stress litigants placed on the equivalence of law and justice. What these litigants wanted the judges to bear in mind as they decided how to vote was that they had sworn an oath and that oath required them to vote in accordance with the laws, not just in a way that seemed right to them.

The message of the judicial oath is clear: it bound the judges to vote in accordance with the laws. It is therefore not surprising that when orators mention or allude to the oath, they also mention the laws.²⁶ On the other hand, the importance of the clause "I will vote with my most fair judgment in cases where there are no laws" should not be exaggerated or taken out of context. Above all, it did not grant the judges the right to ignore the law if they considered it wrong. What is most striking (and most ignored by some scholars) is how rare this clause is invoked and how it is used in the only two passages where it is found. And in no extant

²⁶ E.g. Dem. 19.134, 239, 297; 21.177, 211; 22.45; 23.101; 39.41; 27.63; Isaeus 2.47; 8.46.

speech delivered in an Athenian court does a litigant rely solely on this clause and ignore the pledge to vote in accordance with the laws.

2. Despite the evidence of the judicial oath, it has become fashionable in some circles to claim that trials in Athens were political events.²⁷ According to this view, the courts did not primarily serve as “guardians of the laws” (Dem. 24.36), but were arenas for political and social contests. Litigants aimed to use the courts as weapons in political struggles, and decisions were made on the basis of political or social considerations.²⁸ There is no reason to doubt that many trials in Athens were “political” to some extent, but one must be careful to define what one means by the term “political.” This is especially true nowadays when the terms “political” and “politics” have been stretched so far that they seem to mean almost anything. In recent scholarship “politics” is often used of any activity where there is a struggle for power and influence. But when examining Athenian attitudes, one must be careful to analyze their behavior in terms of their own practices and ideas.

The Athenians drew a general distinction between *ta koina* or *ta politika*, matters pertaining to the community, and *ta idia*, matters pertaining to private individuals. Decisions about the former were made in the Council and Assembly or left in the hands of officials appointed by the community. Decisions about private life concerned activities like marriage, friendship, and personal finances. A trial on a private charge (*dikê*) was not political in the Athenian sense of the term. It arose because of a private dispute between individuals, and its outcome did not have broad implications for the community. Even if the defendant in a private case were a famous politician, the outcome of such a trial would have little, if any, effect on his political career. For this reason a litigant in a *dikê aikeias* states that his public service is simply not relevant to the case (Dem. 54.44).

A trial on a public charge (*graphê*) might by contrast be political in one sense: it might involve prominent politicians whose careers were affected by the outcome of the trial. For instance, Pericles was removed from office, convicted and fined in 429 BCE (Th. 2.65). His trial had a temporary (but not long-lasting) effect on his political career. Alcibiades’ trial *in absentia* for impiety resulted in a sentence of permanent exile, which put an end to his political career in Athens - for the moment (Thuc. 6.61). Timotheus was convicted and received an enormous fine, which forced him out of politics (Dinarchus 1.14). Aeschines’ humiliating loss at the trial of Ctesiphon appears to have driven him from politics and possibly into exile.²⁹ In this sense one could call some trials in Classical Athens “political.”

²⁷ The most extreme proponents of this view are Ober (1989) and Cohen (1995). Although popular among some social historians, this view is not shared by many legal historians.

²⁸ For example, see Todd (1993) 29: “politics and law were at Athens ultimately indistinguishable.” This extreme statement is well criticized by Christ (1998) 42-3.

²⁹ On the verdict see Harris (1995) 148.

But there is no reason to think that the Athenians view trials as just another political procedure no different from policy-making in the Council and Assembly.³⁰ Nor are there grounds for believing that the courts normally decided cases on political grounds. In the accounts they give of judicial verdicts, litigants almost never say that the judges voted for an accuser because they favored his policy or against a defendant because they were opposed to his political agenda. For example, the trial of Euctemon involved several active politicians, but the outcome of the trial was not determined by political factors (Dem. 24.11-14). During an embassy to Mausolus, Androtion and two other ambassadors sailing on an Athenian vessel captured an enemy ship off Naucratis in Egypt. The Assembly decided that the ship was enemy property and thus belonged to the state. Euctemon proposed that the people recover the money from the trierarchs who captained the Athenian ship and that the trierarchs could then collect it from those who held it. If there was any dispute, there would be an adjudication among the claimants (*diadikasia*), and the person who lost would hand over the money to the city. Androtion, Glaucetes, and Melanopus brought a public action against the decree, which must have been a *graphê paranomôn* (action against an illegal decree). According to the speaker, it was judged that the decree was proposed in accordance with the laws, and the defendant was acquitted.³¹ The reason given for the court's decision is that the accuser did not prove the legal charge against the defendant. Nothing is said about the political aspect of the case.

