RELEVANCE IN ATHENIAN COURTS

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This thesis is my own work. All sources used have been acknowledged.

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For Julie - in every way, w.b.t.m.

Abstract

A large number of authors have observed that forensic speeches may contain material which would currently be regarded as inappropriate or irrelevant. For example, defendants may admit or ignore a charge - and claim that, because of their past public services or good character they should not be condemned. In addition to these pleas, one also finds appeals to the court's pity and attempts to deride the opponents character and citizenship, designed to arouse the emotions of the court in an attempt to win its vote. Since the eighteenth century, modern scholars have regularly claimed that these appeals and comments could influence the verdict of the court. Sometimes they have argued that juries did this as part of an overall framework of equity (the "equity" theory); at other times they argue that jury decisions were effectively random and frequently capricious. This latter theory is the earliest found in relation to concepts of relevance, but has become more powerful today under the weight of recent theories about "social competition" and its impacts on the practice of litigation.

There is a contrary position in modern scholarship to these "equity" and "social competition" theories. Meyer-Laurin has noted that speakers frequently exhort the jury to judge according to the law, and never exhort them to ignore the law. He and others claim that juries effectively kept legal considerations uppermost when deciding cases. There has been a long history of debate between proponents of the three theories, but the issue has never been effectively resolved. Scholars have been able to marshal evidence, at times from the same forensic speeches, to prove all three theories simultaneously. It is obvious that all three cannot be correct, but what is less obvious is that all three are probably wrong. The explanation lies in a reassessment of the forensic speeches, and the evidence they provide for the concept of relevance in Athenian courts.

This thesis offers definitions of relevance, an assessment of the extent of legal and nonlegal arguments in forensic speeches, and also discusses key features of the concept of relevance such as the use of witnesses, appeals for pity, the Heliastic oath and appeals based on character or equity. The thesis argues that the "equity" theory is untenable, and the "social competition" theory does not match the evidence of forensic oratory. Meyer-Laurin's "positivistic" theory is the most valid, but drastically underestimates the occurrence of nonlegal pleading. This thesis shows, by analysing Athenian concepts of relevance, that juries generally would be expected to place legal considerations first, but nonlegal arguments were frequent and could be regularly used to supplement a legal case. They were only rarely used as the main prop of a case, and in those cases in circumstances when the speakers did not have solid legal foundations for their cases. Overall, relevance was a flexible concept which could vary in any speech, but nonetheless was confined within the parameters of a general respect for law and evidence.

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de quibus vos aliis testes esse debetis, de eis ipsi alios testis audietis? at quos testis? primum dicam, id quod est commune, Graecos...verum tamen hoc dico de toto genere Graecorum: tribuo illis litteras, do multarum artium disciplinam, non adimo sermonis leporem, ingeniorum acumen, dicendi copiam, denique etiam, si qua sibi alia sumunt, non repugno; testimoniorum religionem et fidem numquam ista natio coluit, totiusque huiusce rei quae sit vis, quae auctoritas, quod pondus, ignorant...hi si Graeci fuissent, ac nisi nostri mores ac disciplina plus valeret quam dolor ac simultas, omnes se spoliatos, vexatos, fortunis eversos esse dixissent. Graecus testis cum ea voluntate processit ut laedat, non iuris iurandi, sed laedendi verba meditatur; vinci, refelli, coargui putat esse turpissimum; ad id se parat, nihil curat aliud. itaque non optimus quisque nec gravissimus, sed impudentissimus loquacissimusque deligitur...qui autem dicit testimonium ex nostris hominibus, ut se ipse sustentat, ut omnia verba moderatur, ut timet ne quid cupide, ne quid iracunde, ne quid plus minusve quam sit necesse dicat! num illos item putatis, quibus ius iurandum iocus est, testimonium ludus, existimatio vestra tenebrae, laus, merces, gratia, gratulatio proposita est omnis in impudenti mendacio? sed non dilatabo orationem meam; etenim potest esse infinita, si mihi libeat totius gentis in testimoniis dicendis explicare levitatem.

Will you then listen to others as witnesses on those points, respecting which you yourselves ought rather to bear witness to others? And what witnesses are they? In the first place, I will say that they are Greeks...But I say this of the whole race of Greeks; I allow them learning, I allow them a knowledge of many arts; I do not deny them wit in conversation, acuteness of talents, and fluency in speaking; even if they claim praise for other sorts of ability, I will not make any objection; but a scrupulous regard to truth in giving their evidence is not a virtue that that nation has ever cultivated; they are utterly ignorant what is the meaning of that quality, they know nothing of its authority or of its weight...If these men had been Greeks, and if our habits and principles had not had more influence than indignation and hostility, they all would have said that they had been plundered, and harassed, and stripped of their fortunes...When a Greek witness comes forward with a desire to injure a man, he does not think of the words of his oath, but of what he can say to injure him. He thinks it a most shameful thing to be defeated, to be detected, to allow his enemy's innocence to be proved. That is the contest for which he prepares himself; he cares for nothing beyond. Therefore, it is not the best men, nor the wisest, but the most impudent and talkative men who are selected as witnesses...And when a man of our citizens gives his evidence, how carefully does he restrain himself, how scrupulously does he regulate all his expressions, how fearful is he, and anxious not to say anything covetously or angrily,-- not to say one word more or less than necessary! Do you think that those Greeks are so too? men to whom an oath is a joke, evidence a plaything, your opinion of them a shadow, men who place all their credit and profit and reputation, and triumph telling the most impudent lies. But I will not spin out what I have got to say. Indeed, my speech would be interminable if I were to take it into my head to unfold the faithlessness of the whole nation in giving evidence (Cicero *Pro Flac.* iv-vi.9-12).[1]

[1] The translation is by C. D. Yonge (1875:429-31).

With these words Marcus Tullius Cicero summed up Greek witnesses. Cicero was defending a provincial governor charged with extortion and had obvious motives. He needed to discredit his opponent's witnesses, and his speech would have appealed to a Roman jury of the Late Republic. It is unclear whether Cicero's accusations have any basis in fact. What they do reveal, however, is how Greek litigation could be understood and characterised by someone from another culture when he wanted to develop stereotypes for his own ends.

Modern scholars are faced with a similar choice to Cicero. In the study of Classical Athenian juries we inevitably make comparisons between our own world and that of Cleon and Demosthenes. It is a common *caveat* that one must acknowledge the difference between modern western and ancient Athenian courts.[2] Never has this *caveat* been more appropriate than in studying relevance in Athenian courts.

In this thesis "relevance" is used in relation to the types of arguments speakers used and the types of evidence they submitted. Both can be viewed as relevant or irrelevant to the main issue of the trial. Forensic speeches contain material which would currently be regarded as inappropriate or irrelevant.[3] In these speeches defendants may discuss their public services or good characters,[4] make appeals for pity, or deride their opponents' characters and citizenship.[5]

There has been no comprehensive study of relevance in Greek judicial oratory to date. Scholars sometimes list some key references, derived ultimately from Spengel's early study, to show that the ancients viewed emotional arguments or discussions of character and services as irrelevant (Aristotle *Rhet.* 1354a15-24; Lycurgus i.11-13), that the Areopagus forbade irrelevant pleading (Lysias iii.46; Lycurgus i.11-13; Pollux viii.117; Lucian *Anach.* 19; Aristotle *Rhet.* 1354a15-24),[6] and that in forensic orations irrelevant pleading is sometimes described as speaking ἔξω τοῦ πράγματος.[7]

Modern discussions of relevance in legal argument rarely move beyond these references. Scholars sometimes contrast modern common law courts, where judges direct a jury on

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[2] Finley (1975:143-5).
[3] Todd (1993:89-90).
[4] Ibid. See also Todd (1990a:25), Dover (1989:22).
[5] Bonner (1927:78).
[6] Spengel (1828:96-7); Bruns (1896:487-8); Bonner (1905:14-15, 1927:73); Lipsius (1905-15, III:918); Voegelin (1943:13-15); MacDowell (1963:43-44); Lossau (1964:19-20); Wankel (1976:150-2); Wallace (1989:124 and n.112); Carey (1997:18); Carawan (1998:158 and n.33); Whitehead (2000:238-9).
[7] Bonner (1905:14-15). As discussed in Chapter Four, other terms are frequently used.

legal issues, and the Athenian system, where decisions were made by *dikastai*[8] without detailed legal knowledge. On the basis of that contrast, they conclude that Athenian juries could ignore evidence and law in reaching their decisions, in comparison to modern courts that, we are told, prioritise law and rules of evidence and eliminate nonlegal considerations.[9] In a classic example of the method, the Victorian barrister and translator of Aristophanes, Benjamin Rogers, stated his opinion ("as an English lawyer"), "that it would be difficult to devise a judicial system less adapted for the administration of justice."[10] Other authors are less explicit, but a general view has developed that Athenian juries frequently ignored law and evidence and this assumption ultimately rests on the authority of modern conceptions of law and the role of the courts.

I am not arguing that we can avoid modern perspectives. It is a historiographic reality that today's scholars inform their opinions with their own, culturally-derived, understandings. It is important, though, to bear it constantly in mind, since modern theories about relevant argument in Athenian courts centre around the Eurocentric contrast between modern legal systems characterised by strict legal processes and more informal systems that permit nonlegal factors. There is always a danger that, like Cicero, we will do little more than give voice to stereotypes and prejudices, and concentrate more upon convincing our audience than upon developing a relatively objective picture.[11]

The influence of modern conceptions of law in the study of Athenian lawcourts emerged in the late eighteenth century. Since then, theories about relevance in Athenian courts can largely be characterised as a battle between three sets of partly overlapping, but essentially competing, narratives:

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[8] It is traditional to note that the Greek word δικαστής, commonly translated "juror", can mean both "judge" and "juror", and that Athenian *dikastai* fulfilled both these roles. See Todd (1993:82-3).

[9] This point is discussed in detail in Chapters Two and Three. See Beauchet (1897, I:xx); Hirzel (1900:57-60); Vinogradoff (1922:64-5, 1928a:16, 1928b:42); Weiss (1923:73-6); Paoli (1926:122, 1933:35, 39-45, 67-8); Bonner (1927:74-6, 78-88); Wyse (1905:476-77); Bonner and Smith (1930-38, II:298-302); Gernet (1937:121); Arangio-Ruiz (1946:242-3, n.1); J.W. Jones (1956:121-2); Ruschenbusch (1957:260-6); Biscardi (1970:219-21, 227-30; 1982:362-71); Grimaldi (1980:301); Edwards and Usher (1985:232); Hillgruber (1988:112-20); Todd (1990a:19, 1993:54-5, 59-60, 2000a:24); Todd and Millett (1990:14); Millett (1990:177); Scafuro (1997:53); Christ (1998:41, 195, 208); Allen (2000:175).

[10] Rogers (1875:xxxv). Similar views were expressed by Maine (1890:75-6) and Bonner (1927:78-82). For a recent version of the same argument, see Allen (2000:171-9).

[11] This brings to mind postmodern claims that history is little more than the imposition of narratives on the past, and that evidence gains meaning solely from being correlated with these narratives. See, for example, Ankersmit (1989:137) and White (1973:30). While I hesitate to nail my colours to this particular mast, in the context of the history of relevance in Athenian courts it has a certain heuristic value.

- jurors did not feel bound by law and evidence, but based decisions on factors such as emotional arguments and prejudices;
- jurors sometimes followed law and evidence, but frequently departed from them to indulge their sense of equity; and
- jurors generally had a "positivistic" approach and based their decisions primarily on evidence and law.

Since the eighteenth century, historians of the Athenian lawcourts have focussed on particular topics - equity pleas, emotional pleas, slanders, legal pleas - that are pertinent to relevance in a modern western court. They have focussed on the occurrence of these topics in ancient sources. I would submit that this methodology is flawed, because scholars have not tried to measure the overall occurrence of the topics in our sources, but have selected passages to fit their cases. At times it appears that they have trawled through ancient oratory looking for the juicy bits. There has been no real attempt to engage with this oratory as a whole, and as a result our basic knowledge of legal relevance has changed little since the eighteenth century. Rather than considering the overall character of the material in ancient oratory, assessing its variability and inherent patterns, and seeking to understand what that variation and those patterns might reveal, scholars have focussed on extremes. Convincing arguments can in fact be made that Athenian jurors did follow juristic principles, or abandon the law in favour of equity, or judge on the basis of character and civic merit. One is reminded of Erasmus Darwin's comment on his brother Charles' theories: "The *a priori* reasoning is so entirely satisfactory that if the facts won't fit in, why so much for the facts is my feeling."[12]

In this thesis forensic oratory is viewed, in effect, as a statistical population. It is only when we consider the overall balance of arguments in all speeches, and in any speech, that we can really know how common or uncommon was irrelevance in Athenian courts.

Structure of the Thesis

Chapter Two begins with a survey of early eighteenth-century views of Athenian juries. This survey is important for understanding modern theories. In the eighteenth century, the battle lines on our topic were drawn and the forces in support of each theory marshalled. While their backgrounds and political views are different today, in a sense

[12] Letter 23rd November 1859, in Darwin (1888:233).

modern scholars are still firing from the same ramparts. During the eighteenth and early nineteenth centuries, scholars formed into camps that, in part, matched their support for monarchy or democracy, and interpreted the behaviour of Athenian juries as either wholly arbitrary and capricious or no worse or better than that of modern juries. Towards the end of the nineteenth century a new tradition began to emerge among some German scholars.[13] Its major proponents claimed that Athenian courts could decide for equity rather than law, and that much of the nonlegal argument in a court was actually based around these equity pleas. This tradition still has considerable influence. A number of scholars responded that there was no explicit theory of "equity" in Athenian courts, and that, overall, jurors followed law and evidence.[14]

In Chapter Three I will concentrate on the modern versions of the eighteenth-century theory that Athenian juries ignored law and evidence. Those who currently support this theory highlight the use, by litigants in Athenian courts, of emotional appeals, discussions of character, public services and slander, but state that such topics must be explained as part of competition for honour and status in Athenian society.[15] They claim that there was no concept of the rule of law in Athens independent of the will of the people, that there was a "high tolerance for perjury"[16] and that Athenian society accentuated competitive values over "quiet" values such as justice or altruism.

Chapter Four will commence with a discussion of the concept of relevance in Aristotle's *Rhetoric*, because that is where most scholars have started and we need to begin there to unravel the issues. I will then outline the evidence for relevance in forensic oratory, and discuss what that evidence tells us about the sort of arguments that Athenians considered irrelevant. The evidence provides us with a basis for identifying the sorts of arguments that were commonly considered irrelevant - slander, abuse, discussion of character and liturgies, other crimes, lies about actions or character, appeals for pity and jokes and ridicule. The most common complaint was that one's opponent was introducing new claims that were not in the written charges and reply.

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[13] Todd's (1993:91) claim that German scholarship has been hostile to the Athenian courts, whereas English scholars have been more optimistic, is somewhat simplistic. Antidemocratic views of Athenian justice originated in Britain with Tucker (1781), Gillies (1792[1786]) and Mitford (1785, 1818), while the theory that Athenian courts had a concept of equity originated in Germany with Seeliger (1876:673-74), von Wilamowitz-Möllendorf (1893:362), Hitzig (1897:180-81) and Hirzel (1900:57-60).

[14] See in particular Meyer-Laurin (1965).

[15] See in particular Adkins (1972), Garner (1987), Cohen (1995a, 1995b), Christ (1998) and Allen (2000).

[16] Faraone (1999:110).

In Chapter Five I will use this evidence to assess the degree to which forensic oratory as a whole can be characterised as relevant or irrelevant (and, by extension, legal and nonlegal). The evidence shows that, on the basis of the definitions reached in Chapter Four, the overwhelming majority of orations stuck to the issue and were relevant. The evidence also shows that many speeches did contain some irrelevant material, but that this is usually a very small proportion of any speech, and nonlegal factors are seldom intended to have priority over the legal case. Accordingly, the evidence indicates that speakers expected to win their cases on the basis primarily of legal, rather than nonlegal, factors.

Chapter Five will also analyse the evidence for the Heliastic oath. The use of the oath by litigants is characterised by an emphasis on lawful verdicts, rather than nonlegal or equity-based verdicts. In Chapter Six I will discuss the use of evidence in Athenian courts, noting that there is little to support the idea that perjury was more common in Athens than in any other jurisdiction ancient or modern. Independent witnesses did exist, and were frequently used. Witnesses who were not independent commonly appear in family disputes or inheritance cases, where it is debatable whether any other witnesses could have been produced, and in many of these cases speakers are at pains to provide independent witnesses as well where they can.

Finally, in Chapter Seven I discuss appeals for pity in Athenian courts, noting that these are seldom made as nonlegal pleas, but that speakers generally claim pity based on the overall legal justice of their cause.

Discussion of the Sources

There is no single ancient work on the legal concept of relevance in Athenian courts. As a result, we have to reconstruct the concept from available sources. In doing so, a range of methodological issues needs to be discussed.

The speeches of the Attic orators are our chief source for the study of Athenian legal procedure.[17] We have 150 of these speeches, of which 104 were forensic speeches delivered in Athenian courts (see Appendix One; another forensic speech, Isocrates xix, was delivered in Aegina).[18] A few forensic speeches were delivered by the orator himself. The majority, however, were written by the orator, working as a *logographer* or speechwriter, for other people. The precise relationship between a logographer and his client is debated, though the logographer probably provided advice and a speech and may also have sought information on the opponent's case for a client.[19]

In addition to the works of the ten orators, we have other speeches preserved in histories and philosophical works. Three of these purport to have been delivered in trials - the speech by Euryptolemus in defence of the generals at their trial after the battle of Arginusae (contained in Xenophon's *Hellenica* i.7.16-33) and two *apologiae*, by Plato

[17] During the first century AD a canon of the ten "best" Attic orators, judged by standards of literary and rhetorical style, was developed. The orators deemed worthy of inclusion in the canon were Antiphon (speeches dated *c.*430-413 BC), Andocides (*c.*410-391 BC), Lysias (*c.*411-380 BC), Isocrates (*c.*403-340 BC), Isaeus (*c.*380-340 BC), Demosthenes (*c.*365-322 BC), Aeschines (*c.*345-330 BC), Lycurgus (330 BC), Hyperides (*c.*340-322 BC) and Dinarchus (323 BC). See Dobson (1919); Edwards (1994); Jebb (1876); Kennedy (1963). Problems of attribution, for example of speeches in the Demosthenic corpus, are not relevant to this study. The speeches date from about 420 to 320 BC, though the majority are clustered in two main periods - from about 420-380 BC and from about 350-320 BC. The speeches of Isaeus and some of Demosthenes' early works are all we have to fill the gap. Although some form of court must have existed at Athens before 420 BC, we have no speeches from the earlier periods of Athenian history.

[18] The remaining 45 speeches (largely by Isocrates and Demosthenes) are deliberative (assembly) orations or *epideictic* (display) pieces. In this thesis, I have excluded Andocides iv as it is generally thought to be a pastiche (Edwards 1995:131-6; MacDowell 1998:159-61; Heftner 2001:51-4). I consider that the remaining 104 forensic speeches were actually delivered before a court. Some of these have had their doubters, notably Demosthenes xxi (Plutarch *Dem.* xii.4); my reasons for including this are discussed in Appendix One. Recently Porter (1997) has suggested that Lysias i is another pastiche because it includes comic stereotypes about adultery. It is simpler to presume that the comic stereotypes in Lysias i reflect the logographer's skill in developing arguments that he thought would appeal to the prejudices of his audience. Lysias' speeches contain many such stereotypes (Gärtner 1997). Porter does submit some additional points to support his interpretation, but these are largely trivial. For example, the scarcity of rhetorical topoi in the speech (Porter 1997:436-9) may be a reflection of the fact that the speech was delivered in a homicide trial before the Delphinion, and standards were rather different there than in normal *dikasteria* (MacDowell 1963:43-4); in addition, an elaborate rhetorical subterfuge may not have suited the open character Lysias was trying to create.

[19] See Dover (1968:148-74); Lavency (1964:68-122); Usher (1976:32-5). Direct evidence on the role of the logographer is rare; from *Rhet. ad Alex.* 1444b3-6 we can glean that logographers provided both advice and a speech, as did Roman advocates later (Cicero *De Orat.* ii.xxiv.102-4); this contradicts the view (Lavency 1964:192; Todd 1993:95-96) that logographers did not generally provide advice, but wrote speeches only.

and Xenophon, that claim to be Socrates' case in his defence.[20] The speeches have some forensic verisimilitude, but they are not included in the detailed analyses in Chapter Five for the following reasons:

- Diodorus Siculus (xiii.101) contradicts Xenophon's account of the Arginusae trials. Xenophon is probably more likely to have known the facts, but his account may have been distorted because he wished to stress the illegal nature of the trial.[21]
- The *apologiae* by Plato and Xenophon are unlikely to be accurate accounts. Given their authors' pro-Socratic bias and likely audience (private groups of friends)[22] they may not represent the real arguments Socrates used (and in any case, the inconsistencies between the two speeches self-evidently show that one at least must be inaccurate).[23]

In addition to speeches, there are occasional references to Athenian legal procedure in philosophical works and rhetorical handbooks and some longer accounts of particular aspects in Aristophanes' *Wasps* and the *Athenaion Politeia* (*AP*). Philosophical works (notably Plato's and Xenophon's dialogues) and the *Wasps* have been used to deride Athenian courts (see Chapter Two). There are, however, major problems with this approach:

- Aristophanes' *Wasps* satirised jurors for ignoring law in favour of other factors when deciding cases (*Wasps* 157, 159-60, 240, 286, 323, 340, 550-86, 893, 900).[24] We cannot be sure that the play represents the opinions of the Athenian *demos* at large

[20] I exclude the much later *apologiae* like Libanius i-ii. There is also the Plataean Debate in Book iii of Thucydides' *History*, delivered in a "trial," although in this case of a whole state, and further speeches delivered outside the legal system, but in situations which were akin to trials, such as Critias' accusation of Theramenes and the latter's defence (Xenophon *Hell.* ii.3.24-49) and the trial at Thebes of the assassins of Euphron (Xenophon *Hell.* vii.3.1-12). We also possess fifth-century B.C. sophistic pieces written in the style of defence speeches for legendary characters (e.g. the *Helen* and *Palamedes* of Gorgias, the *Dissoi Logoi*, the *Ajax* and *Odysseus* of Antisthenes and the *Odysseus* of Alcidamas). None of these cast much light on our topic, except insofar as they all stick to the main issues of the trials. Similarly, the speeches incorporated in histories are of limited use as they may have been tailored by the historians to highlight particular points (Macleod 1997:242-6; Pelling 2000:119-22).

[21] Andrewes (1974).

[22] Kelly (1996:152-3). Tarrant (1993:32) points out that with such a readership Plato may not have felt that historical accuracy was important.

[23] For the view that Plato's *Apology* is historically accurate, see Allen (1980:33-6) and Brickhouse and Smith (1989:50, n.7). For the alternative view, see the recent review by Barrett (2001). Although I concede that Plato's *Apology* may have been the first of many such *apologiae*, I do not consider that this of necessity proves that it is historically accurate.

[24] The *Wasps* was interpreted this way in the nineteenth century (Mitchell 1820-22, II:162-8; Rogers 1875:xvi-xvii). The view has never entirely gone away, and can be found in a rather more nuanced reading by Pelling (2000:137, 176).

(or, even if it does, whether they were warranted).[25] The *Wasps* is a comedy, and comedy by its very nature distorts and deceives. Aristophanes' portrait of jurors is sometimes accepted because similar comments were made by antidemocratic critics (Plato *Apol.* 34c, 35c; Xenophon. *Apol.* 4, *Mem.* iv.4.4; Old Oligarch *Ath. Pol.* i.13, 18; Isocrates. xv.142), but his criticisms are not as clearcut as is sometimes claimed.[26] If we are to believe from the *Wasps* that jurors cared solely for their own self-interest, then we have no methodological alternative but to conclude that Athenian daughters would often greet their fathers with a tongue kiss and try to steal their money, since these comments occur in the same part of the play as the most sustained criticism of jurors (*Wasps* 608-9).[27]

- The *Wasps* is unique; we do not have another play which provides so detailed a picture of jurors or of legal procedures.[28] There are only occasional comments in Aristophanes' other plays,[29] New Comedy[30] or Roman comedies based on Greek originals,[31] so we have little in the way of comparanda with which to judge the degree of distortion in the *Wasps*.

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[25] Gomme (1938:97-103); De Ste Croix (1972:231-4); Chapman (1978:60-3); Horsley (1982:72-3); Sandbach (1985:29-31); Forrest (1986:232).

[26] Bowie (1993:97-101); MacDowell (1995:175-79).

[27] The point is that incest was a common taboo in Greece, but tongue kissing was a sexual act (Aristophanes *Clouds* 51, *Thesm.* 132, *Wealth* 1194; Henderson 1975:182), though not all sexual kissing needed to involve the tongue (Xenophon *Sym.* ix.6).

[28] The second Mimiamb of Herodas (*Pornoboskos*) is written as a mock prosecution speech. A number of forensic topoi have been identified in the Miniamb (Hense 1900:230-1; Headlam 1922:70-2; Porter 1997:443, nn.80-1), but it was probably written roughly during the period 280-270 BC, and its author Herodas lived in Egypt or Asia Minor. He may have portrayed Athenian litigation as it appeared to an outsider, and we should not expect him to have been closely familiar with it. Although forensic allusions abound in the Miniamb, it would be wrong to say that it is a parody of a court speech. Herodas' main aim was to depict the character of the Pornoboskos (Cunningham 1971:81); therefore forensic material would only have been included insofar as it assisted the narrative and raised a laugh, and whatever information the second Mimiamb offers us about Athenian court procedure is likely to be distorted.

[29] See Aristophanes *Clouds* 208, *Knights* 1316-18; schol. Aristophanes *Knights* 1317; schol. Aristophanes *Birds* 1695a.

[30] Scafuro (1997:157) suggests the arbitration in Menander's *Epitrepontes* was decided on a combination of law and fairness, but her interpretation is far-fetched, being based on the law of "finders-keepers" rather than a real law. There are methodological problems that are unique to New Comedy. At times, some historians treat New Comedy as a direct reflection of fourth century legal practice (e.g. Hunter 1994:23 [Menander's *Plokion* as evidence about the *epikleros*], 32-3 [Menander's *The Rape of the Locks* as evidence for women's *kyria*]). This approach presumes that Athenian law remained virtually unchanged from the fourth century into the third. We do not know if this was the case, but it seems unlikely as during the third century B.C. Athens had a very different constitution (O'Neil 1995:108).

[31] Roman Comedy offers a further methodological problem - untangling Roman elements from Athenian (Paoli 1962:50-69, 1976:32-3, 48-52, 62, 66-7, 72-9). This may be possible in some cases, but is probably not possible in relation to relevance. Roman courts could be as prone to the influence of character and services as Athenian ones (e.g Cicero *Pro Publio Quinctio* i.1, 2, 5; Terence *Eunuchus* 759-61), so it would be a dubious procedure to interpret every such occurrence in Roman Comedy as evidence for Athenian stereotypes.

Plato's and Xenophon's dialogues have fictional settings. It is seldom clear, when they refer to courts, whether they are even representing the opinions of the elite minority to which they themselves belonged, let alone a balanced view. Some scholars argue that Plato and Xenophon, who had little love for the Athenian democracy, cannot be entirely trusted as sources on the way its institutions functioned.[32]

These methodological issues mean that we effectively have to abandon Aristophanes, Plato and Xenophon as reliable sources in their own right on Athenian juries. We can, it is true, still use them and rhetorical handbooks to draw out particular points and to confirm that particular issues were generally well known. Nevertheless, they provide only limited and partial pictures of legal procedure, and we are better served by concentrating on the 104 forensic speeches delivered in Attica.

Numerous methodological issues affect our interpretations of these speeches. There is insufficient space to discuss all of these here, but as others have devoted considerable attention to many of them the task is also unnecessary.[33] Some issues are, however, particularly important to this thesis:

- Only a small percentage of disputes probably came to court.[34] The penalties that applied, in some cases, to unsuccessful litigants, along with fees for bringing litigation, may have encouraged disputants to settle out of court. Those disputes that did go to court may therefore have been higher profile or relatively intractable cases.
- It is likely that only a small minority of speeches delivered in courts were written by logographers. From what little we know about the logographers' fees, it seems that

[32] A. H. M. Jones (1957:43); Finley (1962:7, 1975:136); Dover (1974:2). There is even ancient authority for such skepticism; Athenaeus (220a) noted that "most philosophers are by nature even more abusive than the comic poets" (πεφύκασι δ' οἱ πλεῖστοι τῶν φιλοσόφων τῶν κωμικῶν κακήγοροι μᾶλλον εἶναι). This view may, however, be idiosyncratic.

[33] For a review of earlier research on Athenian law see Gernet (1938). For historiographic discussions on sources of Athenian law see Wolff (1957, 1962, 1969, 1975); Dover (1968, 1974:5-13); Todd (1990b, 1993:18-63); Carey (1994a); E. M. Harris (1995:7-16) and Scafuro (1997:25-67).

[34] The majority of disputes were probably resolved by private means, the Eleven, the Forty deme judges or public and private arbitrators. See on these judges and arbitrators Lipsius (1905-15, I:220-33); Gernet (1955:103-19); Harrison (1968-71, II:64-8); MacDowell (1978:206-9) and Scafuro (1997:383-99). The point that arbitrators probably settled many private disputes was made by Ruschenbusch (1982:36-7).

only wealthier Athenians could afford their services.[35] Many speeches delivered in lawcourts may have been delivered *ex tempore*, or prepared by the litigants themselves. Our surviving speeches may therefore be skewed towards speeches written for wealthier Athenians.

- Not all logographers' speeches may have been circulated, depending upon a variety of factors such as the wishes of the client and the outcome of the case.[36] Many of those that were circulated may not have sparked the interest of the later scholars who developed the canon of the ten orators.[37] Our remaining speeches represent a particular attribute (rhetorical technique) that was sought by later scholars, and this attribute was a crucial factor in their continued preservation. Even with respect to the ten orators, our sample is fragmentary; for example, we have lost most of the speeches attributed to Hyperides.

- Generally we have only "half a window" on a case.[38] Out of the 104 speeches, we have only two cases where the speeches of both the prosecutor and the defendant survive (Aeschines ii *vs.* Demosthenes xix in the *Embassy* trial and Demosthenes xviii *vs.* Aeschines iii in the *Crown* trial), plus one imperfect match (Lysias vi *vs.* Andocides i in the *Mysteries* trial). We also have multiple speeches delivered for one side in the same trial (Lysias xiv, xv [*Against Alcibiades*]; Demosthenes xxv, xxvi [*Against Androtion*]; xxvii, xxviii [*Against Aphobus*]; xlv, xlvi [*Against Stephanus*];

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[35] Wevers (1969:96); Edwards and Usher (1985:127); Hunter (1994:51-2). Logographers' fees were quite high, which may mean that generally the wealthier sections of Athenian society consulted them. Philostratus (*Lives of the Sophists* 499) tells us that Antiphon was attacked in comedy for "selling speeches composed contrary to justice for large sums of money" (λόγους κατὰ τοῦ δικαίου ξυγκειμένους ἀποδιδομένου πολλῶν χρημάτων; see also Antiphon Fr. 1a [Gagarin], 10-11). Dinarchus (i.111) similarly claimed that Demosthenes had become wealthy as a result of his activities as a logographer. Dover (1968:149, 158) cited Aristophanes' *Clouds* 462-75, where the Chorus tells Strepsiades that if he learns rhetoric he will be besieged by people "wanting to discuss and talk over with you troubles and lawsuits over enormous sums of money, in the hope of consulting you on problems to which it will be profitable for you to turn your intelligence (Dover's translation)." The word ἄξια, "profitable," indicates that one could expect significant fees for legal advice. The last piece of evidence is more circumstantial. We hear from Dem. xlix.21-2 that "Lysias the sophist" paid large sums of money for the teenage courtesan Metaneira. It is generally thought that Lysias the sophist is the same as Lysias the logographer (Carey 1989:3 n.19). It is known (Lys. xii.6-11, POxy 1606 Frr. 1-2) that Lysias lost much of his family wealth and property during the rule of the Thirty, though it is clear that he did not lose all his wealth as he was able to aid the democratic cause whilst in exile (Carey 1989:3, POxy 1606 Fr. 6). For Lysias to afford the substantial expense of moving, feeding and accommodating Metaneira and her companions attests to his having made up a large amount of his lost wealth since his return to Athens, probably as a result of his activities as a logographer.

[36] Dover (1968:151, 159-60).

[37] We know of other orators, such as Phocion, Demades, Hegesippus and Pytheas; cf. Edwards (1994:68). Their forensic work is not preserved, though Libanius (*Hypothesis to Demosthenes vii.*3) assigns *On Halonnesus* to Hegesippus. Speakers occasionally mention other logographers - eg. Hyperides iii.3, who accuses Athenogenes of being a speechwriter and an Egyptian.

[38] The phrase is from Rydderch (1997:122). This point was made by Wolff (1969:4).

Hyperides v, Dinarchus i [*Against Demosthenes*]). We are usually dependent on a single speech, which may contain bias and distort issues and can be difficult to interpret in isolation.[39]

- Litigants could sometimes form a group to increase their chances of winning a case. Such groups could take several forms. Thucydides (viii.54) notes that some men formed cabals (ξυνωμοσίαι) to help each other in lawsuits and elections.[40] There appear to have been two main forms of assistance - a man might help a friend by attacking his rivals in an effort to deflect the lawsuit,[41] or friends could act as συνήγοροι and deliver speeches on behalf of the litigant in whose name the case had been brought.[42] In most cases, we have only one of the speeches delivered in support of the litigant (the exceptions are Lysias xiv and xv and Hyperides v and Dinarchus i). As a result, the speeches we have that were delivered by *synegoroi* may be missing key arguments that were presented in the overall case.

- We know the final outcome in the case of 23 speeeches and possibly two more (Appendix One), but generally there is no independent check on our interpretations of what might have been deemed relevant in any case. Dover noted that we really have

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[39] Erbse (1977:210).

[40] On the judicial role of ξυνωμοσίαι see Sartori (1967:30-1). This is the only instance in our extant sources of ξυνωμοσίαι referring to cabals to help each other in lawsuits. Normally the word refers to conspiracies (eg. Thucydides vi.21.3, vi.61.1, viii.69.2) or, if it means cabals, does not specifically occur with a mention of lawsuits (Thucydides viii.48.2). The ξυνωμοσίαι are usually connected to the frequently-mentioned groups of ἑταῖροι (e.g. Calhoun 1964[1913]:40-1, Gomme *et al.* 1981:128). These groups often have oligarchic associations (Gomme *et al.* 1981:130), and some caution must be exercised as there are several different kinds of groups, including philosophical clubs, friendships and client relationships, which could be referred to as ἑταῖροι (Longo 1971:155). Groups of ἑταῖροι with clearly judicial roles, however, occur regularly enough in fourth-century oratory to be considered a regular feature; see Calhoun (1964[1913]:40-96, Longo (1971:71-4, 80, 84-97, 102, 154); Strauss (1986:20).

[41] In his story about Charmides, Xenophon recounts how Aristarchus helped Charmides by taking his enemies to court (*Mem.* ii.9.5-7), and a similar tale is told by Antiphon in his speech on the *Choreutes* (Antiphon vi.35-6).

[42] Rubinstein (2000:58-9, 261) has identified 31 speeches in our corpus that were delivered by συνήγοροι. The frequency with which groups formed for litigation is also revealed by an unusual source - *defixiones*, or lead curse tablets dedicated by litigants prior to a trial. Virtually all the extant Classical Athenian judicial tablets curse the opponent and his σύνδικοι, while others curse the opponent and his συνήγοροι, witnesses and various other associates. See Wünsch (1897:Nos. 66, 94, 103, 106-7); Audollent (1904:Nos. 49, 60); Trumpf (1958:97); Jordan (1985:Nos. 6, 19, 42, 49, 51, 68, 71); SEG xliv.226; Costabile (1999:92-4, 99, 101-2). Faraone (1991:16) has suggested that at times judicial tablets may have "looser, political connotations" (ie., they do not relate to specific court cases), noting the occurrence of women's names on a few tablets and the fact that women could not testify in court. I would note here that women could give oaths as evidence (Demosthenes xxxix.3-4, xl.10-11; see MacDowell 1963:99, 106-7). In addition, one tablet which binds the wife of Purias and her tongue, also curses eight men, seven of whom are practising speeches and one of whom will give evidence, and wishes them to be of no account before either the court or the arbitrator (Audollent 1904:No. 49, Gager 1992:131-2). Accordingly, I doubt Faraone's hypothesis. Faraone's comment (1999:112) that the testimony of Purias' wife is not mentioned because she could not appear in court ignores the fact that only one of the men is giving testimony.

evidence only for what a speaker wished a jury to believe and thought they would find credible.[43] With the majority of speeches where the result is unknown, we must make the further assumption that a speaker is putting forward arguments that are likely to win the case, and is unlikely consciously to say anything that would work against him. This assumption is tenable, but only just, because clearly in all cases speakers presented cases they hoped would win, but one side had to lose. Litigants' expectations need not have coincided with jurors' expectations.

- Some or all of the speeches we have may have been revised after delivery to include material that was not actually delivered in court. This is a large and complex problem, and due to space limitations is discussed in greater depth in Appendix Two.

These methodological issues do restrict our ability to interpret Athenian forensic speeches. They mean that we have a very, very small sample of the speeches that were actually delivered in trials. We simply do not possess any speeches presented in courts that were convened to hear specific types of suits, such as the courts chaired by the *nautodikai*, the *xenodikai*, street or market officials or others.[44] We have mostly speeches written by logographers,[45] and only a small sample of these. This does not mean, however, that our sample is so small and so distorted that we cannot use our extant speeches to study the types of arguments used and classify those arguments as relevant or irrelevant. It is likely that the preserved speeches may still present a reasonably accurate picture of the sorts of evidence and argumentation that were considered appropriate in Athenian courts. In the first place, there are no *a priori* grounds for assuming that speeches written by the canonical ten Attic orators would have contained more or less relevant and irrelevant material than the vast bulk of speeches that we have lost. In the second place, our corpus of forensic oratory is one of the largest corpora known from the ancient world. As a result, we can probably generalise from the 104 speeches about the ways in which the Athenians understood relevance, but we will need to be aware of possible distortions. Some of the 31 speeches delivered by *synegoroi*, for example, may concentrate on minor topics as the main issues were dealt with by other speakers whose speeches are lost.

[43] Dover (1974:13).
[44] For a summary of these specific courts see Harrison (1968-71, II:21-36).
[45] The exceptions are Aeschines i-iii, Andocides i and Lycurgus i.

Sources of Weakness in the Athenian Legal System

A number of modern authors have identified weaknesses in the Athenian legal system that, they claim, allowed jurors to make nonlegal decisions as a result of irrelevant pleading. Before summarising these limitations, I should note that to identify them as limitations is, in part, to validate the distinction between legal and nonlegal pleading. This is a distinction derived from modern concepts of the role of juries and lawcourts. We have no real evidence that the Athenians thought of them as limitations, or that they could even have conceived that their legal system could work in any other way. By focussing on limitations we may be led to obscure the ways in which Athenian courts actually worked. As many modern scholars have focussed on these limitations, however, it is necessary to discuss them here.

In the first place, an Athenian court was not a place of calm deliberation and silent contemplation. It seems that courts were noisy and crowded, and this may have made it difficult for some jurors to concentrate on all that was said, or form a balanced view. Jurors were known to interject or heckle, and the roaring of a jury is referred to by more than one ancient author.[46] Spectators went to watch important trials (Andocides i.25, 105; Aeschines i.77, 117, 173, iii.8, 56, 207; Demosthenes xviii.196, xx.165, xv.98, xxx.32, liv.41, lvi.48). They were cut off from the court by flimsy partitions[47] and it is possible that spectators could watch court cases and contribute to the noise level.[48] Finally, jurors were packed fairly tightly into a court; juries numbered several hundred men[49] and Aristophanes (*Wasps* 1102-21) talks about them swarming together like larvae, hardly able to move a muscle.

As a result of crowding and noise, it has been suggested that crowd psychology may have played a role in courts, and that jurors could have become a mob whose decisions may have had little to do with facts or law.[50] This argument should be treated with caution. Athenian meetings in general appear to have been noisy events; meetings of the Assembly were also rowdy[51] and Aristophanes' caricature of a meeting of the βουλή

[46] Xenophon *Apol.* 14-15; Plato *Apol.* 20e, 21a, 27b, 30c; Aristophanes *Wasps* 623-4; Bers (1985:10).
[47] Boegehold (1967:119); Travlos (1974:508).
[48] Lanni (1997:187-8), though I would note that direct evidence for *thorubos* is limited to jurors.
[49] *AP* liii.3, lxviii.1. The numbers of jurors varied in a manner that we cannot reconstruct, though generally public cases had larger juries (of about 500 men) than private cases. See Todd (1993:83-84).
[50] See in particular De Romilly (1975:24-38); Allen (1980:24-5); Missiou (1992:6-8).
[51] Hansen (1999:146-7); Carey (2000:52-4); Tacon (2001).

(*Knights* 624-82) may indicate that this could be a lively occasion. Although Athenian social gatherings appear to have been noisier than our own, we should not presume that jurors were incapable of paying attention and following an argument. Given the range of cultural differences in the use of space and tolerance of crowding levels[52] it would be unwise to generalize about ancient Athens on the basis of modern Eurocentric assumptions. It is significant that no ancient author actually claims that crowding or noise distorted or undermined justice[53], while both Aristotle and the Old Oligarch considered that large groups of people could prove better judges than small ones.[54]

More seriously, Athenian court procedure was designed to limit the scrutiny of the evidence. Witnesses were not cross-examined; speakers could cross-examine their opponent, but this appears to have been a limited and fairly short procedure (e.g. Lysias xxii.5). As a result witness statements could be manipulated to support a speaker even when they were in reality neutral or hostile.[55] Furthermore, in *dikasteria* jurors were not permitted to discuss their verdicts (though it appears the Areopagus did this); they had to vote once the speakers finished. The absence of time for reflection or consideration of the evidence, and the absence of any opportunity to debate views, may have contributed to some confusion amongst jurors.[56] Some modern authors argue that it led juries to abandon law and facts and concentrate instead on the character of the litigants and the interests of the polis.[57] It would be unwise to be too dogmatic on this point. We should not presume, simply because modern courts rely on cross-examination and deliberation, that an Athenian juror was incapable of forming an opinion on the evidence presented to him.

So too we should not place too much weight on the claim, frequently made,[58] that as Athenian jurors were amateurs they did not have enough legal knowledge. This lack of knowledge may have made them easy prey for unscrupulous orators, who could convince jurors to vote against what was lawful. The crucial problem here is that we do not know just how much legal knowledge an average Athenian had. Some authors point

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[52] See, for example, Hall (1966); Evans (1978:4-9).
[53] Aeschines i.35 contains the text of what purports to be a law banning interruptions or *thorubos* in the *Boule* and the Assembly. However, this document is of uncertain status; while it is thought to be spurious, it is possible that it was based on a genuine law (Drerup 1898:307; Harrison 1968-71, II:4, n.1).
[54] Aristotle *Pol.* 1281a39-1281b14, 1281b32-7, 1282a14-40; Old Oligarch *Ath. Pol.* iii.7.
[55] Carey (1994b:101-6).
[56] Allen (1980:24).
[57] Notably Cohen (1995a:105).
[58] Anon. (1826:337-8); Heitsch (1984:7); Ober (1989:169); Scafuro (1997:51-3); Wolf (1956:164).

out that jurors would have gained knowledge from sitting on the Council, attending the Assembly and working as officials; many may also have been habitual jurors, and formed a good knowledge of legal issues over time.[59] Each year the Assembly was responsible for scrutinising the existing laws and hearing proposals for revising or adding laws (Demosthenes xxiv.20-3). Proposals for new or revised laws would be considered by the νομοθέται, who were selected from those who had sworn the Heliastic oath (ἐκ τῶν ὀμωμοκότων).[60] Consequently, one should expect that jurors would have a good knowledge of the laws. I would also add that the level of participation in Athenian democratic institutions appears to have been quite high,[61] and interest in major lawsuits was also high.[62] Accordingly, we should not expect that Athenians would have had only slight knowledge of their laws.

Another weakness that is often identified is not actually procedural, but substantive; the vagueness with which Athenian laws are commonly phrased, which left "gaps" where some cases were not actually covered by law, or it was not clear how a law should be applied.[63] Some have argued that vague statutes would have left the jurors with no hope of working out whether someone had actually broken the law, and would have led them to rely more on character evidence in reaching a verdict.[64] This argument effectively condemns Athenians as idiots. We have no evidence that an average Athenian could not identify what, for example, he considered ὕβρις or impiety, and that he could not decide

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[59] Gagarin (1989:113); Gomme (1962:185); E. M. Harris (1994:134-6).

[60] Demosthenes xxiv.21. Some (e.g. MacDowell 1975:73, Rhodes 1995:318, 2003a:129) argue that by the middle of the fourth century BC *nomothetai* no longer needed to be selected from jurors. This argument has been doubted by Hansen (1978:154-7, 1980:97, 1985:363-5). It rests on two pieces of evidence. The first (MacDowell 1975:65) is that Demosthenes xx.93 shows that the law on *nomothesia* had been repealed and that, as it is not specifically stated that *nomothetai* were now jurors, they no longer needed to be jurors. This argument *ex silentio* would need to be supported by other evidence to be decisive. The second piece of evidence (MacDowell 1975:69) is that Demosthenes xxiv.27 shows that *nomothetai* comprised 1,001 jurors plus the *Boule*. Hansen (1985:364) has suggsted that the second claim is incorrect as it is precluded by the syntax of Demosthenes xxiv.27. His claim may be too ambitious; the syntax of the passage does not really preclude the possibility that the *Boule* joined with the *nomothetai* in drafting laws. The key lies in the precise meaning of the word συννομοθετεῖν. Unfortunately, we have little to go on here; Hansen takes it to mean that the *Boule* cooperated with, or assisted, the *nomothetai*, but συννομοθετεῖν could equally mean "joining with [someone] to draft laws." The word occurs once more only in Greek literature, in Plato *Laws* 833e, where again it could have either meaning. Even if we accept MacDowell's view, however, Demosthenes xxiv.27 need not indicate that *nomothetai* were regularly drawn from outside those who had sworn the Heliastic oath; the passage may well reflect an unusual procedure for a specific circumstance, since the meeting of *nomothetai* was called for a festival day (Hansen 1978:154-5).

[61] Sinclair (1989:140-1).

[62] The youthful Demosthenes was moved to become an orator when he saw the public adulation granted to one man whose speech won an important case (Plutarch *Dem.* vi).

[63] Ruschenbusch (1957:263-4); Sealey (1994:51-2); Todd (1993:58, 2000a:26-7).

[64] Notably Allen (1980:26) and Cohen (1995a:105); see also Scafuro (1997:52).

whether a speaker so accused was guilty, on the evidence presented, or not.[65] We also have no evidence that Athenian audiences were incapable of untangling the various tricks and pettifogging of the speakers. Open texture is a feature of all law codes, and exists because legislators cannot predict all possible circumstances.[66]

Although it is not wise to stress these various limitations too much, it is worth noting that they may have contributed to an overall pattern of behaviour in court. They show that a trial became a contest over what was *actually said at the time*. Jurors would have had to base their decisions on the claims made by each speaker at the precise moment of the trial. Generally, they would have had no other source upon which to base their knowledge of the facts of the case or other evidence, and they may have depended on the speakers for much of their knowledge of the relevant laws. Accordingly, success in a case depended very much on the ability to present one's case clearly and persuasively, and may also have been susceptible to more random factors such as variation in the attitudes of the jurors or popular sentiment.

Summary

One of the problems of studying the legal concept of relevance in Athenian courts is the way in which modern views of how a case should be discussed in court have been applied to Athenian juries. This perspective is unhelpful for understanding our subject. Scholars have tended to focus on two extreme views that are products of a modern conception of a legal system. In a modern common law court, where relevance is strictly determined, slanders and discussion of character would seldom be allowed. When applied to Classical Athenian courts the modern perspective produces an unsolvable paradox. Either the Athenians stuck rigidly to law, or they frequently abandoned it. It is foolish to deny that these extremes exist. Clearly, however, both sides cannot be right; the Athenians cannot have both accepted laws and ignored them. Perhaps both sides are wrong. The extremes are, after all, *extremes*. It is just as false to characterise Athenians as sober jurists, as to deride them as vulgar brawlers. Modern scholars have paid little attention to the overall variance of Athenian oratory, and the pattern that might be discerned from it and used to characterise Athenian jurors. If we study the range of arguments in oratory, we find that speakers generally included both legal and nonlegal

[65] One is reminded of Justice Potter Stewart's comment "I can't define pornography, but I know it when I see it."
[66] See E. M. Harris (1994:138-40).

arguments in their speeches, depending on a range of factors. By focussing on the extremes, modern scholarship has blurred the actual picture. A concern with deriding Athenian juries for listening to nonlegal argument, or upholding their respect for law, ends up reinforcing the extreme positions. More importantly, it leaves no opening for seeking to understand why some speeches are predominantly nonlegal, and when speakers would use legal or nonlegal arguments. This thesis will be based on the overall pattern of forensic oratory, and that includes the extremes, but as part of the entire range of variance.

Chapter Two Law and Equity in Athenian Courts

This chapter considers the historical development of theories about relevance. It also discusses two of the theories identified in Chapter One - the "equity" theory that speakers could base their case on fairness in opposition to law, and the "positivistic" theory that juries were bound to follow law and evidence only. The two theories have grown, in part, in response to each other, and therefore I deal with them together.

Early Reconstructions of Athenian Jurors

There has been a tradition of viewing Athenian juries in a dim light. Ancient philosophers condemned them for their perceived prejudice, for heeding supplications and for failing to pay attention to laws or the details of the case (Plato *Apol.* 34c, 35c; Xenophon. *Apol.* 4, *Mem.* iv.4.4; Old Oligarch *Ath. Pol.* i.13, 18; Isocrates. xv.142). Xenophon, for example, has Hermogenes ask Socrates:

> οὐκ ὁρᾷς τὰ Ἀθηναίων δικαστήρια ὡς πολλάκις μὲν οὐδὲν ἀδικοῦντας λόγῳ παραχθέντες ἀπέκτειναν, πολλάκις δὲ ἀδικοῦντας ἢ ἐκ τοῦ λόγου οἰκτίσαντες ἢ ἐπιχαρίτως εἰπόντας ἀπέλυσαν;
>
> Don't you see that the Athenian *dikasteria* have often been carried away by a speech and executed innocent men, and have often acquitted guilty men either because they took pity on them because of their speech or because the [speakers] curried favour when they spoke (*Apol.* 4)?

Both Xenophon (*Apol.* 22, *Mem.* iv.4.4) and Plato (*Apol.* 34c, 35a) stress that Socrates refused to make any of the customary emotional appeals at his trial. Xenophon states:

> καὶ ὅτε τὴν ὑπὸ Μελήτου γραφὴν ἔφευγε, τῶν ἄλλων εἰωθότων ἐν τοῖς δικαστηρίοις πρὸς χάριν τε τοῖς δικασταῖς διαλέγεσθαι καὶ κολακεύειν καὶ δεῖσθαι παρὰ τοὺς νόμους καὶ διὰ τὰ τοιαῦτα πολλῶν πολλάκις ὑπὸ τῶν δικαστῶν ἀφιεμένων, ἐκεῖνος οὐδὲν ἠθέλησε τῶν εἰωθότων ἐν τῷ δικαστηρίῳ παρὰ τοὺς νόμους ποιῆσαι, ἀλλὰ ῥᾳδίως ἂν ἀφεθεὶς ὑπὸ τῶν δικαστῶν, εἰ καὶ μετρίως τι τούτων ἐποίησε, προείλετο μᾶλλον τοῖς νόμοις ἐμμένων ἀποθανεῖν ἢ παρανομῶν ζῆν.
>
> And when he defended himself against the charge brought by Meletus, although it is the custom of other men in the *dikasteria* to ingratiate themselves in speaking to the jurors and to flatter them and beg against the laws, and by such means many have often been acquitted by the jurors, he in no way wished to carry out the familiar practice in the courts against the laws, but, even though he might easily have been acquitted by the jurors, if he had done anything of this kind even in moderation, he preferred to die, standing by the laws, rather than to live by breaking them (*Mem.* iv.4.4).

At the end of his *Apology* Plato made a statement of principle about just conduct in a lawcourt, implying that such conduct was not to be found in Athenian *dikasteria*:

> οὐδὲ δίκαιόν μοι δοκεῖ εἶναι δεῖσθαι τοῦ δικαστοῦ οὐδὲ δεόμενον ἀποφεύγειν, ἀλλὰ διδάσκειν καὶ πείθειν. οὐ γὰρ ἐπὶ τούτῳ κάθηται ὁ δικαστής, ἐπὶ τῷ καταχαρίζεσθαι τὰ δίκαια, ἀλλ' ἐπὶ τῷ κρίνειν ταῦτα· καὶ ὀμώμοκειν οὐ χαριεῖσθαι οἷς ἂν δοκῇ αὐτῷ, ἀλλὰ δικάσειν κατὰ τοὺς νόμους. οὔκουν χρὴ οὔτε ἡμᾶς ἐθίζειν ὑμᾶς ἐπιορκεῖν οὔθ' ὑμᾶς ἐθίζεσθαι· οὐδέτεροι γὰρ ἂν ἡμῶν εὐσεβοῖεν.
>
> I don't think it is just to beg the juror, or to get acquitted by begging, but rather to teach him and persuade him. For that's not why the juror is sitting, to give favours about matters of justice, but to judge those matters; and he has sworn, not to grant favours to anyone he pleases, but to judge according to the laws. Neither should we accustom you to breaking your oath, nor ought you to become accustomed; for neither of us would be acting piously (*Apol.* 35c).[1]

Athenian Old Comedy also satirized jurors. Aristophanes charged that jurors could be influenced by bribes and supplications, rather than the evidence (*Wasps* 550-86). His jurors are keen to do harm to the accused (321-22, 340), are moved by supplications or jokes (560-61), defendants must recite the speech from Niobe or play the flute to get off (579-81), and wills are ignored (583-86).

These criticisms of jurors were picked up in later antiquity. Cicero, for example, refers to Plato's *Apology* and claims that Socrates was unfairly condemned (*De Orat.* i.230-33). Other authors criticised the unstable nature of the *demos* and derided Athenian democracy in general.[2] The Romans in turn influenced early Christian and Renaissance scholars. From the sixteenth century, three traditions developed in scholarship on Athenian juries:

- The first was concerned simply with sorting out the Athenian legal system.[3] These

[1] The general point made by Plato and Xenophon is that emotional appeals to the jury are not only unjust, but illegal, though the precise nature of the illegality is never specified. Presumably anything that detracts from a judgement on the facts alone is illegal, insofar as it ensures that guilty parties are not punished for breaking a law.

[2] Roberts (1994:104-18).

[3] The earliest modern work on Athenian law was carried out as part of a bitter and intemperate argument in print between the monarchist Salmasius and his rival Heraldus. Their work concentrated on defining the legal issues and on source criticsim, but was intensely polemical; their diatribes, however, were directed against each other. For example, Salmasius (1645:769) claimed that he had found nothing on Athenian witnesses that did not deserve a shepherd's pipe or a corrective cane (nihil me in eo invenisse nisi pastoritia fistula dignum & censoria virgula notandum"). Heraldus retorted that clearly Salmasius had conjunctivitis (1650:440; "Atque hoc lippientibus oculis vidisse te docet nos pagina 834. istius capitis ultimi").

scholars built the foundations of our understanding of Athenian legal institutions and procedure.[4]

- The second argued that the good aspects of Athenian democracy should be emulated. This view appears to have originated with Florentine scholars seeking to legitimse their own popular rule,[5] but became influential in later libertarian philosophy, notably Rousseau[6] and some German thinkers.[7]
- The third derided Athenian democracy in an effort to bolster current monarchies against demand for parliamentary government. By the eighteenth century it had become dominant.[8]

One of the earliest historical works to expound the monarchist view was Jean Bodin's *Method for the Easy Comprehension of History*, in which Athenian democracy was denigrated as emotional and random and inferior to monarchy, which linked government to ability and also had the sanction of God.[9] Bodin asked: "And how can a multitude, that is to say, a Beast with many heads, without jugement (sic) or reason, giue (sic) any good counsel? To aske counsell of a multitude (as they did in old times in Popular Commonweals) is to seeke for wisdome of a mad man."[10]

Bodin's comments were picked up by eighteenth-century authors who criticised Athenian democracy. Few had much to say about Athenian juries, though the trial of Socrates was regularly seen to prove the capriciousness of the Athenian mob and its lack of a rule of law.[11] Direct criticism of Athenian juries originated in a pamphlet by Josiah

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[4] Potter (1818[1697-8]:120-48); Stanyan (1766, I:134-5, 153, 177); Tittmann (1822:193-239). Hudtwalcker (1812:xiii) referred to the need "dieser Stall des Augeias gereinigt werden."
[5] See Roberts (1994:121-27).
[6] Rousseau (1997[1755]:116-17).
[7] In Germany, praise for the Classical Athenians appears to originate with an appreciation that their artistic greatness was achieved under a democracy (Winckelmann 1764, II:324-25). The view that democracy could ennoble character and political life was raised by von Herder (1968[1784-91]:194) and Hegel (1888:260-64, 268-72).
[8] Ralegh (1820, IV:81, 93-94); Harrington (1887[1656]:152, 161-62, 176); Filmer (1940[1680]:84-89, 93-94); Swift (1701:93-98); Montagu (1760:6, 10-12); Goguet (1775, III:36-38, 232-33); Rollin (1775, IV:228-48, VII:71); Tucker (1781:211-12, 215-17, 220); Young (1786:59-65, 227-28; 1793:8-17, 45, 53-54); de Mably (1796, IV:79-80; X:174, 192); Bisset (1796:xxiii, 6-8, 67-73, 83, 146-7).
[9] Bodin (1945[1583]:192-93, 269, 270-79, 282). See also Bodin (1606:250-51, 543-44, 717-18).
[10] Bodin (1606:702); the translation is by R. Knolles.
[11] Stanyan (1766, II:55-7) compared Socrates to a Christian martyr, thereby implicitly condemning the Athenians. Rollin (1775, IV:228-29) spoke of Socrates' noble demeanour at his trial, and his refusal to flatter the judges. Goldsmith (1784:379) argued that Socrates had been unjustly condemned, even though he had defended himself honestly and nobly and not stooped to the usual trickery of speakers in courts. Sir William Young (1786:198) stated that Socrates refused to plead in his defence - "but what defence could avail, when virtue was the crime!" Bisset (1796:127) claimed that Socrates was tried by a court "composed of the most furious and ignorant of the populace."

Tucker. Following Aristophanes, he states that every man brought into court had to flatter and cajole the jury in the hope of being acquitted, and suggests that, if one were to imagine their speeches in modern words, the following would be typical:

> My client is a rich and generous Man. If you will decree for him, he shall treat his Judges with splendid entertainments at Ranelagh, Vauxhall, and Sadler's Wells, and at other Places of Diversion. Moreover he will give you Tickets to go for several Nights to both the Theatres, &c. &c. &c.[12]

Tucker's comments were put in a more authorative way by Gillies and Mitford, who helped establish the modern study of Greek history.[13] Both viewed Athenian democracy as mob rule,[14] and deemed Athenian juries inferior to British juries because of their apparent prejudice and passion, inattention to law and evidence, and lust for prospective rewards.[15] Gillies asserted that Socrates was wrongly condemned by "the mob of the Heliaea, a court, for so it was called, consisting of five hundred persons, most of whom were liable, by their education and way of life, to be seduced by eloquence, intimidated by authority, and corrupted by every species of undue influence."[16] Mitford argued that democratic courts were populated by "the poor, the idle, the profligate"[17] who rendered life and property insecure by their avarice, so that the "glorious security provided by the English law" was unknown.[18] Instead it was not even necessary to allege that a specific crime had been committed; "as passion and prejudice, or the powers of oratory, or solicitation and bribery, moved, condemnation or acquittal were pronounced."[19]

Mitford's views were developed by an anonymous reviewer who wrote the first detailed study of Athenian courts. He derided jurors as mean of rank and character, ignorant of jurisprudence, prone to passion and lacking in intelligence, and generally inferior to "the twelve 'good men and true,' to whom an Englishman undoubtingly submits his honour,

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[12] Tucker (1781:224-25). Tucker did not cite any references, offering instead an excuse that would be welcomed by every harassed student: "Only let me add, that I would have produced the very Passages from the original Authors, as Vouchers for the general Truth and Justness of the Parallel, [*mutatis mutandis*] if I had had the Convenience of *Greek* Types at the Place where I am printing (1781:225)."
[13] Momigliano (1966:57).
[14] Peardon (1933:84-85, 92-93) pointed out that Gillies and Mitford's views were by no means separate from their clearly highlighted interests in using history to protect the British Constitution against democrats and to undermine the possible influence of the French and American revolutions. As Peardon notes (1933:89), Mitford had visited France in 1776 and detested the democratic views he encountered there; his most strongly anti-democratic comments were composed after the French Revolution and were written with the "lurid background of Jacobin France."
[15] Gillies (1792[1786], III:130-3, 469-72); Mitford (1785:230-2, 1818, V:7-14, 88, VII:359-60, 372-3).
[16] Gillies (1792[1786], III:131).
[17] Mitford (1818, V:10-11).
[18] Mitford (1818, V:12).
[19] Mitford (1818, V:14).

his property, his person."[20] The reviewer cited Plato and Cicero, but also cited forensic oratory, suggesting that "there is scarcely an anomaly in law or a violation of the first principles of jurisprudence, which is not to be found in its pages, either pressed upon the acceptance of the people or sanctioned by their practice."[21]

These early studies set the parameters for later discussions of Athenian democracy. In particular, they initiated the view that Athenian juries ignored law and judged on the basis of emotion or prejudice. Gillies and Mitford were extremely influential, and there is scarcely a relevant publication from the nineteenth century which does not echo their distaste for Athenian courts.[22] Even though later authors' politics may be different, the seductively negative view of Athenian courts has maintained its hold over scholarly opinion to this day.

From a current perspective, these early histories are of dubious worth. Their treatment of sources is generally doubtful and does not stand up to analysis.[23] They were swiftly challenged by scholars with a more supportive view of Athenian democracy, notably George Grote.[24] In Chapter xlvi of his *History of Greece* Grote agreed that emotion

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[20] Anon. (1826:335).

[21] Anon. (1826:350). Mitford (1818, V) had earlier summarised selected forensic speeches to illustrate the low quality of justice in Classical Athens. Interestingly enough, there may have been a general prejudice during the eighteenth century against English juries for their perceived willingness to reach decisions contrary to law (King 1988:283-91). The popular expression of this view can be seen in Lismahago's verdict, in Smollett's *The Expedition of Humphry Clinker*, that juries were "generally composed of illiterate plebians, apt to be mistaken, easily misled (Smollett 1771:241)." This popular prejudice should not be ignored as a possible source of eighteenth-century distrust of Athenian juries.

[22] Bisset cites Gillies extensively and dismisses Athenian courts as mob rule (1796:83), where "proof is disregarded, amidst prejudice and passion. The forms of justice may be observed, the substance is neglected." One of Mitford's earliest converts was Mitchell, who, in his translation of Aristophanes' *Wasps*, quotes Mitford extensively and contrasts Athenian law unfavourably with English law (1820-22, II:162-8). Thirlwall (1835-40:222-6) echoed both Mitford and Mitchell in condemning Athenian jurors as representatives of the lowest class of people, prone to passion and completely deficient in the ability to weigh up arguments and evidence. His analysis was largely based on Aristophanes' *Wasps*. Thirlwall himself was followed by Forsyth (1879[1849]:26-7, 31-2, who made numerous comparisons between Athenian and English juries (especially at 1879[1849]:31-2, 38-9, 45, 51). For other Mitfordian comments on Athenian juries see Hudtwalcker (1812:39); Boeckh (1842[1817]:227-8); Wachsmuth (1837, II:201-3); Keightley (1839:166, 285-6); Curtius (1867-73, V:119-20) and Lytton (1874:450-2). For general comments on the influence of Mitford see Peardon (1933:84), though he should be read with the *caveat* that, although Mitford's general influence was limited, the specific influence of his picture of Athenian courts carried all before it during the nineteenth century, even in the face of Grote's strenuous opposition.

[23] For example, the anonymous reviewer accepts Aristophanes' views as fact (eg. 1826:334, 336) and is similarly credulous about all statements in forensic oratory (eg. 1826:338, 350-1). Gillies (1792[1786]:469) and Goldsmith (1784:379-80) accept Plato's *Apology* at face value. Mitford (1785:230) accepts Aristotle's views of democracy at face value. For an exhaustive list of Mitford's methodological errors and political biases against democracy, see Grote (1826:284, 297-330), while for a general but nonetheless devastating summary see Peardon (1933:91). Anon. (1827:228-51) delivers a point-by-point refutation of the anonymous reviewer's comments on Athenian juries.

[24] Initially, Macaulay 1860[1824]); Grote (1826:286, 307), Anon. (1827:238). See also Arnold (1830-35, I:669).

could sometimes count for rather more than reason in a court, because jurors primarily gained information about a case from orators' speeches rather than from factual sources such as witnesses,[25] but stressed that overall juries would base decisions on law and the facts of the case. He supported his argument by citing the weight placed on the authority of law in the Heliastic oath.[26]

Grote's views on Athenian democracy were attacked on a number of fronts,[27] and his critics focussed on the lawcourts. They argued that nonlegal arguments played a key role in deciding a case, due to the lack of legal expertise enjoyed by an average jury, which encouraged its members to indulge prejudice and passion as whim took them.[28] Grote's critics had won the day by the early twentieth century.[29] Of the few who seem to have agreed with him, Fränkel picked up his emphasis on the Heliastic oath, suggesting it bound Athenian jurors to consider law as the primary factor in their judgements. Only in exceptional circumstances, he argued, where a law did not cover a particular matter, were jurors permitted some flexibility; here they were to use their "most just opinion" (γνώμῃ τῇ δικαιοτάτῃ).[30] Fränkel did not discuss γνώμῃ τῇ δικαιοτάτῃ at length, but it was to become crucial to our understanding of relevance.

Hirzel, Vinogradoff and Equity Principles

During the nineteenth century scholars identified concepts of fairness or equity in speeches.[31] Hirzel linked them to γνώμῃ τῇ δικαιοτάτῃ, noting that appeals to unwritten law (ἄγραφος νόμος), comprising the general customs and traditions of a *polis*, were occasionally made in forensic oratory (e.g. Lysias vi.10).[32] Aristotle (*Rhet.* 1375a28-1375b4) was the key basis of his argument:

> φανερὸν γὰρ ὅτι, ἐὰν μὲν ἐναντίος ᾖ ὁ γεγραμμένος τῷ πράγματι, τῷ κοινῷ νόμῳ χρηστέον καὶ τοῖς ἐπιεικέσιν ὡς δικαιοτέροις.[33] καὶ ὅτι τὸ γνώμῃ τῇ ἀρίστῃ τοῦτ' ἐστί, τὸ μὴ παντελῶς χρῆσθαι τοῖς γεγραμμένοις. καὶ ὅτι τὸ μὲν

[25] Grote (1826:297, 1867[1848]:396-8).
[26] Grote (1867[1848]:373-4, 388-9).
[27] See the discussion by Turner (1981:234-58).
[28] Burckhardt (1998[1872]:80, 229); Rogers (1875:xxxv-xxxvii); von Pöhlmann (1911[1890]:236); Abbott (1891:269-64); Headlam (1891:37); Beauchet (1897, I:xx).
[29] Wyse (1904:512) noted that Athenian legal procedure "opened a wide door to chicanery and jesuitical acts." For similar condemnations see Pickard-Cambridge (1914:88-90); Weber (1917:158); Glotz (1929:251); Bonner (1927:74-6, 78-88); Bonner and Smith (1930-38, II:298-302).
[30] Fränkel (1878:454-5, 465).
[31] Seeliger (1876:673-74); Hitzig (1897:180-81).
[32] Hirzel (1900:14-19, 22-29). Hirzel identified two types of unwritten law; one comprising the customs of the *polis*, the other general ethical constructs common to all Greeks (such as incest taboos). See Ostwald (1973).
[33] Following Mirhady (1990:395-6) in preferring this reading to ἐπιεικεστέροις ὡς.

ἐπιεικὲς ἀεὶ μένει καὶ οὐδέποτε μεταβάλλει, οὐδ' ὁ κοινός (κατὰ φύσιν γὰρ ἐστιν), οἱ δὲ γεγραμμένοι πολλάκις.

For it is clear that, if the written law is opposed to our case, we must employ common law and equity as more in accordance with justice. And that this is [the meaning of] to the best of one's judgement, not to use the written laws absolutely. And that equity always remains and never changes, and nor does the common [law] (for it is according to nature), but the written [laws] often [do] (Aristotle *Rhet.* 1375a28-1375b4).[34]

Hirzel suggested that γνώμῃ τῇ δικαιοτάτῃ effectively gave jurors a licence to dispense with statutes, and that in practice juries regularly indulged their sense of "equity" (ἐπιείκεια).[35] His theory was expanded by Vinogradoff, who argued that Aristotle's concept of ἐπιείκεια described the means by which speakers could introduce nonlegal arguments in court. He suggested that law provided a baseline upon which Athenian juries founded their decisions, but that it was common to depart from this base when no law applied, or when applicable laws were vague, or even when an applicable law would, in the circumstances, result in an injustice.[36] He drew attention to the following two passages in Aristotle's *Nicomachean Ethics* and *Rhetoric*:

...τὸ ἐπιεικές δίκαιον μέν ἐστιν, οὐ τὸ κατὰ νόμον δὲ, ἀλλ' ἐπανόρθωμα νομίμου δικαίου. αἴτιον δ' ὅτι ὁ μὲν νόμος καθόλου πᾶς, περὶ ἐνίων δ' οὐχ οἷον τε ὀρθῶς εἰπεῖν καθόλου. ἐν οἷς οὖν ἀνάγκη μὲν εἰπεῖν καθόλου, μὴ οἷον τε ὀρθῶς, τὸ ὡς ἐπὶ τὸ πλέον λαμβάνει ὁ νόμος, οὐκ ἀγνοῶν τὸ ἁμαρτανόμενον. καὶ ἔστιν οὐδὲν ἧττον ὀρθός· τὸ γὰρ ἁμάρτημα οὐκ ἐν τῷ νόμῳ οὐδ' ἐν τῷ νομοθέτῃ ἀλλ' ἐν τῇ φύσει τοῦ πράγματός ἐστιν· εὐθὺς γὰρ τοιαύτη ἡ τῶν πρακτῶν ὕλη ἐστιν. ὅταν οὖν λέγῃ μὲν ὁ νόμος καθόλου, συμβῇ δ' ἐπὶ τούτου παρὰ τὸ καθόλου, τότε ὀρθῶς ἔχει, ἃ παραλείπει ὁ νομοθέτης καὶ ἥμαρτεν ἁπλῶς εἰπών, ἐπανορθοῦν τὸ ἐλλειφθέν, ὃ κἂν ὁ νομοθέτης αὐτὸς οὕτως ἂν εἴποι ἐκεῖ παρών, καὶ εἰ ᾔδει, ἐνομοθέτησεν ἄν. διὸ δίκαιον μὲν ἐστι, καὶ βέλτιόν τινος δικαίου, οὐ τοῦ ἁπλῶς δὲ ἀλλὰ τοῦ διὰ τὸ ἁπλῶς ἁμαρτήματος καὶ ἔστιν αὕτη ἡ φύσις ἡ τοῦ ἐπιεικοῦς, ἐπανόρθωμα νόμου, ᾗ ἐλλείπει διὰ τὸ καθόλου. τοῦτο γὰρ αἴτιον καὶ τοῦ μὴ πάντα κατὰ νόμον εἶναι, ὅτι περὶ ἐνίων ἀδύνατον θέσθαι νόμον, ὥστε ψηφίσματος δεῖ.

...equity is justice, but it is not [justice] according to law, but a correction of legal justice. The reason for this is that a law is always a general statement, but in relation to some cases it is not possible to make a general statement correctly. Therefore, in cases where it is necessary to make a general statement, but it is impossible to do so correctly, a law takes account of the majority of cases, even though it recognizes that it is making a mistake. And [the law] is no less correct; for the mistake is not in the law nor in the lawgiver but in the nature of the case; the subject matter of things is always irregular. Therefore whenever a law makes a general statement, and then [a case] arises in relation to this [law] which is against the general statement, it is then correct, in a case where the lawgiver has

[34] γνώμῃ τῇ ἀρίστῃ appears to be the same as γνώμῃ τῇ δικαιοτάτῃ (Carey 1996:37).
[35] Hirzel (1900:57-60).
[36] Vinogradoff (1922:64-5, 1928a:16, 1928b:42).

made an absolute statement and omitted [something] and committed an error, to correct the omission in such a way as the lawgiver himself would have made the statement had he been present, and would have decided if he had known [about such a case]. Hence [equity] is just, and is better than one sort of justice, but is not better than absolute [justice] but [is better than] the mistake that results from the absolute statement. And this is the nature itself of equity, a correction of the law in matters where it omits [something] because [it is] a general statement. This is the reason also why not all cases are [decided] according to law, because it is not possible to lay down a law in relation to some cases, so that there is a need for a decree [of the Assembly] (Aristotle *EN* 1137b11-29).

τὸ γὰρ ἐπιεικὲς δοκεῖ δίκαιον εἶναι, ἔστι δὲ ἐπιεικὲς τὸ παρὰ τὸν γεγραμμένον νόμον δίκαιον. συμβαίνει δὲ τοῦτο τὰ μὲν ἀκόντων τὰ δὲ ἑκόντων τῶν νομοθετῶν, ἀκόντων μὲν ὅταν λάθῃ, ἑκόντων δ' ὅταν μὴ δύνωνται διορίσαι, ἀλλ' ἀναγκαῖον μὲν ᾖ καθόλου εἰπεῖν, μὴ ᾖ δέ, ἀλλ' ὡς ἐπὶ τὸ πολύ. καὶ ὅσα μὴ ῥᾴδιον διορίσαι δι' ἀπειρίαν, οἷον τὸ τρῶσαι σιδήρῳ πηλίκῳ καὶ ποιῷ τινί. ὑπολείποι γὰρ ἂν ὁ αἰὼν διαριθμοῦντα. ἂν οὖν ᾖ ἀδιόριστον, δέῃ δὲ νομοθετήσαι, ἀνάγκη ἁπλῶς εἰπεῖν, ὥστε κἂν δακτύλιον ἔχων ἐπάρηται τὴν χεῖρα ἢ πατάξῃ, κατὰ μὲν τὸν γεγραμμένον νόμον ἔνοχός ἐστι καὶ ἀδικεῖ, κατὰ δὲ τὸ ἀληθὲς οὐκ ἀδικεῖ, καὶ τὸ ἐπιεικὲς τοῦτο ἐστίν.

For equity is thought to be justice, but equity is justice beyond[37] the written law. This occurs in some cases with the will, and in other cases without the will of the legislators, without their will whenever they overlook something, and with their will whenever they are unable to give a precise definition, but there is a need to make a general statement, or, when it is not necessary [to do so], they make a statement that applies to most cases. And in as many cases as are difficult to define through inexperience, such as wounding with an iron object of such a size and what kind. For life would come to an end for one who enumerated [the cases]. So if the matter should not be precisely defined, but there should be a need to make a law, it is necessary to frame an absolute statement, so that if [a man] wearing a ring should raise his hand or strike [someone], then according to the written law he is guilty and commits a crime, but in fact he commits no crime, and this is equity (Aristotle *Rhet.* 1374a26-1374b1).

In the first passage Aristotle states that a law framed as a general statement may not account for all possible situations,[38] and that equity is required to correct a miscarriage of justice. His argument in the *Rhetoric* is similar, but Aristotle also suggests that equity can correct an unjust law. By striking someone while wearing a ring a man has theoretically struck them with a piece of metal and broken the law, but in fact he has not committed a crime.[39] The first passage is a discussion of general legal principles, and so cannot be taken as evidence for the practical application of equity in a court; however, the discussion in the *Rhetoric* concerns arguments to use in court, and therefore shows Aristotle believed appeals for equity were possible in court.

[37] I have translated παρὰ here as meaning "beyond" rather than "contrary to" the law, following Grimaldi (1980:300). For this meaning see LSJ s.v. C.8.
[38] See also Aristotle *Pol.* 1228a41-1282b13.
[39] This point was made by Mirhady (1990:400).

Vinogradoff agreed with Hirzel that a speaker could introduce ἐπιείκεια by appealing to γνώμῃ τῇ δικαιοτάτῃ.[40] He suggested that ἐπιείκεια "amounted in practice to a liberal interpretation and application of legal rules."[41] A speaker could appeal to equity even if there were no gaps in the law, and convince jurors to ignore laws altogether, or to consider legal interpretations that were in reality outside the actual meaning of a law.[42] As evidence for his theory Vinogradoff noted the treatment of testaments and contracts in Athenian forensic oratory, including what he suggested were equity arguments in Isaeus iv.12,[43] Hyperides iii.13,[44] and Demosthenes xxxii.[45]

In assessing the "equity" theory, it is important to work out exactly what point Aristotle was making. One problem is that his discussion of equity is inconsistent. In *Nicomachean Ethics* 1137b he argues that equity should only apply when the law omits to allow for a particular case. Aristotle's statement "And this is the nature itself of equity, a correction of the law in matters where it omits [something], because [it is] a general statement" seems unequivocal. Yet in the *Rhetoric* ἐπιείκεια is something different, amounting to a correction of existing law through the claim that equity is superior to law.[46] Furthermore, in the *Rhetoric* ἐπιείκεια is linked to γνώμῃ τῇ δικαιοτάτῃ, yet in the *Nicomachean Ethics* it is not.

The inconsistencies probably reflect the different purposes of the two works. In the *Nicomachean Ethics* Aristotle's object is to discuss justice, and to make the point that written law cannot perfectly ensure justice. Equity is therefore needed to fill in the gaps in the law. In the *Rhetoric* Aristotle's concern is more practical, to outline various tactics for winning a case in court. In this case, arguing that equity should be applied only when there is a gap in the law does not offer a particularly useful approach, since what is needed is a recourse when the speaker does not have written law on his side (*Rhet.* 1375a27-9). Accordingly, equity needs to be used more widely, as the basis of an appeal to correct unjust laws. This is also why, at *Rhet.* 1375b16-17, when he presents the balancing arguments in favour of written laws, Aristotle states that if the written law

[40] Vinogradoff (1928b:42).
[41] Vinogradoff (1928b:42).
[42] Vinogradoff (1922:66, 68-69, 1928a:17-19).
[43] Vinogradoff (1922:66-67). There is insufficient space here to discuss his claims in detail.
[44] Vinogradoff (1922:68, 1928a:20-21).
[45] Vinogradoff (1928c:32-34).
[46] Grimaldi (1980:300); Mirhady (1990:397-99).

is on the speaker's side he should argue that it is not just to abandon written law in favour of γνώμῃ τῇ δικαιοτάτῃ.

That Aristotle's aim in the *Rhetoric* was more practical is clear from 1374b1-18, where Aristotle lists types of equity pleas. The list includes appeals that errors and misfortunes should not be considered on the same basis as crimes; that one should make allowances for human failings; that one should consider not the law but the lawgiver and look, not at the letter of the law, but at the intention of the lawgiver; that one should not consider the action but the purpose; that one should consider not how someone is but how he has always (or for the most part) been; that one should remember good treatment rather than bad, and benefits received rather than offered; that it is better to be judged by agreement than by violence, and better to arbitrate than go to court.

The items are not internally consistent, but are appropriate depending on the circumstances in which one chooses to use them. One might consider that the list broadly covers all sorts of nonlegal argumentation. Against this, some point out that Aristotle grounds his discussion in terms of supplementing law. There is little point in distinguishing errors, misfortunes and crimes if ἐπιείκεια is simply intended to cover all sorts of nonlegal argumentation.[47] A discussion of the meaning of the law is grounded in the assumption that it is the law that matters, not an assumption that the law may be dismissed. We should note here the use of τὸ ἐπιεικὲς in the *Rhetorica ad Alexandrum* 1444a10-14. This handbook advises a litigant who admits the charges to claim an error or misfortune, and to say that forgiving error is equitable and just. Aristotle's discussion of equity in the *Rhetoric* was also made in this context, as Aristotle introduced it in relation to people who admit facts but deny the charge (1373b40-1374a10). One could argue, for example, that to convict a man for assault with a dangerous weapon when he struck whilst wearing a ring is unjust, and likewise to convict someone of homicide when the murder was accidental is also unjust. The handbooks show that ἐπιείκεια could have been useful in rare cases where a speaker had to admit guilt but was nonetheless trying to be pardoned. Equity can be used to offset the law *in these circumstances*, but not as a broad prop on any occasion.

How closely does Aristotle's concept of equity match the forensic speeches? Although general issues of justice or fairness occur fairly frequently in forensic speeches, they are

[47] von Leyden (1967:6-8); Grimaldi (1980:304).

never termed ἐπιείκεια. Generally, τὸ ἐπιεικὲς/ἐπιείκεια refer to moral characteristics and could be translated "reasonable", "decent", "respectable", "honest", "fair" or "moderate".[48] There is no instance where a speaker directly appeals for ἐπιείκεια in a forensic speech, and we do not find speakers seeking to replace written law with a broader concept of fairness.[49] The word does not occur, for example, in Antiphon's second *Tetralogy* (iiiβ.6-10, iiiδ.5-8), where the imaginary litigant admits the charge but pleads error or misfortune. Similarly, whenever speakers allude to γνώμῃ τῇ δικαιοτάτῃ they do so in contexts characterized by overall pleading in accordance with law that revoke any notion of ἐπιείκεια.[50]

In discussions of justice, ἐπιείκεια is sometimes contrasted with δίκαιον, indicating that it could generally have an extra-legal meaning, equivalent to equity (Sophocles Fr. 703 [Nauck]; Gorgias Fr. B6 D-K; Herodotus iii.53, Antiphon ii.2.13).[51] In a few instances, the word appears to be used in Aristotelian terms:

> ἀλλ' ἵνα μὴ Μειδίας ἀτίμητον ἀγωνίσηται δέκα μνῶν δίκην, πρὸς ἣν οὐκ ἀπήντα δέον, καὶ εἰ μὲν ἠδίκηκεν, δίκην δῷ, εἰ δὲ μή, ἀποφύγῃ, ἄτιμον 'Αθηναίων ἕνα εἶναι δεῖ καὶ μήτε συγγνώμης μήτε λόγου μήτε ἐπιείκειας μηδεμιᾶς τυχεῖν, ἃ καὶ τοῖς ὄντως ἀδικοῦσιν ἅπανθ' ὑπάρχει.
>
> But so that Meidias might not contest a case with a fixed penalty of ten mnai, which he did not attend when he should have, and so that, if he had committed a crime, he might pay the penalty, and if he had not, he might be acquitted, one of the Athenians had to lose his citizen status and obtain neither sympathy nor a right of defence nor any sort of equitable treatment of any type, which even real offenders all receive (Demosthenes xxi.90).
>
> ἑώρων γὰρ τοὺς περὶ τῶν συμβολαίων κρίνοντας οὐ ταῖς ἐπιεικείαις χρωμένους, ἀλλὰ τοῖς νόμοις πειθομένους.
>
> ...for they saw that the men who judged in relation to contracts did not apply equity but obeyed the laws (Isocrates vii.33 [a *symbouleutic* oration]).
>
> ὥστ' οὐκ ἄξιον οὔτε κατὰ χάριν οὔτε κατ' ἐπιείκειαν οὔτε κατ' οὐδὲν ἢ κατὰ τοὺς ὅρκους περὶ αὐτῶν ψηφίσασθαι.

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[48] See the discussions in Stoffels (1954:20-5) and Fortenbaugh (1996a:152), and Lysias ix.7; xvi.11; xix.13; Isocrates i.38, 48; iv.63; vii.68; xi.1; xiii.21; xv.149, 195, 212; Demosthenes xix.32, 223; xx.155; xxi.207; xxii.40; xxiv.215; xxv.18, 86; xxvi.16; xxxiv.40; xxxvi.50; cf. also Plato *Epist.* vii.325b; Sophocles *Or.* 1127; Thucydides iii.40.4. A similar meaning of ἐπιείκεια may be observed in oratory of the Roman period, where it can mean "modesty" and refers to the sort of character a speaker would try to project; cf. Hermogenes *On Types of Style* 345-52. This meaning shows echoes of Aristotle's definition, notably in the argument that a modest character would be displayed through the plea that the speaker was coming to trial against his will and the matter could have been settled among friends and relatives (ibid. 346).

[49] Meyer-Laurin (1965:2, 35, 39); Harris (1994:140); Carey (1996:36-7, 43).

[50] Biscardi (1970:225-6); Johnstone (1999:41-2).

[51] See also Stoffels (1954:31-3).

> Consequently, it is not right that you should vote in accordance with favour, or with equity, or in accordance with anything else than the oaths you took about these matters (Isocrates xviii.34 [concerning the juror's oath]).

The first passage is a general denunciation of Meidias' destruction of Straton rather than a technical plea, so the context is too broad to offer much help. The second passage has been seen as indicating that equity considerations were applied in court during Isocrates' time.[52] It is unclear how historically accurate Isocrates' claim is, but the passage surely indicates that Isocrates and his audience could acknowledge that jurors could consider equity, not law, in contract disputes.[53]

The third passage is precisely the sort of argument posited by Aristotle (*Rhet.* 1375b16-17) to be used against a claim for ἐπιείκεια in conjunction with γνώμῃ τῇ ἀρίστῃ. The passage proves that an appeal to ἐπιείκεια could be attacked as against a reasonable conception of the juror's oath, though the fact that Isocrates' speaker felt it necessary to mention a vote in accordance with equity may indicate that an appeal to equity was not unknown in Athenian courts. The passage does not indicate whether such an appeal would be made on the basis of gaps in the law, or by an attempt to counter an existing law.