When litigants mention the public services of defendants, they say that they had no effect on the decision of the judges. Take, for example, the account given by Aeschines (3.195) of the trial of Thrasybulus of Steiria soon after the restoration of the democracy in 403 BCE: "Archinus of Coele brought a public charge for an illegal decree against Thrasybulus of Steiria, one of the men who returned with him from Phyle although his public services were very recent. *The judges did not take them into account.* They considered that just as Thrasybulus had restored them from exile, he was attempting to send them into exile again by proposing an illegal motion."³²

One finds a similar analysis of Timotheus' conviction for bribery in Dinarchus' *Against Demosthenes* (14): "Men of Athens, you did not take Timotheus' achievements into account. He sailed around the Peloponnese and defeated the

³⁰ For the division between the deliberative and judicial parts of the Athenian *polis* see Th. 2.37 with Harris (2006a) 29-39.

³¹ Compare the analysis given by Demosthenes (18.249-50) for his acquittal in a *graphê paranomôn*: the court found that his proposal was made in accordance with the laws. Although the trial involved active politicians, Demosthenes does not say that politics affected the verdict.

³² Aeschines (3.196) goes on to claim that generals who have received maintenance at the Prytaneum now ask to be acquitted presumably on the basis of their public service, but Aeschines does not say they are successful and gives no names of specific examples. The passage is a typical lament about the decline of contemporary morals and is no more than empty rhetoric.

Spartans in a naval battle near Corcyra. He was the son of Conon, who liberated the Greeks and captured Samos, Methone, Pydna, Potidaea and twenty other cities as well. *You did not allow public services like these to influence the trial or the oath that you obeyed while casting your votes*, but you fined him one hundred talents because Aristophon said he received money from the Chians and Rhodians.” Both orators may be simplifying a complex reality, but they must be presenting an analysis of the court’s reasons for its decision that would have appeared plausible to the judges and the audience attending the trial. In each case, the defendant had an impressive record of public service, yet both Demosthenes and Dinarchus say that the generals were convicted because they were guilty as charged. They also assert that the judges obeyed their oath and were not swayed by political considerations.

Promises by accusers to pay large political rewards also did not make the judges betray their oath. Hyperides (4.35-6) reports that Lysander charged Epicrates of Pallene with digging his mine inside the limits of another man’s mine and promised to bring in three hundred talents for the city’s budget.³³ “The judges paid no attention to the accuser’s promises but followed what justice required: they determined that the mine was inside its own boundaries and by that same vote made their property secure and confirmed the rest of their period for working the mine.” The accuser’s promise did not sway the judges; they paid attention to the law and the facts of the case. When they saw that the defendant’s actions did not violate the law and that he was not guilty of the charge of encroaching on another’s mine, he was acquitted. Political factors did not play a role despite the accuser’s best efforts.

When the orators mention the social status of a defendant, they normally indicate that the courts were not influenced by it. For instance, Demosthenes recalls the trial and execution of a man named Pyrrhus, who was a member of Eteobutadae, a famous *genos*, from whom the priestess of Athena Polias was selected (Aeschines 2.147).³⁴ Despite his high social status, Pyrrhus “was denounced for serving as judge when he owed money to the treasury, some of you thought that he must be put to death, and after being convicted in your court, he was executed. And yet he tried to receive his payment because of poverty, not to commit abuse.” The judges might have taken either of two factors, his social status or his poverty, into account, but they looked only at his actions.³⁵

If the courts allowed factors like public service or social status to influence their decisions, they would not only have violated their oaths but also Athenian

³³ For the nature of the charge see Whitehead (2000) 248-9 with references to earlier literature.

³⁴ On this *genos* see Parker (1996) 290-93.

³⁵ See also Dem. 54. where the Areopagus convicted a man and sentenced him to exile for deliberate homicide despite the fact that he was the father of the priestess of Brauron. For the nature of the charge see Harris (2006a) 397-8.

belief in equality before the law (*isonomia*). Theseus in Euripides' *Suppliant Women* (429-37) succinctly expresses the ideal:

There is nothing more inimical to a city than a tyrant. In this case, first of all

the laws are not common property, but one man owns the law for himself.

There

is not longer any equality (*ison*). But when the laws are written, the weak and the

rich have equal justice, the weaker have the same right to speak as the fortunate

when the former is slandered, and the lesser man prevails over the mighty when

he has justice on his side.