Two possible passages is a very meagre yield from such a large corpus of evidence. We should not be surprised that there is so little evidence for ἐπιείκεια in forensic oratory. If ἐπιείκεια was mainly useful in situations where a speaker admitted the charge, then there are virtually no speeches in our corpus that fit this circumstance. The speaker of Lysias i admitted the charge, but claimed that his actions were lawful; obviously there was no need for equity in that case. Otherwise, there are no speeches where the speakers admit guilt.

How then are we to interpret the evidence for equity that Vinogradoff identified in forensic speeches? Vinogradoff may have erred in assuming that equity arguments always had to be introduced through an appeal to γνώμῃ τῇ δικαιοτάτῃ. Aristotle outlines a broad range of circumstances in which an appeal to equity may be tried, only one of which is to appeal that the written law does not allow for a particular case. In

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[52] Vinogradoff (1928a:19); Bonner and Smith (1930-38, II:302).

[53] It might be objected that κρίνοντας does not clearly refer to jurors. Certainly, in some forensic speeches the term can refer to prosecutors (e.g. Antiphon iv.1.1, 1.3); however, when Isocrates uses it and its cognates he tends to refer to jurors (e.g. xv.31).

other situations the purpose of the equity argument is that the law, if applied rigidly, would result in an injustice.

So do the nonlegal arguments that Vinogradoff identified constitute clear evidence that equity could override law? When they make their pleas it is striking that the speakers give primacy to law and structure their arguments in legal terms. For example, in Hyperides iii.13 the speaker frames his argument on the basis that the *law* makes unjust agreements invalid, and then seeks to prove this by applying existing laws to his situation (Hyperides iii.14-21).[54] The speaker does not appeal to another authority than law. In this regard, the speeches actually reflect Aristotle's advice in the *Rhetoric*. As noted above, Aristotle outlines strategies to employ when a speaker does not have the laws on his side, such as pointing to conflicts between laws or ambiguous wording (*Rhet.* 1374a; see also *Rhet. Ad Alex.* 1443a12-38). In Hyperides iii the law was certainly against the speaker, but it is important to note that he was not making an outright attack on law but seeking to subvert it within a legalistic framework.

Further Equity Arguments

Vinogradoff's arguments were adopted by a number of other scholars who identified further examples of equity arguments in forensic oratory.[55] Paoli argued that a "subjective foundation" of law dominated, because a law only had authority if it coincided with the will of the people. Accordingly, fairness, emotion and character discussion could undermine law if jurors believed that a legal decision would result in injustice.[56] Paoli noted that this system was especially evident in major political trials such as the *Crown* case,[57] but occurred in all situations:

> Ma nei casi ordinari, quando il processo non avesse carattere politico, in caso di conflitto fra una soluzione evidentemente equa e la contrapposta soluzione legale, come si cónteneva il giudice? Noi riteniamo che, anche in questi casi,

[54] ἐρεῖ δὲ πρὸς ὑμᾶς αὐτίκα μάλα Ἀθηνογένης, ὡς ὁ νόμος λέγει, ὅσα ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ, κύρια εἶναι. τά γε δίκαια ὦ βέλτιστε· τὰ δὲ μὴ τοὐναντίον ἀπαγορεύει μὴ κύρια εἶναι.

[55] For example, Weiss (1923:73-6); Gernet (1937:121); Arangio-Ruiz (1946:242-3, n.1); J. W. Jones (1956:121-2, 135).

[56] Paoli (1926:122, 1933:35, 39-45, 67-8; see also Gernet 1937:121). Paoli's examples were Demosthenes xliv.8, xxxiii.27 and xxxvi.26-7.

[57] Paoli (1933:40: "il quale sostenne la sua accusa su di una rigorosa linea di diritto, aveva la legge dalla sua"). This interpretation of the *Crown* case has gained a fairly wide acceptance, in part due to the authoritative survey by Gwatkin (1957).

> quando l'antitesi fra le due soluzioni fosse irrimediabile, il giudice sacrificasse la legge.[58]

Ruschenbusch argued that the vagaries of Athenian legal procedure would have ensured a very inconsistent regime, since jurors were laymen with little, if any, legal knowledge. The ease with which jurors could follow their passions simply exacerbated the situation, so that identical cases could be judged legal or illegal on different days simply on the basis of "pure arbitrariness:"

> Das bedeutet aber, daß eine Handlung, die Heute als Unrecht beurteilt worden war, am nächtsten Tage als Recht betrachtet werden konnte. Die Rechtsprechung lief damit auf reine Willkür hinaus, die dann infolge des primitiven Prozeßverfahrens und der Rabulistik der Advokaten nicht mehr zu überbieten war.[59]

Positivistic Jurors

Few scholars have followed Grote and Fränkel and suggested that Athenian jurors focussed on law and evidence. Erik Wolf fleshed out the theory. Like Ruschenbusch, he observed that there were weaknesses in Athenian legal procedure, but argued that jurors' concerns were answered by "ein überängstliches, formalistisches Festhalten am Wortlaut der gesetze und Volksbeschlüsse."[60] In forensic speeches the discussion of law

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[58] Paoli (1933:40). The extra cases produced by Paoli as evidence that appeals were made to equity actually provide little support for his argument. He drew attention, for example, to the phrase καὶ ἐὰν μὲν ἐκ τῶν νόμων μὴ ὑπάρχῃ, δίκαια δὲ καὶ φιλάνθρωπα φαίνωνται λέγοντες, καὶ οὕτω συγχωροῦμεν in Demosthenes xliv.8. However, the phrase δίκαια δὲ καὶ φιλάνθρωπα φαίνωνται λέγοντες is not the basis of a plea, but hyperbole; the point is actually to link an unlikely fact (the case being more just) with the implication that the opponent's case is also unlikely. Elsewhere in the speech the speaker stresses that his claim is founded upon law (xliv.7, 14, 46, 60, 66-8) and factual testimony (xliv.15, 31). I also find very little to convince me in Paoli's citation of Demosthenes xxxiii.26 and xxxvi.26-7. In both cases the speaker is broadly discussing the meaning of the law. In xxxvi.27 he offers his opinion of Solon's intention in framing the law limiting the time for bringing a suit, but this is incidental to his case - as the speaker says, the law clearly outlines the time limit (xxxvi.26) and this is the key issue.

[59] Ruschenbusch (1957:265). Some authors also draw attention to Lysias x.7, which they consider to be an appeal against the actual wording of the law to its broader spirit (Grimaldi 1980:301; Edwards and Usher 1985:232). However, the argument appears flawed. Firstly, it is unclear that the speaker is appealing to the spirit of the laws. He states (x.12) that certain words in the laws as drafted are not to be understood as limiting the application of the law only to charges framed with reference to those words; words such as "vow" (ἐπιορκήσαντα) or "flee" (δρασκάζειν) can also be understood to mean "swear" (ὀμόσαντα) or "run away" (ἀποδιδράσκειν), for example. The defendant's case is essentially semantic, and therefore the speaker's point is that to take the words literally, rather than to consider the actions for which everybody uses those words, is ludicrous (Lysias x.10). This is why, in the remainder of the speech, the speaker draws attention to other laws, or laws which still exist but are phrased in obsolete language, as they support his claim that it is the action described by the word, rather than the word itself, that is important. Secondly, the speaker's opponent does not appear to have claimed that the laws were invalid, but rather that the claim was not legally admissible. He was still upholding the authority of the laws, rather than appealing to another authority than law. See the discussions by Carey (1997:238-9) and Todd (2000a:30, 2000b:102-3).

[60] Wolf (1956:167).

was "positivistic."[61] Wolf accepted that nonlegal pleas could be made, but suggested that law was the most important element in a speech in influencing jurors' decisions.[62]

This "positivistic" view of Athenian jurors was a key prop in the articles by Hans Julius Wolff. He followed Fränkel in holding that the Heliastic oath bound jurors to judge in accordance with law, and claimed that γνώμῃ τῇ δικαιοτάτῃ was simply a subsidiary expedient which was rarely used:

> Aus alledem ergibt sich: Das Gesetz war ein *Befehl*, der befolgt werden mußte.[63]

Wolff rejected the possibility that an Athenian jury might come up with a spontaneous interpretation that did not accord with law. Emotional appeals and character discussion he saw as supplementary arguments designed to deceive a jury, which were unlikely to have been crucial in determining a case; success depended on convincing jurors that the law applied to the case, for they constantly kept the purpose and wording of the law in mind.[64]

Wolff argued this theory in a number of short articles, but presented little evidence. His case was based, to a degree, on the assumption of a universal "Greek" law. Fortunately, his student, Meyer-Laurin, presented a detailed analysis based on forensic speeches. Meyer-Laurin noted that Aristotle was not a useful guide to Athenian practice, and that speeches were dominated by attention to laws. Like Fränkel and Wolff, he stressed the rigid binding of jurors under the Heliastic oath to the law and dismissed γνώμῃ τῇ δικαιοτάτῃ as a subsidiary expedient in rare cases where no applicable law existed, and therefore little use as evidence for the consistent application of equity principles.[65] He surveyed the speeches that previous authors had argued contained equity arguments and claimed that they were in fact devoted largely to legal argumentation.[66] He concluded that equity considerations had no legal significance:

> Hier hat sich jedoch gezeigt, daß die Sprecher in dem Bestreben, sich auf gesetzliche Gründe zu stützen, eher zu rechtlich Zweifelhaften und abwegigen Bestimmungen gegriffen haben, als sich auf den offenkundigen Dolus des

[61] Wolf (1956:343-4).
[62] Wolf (1956:345).
[63] Wolff (1962:18 [emphasis in original]).
[64] Wolff (1962:10-13, 1968:15-16, 18-19, 1969:2).
[65] Meyer-Laurin (1965:29), following Wolff (1962:18).
[66] Meyer-Laurin (1965:11, 14, 19, 20-22, 26).

> Gegners zu berufen. Das läßt die Schlußfolgerung zu, daß Billigkeitsgesichtspunkte rechtlich noch keine Bedeutung gehabt haben.[67]

Meyer-Laurin accepted that equitable arguments could be made in court, but, like Wolf and Wolff, suggested that such arguments did not actually have any legal meaning. They were merely a common form of "artificial proof" in Athenian courts.[68] In this context, he noted that speakers could resort to all manner of psychological means and methods in an effort to win their case, including appeals to sympathy, slander and personal insults - all of which also fall under the category of artificial proofs. In rare circumstances, he conceded, such artificial proofs could win a case despite the law. Following the accepted interpretation of the *Crown* case, he saw this as one such example in which the stronger legal argument failed, but explained this as a reflection of political circumstances.[69] Generally, however, he felt that law was the primary consideration in court, and nonlegal arguments were secondary.

The Revival of Equity

The "positivistic" theory has been accepted by some scholars.[70] The first thing to note about the contest between it and the "equity" theory is that they are talking at cross purposes. The focus of the "positivistic" theory is on the juror himself, and the principles that the juror would have kept in mind when judging. By contrast, the focus of "equity" theorists is on the speakers in court, and the range of arguments they brought to bear. In terms of the evidence, "equity" theorists are in a stronger position. We have ample evidence through forensic oratory of both legal and nonlegal pleading. We have very little evidence, however, for the thoughts and interests of Athenian jurors. The key prop in the "positivistic" theory is the Heliastic oath, and its command that jurors should vote in accordance with the laws and the decrees. Yet the theory is distressingly circular; the oath bound jurors to vote in accordance with the law, but the evidence that they did so is the oath.

In ancient literature there are remarkably few non-forensic comments on Athenian jurors, and these present a mixed result. Within forensic oratory, one of the clearest statements is Demosthenes xxiv.95-7; the speaker notes that jurors can be misled by

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[67] Meyer-Laurin (1965:24-5).
[68] Meyer-Laurin (1965:25), following Wolff (1968:18).
[69] Meyer-Laurin (1965:32).
[70] For example, Meinecke (1971:280, 355-7); Finley (1985:101-3); Triantaphyllopoulos (1985:26-7); Bleichen (1986:139); Meier (1999:418).

speakers, and can only decide on the basis of the arguments that are put to them.[71] If we were to consider the statement generally applicable, we could argue it means the speaker who presented the most persuasive arguments could win, even if those arguments were a corruption of law. In this vein, Hillgruber concluded that legalistic interpretation was essentially designed to persuade the jurors rather than to resolve juristic problems. Athenian laws were vaguely phrased and often silent on particular matters;[72] this allowed considerable freedom in legal interpretation. Speakers interpreted laws to make them fit the facts of the case.[73]

This would have ensured that jurors did not confine themselves strictly to legal principles, and the evidence indicates that judgements were not always based on the laws. Jurors were, Hillgruber conceded, bound by their oath to vote according to the laws, but they understood this oath not as a summons to extreme obedience to the letter of the law, but rather as an instruction to vote for justice:

> Die Heliasten waren zwar an ihren Eid gebunden, κατὰ τοὺς νόμους ψηφιεῖσθαι, aber sie verstanden diesen Eid nicht als Aufforderung zu einem extremen Buchstabengehorsam gegenüber den Gesetzen, sondern als Auftrag, τὰ δίκαια ψηφίζεσθαι.[74]

Hillgruber cites a number of occasions on which speakers exhorted the jury to decide what was just (Andocides i.31; Lysias xv.8; Demosthenes xx.167, xxi.4, 212, xxiii.194, xxiv.175, lviii.61).[75] What was just was not necessarily identical with what was lawful. Jurors adopted a flexible approach, and were not bound by juristic principles or equity.[76] However, Hillgruber concluded that it did not follow that Athenian legal practice was governed by the pure arbitrariness posited by Ruschenbusch. He suggested that the jurors would have fairly closely examined the facts of the case, and the various arguments presented by the speakers, so that in the majority of cases (where political concerns were not involved), there would have been a "satisfactory" resolution.[77]

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[71] This passage is quoted and discussed at greater length in Chapter Five.
[72] Hillgruber (1988:107).
[73] Hillgruber (1988:105-7, 112-13, 116).
[74] Hillgruber (1988:112-13).
[75] Ibid. Hillgruber's identification of pleas based on *justice* can be traced back to Paoli (1933:40), who earlier noted the occurrence of such pleas and labelled them examples of equity pleas.
[76] Hillgruber (1988:119-20: "Die Athener sind offensichtlich bei der Lösung juristischer Probleme sehr flexibel gewesen, da sie sich an kein juristisches Prinzip gebunden fühlen, weder an ein Prinzip der Billigkeit - insofern ist die Hauptthese von Meyer-Laurin zutreffend - noch an ein starres Gesetzesprinzip").
[77] Hillgruber (1988:120); similar conclusions were reached by Bleicken (1984:384-85) and Gehrke (1985:30).

Other authors have criticized the "positivistic" theory by claiming that it is incorrect to argue that law had primary importance over other types of evidence.[78] Like Hillgruber, they dispute Meyer-Laurin's claim that appeals to more general considerations of justice were of less importance than legalistic pleading, and condemn Meyer-Laurin for "selective quotation" by dismissing such passages as rhetorical.[79] They note that a law itself was introduced into court as one of a number of types of evidence.[80] If law was a type of evidence, then they claim that law need not have been crucial to a case, and therefore speakers were free to base their argument on a range of pleas, including appeals to fairness or equity.[81] Todd argues that speakers could have presented laws which appeared to contradict each other, "but the oath sworn by the *dikastai* obliged them in such circumstances not to discover what was 'the law' in a particular situation, but rather to reach a verdict while giving proper weight to those laws which had been cited in evidence before them."[82] The implication is that Athenian juries were free to decide on whatever grounds were actually argued, whether legal or nonlegal.

This revival of equity arguments has one major weakness - its contention that arguments based on justice were as valid as legal pleas. As noted already, speakers do not appeal to an authority over law, and when nonlegal arguments are made they do not coincide with the claim that the law does not apply. This casts doubt on whether jurors actually accepted broad concepts of justice as superior to law. The main evidence that jurors were not solely bound by law is Biscardi's point that law was one of a number of types of evidence. This apparent equality of law with evidence, however, is based on Aristotle's classification (*Rhet.* 1375a24-5) of "artless" and "inartificial" proofs (ἀτέχνοι πίστεις) and "artful" or "artificial" proofs (ἐντέχνοι πίστεις).[83] As with most of

[78] Biscardi (1970:219-21, 227-30; 1982:362-71); Todd (1990a:19, 1993:54-5); Todd and Millett (1990:14); Millett (1990:177).
[79] Todd (1993:54-5).
[80] Biscardi (1970:232), following a point that was made earlier by Gernet (1955:67); Todd (1993:59-60); Scafuro (1997:53); Allen (2000:175).
[81] Biscardi (1970:232); Todd (1993:58-8); Christ (1998:41, 195, 208) and Allen (2000:175-6).
[82] Todd (1993:59-60).
[83] As noted by Gagarin (1990:24), πίστεις, although conventionally translated as "proof", really does not convey any sense that such proof automatically proves anything. Rather, πίστεις are the material that are used to support an argument; the argument is still needed to convey the meaning of the πίστεις. Among the artless proofs he listed witnesses, tortures, contracts, oaths and laws. Only the first three are listed at 1355b; oaths and laws are added at *Rhet.* 1375a22. This classification is followed by, for example, Harrison (1968-71, II:133-54); MacDowell (1978:242-7); and Soubie (1973-74:184). The artificial proofs include moral character, emotion and common topics (basically a shopping list of rhetorical tricks, including probabilities, examples, maxims, enthymemes [a type of syllogism], demonstrative topics, illusory topics and refutations). Similar distinctions were drawn by the roughly contemporary *Rhetorica ad Alexandrum* 1428a17, although that handbook conspicuously did not include laws. It distinguished proofs drawn "from the words and deeds and persons themselves" (ἐξ αὐτῶν τῶν λόγων καὶ τῶν

his work, Aristotle has established a taxonomy to give order to his ensuing discussion. There is no evidence that the taxonomy carried any weight in court; indeed, the terms ἀτέχνοι πίστεις and ἐντέχνοι πίστεις were apparently invented by Aristotle (Quintilian *Inst.* v.1.1).[84] It is significant that Cicero, in presenting rhetorical devices for use in Roman courts, could adopt Aristotle's distinction (*De Orat.* ii.116-9); nobody, however, has suggested that laws had equal status with evidence in Roman courts.

In this regard Carey states:

> The juror's oath indicates clearly that although in presentational terms the laws are not distinguished from other forms of direct evidence, they have a fundamental importance denied to items such as depositions. And although the oath allowed for decisions in areas where the laws gave no guidance, almost all cases which came before the lawcourts were based on accusations of breaches of specific laws.[85]

Carey also points out that law was afforded a more privileged position than other artless proofs. The penalty for introducing a non-existent law was death, whereas the penalty for false witness was damages to the prosecutor.[86] Accordingly, it seems that the procedural orientation of Athenian courts was towards law, and that law may well have had greater authority than pleas for justice or fairness.

Hillgruber's view that the Heliastic oath supported a vote for justice is also dubious. Each juror swore ψηφιοῦμαι κατὰ τοὺς νόμους (I will judge according to the laws),[87] and our understanding of the word νόμος indicates that it generally refers to valid and binding rules when the term is used to denote written statutes.[88] It is difficult to see how this can be construed as permitting a vote for justice in opposition to law. Speakers tend to interpret the oath as incompatible with conferring favours. Demosthenes states that jurors swore to judge without favour or hostility (οὔτε χάριτος ἕνεκ' οὔτ' ἔχθρας),[89] while, as noted above, Isocrates xviii.34 states that, having sworn their oath, it is not right that jurors should vote according to favour or equity. Lysias (xiv.22) similarly

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πράξεων καὶ τῶν ἀνθρώπων) from "supplementary" proofs (ἐπιθέτοι). The first type of proof included probabilities, examples, tokens, enthymemes, maxims, signs and refutations, and the latter the opinion of the speaker, witnesses, tortures and oaths.

[84] Solmsen (1941:186-7) and Gagarin (1990:23 n.5) make the point that the terms occur regularly in later writers on rhetoric, but do not occur prior to Aristotle.

[85] Carey (1994a:183).

[86] Carey (1996:34).

[87] Aeschines iii.6. For discussion on the wording see Harrison (1968-71, II:48), MacDowell (1978:44).

[88] Ostwald (1969:20, 40, 43).

[89] Demosthenes lvii.63; see also xix.1.

states that request for favours are unjust, since they are really a request to break the oath and disobey the laws.

Litigants may state that the jurors have sworn, through their Heliastic oath, to vote for justice, but they never use the oath to make a plea that is based on justice in opposition to law. To take two of Hillgruber's examples, Andocides i.31 and Lysias xv.8, both do contain the claim that jurors have sworn to vote τὰ δίκαια, but these comments follow fairly extensive discussions of pertinent laws. Lysias xv.8, in fact, begins by claiming that, if a law has been broken, it is not just to ignore this. As discussed in Chapter Five, when speakers use the oath to refer to justice they usually rely on a claim that their case is both just and in accordance with law.[90] Johnstone notes "speakers did not urge the jurors to disregard the law in the interests of justice, did not suggest that justice alone should inform their decision, did not oppose justice to the law, did not even argue that justice was a necessary supplement to areas not covered by the law."[91]

On the other hand, the fact that speakers could deliver nonlegal or equity arguments must indicate that legal pleading could be rather more open than "positivistic" scholars claim. To argue that nonlegal arguments had no effect is simply incredible; it is unlikely that they would occur so regularly if they were not expected to influence jurors. Todd may be on the right track when he notes that laws did not supply rules which jurors had to follow, but set the limits within which they had to resolve disputes.[92] On the face of it, his claim is internally inconsistent as it is difficult to see how something that sets limits cannot be considered a rule, but if laws are viewed as setting parameters which could be distorted and manipulated by speakers, we can envisage that jurors could be convinced they were following the law even when they were being led up the garden path.

The Recent Revival of the Importance of Law

Recently, Meyer-Laurin's arguments have been resurrected by E. M. Harris, who also deals with some of the more recent criticisms of the position. Harris stresses that the Heliastic oath commanded jurors to vote in accordance with the law[93] In addition, he points out that there are frequent passages in forensic speeches where speakers discuss the intention and meaning of laws. Where a relevant law is not cited, this "tends to occur

[90] Dover (1974:306-9).
[91] Johnstone (1999:41).
[92] Todd (1993:59).

mainly in speeches given by defendants. Since it was customary for the accuser to discuss the law under which he brought his case, the defendant normally had no need to have the law read out again."[94]

Harris also denies that Athenian jurors can automatically be assumed to have possessed no legal experience[95] and criticises the common belief that the "open texture" of Athenian laws would have made it impossible for jurors to grasp the meaning of a law (see the discussion in Chapter One).[96] Harris surveyed a number of speeches and claims that they were decided primarily on legal grounds, notably the *Crown* case. He claims that Ctesiphon's decree did not breach the law and concludes that Aeschines' legal case was quite weak.[97] In summarising his arguments, Harris notes that "litigants pay careful attention to substantive issues and questions about the interpretation of law; they would only have done so if they considered themselves bound to adhere to the letter of the law."[98]

Harris does concede that Athenian courts could "on occasion" let their passions overturn the law, but suggests that these occasions were "aberrations from the norm."[99] This is, in fact, the crux of the argument. How common was it for a jury to look to law, or nonlegal considerations? What was the weight that the jurors gave to the various types of argument that were placed before them? As noted before, scholars have tended to emphasise one class of material (e.g. legalistic discussion) over another (e.g. pleas for pity or equity). The very different characterisations of Athenian justice that have resulted reflect these varying emphases.

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[93] Harris (1994:133).
[94] Harris (1994:134).
[95] Harris (1994:134-6). Gagarin (1989:113; 1997:20) lays similar stress on the possibility that Athenian jurors had greater legal knowledge than is usually acknowledged.
[96] Harris (1994:138-9, 2000:27-35).
[97] Harris (1994:144, 147-48; 2000:35-75).
[98] Harris (2000:78).
[99] Harris (1994:137).

Chapter Three Litigation and Social Competition

In recent years the theory that Athenian juries ignored law and evidence in favour of nonlegal factors, such as the characters of the litigants, has resurfaced in a new form. Its proponents asserts that social values shaped the character of juries. The argument originated with Adkins, who noted the importance of competitive values in ancient Greek, and especially Homeric, society.[1] He argued that Greeks basically evaluated actions in terms of shame and honour - shame would accrue for failing in a competitive pursuit, while victory brought honour.[2]

Adkins claimed that in Classical Athens competitive values were able to overturn law in a court. His chief evidence for this point was a number of passages in which speakers brought their life and character before the court.[3] His argument hinges on the assumption, not clearly stated, that such pleas were actually successful, and more important to winning a case than appeals to law or justice, since success in competition as revealed by the character of the litigant would be of greater interest to an Athenian jury.[4]

Garner extended Adkins' theory, using passages from Athenian tragedies to pinpoint competitiveness and desire for honour as major moral traits in Athenian society:

> Given the importance of honor, even a judge, whose function was to dispense *dike*, would be so concerned with the opinions, praise and blame of others that he might choose to gain honor from the many rather than rule in accordance with the facts of the case.[5]

Garner claimed that there is actually little clear evidence for what the Athenians meant when they praised the rule of law. They would have been influenced by their moral

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[1] Adkins originally based his views on Homeric Greece, classifying it as a "shame-culture." With life being a struggle for survival, "success is so imperative that only results have any value (1960:35)." Martial attributes such as skill and courage were prized above quiet virtues such as justice; as Adkins put it, those who suffer from wrong-doing do not admire it, but since skill and courage are more crucial than justice for survival right-doing was less highly prized by society (1960:55).

[2] Adkins (1960:154), followed by Carter (1986:1-2); Garner (1987:27, n.23); Ferguson (1989:6-9). The notion of ancient Greece as a "shame-culture" was first put forward by Dodds (1951:17-18). Adkins was not the first to highlight the importance of honour, and of competitive values, in Greek society; see for example Burckhardt 1998[1872]:69-72.

[3] Adkins (1960:209, 1972:139).

[4] Burckhardt (1998[1872]:183) similarly connected competitive values with litigation, though he did not consider the point in detail. R. Osborne (1985:52-53) later echoed Adkins' views with his claim that courts were a "public stage" for playing out "private enmities."

[5] Garner (1987:10), who cites Euripides *Hec.* 852, 1240 in support. These references do not prove the point, however. Although Agamemnon in the play is concerned about the views of his troops, and this may influence his decision, it is clear from the context that Agamemnon's decision will also be based on what he considers just, having heard the facts of the case.

values, which, following Adkins, he saw as elevating wrong-doing over right-doing if it guaranteed results.[6] Accordingly, praising one's own achievements and deriding one's opponents was not irrelevant, but "a deep Greek tendency which simply allows the competition to be removed to a higher and more general level."[7] Such praise and derision proved that one had achieved results and attained honour, and allowed a speaker to turn a court case into a contest over honour and status. Garner notes that courts had a clear competitive aspect, including the antagonistic form of proceedings and the use of language which echoed sporting contests and battle.[8] Law was not always important in court; if a defendant was guilty "he could ask to be acquitted or to win the case on the basis of past excellence in achievement and service."[9]

Garner's views have been further developed by Cohen, who argued that Athenian citizens were fundamentally concerned with striving to win honour, and establishing their worth in relation to other men.[10] He claimed that, because social relations were competitive, Athenian society became dominated by patterns of feuding behaviour, in which friends supported each other and tried to harm their enemies.[11] Like Garner, Cohen argued that the Athenians' competitive values were transferred to the courts. The competitive rivalries that could erupt in feuds, and the networks of friends that citizens established, conditioned the way courts operated. Lawsuits were a formalized competition for honour and status, with decisions based more on the parties' deeds and character than on any actual facts of the case.[12]

One problem, as Cohen notes, is that speakers frequently urge the jurors to decide on the basis of the law, and applaud the virtue of the rule of law. On the face of it, competitive values are in conflict with the requirements of the rule of law, since individuals may be willing to subvert the law in order to further their own interests. Cohen argues that in

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[6] Garner (1987:18).
[7] Garner (1987:62-63).
[8] Garner (1987:59-62, 70).
[9] Garner (1987:63). Unfortunately, Garner's sole references here are to the victory of Eumelos in the chariot race, and Agamemnon's victory at javelin throwing, in the *Iliad*, which are hardly evidence for Athenian practice, and Isocrates xv.4-5, where Garner claims Isocrates lost an *antidosis* because his opponent based his case on Isocrates' profession and its effects on society. Isocrates actually claims that his defeat was unjust, in part because his opponent amplified his wealth by drawing upon Isocrates' reputation for teaching rhetoric. It would be unwise to press this single, biased comment to prove so critical a point.
[10] Cohen (1995a:62-3). Cohen interpreted Aristotle's *Rhetoric* and the orators as showing that society emphasised rivalry for status, envy and revenge.
[11] Cohen (1995a:62).
[12] Cohen (1991:155, 1995a:61-2, 77, 104-5, 184-6).

Athens law ultimately gained its sanction only from the support of the *demos*,[13] and since the jury would be attuned to competition and the pursuit of honour they would understand speakers to be asking them to judge on the basis of the parties' "civic merit."[14]

Cohen argues that character became the central issue at the trial. Claims about litigants' reputation and conduct are "as relevant as the factual conflict upon which the suit is technically based."[15] In expanding upon this point, Cohen amends it; he portrays the facts of the case as completely subverted by the process of supplying and evaluating evidence. Cohen suggests that the weaknesses of Athenian legal procedure (see Chapter One) gave jurors little hope of evaluating the claims made by opposing parties. As a result, they could only judge claims by assessing the litigants themselves, and analysing their "reputation, character and status as citizens."[16] Cohen adds that witnesses were no help to jurors since "the role of witnesses at Athens is shaped by agonistic values," and witnesses in Athenian courts had little function other than to lie for the party that brought them forward.[17] Accordingly,

> In an agonistic society where prosecution is only by private initiative, where everyone knows that individuals seek revenge and pursue feuding relations through the courts, where there is no cross-examination of witnesses or expert evaluation of evidence, where the trial is of extremely limited duration and confined to two opposing speeches, where the available means of proof of factual claims are in any event extremely limited, and where the principle of solidarity means that witnesses are generally expected to lie for the side on whose behalf they testify...litigants have wide scope to create a factual context to explain the enmity they share with their opponent in a way which suits their needs. In doing so they are constrained only by the limits of probability and public knowledge, two central forms of argument in forensic rhetoric. In short, when courts are faced with cases where both opponents manipulate the same topoi to justify their cause, how can the judges decide whether this is, in fact, a case of legitimate revenge for wrong done, a sycophantic prosecution for financial gain, or a trumped up charge in the tit-for-tat of feuding relations?[18]

Cohen discusses numerous speeches to support his argument, including Demosthenes xxi,[19] the famous *Crown* exchange between Demosthenes xviii and Aeschines iii, and

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[13] Cohen (1995a:56, 184-5, 1995b:242, following Ober 1989:304; the same argument was used by Gernet 1937:122 to justify a claim that jurors would prefer equity to law).
[14] Cohen (1995a:184, citing the example of Lysias xxx.1, 26-8).
[15] Cohen (1991:159, repeated at 1995a:93. See also Cohen 1995b:242).
[16] Cohen (1995a:106-7).
[17] Cohen (1995a:107).
[18] Cohen (1995a:105).
[19] Cohen (1995a:90; see also 1991:157-9).

Demosthenes liii.1-2 *Against Nikostratos*.[20] He presents many examples of the use of character and emotional pleading and argues that they formed the basis of a case.[21] Cohen's comments on the procedural limitations of courts on their own hardly prove that jurors would have been forced to concentrate on the character, reputation and status of the speakers, so the crucial link in his theory is that jurors were unable to trust the testimony of witnesses. If all evidence is seen to be perjured, and all testimony inevitably corrupt, then jurors would have little option but to fall back upon the litigants' characters as a basis for decision-making.

The view that Athenian witnesses were by and large perjurers has been common since the late eighteenth century, when Gillies claimed that they "might be purchased at Athens for the small sum of a few drachmas."[22] In more recent years it has become associated with three studies, by Soubie, Humphreys and Todd:

- Soubie claimed that a proportion of Athenian witnesses attended court to express support for their side, rather than provide objective facts. His key item of proof was Demosthenes liv.32, where Ariston had argued that Conon's witnesses were his friends and therefore likely to be testifying for him out of solidarity. Soubie also claimed that a number of other speeches proved that friends and relatives were brought out to support a cause.[23]
- Humphreys argued that most witnesses in Classical Athens were "overtly partisan", and friends or kinsmen of the litigant.[24] She claimed that they were in court to appear as supporters of the speaker, rather than to offer independent corroboration of his account, and that the content of their testimony was often unimportant or irrelevant.[25]
- Todd similarly suggests that the essential function of a witness in Classical Athens was to support relations or friends, not to testify to facts or tell the truth.[26] Todd's evidence for this claim is largely based on procedural distinctions between Athenian and modern courts. Witnesses generally could not be cross-examined, and he claims there are very few attacks on the credibility of opponents' witnesses, though it is

[20] Cohen (1995a:102-4).
[21] Cohen (1995a:97, 126, 131, 180).
[22] Gillies (1792, III:130); see too Anon. (1826:344-45).
[23] Soubie (1973-74:179, 182-3, 188, 201).
[24] Humphreys (1985:315, 322).
[25] Humphreys (1985:322-4); her arguments are discussed further in Chapter Six.
[26] Todd (1990a:23-4, 27-31, 1993:96-7).

often claimed that the opponent's witnesses are lying. Finally, there was no such thing in Athens as a subpoena, but litigants had to provide their own witnesses.[27]

Cohen suggests that speakers would regularly ask friends and relatives to lie for them in court. He notes the frequent references in forensic speeches to false testimony and cites Demosthenes xxix.22-3 as evidence that people would give false testimony due to bribery, friendship towards one party or enmity towards one party.[28] He also asserts that suits for false witness were common.[29] Like Todd he stresses that it is not the nature of the testimony that is important as much as the identity of the witness.[30] Cohen compares Athenian practice with nineteenth-century Corsica, where he claims witnesses were compatriots of disputing parties and routinely lied for their side.[31] According to Demosthenes, Cohen states, "it is simply to be expected that enmity is taken to justify perjury."[32]

Cohen draws upon two main speeches to flesh out this picture. Firstly, he notes that in Lysias vii the speaker draws attention to his opponent's lack of witnesses, and states that the opponent will say that he could not find any because they were frightened of the speaker's wealth and influence. According to Cohen, the speaker says (Lysias vii.30-32) that "the judges should disregard the accusation of his enemies and instead look at his conduct as a citizen including his many benefactions to the state."[33]

Secondly, Cohen draws attention to Aeschines' comment in *Against Timarchus* that he has called friends of the opponent to prove his accusations, to negate the expectation that witnesses will lie for their friends (Aeschines i.47-8). According to Cohen, Aeschines goes on to state that the jurors should base their judgements, not on what witnesses say, but on a man's habits, life and associations. Aeschines cites a fragment of Euripides, which Cohen translates as "I have already judged many disputes and have listened to witnesses competing against one another with conflicting accounts of the same event. Like any sensible man I determine the truth by looking at a man's nature

[27] Todd (1990a:23-4).
[28] Cohen (1995a:107).
[29] Cohen (1995a:111).
[30] Cohen (1995a:109-15, 129); Humphreys (1985:323); Todd (1990a:30).
[31] Cohen (1995a:108-9).
[32] Cohen (1995a:107).
[33] Cohen (1995a:109).

and his life (Euripides *Phoenix* Fr. 812 [Nauck])."[34] As Cohen notes, this fragment "surely appeals to widely held convictions."[35]

Besides this fragment, there is actually very little evidence in forensic speeches of witnesses competing against each other. Cohen cites Demosthenes xlv.37-8 as "a world of fraudulent litigation in which *everyone* fabricates testimony and documents", and in particular the lines "Why did one group of witnesses testify to these facts and another group to these? As I explained before, they divided the fraud."[36] He also cites the report in Demosthenes liv.31-2 of the conflicting testimony of Conon's and Ariston's witnesses.[37] Otherwise he has remarkably little evidence for competing witnesses. When discussing Lysias iii, for example, he falls back upon outright assumption: "Clearly, the judges will be confronted with totally incompatible versions of what happened, both supported by numerous eyewitnesses."[38]

Critique of Social Competition Theories

There has been little discussion of "social competition" theories.[39] Rubinstein pointed out that "there are at least as many private speeches in which the speaker does not depart from the issue at hand...as there are speeches which invite comparison of the entire lives and characters of the litigants." She also noted that Cohen assumes that attacks on an opponent must always occur with self-praise, and implied that this is not the case.[40]

Such statements are too general to be definitive, and as a result a more detailed critique is offered here, and detailed analyses of the data of forensic oratory are presented in

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[34] ἤδη δὲ πολλῶν ἠρέθην λόγων κριτής,/ καὶ πόλλ' ἀμιλληθέντα μαρτύρων ὕπο/ τἀναντί' ἔγνων συμφορᾶς μιᾶς πέρι./ κἀγὼ μὲν οὕτω, χὥστις ἔστ' ἀνὴρ σοφος,/ λογίζομαι τἀληθές, εἰς ἀνδρὸς φύσιν/ σκοπῶν δίαιτάν θ', ἥντιν' ἡμερεύεται. For his discussion see Cohen (1995a:110-1). Cohen's translation is very similar to Humphreys' (1985:323). I do not think the fragment actually says that the witnesses are "competing" against each other. The second and third lines are in secondary speech, so the aorist passive participle ἀμιλληθέντα agrees with the accusative subject τἀναντί'; "I have often seen that the opposite has been contended by witnesses about the one event." I accept that ἀμιλλάομαι often means "competing" (c.f. Plato *Rep.* 328a, *Laws* 833a; Euripides *Her.* 960; Xenophon *Anab.* iii.4.46; Dinarchus i.103), but in the Euripidean context of disagreements between people one might better translate it here as "contended" or "argued" on the basis of *Suppl.* 195, *Iph. in Aulis* 309, *Hec.* 291, *Her.* 1255.

[35] Cohen (1995a:111).

[36] Cohen (1995a:111).

[37] Cohen (1995a:129).

[38] Cohen (1995a:134).

[39] Carey (1997:16) pointed out, in citing Cohen's work, that witnesses are expected to testify to facts. E. M. Harris (2000:32-33) notes that Cohen and Ober exxagerate the open texture of law.

[40] Rubinstein (2000:174). I have found references to a more wide-ranging rebuttal of Cohen's work by E. M. Harris and forthcoming articles on how litigants "stuck to the point" by both Rubinstein and Rhodes, but as these are unpublished I have not been able to see them.

Chapters Five and Six. "Social competition" theories are flawed on several counts. In the first place, the characterisation of witnesses as family supporters who were expected to lie for their side is at best partial and at worst seriously deficient in its treatment of the evidence. In the second place, the analysis of the rule of law ignores significant contradictory evidence. Finally, the picture of popular morality drawn by Adkins, Garner and Cohen pays insufficient attention to the important role of concepts of fairness or justice.

Perjury in Athenian Courts

Chapter Six assesses the use of evidence in Athenian courts in some detail. As a result, the discussion here provides background for the comprehensive assessment of the data presented in that chapter.

Accusations of perjury are found in Athenian forensic speeches. Cohen cites a number of instances, nearly all of which are either outright claims that the opponent's witnesses are lying (Andocides i.7; Demosthenes xix.216, xxi.112, 139, xxix.22-5, xlv.37-40, liv.31-2; Isocrates xviii.51-8; Lysias xix.4) or suggestions that people are scared to testify because of a party's wealth and power (Lysias vii.21-2; Demosthenes xxix.22-5). In many of these cases witnesses are friends or relatives of a party, and in certain cases (e.g. Demosthenes liv.35-6) it is clearly suggested that friends and relatives will lie for their party.

Speakers do not claim that perjury is generally accepted behaviour, or that the sole function of a witness is to express support for their party. On all occasions the accusation is made that the *opponent* has brought forward false witnesses; the implied contrast is with the speaker's own witnesses.[41] In both Andocides i.7 and Lysias xix.4 the speakers openly condemn the practice, noting that often perjurers have unjustly destroyed (ἀδίκως ἀπολέσαντες) people and their punishment has come too late for their victims.

Similarly, in Demosthenes liv.35-6, when Ariston suggests that Conon's witnesses support him as they are his friends, he goes on to state "But I actually provide the doctors as witnesses."[42] The implication is that Conon's friends are willing to lie, but that Ariston's witnesses are speaking the truth. As a first point, then, and leaving aside

[41] See Mirhady (2000:188).
[42] Dem. liv.36: ἀλλὰ καὶ μάρτυρας ἰατροὺς παρέχομαι.

whether or not witnesses' accounts may conflict, it is clear from the sources that Cohen cites that providing false testimony was viewed as criminal behaviour.

In response it might be argued that in law witnesses were expected to tell the truth, but in practice no one actually expected them to do so. Clearly, in some cases witnesses must have lied, and friends and relatives will also have lied for their side. This is probably a common feature of litigation. Depending on the facts of the case and the opponents' likely arguments, a speaker may have decided that offering false witness was worth taking the risk.[43] At other times, they would have refused. Speakers can claim that their opponents could not get their friends to testify for them as this would have meant committing perjury (Demosthenes xxx.23).[44] Although the procedures for obtaining and presenting witnesses in Athens differed from today, this does not necessarily indicate that witnesses were there to lie and express support. Todd's argument appears to be based on an illogical syllogism, that because the procedure was different therefore the aim was different. Yet this is by no means clear from the forensic speeches. The evidence that Todd, Soubie and Cohen provide might look more convincing if accusations of false witness or co-opting friends and relatives to tell lies were not clearly identified in rhetorical handbooks as a *topos* designed to undermine the opponent's evidence.[45]

Carey pointed out that "witnesses are always required to attest a fact based on personal knowledge or experience; they are never required simply to express their support and are therefore not merely a presence."[46] All of the passages that Soubie claimed indicate support by family and friends in fact can be disputed. In every case the speaker calls witnesses to testify to facts.[47] In one speech, Demosthenes lvii, the speaker does rely

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[43] Polyaenus (*Strat.* i.40.1) provides an anecdote which shows such a circumstance. Alcibiades hid a dummy in a small dark room and brought each of his friends in, telling them that he had murdered the man and needed their help so that he could escape the danger. Some refused to help, but Callias agreed. Polyaenus' story was epitomised in the *Leonis imperatoris stratagemata* vii.2, where Alcibiades' test included selecting friends who were willing to support him in court (συναγωνιζομένους). The difference in wording may be an attempt by the later author to elucidate the passage, so we should not press too far this hint that Alcibiades' friends might have assisted him in litigation.

[44] Mitchell (1996:14) notes that in Demosthenes xxix.22-4 and Aeschines i.47 witnesses were friends of the opponents, and therefore more likely to be presenting evidence that was not in the speakers' favour.

[45] Notably in the fourth century B.C. *Rhet. ad Alex.* 1431b24-1432a3. Later rhetorical handbooks also reproduced the *topos*; cf. Apsines *Tech.* 5.12, Anonymous Seguerianus *Tech.* 189. Aristotle briefly refers to the topos at *Rhet.* 1376a29-32.