Although the public service or social status of a defendant was not considered relevant when assessing guilt or innocence, in the second part of a public case, there was a different standard of relevance. In his speech *Against Meidias* Demosthenes (21.151) makes it clear that it was permissible to mention liturgies during the second phase of the trial when the penalty was assessed (*timêsis*). Demosthenes imagines a friend advising him not to pursue his case against Meidias because of his wealth. He admits that the court will probably convict Meidias because he is clearly guilty of *hybris*, But at the second part of the trial Meidias will boast about his public service and convince the court to give him a light penalty. "He has been convicted, and the vote was against him. What penalty do you expect the court to assess for him? Don't you see that he is rich and will mention his trierarchies and liturgies? Watch out lest he asks for lenient treatment with these tactics and has a good laugh at your expense when he pays a fine that is smaller than the amount he is offering to give you." The imaginary friend does not say that such conduct is illegal or immoral. Nor does Demosthenes object to such a tactic. Instead he argues that Meidias' public services are not that impressive and therefore should not count in his favor (Dem. 21.152-68). In other words Demosthenes appears to consider it acceptable for a defendant to ask the court to take liturgies and military service into account during the second part of the trial.³⁶

In his speech *Against Ctesiphon* Aeschines (3.197-200) also indicates that there was a different standard of relevance in each part of a trial on a public charge. In a public trial the day is divided into three parts: the first is for the accuser, the laws, and the democracy; the second for the defendant and those who speak to the point (*eis auto to prâgma*), that is, supporting speakers who address

³⁶ Demosthenes probably deals with the question in his speech delivered at the first part of the trial to anticipate Meidias' arguments in the second part of the trial. Because Meidias' record of service appears to have been impressive, Demosthenes probably thought that the relatively short amount of time allotted to him for discussion of the penalty at the *timesis* phase would not be enough for an adequate response. He therefore decided to devote part of his first speech to the topic.

the charge in the indictment; and the third for the assessment of the penalty and to measure the extent of the judges' anger. "To measure the extent of the judges' anger" means that if the offense is greater and stirs more anger, the penalty will be more severe; if the offense is less serious and stirs less anger, the penalty will be less severe. At this point Aeschines introduces a contrast between those who speak to the point and a person "who asks for a vote." The implicit contrast suggests that the person who "asks for a vote" is one who does not speak to the point and address the legal issue but asks for a vote in gratitude for their public service or a sign of respect for their power and influence. Aeschines does not criticize a speaker for making such an appeal at this stage in the trial. But the person who "asks for a vote" for these reasons during the first phase of the trial is in effect asking the judges to betray their oaths, the laws, and the democracy. Aeschines says that it is immoral to make such a request or to grant it when the judges are considering the guilt of the defendant. He then goes one step further and argues that there is no need for supporting speakers at all during the first part of the trial because here the decision is guided solely the laws. This proposal is clearly aimed at Demosthenes, who, he claims, is the type of supporting speaker who employs sophistry. As a result, the judges should not listen to him if he addresses the court during the first part of the trial.

Some of Aeschines' argument in this passage is tendentious, designed at undermining his opponent's credibility before he has a chance to reply to the charges against Ctesiphon. In actuality, Demosthenes does address the main points in the indictment against Ctesiphon; though there is room for debate about his defense of his political career, his interpretation of the laws about crowns is based on a more straightforward reading of the statutes and supported by numerous precedents. What is significant is that Aeschines makes a clear distinction between the types of arguments that are appropriate at each part of the trial. In the first part of the trial a supporting speaker should keep to the point; during the assessment of the penalty a speaker can "ask for a vote" and use arguments that would be inappropriate during the first part of the trial.

These different standards of relevance at a public trial explain the behavior of Eubulus at the trials of Hegesilaos and Thrasybulus. During his prosecution of Aeschines in 343 for misconduct as ambassador to Philip, Demosthenes (19.290) was concerned that Eubulus would use his prestige to influence the judges and tried to discourage him from speaking for his opponent. He therefore reminds Eubulus how when Hegesilaos and Thrasybulus called on him during the first phase of their trials (*prôtês psêphou*), he did not respond.³⁷ Then during the assessment of the penalty (*timêma*) he did step forward (*anabas*), which was obviously a show of support and was in contrast to his earlier refusal. Demosthenes adds that Eubulus still did not say anything at this point and asked the judges to

³⁷ MacDowell (2000) 331 rightly argues that Demosthenes refers to two trials, not one trial of two men.

forgive him.³⁸ Eubulus acted differently at each stage of the trial because he did not think his intervention was appropriate at the first stage of the trial. He was not in court to plead the case for the defendants, but to lend moral support for a relative and a friend. He therefore did not consider it right to come forward during the first part of the trial when the judges were deciding whether the defendant had broken the law or not. During the second phase by contrast it was expected of him to say something in support of his relative and friend and to try to influence the court. When he was unable to say anything (Demosthenes does not give the reason), he failed to perform his duty as relative and friend and therefore asked to be forgiven. After all, one only asks for pardon when one cannot do what is expected or required.