[46] Carey (1994a:184); see also Gagarin (1990:28, 30) and Soubie (1973-74:197). Mirhady's comment (2000:186) that "the identity and status of the witness, besides his being a free male, was irrelevant" seems a little too sweeping. Otherwise the speaker of Demosthenes liv.35-6 would not have attacked the *character* of his opponent's witnesses.

[47] The cases are (Soubie 1973-74:183): Demosthenes xxviii.10-13; xliii; xlviii and lvii.

mainly on friends and relatives, but as the case is about citizenship and the speaker needs to prove his parents' citizen status this is hardly surprising. In another speech cited by Soubie the speaker calls apparently impartial witnesses.[48] The contention that it is the identity of the witness rather than the content of their testimony that is important must be doubted.

A key problem is that claims of perjury were presented to undermine an opponent's case, and it is unclear how valid such claims may have been. Fortunately, there is a little external evidence that sheds some light on Athenian concepts of perjury. This evidence matches the impression we get from forensic oratory that perjury was commonly viewed as unjust. Aristotle, whom Cohen cites in support of his portrayal of Athenian "agonistic" values, stated that providing false witness was wicked (*Pol.* 1236b15-28) and unjust (*Virtues and Vices* 1251b5).[49] That providing false testimony was generally considered unjust may also be evidenced by one of the fragments of Antiphon the Sophist's *Truth* (POxy 1797). Here the writer constructs a sophistic argument in which he contrasts giving true evidence - which is generally considered just conduct - with the moral problem that simply by giving evidence against someone one may harm that person and therefore do them an injustice.[50] Accordingly, from this perspective "it is clear that jurors' judgements and private arbitrations and public arbitrations with a view to a final settlement are all contrary to justice, for what benefits some harms others."[51] Legal justice inevitably ensures that there must be a victor and a loser in any dispute, so one party must be injured, and in moral terms causing harm to anybody is unjust. Although the passage is fragmentary, it may well indicate that witnesses in an Athenian court were normally expected to give true evidence, regardless of the damage that could cause to an individual, and that jurors' judgements were generally understood to reflect this.

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[48] Demosthenes xlvii.17 (οἱ παραγενόμενοι), 24 (a magistrate and members of the symmory), 27 (magistrates).

[49] See also Aristotle *EN* 1131a7-9, where he groups perjury with crimes such as theft, adultery, poisoning and procuring. Aristotle is also contemptuous of lying at *EN* 1127a28-9: καθ' αὑτὸ δὲ τὸ μὲν ψεῦδος φαῦλον καὶ ψεκτόν, τὸ δ' ἀληθὲς καλὸν καὶ ἐπαινετόν.

[50] POxy 1797 column i.1-9: τοῦ δικαίου [σπουδ]αίου δοκοῦν [τος τὸ] μαρτυρεῖν ἐν ἀλλήλοις τἀληθῆ [δίκαιο]ν νομίζεται [εἶναι] καὶ χρήσιμον [οὐδὲν] ἧττον εἰς [τὰ τῶν] ἀνθρώπων [ἐπιτ]ηδεύματα. See also Decleva-Caizzi (1989:214-22).

[51] POxy 1797 column ii.63-70: φαίνεται δὲ καὶ τὸ δικάζειν καὶ τὸ κρίνειν καὶ τὸ διαιτᾶν ὅπως ἂν περαίνηται οὐ δίκαια ὄντα; τὸ γὰρ [ἄ]λλους ὠφελοῦν ἄλ[λο]υς βλάπτει. τὸ κρίνειν is translated "deciding" by Pendrick (2002:189) and "giving verdicts" by Gagarin (2002:187); my translation is tentative, but reflects the apparent emphasis in the fragment on legal procedures.

Indeed, Athenian procedure contained a number of well-known sanctions against providing false witness.[52] The existence of these statutes need not indicate that people never provided false witness; but, as Carey has noted, the orientation of the statutes is towards matters of fact,[53] and, in conjunction with the other sources discussed above, the statutes indicate that giving false testimony or appearing simply to support a family member was not necessarily considered appropriate conduct in an Athenian court.

In part, it appears that Cohen's argument is being driven by the analogy he has drawn between Athens and feuding societies, and, more specifically, between Athens and nineteenth-century Corsica. In the latter context, friends and relatives are recorded as providing false witness in support of their party when feuds reach court. An analogy is not proof, however, and must be tested against historical evidence. In this case, although our evidence indicates that a speaker could claim false witness to undermine his opponent's case, it by no means proves that providing false witness was socially acceptable, or even common behaviour in an Athenian court. All our evidence indicates is that the *topos* of making an accusation of perjury was used in a number of cases to attack opponents.

What then of Cohen's other contention, that Athenian litigation was characterised by witnesses competing against each other, and as a result speakers urged jurors to consider their character as the most significant form of evidence? The striking aspect of this claim, as noted above, is that there is actually very little evidence to support it. Cohen's contention, that the speaker of Lysias vii.30-32 urged the jury to rely on the speaker's character and not witnesses, is seriously misleading. The speaker actually claims that the Areopagus should be guided by "what I have said and by the rest of my conduct as a

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[52] These included the *dike kakotechnion* against a litigant who suborned a witness (Demosthenes xlvi.10, xlvii.1, xlix.56; see Leisi 1908:139-41; Lipsius 1905-15, III:783 and MacDowell 1978:245); the *dike pseudomarturion* against a witness who had provided false testimony or testimony contrary to the laws (Demosthenes xlvii.1; see Leisi 1908:121 and Harrison 1968-71, II:124-31) and an *anadikos dike*, under which a plaintiff who had successfully accused someone of false witness would be allowed a retrial (*anadikia*) in cases arising from *xenia*, false witnessing and disputed estates (Theophrastus *Nomoi* Fr. 5 [Szegedy-Maszak]; Behrend 1975:148-50). The penalty for anyone convicted three times of *pseudomarturia* was disfranchisement (Andocides i.74; Hyperides ii.12). Finally, witnesses could also take the *exomosia*, or oath of disclaimer, and decline to testify by claiming they were not present at the crime scene or that they had no knowledge of the case (Harrison 1968-71, II:143-5; Carey 1995). Todd (1990a:37-8) argues that the *dike pseudomarturion* referred to "illicit" rather than "false" evidence on the basis that Stephanos was not an important witness in Phormion's case (Demosthenes xlvi.5-8), and that therefore the real purpose of the prosecution was to pay back someone who had "ratted" on the family. This ignores the fact that other *dikai pseudomarturia* (e.g. Demosthenes xlvii) are based on allegations that witnesses who were not family or friends testified to facts which they could not have known.

[53] Carey (1994a:184).

citizen" (καὶ ἐκ τῶν εἰρημένων καὶ ἐκ τῆς ἄλλης πολιτείας). The former point is given much more emphasis in the speech, and on numerous occasions the speaker points out that he has the evidence of witnesses to back him up (vii.11, 17, 20, 25, 30) and asks the Areopagus to give greater credit to the side which has produced witnesses rather than the side which did not (vii.33, 38, 42). The speaker's character is given much less emphasis (vii.30-3, 41), and is actually presented as a sort of example to support the likelihood that he would not have removed the olive stump. In other words, character evidence is intended to support witness evidence, not to replace it.

As for Cohen's other major piece of evidence, the fragment of Euripides, it is unclear how far this should be pushed. We do not have any idea of the context in which Euripides penned the original words,[54] which is underscored by two different interpretations of the same passage. Cohen interprets it as referring to a juror, although it only states that the speaker has been chosen as a judge (κριτής). κριτής can also be used of a private arbitrator (Menander *Epitr.* 223, 226) and Scafuro takes this passage as referring to an arbitrator.[55] The main verb of the first clause, ᾑρέθην, means "I have been chosen." As jurors were selected by lot, but private arbitrators were chosen by the disputants, this is further evidence that the passage may refer to an arbitrator.[56] As Aeschines states (i.152) that the speaker in *Phoenix* was defending himself against his father, the passage may originally have referred to private disputes. Given that there is disagreement about whether we are dealing with a juror or an arbitrator, one is entitled to wonder whether Cohen places too much weight on this fragment as evidence that jurors ignored witnesses and determined cases on character. There is some evidence that arbitrators and jurors applied different standards when judging disputes.[57]

Cohen's other evidence for competing witnesses does not hold up. The passage in Demosthenes xlv.37-8 that he claimed showed both sides' witnesses gave false,

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[54] We have every reason to be sceptical of the context in which the fragment is preserved - Aeschines' speech *Against Timarchus* (i.152). That speech is characterised by a dearth of testimony on the main point of the case (that Timarchus prostituted himself - Dover 1989:22), and it is therefore not surprising that Aeschines suggested the jurors should pay more attention to character and rumour than witnesses.

[55] Scafuro (1997:398). The key verb in the phrase "I have often observed that the opposite has been contended by witnesses about the same event", ἔγνων, can also be used as a technical term for making a decision in an arbitration (*AP* 53.2; Demosthenes xli.28) and Scafuro therefore translates the phrase "have I decided the arguments of witnesses." I should note here that I do not accept Scafuro's translation, though I accept the possibility that the passage refers to an arbitration.

[56] I owe this observation to Douglas Kelly.

[57] Isaeus ii.29-33; Aristotle *Rhet.* 1374b19-22, ὁ γὰρ διαιτητὴς τὸ ἐπιεικὲς·ὁρᾷ, ὁ δὲ δικαστὴς τὸν νόμον; καὶ τούτου ἕνεκα διαιτητὴς εὑρέθη, ὅπως τὸ ἐπιεικὲς ἰσχύῃ.

competing testimony, is actually a reference to false testimony from two different sets of witnesses who both appeared for the speaker's opponent. It is also not clear that conflicting witnesses are present in Demosthenes liv.[58] Carey has drawn attention to the drafting of Conon's witnesses' deposition. He points out that it is ambiguously worded, so that it is not clear who struck and who was struck. Carey places the document within a wider group of witness documents that are worded so as to support a speaker's case, but which in fact are ambiguous or unclear, so that a witness may avoid outright lying.[59]

A similar tactic may well have been used in Lysias iii. At one point in this speech the speaker states that his witnesses contradicted Simon's testimony (iii.37). This contradiction, however, is in relation to what they saw on the street, rather than the more crucial points of the case - who started the fight and who wounded Simon and with what. In relation to these points the speaker was evasive - he did not state whether he had a weapon, nor did he say how Simon was injured and by whom; rather, he noted that "in this confusion we all had our heads split open (iii.18)."[60] It seems reasonable to interpret this evasiveness as evidence that Simon could possibly have brought forward witnesses to say that the speaker started the fight and struck Simon, and the speaker was trying to counteract this with artful manipulation, rather than outright contradiction.[61] The speaker did claim that Simon started the fight, but provided no witnesses for this statement.

The Rule of Law

If witnesses did not automatically lie, then we should question Cohen's and Garner's claim that the "rule of law" had to be consistent with competitive values.[62] It is much debated whether in Classical Athens the "rule of law" equaled a lawful process based on equality before the law, or was simply a euphemism for the supremacy of the will of the people over statutes.[63] Cohen pays particular attention to Demosthenes xxi.224, where Demosthenes states that the laws are simply written texts, and only gain power from the support they gain from the jurors. One might also point to Aristotle's claims (*Pol.*

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[58] Humphreys (1985:332).
[59] Carey (1994b:99-100). Carey supports his contention with "a more secure case" in Demosthenes lix.54, where there are discrepancies between the deposition and the interpretation the speaker places upon it.
[60] ἐν τούτῳ τῷ θορύβῳ συντριβόμεθα τὰς κεφαλὰς ἅπαντες.
[61] The speaker's willingness to name Simon's companions (iii.12) may indicate that these are the very people Simon has called as witnesses, and the speaker is therefore trying to undermine their credibility.
[62] Cohen (1995a:56); Garner (1987:10). See also Ober (1989:299-304), and Paoli (1933:35-45).
[63] See, for example, Hansen (1999:84, 351); de Romilly (1971:139-54); Ober (1989:249-304); Ostwald (1986:497-524); Sealey (1982:301-2).

1292a7-38, 1292b34-1293a9) that the mob or demagogues could control democracies, so that laws were not sovereign, but the mob; or to the manifestly illegal procedure imposed by the *Ecclesia* during the trial of the generals after the Battle of Arginusae (Xenophon *Hell.* i.6.24, Diodorus Siculus xiii.97.1).

Guthrie, who supported the view that Athens had the rule of law, cited Herodotus vii.104, Euripides *Suppl.* 429-31, Thucydides ii.37, Plato *Crito* 50a-53a, the late fifth or early fourth century B.C. *Anonymus Iamblichi* iii, vi-vii [D-K] and references in forensic oratory such as Demosthenes 25.15-20 to support his position.[64] Garner spent some time trying to dismantle Guthrie's references. He correctly assailed Herodotus vii.104 as reflecting Spartan customs rather than Athenian,[65] but his attempts to downplay *Suppl.* 429-41 and Thucydides ii.37 seem rather desperate.[66] There are also methodological flaws in Garner's analysis. He presented a number of passages from tragedy to "prove" that competitive values might subvert jurors' belief in law, arguing that tragedy was likely to reflect fifth-century BC Athens.[67] The possibilities of reconstructing political and social history from tragedy are hampered by the heroic settings of tragedy, and the resulting interplay between the fictional dramatic world and any contemporary echoes that may be inferred from it.[68] This problem is exacerbated when we analyse tragedy for evidence of particular ethical views, as opposed to evidence of civic institutions. It is difficult enough to identify what moral viewpoint the playwright was actually putting across. It is even harder to work out whether the Athenian audience, in whole or part, may have agreed with him.[69] Characters may say something that is appropriate to the plot of the play or the scene, or the mood the poet is trying to convey; it cannot be taken

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[64] Guthrie (1971:69-73); see also Vlastos (1964).

[65] Garner (1987:20).

[66] Garner (1987:24) based his criticisms of Thucydides ii.37 on Pericles' friendship with Protagoras, and Protagoras' skill in using forensic oratory to make the weaker argument stronger. While this may reveal that a speaker could interpret the law to suit his own ends, it in no way proves that the will of those in power could subvert the rule of law. Similarly, in dealing with Eur. *Suppl.* Garner (1987:23) claims that, although Theseus claims that a weak person is guaranteed victory over a more powerful opponent if his case is just, he "is absolutely certain that his wish alone is sufficient to ensure the city's action", citing lines 350 and 393-4. Garner fails to allow for the restrictions placed on the playwright by the mythical setting. If the play blends mythical and contemporary attitudes, it may only obliquely represent the realities of Athenian democracy.

[67] Garner (1987:11-12). To a degree, he is travelling a well-worn road here, as few modern authors would argue that tragedy does not, in some way, reflect contemporary democratic attitudes and values (Meier 1988:236-8; Blundell 1989:88-95, 269-70; Cairns 1993:240-63; Griffith 1995:108-10; Goldhill 2000:35). The more difficult question is to what degree the values are uniquely democratic (Rhodes 2003b:106-12, 119).

[68] (Easterling 1997:21-3, 28-37; Griffith 1995:111-14; Pelling 1997:1-6).

[69] It is also relatively easy to find opposing views on morality or politics in different plays by the same poet (Dover 1974:17).

as certain that what they say is proof of Athenian ethics. For example, Euripides' infamous line from *Hippolytus* (612), ἡ γλῶσσ' ὀμόμοχ', ἡ δὲ φρὴν ἀνώμοτος, outraged many Athenians and was used in a lawsuit against Euripides to discredit him (Aristotle *Rhet.* 1416a37-40).[70]

In this regard, Garner could be accused of some selectivity. While there are some Athenian dramas which do appear to portray justice as the creation of those in power, one could equally (and with perhaps as little real linkage to Athenian practice) refer to Sophocles *OT* 603-10, 656-7. Here the tyrant Oedipus is deciding what is lawful on the basis of his opinion alone; yet his behaviour is criticized by the Chorus (656-7) and Jocasta (646-8).[71] It is difficult to believe that Athenian audiences were not intended to feel similar disapproval for the actions of the tyrants in *Antigone* and *Hecuba*. If the audiences were being asked to disapprove, does this mean that they were being asked to condemn a contemporary practice or a mythical situation? It is impossible to say; but, given contemporary evidence from Athens that indicates respect for law, I find it difficult to believe that the plays are making direct comments on the Athenian lawcourts.

Athens, like any state, was not immune from illegal actions. The execution of the generals after Arginusae was clearly illegal. Athens was occasionally subjected to such stresses, but there is little evidence that the popular will regularly overturned the laws.[72]

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[70] Recently, Garner's approach has been taken further by Pelling (2000:167-88), who has suggested that Aeschylus' *Eumenides* and Euripides' *Orestes* raise disquieting questions about justice, which may be linked to contemporary concerns about the administration of justice in Athenian lawcourts. The problem with this thesis is that the evidence for disquiet is the disquieting questions themselves. Griffin (1998:55-61) has rightly criticised this sort of approach.

[71] For discussion of this scene see Knox (1998:86-90) and Scodel (1984:64-7).

[72] During the fifth and fourth centuries B.C. Athens underwent a great deal of constitutional change, and there is evidence of differing attitudes to law and the power of the *demos* in this period. In the second half of the fifth century B.C., we have evidence for some questioning of laws, the system of justice and the nature of the constitution. At the one extreme, one might point to Euripides' notorious assaults on social mores (eg. *Andr.* 173-6, Fr. 402 [Nauck]). At the other, one might point to philosophers' frequent discussions of legal justice, such as Antiphon's *On Truth*. It is unclear how much influence these extreme views had on popular opinion; judicial developments do not appear to have been influenced by philosophers' enquiries (Wolff 1970:80). What does seem fairly clear, however, is that the later fifth-century B.C. marked a period of unprecedented power for the *demos*, if the judgement of usually hostile sources such as the Old Oligarch (i.5) may be believed. This power was wielded through regular changes and confusion in legislation. One hears of the existence of contradictory laws, and the frequency with which the Athenians changed their laws led Plato Comicus to satirize them by saying that a man who had been absent from Athens for three months would not recognize it as he walked past the walls, since with regard to the laws it was not the same city (Fr. 239 [PCG]). During the Peloponnesian War Athens' democracy was subjected to considerable constitutional stress. The power of the *demos* was expressed through illegal actions, such as the Arginusae trial. Thucydides records that customary values were abandoned during the early years of the Peloponnesian War (i.52, iii.82). The culmination of this relative legal chaos was a series of oligarchies and democratic restorations. The first oligarchy, the Four Hundred,

During the fourth century Aristotle claimed that that what is lawful is just (*EN* 1129a34-5, 1129b12-14, 1130b21-5), and that a principal tenet of democratic justice is that the poor shall not enjoy any greater advantage than the rich (*Pol.* 1291b30-8, 1310b28-36, 1317a40-1317b7).[73] Similar statements occur in fourth-century oratory; speakers claim that equality under the laws means that poor people deserve the same protection as the rich (e.g. Demosthenes xxv.16, Isocrates xx.26), and that equality before the laws is one of the hallmarks of democracy (Aeschines i.5, Demosthenes xxi.188). There is also evidence that people would obey laws against their wishes (e.g. Plato *Crito* 50-53a, Aeschines i.4-6, iii.16, Demosthenes xxv.75-6).

Cohen dismissed these statements by claiming that a belief in the rule of law depends upon a fiction which sees legislation as somehow separate from political realities. He asserts that the popular, democratic, view of the rule of law in Athens is radically different from the view of Athenian democracy proposed by Aristotle.[74] The Athenians, he suggests, were only too aware of this "doublethink," as demonstrated by Demosthenes' comments at xxi.224 that the laws are only made powerful by the support of the jurors. Yet Demosthenes (xxi.225) goes on to say that someone who has broken the laws must not be allowed to escape punishment because of his liturgies, pity, personal services or forensic skill. It seems inescapable that Demosthenes' argument here, at least, is that the rule of law as imposed by a jury overrides personal and public interest. Even more direct statements of this point may be found at Aeschines iii.16, where Aeschines comments that, when a speaker says one thing and the law another, the jurors ought justly to give their vote to the law; or at Demosthenes xviii.123, where Demosthenes satirically observed that he did not think their ancestors built lawcourts so that the jury could listen to people abusing each other with scandalous accounts of their

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came to power through manipulating the constitution (Demosthenes xxiv.154; Thucydides viii.67). After the final restoration of the democracy the Athenians instituted a number of legislative reforms, including establishing a coherent, unified lawcode and setting in place constitutional checks on making laws and decrees. During the fourth century the Athenians' legal freedom was restricted by devices such as the *graphe paranomon* and *graphe nomon me epitedeion thenai*, the appointment of *nomothetai* and the separation of laws from decrees (Sinclair 1989:221; Orrieux and Pantel 1999:284-7; Hansen 1999:174, 307, 336). In 348 BC, when Apollodorus tried to pass a decree on the basis of the doctrine that "the people should have the power to do what it wished with its own property" (κύριον δ' ἡγούμενος δεῖν τὸν δῆμον εἶναι περὶ τῶν αὑτοῦ ὅ τι ἂν βούληται πρᾶξαι), his proposal was indicted by *graphe paranomon* and nullified (Demosthenes lix.4-5).

[73] Cohen (1995b:240, and 232 where he links Aristotle's views to Athenian democracy). Aristotle considered that in radical democracies the mass of poor people are sovereign rather than the law (*Pol.* 1292a1-6, 1293a7-9), though he did not specifically state that Athenian democracy suffered from this problem. Indeed, his view that in radical democracies the *demos* may overturn the laws through decrees does not fit our knowledge of fourth-century Athens, where the complex systems for changing laws in fourth-century Athens indicate an institutionalized status for law (Hansen 1999:175-6).

private lives, but so that the people could convict someone if he had clearly committed a crime against the city.

In other words, Cohen's argument enjoys little real support from fourth-century orators. There is simply no evidence that law was customarily seen as a target to be repudiated whenever it clashed with the interests of the *demos*. Attacks on written law as a category are conspicuously absent in forensic oratory.[75] Our one great example of the triumph of the popular will over law, the trial of the generals after Arginusae, is famous precisely because such an event was highly irregular.[76] Taken together, the sources indicate that laws could be seen to be independent of the will of the *demos*, and that courts could be expected to uphold this "rule of law."

Athenian Moral Values

How realistic is the picture Adkins, Garner and Cohen draw of Athenian moral values? Scholars do stress the importance of desire for honour and competitive values in Classical Athens.[77] Character discussion also occurs often enough in forensic speeches to invite the suggestion that demonstrating one was of value to the community was virtually an "official orthodoxy."[78] But it is by no means clear that alternative views had no effect on jurors' decisions. Athenian literature contains a number of comments on the problems brought about by love of honour[79] and speakers may state that they are not seeking revenge in court[80] or condemn those who introduce character or emotion in an effort to escape law.[81] Although we should not underestimate the importance of competition, neither should we underestimate the possibility that "quiet" values could undercut the competitive values of rivalry and revenge.[82]

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[74] Cohen (1995a:56).
[75] Carey (1996:36).
[76] A. H. M. Jones (1957:54). The decisions in the Arginusae trial were made, not by a jury, but by the *Ekklesia*, exercising its judicial functions in *eisangeliai*. This precise function was later removed from the *Ekklesia* during the fourth century BC.
[77] Dover (1974:226-29); Blundell (1989:26-30).
[78] Whitehead (1983:60); cf. Dover (1974:296-9).
[79] Pearson (1962:17-18, 170, 197); Sinclair (1989:188); Walcot (1978:61-2, 69); Wilson (2000:188-90).
[80] See Lysias xxxi.2; Isocrates xv.27; Demosthenes xviii.278-9; liv.5-6. A. H. M. Jones (1957:58), in discussing speakers' claims that they are seeking revenge, offers the rather more prosaic interpretation that they are trying to make it clear they are not sycophants.
[81] For example, Antiphon v.11-12, vi.7-8; Lysias xiv.23; Demosthenes xix.239, 277, 281, 310, xxi.225, xxxviii.27, lix.116-7; Aeschines iii.16; Hyperides ii.9, iv.32, v.40; Lycurgus i.150; Dinarchus i.14-17, 92, 103, 108-111, ii.8, 11, iii.20.
[82] On the importance of revenge in Athenian society see Dover (1974:182-4); Gehrke (1987) and the recent discussion by W. V. Harris (1997). I agree with Harris (1997:366) that Herman's (1993, 1994) attempt to downplay the significance of revenge in Athenian morals takes inadequate account of the evidence. On the other hand, there is some diversity in our sources; Xenophon's and Plato's Socrates, for

On the face of it, there appears to be a contradiction here. It is difficult to see how a society which openly upholds agonistic values could simultaneously uphold values based on cooperation and mutual interest. Part of the explanation for this apparent contradiction may lie in the wide range of values that can exist in any single society (below); part may also lie in the interpretation of Aristotle's *Rhetoric*. Cohen, quite rightly, notes that Aristotle's discussion of emotions in the *Rhetoric* is designed to provide a reader with the means for persuasion.[83] He appears, however, to ignore some key aspects of individual emotions in that work. For example, Cohen suggests that Aristotle's comments in the *Rhetoric* on envy and anger demonstrate that "social relations are essentially evaluative and competitive."[84] Yet in discussing anger, for example, Aristotle points out that anger is defined as a desire for revenge on account of an apparent insult which is unjustified (*Rhet.* 1378a30-2). The cause, that the insult is unjustified, is crucial to Aristotle's discussion (*Rhet.* 1380b16-18), and underpins the persuasive force of any appeal based on one's anger that is designed to excite listeners to share that anger. This link between anger and injustice is ignored by Cohen; yet it is crucial to understanding Aristotle's views of revenge. Revenge is pleasant insofar as it relates to redressing an injustice; as Aristotle notes, "anger is not aroused against what is just."[85]

In his broader work, the *Nicomachean Ethics*, Aristotle defined virtue in relation to the choice of actions and emotions, and in particular in relation to observing a "mean" standard of behaviour between excess and deficiency (*EN* 1106b35-1107a3). This observance of the mean underpins his entire discussion of emotions and virtue.[86] Aristotle sees envy and unjustified anger as excessive, and thus by definition they are not the choices or actions of a virtuous person, since virtue resides in the observance of the mean. Aristotle also admits behaviour that appeals to mutual interest, rather than competition; for example, altruism (*EN* 1155b31, *Rhet.* 1380b35-1381a6), benevolence (*Rhet.* 1385a17-19) and justice (*EN* 1129b25-1130a3). When discussing altruism,

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example, famously preaches that revenge is unjust (Xenophon *Mem.* 2.6.24; Plato *Crito* 49c-d, *Rep.* 332b-336a).

[83] Cohen (1995a:62); and see also Fortenbaugh (1979:133, 138) and Aristotle *Rhet.* 1380b28-32.

[84] Cohen (1995a:62).

[85] οὐ γίγνεται γὰρ ἡ ὀργὴ πρὸς τὸ δίκαιον (*Rhet.* 1380b16).

[86] In relation to virtues, Aristotle suggested, for example, that the mean between fear and confidence was courage; the mean between vanity and smallness of soul was greatness of soul; and the mean between irascibility and a lack of spirit, gentleness (*EN* 1107b1-1108a10). In relation to emotions, he suggested that the mean between bashfulness and shamelessness was modesty, and the mean between envy and malice was righteous indignation (*EN* 1108a33-1108b6).

Aristotle clearly states that loving someone entails wishing good things for that person's sake and not one's own,[87] and when discussing justice he argues that it is the practice of perfect virtue, because a just man practises this virtue towards others and not merely by himself.[88] His discussions of altruistic virtues explicitly exclude the possibility of self-interest.[89] Consequently, Cohen's emphasis on envy and anger seems to focus on a small slice of the overall range of emotion and virtue. To understand those emotions properly, one needs to see where they fit into Aristotle's overall scheme. This scheme shows that envy and unjustified anger are signs of a deviant, if not evil, character.

In a similar vein, Aristotle's discussion of honour shows that people can possess both excessive and defective desires for honour. Aristotle does note that honour is the greatest external good, and most sought by men of rank (*EN* 1123b17-18); and he notes that it is possible to desire honour more than is right, or to be so unambitious as to not care for it altogether (*EN* 1125b7-8). He notes that those with an excessive desire for honour are called φιλότιμος (*EN* 1125b8). This term is important to evaluating "social competition" theories. Cohen argued that, at Athens, being willing to litigate implied being willing to obtain a public judgement of one's social position and identity, and that "this is, of course, what *philotimia*, the competitive pursuit of honor, is all about."[90] The meaning of the word is actually rather more complex than that. In Classical Athens, φιλοτιμία did mean a desire for public honour and recognition, but the word carries a range of meanings that can only be understood in terms of the ways in which people achieved honour and the ways in which the *demos* conferred honour. Competition is not at the core of any of the meanings.[91]

In the *Rhetoric* Aristotle commented that "honour is a mark of a reputation for good

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[87] ἔστω δὴ τὸ φιλεῖν τὸ βούλεσθαί τινι ἃ οἴεται ἀγαθά, ἐκείνου ἕνεκα ἀλλὰ μὴ αὑτοῦ (*Rhet.* 1380b35).

[88] ὅτι ὁ ἔχων αὐτὴν καὶ πρὸς ἕτερον δύναται τῇ ἀρετῇ χρῆσθαι (*Rhet.* 1129b31-2).

[89] See Konstan (2000a:4).

[90] Cohen (1995a:186).

[91] Aristotle notes that *philotimia* can mean both being "more fond of honour than most men" and being "more fond of honour than is right" (*EN* 1125b9-22). *Philotimia* can often be a negative trait, referring to a selfish desire for advantage (eg. Pindar Fr. 210, Thucydides ii.65.7, iii.82.8, Euripides *Iph. in Aulis* 527, *Phoen.* 531-2). In *Against Neaira* it is used to describe the way Phrynion openly abused her in front of onlookers (Demosthenes xlix.33); here we must understand the word as showing that Phrynion was striving for honour through his abuse. At other times *philotimia* can be a term of praise for someone's love of honour (eg. Aristophanes *Frogs* 678, Isocrates v.110, Xenophon *Mem.* iii.3.13). In these circumstances, it is not always clear why love of honour is being praised. In the second half of the fourth century, however, when *philotimia* is cited with approval, it generally refers to "performing services to the community, to which the community is expected to respond by conferring τιμή in gratitude" (MacDowell 2000:224; see also Dover 1974:230-3; Fisher 1976:28).

works, and those who have done good works are justly and most particularly honoured, although he who is capable of good works is also honoured (*Rhet.* 1361a35-7).[92]" Good works appear to be actions that improve the safety or quality of life of the citizens; in the *Nicomachean Ethics* 1122b19-35 Aristotle describes how a great-souled man gains honour through spending money on the community, for example on liturgies (see also Xenophanes Fr. 2 D-K; Xenophon *Hiero* vii.9-10). The most obvious example is Alcibiades, who used his victories in the chariot races at the Olympic Games and the magnificence of his liturgies to claim popular honour (Thucydides vi.16.2; Plutarch *Alc.* 11-12). Similar examples can be found in the Attic orators (Aeschines iii.19; Demosthenes xxi.67, xlii.24, xlvii.54; Isaeus vii.36; Lysias xxi.22).[93]

The *demos* could give concrete expression to its honour for benefactors in a number of ways. Aristotle lists sacrifices, memorials in verse and prose, rewards, sanctuaries, precedence, tombs, statues, public maintenance, barbarian practices such as genuflection, and gifts (*Rhet.* 1361a40-3). We have numerous instances of these sorts of rewards being conferred upon citizens as a mark of honour for their services or goodwill to the people of Athens. For example, contemporary inscriptions honour individuals with crowns,[94] statues[95] or grants (such as exemption from taxation),[96] free meals in the Prytaneion[97] or a front seat at the theatre.[98] Inscriptions honour individuals for *philotimia* as well as a number of other virtues, including *andragathia*, *arete*, *dikaiosyne*, *epimeleia*, *eunoia*, *eusebeia*, *eutaxia*, *prothymia* and *sophrosyne*.[99]

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[92] τιμὴ δ' ἐστὶ μὲν σημεῖον εὐεργετικῆς δόξης, τιμῶνται δὲ δικαίως μὲν καὶ μάλιστα οἱ εὐεργετηκότες, οὐ μὴν ἀλλὰ τιμᾶται καὶ ὁ δυνάμενος εὐεργετεῖν.

[93] Even here there is some variation in meaning; Lycurgus (i.139-40) claimed that some liturgies should not deserve gratitude from the people, suggesting they conferred little public benefit; greater liturgies which did deserve honour were serving as a trierarch, or building walls to protect the city, or spending one's own money for the public safety. His aim, however, was to undercut one of Leocrates' likely pleas, by restricting *philotimia* to items which highlighted public security, and therefore could be easily contrasted with his accusation that Leocrates was guilty of treachery.

[94] There are numerous examples; Henry (1983:22-45) discusses some 48 inscriptions. See for example *IG* I^3.102.8-14 (410/09 BC), II^2.212.21-33 (347/6 BC), II^2.466.30-40 (307/6 BC), II^2.557.16-18 (*c.*303/02 BC).

[95] *IG* II^2.450*b*.7-12 (314/13 BC), II^2.555.12-14 (307/03 BC), II^2.513.4-5 (f.s.iv BC).

[96] See, for example, *IG* II^2.10.5-9 (404-400 BC); II^2.18.6-8 (393 BC); II^2.31.6-25 (386/5 BC); II^2.141.5-14, 31-35 (378-360 BC); II^2.212+.13-34 (346 BC); II^2.1147 (mid-fourth century BC); cf. Aeschines iii.177-89, Demosthenes xviii.118-20, xxiii.198, Walbank (1978:4-6).

[97] See, for example, *IG* I^3.106.23-24 (409/08 BC), II^2.226.26-31 (*c.*343/2 BC), II^2.385*b*.16-18 (*c.*307/03 BC). Henry (1983:262-90) discusses some 36 examples from the fifth and fourth centuries BC. See also Aristophanes *Knights* 280-83, 575-6, 702; Demosthenes xx.120, xxiii.130; Dinarchus i.143; M. J. Osborne (1981:159, 167-8).

[98] See for example *IG* II^2.1187 (329/8 BC), II^2.500.31-36 (302/01 BC). Henry (1983:291-310) discusses 8 examples from the fifth and fourth centuries BC.

[99] Whitehead (1993:65).

Philotimia is often discussed in terms that make it clear that it is not only consistent with cooperative values, but also with the rule of law (e.g. Aeschines i.196; Demosthenes xxiv.210, Plato *Laws* 841c4-5). Demosthenes' *Against Meidias*, for example, can be characterised as suggesting that Demosthenes' *philotimia* serves the city in accordance with the laws, but Meidias chose not to display his *philotimia* lawfully and therefore threatens the rule of law.[100] Aeschines (iii.20) claims that the Areopagus so desire honour (φιλοτιμοῦνται) that if one of their members commits a crime, even if by mistake, they punish him.

Clearly, in performing public services, an Athenian may have been inspired by competition to perform greater public services than his rivals. Our sources do not really elevate competition, however, and concentrate instead on Aristotle's "good works" and cooperative values. This strikes a discordant note alongside the claims by Garner and Cohen that honour was the central object of political competition.[101] Cohen, for example, states:

> Competition necessarily produces enmity. Since a basic moral principle of Greek societies from Homer onward is that justice requires one to help one's friends and harm one's enemies, enmity and rivalry inevitably produce mutual attempts to harm, hinder, defeat and dishonor one's enemies. Honor is centrally at stake in such interactions.[102]

Competition between the politicians of the fifth and fourth centuries can be, and has been, analysed in these precise terms.[103] Aristotle identified honour as the ultimate goal of political life (*EN* 1095b14-31, *Pol.* 1302a31-b18). In Classical Athens, probably the most basic reward of honour was power, and it has been suggested that "for most Athenian leaders honour was largely, or perhaps simply, a means of acquiring power."[104] Power enabled politicians to influence public life, both in the assembly and the courts. Aristophanes' frequent jibes against Cleon's willingness to indict people for imaginary crimes may be explicable in terms of Cleon's ability to influence popular juries.[105] In addition, Pausanias (vi.7.5) recounts the story of Doreius of Rhodes, victor in the Pancration at the Olympic Games, who was taken before the assembly in Athens

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[100] Fisher (1992:334-5); cf. Demosthenes xxi.61-9, 222-6.
[101] Garner (1987:18); Cohen (1995a:63).
[102] Cohen (1995a:65-6).
[103] Dover (1974:226-36); Sinclair (1989:152-61, 174-9); Davies (1993:114-5). See Aeschines i.129, Demosthenes xii.76, Thucydides ii.46, Xenophon *Hiero* vii.3-4.
[104] Sinclair (1989:179).
[105] Aristophanes *Knights* 235-9, 255-65, 278-9, 300-3, 442-6, 475-9; *Wasps* 240-4; MacDowell (1995:109-10).

after fighting against them in the Peloponnesian war. "When they met in the Assembly and observed that so great and famous a man had come to such a situation in the guise of a prisoner, their opinion towards him changed, and they released him without doing him any harm, even though they might with justice have punished him severely."[106]

How, then, do we reconcile the very real power that men could gain with the evidence of our sources? It is possible that Classical Athenians could view honour more broadly than the simple product of political power. Desire for honour did not of necessity require bitter rivalry. Non-competitive activities could also result in a citizen gaining honour, and some degree of influence. Someone who did not engage in political life at all, such as Charmides in Xenophon *Mem.* 3.7, could be called influential. A regular *topos* consisted in denying that the speaker had previously had any interest in political life or litigation, which is surprising if honour and status could only be gained through competition.[107] Furthermore, Athenians could gain honour from being considered *dikaios*, or for their *dikaiosyne*. A mid-fourth century BC inscription honours the *archon thesmothetes*, Callias, for holding his office excellently, justly and incorruptibly, and rewards him with a crown of olive for his *arete* and *dikaiosyne* toward the people of Athens.[108] Numerous inscriptions honour officials for their *dikaiosyne*, which may be understood in an epigraphic context as honest and upright behaviour on the part of someone who could have taken advantage of their position but did not do so.[109] Similarly, Aristotle (*Pol.* 1283a16-22), in discussing the sound management of a state, commented that more was needed than the ability to claim honour; justice and virtue

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[106] ὡς δ' ἐς ἐκκλησίαν συνελθόντες ἄνδρα οὕτω μέγαν καὶ δόξης ἐς τοσοῦτο ἥκοντα ἐθεάσαντο ἐν σχήματι αἰχμαλώτου, μεταπίπτει σφίσιν ἐς αὐτὸν ἡ γνώμη καὶ ἀπελθεῖν ἀφιᾶσιν οὐδὲ ἔργον οὐδὲν ἄχαρι ἐργάζονται, παρόν σφισι πολλὰ τε καὶ σὺν τῷ δικαίῳ δρᾶσαι.

[107] See Lateiner (1982:6-9) for examples from Lysias, and Carter (1986:112-3).

[108] *IG* II^2.1148.3-9. See also II^2.1143.3-6 (beginning of fourth century BC), II^2.1153.4-5, II^2.1253.3-8, II^2.1254.1-4, (mid-fourth century BC), II^2.2834.1-2 (337/6 BC), II^2.415 II.12-16 (330/29 BC), II^2.1258 (324/3 BC), and Merritt and Traill (1974:48-9, No.38.75-8 [341/0 BC]) for inscriptions honouring officials as *dikaios*. Veligianni-Terzi (1997:209) points out that *dikaios* is seldom found in fourth century BC inscriptions. It is also worth mentioning, in this context, Aristides' reputation for justice, which was manifested in his refusal to engage in unjust or illegal behaviour in court cases and arbitrations (Plutarch *Arist.* 4, 6). It is possible that Plutarch may have invented these anecdotes, but as Aristides' reputation for justice is confirmed elsewhere (Aeschines ii.23, iii.181; Eupolis *Demoi* Fr. 99, lines 80, 91, 118-19; Fr. 102; Fr. 105 [PCG]; Herodotus viii.79; Plato *Gorgias* 526b) Plutarch's point may be accepted. On Plutarch's methods in the *Lives* see Pelling (1990:27-9, 36-41, 2000:44-58).

[109] Whitehead (1993:67-8); and see generally Dover (1974:66); Havelock (1969:68-9); Tritle (1988:142-3). Aristotle (*Virtues and Vices* 1251b3-5) includes in his definition of *dikaiosyne* a willingness to preserve ancestral customs and institutions and the established laws, to tell the truth and to keep agreements. Inscriptions include *IG* II^2.223A.7, 12 (342 BC), II^2.1140.10-12 (early fourth century BC), II^2.1142.4 (early fourth century BC), II^2.1145.5-6 (*c.*353/2 BC), II^2.1149.6-8 (f. s. iv BC), II^2.1191.23-6 (321/20 BC), II^2.1202.7-8, 17-18 (313/2 BC), II^2.1203.15-16 (324/3 BC), II^2.1257.1-2 (324/3 BC), II^2.2821.6-7 (351/0 BC), Merritt and Traill (1974:42-6, 48-9 - Nos.26.21 [348/7 BC], 34.12-13 [343/2 BC], 35.4, 38.76, 80-81, 84 [341/0 BC]).

were necessary as well. Virtuous action formed the cornerstone of his ethical system, and acting justly, and in accordance with established laws, was one of the keys to virtuous action (*EN* 1103b1-7; 1130a29-31).[110] Accordingly, the sources offer little support for the argument that Athenian moral values were concentrated on competition for honour and that quiet virtues, such as justice, were unimportant.

What I am arguing here is essentially the point that a number of authors have made in relation to Adkins' portrayal of Homeric values. This is that those values appear to admit a broader range of morality than Adkins had allowed.[111] Greek literature after Homer indicates that both competitive and cooperative values coexisted down to and during the period of Classical Athens.[112] One of the clearest examples from Classical Athens is Sophocles' *Philoctetes*. In that play Neoptolemos is informed by Odysseus that if he tricks Philoctetes into giving him his bow, even though the act is shameful (79-80), he will be called the most devout of men for all time (85) and help the Greeks win the war (109, 113). This is a fairly clear statement that wrong-doing is justified by the results and the honour it will bring. Neoptolemos originally goes along with Odysseus' argument, even though he considers deceit shameful (86-95, 100, 108), and gains the bow. When everything appears won, however, he relents and hands the bow back, noting that he won it by base and unjust means (1234) and wants to atone for his crime (1224). In this new guise Neoptolemos makes it clear that he has justice on his side (1251), and the moral of the play is clearly that just actions are superior to unjust

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[110] Lest it be objected that "justice" here could mean whatever was sanctioned by the *demos*, I should note that Aristotle defines justice in legalistic terms. Aristotle notes (*EN* 1129b26, 1130a3) that justice is displayed by people towards other people. δικαιοσύνη and ἀδικία are used in several senses (*EN* 1129a27) defined at *EN* 1129a32-3, where Aristotle observes that a lawbreaker is unjust, and a man who takes more than his due and is unfair is unjust. τὸ δίκαιον means both what is lawful and what is fair (ὅ τε νόμιμος καὶ ὁ ἴσος; *EN* 1129a35). Aristotle goes on to identify a variety of types of justice concerned with lawful relations between people. What is lawful is the statutes of the lawgiver (τά τε ὡρισμένα ὑπὸ τῆς νομοθετικῆς νόμιμά ἐστι; *EN* 1129b12-14).

[111] Adkins' work was flawed in two major respects. Firstly, the concepts of "shame-culture" and "guilt-culture", derived from Ruth Benedict's (1946:222) work on Japan in the 1940s, were repudiated by the 1960s, largely because they were incapable of explaining variation in morality within a single group of people and because Benedict's work was based on selective omission or treatment of non-conforming data (M. Harris 1968:405, 443-6; Leaf 1979:223-4). Secondly, a number of authors have pointed out that the Homeric epics contain a range of passages in which moral approbation is reserved for acts of fairness or justice, and that these concepts appear to have been more significant than Adkins allowed (Long 1970:124-6; Lloyd-Jones 1971:5-8, 1990:261; Dover 1983:39; Cairns 1993:140, 255; Zanker 1994:2-5). For example, at *Od.* xxi.331-34 Penelope notes that the suitors cannot enjoy a good reputation (εὐκλεΐας) by dishonouring Odysseus' estate, which tends to indicate that honour would not be bestowed for committing unjust acts (see on this passage Long 1970:134 and Dover 1983:39). Similarly, at *Il.* xvi.384-89 Zeus is said to send storms to punish men who by violence pronounce crooked judgements in the market place and drive out justice (see the discussion by Lloyd-Jones 1971:6).

[112] See Lloyd-Jones (1990:263 [Pindar], 269 [Euripides], 271-2); Cairns (1993:170 [Theognis i.27-30], 240-1, 249, 252-4 [Sophocles], 390 [Plato]); Kyriakou (2001:25, 31 [Bacchylides]).

ones.[113] It is not clear whether Sophocles is outlining a general Athenian view here, but the key point is that, in the moral world posited by Adkins, Garner and Cohen, this sort of revulsion for deceitful means to achieve victory should be virtually impossible.

These examples show that, if a jury did judge in accordance with popular moral values, although it might be swayed by discussion of competition and honour it might also be swayed by the numerous appeals to justice and law in forensic speeches. If juries based their decisions on their general moral values, it is unlikely that decisions would be made on the basis of character and emotion alone.

One of the key claims underpinning the "social competition" argument is that a litigant could admit his guilt but appeal to be let off on the basis of his civic virtue, as suggested by Garner (above).[114] Yet there is no occasion in forensic oratory where such a plea is actually made.[115] In Plato's *Euthyphro* 8c-d Socrates and Euthyphro agree that it would be impossible for a litigant to admit he has done wrong, but claim he should not pay the penalty. Where speakers raise the issue of character it is generally in conjunction with legal appeals and discussion of the facts of the case. The argument appears to be based on negative evidence, in that on a few occasions speakers attack the possibility of their opponents appealing to civic virtue to win the case. The use of a *topos* such as this may indicate that appeals to civic virtue could help, but it does not indicate that such an appeal *alone* was sufficient to win a case. Carey rightly points out that Garner's statement "grossly oversimplifies" the matter.[116]

How likely is it that an Athenian jury represented a single mass of people sharing a dominant set of moral values? Caution is required here. Although some anthropologists claim that cultures are characterised by widely shared beliefs and values, or beliefs and values that are sanctioned by the majority of the group, others have pointed out the virtual impossibility of characterizing any group of people on these terms. In any human group there is considerable disagreement over most moral issues. Individuals' social networks tend to comprise people with similar values, and individuals may generalize

[113] For recent discussions of Philoctetes and Athenian moral values see Cairns (1993:252-63); Falkner (1998), Hawkins (1999).
[114] Cohen (1995a:184) essentially advocates the same position when he suggests that speakers ask the jurors to decide a case "upon the civic merits of the litigants rather than by applying the law." I am not aware of any case where a speaker actually makes so direct a plea. As I will show in Chapter Five, speakers usually appeal to the law as well as to their civic merit.
[115] Fisher (1976:28-9).
[116] Carey (1994a:185-6, n.30).

the values they think are shared to a larger group which does not actually share the values at all.[117] Given the dependence of modern anthropology on a limited number of informants to develop ethnographies, and the dependence of "social competition" theories on anthropological models, one is entitled to wonder how much such models actually tell us about Athenian popular morality after all. Any given jury on any given day is likely to have possessed a mass of different values and norms, with great variation in perceptions of any moral issue. For example, some jurors may have cared more for law than character, and others the opposite. Others may have paid greatest attention to the facts of the case and what appeared to be just. Others may have weighed up the admixture, or been moved by appeals to emotion. This mass of varied perceptions and values would be reflected in the jurors' decisions. If anything, then, we should expect to find that forensic speeches would cater for a variety of attitudes, and include discussion of law, character and the facts.

This leads us to the final criticism of social competition theories - that their adherents ignore large slabs of oratory in which speakers discuss the facts of the case and the application of law (see Chapter Five). If going to court were simply seen as a contest to affirm one's social standing over an "enemy," and jurors had no hope of resolving a case except on the basis of character alone, one wonders why speakers bothered to introduce the law or the facts at all. By contrast, in a situation where the moral standpoints and interests of each juror were likely to vary, a simple appeal to character and prejudice may not have been sufficient, and speakers may also have needed to discuss facts and the application of law.

The Importance of Context

Few authors have tried to gauge the interaction between legal and nonlegal arguments in an Athenian court. Missiou notes that there is no consistent picture in forensic speeches of arguments based on character and good deeds. Although some speakers may dwell on this sort of material, others may portray such arguments in a negative light.[118] She suggests that it is best to assess such arguments in context - that is, in light of the speech as a whole and their likely importance to a case.

[117] For a useful summary of the issues see Aunger (1999:S94-5).
[118] Missiou (1992:29-30).

Carey notes the Athenian conception of the court system and modern conceptions differ in several key aspects, notably in relation to what material was considered relevant. In Athens, emotional appeals, references to civic virtue and character assassination are common, as well as witnesses who are clearly not impartial. "The trial is thus placed squarely in the context of the lives of the parties concerned."[119] But conceptual barriers did exist between the lawcourts and everyday society in some important areas. Carey accepts that emotional and character material would be considered by juries; they could help them develop a view of the credibility of the litigant, and could also be crucial in the final verdict. In some cases the Athenian legal system allowed no flexibility in sentencing, and considering character could have been one way for the jurors to introduce flexibility:[120]

> But it is a mistake to suppose that as a general rule the main issue becomes an appendix at the trial. A crude reading of the orators shows that, in general, information about the career and character of the disputants plays a much smaller role (quantitatively) in Greek trials than the main issue. It is moreover important to note that we do not find speakers in court admitting that their case is weak and asking for a verdict in their favour on the basis of factors outside the case. It was evidently difficult to win a case on character-assassination and self-praise.[121]

Carey ends up asserting that the jurors' decisions were often based on law, though he accepts that nonlegal considerations played a large role in influencing the final verdict.[122]

The crucial factor that these two authors have raised is the overall balance of arguments. When legal and nonlegal arguments are considered together, both claim that a simple plea on the basis of character or emotion would probably not have succeeded. Their arguments are attractive, but it must be noted that they are not demonstrated. As a result, one of the major tasks of this thesis is to see whether Carey and Missiou are right and relevant discussion generally outweighed irrelevant pleading.

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[119] Carey (1994a:175-6).
[120] Carey (1994a:182, 1997:18).
[121] Carey (1994a:182).
[122] Carey (1996:34, n.8).

Chapter Four The Concept of Relevance in Athenian Courts

In this chapter I will analyse more fully the concept of relevance in Athenian courts. A concept of relevance is mentioned in most of the major books on Athenian lawcourts. Little attempt has been made to define it since Bonner's work a hundred years ago.[1] His study was not exhaustive. While it is generally recognised that the Athenians understood relevance as speaking to the issue, there has been little consideration of how the issue was defined and what a lawcourt would consider outside the issue.

Relevance in Aristotle

Modern discussions of relevance usually begin with Aristotle's *Rhetoric*.[2] Book One of the *Rhetoric* discusses rhetoric as a method or system (τέχνη). Aristotle uses the words ἔξω τοῦ πράγματος six times in Book One (1354a15-18, 22-23; 1354b17-20, 27; 1355a2, 19). He tells us that most handbooks devote themselves to τῶν ἔξω τοῦ πράγματος and explains "For slander and pity and anger and such emotions are [directed] not to the issue, but to the juror (1354a18)."[3] Next Aristotle tells us that speaking ἔξω τοῦ πράγματος is correctly forbidden in the court of the Areopagus, for it is wrong to pervert the juror's feelings, to arouse him to anger or jealousy or pity. "Further, it is clear that the only business of the litigant is to demonstrate that the fact is or is not, that it has happened or not; whether it is great or small or just or unjust, insofar as the lawgiver has not drawn a distinction, is for the juror himself to decide and not to learn from the litigants (1354a23)."[4]

Aristotle suggested that lawgivers should as much as possible leave little discretion to the jurors. "If this is so, it is clear that those who draw other distinctions write handbooks about what is irrelevant to the issue (τὰ ἔξω τοῦ πράγματος), such as what must be the contents of the proem or the narrative, or each of the other parts [of the

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[1] Bonner (1905:14-15).

[2] See, for example, Lossau (1964:19); Wankel (1976:151); Wallace 1989:124 and n.112); Carawan (1998:158 and n.33) and Whitehead (2000:238-8).

[3] διαβολὴ γὰρ καὶ ἔλεος καὶ ὀργὴ καὶ τὰ τοιαῦτα πάθη τῆς ψυχῆς οὐ περὶ τοῦ πράγματος ἐστιν ἀλλὰ πρὸς τὸν δικαστήν.

[4] ἔτι δὲ φανερὸν ὅτι τοῦ μὲν ἀμφισβητοῦντος οὐδέν ἐστιν ἔξω τοῦ δεῖξαι τὸ πρᾶγμα ὅτι ἔστιν ἢ οὐκ ἔστιν ἢ γέγονεν ἢ οὐ γέγονεν· εἰ δὲ μέγα ἢ μικρὸν ἢ δίκαιον ἢ ἄδικον, ὅσα μὴ ὁ νομοθέτης διώρικεν, αὐτὸν δή που τὸν δικαστὴν δεῖ γιγνώσκειν καὶ οὐ μανθάνειν παρὰ τῶν ἀμφισβητούντων.

speech]. For they are concerned with nothing in their handbooks except how to place the judge in a certain state of mind (1354b20)."[5]

Aristotle's final comments in Book One are to note that it is less worthwhile speaking ἔξω τοῦ πράγματος in deliberative oratory, as the only thing necessary is to prove the truth of a statement, whereas in lawcourts it is useful to win over the hearers, and that is why in many places the law prohibits λέγειν ἔξω τοῦ πράγματος (1354b27, 1355a2). It is clear that all other writers of handbooks include τὰ ἔξω τοῦ πράγματος (1355a19).

In Book Three Aristotle discusses appeals, noting that they are made to place the listener in a certain emotional state. He outlines a range of material, adding: "But we must not forget that all such things are ἔξω τοῦ λόγου; for they are only addressed to a worthless listener who will hear τὰ ἔξω τοῦ πράγματος, since if he is not such a man, there is no need of a proem, except to make a summary statement of the case, so that like a body it may have a head (1415b5-6)."[6]

Aristotle's main points seem clear, though their precise meaning is disputed. Material that is ἔξω τοῦ πράγματος is extrinsic to the matter or the subject of the speech. At a general level, Aristotle is criticizing the inclusion of emotional appeals in a forensic context. He notes that emotional appeals are commonly placed in proems and epilogues, and that other writers of rhetorical handbooks concentrate on such material that is ἔξω τοῦ πράγματος. Two matters are disputed in modern scholarship: the nature of Aristotle's criticism of emotional appeals, and the nature of his comments on the divisions of speech.

It is traditional to view Aristotle as claiming that all use of ἦθος or πάθος is irrelevant.[7] Based on this view, some scholars have claimed that Book One represents an ideal rhetoric, derived from Plato, in which factual discussion is contrasted with extraneous matters such as emotional appeals, and identify an inconsistency between this ideal

[5] εἰ δὴ ταῦθ' οὕτως ἔχει, φανερὸν ὅτι τὰ ἔξω τοῦ πράγματος τεχνολογοῦσιν ὅσοι τἆλλα διορίζουσιν, οἷον τί δεῖ τὸ προοίμιον ἢ τὴν διήγησιν ἔχειν, καὶ τῶν ἄλλων ἕκαστον μορίων· οὐδέν γὰρ ἐν αὐτοῖς ἄλλο πραγματεύονται πλὴν ὅπως τὸν κριτὴν ποιόν τινα ποιήσωσιν. The phrase ποιόν τινα literally means "a certain kind of person;" on the translation of the phrase see Fortenbaugh (1996a:163).

[6] δεῖ δὲ μὴ λανθάνειν ὅτι πάντα ἔξω τοῦ λόγου τὰ τοιαῦτα· πρὸς φαῦλον γὰρ ἀκροατὴν καὶ τὰ ἔξω τοῦ πράγματος ἀκούοντα, ἐπεὶ ἂν μὴ τοιοῦτος ᾖ, οὐθὲν δεῖ προοιμίου, ἀλλ' ἢ ὅσον τὸ πρᾶγμα εἰπεῖν κεφαλαιωδῶς, ἵνα ἔχῃ ὥσπερ σῶμα κεφαλήν.

[7] This view, first developed by Spengel (1828:96-7), was consolidated by Cope (1877:6-7).

rhetoric and the succeeding discussion elsewhere in the *Rhetoric* of emotion.[8] As a result, Fortenbaugh speculates that the *Rhetoric* is an amalgam of two books written at different times and showing two different views of the function of rhetoric.[9]

By contrast, Grimaldi argued that not all emotional appeals are irrelevant, and that Aristotle was talking only about appeals which are outside the issue.[10] Grimaldi did not discuss the matter in detail, and does not deal with Aristotle's comment in Book Three, where he states directly that all such appeals are outside the matter (1415b5-6). Other authors have presented a range of explanations. For example, Sprute believes Aristotle was writing an "ideal" handbook of rhetoric for an ideal world while understanding that no such world exists.[11] Others view the apparent paradox in the *Rhetoric* as a result of Aristotle's varying aims in the work - providing useful advice (such as how to make an emotional appeal), and discussing the theory and function of rhetoric as an art, which requires more complex argumentation than making simple emotional appeals.[12] This argument is as unconvincing as it is circular; it explains away the inconsistencies as a result of differing prior aims, but the the inconsistencies themselves are evidence for these prior aims.

It is possible that the paradox is actually something of a mirage. In Book One Aristotle never actually states that he will not discuss emotional appeals, or that they have no place in rhetoric. At 1356a1-4 he in fact makes it clear that they do have a place. He is not disowning emotional appeals, but criticising other authors for concentrating on them alone and ignoring the other elements of the "system," such as "enthymemes which are the body of proof (1354a14-15)." Irrelevant arguments are indeed bad arguments, but they are also potentially of little use to a speaker; as Aristotle, notes, if all trials were carried on as they are in some states, there would be nothing left to say if irrelevant arguments were excluded, since the handbooks have provided no other advice on

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[8] Cope (1877:6); Sprute (1994:119); Barnes (1995:263); Fortenbaugh (1996b:167-70); Frede (1996:264-65).

[9] Fortenbaugh (1996b:171-2, 175-80). Later in Book One Aristotle comments that there are three methods of proof in rhetoric - the character of the speaker, disposing the hearer in a certain way (by which he means arousing an emotional response) and factors in the speech itself (1356a1-4, 14-16). Aristotle notes that persuasive arguments alone are not enough, but an orator must show himself to have certain qualities and his audience must think he is disposed in a certain way towards them, and themselves be disposed in a certain way towards him (1377b16-20). Finally, in Book Three Aristotle goes on to discuss the uses of emotional appeals at length.

[10] Grimaldi (1980:9, 11, 24); see also Striker (1996:297-98).

[11] Sprute (1994:119-20).

[12] Lossau (1964:19) suggests Book Three is practical advice for the reader, whereas Book One is a philosophical introduction.

rhetoric (1354a19-21). If this interpretation is sound, there is no inconsistency. Aristotle is admitting that emotional appeals are irrelevant, but instead of advocating their excision, is recognising that they should be properly mastered along with other elements of the art of rhetoric. It is possible that the degree of influence on Aristotle by Plato in Book One has been overstated.[13]

It has also been suggested that Aristotle is claiming that "a concern with the technique and technicalities of speech structure" are irrelevant.[14] He seems to have been understood this way in antiquity, as later authors concluded that proems and epilogues were forbidden by the Areopagus (below). This interpretation is unfounded. Aristotle is not criticising the existence of divisions of speech at 1354b20 and 1415b5-6, but handbooks that insist on what the contents of those divisions should be. He is drawing attention to the view of other authors that (for example) emotional appeals should be placed in the proem, as this is the most effective way of swaying the audience's emotions.[15] Once again, he is attacking their concentration on irrelevant emotional appeals at the expense of the "system" of rhetoric.

Relevance after Aristotle - ancient and modern scholarship

Four authors from later antiquity discussed relevance. The earliest, Quintilian, asserted that Athenian orators were forbidden to stir the audience's passions, or deliver a peroration (*Inst.* ii.xvi.4, vi.i.7, x.i.107, xii.x.26).[16] In the second century A. D., Pollux (viii.117) claimed that the Areopagus prevented speakers from making proems or appeal to pity,[17] and Lucian (*Anach.* 19) stated that the Areopagus forbade proems and

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[13] Schütrumpf (1994:103) also argues that Aristotle is presenting emotions as part of a whole "system" of rhetoric. I would disagree, however, with his claim that Aristotle's system is still Platonic. It seems to be another inconsistency that Aristotle should be following Plato both in proposing an ideal rhetoric and in proposing a real-world rhetoric.

[14] Lossau (1964:19); Grimaldi (1980:24).

[15] Parallels are often drawn (eg. by Hellwig 1973:162-63; Sprute 1994:101-2; Fortenbaugh 1988:262-63, 1996b:169) between Book One and Plato's *Phaedrus* 266d-67d. Plato also discusses rhetorical handbooks, and notes that some of them outline the divisions of speech, but he does not explicitly criticize their existence, though his tone in the *Phaedrus* and *Politicus* 305b8 is generally depreciating.

[16] Et Athenis quoque, ubi actor movere adfectus vetabatur, velut recisam orandi potestatem (ii.xvi.4); Id sensisse Atticos credo, quia Athenis adfectus movere etiam per praeconem prohibebatur orator (vi.i.7); Et fortasse epilogos illi mos civitatis abstulerit (x.i.107); tamen quae defuisse ei sive ipsius natura seu lege civitatis videntur, adiecerit, ut adfectus concitatius moveat, audiam dicentem, *Non fecit hoc Demosthenes*? (xii.x.26). Quintilian's *Institutio Oratoria* was completed about A.D. 95.

[17] προοιμιάζεσθαι δὲ οὐκ ἐξῆν οὐδ' οἰκτίζεσθαι.

emotional appeals and that attempts would be silenced by the herald.[18] In the third century A.D., Anonymous Seguerianus (*Tech.* 33) claimed that the Areopagus did not allow proems or epilogues.[19]

When modern scholars began to write the history of Greece, they drew on the whole range of ancient sources and used Quintilian, Pollux and Lucian to confirm and extend Aristotle. They decided that emotional pleading (including appeals to pity), proems and epilogues were forbidden on the Areopagus.[20] This view continued after the advent of more "scientific" history in the nineteenth century.[21] By the late nineteenth century, when modern concepts of Athenian juries began to crystallize, this view of the Areopagus had become established.[22]

Prior to the discovery of the *Athenaion Politeia*, it was generally assumed that rules on relevance were confined to the Areopagus. Cope, for example, disparages "Quintilian's carelessness in extending to all the lawcourts of Athens, a practice actually prevailing at the most only in one of them," noting that extant orations provided direct evidence to the contrary.[23] The *Athenaion Politeia* shows, however, that litigants in *dikasteria* also

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[18] ἦν δέ τις ἢ φροίμιον εἴπῃ πρὸ τοῦ λόγου, ὡς εὐνουστέρους ἀπεργέσαιτο αὐτούς, ἢ οἶκτον ἢ δείνωσιν ἔξωθεν ἐπάγῃ τῷ πράγματι - οἷα πολλὰ ῥητόρων παῖδες ἐπὶ τοὺς δικαστὰς μηχανῶνται - παρελθὼν ὁ κῆρυξ κατεσιώπησεν εὐθύς, οὐκ ἐῶν ληρεῖν πρὸς τὴν βουλὴν καὶ περιπέπτειν τὸ πρᾶγμα ἐν τοῖς λόγοις, ὡς γυμνὰ τὰ γεγενημένα οἱ Ἀρεοπαγῖται βλέποιεν.

[19] ἡ ἐν Ἀρείῳ πάγῳ βουλὴ οὔτε προοιμιάζεσθαι εἴα οὔτε ἐπιλογίζεσθαι. Quintilian's source is unknown, but there seems to be a considerable difference between the information we find in Aristotle's *Rhetoric* and the comments of these scholars. All may be based on a common source, as they all agree on the exclusion of proems and emotional appeals, and both Quintilian (vi.1.7) and Lucian mention a herald. Quintilian's views seem directly opposed to the *Rhetoric* as he claims all courts enforced these prohibitions, whereas Aristotle only mentioned the Areopagus. It is possible that Quintilian may have misunderstood Aristotle (Kennedy 1994:179 notes that Quintilian was "not always precise in his quotations or paraphrases of what Greek writers had said" and that he appears to be selective in his use of Aristotle's *Rhetoric*), but it is also possible that there was a separate source which was itself inaccurate. Aristotle's *Rhetoric* had been lost for about 200 years prior to its rediscovery in about 80 B.C. (Plutarch *Sulla* xxvi; Strabo xiii.54), so an independent tradition about relevance may have developed during this time. There are some meagre indications of lost traditions in the early Empire concerning Athenian legal procedure. Dionysius of Halicarnassus (*First Letter to Ammaeus* 1) attacked the view that Demosthenes learnt his art from Aristotle's rhetoric, while Athenaeus (xiii.590f) tells us that after Hyperides' acquittal of Phryne, the Athenians passed a decree that no speakers should appeal for pity and no defendants, male or female be exposed to the open gaze while on trial. There are no clearly known sources for either account.

[20] Montagu (1760:77); Goguet (1775, II;23-24); Rollin (1775, IV:285); Goldsmith (1784, I:65); Mitford (1785:344). Montagu (ibid) held the Areopagus up as superior even to English juries in this regard: "Happy if the pleaders were restricted to this righteous method in our own courts of judicature, where great eloquence and great abilities are too often employed to confound truth and support injustice!"

[21] See Meier and Schömann (1824:719); Spengel (1828:96-7).

[22] See Cope (1877:8); Bruns (1896:487-8); Lipsius (1905-15, III:918). They are generally followed in the major modern account of Athenian homicide procedure - MacDowell (1963:43-4).

[23] Cope (1877:8).

swore to speak to the matter,[24] while Antiphon (vi.9) mentions a similar rule in the Palladion.[25]

It is generally assumed that irrelevant pleading was defined in the same way by *dikasteria* as by the Areopagus. Modern scholars combine evidence from speeches delivered before all types of courts and define irrelevance as consisting in slander, emotional pleas and discussion of services and character.[26] Few have considered the implication that, if all courts had the same rule, then if we are to believe ancient authors proems and epilogues would have been forbidden in *dikasteria* too.[27]

Where authors have considered that relevance must have been defined differently in different types of court, they have confined themselves to a few general comments. Carawan suggests that the rule was more restrictive and better respected on the Areopagus than elsewhere, citing Lycurgus i.11-13.[28] In that speech, Lycurgus recommends that the *dikastai* take the Areopagus as their model, which may suggest that legal standards in the two courts were seen to differ.Wallace[29] argued that the rule was always phrased as ἔξω τοῦ πράγματος λέγειν on the Areopagus, and as speaking εἰς τὸ πρᾶγμα before other courts, which "suggests that the Areopagus had its own provision." However, the phrase ἔξω τοῦ πράγματος is not used before the Areopagus in Lysias vii.42 where the speaker raises the issue of relevance. It is found used in *dikasteria* in speeches by Isaeus (Fr. 1 [Forster]), Lycurgus (i.11-13, 149) and Hyperides (iv.31-2), and appears three times in Demosthenes' *dikasterion* speech *Against Eubulides* (lvii.33-4, 63, 66) - a speech which also three times contains the phrase εἰς τὸ πρᾶγμα (lvii.7, 59, 60)! This more than any other speech would indicate that Wallace's argument is incorrect. The two phrases appear to be positive and negative expressions of a single idea. "Speaking outside the matter" is simply the logical opposite of "speaking to the matter."

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[24] κ[α]ὶ δ[ιο]μνύ[ουσι]ν οἱ ἀντίδικοι εἰς αὐτὸ τὸ πρᾶγμ[α] ἐρεῖν (*AP* 67.1).
[25] φόνου διώκοντες καὶ τοῦ νόμου οὕτως ἔχοντος, εἰς αὐτὸ τὸ πρᾶγμα κατηγορεῖν.
[26] See Bonner (1905:16-18); Lipsius (1905-15, III:918-20); Voegelin (1943:13-14); Wankel (1976:151-52).
[27] Lossau (1964:19-20) did compare Aeschines' use of the rule on relevance to Aristotle's and argued that they were generally similar, but his references to Aeschines i.166, 170 and iii.201-2 do not really support the conclusion that strictures against divisions of a speech were believed to be irrelevant. The passages do not criticise the divisions of a speech but the skill with which a practised orator can obscure the issue and mislead the jury.
[28] Carawan (1998:158).
[29] Wallace (1989:124).

It is unclear whether a different rule on relevance was applied in the scrutinies of magistrates, the *dokimasiai* and *euthynai*. Bonner thought so, citing Lysias xvi.9.[30] In that speech, a *dokimasia* before the Boule, the speaker states that in other cases it is right to make one's defence only about the charges themselves, but in *dokimasiai* it is just to give an account of one's whole life.[31] Weißenberger countered that in a *dokimasia* one was actually supposed to answer formal questions about one's life, but this did not mean that the routine could be extended into the elaborate accounting of liturgies we find in Lysias xvi.9-21.[32] This claim does not sit well with the evidence of Lysias xxiv and xxxi, which are also *dokimasia* speeches. The speaker of Lysias xxiv.1 emphasises his whole life in response to the charges brought by his opponent. The speaker of Lysias xxxi.2 claims that his Bouleutic oath requires him to disclose if he knows anyone of those chosen by lot to be unsuitable for service on the Boule, which perhaps indicates that a more general discussion of character and services was relevant.[33] To further complicate the matter, the speaker of another *dokimasia* speech, Lysias xxvi.3, claims his opponent will discuss his character and deeds rather than the charges, and suggests that this will be irrelevant to the issue. The speaker of this speech does not state that such a plea is unjust, instead briefly depreciating his opponent's services and character (Lysias xxvi.4-5).

This contradiction between the speeches can be resolved if we assume that *dokimasiai* and *euthynai* had the same rules concerning relevance as other trials. As will be discussed below, there was no concrete prohibition on irrelevance as such (outside the Areopagus and perhaps other homicide courts), but a more flexible situation in which it was up to the speaker to prove the relevance or otherwise of his case. In this situation, speakers could claim as relevant arguments that other speakers, on another occasion, might label irrelevant. It is this flexibility that we observe in Lysias' *dokimasia* speeches.

Despite the apparent existence of an Areopagite rule, speakers appear to have flouted it regularly, since the extant Areopagus speeches contradict Quintilian, Pollux and Lucian by containing material those authors identify as irrelevant. Lysias iii contains a proem (1-5), and a short peroration (46-8) that contains a brief appeal for pity (48) and

[30] Bonner (1905:16); see also Voegelin (1943:14, n.13) and Adeleye (1983:297-300).
[31] δοκεῖ δέ μοι, ὦ βουλή, ἐν μὲν τοῖς ἄλλοις ἀγῶσι περὶ αὐτῶν μόνων τῶν κατηγορημένων προσήκειν ἀπολογεῖσθαι, ἐν δὲ ταῖς δοκιμασίαις δίκαιον εἶναι παντὸς τοῦ βίου λόγον διδόναι.
[32] Weißenberger (1987:50), building upon a point made earlier by Frohberger (1871:12-13).

comments on public services (47). There is also a brief digression to introduce an irrelevant charge of criminal behaviour against the opponent, which the speaker admits is ἔξω τοῦ πράγματος (45). Lysias vii contains a proem (1-5) with an extensive emotional plea to undermine the opponent's character. Lysias iv.20 has an appeal to pity, while iv.19 and vii.41 contain statements about the speakers' good public records and services. Finally, in his account of the Areopagus' inquiry into Theogenes' wife, Apollodorus tells us that Theogenes begged and pleaded and supplicated himself to the Areopagus, insisting that he had been tricked; the Areopagus, we are told, pitied him (Demosthenes lix.81-83).

In response to this, Wallace has claimed that "the tradition that [appeals to pity] were forbidden on the Areopagus is both late and contradicted by evidence from Lysias."[34] As we shall see below, Wallace is certainly on the right track.

The more general point is also made that all courts appear to have allowed appeals for pity and proems.[35] As a result, Athenian courts are sometimes viewed as places where rules on relevance, even if they existed, had little real enforcement or meaning.[36] Some attempts have been made to explain this. Adkins noted that the long list of liturgies in Lysias xvi flew "in the face of the justice that the juries swore to observe."[37] He then sought to prove that in reality discussion of liturgies was not irrelevant, but in fact a crucial part of the defence - something that was best explained by viewing Athenian litigation as part of the relentless competition over status and honour.[38] Not surprisingly, his interpretation proved attractive to those with similar ideas, and has been echoed by Garner and Cohen.[39]

This interpretation does present us with a conundrum. If discussion of one's character and liturgies is actually relevant, why is it so often labelled irrelevant in forensic oratory? That it is labelled irrelevant is shown below. There is a further problem, that the clear testimony of a number of authors writing in late antiquity about what was relevant on the Areopagus is contradicted by forensic oratory. There is also the problem that we have a somewhat confused picture of the application of relevance in other

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[33] ἔνεστι τε ἐν τῷ ὅρκῳ ἀποφανεῖν εἴ τίς τινα οἶδε τῶν λαχόντων ἀνεπιτήδειον ὄντα βουλεύειν.
[34] Wallace (1991:78-9).
[35] Bonner (1905:16).
[36] Bonner (1927:73-5).
[37] Adkins (1972:121).
[38] Adkins (1972:121-3).
[39] Garner (1987:62-3); Cohen (1991:155, 1995a:190-1).

Athenian courts, with a number of modern scholars concluding that rules on relevance were simply ignored.

The resolution of this conundrum lies in a re-examination of the evidence. Modern scholarship has been too heavily based on the mantra passed down from late antiquity, and has tried to fit forensic oratory into the picture drawn by Aristotle, Quintilian, Pollux and Lucian. We would be better served by analysing what forensic orations themselves say, and then comparing them to Aristotle and later authors to see where they match and differ.

Terminology of Relevance

Table 4.1 lists all the "contexts" I have found in Athenian forensic oratory where speakers discuss relevance.[40] The table presents only the actual phrases which bear upon the terminology of relevance; the contexts themselves provide broader information about the material that could be viewed as relevant or irrelevant.

There are 96 contexts in all, derived from 46 speeches and one fragment of Isaeus. Overall, the list is characterized by a great variety in phrasing, and there is no consistent terminology for describing relevance. The most common grammatical formation is a prepositional phrase, usually with a noun following the preposition. The familiar phrase ἔξω τοῦ πράγματος occurs nine times in four speeches, while εἰς αὐτὸ τὸ πρᾶγμα occurs eight times in five speeches. The phrase περὶ [αὐτοῦ] τοῦ πράγματος also occurs eight times, but may have been fairly widely used in discussing relevance as it is also used in this way by Isocrates (*Antidosis* xv.104), and Aristotle (*Rhet.* 1354a18). It also reappears much later as the phrase used by Lucian (*Anach.* 19) in discussing the Areopagus' views on relevance. Less common prepositional phrases involving the word πρᾶγμα are ὑπὲρ [αὐτοῦ] τοῦ πράγματος (thrice), περὶ τῶν [αὑτῷ] πεπραγμένων (twice), περὶ τῶν πραγμάτων (twice), ὑπὲρ τῶν πεπραγμένων (twice), πρὸς τὸ πρᾶγμα (twice), ἐπ' αὐτοῦ τοῦ πράγματος (once), εἰς τὸν τοῦ πράγματος αὐτὸν (once) and ἄπο τοῦ πράγματος (once). The latter is echoed in compound form in the

[40] I use the word "contexts" because a speaker may, in discussing relevance, spend one or more sections dealing with a single point, and it would therefore be incorrect to separate sections belonging to a single argument. Two contexts have been excluded from this analysis. Isocrates xix.16 includes the phrase περὶ μὲν ἀυτοῦ τοῦ πράγματος, but as the speech was delivered under Aeginetan, rather than Attic, jurisdiction I have excluded it. Isocrates xv.104 contains the phrase χρὴ δὲ τὸν ὑπὲρ ἐκεινοῦ λόγον οὐκ ἀλλότριον εἶναι νομίζειν τοῖς ἐνεστῶσι πράγμασιν, οὐδ' ἔμε λέγειν ἔξω τῆς γραφῆς. As this is an epideictic oration it is also not considered here, except insofar as it bears upon the general picture derived from forensic oratory.

phrase ἀπὸ τῆς ὕβρεως καὶ τῶν πεπραγμένων, found once. The phrase ἄπο τοῦ πράγματος is the only one of these phrases to be found in later lexicographers and linked to relevance.[41]

A total of 41 references include some form of the word πρᾶγμα. The basic meaning of the word, according to LSJ s.v., is "that which has been done, a deed, act", but it can be extended from that to include ongoing actions, work, circumstances, matters or facts and even intellectual positions (Aeschines iii.79) or plots (Demosthenes xxix.27). In forensic oratory πρᾶγμα is commonly used to refer to the object of the suit, the charge, or the case as a whole.[42] A classic example of this meaning is Demosthenes xxiv.5: τὸ μὲν οὖν πρᾶγμα, περὶ οὗ δεῖ νῦν γνῶναι.[43]

There are a number of instances where, in discussing relevance, a speaker uses a more specific term than πρᾶγμα. As a result we get ἔξω τῆς γραφῆς (twice, and also in Isocrates xv.104); ἔξω τῆς κατηγορίας, ἔξω τι τῆς πρεσβείας ταύτης, ἔξω τοῦ παρανόμου (once each), ὑπὲρ τῶν [αὐτοῦ] κατηγορουμένων (twice), ὑπὲρ τῆς ἐνδείξεως, περὶ [αὐτῶν μόνων] τῶν κατηγορημένων (twice), περὶ τοῦ ἐγκλήματος, περὶ τοῦ προβουλεύματος, περὶ τῆς μαρτυρίας, περὶ τῆς ἐνδείξεως, εἰς αὐτὸν τὴν φόνον, πρὸς τὰ κατηγορημένα (once each), ἀπὸ τῆς ὑποθέσεως (thrice), ἀπὸ τῆς ἀπολογίας and ἐπὶ τῆς ὑποθέσεως (once each). Some of these, such as γραφῆς, φόνον, or πρεσβείας, are synonyms for the case as a whole. Others refer to the charge under which the case is brought (κατηγορίας and its cognates, ἐγκλήματος), the indictment (ἐνδείξεως) or orders under discussion (προβουλεύματος).

Outside forensic oratory we find a similar picture. Plato (*Theat.* 172e) notes that in courts a litigant's opponent would hold the ὑπογραφή against him, from which it is not possible to deviate (ὧν ἐκτὸς οὐ ῥητέον). In this context ὑπογραφή means an accusation, and is a synonym for a charge.[44] Furthermore, Thucydides (iii.61.1) uses the

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[41] See Harpocration s.v. ἄπο τοῦ πράγματος and Suda s.v. ἄπο τοῦ πράγματος. Harpocration defines the phrase ἀντὶ τοῦ ἄπωθεν Δημοσθένης κατ' Ἀνδροτίωνος. I cannot find the phrase in Demosthenes' *Androtion*, but can find it in his *Timocrates*. Some passages of the *Timocrates* are virtually identical to passages of *Androtion*, but xxiv.6 is not one of them.

[42] Amerio (1984:180-90).

[43] For other examples, see Andocides i.37, Demosthenes xl.58, Lycurgus i.66.

[44] This use of ὑπογραφή is rare. In Athenian forensic oratory the verb ὑπογράψας meaning "to accuse" is attested at Demosthenes xxxvii.23. In much later times it is found in Themistius *Or.* xxvi.313c (τὴν ἀντωμοσίαν...ἣν ὑπογράψονται). To these LSJ s.v. adds Euripides *Her.* 1118, but this seems mistaken; see Barlow (1996:172), who suggests that in *Heracles* 1118 it means "indicate", "suggest" or "hint."

term ἔξω τῶν προκειμενῶν in the Plataean Debate to refer to matters outside the case currently under discussion. These external references may indicate that it was relatively common to define the case through a more specific word than πρᾶγμα. The contexts in which the more specific words appear are similar to those in which πρᾶγμα is used, so references which use a more specific word do not seem to have a more specific meaning.

Another pattern that can be observed in Table 4.1 is the use of a prepositional phrase where the object of the clause is replaced by a relative pronoun and a verb. We thus find περὶ ὧν ἀντώμοσαν, περὶ οὗπερ ὑμᾶς δεῖ ψηφίζεσθαι, περὶ ὧν ἐγκέκληκε, περὶ ὧν ἐδίωκε, περὶ οὗ μάλιστα προσῆκεν αὐτῷ τὸν λόγον ποιεῖσθαι, περὶ ὧν φεύγει, περὶ ὧν οὐκ ἀγωνίζεται, περὶ ὧν μὴ ἐὰν λέγειν, περὶ ὧν μὴ κατηγόρηται, περὶ οὗ μέλλετε τὴν ψῆφον φέρειν, οὐ καθ' ὅν εἰσελήλυθας, ὑπὲρ ὧν μὴ βουλεύεσθε, ὑπὲρ ὧν ἀγωνίζῃ (once each).

A third pattern is the use of verbs that indicate diverting, leading astray, twisting, or simple deceit. Table 4.1 supplies παράγειν (ten times), ἐξαπατᾶν (eight times), ἀπάγειν (four times), φενακίζειν (three times), ἁπαρτᾶν, παράττειν, πλάττειν, πλανᾶν and μεταστρέφειν (once each), for example. Sometimes two verbs are used to reinforce each other, as for example ἐξαπατᾶν δ' ὑμᾶς πειράσεται πλάττων καὶ παράγων (Demosthenes xxii.4), τοῦτο γὰρ πλάττουσιν οὗτοι καὶ παράγουσι (Demosthenes xxxviii.9) and παράγων τῷ λόγῳ, ὡς οὐ πάντα μεμαρτύρηκε τὰ ἐν τῷ γραμματείῳ γεγραμμένα, καὶ ἐξαπατῶν ὑμᾶς (Demosthenes xlvi.1). These verbs can be found in non-forensic contexts with the same meaning of leading astray or deceiving, especially in relation to giving a speech. ἐξαπατᾶν, for example, is used in this way by Aristophanes (*Knights* 1115-9, *Wasps* 281), ἀπάγειν by Thucydides (ii.59.3, ii.65.1) and Plato (*Phaedr.* 262b), and παράγειν by Plato (*Rep.* 383a).

The variety of phrasing evident in Table 4.1 may indicate that there was no specific legal term for relevance in Athenian courts. If this was the case, then it must be considered that there was no actual law on relevance in Athenian courts (except perhaps on the Areopagus). In forensic oratory speakers regularly cite laws using consistent phrasing. For example, the term for being "caught in the act" is consistently expressed as being taken ἐπ' αὐτοφώρῳ both in forensic oratory (Aeschines i.91; ii.88; iii.10; Antiphon i.3, 9; v.48; Demosthenes xix.121, 132, 293; xxiii.157; xxxix.26; xlv.59, 70,

81; Dinarchus i.29, 53, 77; ii.6; Isocrates xviii.53; Lysias i.21; vii.42; xiii.30, 85-8) and in general prose and poetry (Aristophanes *Wealth* 454; Eupolis *Marikas* Fr.193 [PCG]; Euripides *Ion* 1213; Herodotus vi.72.2; vi.137.3; vii.6.3; Plato *Apol.* 22a; *Rep.* 359c; *Laws* 942a; Xenophon *Symp.* iii.13; *Oec.* xviii.3).[45] A more complex example is the phrase used to indicate that an inheritance (or an heiress) is open to claim. Although the word order may vary, we consistently find the words μὴ ἐπίδικον εἶναι (Isaeus ii.2; iii.3, 43, 66, 67, 73; iv.28; v.16; vi.3, 46, 52, 58, 59; vii.3; xi.10, 24; Demosthenes xliii.69; xliv.46). The consistent phrasing in these cases indicates that the speakers are citing the wording of laws (or, in the case of ἐπ' αὐτοφώρῳ, a legal term that has passed into common usage).[46]

A further point in favour of this argument is that some of the phrases that are used in discussing relevance can also be used in forensic oratory with completely different meanings. Demosthenes describes "people who were not involved in a matter" with the words τοῖς ἔξω τοῦ πράγματος οὖσιν (xxi.15) or τῶν ἔξω τοῦ πράγματος ὄντων (xxi.45). Elsewhere, we find him describing the same idea with the phrases τῶν ἔξω τῶν ἐγκλημάτων ὄντων (xxiii.42) and ἔξω τῶν ἐν τῇ συγγραφῇ γεγραμμένων (xxxiv.3). Elsewhere, speakers use the phrase περὶ τοῦ πράγματος (without discussing the issue of relevance) to refer to something that is part of a matter (Demosthenes xxii.30; xlvii.1, 3, 46; Isocrates xviii.58). If a phrase such as ἔξω τοῦ πράγματος was derived from a law on relevance, it would have struck an incongruous note when being used to refer to people, rather than arguments.

Relevance in Law and Oath

Speakers regularly claim that relevant argument is just (Aeschines i.175-76; iii.193-97; Antiphon vi.7-10; Demosthenes xviii.9, 59; xix.202; xx.1-2; xxii.4; xxiii.95-7; xxxv.41; xxxvi.61; xxxviii.9; xxxix.35; xl.20-21; xli.12-14; xlv.47-50; xlviii.36; li.3; lii.1-2; lvii.33; lviii.22-25, 41; Hyperides iv.31-32; Isaeus xi.47; Lycurgus i.11-13; Lysias xvi.9). Only on two occasions does a speaker claim that the law forbids irrelevance

[45] In one case (Sophocles *Ant.* 51) it is phrased πρὸς αὐτοφώρου, perhaps for metrical reasons.
[46] Although Athens did not have the legalistic formalism characteristic of later Roman and modern common law courts, it nonetheless did enjoy a fairly standard use of legal terms (Todd 2000a:32-34). Scholars sometimes posit a much sloppier use of legal terms (e.g. Finley 1951:8), although Finley nonetheless relies on the assumption of formalism to explain his view that *hypotheke* and *prasis epi lysei* were separate forms of real security. E. M. Harris (1993:76) rightly notes that apparent imprecision sometimes reflects modern assumptions rather than ancient reality.