The only example of a speech that purports to have been delivered at the *timêsis* phase is found in the second part of Plato's *Apology of Socrates* (35c-38c). It is impossible to determine how closely the text of this speech reproduces what Socrates said in court at his trial in 399, but it should contain the kind of arguments one would expect to find in a forensic speech. Indeed the first part of the *Apology* adheres to many of the conventions of forensic oratory even when Socrates subverts or critiques them. For instance, Socrates prefaces his speech with a standard *captatio benevolentiae*, attempting to gain the court's sympathy by portraying himself at a disadvantage. Toward the end of his first speech he alludes to the well-known practice of bringing one's family into court even if he declines to follow it. In general, Socrates attempts to "stick to the point" by addressing the main charges in the indictment (19a-b). The earlier charges against him, which might prejudice the court's opinion, are dealt with at 19-24b. Meletus' charges are refuted at 24b-34b. At the end of this section produces witnesses to refute one of the main charges and to prove that he does not corrupt the youth (32c-34b). He mentions his military service only as part of an analogy: he obeyed the order of the Delphic oracle just as he obeyed the orders of his commanders in battle (28e-29a).

In his second speech, however, Socrates discusses the benefits he has conferred on each Athenian individually in his private life. In his first speech he denied that he corrupted the youth. Here he switches from the negative to the positive: he talks not about his guilt or innocence but about his worth (*axian*) and his claim to be considered a benefactor. Had he been a normal citizen, he would have spoken about his public service, his military offices, and his liturgies at this point. Thus topics that Socrates did not consider relevant in his first speech come to the fore when the court was deciding which penalty to choose.

An anecdote from Aeschines' speech *Against Timarchus* confirms this analysis. Aeschines (1.113) recalls Timarchus' conviction for theft of public funds. Timarchus had been elected inspector of mercenary troops in Eretria and on his return to Athens was put on trial for embezzling money entrusted to him along with

³⁸ Neither MacDowell (2000) 332 nor Paulsen (1999) 272-3 analyzes the reasons for Eubulus' behavior.

two other inspectors. At the first part of his trial, Timarchus did not make his defense about the charge, but admitted his guilt and immediately supplicated the court about the penalty. His speech was therefore not relevant at this part of the trial (*ou peri tou pragmatos*).³⁹ As a result, it was not taken into consideration by the court, and Timarchus was convicted just like the other two inspectors who did not confess. The fact that he confessed his crime set him apart from his colleagues, but since his confession had nothing to do with the question of guilt or innocence, it made no difference, and all three received the same verdict. His confession did however make a difference at the assessment stage: those who denied their guilt were fined a talent apiece, whereas Timarchus was fined thirty *mnai*, half that amount. The incident reveals how the two different standards worked in practice. Timarchus and other litigants might attempt to sway the court with irrelevant arguments during the first part of the trial, but if the judges obeyed their oath, they would ignore extraneous considerations and examine just the relevant issues.⁴⁰ Like the other cases examined in the beginning of this section, Aeschines' explanation shows that even in cases involving politicians, the court did not make its decision about innocence and guilt on political grounds.

Modern scholars (except those who believe in necromancy) cannot raise Athenian judges from the dead and ask them why they voted the way they did in a particular case. But the orators frequently tell us what they thought were the reasons for their decisions. Of course, we have no means of testing their assertions. But it is reasonable to assume that the judges and onlookers must have found these explanations plausible. Indeed, they would not put forward these explanations unless they thought they would positively influence the judges' decision. There is no reason to deny that some trials in Athens were political, but the Athenians did not believe that these trials were decided on political grounds. Because they believed in the rule of law, they assumed that their fellow citizens did too.

³⁹ The phrase *ou peri tou pragmatos* clearly alludes to the litigant's promise to speak to the point and the judges' duty to pay attention only to matters relevant to the charge brought by the accuser. See Rhodes (2004). Carey (2000) 62 translates the sentence "He did not address his defense to the question of fact" but this misses the allusion to the requirement to speak "to the point." The translation of Fisher (2001) 97 is closer to the required sense: "he made no defense on the charge."

⁴⁰ Fisher (2001) 253 refers to Timarchus' strategy as "plea-bargaining," but this misunderstands the nature of the Athenian legal system. Plea-bargaining is only possible in a system where a permanent public prosecutor has the power to bargain with defendants on behalf of the state and offer them a reduced sentence in exchange for a plea of guilty, which avoids a trial. Because the Athenian legal system had no permanent public prosecutor with such power, plea-bargaining was not possible. Fisher also claims "There is likely to be no little evasion and distortion in this account" but does not specify what the distortion might be. Yet because the trial involved a public figure, it must have been common knowledge. And the explanation of the different standards of relevance must have appeared plausible to the judges Aeschines was addressing as the evidence analyzed in the rest of this section reveals.

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