(Lysias iii.46 and Antiphon vi.9).[47] Lysias iii was delivered before the Areopagus, where we have external testimony (Aristotle *Rhet.* 1354a23, Lycurgus i.13) that irrelevance was forbidden. Little is known of rules in the Palladion, where Antiphon's sixth speech was delivered, but this passage of Antiphon has been seen as proving that there was also a law for that court upholding relevance.[48]

The picture is muddied by a passage in Antiphon (v.11) in which the speaker claims that his opponents have illegally tried him as a *kakourgos* even though the charge is murder. He suggests that they should, if trying him for homicide, have sworn an oath[49] in which they swore to confine their prosecution εἰς αὐτὸν τὸν φόνον. If the speaker had been tried in a homicide court, it seems most likely that he would have been tried for intentional homicide, in which case he should have been tried before the Areopagus.[50] This presents us with a paradox, since if we accept the evidence of Lysias iii, the law, rather than an oath, restrained irrelevance before the Areopagus.

In this regard Glotz and Mederle suggested that only the references to the law were to be trusted. Mederle argued that Antiphon may have confused the provisions of the law and the oath, since anyone who swore the oath was also bound by the law.[51] Glotz argued that speakers simply stated in the oath whether they were guilty or not, with no further claims about the facts of the case. He claimed support from two passages in forensic oratory:[52]

> Il est aisé, après cela, de voir à l'aide de quel sophisme le rhéteur a pu transformer un serment déclaratoire et réel en un serment promissoire et imaginaire: d'une part, l'accusateur est tenu à une déclaration sur les faits de la cause (εἰς αὐτὸν τὴν φόνον, ὡς ἔκτεινα); d'autre part, les lois du Palladion et de l'Aréopage défendent à l'accusation de sortir de la cause (τοῦ νόμου οὕτως ἔχοντος, εἰς αὐτὸ τὸ πρᾶγμα κατηγορεῖν, οὐ νόμιμόν ἐστιν ἔξω τοῦ πράγματος λέγειν); donc, en prêtant le serment déclaratoire sur les faits de la cause, on admet les lois du tribunal dont elle relève, et l'on jure implicitement de respecter ces lois. Ainsi il ne reste en faveur d'une diômosia promissoire d'autres témoignages que ceux de deux ou trois grammairiens. Encore sont-ils contredits par d'autres grammairiens et par tous les contemporains des institutions qu'ils prétendent décrire.[53]

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[47] Lysias iii.46 (οὐ νόμιμόν ἐστιν ἔξω τοῦ πράγματος λέγειν); Antiphon vi.9 (τοῦ νόμου οὕτως ἔχοντος, εἰς αὐτὸ τὸ πρᾶγμα κατηγορεῖν).
[48] Wallace (1989:124).
[49] τοῦτο δὲ δέον σε διομόσασθαι ὅρκον τὸν μέγιστον καὶ ἰσχυρότατον.
[50] MacDowell (1978:117).
[51] Mederle (1902:16).
[52] Glotz did not provide references, but his citations are from Lysias x.11 and Antiphon vi.16.
[53] Glotz (1906:151-52), followed by Bonner and Smith (1930-38, II:166).

Glotz's thesis does not sufficiently explain the emphasis that the speaker of Antiphon v places upon the oath,[54] and neither Lysias x.11 nor Antiphon vi.16 should be viewed as containing the entire text of the homicide oath.[55] All the lexicographers agree that the prosecutor swore that he was bringing the charge about the matter in dispute against the guilty party, while the defendant swore that he had not committed the crime raised in the charge.[56] Their entries indicate that speakers could swear oaths that provided details of the charge and the accusations that supported the charge. This is, in fact, what forensic oratory actually shows us (Antiphon i.28; Lysias iii.4; Demosthenes lix.9-10). Glotz perhaps too readily discounts lexicographers and places too much weight on a couple of passages taken out of context.

There seem to be two other possibilities - either the νόμος mentioned in Lysias' third speech, and perhaps even Antiphon's sixth speech, is in fact the preliminary oath sworn by the parties at the start of each homicide case, or litigants in homicide courts swore an oath to stick to the matter even though there was already a rule that they should do so. The former possibility simply reverses Glotz's argument. Consequently, it is worth revisiting the possibility that there may have been both a law and an oath.

The oath sworn at the start of a homicide trial is mentioned in several sources, but there is no direct evidence outside Antiphon that it prohibited irrelevance.[57] It is at least possible that litigants' oaths were themselves derived from the terms of homicide laws, which might indicate that the speakers of Lysias iii and Antiphon v were correct to refer to laws on relevance. There are some meagre indications that the oath reflected homicide laws. Demosthenes (xlvii.72) tells us that the laws of Draco ordered relatives of the deceased to take proceedings against murderers, as far as the sons of cousins, and that in the oath it is laid down who the relative is.[58] Elsewhere, Dinarchus (i.46-47) tells

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[54] MacDowell (1963:93).

[55] In the case of Lysias x, the speaker is discussing the semantics of words for 'killed' and using the homicide oath as an example. He had no need to cite more than the relevant clause of the oath as a result. In the case of Antiphon vi the speaker is discussing his opponent's claim that he committed the murder βουλεύσαντα, and had no need to discuss more than this issue.

[56] Harpocration s.v. ἄντωμοσία; Hesychius s.v. ἄντωμοσία and διωμοσία; *Lex. Sabb.* s.v. διωμοσία (Papadopulos-Kerameus 1965[1892-93]:52, l.8); *Lex. Rhet.* s.v. ἄντωμοσία καὶ ἀντομνύναι (Bekker 1814:200); Pollux viii.55; Suda s.v. ἄντωμοσία and διωμοσία. Glotz combines both types of oath in making his argument.

[57] On the oath, see Antiphon i.28; Demosthenes xlvii.73, lix.9-10; Lysias x.11, iii.1, 4; and Philippi (1874:85-96); Mederle (1902:14-16); Lipsius (1905-15:830-31); Bonner and Smith (1930-38, II:165-66); MacDowell (1963:90-98); Harrison (1968-71, II:99-100); and Hansen (1981:15).

[58] κελεύει γὰρ ὁ νόμος, ὦ ἄνδρες δικασταί, τοὺς προσήκοντας ἐπεξιέναι μέχρι ἀνεψιαδῶν, καὶ ἐν τῷ ὅρκῳ διορίζεται ὅ τι προσήκων ἐστίν. The text of the last clause is disputed. I prefer the manuscript reading "defined" (διορίζεται) for "inquired" (ἐπερωτᾶν, which has the authority of Pollux

us that Demosthenes broke the oaths he took on the Areopagus in the names of the holy goddesses and the other gods, by whom it is lawful to swear there.[59] It is possible that the laws of Draco outlined the procedure for trials, including the items to be sworn in the oath. If this is the case, then there could very well be both a rule on relevance and a requirement for speakers to swear to stick to the matter at the trial. The evidence is not good, however, so on this issue uncertainty must remain.

In forensic oratory δίκαιον is regularly used to indicate that something has a legal basis (see Chapter Five). Accordingly, the regular claim in oratory that irrelevance is unjust may indicate that there was commonly held to be some ban on it in *dikasteria*. Such a ban must clearly have existed by the last quarter of the fourth century B.C., as it was recorded in the *Athenaion Politeia* (67.1). The key to understanding the nature of any ban in *dikasteria* lies in the wording used there - δ[ιο]μνύ[ουσι]ν οἱ ἀντίδικοι εἰς αὐτὸ τὸ πρᾶγμ[α] ἐρεῖν. The key word is δ[ιο]μνύ[ουσι]ν, which indicates that litigants swore on oath to confine themselves to the matter.

Little is known about preliminary oaths sworn by litigants in *dikasteria*. Hansen suggests that the litigants swore the oath mentioned in the *Athenaion Politeia* at the trial itself.[60] The *Athenaion Politeia* outlines the procedure as it unfolded on the day, though it does not actually state that the oath was sworn in court. There is no other evidence that litigants swore a preliminary oath in a *dikasterion*, although it is known that the litigants' oaths in homicide trials were sworn in the court before the trial.[61] The use of the verb διόμνυμι may show that the *Athenaion Politeia* is indeed referring to an oath sworn at the start of the trial, as this is the verb regularly used for the oaths sworn by litigants at the start of homicide trials.[62] In this regard, it contrasts with the verb that is generally used to refer to the other major oath sworn by litigants before a trial, the

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viii.118, where he appears to quote this passage) as I know of no Athenian oaths that comprised questions, rather than testimony to a fact.

[59] ἐπιωρκηκὼς μὲν τὰς σεμνὰς θεὰς ἐν Ἀρείῳ πάγῳ καὶ τοὺς ἄλλους θεοὺς οὓς ἐκεῖ διόμνυσθαι νόμιμόν ἐστι.

[60] Hansen (1999:200).

[61] Antiphon vi.14; Demosthenes xxiii.67, 71. This was something of a vexed issue previously, with Lipsius (1905-15, III:831) and Bonner and Smith (1938, II:166-67) claiming that litigants in *dikasteria* only swore oaths at the *anakrisis*. MacDowell (1963:96-97) discusses the evidence and settles for the oaths being sworn at the trial.

[62] Antiphon i.28, Demosthenes xlvii.73, lix.9-10. Lysias x.11, iii.1, 4. διόμνυμι can also refer to pledges or oaths which were not required by law but were given by someone on his own initiative (Aeschines iii.150, Demosthenes xviii.283, 286, xl.41, xlix.67, lvii.44; Isaeus xi.6; Lycurgus i.127; Sophocles *Trach.* 254; see Bonner and Smith 1930-38, II:165, n.6) or even oaths sworn by witnesses (Aeschines iii.156).

ἀντωμοσία, the oath sworn at the *anakrisis*. The normal verb there is ἀντόμνυμι, and διόμνυμι is not used in forensic oratory for this oath.[63]

Another ban on irrelevance in *dikasteria* derived from the Heliastic oath. Some speakers claim that, by ensuring their opponent does not make irrelevant arguments, the jurors will be upholding their oath.[64] What purports to be a full text of the Heliastic oath can be found at Demosthenes xxiv.149-51,[65] and this shows that jurors swore to vote on "the very matter that the prosecution is about" (διαψηφιοῦμαι περὶ αὐτοῦ οὗ ἂν ἡ δίωξις ᾖ, Demosthenes xxiv.151).[66] This may have been the key phrase in the oath that was understood as forbidding irrelevance. It is indeed interpreted on these very terms in a speech delivered by Apollodorus, where he notes that the jurors have sworn to judge, not on what the defendant claims, but on the very matters that the prosecution is about, and, therefore, μὴ δὲ τοῦτ' ἀφεὶς περὶ ὧν οὐκ ἀγωνίζεται λεγέτω (Demosthenes xlv.50).

In summary, it is possible that there were indeed separate proscriptions on relevance in homicide courts and general courts. In relation to homicide courts, it appears that there was a rule on relevance and that litigants also swore an oath. In *dikasteria*, there does not appear to have been any rule, though the litigants swore to stick to the matter and the jurors swore to judge on the actual matter.

Although speakers had sworn their oath, they still enjoyed the flexibility to raise

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[63] Plato (*Apol.* 27c) states that Meletus διωμόσω ἐν τῇ ἀντιγραφῇ. ἀντιγραφῇ here appears to be a synonym for ἀντωμοσία as the charge referred to (that Socrates believes in new deities) is the same charge referred to in *Apol.* 24b, where Plato uses the word ἀντωμοσία. It may be that, outside forensic oratory at least, authors could be looser in their choice of terms. For the use of ἀντόμνυμι see Demosthenes xliii.3; Isaeus iii.6, v.1, 16, ix.1, 34; Isocrates xvi.2. Isaeus v.16 proves the oath was sworn at the *anakrisis*.

[64] Aeschines i.170; Demosthenes xxii.4, 43-6, xxiii.19-21, xxxvi.61, xlv.47-50, lviii.25; Lycurgus i.11-13. See also Antiphon vi.10, where he notes that the jury will not convict for any reason other than the crime itself; ταῦτα γὰρ καὶ ὅσια καὶ δίκαια. This last phrase may be an allusion to an oath sworn by the Ephetai sitting in judgement in the Palladion.

[65] This text has been questioned, notably because it omits some clauses known from other sources, and may include some spurious material. There is general agreement that a number of clauses known from several sources did in fact appear in the oath, including commitments to vote according to the laws and decrees of the Athenian people and the Boule, and, in a case not covered by law, to vote according to the most just opinion. Further commitments (which are not accepted by all scholars as genuine) were to vote without favour or enmity and after hearing both sides. For discussion on the clauses in the Heliastic Oath see Fränkel (1878); Lipsius (1905-15, I;151-3); Bonner (1927:73); Bonner and Smith (1930-38, II:152-6); Harrison (1968-71, II:48); MacDowell (1978:44); Todd (1993:54); Hansen (1999:182-3).

[66] Fränkel, Lipsius, Bonner, Harrison and Hansen agree that the Oath included a clause to vote on the matter. The phrase at Demosthenes xxiv.151 is repeated (with some minor variations) at Aeschines i.154 (ὑπὲρ αὐτῶν ψηφιεῖσθαι ὧν ἂν ἡ δίωξις ᾖ) and Demosthenes xlv.50 (δικάσειν γὰρ ὀμωμόκαθ' ὑμεῖς...ὑπὲρ αὐτῶν ὧν ἂν ἡ δίωξις ᾖ).

irrelevant matters in *dikasteria* if they so desired. In the absence of a law on relevance, they could not be sued for irrelevance. They were therefore free to introduce any argument and endeavour to convince the jurors that it was relevant. Depending on the circumstances of the case, they may have adopted very different tactics at different times. In some situations speakers may have felt able to concentrate on law and the facts of the case, if their case was strong on those points. If they had a legally or factually weak case, they may have felt that their best option lay in their character and public services, or in assassinating their opponent's character. In such cases they would claim that the material was relevant.

The only sanction on their conduct was the mood of the jury. On several occasions speakers ask the jury to stop their opponent, or to order him to discuss relevant issues (Aeschines i.175-76, iii.201-8; Demosthenes xix.97, xlv.50). Similarly, speakers could comment that the jurors would perhaps criticise them if they were irrelevant (Demosthenes lvii.33). Jurors would, if they thought a speaker was being irrelevant, interrupt with cries of "Why are you telling us this?" (Hyperides i.Fr.2, iv.31), and speakers would try to convince jurors that they should be allowed to raise certain points (Demosthenes lviii.41, 48).[67] This system was clearly open to manipulation by skilled speakers, but on occasions jurors could indeed stop someone from speaking; Apollodorus famously was prevented from replying to Phormio (Demosthenes xlv.6). We have only one possible example, though, of jurors stopping a speaker from being irrelevant, and not a very clear one at that. Aeschines (ii.4, 153) commends the jurors for "throwing out" (ἐξεβάλλετε) Demosthenes' story about the Olynthian woman. This may possibly be a reference to jurors preventing Demosthenes from indulging in irrelevance, though it is also likely that the jurors simply did not credit the story and therefore stopped Demosthenes from using it. There is no trace in Demosthenes' own speech of the jurors preventing him from speaking, though it is perhaps significant that the story is dealt with fairly briefly (xix.196-99) in comparison to Demosthenes' other slanders, which may indicate (if the speech reflects what was said in court) that he had to cut short the tale.

In homicide courts the picture is less clear. If there was no law on relevance, speakers

[67] It may be that dikastic *thorubos* is what Aristotle (*Rhet.* 1355a3) had in mind when he said that in the lawcourts the judges themselves take adequate precautions against irrelevance (ἐκεῖ δ' αὐτοὶ οἱ κριταὶ τοῦτο τηροῦσιν ἱκανῶς).

would have enjoyed the same flexibility as speakers in *dikasteria*. If there was a law against irrelevance, however, then one would expect speakers to be more circumspect. There is some evidence, albeit superficial given the general paucity of homicide cases, that irrelevant arguments were used less extensively in cases before homicide courts than before *dikasteria*.[68] The matter is uncertain, however, and the weight of negative evidence is worth noting here, for in all of the extant ancient literature we never hear of anyone being sued for breaching a law against irrelevance.[69]

In practice speakers must have been fairly confident that the jurors would not stop them from raising certain issues. As the Younger Pliny remarked in a letter to Arrianus discussing legal procedure, you cannot tell whether an argument is irrelevant until you have heard it.[70] Athenian jurors would have had to listen to the irrelevance first before deciding whether to condemn it or condone it, and at Athens there was the added complication of the size of the juries. Large juries of several hundred men may have had a diversity of opinions over any issue, so whereas some may have felt that an issue was irrelevant, others may not. Athenian courts did not have an official to stop the speakers when they were being irrelevant, as was the case in Rome,[71] so there does not appear to be any workable method in Athenian procedure for preventing speakers from being irrelevant. Obviously if some jurors disliked what was being said they would have felt free to heckle the speaker, but they could only stop a speaker if a majority of jurors felt the same way.

Defining Relevance

The basic meaning that is common to all the references in Table 4.1 is that there is a matter at issue (however defined) and that some issues are extraneous to that matter. This is a fairly well recognised point in relation to familiar phrases such as ἔξω τοῦ

[68] For example, Lysias makes more extensive use of the evidence of good citizenship in the non-homicide case xxi.1-10, and scripted extended appeals for pity in xxi.25 and xxiv.6-7. Similarly, a lengthy discussion of the opponent's other crimes can be found in Lysias xiii. 62-68. These may be contrasted with Lysias' decision to restrict his discussion of Simon's other crimes to one single instance in iii.45, or the brief mention of the speaker's services in Lysias vii.41.

[69] Mederle (1902:16). In procedural terms, the only way I can envisage that a speaker could have indicted his opponent for irrelevance would have been to make clear in court before the case had finished that he intended to sue him for it, in much the same way as a speaker would indicate his intention to sue an opponent's witness for perjury. The fact that we never hear of any such procedure is perhaps instructive that there was no law.

[70] Pliny *Epist.* vi.ii.6: "Praeterea, an sint supervacua, nisi cum audieris, scire non possis."

[71] Aulus Gellius *NA* i.22.6.

πράγματος, but it holds for all the references in the table.[72] Despite this, there has been little attempt to define what sort of argument was outside the matter. In this section I will explore how the matter was defined, and what sort of discussion would commonly be considered irrelevant in Athenian courts.

The use of words such as τῶν κατηγορημένων or τοῦ ἐγκλήματος in contexts where the speaker is talking about relevance helps define a key aspect of the matter - that it would be defined in relation to the charge made by the prosecution as written down. The charge would set the boundaries of the matter, including what the basic issue was about, and what sort of discussion one might expect to hear in relation to that issue. Demosthenes (xviii.9) alludes to this when he notes that if Aeschines had confined his speech to the matters on which he was prosecuting, he would immediately be giving his defence on the *probouleuma*.[73] Speakers could claim that they should be judged simply on the charge alone, and recount all that happened in connection with it (Antiphon vi.8).[74] Lycurgus (i.90-91) gives examples of what sort of things to recount on the issue - that Leocrates did not sail, that he did not leave the city and that he did not settle in Megara.[75] Demosthenes (xix.335-36) provides a similar discussion in claiming that the case is not about the peace, or about other men's guilt, but about Aeschines' role.

We possess only two copies of actual *graphai*.[76] The first is Dinarchus Fr. 14 [Burtt], the beginning of a speech. The speech commences with the charge, in which Dinarchus claims βλάβης from Proxenus for two talents, and recounts a series of claims on how he sustained damage. The second is recorded by Plutarch (*Alc.* 22) as the *eisangelia* brought by Thessalus against Alcibiades for impiety in profaning the Mysteries. This also includes a general charge and then a series of specific claims that outline how the impiety occurred. In addition to these, Aeschines' *graphe* in the *Crown* case is discussed at length by Demosthenes (xviii.56-59). According to Demosthenes, the charge concentrates on the actions that are claimed to be illegal (that Demosthenes should be

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[72] See Grimaldi (1980:9) and Westermann's (1868:17) comment on Demosthenes xviii.9: "Ausserhalb der Sache liegende und gleichwohl herbeigezogene, ausserwesentliche Puncte (sic)."

[73] εἰ μὲν οὖν περὶ ὧν ἐδίωκε μόνον κατηγόρησεν Αἰσχίνης, κἀγὼ περὶ αὐτοῦ τοῦ προβουλεύματος εὐθὺς ἂν ἀπελογούμην.

[74] ἐγὼ δὲ ἀξιόω πρῶτον μὲν περὶ αὐτοῦ τοῦ πράγματος κρίνεσθαι, καὶ διηγήσασθαι ἐν ὑμῖν τὰ γενόμενα πάντα.

[75] οὐ γὰρ τοῦτο δεῖ λέγειν, ἀλλ' ὡς οὐκ ἐξέπλευσεν, οὐδὲ τὴν πόλιν ἐγκατέλιπεν, οὐδ' ἐν Μεγάροις κατῴκησε· ταῦτά ἐστι τεκμήρια τοῦ πράγματος.

[76] The *graphai* were read as evidence in Demosthenes lviii.36 and Lysias xiv.47, but the text is not preserved. In *On the Crown* Demosthenes (xviii.53) has the *graphe* read out but the preserved text is widely viewed as a forgery (See Goodwin 1904:34).

crowned with a golden crown, that the crown should be proclaimed in the Theatre at the Great Dionysia, that Demosthenes should be crowned on account of his various good points and deeds) and on showing that they are against the laws. The *graphe* here appears to cover the main points of the case, and one is reminded of a speech by Hyperides where the speaker claims that jurors should not listen to prosecutors until they have examined the main point of the trial and the written reply, to see whether the laws have been broken or not.[77]

References to the preliminary oaths sworn in homicide cases indicate that they included a summary of charges (Antiphon i.28; Lysias iii.1, 4; Demosthenes lix.9-10). References to the ἀντωμοσία indicate it also included a summary statement of the charges (Demosthenes xliii.3; Isaeus v.1-2, ix.1, 34).[78]

Statements about the charges also appeared in the διαμαρτυρία (Isaeus iii.7; Demosthenes xliv.45; *Lex. Rhet. Cantab.* s.v. διαμαρτυρία) and the παραγραφή (Demosthenes xxxii.23, xxxiv.17). We also possess three partial copies of the written accusations made in private speeches (τὸ ἔγκλημα). In *Against Pantaenetus* the speaker has portions of the ἔγκλημα read out (Demosthenes xxxvii.22, 25, 26, 28, 29, 32), and it contains a charge (that Nicobulus has harmed the speaker by laying a plot) and a list of claims to prove that charge. In *Against Aphobus III* Demosthenes (xxix.31) reads out the beginning of the ἔγκλημα, and this contains the charge that Aphobus has his money as a guardian, and then the first of a series of claims about the money that was stolen. Little is left of the ἔγκλημα in *Against Nausimachus* (Demosthenes xxxviii.14-15), but it appears to have contained a charge that a debt was owed, and claims to prove that charge.[79]

Finally, we possess a copy of the charge and the reply made in a δικὴ ψευδομαρτυρίων, Apollodorus' suit *Against Stephanus* (Demosthenes xlv.46). The charge states that

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[77] Hyperides iv.4: ἐπὶ τῶν δημοσίων ἀγώνων οὐ χρὴ τοὺς δικαστὰς πρότερον τὰ καθ' ἕκαστα τῆς κατηγορίας ὑπομένειν ἀκούειν, πρὶν [ἂν] αὐτὸ τὸ κεφάλαιον τοῦ ἀγῶνος καὶ τὴν ἀντιγραφὴν ἐξετάσωσιν εἰ ἔστιν ἐκ τῶν νόμων ἢ μή.

[78] Plato's *Apology* (19b, 24b and possibly 27c) provides some parallels here, as Meletus's ἀντωμοσία includes a list of charges. These charges also turn up in the ἀντωμοσία that Diogenes Laertius (*Socr.* ii.40) claims was submitted in Socrates' case, though as his list contains nothing not already known from Plato it may be derived from the *Apology*. Isocrates (xvi.2) also tells us that his opponent spends more time slandering his father than περὶ ὧν ἀντώμοσαν διδάσκοντες. Plato (*Theatetus* 172e) also notes that the charge that one litigant always holds over the other's head, from which it is not possible to deviate, is the ἀντωμοσία. These sources confirm that the ἀντωμοσία would include details of the charge and the accusations.

[79] ἐγκλήματα were presented in Demosthenes xxxiv.16 and xxix.38, but the texts are not preserved.

Stephanus gave false testimony about what was written ἐν τῷ γραμματείῳ. Stephanus' reply (ἀντιγραφή) is that he gave true testimony. The ἀντιγραφή is also crucial in determining the issue of the case. Apollodorus goes to great lengths to define the case as being about all of the written testimony, not about certain parts of the testimony (Demosthenes xlv.45) and to claim that the jurors should not pay attention to the issues of the original case, but to the issue raised in this charge - that Stephanus gave false testimony (xlv.47-50).

The above evidence indicates that a case could be defined through the written charge made by the prosecutor, and the written reply made by the defendant. The charge would contain a basic accusation about an illegality (in the above examples from private suits, damage and a debt respectively), with claims to prove that. The reply made by the defence would then set the boundaries of the case, and the matter at issue would be defined in accordance with the claims outlined in the charge and the points made in reply by the defence.[80] The type of claims made in a charge would probably vary with the type of process being used. For example, as Demosthenes' *On the Crown* was delivered in a *graphe paranomon*, Aeschines' charge had to prove that laws had been broken and identify those laws. In the two private suits above, which were delivered in *dikai blabes*, the law was less crucial than proving that damage had actually been caused and for what amount, so the ἐγκλήματα concentrate on claims and actions.

On three occasions speakers go to some effort to point out that it is the charge made by the prosecutor that defines the issue, not counter-accusations made by the defence. Apollodorus made this point (Demosthenes xlv.50) in raising the Heliastic Oath. Aeschines (i.178-9; iii.193) makes the same point, claiming that by allowing the defence to mislead them with counter-accusations the jurors are led away from the matter at issue. Such accusations are a regular feature of discussions on relevance. Some 56 of the contexts in Table 4.1 include a claim that the opponent is seeking to lead the jury astray

[80] Classical Greek rhetoricians did not devote much attention to defining the charge in judicial oratory, apart from basic discussions on whether the matter was a question of fact or law, which underlay rhetorical exercises as far back as Antiphon's *Tetralogies* and Antisthenes' *Ajax*. In the second century B.C. defining the issue was more important, featuring in Hermagoras' *stasis*-theory, which became a fundamental element of Hellenistic and Roman-period oratory. Kennedy (1994:98) notes that *stasis* theory defined the charge in the way outlined here - it began with the charge of the prosecutor, and the claims in that charge, and the written reply by the defendant, which provided the answering claims, and thereby "focused the basic conflict."

by making irrelevant accusations or claims.[81] What might constitute an irrelevant claim would be specific to each case. For example, in *On the Crown* Demosthenes (xviii.59) is point outs that Aeschines has made Greek affairs and debates relevant to the case by attacking as false the wording in Ctesiphon's decree that Demosthenes in speaking and acting has acted in Athens' best interests.[82] In *Against Timarchus* Aeschines (i.166-67) states that Demosthenes' irrelevant claims will be about Macedon - "There will be a lot about Philip, and the name of his son Alexander is going to be mixed up in it."[83] In this case the claims are irrelevant because Demosthenes will be attacking Aeschines' public career, rather than speaking about the charges against Timarchus.

At times speakers claim that their opponents are introducing ridiculous stories. Ariston states that Conon introduced all kinds of scurrilous and irrelevant claims before the arbitrator, such as "that Ctesias was the son of Conon by a whore (Demosthenes liv.26)."[84] On another occasion, a speaker remarks drily that of course his opponent cannot be expected to admit his debt and say that he has been justly indicted, but instead will invent accusations and excuses, some of which have been used ten thousand times before (Demosthenes lviii.22-23). Sometimes the claims appear to be little more than an attempt to undercut what may be a legitimate defence by branding it irrelevant (Demosthenes xx.1-2, 98; xxiii.90, 191; xxxviii.9; xlvi.1; lviii.48, 52; Hyperides iv.4-5; Lycurgus i.90-91). We also find the opposite tactic - transparent attempts to introduce what appear to be irrelevant arguments by claiming that they are relevant (Demosthenes xxii.21-24; xxxvi.54-55).

Speakers could also claim that irrelevant considerations included discussion of public services (eight times),[85] character (nine times),[86] other crimes (four times),[87] lies about

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[81] Aeschines i.166-9, 178, iii.193; Antiphon vi.9-10; Demosthenes xviii.9-11, 34, 59, xix.88, 92, 97, 192-5, 202, 242, 335-6, xx.1-2, 98, xxii.4, 21, 42-6, xxiii.90, 95, 191, xxvii.53, xxix.13, xxxv.41, xxxvi.61, xxxviii.9, 19-20, xxxix.35, xl.20-21, 61, xli.12-14, xlv.47-50, xlvi.1, xlviii.36, liv.13, 26, lvii.7, 34, 63, lviii.22, 48, 52, lix.6; Hyperides iv.4, 10, 19, 31; Isaeus iv.5-6, vi.59, xi.47; Isocrates xviii.35-36, 40; Lycurgus i.11, 90-91; Lysias xxxii.21.

[82] καί με μηδεὶς ἀπαρτᾶν ὑπολάβῃ τὸν λόγον τῆς γραφῆς, ἐὰν εἰς Ἑλληνικὰς πράξεις καὶ λόγους ἐμπέσω· ὁ γὰρ διώκων τοῦ ψηφίσματος τὸ λέγειν καὶ πράττειν τὰ ἄριστά με καὶ γεγραμμένος ταῦθ' ὡς οὐκ ἀληθῆ, οὗτός ἐστιν ὁ τοὺς περὶ ἁπάντων τῶν ἐμοὶ πεπολιτευμένων λόγους οἰκείους καὶ ἀναγκαίους τῇ γραφῇ πεποιηκώς. See also the similar comments at Isocrates xvi.3 and Lysias ix.3.

[83] πολὺς μὲν γὰρ ὁ Φίλιππος ἔσται, ἀναμειχθήσεται δὲ καὶ τὸ τοῦ παιδὸς ὄνομα Ἀλεξάνδρου.

[84] ἀλλ' ἐξ ἑταίρας εἶναι παιδίον αὐτῷ τοῦτο.

[85] Antiphon v.11; Isocrates xvi.2-3; Lysias vii.41-2, xii.38, xiv.16-19, xvi.9, xxvi.3, xxviii.12.

[86] Aeschines iii.203; Demosthenes xxiv.6, xxxviii.19-20, lviii.41; Hyperides iv.32; Isaeus vi.59, xi.47; Lysias ix.1, xxvi.3.

[87] Aeschines iii.203-4; Antiphon v.11; Demosthenes lvii.66; Lysias iii.44-6.

actions or a person's character (sixteen times),[88] slander (eighteen times),[89] personal abuse (six times),[90] jokes and ridicule (twice),[91] threats (once)[92] or appeals for pity (five times).[93] Speakers could also claim that their opponent's irrelevance will be part of their rhetorical skill (twelve times),[94] or their shouting and railing (three times).[95] Lycurgus (i.11) also condemns speakers who offer advice on public affairs rather than discussing the matter itself.[96] His comment is reminiscent of Plato's statement (*Theat.* 172e) that οἱ ἀγῶνες οὐδέποτε τὴν ἄλλως ἀλλ' ἀεὶ τὴν περὶ αὐτοῦ.

A classic formulation of the irrelevance of past public services and crimes is at Antiphon v.11, where the speaker states that he should be tried for the murder itself, and not be convicted of anything else, even if he had committed many other crimes, nor pardoned for his good deeds, no matter how many he had performed.[97] Hyperides builds a similar argument, stating that it is outrageous that his opponents condemn Euxenippus for being rich, and for having amassed his wealth dishonestly:

> ἃ εἰς μὲν τὸν ἀγῶνα τοῦτον οὐδὲν δήπου ἐστίν, εἴτε πολλὰ οὗτος κέκτηται εἴτε ὀλίγα, τοῦ δὲ λέγοντος κακοηθία καὶ ὑπόληψις εἰς τοὺς δικαστὰς οὐ δικαία, ὡς ἄλλοθί που οὗτοι τὴν γνώμην ἂν σχοίησαν ἢ ἐπ' αὐτοῦ τοῦ πράγματος, καὶ πότε[ρον] ἀδικεῖ ὑμᾶς ὁ κριν[όμ]ενος ἢ οὔ.
>
> This is surely nothing to do with this trial, whether he possesses great wealth or small, and to raise the matter is malicious and is an unjust assumption about the jurors, that they would base their judgement on other matters than the very matter itself, and whether the man on trial commits a crime against you or not (Hyperides iv.32).

Another explicit statement of the irrelevance of arguments based on an opponent's character may be found in a speech by Lysias:

> τί ποτε διανοηθέντες οἱ ἀντίδικοι τοῦ μὲν πράγματος παρημελήκασι, τὸν δὲ τρόπον μου ἐπεχείσησαν διαβάλλειν; πότερον ἀγνοοῦντες ὅτι περὶ τοῦ

[88] Aeschines i.178, iii.207; Antiphon vi.7; Demosthenes xviii.9-11, xxii.21, xxv.38, xxix.13, xl.21, xli.14, xlviii.36, lii.1, lvii.33, 66; Hyperides i.11, iv.19; Lycurgus i.11-13. Wankel (1976:149) had already noted that accusations of irrelevance commonly included a claim that one's opponent had told lies.

[89] Aeschines i.167, iii.207; Antiphon vi.7; Demosthenes xviii.10-11, 34, xxii.21, xxv.36, xxxvi.61, xli.13, lvii.33; Hyperides i.9, iv.31; Isaeus xi.47, Fr. 1 [Forster]; Lycurgus i.11, 149; Lysias ix.1.

[90] Demosthenes xviii.10-11, xxii.21, xxv.36, xxxvi.61, li.3, lvii.34.

[91] Aeschines i.175; Demosthenes liv.13.

[92] Demosthenes xxv.36.

[93] Aeschines i.113, iii.207; Demosthenes xxxviii.19-20, xxxix.35; Lysias xxviii.14.

[94] Aeschines i.166-9, iii.201-2; Demosthenes xix.336, xxii.4, xxxv.41, xli.12, xlvi.1, lii.2, lviii.25, 41; Dinarchus i.113; Isaeus xi.59.

[95] Demosthenes xxxvi.61, xl.61; Isaeus xi.59-60.

[96] συμβουλεύουσιν ἐνταῦθα περὶ τῶν κοινῶν πραγμάτων.

[97] ἦ μὲν μὴ ἄλλα κατηγορήσειν ἐμοῦ ἢ εἰς αὐτὸν τὴν φόνον, ὡς ἔκτεινα, ἐν ᾧ οὔτ' ἂν κακὰ πολλὰ εἰργασμένος ἡλισκόμην ἄλλῳ ἢ αὐτῷ τῷ πράγματι, οὔτ' ἂν πολλὰ ἀγαθὰ εἰργασμένος τούτοις ἂν ἐσῳζόμην τοῖς ἀγαθοῖς.

πράγματος προσήκει λέγειν; ἢ τόδε μὲν ἐπίστανται, ἡγούμενοι δὲ λήσειν περὶ [τοῦ] παντὸς πλείω λόγον ἢ τοῦ προσήκοντος ποιοῦνται; ὅτι μὲν οὐκ ἐμοῦ καταφρονήσαντες ἀλλὰ τοῦ πράγματος τοὺς λόγους ποιοῦνται, σαφῶς ἐπίσταμαι· εἰ μέντοι ὑμᾶς οἴονται δι' ἄγνοιαν ὑπὸ τῶν διαβολῶν πεισθέντας καταψηφιεῖσθαί μου, τοῦτ' ἂν θαυμάσαιμι.

Whatever did my opponents have in mind in disregarding the subject of the case, and seeking to slander my character? Don't they know that it is proper to speak on the matter? Or do they know this, but consider that it won't be noticed that they talk much more about anything other than what they ought to? That they make their speeches out of contempt, not for me, but for the subject of the case, I understand clearly. If, however, they think that you will, from ignorance, be persuaded by their slanders to condemn me, this would indeed surprise me (Lysias ix.1-2).

The basic reason for discussing relevance during a speech was, of course, strategic. By claiming his opponent was being irrelevant, a speaker tried to undercut his opponent's argument and bolster his own case. By claiming his own arguments were relevant, a speaker either tried to give his arguments greater authority, or to introduce claims that were not listed in the written charge but may have been essential to winning his case. A classic example of this kind is discussion of a past history of enmity, which may have initially seemed irrelevant to the charge, but could support a defendant's claim that the prosecution was sycophantic or trumped-up. Diodorus supports his case against Timocrates with a discussion of past enmity (Demosthenes xxiv.6-16) which is prefaced by the comment that this is not irrelevant.

Speakers sometimes claim that their opponent has introduced irrelevant arguments so that they will need to waste time on the false charges in their own speech, thereby leaving less time to discuss pertinent issues (Demosthenes xxvii.53, xlv.47; Hyperides i.9-11, iv.31-2). At other times a claim about relevance seems to have been a tactic used to shore up a case that was legally or factually weak. Speakers might slander opponents' characters or past actions, and claim that these are relevant (Demosthenes xxxvi.54-5, lvii.59, 60, 63). In the first of these speeches, the speaker introduces witnesses to Phormio's character (which are clearly irrelevant) and justifies this by claiming that they prove that Apollodorus' charges are sycophantic. In the second speech the speaker introduces various stories about his opponents' past crimes, claiming that it is relevant to show how wicked they are. On another occasion, a speaker eked out his *dokimasia* speech with a long list of his past good services and actions, claiming that they were relevant (Lysias xvi.9).

Relevance in the Crown Case

The Crown case is one of the few instances where speeches made by both the prosecution and the defence are preserved. The question of relevance features regularly in the speeches, which cast additional light on how it might be defined.

As Table 4.1 shows, Aeschines refers to relevance six times. The first three references are somewhat unusual. On each occasion Aeschines makes a brief digression from a discussion to attack Demosthenes' actions or character, and then exits the digression by noting that he does not want to digress from his point. The next three references form part of a larger argument in which Aeschines discusses what the appropriate form of defence should be, and tells the jury to make Demosthenes adopt such a course. He suggests that they should tell Demosthenes to address the legal issues first, and then the issue of whether he deserves the crown (iii.205). As Aeschines notes, his speech did follow this general pattern, outlining a range of legal issues (iii.9-50) and then indulging in a longer and concerted assault on Demosthenes' public career (iii.51-192). Aeschines states that he has only briefly mentioned Demosthenes' private life, concentrating on his public crimes (iii.204). His speech does contain only a little abuse, slander and discussion of unrelated crimes (iii.51-3, 76, 171-76, 207, 209-10, 213-14, 231, 241, 242-47, 248-49).[98]

In his reply, Demosthenes discusses relevance three times in the first quarter of his speech. He claims that Aeschines has not kept to the written charges, but has talked about other matters and told lies (xviii.9), along with personal abuse and slander (xviii.10-11). He claims that Aeschines expected him not to review his public career and discuss the abuse and slanders instead, and notes that he will do no such thing (xviii.11).[99] Next he states that if Aeschines had not made charges that were not in the indictment, he would not be speaking on other matters, but since Aeschines has used every accusation and slander he must say a few words in reply to each charge

[98] As Gwatkin and Shuckburgh (1890:208) note, the attack on Demosthenes' private life is fairly brief, "but, on the other hand, it is more or less continuous throughout the speech by means of innuendoes and epithets; and is again and again recurred to."

[99] Demosthenes does not follow the order of speech proposed by Aeschines, but reviews his own career (and Aeschines') between xviii.18-110, then briefly answers the legal issues (xviii.111-25) and then follows this with an extensive attack on Aeschines (xviii.126-59) before moving once again into an extensive account of his own public career (xviii.160-296).

(xviii.34).[100] Later, after discussing his role in the Peace of Philocrates, he argues that he is not being irrelevant by discussing Greek affairs and speeches, for Aeschines has made all his public career relevant by attacking the clause in Ctesiphon's decree that Demosthenes, in his speeches and actions, has acted in Athens' best interests (xviii.59).

Modern authors commonly presume that Demosthenes is claiming that Aeschines' claims about the Peace of Philocrates are among the irrelevant slanders and accusations.[101] Their view is derived from a common belief that Demosthenes xviii.9-52 can be seen as a single coherent argument in which Demosthenes replies to Aeschines' irrelevant charges.[102] On the face of it, this presents us with a conflict, as it does not make sense for Aeschines' claims about Demosthenes' policies to be irrelevant (xviii.9-11, 34) and then, only a little later in the speech, to be relevant (xviii.59). It may be that Goodwin's grouping of Demosthenes xviii.9-52 into a single argument may be a little too sweeping. At xviii.9-11 Demosthenes refers to abuse and slanders, and then at xviii.12-16 he builds upon this claim and makes one of his strongest points, asking why, if he had committed so many crimes in the past, Aeschines did not indict him before, but chose to attack Ctesiphon instead. At xviii.17 he states that this argument (Aeschines' previous inaction and unjust attack on Ctesiphon) proves that all the charges have been made equally without justice or truth. He notes that he wishes to examine the charges individually, and especially the lies about the Peace of Philocrates and the embassy. He then goes on to discuss the Peace at 18-33. At 34 he mentions irrelevance again, and immediately launches into an attack on Aeschines' role in the Peace (xviii.35-49), summing the discussion up by noting that it is Aeschines' fault for having bespattered him with the dregs of his own wickedness and his crimes (xviii.50).[103] He then states (xviii.53) that he will now answer the indictment itself.

The mention of relevance at Demosthenes xviii.9-11 sets the scene for the general point on Aeschines' injustice to be made at xviii.12-16. The injustice provides the link to the ensuing discussion of the Peace of Philocrates, which is swiftly dealt with and then followed by another mention of relevance. In this instance, it is not an excuse for the

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[100] ὅτι μὴ κατηγορήσαντος Αἰσχίνου μηδὲν ἔξω τῆς γραφῆς, οὐδ' ἂν ἐγὼ λόγον οὐδέν' ἐποιούμην ἕτερον· πάσαις δ' αἰτίαις καὶ βλασφημίαις ἅμα τούτου κεχρημένου ἀνάγκη κἀμοὶ πρὸς ἕκαστα τῶν κατηγορημένων μίκρ' ἀποκρίνασθαι.

[101] See Goodwin (1904:259-60); Yunis (2001:129).

[102] Goodwin (1904:261); Usher (1993:176); Yunis (2001:129).

[103] αἴτιος δ' οὗτός, ὥσπερ ἑωλοκρασίαν τινά μου τῆς πονηρίας τῆς ἑαυτοῦ καὶ τῶν ἀδικημάτων κατασκεδάσας.

preceding discussion, but rather an excuse for what is to follow - the irrelevant attack on Aeschines' role at xviii.35-49.[104] Accordingly, there is no inconsistency between the first two mentions of relevance at xviii.9 and 34, and the last at xviii.59. The first two references are part of Demosthenes' rhetorical strategy, to claim that Aeschines' approach had been unjust, and also to bury his own weakest point - his role in the Peace of Philocrates - under a general accusation of irrelevance, slander and abuse.[105] The final mention is simply justification for the long eulogy of his own career that is to follow. All the mentions of relevance have a tactical basis, and are designed to justify Demosthenes' approach and downgrade Aeschines' at the same time.

Comparison between Forensic Oratory and Philosophy

Aristotle's general claims about relevance, and especially his comments about emotional appeals, are supported by forensic oratory. Speakers complain about jokes, threats, shouting and appeals for pity. Such comments are not as common as complaints about abuse, slander, character discussion or talking about past crimes. These comments themselves are not as common as the fundamental claim that, by raising charges or claims not in the indictment or the written reply, a speaker was introducing irrelevant material.

Consequently, while Aristotle provides insights into the sort of arguments that could be considered irrelevant, he does not offer an exhaustive analysis. Forensic oratory reveals that emotional appeals are part of the picture on irrelevance, but only a small part.

Developments Over Time

Table 4.1 includes references from nine of the ten Attic Orators. Relevance is discussed throughout the period of forensic oratory, and by some of the earliest (Antiphon) and latest (Dinarchus) orators. No clear pattern can be discerned in terms of the development of phrases. Phrases such as ἔξω τοῦ πράγματος, εἰς αὐτὸ τὸ πρᾶγμα and περὶ [αὐτοῦ] τοῦ πράγματος occur in both early and late works.

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[104] This point is made by Goodwin (1904:23) and Usher (1993:184).

[105] On this issue I differ from Goodwin (1904:260), who sees the Peace of Philocrates as one of Demosthenes' strong points, because "later events had triumphantly vindicated his own course of action." Demosthenes' role in the Peace actually appears to have been somewhat inglorious, but the memories of the Athenians on his role appear to have been short, allowing him (and Aeschines) to sidestep the blame. Given popular feeling against the Peace, however, it is difficult to see it as anything other than a weak point in Demosthenes' career, requiring the smokescreen of his accusations about irrelevance (see Cawkwell 1969:165, 1978:92-95).

Lipsius considered that a rule on relevance must have been introduced to *dikasteria* just before the *Athenaion Politeia* was composed in the last quarter of the fourth century B.C., as it was so poorly attested before then.[106] Some support for his view might be gained from Athenaeus' story about Hyperides' defence of Phryne; Athenaeus (xiii.590e) tells us that after the case a decree was passed μηδένα οἰκτίζεσθαι τῶν λεγόντων ὑπέρ τινος μηδὲ βλεπόμενον τὸν κατηγορούμενον ἢ τὴν κατηγορουμένην κρινέσθαι. As Phryne was tried before a panel of dikasts, such a decree can only have applied to *dikasteria.*

There are a number of problems with Athenaeus' story that preclude it from supporting Lipsius' argument. In the first place, we do not really know the date of the trial of Phryne.[107] It is safest to note that the trial could have happened any time during Hyperides' *floruit*, which was about 350 - 322 B.C. In the second place, there are major questions over the reliability of Athenaeus' sources.[108] Davies, citing the *Fragmenta Historicorum Graecorum*, attributes the passage about the decree to Hermippus the Callimachean, a second-century B.C. biographer, who is also presumed to be following an earlier tradition penned by Idomeneus of Lampsakos.[109] That work, however, actually only sources the first line of Athenaeus xiii.590e (about Euthias' hatred of Phryne) to Hermippus.[110] Athenaeus himself cites a range of sources on Phryne, including Hermippus, Idomeneus, Alcatas, Apollodorus, Herodicus, Callistratus, the comic poets Poseidippus, Timocles and Amphis, the speech against Phryne by Androtion and Hyperides' own speech. Even if we accept that Hermippus was the author, his reliability is itself open to doubt,[111] and indeed there are a range of inconsistent accounts of the trial that cast doubt on the version in Athenaeus.[112]

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[106] Lipsius (1905-15, III:918-9).

[107] Bartolini (1976:117-18) notes that dates of 350 and 340 B.C. have been proposed, but depend on the assumption that the trial must have been held before Anaximenes (who wrote the speech delivered by Hyperides' opponent Euthias) went to Macedon, which itself is based on the assumption that he must have gone there before Aristotle went in about 343/2 B.C. This is little more than a house of cards.

[108] Cooper (1995:304).

[109] Davies (2000:214); he cites FHG III, F. 66.

[110] Müller and Müller (1853, III:50).

[111] Hermippus' value as a biographer has won varied appraisal, though he may be typical of Alexandrian biographers - in which case little reliance can be placed on his version of events (see Fairweather 1974:238-39; Flower 1994:48-49, Fraser 1972, II:656).

[112] Cooper (1995:313-14) notes that there is a degree of variability in the story as presented in ancient rhetorical treatises, with Phryne sometimes rending her robe and striking her breast rather than being disrobed. He also notes that the earliest source of the story, Poseidippus *Ephesia* Fr. 13 [PCG] has Phryne grasping each juror by the hand, rather than revealing her bosom. He therefore suggests that Hermippus' version is an ancient fabrication, originally perhaps by Idomeneus in the third century B.C. (Cooper 1995:315). Davies (2000:214) made the further point that the decree as recorded by Athenaeus does not accord with the practice of Athenian courts. He notes that it would be impossible for people on trial to

That being said, Lipsius underestimates the degree of discussion of relevance in forensic oratory prior to the *Athenaion Politeia*, and consequently Rhodes is correct to insist that Lipsius' view need not be believed.[113] Table 4.1 shows that in fact the majority of references to relevance predate the last quarter of the fourth century B.C. Changes to Athenian legal practice are probably best sought in 322/1 B.C. after the Macedonian conquest, when the Athenian constitution was altered and a property qualification was instituted for jury service, and as a result Antipater is said to have "terminated the jury courts and the orators' debates."[114] The Athenian constitution changed eight times in the period down to 260 B.C.,[115] and little is known about the lawcourts in this period, but perhaps the consistent belief of later authors that appeals to pity were forbidden in Athens might have had its origin in the changes that took place after the end of the Classical period.

Summary

In summary, irrelevance was most commonly seen to lie in new claims or accusations that were not outlined in the written charges under which the case was brought. Speakers could also, however, refer to discussions of character, crimes or past services, slanders, abuse and lies as irrelevant, along with appeals to pity. In this regard forensic oratory bears some similarities with the picture to be derived from Aristotle and his successors, but the picture derived from Quintilian, Pollux and Lucian is seriously flawed and should be abandoned.

The Heliastic oath did not outline what kind of argument was irrelevant. It was up to the jury to decide this for themselves, and for speakers to convince them. As a result, what was irrelevant may have depended to a degree on the specific facts of a case. The contexts presented in Table 4.1 do show that appeals to character or services, discussions of unrelated crimes, slanders and abuse and appeals to pity could be

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defend themselves if they were not to be seen by jurors, and therefore concludes that the decree is an invention. His argument appears implausible however; Athenaeus is being coy in his use of the word βλεπόμενον, which here means not just "looked at" but "the parts usually covered being looked at." This meaning becomes clear from what Athenaeus goes on to say, when he notes that Phryne was better looking ἐν τοῖς μὴ βλεπομένοις - "in the parts that you could not otherwise see." Accordingly, Athenaeus is referring to a decree prohibiting uncovering the private parts, rather than a decree forbidding litigants to appear in court.

[113] Rhodes (1993:719).

[114] Suda s.v. Demades, ὃς κατέλυσε τὰ δικαστήρια καὶ τοὺς ῥητορικοὺς ἀγῶνας. See the discussion in Beloch (1904:77-80) and Ferguson (1911:22).

[115] Ferguson (1911:95).

regularly viewed as irrelevant. They also show, however, that a speaker would still be prepared to use such arguments if they suited his case.

Table 4.1 shows little real difference between *dikasteria* and homicide courts. Speakers would denounce irrelevant arguments in both courts, but would still make use of those arguments if they could get away with it. In the next chapter I will discuss the picture presented by forensic oratory as a whole, to see how common relevant and irrelevant arguments were, and what factors might be related to their occurrence.

Chapter Five Legal and Nonlegal Pleas

Using the information presented in Chapter Four, this chapter will define "legal" and "nonlegal' pleas and assess their importance in forensic oratory. It will consider whether nonlegal pleas were given priority over legal ones. It will then assess speakers' use of the Heliastic oath to make legal or nonlegal pleas and will go on to evaluate the evidence for concepts of equity and justice in Athenian legal procedure.

Definitions and Methodology

As noted in Chapter Four, forensic speakers identify as irrelevant discussion of public services or character, other crimes, lies about actions or character, slander, personal abuse, jokes and ridicule, threats and appeals for pity. The most common assertion is that the opponent is making irrelevant accusations. Many of these have also been identified as irrelevant by modern scholars.[1] Relevant pleas are those pleas that are to the point - that is, they discuss the charge and the allegations contained in the charge, and seek to prove or disprove them.

In general, I identify "irrelevant" as "nonlegal." Thus an appeal based on character or services will usually be an "irrelevant" plea and *nonlegal*. The definitions are not black and white and cannot be applied to every situation. At times speakers will be completely to the point, but if their pleas are based on general notions of justice opposed to statute law they will be "nonlegal." Similarly, legal discussions about other crimes or irrelevant accusations will be "nonlegal." As a result, when I use the terms "relevant" or "irrelevant" in this chapter I am referring narrowly to the topics speakers have identified, as outlined above and in Chapter Four. When I use "legal" or "nonlegal" I am interpreting relevant or irrelevant arguments in the context of the speech, and in particular whether pleas are clearly outside the issue.

As Chapter Seven will show, appeals for pity can be made as part of a legal plea, and are not automatically irrelevant. They are irrelevant when part of an appeal based on character or services. At times even discussion of liturgies will be relevant. For

[1] Dobson (1919:67), Bonner (1927:78), Adkins (1960:202-3, 1972:139), Hardcastle (1980:19-22), Ober (1989:141) and Todd (1993:90, 2000a:24), for example, mention discussion of one's services and character assassination. On abuse see Lipsius (1905-15, III:919); Leisi (1908:108); Dobson (1919:67-73, 232-33, 295-96); Bonner (1927:78-81); Bonner and Smith (1930-38, II:123); Voegelin (1943) and Carey (1994c:31-32). Bonner and Smith (1930-38, II:22-24), Dover (1974:198) and Wolff (1975:8) mention appeals for pity.

example, the speaker of Lysias xix.21-33 outlines a series of liturgies performed by his family to prove that they have spent all their money and are not holding any back from the state (xix.27). Similarly, as both Aeschines (iii.49-50) and Demosthenes (xviii.57-59) make clear, discussion of Demosthenes' public services during the *Crown* speeches is relevant, as it relates to the clause in Ctesiphon's decree that Demosthenes "always speaks and does what is best for the people."[2]

In defining abuse, I note that speakers may often call their opponents a variety of names, and I sometimes classify these as nonlegal. Not all abuse, however, is nonlegal. Athenian speeches frequently include random name-calling, which may accompany nonlegal arguments or may be included in legal arguments.[3] Labelling every single epithet as nonlegal may lead us to misunderstand the Athenians' tolerance for insults and to exaggerate the amount of nonlegal argument.[4] It is significant here that, of the six speakers who label abuse as irrelevant, five link abuse to slanders.[5] Slander itself is, as Carey points out, intended to cause hostility against an opponent, often by accusing them of immoral acts or crimes.[6] As irrelevant arguments they are closely linked to discussion of other crimes or lies about actions or character. Accordingly, where abuse is clearly part of a slander (for example, that Aristogeiton is a habitual criminal, as the speaker of Dinarchus ii.2 states) I classify it as nonlegal, but where a speaker calls his opponent a name simply for emphasis or effect as part of an otherwise legal argument, I do not record it.

An additional difficulty lies in classifying irrelevant accusations. In practice it is almost impossible to define exactly what accusations might have been irrelevant without having both speeches delivered in a case. When defendants identify such accusations they do so

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[2] Spengel (1987[1863]:35). When they discuss Demosthenes' *private* actions the speakers are being irrelevant, as these are not covered in the decree; as a result Table One classifies some of Demosthenes' discussion of his past career as irrelevant (xviii.10, 252-57, 268-69). The boundary between private and public interests in Athens could be blurred, as Humphreys (1993:31) points out, but in these two speeches we may draw it sufficiently. The distinction is drawn by both speakers themselves, and relates to activities rather than interests.

[3] For example, Demosthenes xxxv.5, 7, 8, 15, 30, 31, 32, 35, 39, 40, 41, 42, 46, 49, 52 (I classify sections 41, 42 and 52 in this speech as nonlegal); xxxvii.2, 3, 8, 13, 15, 31, 39, 42, 45, 47, 52 (I classify only parts of sections 48 and 54 as nonlegal); xxxix.2, 13, 17, 18, 19, 20, 34 (I classify the whole speech as nonlegal but relevant argument) and xli.20, 23, 24, 25, 29 (I classify the whole speech as legal argument). Examples of this sort of abuse include addressing an opponent with insulting vocatives.

[4] Wallace (1994:121-22) suggests that some abuse was tolerated in the interests of free speech, but outright slanders about sensitive issues such as cowardice or parental abuse were not.

[5] Demosthenes xviii.10-11, xxii.21, xxv.36, xxxvi.61, li.3, lvii.34.

[6] Carey (1994c:31-32). Carey identifies a number of types of slanders, some of which, however, could fall into the category of passing insults (such as accusations that an opponent is a sycophant).

to justify discussing them, and as the accusations were already raised by their opponent it is often best to classify the response as relevant. Accordingly, Aeschines' responses to Demosthenes on Cersobleptes and the Phocians (ii.81-96) and the Olynthian woman (ii.4, 153-58) are classified as relevant here, as Aeschines was responding to Demosthenes' irrelevant accusations. Demosthenes' slur about the Olynthian woman (xix.196-99) is however classified as irrelevant.[7]

Prosecutors may also identify issues as relevant or irrelevant to justify discussing them. For example, Diodorus states (Demosthenes xxii.21-24) that Androtion will argue that, by claiming he was a prostitute, the prosecution are abusing and slandering him. Diodorus attempts to justify his allegation, but in this case I classify the plea as irrelevant. The charge was one of making an illegal proposal, not one of being forbidden from making any proposals at all, and the accusation of prostitution therefore seems to me to be irrelevant.

In general, a degree of interpretation is necessary. Where I consider an accusation is clearly outside the charge (insofar as it can be reconstructed) I classify it as irrelevant. The clearest examples are accusations about cutting sacred olives or breaking grain laws that are raised during cases that have nothing whatsoever to do with these offences (Demosthenes xxxiv.37, xxxv.51, xliii.71). Even here some interpretation is necessary; when Ariston claims that Conon is also guilty of *hybris* and cloak-stealing (Demosthenes liv.24), these claims are relevant because they relate to the actual charge of assault, rather than crimes committed on some other occasion.

I do not always agree with previous scholars' attributions of some topics as "nonlegal." For example, some claim that arguments about the intention of the lawgiver were nonlegal and designed to undermine the authority of law.[8] There is some support for this view from Aristotle (*Rhet.* 1374b1-18), who notes in his discussion of ἐπιείκεια that one could appeal to the lawgiver rather than to the law, and to the intention of the lawgiver rather than the language of the law. This does not mean, however, that all discussions about the intention of the legislator are equity arguments. Aristotle was not making a general statement but was offering options for speakers to use when the law was against

[7] The slur was no idle piece of slander that could be ignored; Aeschines (ii.4) claimed that the story had especially outraged him and that if he failed to prove the accusation false, then even if he were clearly not guilty of all the other charges he would deserve death. Given the degree of prejudice that the story could have aroused, it was clearly relevant for Aeschines to attempt to refute it.

[8] Hillgruber (1988:107-20); Thomas (1994:124); Scafuro (1997:53).

them and they wished to invoke equity. It is therefore significant that when we do find speakers discussing the intentions of the legislator they do not admit that the law is against them, but instead seek to prove that their actions fit the law as they define it (e.g. Demosthenes xxii.11, xxxvi.27, lviii.11; Hyperides iii.21; Isaeus ii.13; Lysias iii.43-43, x.7; see also *Rhet. ad Alex.* 1422b1-25). Accordingly, it is misleading to call such arguments nonlegal, since arguments about the intention of the lawgiver are always grounded in the assumption that it is the authority of the law that counts. They are not assaults on the authority of the law, but rhetorical attempts to use that authority to make it appear that the laws fit one's case.[9] Even if a speaker offers a quite specious interpretation of a law, he is still making a legal argument. In modern common law systems barristers may offer an interpretation of law that a judge will determine is incorrect or unsound; such interpretations are considered relevant argument in a modern court. It would be strange indeed to insist that only correct legal interpretations could be classified as legal arguments in forensic oratory.[10]

Similarly, I do not agree with some scholars' claims that speakers' interpretations of law, or adaptations of particular circumstances to fit laws, were nonlegal equity arguments.[11] An attempt to fit circumstances to law, or to interpret law to fit circumstances, is, as Meinecke recognised, a legal argument, even if it is specious, since it relies on the authority of law for its persuasive force.[12] Certainly the speaker of Hyperides iii appears to be twisting the meaning of laws to arrive at what would, effectively, be an illegal decision; but illegal and nonlegal are two different things, and, as pointed out in Chapter Two, the speaker frames his arguments within the context of existing laws to make a legal claim, rather than a nonlegal claim that relies upon equity replacing law.

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[9] See Johnstone (1999:26, 33 and 145, n.23).

[10] This does not mean that I classify all discussions of the intentions of lawgivers as legal argument. The classification depends on the context of the discussion within any speech. Lycurgus' claim, for example, that there was no penalty for Leocrates' crime because lawgivers had not expected such a thing to happen (i.9) is classified as legal argument. Lycurgus used the *eisangelia* procedure to prosecute Leocrates, and in this case the law was general enough to permit the charge, even though strictly speaking there was no law against the crime. As Lycurgus was able to make his case under the law, however, his charge must be classified as legal and the discussion at i.9 is also legal. By contrast, the similar claim at Lysias xxxi.27 is classified as nonlegal, even though it deals with exactly the same charge (deserting the city in a time of crisis). This time the procedure was a *dokimasia*, and, as argued in Chapter Four, it is not clear that speakers could make general accusations about past crimes during a *dokimasia*. As a result, I have erred on the side of caution and classified Lysias xxxi.27 as nonlegal argument.

[11] Scafuro (1997:53-56); Christ (1998:195-96, 208-11); Allen (2000:168-83).

[12] Meinecke (1971:280).

In claiming that interpretations of laws were nonlegal, modern scholars frequently claim that jurors would interpret laws in accordance with social norms and rely upon these, even if they contradicted laws.[13] They present very little evidence for this position. Christ, for example, bases his claim on the fact that litigants speak of a law as just, or occasionally cite common ethical standards or laws from other states.[14] Allen contends that only four speeches strongly assert the case for a "rule of law" (Aeschines i; Demosthenes xxiv, xxv, xxvi) and argues that the four speeches are "anomalous."[15] Yet she does not prove that Athenian orators appealed more frequently for a verdict based on justice than for a verdict based on the laws. Instead, we are given the somewhat breathtaking conclusion that only Antiphon urged jurors to vote according to laws, while others told jurors to decide "simply, the just things (*ta dikaia*)."[16] The comment is supported by a footnote to seven speeches, which is hardly an exhaustive list.

The upshot of this is that interpretations of laws or specious legal claims should not be derided, in a Eurocentric manner, as irrelevant. Where they are intended to support the speaker's case for or against the charge they are relevant.

The topics that have been identified as nonlegal or irrelevant often tell us more about modern preconceptions than about ancient legal procedure. I have concentrated on some of the major ones here. Others could be mentioned, for example Scafuro's claim that probability arguments may be based on "the representation of character and...a common consensus of what is fair and just in human conduct" rather than discussion of "the technicalities of law."[17] This is a very restrictive interpretation of legal argument that would exclude most of the discussion in a modern common law court, not just an ancient Athenian one. Scafuro's claim is based, in part, on her reading of Lysias iii. She claims that all the speaker of that oration needed to do was to prove that he did not intentionally wound Simon. She notes that he did not do this because he lacked bystander witnesses, and further notes that the use of such witnesses would be a precarious prop in an Athenian court anyway since such witnesses were not considered as respectable as family members. As a result, she claims that the speaker had to rely on probability arguments which were designed more to blacken Simon's character and

[13] See, for example, Scafuro (1997:53); Christ (1998:41, 195); Allen (2000:175-83).
[14] Christ (1998:195).
[15] Allen (2000:182).
[16] Allen (2000:175).
[17] Scafuro (1997:56-57).

appeal to jurors' senses of what is fair and just than to prove that he did not wound Simon.[18] The speaker of Lysias iii did indeed rely on probability arguments and constructed an elaborate story designed to blacken Simon's character; but rather than proving Scafuro's theory, this may simply prove that the speaker actually had a bad case and may in fact have started the fight. He did not have any witnesses who could say that he did not start the fight. Despite this, his arguments still concentrated on the main issues of the case, and consequently very little of Lysias iii is classified as nonlegal in Table 5.1.

In classifying arguments I have used the standard section numbers of speeches as the basis for classification. This is not a perfect system. Sections are of different lengths, though the unevenness would probably cancel itself out over the total corpus. More seriously, the use of sections might exaggerate the actual amount of nonlegal pleading. Some speeches may contain only a few insults that are classified as nonlegal, but if the few nonlegal lines occur in several sections the result could be that as much as 18.75 per cent of the sections are classified as containing nonlegal arguments (Lysias xxiii, reflecting insults in xxiii.4, 11 and 14). This is clearly a different order of pleading from a speech that may contain a continuous nonlegal argument running over several sections. The flaw is not fatal, however, as it affects all speeches and we can correct it by remembering that a figure such as 18.75 per cent does not automatically mean that this entire proportion of a speech is nonlegal, but only that this proportion of the speech contains some nonlegal pleas.

A single section within a speech can contain both relevant and irrelevant arguments. A section that is generally relevant may contain a one-line slander that has to be noted as irrelevant. For example, the proem of Dinarchus ii outlines the legal case, but contains a number of accusations against Aristogeiton, including the claim that he is the worst character in the *polis*, or even amongst all men (ii.1), that he has committed many crimes (ii.2, 3), and that he is wicked and depraved (ii.4). On other occasions, an argument will end in a section and the speaker will then commence another line of argument. For example, Demosthenes (xxiv.187) contains the end of a long slander against Androtion and the start of a legal discussion about his opponent's arguments.

The consequence of using section numbers is that on occasions when a section contains

[18] Scafuro (1997:60).

both relevant and irrelevant arguments it is double-counted. This needs to be taken into account when calculating overall proportions; at times the relative proportions of relevant and irrelevant arguments in a speech will sum to more than 100 per cent, as some sections are double-counted. This might have been avoided if I based my calculations on lines, for example, or the number of words, but these methods are also subject to problems that make them even less useful than calculations based on sections. Different texts print different line lengths and it would be difficult to deal with cases where only part of a line was classified; in addition, minor particles could swamp word counts. Consequently, I have stayed with section numbers as permitting a broad understanding of the proportions of relevant and irrelevant arguments.

Some speeches contain bogus sections, or some sections have been cut out by modern editors leaving the total section numbers unchanged. I have adjusted my totals to make sure that my figures reflect the actual sections counted.

Although speakers generally claim some topics are irrelevant, as I argued in Chapter Four there was no law against irrelevance in Athens (at least outside homicide courts). As a result, speakers could argue that discussion of liturgies was irrelevant, but on other occasions claim it was relevant (Lysias xvi.9). It is artificial to define certain topics as irrelevant when they were not legally or universally recognised as such. Two factors excuse such attempts. In the first place, topics such as services, character, slander, abuse, other crimes and appeals for pity are regularly linked to irrelevance in forensic oratory, by different speakers at different times and in different types of procedure. The use of such topics is also condemned by ancient philosophers such as Plato and Xenophon (see Chapter Two). This surely indicates that it is correct to discern a general view that discussion of such topics in Athenian courts was irrelevant.[19] In the second place, topics such as services, character, slander, abuse, other crimes and appeals for pity are regularly identified as irrelevant by modern scholars (above). For the purposes of testing modern theories on irrelevance, it does not matter if the definitions are Eurocentric, as the theories are Eurocentric. Obviously, if we want to understand Athenian litigation *wie es eigentlich gewesen* we must recognise our Eurocentricism and correct it where possible; but if we want to test modern theories then it is surely

[19] It is notable that, when they want to use such topics, speakers often excuse themselves by claiming they are actually speaking to the issue (Aeschines iii.76, 176, 190; Demosthenes lvii.59, 60, 63, 66) or cut short the discussion on the basis that it is irrelevant (Lysias iii.46).

acceptable to classify the occurrences of irrelevant discussions based on justice or "civic merit" because these are central to those theories.

While modern scholars have had a fair bit to say about irrelevance, they have been far less loquacious about what constitutes relevant argument. By and large, they restrict their comments to comparisons between modern western procedure and Athenian courts – noting, for example, the lack of a judge to direct the jurors, or the fact that jurors did not deliberate amongst themselves before voting, or that there was no ability to cross-examine witnesses.[20] At times they have claimed that some topics are irrelevant, often with mixed success,[21] but no scholar has actually set out the key components of relevant argument. The most detailed discussions have concentrated on proving that speakers would use narrative to make their cases.[22] Johnstone, for example, notes that "judicial narratives" had to contain certain elements to qualify as a legal case - they had to describe a violation of laws, recount the differences between the two parties and be presented by legally competent people.[23] Johnstone further noted that law served as a central factor in speeches; it provided a template which determined what issues to discuss and how to discuss them.[24] At a basic level, Johnstone's point is certainly one

[20] For example, Bonner (1927:74-75); Ruschenbusch (1957:259); Adkins (1972:120-21); Paoli (1933:68); Allen (1980:24); Heitsch (1984:6-7); Cohen (1995a:105); Scafuro (1997:53); Todd (2000a:28).

[21] See Chapter Six, where I outline some of the claims made by Humphreys (1985) and argue that her conclusions are flawed. Another example would be Usher's (1999:180) claim that "the amount of digressive material [in Demosthenes xxix] seems excessive," a claim based on the lengthy discussion of the original lawsuit out of which this suit for false witness arose. I would suggest that, in practice, speakers when engaged in subsequent proceedings often had to discuss the original lawsuit at length to prove that their overall case had been based on sound evidence. Their opponents might choose to impugn a trivial witness for some minor flaw in their testimony (as Apollodorus did, for example, in Demosthenes xlv). If such a ploy had been successful, it might have cast some doubt on the original verdict, and to avoid being sunk by minor issues speakers would have chosen to remind the jurors that their original legal case had been based on quite strong evidence (as does Demosthenes xxix.33-39).

[22] Johnstone (1999:47); Gagarin (2003:199).

[23] Johnstone (1999:49-54).

[24] Johnstone (1999:62-66); a similar claim was made by Thomas (1994:127) and Scafuro (1997:54-56). Hardcastle (1980:12), discussing inheritance disputes, asserted that legal arguments included "those arguments which relate directly to the laws concerned with the important aspects of inheritance: the order of succession, wills, adoptions and marriage." Nonlegal arguments, by contrast, were those "not directly related to the laws or legal aspects of succession, wills, adoption or marriage." This definition seems unduly restrictive. It would effectively eliminate discussion of witnesses or narrative, unless those were specifically linked to a law. Many of the passages that Hardcastle highlights as 'nonlegal' are therefore classified as *legal* in this thesis. For example, the speaker's claims in Isaeus ii that his opponent wishes to deprive Menecles of a son is relevant (*contra* Hardcastle 1980:14-15) as the speaker needs to prove that his adoption was valid and based on mutual affection. The speaker's claim in Isaeus viii.21-27 that he spent money on burying Ciron is relevant (*contra* Hardcastle 1980:15-16) as the speaker is attempting to prove he had a more valid claim to the estate than his opponent Diocles, in part by proving that he paid money for the funeral expenses (which only the closest relative and heir would be expected to do). The speaker's claim to the estate seems rather poor, and Isaeus viii is something of a masterpiece in making a silk purse out of a sow's ear; that does not mean, however, that claims that are integral to proving the speaker's relationship should be so unjustifiably dismissed as irrelevant.

worth following in this thesis, insofar as any discussion that is clearly about the meaning of laws or that mentions words such as νόμος, ἔννομος or νόμιμος must generally be classified as legal (though, as noted above, sometimes discussion of laws takes place in relation to irrelevant accusations about other crimes that are not part of the charge). As an organising principle for the discussion of relevance, however, it is of limited use as there is actually only a small amount of direct discussion of laws in speeches (Table 5.1), and we need to make sense of the larger amounts of narrative, proof, argument and analogy.

Rhetorical handbooks are of some use here. Aristotle (*Rhet.* 1414a - 1414b) argued that a speech had two parts, the statement and the proof, and that it could also include an introduction and a peroration, and that during the proof section a speaker should outline his own arguments and refute his opponent's. He referred to another handbook by Theodorus which made further divisions of the narrative and refutations (*Rhet.* 1414b). Plato (*Phaedr.* 266d-e, 267d) also referred to Theodorus' handbook, and mentioned the introduction, narrative and testimony, proofs, probabilities, confirmations and refutations and the conclusion among the divisions of a speech. Furthermore, the *Rhetorica ad Alexandrum* (1422b28-1444b35) outlined the various parts of a forensic speech including an introduction, narrative, proof (confirmed by evidence, maxims, probabilities and general considerations and concentrating on facts or law as the case required), discussion of the opponent's arguments and a peroration which could include an appeal to the emotions. These handbooks identify the basic issues that may be discussed in a forensic speech, and that therefore may be defined as constituting legal argument.[25]

Modern textbooks on advocacy are also useful. It is justifiable to use them as heuristic analogies because, when modern scholars make claims about nonlegal pleas in Athenian courts, in the absence of any definition of "legal" they fall back on an implicit analogy with modern practice. The analogy from textbooks is therefore acceptable for testing modern theories that juries based their decisions on nonlegal factors. Accordingly, I have consulted some textbooks, in particular Munkman's *The Technique of Advocacy*, which is viewed as a standard work in the British common law system and has been widely cited and reprinted since its original publication in 1951.

[25] These basic divisions of a speech were also accepted as "normal" during the late Republic at Rome (Cicero *De Partitione Oratoria* ii.27-52).

The procedures in modern western courts are markedly different from those in Classical Athenian ones. Speeches in modern courts are generally restricted to brief opening and closing statements, and much time is taken up in questioning witnesses and presenting evidence. Athenian speeches had to encompass all of these roles. That being said, opening and closing speeches in modern western courts cover a range of issues that we can describe as 'legal' argument. Munkman pointed out that a speech has two essential parts – the statement and the proof. The statement outlines the factual basis of the case and what is to be proved, and the proof sets out the arguments in support of the speaker's position and against those advanced by the opponent.[26] Munkman noted that in addition to this speeches could contain an introduction and a peroration. He noted that narrative was an essential part of a speech, as it allowed the speaker to outline the factual background and make arguments about the facts.[27] Finally, he observed that emotional appeals could be included, though he does not appear to have been talking about such overt appeals as we find in Athenian forensic oratory.[28]

It is obvious that Munkman's discussion owes a great deal to Aristotle, though it is nonetheless seen to be a valid description of modern court speeches. With such agreement between ancient and modern handbooks it is reasonable to conclude that discussion devoted to the statement, proof and narrative is "legal" argument in an Athenian speech. This definition of legal argument is also consistent with the interpretation developed in Chapter Four of relevance or "speaking to the issue." If relevance was defined as speaking about the charge and the accusations outlined in the charge, this is of course much the same thing as Aristotle's (and Munkman's) advice that orators should speak about the statement and the proof. Accordingly, the basic rule of thumb adopted here is that any argument in a speech, so long as it can clearly be linked to the charge and the points under discussion, and is not overtly irrelevant such as a discussion of public services, should be defined as legal.

When speakers claim that their opponents have relied (or will rely) on their character and services, as Adkins noted they generally are not content with noting that such claims are unjust, but go on to depreciate their opponents' services and character.[29] I have been unsure how to classify such sections when they occur. If a speaker is seeking to overturn

[26] Munkman (1951:145-46). See also Boon (1993:79-83); Hamlin (1985:106).
[27] Munkman (1951:148); see also Boon (1993:74).
[28] Munkman (1951:149-50); see also Boon (1993:1-2), Crawford (1989:179-84).
[29] Adkins (1960:205-6).

an opponent's attempt to use irrelevant argument, then his attempt should be counted as relevant. If he then in turn attacks his opponent's character and services his plea should be recognised as irrelevant. I have listed these occurrences separately, but lean towards concluding that all such sections should be classified as irrelevant, and therefore will present figures for nonlegal argument that both exclude them and include them.[30]

There is one final methodological issue to be discussed. Historical examples occur in forensic oratory, and at first glance they might appear to be irrelevant. However, when such arguments are presented the speaker generally uses them to highlight a particular moral aspect or virtue that he claims is at variance with his opponent's conduct, or at risk if the jury does not vote for him.[31] Lycurgus (i.93-110), for example, uses the courage shown by the Athenians of old to highlight his claim that Leocrates' desertion was unjust, while Aeschines (iii.178-88) uses the example of noble ancestors who did not receive crowns to support his argument that Demosthenes' inferior deeds did not deserve crowning. Such arguments are used to support the speakers' main points and are therefore relevant.

Table 5.1 presents the overall classification of legal and nonlegal arguments. Some 19 of the speeches are incomplete or fragmentary, and while they are included in some analyses I exclude them from the study of proportions of legal and nonlegal arguments within each speech as any results would be skewed to reflect the state of preservation of the speech rather than the original proportions.

The figures as printed in the table require some explanation. The first column contains the speech number and author, and the second the total number of sections in the speech. For the five columns following, the figure in the bottom line of each entry is presented in brackets. This represents the total number of sections accorded to that entry. Above the figure in brackets will be further figures; these represent the actual section numbers in the speech. Thus Isocrates xvii, for example, has 58 sections in total. I classified 55 as legal argument (sections 1-32 and 35-57) and 4 as nonlegal argument (sections 33-34 and 57-58). Section 57 is double-counted and therefore the entry (total 1) appears under the appropriate entry.

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[30] Where speakers anticipate an opponent's argument but concentrate on refuting that argument, rather than depreciating their opponent, I classify their plea as legal. An example is Dinarchus i.48-53, where the speaker rebuts a claim Demosthenes is likely to raise but concentrates on the issue.

[31] See Loraux (1986:132-71), who concluded that historical examples were used to make particular points that served to reinforce an idealized view of Athens.

Relative proportions in forensic oratory

There are in total 6554 sections in the 104 speeches (plus 4 fragments from Hyperides i). Of these, Table 5.1 shows that 5422 sections constitute legal argument and 1132 nonlegal argument. Some 153 sections are double-counted and 153 sections are in the class discussed above where I did not allocate them as I am unsure if they should be classified as legal or nonlegal. In relative terms, 82.7 per cent of the sections are legal argument and 17.3 per cent are nonlegal argument. If we add the unallocated category to the nonlegal category 1285 sections (or 19.6 per cent) are nonlegal.[32]

When the 19 fragmentary speeches are excluded, the total number of sections is 5974, of which 4995 (or 83.6 per cent) are legal argument and 992 nonlegal argument (or 16.6 per cent). Some 140 sections are double-counted and 127 fall into the unallocated category. If we add the unallocated category to the nonlegal category 1119 sections (or 18.7 per cent) are nonlegal.

Legal pleading appears in 101 of our 104 speeches, whereas nonlegal arguments occur in 77 speeches (80 if we include speeches where sections were not allocated). This indicates that in the overwhelming majority of cases it was seen to be necessary to make relevant arguments about the facts and prove one's case, whereas it was less significant to have nonlegal pleas. The fact that nonlegal pleas occur in 80 speeches, however, indicates that they cannot be dismissed as occasional aberrations.

What constituted legal argument varied according to the matter at hand. In 67 speeches speakers devoted some discussion to the terms and meaning of particular laws or decrees, though generally such discussion comprised only a small proportion of any speech. Only 583 sections in total comprise such discussion (plus one fragment from Hyperides i and 19 further sections that are actually from nonlegal arguments), a mere 8.9 per cent of the total sections.[33] Such discussion occurred regularly in speeches where one might expect a larger proportion of "legalistic" discussion, such as *graphai paranomon* or *graphai nomon me epitedeion thenai* (e.g. Aeschines iii; Demosthenes xxiii, xxiv), though "legalistic" discussion occurred where the circumstances warranted it. For example, Andocides (i.71-9, 83-91, 110, 115-16) discussed decrees and laws to

[32] Isaeus v.45 is 'double-counted' as both nonlegal argument and not allocated, and therefore I have only counted it once in arriving at this total.

[33] If we remove incomplete speeches, the figures are 523 sections in total with discussion of laws or decrees (plus 13 in nonlegal arguments), or 8.8 per cent.

prove that he was covered by the Amnesty, while Aeschines (i.1, 3, 9-11, 13-20, 22-25, 27-34, 73, 119, 138-40, 160) and Apollodorus (Demosthenes xlvi.6-10, 12-27) discussed a range of laws about crimes that were generically related.

The data support Johnstone's claim that legal issues were central concerns in the trial. Overall 85 speeches contain claims that the speaker has legal right on his side.[34] Other speeches may have left out overt claims of legal rights because they were self-evident, in particular if the points at issue centred on particular facts, and the interpretation of laws was agreed. In this regard, the claim that a plea is supported by proofs such as witnesses or τεκμήρια may be another form of claim that a speaker has legal right on his side.[35] Speakers may also highlight the importance of laws to maintaining order and the democratic system[36] These figures back up the information derived from the overall proportion of legal argument in speeches, and indicate that in a substantial majority of cases speakers felt they needed to make a legal claim about their case.

Nonlegal pleas fall into three groups - attacks on the opponent (including abuse, slanders, lies about past actions, discussions of past crimes or ridicule); discussion of a speaker's own character, family and services; and appeals against law based on the justice of one's cause. The last category is very rare and is barely found, though there

[34] Aeschines i.1-2, 8, 20, 37, 46, 73, 106, ii.38-39, 45-46, 62, 123, iii.14-16, 19-23, 28-31, 32-34, 48, 176, 211, 230; Andocides i.10, 29, 71-72, 89, 91; Antiphon i.24, v.8-19, vi.7-10, 50; Demosthenes xviii.56-59, 83-85, 93, 110-25, 223, xix.9, 82, 131-33, 278, xx.8, 11, 24-25, 35, 37, 50, 53, 63, 87, 88-92, 94, 96, 97, 98, 99-101, 138, 139, 155, 157, 160, 163, xxi.5-6, 19-20, 31, 42, 51, 227, xxii.1-2, 7, 11, 17, 20, xxiii.22-94, 220, xxiv.1-2, 22-109, xxv.17, 22, xxvi.1, xxvii.38, 46, 47-48, 53, 58, 65, xxviii.9-10, xxix.22, 27, 39, 55-57, xxx.18, 30, xxxii.1-2, 24, xxxiii.1-3, 27, 33, 35, xxxiv.3-5, 33, 42, xxxv.4, 45, xxxvi.3, 23-25, 26-27, xxxvii.1-3, 18-21, 33-34, 35-38, 39, xxxviii.1, 3, 4-6, 9, 17-18, 27, xxxix.41, xl.19-20, 39, xli.7, 10, xlii.1-2, 4, 14-15, 17-19, 23, 26, 27, 28, 30, xliii.15-17, 27, 41, 50-52, 53-56, 57-61, 62-65, xliv.2-3, 5-6, 7-8, 15-16, 46-51, 60, 63-64, 65-68, xlv.22, 42, 87-88, xlvi.6-8, 9-10, 12-15, 18-19, 19-21, 22-23, 24-25, 26-27, xlvii.3, 7, 8, 18, 22, 25, 29-30, 33-34, 40, 48, xlviii.56-57, l.7, 43, 58, 65, li.1, 4, 6, 12, lii.30, 32, liii.3, 26-28, liv.13, 16, 17-20, 24-25, lv.26, 33, lvi.2, 34-35, 43, lvii.3, 5, 30, 31-32, 54, 69, lviii.5, 6-7, 10-13, 14-17, 19-21, 22, 47, 49-50, 50-52, 55, lix.16-17, 52-53; Dinarchus i.1, 4, 6, 7-9, 106, ii.1, 20, iii.1, 16, 22; Hyperides i. Fr. iv, 22, ii.4-7, iii.13, 18, 20, 22, iv.4-10, v.1-2, 6-7, 24; Isaeus i.35, 39-40, ii.13-16, 45, 47, iii.10-11, 39, 42-43, 63-64, 68-70, iv.15-16, 21-22, 31, vi.3-4, 8-9, 25-26, 42, 44, 47-50, 63-64, vii.1-4, 17, 18-23, viii.1, 30-31, 32, 34, 46, ix.1, 35, x.2-3, 15, 22, xi.1-4, 6, 22-23, 28-31, 34; Isocrates xvi.2, xviii.19, 26, 34, xx.1-2, 8; Lycurgus i.5, 27, 34; Lysias i.26, 27-28, 29-36, 48-50, iii.17, 37, vi.8, 12, 51-53, ix.8-12, 18, 19, x.3, 13-14, 32, xii.82, xiii.95, xiv.3, 4-6, 8, 47, xv.6, 9, 11, xxii.5, 6, 7, 10, 17-18, xxvi.5, 9, xxviii.1, xxx.5, 17-21, 35, xxxi.2-3, 27-28, xxxii.3, 23-24.

[35] Aeschines ii.44; Andocides i.25; Antiphon vi.47-48; Demosthenes xix.120, xxvii.47, xxviii.23, xxix.15, xxx.25, 27, 31, xxxiii.4, xxxv.27, xxxvi.21-22, xxxvii.17-18, xl.19, 54, xlv.23, xlix.69, l.29, liv.10, lv.12, lvii.24, 62, 67-70, lix.49; Isaeus viii.28-29, x.15; Isocrates xvii.53, xviii.16; Lysias vii.30, 42, xiv.53, and see the detailed list in chapter six of speakers who claimed their speeches were supported by witnesses.

[36] Aeschines i.176-79, iii.6-7; Antiphon v.14; Demosthenes xxi.30, 34-35, 188, 223-25, xxii.51, xxiv.5, 91-95, 210-11, 212-14, 216-17, xxv.15, 17, 20-27, xxvi.1-8, 23-27, xxx.8, lix.115; Dinarchus i.84-88, iii.16, 21; Hyperides i.12; Isaeus iii.54; Lycurgus i.2, 3-5; Lysias i.29, 35-36, 48-49, xiv.40, xxxii.23.

are a number of 'marginal' cases that will be discussed later.[37] Speakers do discuss their own character, family and services regularly, though this is not as common as one might expect from the attention it has received in modern scholarship. Such pleas are made in 278 sections in 44 speeches, or 4 per cent of all sections and 42 per cent of all speeches.[38] These contrast with the relatively common attacks on the opponent, which are found in 962 sections in 64 speeches, or about 15 per cent of all sections and 62 per cent of speeches.[39] There is overlap between the two categories, with 30 speeches containing both discussions of liturgies and attacks on the opponent.[40]

Pleas based on character and services are usually found with attacks on opponents in the same speech, except for 12 speeches (Demosthenes lii; Hyperides i, iv; Isaeus ii, vii, xi; Lysias iv, vii, xvi, xx, xxiv, xxv). The earliest examples we have of both categories come from *On the Mysteries*. Andocides (i.92-99) included claims that his opponents were guilty of various crimes such as owing debts to the state and holding office under

[37] I classify only Demosthenes xxxix.1-41 as an appeal for justice; other speeches discussed below verge on appeals for justice, but were brought under procedures that allowed some flexibility and therefore are classified as legal pleas.

[38] Aeschines ii.78, 146-52; Andocides i.141-50; Antiphon v.77; Demosthenes xviii.10, 252-57, 268-69, xix.169-73, 229-30, xxi.155-57, 189, xxviii.22, 24, xxxvi.57, 58-9, xxxvii.54, xxxviii.26, 28, xlv.77-78, 85, xlvii.54, xlix.46, l.58-62, 63-64, lii.26, 29, liv.44, lviii.66-68; Hyperides i.14-18, iv.23, 28-30, v.28-29, 30; Isaeus ii.35-37, 42, iv.27-28, v.41-42, 45-47, vi.59-61, vii.34-42, x.25, xi.50; Isocrates xvi.5-41, 45-50, xvii.57-58, xviii.16, 58-68; Lysias iii.47-48, iv.19-20, v.2-3, vii.30-33, 41, x.24, 26-29, 31, xii.20, 99, xvi.1-3, 9-21, xviii.1-12, 21-27, xix.9-10, 14-17, 55-64, xx.2, 4, 5-6, 11-15, 22-26, 28-36, xxi.1-19, 21-25, xxiv.24-25, xxv.12-13, 17, xxvi.21-22. Johnstone (1999:94, 166 n.4) identified 28 speeches in which speakers cited their liturgies. My data include all of his references with the exception of Demosthenes xxiii.5. The speaker there mentions that he was performing a trierarchy, but this is not part of a nonlegal argument, but part of the general narrative of events. I would likewise not classify Demosthenes xlvii.23 as a nonlegal argument. The speaker there also mentions his trierarchy as part of a general narrative, rather than as part of a nonlegal plea.

[39] Aeschines i.26, 39, 43, 58-64, 107-16, 170-73, 189, ii.3, 22-23, 34-35, 40-43, 54, 55, 62, 79, 88, 93, 99, 108-12, 113, 121, 153, 165, 166, 167-70, 179-82, iii.51-53, 76-78, 171-76, 207, 209-10, 213-14, 230-31, 241-53; Andocides i.92-102, 124-31; Demosthenes xviii.32-42, 126-59, 258-66, xix.192-201, 206-14, 237-38, 241-62, 281-82, 287, 314, 331, 337-40, xx.13-14, 143-44, 147-53, xxi.19-23, 83-125, 128-54, 158-68, 171-74, 184-85, 197-212, xxii.21-24, 47-78, xxiv.123-30, 158-87, 197-203, xxv.35, 38-68, 74, 76-80, xxvi.16-18, xxix.41, xxxiv.37-40, xxxv.1-2, 41-42, 44, 50-54, xxxvi.36-42, 43-56, xxxvii.48, xxxviii.24-25, xl.32-35, 57, xlii.21-25, xliii.68-72, xliv.31-40, xlv.53-56, 63-76, 79-84, xlvii.49-82, xlviii.52-57, xlix.9, 14, 65, 66, l.68, liv.16-17, 36-37, 39-40, lvi.7-8, 10, lvii.58-66, lviii.27-35, 69-70, lix.27-28, 33-34, 36, 41-43, 45-48, 64-71, 85-87, 107-9; Dinarchus i.15, 17, 18-36, 46, 78-82, 91-98, 99-102, ii.1, 2, 3, 4, 8-13, 14, 15, 18-19, 20, iii.1, 6-10, 15-16; Hyperides ii.9, 10, iii.3, 29-36, v.17-18, 20-21; Isaeus iii.37, 40, iv.28-30, v.10-11, 26-27, 35-40, 43-45, vi.38-42, 47-50, 55, viii.40-42, 44, 46; Isocrates xvi.42-44, xvii.33-34, xviii.47-57; Lycurgus i.25-27; Lysias iii.44-46, v.4-5, vi.6-7, 11-12, 26-34, 46-49, x.9, xii.38-78, xiii.18, 62-69, 70-82, xiv.1-2, 10, 23-31, 35-42, 43-47, xviii.13-14, 20, xix.2, 19, xxi.20-21, xxii.14-16, xxiii.4, 11, 14, xxvi.4-5, 8, 13, 14, 23-24, xxvii.9-12, xxviii.12-17, xxx.2, 6, 9-14, 26-35, xxxi.1-34.

[40] I should note here that, in adding up the totals, four sections were double counted as the speakers changed from attacks on their opponents' character or services to discussions of their own (Demosthenes xlvii.54; Isaeus iv.28, v.45; Lysias xxi.21). To make the figures sum to 1285 sections with nonlegal arguments we need to correct the total for attacks on the opponent to 966 and add the 41 sections from Demosthenes xxxix which comprise an appeal based on justice.

the Thirty. After discussing the dispute between himself and Callias which he claimed had caused Callias to prosecute him, he went on to accuse Callias of a range of impious acts, including seducing his wife's mother and disowning his child. At the end of his speech he described his ancestors' public services and then went on to outline his own good character and noted (i.145) that he had ties to foreign kings, cities and private individuals that could be of use to the polis.

Similar attacks against opponents occur in some of the latest speeches we possess, such as Dinarchus' speech composed for the prosecution of Demosthenes, which outlines a range of accusations against Demosthenes for various crimes including accepting bribes to stand by while the Thebans were destroyed (i.18-22), defending Philocrates (i.28) and killing Nicodemus and betraying Aristarchus (i.30). The attack is sustained in several parts of the speech and culminates in the claim that the Athenians have had too much experience of Demosthenes to believe that someone who had reduced the city from prosperity to disgrace could now serve her well (i.93).

Demosthenes delivered a long diatribe against Meidias, noting (xxi.20-21) that Meidias had wronged many other people and asking the jurors to deliver one penalty for all the crimes, whatever they considered just. Later on Demosthenes (xxi.130) had read out as evidence a *hypomnema* of Meidias' crimes. In another speech by Demosthenes (xxv.38-68), we are treated to a prolonged attack on Aristogeiton's character and services, detailing his various crimes with memorable similes like the description of him going through the agora like a snake or a scorpion with sting erect, darting here and there, looking for someone whom he can harass with misfortune or slander or some sort of evil, and terrify in order to extract money from him (xxv.52).[41]

While attacks against opponents can be quite extensive, speakers' discussions of their own character, family and services are generally not as lengthy. Of the 44 speeches which contain such discussions, only nine have ten or more sections devoted to it (Andocides i.141-50; Demosthenes xxi.151-59, 189; Isocrates xvi.5-41, xviii.16, 58-68, Lysias xvi.1-3, 9-21, xviii.1-12, 21-27, xix.9-10, 14-17, 55-64, xx.2, 4, 5-6, 22-26, 28-36, xxi.1-19, 21-25). The longest of these is Isocrates xvi, a defence by the younger Alcibiades of his father's character and actions. That speech, however, is incomplete, so

[41] ἀλλὰ πορεύεται διὰ τῆς ἀγορᾶς, ὥσπερ ἔχις ἢ σκορπίος ἠρκὼς τὸ κέντρον, ᾄττων δεῦρο κἀκεῖσε, σκοπῶν συμφορὰν ἢ βλασφημίαν ἢ κακόν τι προστριψάμενος καὶ καταστήσας εἰς φόβον ἀργύριον πράξεται.

we cannot be sure what proportion of the original speech comprised nonlegal argument. Lysias xviii and xxi are also incomplete, so these three speeches cannot be used for calculating the relative proportions of this type of nonlegal argument.

Demosthenes xxi and Andocides i are long speeches, and the speakers' discussions of their character, family and services therefore represent a fairly low proportion of each speech (4.4 per cent and 6.6 per cent respectively). The three complete speeches by Lysias have a much greater proportion taken up by speakers' discussion of their character, family and services, representing 76.2 per cent, 25 per cent and 50 per cent of Lysias xvi, xix and xx respectively. The speakers deliver extensive accounts of their conduct as citizens and soldiers (Lysias xvi.9-21, xix.55-64, xx.22-25). All three also contain fairly direct appeals to obtain the jurors' verdict on the basis of their character and liturgies (xvi.17, xix.63-64, xx.30-31; similar appeals were also made in the incomplete speeches xviii.21-27 and xxi.11, 18, 25). This will be discussed further below, but at this point it may be commented that the three complete speeches by Lysias are clearly unusual in containing such a large proportion devoted to discussion of speakers' character, family and services, which may indicate that the speakers felt they had a better chance of winning by using such pleas.

Relative proportions in individual speeches

Overall, the vast majority of sections are devoted to legal argument. This finding alone does not conclusively refute "equity" and "social competition" theories. It could be argued that, although nonlegal arguments form a minority, in any speech they occupied a privileged position and were clearly to be understood as the most compelling arguments presented. It is therefore necessary to consider the proportion and significance of nonlegal argument in each speech.

Some 24 speeches (19 complete speeches) contain only legal arguments.[42] This result indicates that "equity" and "social competition" theories cannot be seen as generally true. Clearly, in some circumstances speakers felt that they would be better served by sticking to relevant and legal arguments. Legal arguments are not correlated with the type of procedure or the date at which a speech was delivered. The 24 speeches come

[42] Antiphon i, vi; Demosthenes xxiii, xxv, xxx, xxxi, xxxii, xxxiii, xli, xlvi, li, liii, lv; Isaeus i, ix, xii; Isocrates xx, xxi; Lysias i, xv, xvii, xxix, xxxii. The incomplete speeches are Demosthenes xxxii, Isaeus xii, Isocrates xx, xxi and Lysias xxxii.

from a variety of procedures, including a number of types of *dikai*, *graphai*, *endeixeis*, *apographai*, *paragraphai* and *diadikasiai*.[43] They also come from both early and late periods of forensic oratory.

As noted above, 77 speeches contain nonlegal arguments. Some 16 contain sections that were not allocated because speakers were responding to their opponents with similar attacks. Here I will treat these as nonlegal argument, leaving us with a total of 80 speeches that contain some form of nonlegal argument. Of these, 13 are incomplete and cannot be used to analyse the relative proportions of legal and nonlegal argument.

Table 5.2 presents the relative proportions of legal and nonlegal arguments. The table shows that 18 speeches include 10 per cent or less nonlegal argument, 23 have between 10.1 and 20 per cent, seven have between 20.1 and 30 per cent, nine between 30.1 and 40 per cent, four between 40.1 and 50 per cent and six have over 50.1 per cent. Of these six, two contain 100 per cent nonlegal argument.

Seven speeches' nonlegal arguments are simply occasional slurs or comments (Antiphon v.77; Demosthenes xxviii.22, 24, xxix.4, xxxvii.48, 54, lii.26, 29; Isaeus iii.37, 40; Lysias xxiii.4, 11, 14). The remainder contain one or more sections with clearly irrelevant or nonlegal argument.

About two-thirds (41) of the 67 speeches contain 20 per cent or less nonlegal argument, while about 85 per cent of the speeches contain 40 per cent or less nonlegal argument. In these speeches the majority of discussion is legal, concerned with the statement and the proof. Accordingly, from this perspective there is little support for theories that speakers paid little attention to the facts of the case or legal discussion but preferred to make the case a contest over honour as defined by discussions of services and slanders.

The figures do not, however, support "positivistic" theories. The fact that about three-quarters of our speeches contain nonlegal arguments, and that 26 have nonlegal comments or pleas in more than 20 per cent of their sections, surely indicates that such pleas cannot be dismissed out of hand as unimportant. There are three issues that need to be considered here:

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[43] *Dikai* include *dikai epitropes* (Demosthenes xxvii); *dikai exoules* (Demosthenes xxx, xxxi); *dikai pseudomarturion* (Demosthenes xlvi); *dikai blabes* (Demosthenes lv) and *dikai phonou* (Antiphon i, v, vi, Lysias i). *Graphai* include a *graphe paranomon* (Demosthenes xxiii) and a *graphe astrateias* (Lysias xv). The *endeixis* is Demosthenes xxv; the *paragraphe* is Demosthenes xxxiii. The *apographe* is Lysias xxix. There are six *diadikasiai* (Demosthenes xli, li, liii; Isaeus i, ix; Lysias xvii).

1. whether the 26 speeches that have more than 20 per cent nonlegal pleading depended on those pleas;
2. whether nonlegal arguments, even if making up only a small proportion of a speech, were nonetheless highlighted as the most significant arguments in the speech; and
3. what sort of pleas were made along with nonlegal arguments - did speakers mention their services and ask for χάρις or for support, regardless of the laws and the facts of the case, or was character evidence supposed to supplement the legal argument, rather than to replace it?

There are two speeches which clearly depended upon nonlegal argument for their success - the two speeches that are classified here as completely nonlegal (Demosthenes xxxix, Lysias xxxi). The first speech, a *diadikasia* over possession of the name Mantitheus, is generally made up of *relevant* argument, with the exception of two slurs by the speaker against his opponent for being involved in sycophantic suits (Demosthenes xxxix.19, 25). The speech is classified as nonlegal because it is not based on any law; the speaker does not discuss the law until the very end of the speech, when he claims that he should win on the basis of the most just opinion, the laws and the Heliastic oath, while admitting that his case is not actually covered by laws (Demosthenes xxxix.40-41). The speaker's claims during the speech are based on his asserted priority to ownership of the name, and various arguments about convenience and justice. The speech includes an outright appeal for the jurors to base their verdict on γνώμῃ τῇ δικαιοτάτῃ, and is therefore nonlegal because it is a plea based on justice rather than law.[44]

The second speech, delivered by a prosecutor against Philon in his *dokimasia* before the *Boule*, also sticks to a general charge - that Philon is not suitable for entry because of his many crimes (Lysias xxxi.1-4). The speaker outlines three main accusations in support of his charge - that Philon deserted the democratic cause during the struggle against the Thirty (xxxi.8-16); that he profiteered from the people's disasters (xxxi.17-19); and that his own mother would not let Philon bury her, but gave money to Antiphanes, who was not her relation, to do the job (xxxi.20-23). The speaker concludes by discussing some of Philon's likely responses. The speech is classified as nonlegal because it is simply a discussion of Philon's apparent past crimes and character. Although there is debate

[44] The speech is discussed in greater depth later in this chapter under the section on the Heliastic oath.

about the degree to which general discussion of past life and character was permitted in *dokimasiai* (see Chapter Four), for the purposes of this thesis I assume that such discussions are irrelevant and therefore nonlegal.

Another speech, Lysias xvi, contains 76.2 per cent nonlegal argument. The speaker devotes a brief discussion to the factual claim against him, that he was a member of the cavalry that served the Thirty (xvi.4-8), but devotes most of his speech to a discussion of his and his family's liturgies. The speech includes a statement by the speaker that he performed a number of military services admirably in order that, if he were ever to be unjustly taken to court, because of his services all the jurors would think him a better citizen and he might obtain "justice to the full" (xvi.17).[45] The speaker then goes on to claim that he has always performed his duty in war and attacked with the first soldiers and retreated with the last. He then claims that the jurors should examine from such deeds who is a *philotimos* and orderly citizen, rather than whether he wears his hair long.[46] In this case it is clear that the factual discussion was important, but the speaker certainly places greater weight on the nonlegal discussion and appeals for votes through that discussion. It is worth noting, however, that the speaker was not trying to replace factual discussion with nonlegal arguments; he was rather seeking to support the factual discussion and enhance his case.

Three speeches contain between 50.1 and 60 per cent nonlegal argument (Dinarchus ii; Lysias xiv, xxx). Lysias xiv and Dinarchus ii are *synegoriae*. The speaker of Lysias xiv informs us that Archestratides has already prosecuted περὶ μὲν οὖν τῶν ἄλλων and presented laws and witnesses of everything (Lysias xiv.3). He concentrates on personal attack and on discussing particular aspects of Alcibiades' defence.[47] Dinarchus ii was delivered against Aristogeiton as one of a series of *apophaseis* arising out of the Harpalus affair. Ten speakers were elected to speak and it seems likely that all ten

[45] καὶ ταῦτ' ἐποίουν οὐχ ὡς οὐ δεινὸν ἡγούμενος εἶναι Λακεδαιμονίοις μάχεσθαι, ἀλλ' ἵνα, εἴ ποτε ἀδίκως εἰς κίνδυνον καθισταίμην, διὰ ταῦτα βελτίων ὑφ' ὑμῶν νομιζόμενος ἁπάντων τῶν δικαίων τυγχάνοιμι.

[46] καίτοι χρὴ τοὺς φιλοτίμως καὶ κοσμίως πολιτευομένους ἐκ τῶν τοιούτων σκοπεῖν, ἀλλ' οὐκ εἴ τις κομᾷ, διὰ τοῦτο μισεῖν.

[47] He notes (xiv.4-5) that the jurors must become lawmakers, claiming that the laws cover desertion not only in battle but through failing to appear among the ranks of the infantry (which may indicate that the prosecution itself was making a case that was legally weak or imposing a fairly tortured interpretation of the law). The speaker concentrates on Alcibiades' likely claims at xiv.4-15 and then delivers a lengthy attack on Alcibiades' deeds and character, his father and his friends at xiv.16-45.

delivered speeches against Aristogeiton.[48] The speech concentrates on a personal attack on Aristogeiton. Taken together, the speeches may show that, when we possess only one or a few of the speeches delivered on one side in a single trial, and the preserved speeches concentrate on nonlegal issues, the key factual and legal issues could already have been discussed by other *synegoroi*.[49] They do not prove that an entire case could be based on nonlegal pleas.

Lysias xxx begins with a nonlegal plea, an attack on Nicomachus as the son of a slave, and the claim that he has committed crimes (xxx.1-2). The speaker then discusses his main legal issues (xxx.2-6), but next directs the jurors to remember Nicomachus' ancestry and how ungrateful he has been in his illegal treatment of the Athenians, and punish him. Moreover, since they did not punish him for his previous crimes they should punish him now for them all. After some further discussion of the speaker's own deeds and Nicomachus' claims, the speaker then returns to the legal issue of the alleged impiety of Nicomachus' actions (xxx.17-23). This is followed by an attack on Nicomachus' deeds and character (xxx.26-30) and an attack on his supporters (xxx.31-35), who appear to include notable political figures as well as magistrates. The speaker ends by claiming that if the jurors condemn Nicomachus they will ensure that all the affairs of the city can be administered in accordance with the laws (xxx.35). The speech shows that speakers needed to discuss legal issues to prove their case, but that they could also devote considerable time to nonlegal issues. The speech contains a mixture of legal and nonlegal pleas, including the nonlegal appeal to the jurors to remember Nicomachus' background and crimes at xxx.6, and legal pleas dealing with the need to ancestral sacrifices (xxx.19, 23). Neither appears to be given priority over the other.

The six speeches with more than 50.1 per cent of nonlegal argument do generally give nonlegal arguments priority over legal arguments, but this evidence must be treated with caution as two of the speeches are *synegoriae* and one (Lysias xxx) does not clearly give nonlegal arguments priority. What of other speeches that contain a large proportion of nonlegal argument? There are four speeches that contain between 40.1 and 50 per cent nonlegal argument - Demosthenes xxi, xxii, xlvii and Lysias xx.

[48] The speaker notes that there are ten prosecutors at Dinarchus ii.6, but it is an interpretation - albeit a reasonable one - that all ten actually delivered speeches against Aristogeiton during the trial (and against the other men charged as a result of the Harpalus affair).
[49] Rubinstein (2000:37).

Demosthenes xxi starts with an outline of the legal case, which runs (with one short interruption) until section 82. At xxi.77-82 Demosthenes outlines the origin of his dispute with Meidias, which affords him the opportunity to change the discussion into an attack on Meidias sustained from xxi.83-168 (but including discussion of their ongoing dispute, Meidias' treatment of the arbitrator Strato and a comparison of their liturgies at xxi.154-59). The nonlegal pleas are then interleaved with legal arguments including examples of other cases of committing wrongdoing at the festival (xxi.175-83), a discussion of Meidias' likely claims (xxi.186-96) and a final plea to uphold the constitution and the laws (xxi.211-227). On several occasions Demosthenes makes it clear that he is seeking to undercut Meidias' use of liturgies to beg himself off (xxi.151, 169). At xxi.169-70 he argues that it is not just (δίκαιον) for Meidias to escape paying the penalty for his *hubris* on account of his liturgies, and adds that many men performed far greater services than Meidias, but were never granted licence to commit *hubris* against their private enemies as a result. In the peroration Demosthenes develops this theme further, noting that the jurors trust in their safety against *hubris* through the security provided by the constitution (xxi.221-22), and claiming that the laws are not strong of themselves, but as a result of the jurors' willingness to enforce them. Demosthenes then reaches the climax of his argument:

> δεῖ τοίνυν τούτοις βοηθεῖν ὁμοίως ὥσπερ ἂν αὑτῷ τις ἀδικουμένῳ, καὶ τὰ τῶν νόμων ἀδικήματα κοινὰ νομίζειν, ἐφ' ὅτου περ ἂν λαμβάνηται, καὶ μήτε λειτουργίας μήτ' ἔλεον μήτ' ἄνδρα μηδένα μήτε τέχνην μηδεμίαν μήτ' ἄλλο μηδὲν εὑρῆσθαι, δι' ὅτου παραβάς τις τοὺς νόμους οὐ δώσει δίκην.
>
> So you must come to their aid just as one would for himself when he is wronged, and consider that offences against the laws are a common concern, no matter in whose case they are detected, and that neither liturgies nor pity nor any man nor rhetorical skill nor anything else has been found, on account of which anyone who has broken the laws should not pay the penalty (Demosthenes xxi.225).

In this speech, then, legal and nonlegal argument are roughly equal in proportion, but the legal arguments are made first, and once Demosthenes has established his case he delivers his attacks on Meidias' character and (briefly) mentions his own liturgies. The attacks on Meidias' character are intended to undercut his probable attempts to use his services to win votes. They are interlinked with legal arguments and the key legal argument to ignore Meidias' services is placed at the very end of the speech. Consequently, legal arguments would appear to be given greater weight than nonlegal arguments in this speech.

Demosthenes xxii is a *synegoria* in a trial where the main legal and factual issues had previously been dealt with by Euctemon.[50] The speech starts off with a discussion of the various claims likely to be made by Androtion, and ends with an extended assault on Androtion's character and services. The speech seems to have had two purposes - to cement in the jurors' minds some of the prosecution's claims, and to leave them with the impression that Androtion was a villain. Nonlegal arguments are placed in an important position, continuing until the very end, but as the speech is a *synegoria* it is not clear that the entire prosecution placed such emphasis on nonlegal arguments.

Demosthenes xlvii is a *dike pseudomarturion* arising out of an earlier case for wounding brought by Theophemus against the speaker and which he had lost. The speaker discusses legal and factual issues between sections 1 and 48, bringing forward a range of depositions and laws in his attempt to prove that Evergus and Mnesibulus had committed perjury. After that the speaker goes on to discuss Theophemus' actions after he had lost his earlier case, narrating his opponents' actions in plundering some of his property and causing the death of an old nurse. Strictly speaking, such matters have absolutely nothing to do with whether or not Evergus and Mnesibulus committed perjury, and are therefore irrelevant accusations as defined in Chapter Four. The nonlegal arguments are important, but seem designed to supplement the legal case. The speaker does not depreciate his opponents' characters or services, and his aims in discussing the plunder and death seem to be twofold; in the first place, to win sympathy and excite anger against his opponents, and in the second place to support his claim that the actions were part of his opponents' strategy in seeking to prevent the case from coming to court (xlvii.75-77). The speaker's point is a dubious one, and the fact that he lost the previous case should be remembered, since he possibly made such an extensive nonlegal plea to bolster a weak legal case.

Lysias xx starts with a discussion of legal issues which continues until section 22, when the speaker switches to nonlegal arguments which continue to the end of the speech

[50] Diodorus states that they base their charges upon a witness (Demosthenes xxii.23), and as there is no notation for a witness in the speech it seems likely that Euctemon had already presented him.

(xx.22-36). The speaker[51] concentrates on outlining his family's good deeds and civic services, and then makes appeals to win the jurors' vote on the basis of those services (xx.30-34). He claims his family deserves to be saved by the jurors on account of their good character (xx.30), and that they did not perform their services for money but, in case they should ever be in court, so they could appeal to obtain the deserved favour from the jurors (xx.31, and also 33).[52] The speaker claims they have done everything zealously, and their father has never committed a crime, so that they would far more justly obtain favour for the things they have demonstrated to the jurors.[53] The speech then ends with a resounding (nonlegal) appeal for pity. Like Lysias xiv, the speaker does discuss legal issues, but the appeal at the end of the speech is clearly nonlegal and appears designed to leave a powerful impression on the jurors. The nonlegal appeal would, however, have gained greater weight from following a legal discussion, which appears designed to convince the jurors of the basic justice of the speaker's position.

The speech probably indicates that the speaker felt he needed to discuss legal factors as well as nonlegal issues, but that the nonlegal issues could be given some degree of priority. This speech is usually identified as a *euthyna*[54] and in this case the basic accusation would have been some form of subversion or treason occasioned by Polystratus' role as a member of the Four Hundred. The speaker does not deny this, but tries to water down Polystratus' role by raising several points in mitigation. The speaker concedes that Polystratus held office under the Four Hundred (xx.1-2, 5, 13-14), but claims that he tried to enrol nine thousand citizens (xx.13) and that he fought bravely at

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[51] Von Wilamowitz-Möllendorff (1893, II:363-64) argued that Lysias xx is actually two speeches delivered in the same case, identifying a change of speaker at xx.11. His argument is usually accepted today (see for example Rubinstein 2000:153-54 and Todd 2000b:217) but may be unsound. It is based on an apparent repetition at xx.6-8 and xx.16-17, and the purported contradiction between the direct statement that Polystratus was the speaker's father at xx.11 and the more impersonal discussion of Polystratus' sons at xx.4. I cannot see the repetition at xx.6-8 and xx.16-17, and the change of tone at xx.11 is insufficient proof on its own. Moreover, Wilamowitz's interpretation does some violence to the Greek as it assumes that a forensic speech could start with καίτοι - which is unheard of. Wilamowitz was aware of the difficulty (1893, II:364) but could offer no explanation. Denniston (1954:558) states that καίτοι "is occasionally used at the opening of a speech, where its place is normally taken by καὶ μήν." He cites only Sophocles *Philoctetes* 1257, Plato *Phaedrus* 241d and Aristophanes *Eccl.* 47 (though he regards the last as uncertain as καίτοι there is an emendation). Ussher (1973:80) declared the emendation to *Ecclesiazusae* unnecessary. *Philoctetes* also offers dubious support for Denniston's view; several of our manuscripts place line 1257 within a single speech by Odysseus, and the matter is too uncertain to afford much confidence (Blaydes 1870:256; Jebb 1883:194; Webster 1970:57). Plato *Phaedrus* 241D is thus our only concrete example, and this is not a new speech but part of an "animated conversation." It is significant that there is no example from forensic oratory of a speech beginning with καίτοι.

[52] Lysias xiv.31: εἴ ποτε κίνδυνος εἴη ἡμῖν, ἐξαιτούμενοι παρ' ὑμῶν τὴν ἀξίαν χάριν ἀπολάβοιμεν.

[53] ὥστε πολλῷ δικαιότεροι ἐστε, ὧν πεπείρασθε, τούτοις χαρίσασθαι.

[54] Harrison (1968-71, II:208, n.2).

Eretria (xx.14). The speaker attacks his adversaries' own conduct under the Four Hundred (xx.15-17). These facts and nonlegal pleas may have been his best hope of success.

In these ten speeches where there is a large proportion of nonlegal argument, two things should be borne in mind. In the first place, several of the speeches are *synegoriae* and it is unclear that the entire prosecution concentrated on nonlegal issues. In the second place, in all the speeches bar the two that are classified as 100 per cent nonlegal argument, the speakers began their speeches by outlining legal issues and then proceeded to nonlegal pleas. In most cases they later returned to legal issues, and, if we exclude *synegoriae*, only two speeches appear to give nonlegal pleas any priority over legal pleas - Lysias xvi and xx.

It is actually a nearly universal pattern in Athenian forensic oratory for a speaker to commence with legal discussion and only after stating his basic claim and facts to move to nonlegal pleas. As Table 5.1 shows, leaving aside the wholly nonlegal speeches Demosthenes xxxix and Lysias xxxi, only three of the 83 remaining complete speeches commence with a nonlegal plea, and those pleas are short and swiftly followed by a legal statement.[55] These are exceptions, however, and the fact that legal issues are generally dealt with first indicates that speakers felt it was important to establish their legal claim first. This surely indicates that a nonlegal claim would usually have been inadequate on its own to win support from the jurors. It is also worth noting that, if Cohen's and Garner's theories are correct, we should not expect speakers to waste much time on legal issues at all; rather, they should have concentrated on nonlegal issues. The fact that 24 speeches do not contain any nonlegal pleas and that most complete speeches give legal arguments priority is a fairly strong refutation of their theories.

Direct nonlegal claims

A further point against Cohen's and Garner's theories is the overall scarcity of any outright claims for the jurors' vote on the basis of speakers' services. If these scholars are correct, speakers should highlight their own services and make a direct claim that these prove they deserve honour and the jurors' vote. Crucially, both claim that speakers

[55] Lysias xiv.1-2 begins with a brief attack on Alcibiades; Lysias xvi.1-2 with a brief attack on the speaker's opponents and an assertion of the speaker's own good citizenship; Demosthenes xxxv.1-2 with a brief attack on the Phaselites.

could admit their crimes but expect to be acquitted on the basis of their services and character.[56] Accordingly, it is worth checking what proportion of speeches contain direct appeals for the jurors' vote based on a speaker's services and character, and what proportion (if any) contain appeals to ignore law and decide a case on the basis of services and character.

Forensic speakers occasionally claim that their opponents will be unable to offer any just arguments, but will rely on their services and character.[57] They occasionally make it clear that people deserve some reward for their services, sometimes by labelling such a reward a "favour" or χάρις (that is, something that the recipient cannot demand as of right).[58] They may also observe that jurors were thought likely to show such favour to people for their liturgies.[59] When a speaker discussed his character and liturgies we should see this as an attempt to win favour and influence the jurors' vote. As a result, in all 44 speeches where speakers cite their character or liturgies, or their family's services, the speakers are making some kind of plea to have those taken into consideration. Only in 15 speeches, however, is this made explicit.[60] Andocides (i.143) claims that his ancestors' services should save him, as does the speaker of Demosthenes lviii.66-69, while the speaker of Isaeus x.25 notes that his orderly life should ensure that he not lose his mother's paternal estate. All highlight their own services and claim that these deserve some reward, though only seven actually label this a favour or χάρις (Demosthenes xlv.85; Isaeus vii.41; Isocrates xviii.67; Lysias xviii.23, 27, xx.30-31, 33, xxi.25, xxv.11, 12-13).[61]

None of these 15 speakers admit any crime. All, in fact, begin with a discussion of the statement and proof (except for Lysias xviii and xxi, which are incomplete speeches). Given that the legal pleas are made first, the nonlegal pleas appear to be supplementary

[56] Garner (1987:63); Cohen (1995a:184).
[57] Demosthenes xxv.76; Lysias xii.38, xxx.1, 27.
[58] Demosthenes xxi.160, xlvii.24-25; Isocrates xvi.35; Lysias vi.36.
[59] Aeschines ii.4; Demosthenes xxxviii.25-26; Lycurgus i.139-40.
[60] Andocides i.143, 149-50; Demosthenes xlv.85, l.63-64, lviii.66-68; Hyperides i.14-18; Isaeus vii.38-41, x.25; Isocrates xviii.58-66; Lysias v.2, xvi.17-18, xviii.21-27, xix.10, 63-64, xx.30-31, 33, xxi.11, 17-19, 25, xxv.11, 12-13.
[61] Johnstone (1999:101, 167 nn.27-35) identified 12 speeches in which speakers asked for χάρις, but I would not accept all of these as nonlegal pleas. Andocides (i.147) notes that none of his ancestors ever asked for χάρις for their services in a trial, but does not explicitly claim χάρις. Similarly, while the younger Alcibiades (Isocrates xvi.15, 35, 38) mentions χάρις in relation to his father's liturgies, he does not ask it for himself. Three other appeals for χάρις were legal pleas; Demosthenes (xxi.28) claims it for bringing his case against Meidias; Euthycles claims it for indicting Aristocrates' decree (Demosthenes xxiii.93) and Aeschines (ii.171) claims it for good service on his Embassy.

to the legal pleas. The speaker of Demosthenes l.63-64 makes this fairly clear, asking the jurors to remember his services along with the witnesses and the decrees and support him. Some of the nonlegal pleas, however, would probably have left a strong impression on the jurors. Six were delivered at the end of the speech (Demosthenes l.63-64, lviii.66-69; Lysias xviii.21-27, xix.63-64, xx.30-33, xxi.25) and appear calculated to persuade the jurors that the speakers were not only pleading a just cause but were men of worthy character as well. As noted above, only one of these six speeches, Lysias xx, gives nonlegal pleas priority over legal ones.

While speakers could highlight their services and character, their opponents were by no means silent in response. There are many appeals to the jurors not to pay attention to character and services. On 13 occasions speakers appeal to the jurors not to show any χάρις to their opponent.[62] In another 26 speeches we find claims that the jurors should not value services or character more highly than the law. This is sometimes coupled with examples of Athenians who had performed noble services but who were condemned when they broke the law.[63] Apollodorus, for example, mentions that Archias was condemned for impiety, despite being a hierophant and a member of the Eumolpidae and despite his honourable ancestors and liturgies (Demosthenes lix.116-17). Similarly, Aeschines (iii.195) tells us that Thrasybulus was convicted by Archinus of Coele, even though his services were recent, while Dinarchus (i.13-17) offers us the example of Timotheus, who captured 24 cities and was the son of Conon but was nonetheless fined 100 talents for accepting bribes. This evidence shows that discussions of character and services were not always successful.

Speakers' reasons for making nonlegal arguments

Although Aristotle (*Rhet.* 1356a16) criticised other rhetoricians for writing handbooks that concentrated on ways to raise emotion rather than on the complete system of rhetoric, surviving handbooks actually provide us with very little insight into nonlegal arguments.[64] The topics are barely discussed in the *Rhetorica ad Alexandrum*. In

[62] Aeschines iii.233; Antiphon vi.9-10; Demosthenes xix.227-29, 239-40, xxi.148, xxiv.67, 175, xxxviii.25-26; Lysias vi.7, 37, 53, xii.79-80, xiv.22, 40, xv.1, 10, xxvii.12-14, xxviii.17, xxx.26-27.
[63] Aeschines iii.16, 194-96; Demosthenes xix.1, xx.1, xxi.66-67, xxii.42-46, xxiii.19-21, 194, xxv.25-27, 75-80, 80-94, xxvi.16, 19-20, xxxiv.49, xl.42, xlii.2, 9, 15, 24-25, 31-32, xliv.36, li.11-12, lviii.15, 20, lix.116-17; Dinarchus i.11, 13-17, 23-24, 54, 62-63, 114, ii.8, 14-15, iii.17-18; Hyperides ii.10, iv.14, 32, 33-37, v.17, 26; Isaeus v.45-47; Lycurgus i.139-40; Lysias vi.35-36, xv.8-11, xxx.1, 27.
[64] Such discussions were apparantely contained in handbooks that have been lost. Cicero (*Brutus* xii.47) notes that Gorgias wrote about how to deliver eulogy and vituperation.

discussing how to secure goodwill, it states that speakers should outline their own good points and depreciate their opponents' deeds. It also states that such material should be placed at the end of the speech and speakers can say that it is now time for the jurors to offer them χάρις in return (1442a6-13, 1444b36-1445a26).[65] Table 5.1 shows that 36 speeches do have nonlegal arguments at or near the end of the speech, though they can also be distributed elsewhere and, as noted above, few speakers actually ask for χάρις. The *Rhetorica ad Alexandrum* does show, however, that raising one's own services and depreciating one's opponent's was a recognised tactic for winning goodwill and arousing hatred of one's opponent.

Another reason for using nonlegal arguments may simply have been that a speaker's legal case was poor. He may have felt that highlighting his services and abusing his opponent gave him a better chance of victory. This would not have been the case all the time, as we have examples of speeches made in what appear to be very weak causes (for example Demosthenes xlv) that do not have a predominance of nonlegal argument. The choice of tactics probably depended upon the facts of the case and the speakers' inclinations as much as anything.

It is possible that nonlegal arguments became a regular feature because speakers had to include them to guard against their opponents' tactics. If a speaker had some services to describe, and could also depreciate his opponent's actions, he was likely to do so, and as a result his opponent would have felt that he had to do the same. Prosecutors would anticipate the defendant's irrelevant arguments and depreciate his services, while defendants could respond in kind. The fact that a few speakers do claim that character pleas could win in court possibly indicates that speakers would have nothing to lose by including them and more to lose by not.

Evidence from the results of trials

The evidence we have for the results of trials is worth considering here. We have good evidence for the results of 23 speeches (and have some possible proof of the results of another two).[66] Some eight of these speeches relate to five trials where character might have played a part - the trial of Andocides (Andocides i, Lysias vi), the trial of

[65] καὶ διεξιόντες αὐτοῖς ὡς νῦν καιρὸς χάριτας ἡμῖν τῶν ὑπηργμένων ἀποδοῦναι (1444b40-1445a2). The handbook outlines the kinds of things to say in eulogy and vituperation (1440b29-1441a14, 1441b14-28), but these points are not linked explicitly to forensic speaking.

[66] Appendix One provides discussion and sources.

Timotheus (Demosthenes xlix), the trial of Timarchus (Aeschines i), the trial of Ctesiphon (Aeschines iii, Demosthenes xviii) and the trial of Demosthenes (Dinarchus i, Hyperides v).

On the face of it, the trial of Andocides should be a fairly important refutation of the view that Athenian juries could reach verdicts on the basis of character and services. Andocides was implicated in the profanation of the Mysteries and the mutilation of the Herms, two events which at the time excited considerable religious controversy and which we should expect to cause considerable antipathy towards those involved.[67] The precise nature of Andocides' involvement in the two crimes is disputed,[68] but it is at least clear that Andocides was not condemned for either crime in 415 but probably suspected of being guilty of both, and in 400 his opponents charged him with both crimes (Lysias vi.51). Given the degree of popular feeling against the two crimes in 415, Andocides' acquittal in 400 needs to be explained. Three factors that are relevant here - Andocides' legal case; the character of his opponents; and the Athenians' later change of heart towards the perpetrators.

In relation to the legal issues, Andocides denies he confessed to profaning the Mysteries (i.10-33) and admits that he denounced others for mutilating the Herms but denies actually taking part (i.34-69). Andocides then claims that Isotimides' decree, which his opponents had claimed he had broken by entering sacred places, had been annulled by the Amnesty (i.71-90). We do not know how convincingly Andocides' opponents made their legal case, but it is possible that Andocides convinced some jurors that he had the Amnesty on his side.

In relation to the character of his accusers, Andocides outlines a series of crimes he alleges were committed by Cephisius, Meletus, Epichares and Agyrrhius, including support for the oligarchy and impiety (the basic crimes that they were seeking to prove against Andocides), and asserts that they are stooges for Callias (i.115-31). His claims may have had some basis in fact, since the speaker of Lysias vi.42 admits that Cephisius

[67] On the controversy and the unpopularity of those involved, see Thucydides vi.27-28, 53, 60.
[68] Andocides is not named directly in Thucydides' (vi.60) account of "one of the prisoners" who denounced others, though he is named by Plutarch *Alc.* xix-xxi, who may however be interpreting his sources rather than passing on an actual historical account. MacDowell (1962:175) cast doubt on Plutarch's account because it differs from Andocides' own account, and concluded that Andocides was probably guilty of profaning the Mysteries, but not of mutilating the Herms (1962:167-76). His view was challenged by Marr (1971:329-33) and Furley (1989:552-53). Both sides rely to a degree on supposition, and the issue must remain unclear.

was involved in wrongdoing. Andocides may have succeeded in getting some jurors to believe that his opponents were bringing a prosecution that was designed to force him to accede to Callias' demands, and they may also have believed that the prosecutors' own characters were doubtful. As a result, they may have voted for Andocides as the least objectionable of several rogues.[69]

Finally, after 15 years the Athenians may not have felt as passionately about the crimes as before. Xenophon (*Hell.* i.4.11-20) tells us that in 407 B.C. dense crowds of people welcomed Alcibiades back to Athens, and, after he delivered speeches in the Assembly denying he had committed sacrilege, the Athenians voted him supreme general. If Alcibiades, who was widely seen as the main culprit, could win such favour some eight years afterwards, one wonders whether the Athenians would have felt much animosity towards Andocides, who had only been small fry and was not as influential.

So the trial of Andocides may not really show how Athenian juries might vote in cases which involved popular prejudice. As the speech contains a majority of legal argument and the nonlegal arguments appear designed to supplement rather than replace the legal argument, we can certainly say that nonlegal arguments do not appear to have been the most significant in ensuring its success.

The trial of Timotheus by Apollodorus shows that the Athenians could find against a man in a trial despite his many public services. Apollodorus sued Timotheus for not repaying various loans. Timotheus had considerable prestige in Athens,[70] and the fact that Apollodorus won may indicate that prestige would not always win favour in court, though a *caveat* must be made. The date of the speech is not known, but is generally thought to be either 369/8 B.C. or 362 B.C.[71] After 369 B.C. Timotheus may have lost some prestige for failures during the Corcyran expedition and the Egyptian venture. As discussed in Appendix One, I consider the lower date more likely. Schaefer originally thought Timotheus was recalled from northern Greece in 362 B.C. for failing to take Amphipolis,[72] which would indicate a loss of prestige, but as E. M. Harris notes he must still have had influence early in 362 B.C. as one of his supporters on campaign was

[69] Jurors in an Athenian trial had to vote; there were no abstensions. If jurors could not make up their minds about a case, or if they were confused, they may have chosen to acquit, as this was the only option open to them if they did not wish to condemn. Andocides could have benefited in this regard.
[70] Isocrates xv.107-13, 131; Dinarchus i.13-17. The Athenians erected a statue of him in honour of his military campaigns (Aeschines iii.243; Pausanias i.iii.2, i.xxiv.4; Nepos *Tim.* ii.3).
[71] See discussion in Appendix One.
[72] Schaefer (1858-85, IV:142-43).

crowned then.[73] If we accept the lower date, this case provides reasonably strong evidence that a man who enjoyed political prestige could nonetheless lose a private case despite his influence.[74]

The trial of Timarchus, by contrast, may be an example of a man being convicted for his notoriety despite a lack of witness evidence of his crimes.[75] There are two issues that need to be considered here. In the first place, Aeschines used the procedure known as *dokimasia rhetoron*. As Aeschines (i.28-32) tells us, this procedure allowed orators to be tried for a number of crimes, including striking parents or failing to provide for them, failing to perform military service or cowardice, being a prostitute or wasting an inheritance.[76] Aeschines concentrated on the alleged crime of prostitution, but he also discussed other crimes such as the allegation that Timarchus had squandered his paternal estate (i.98-104). With respect to the allegation of prostitution he must have felt that Timarchus' past was a matter of general comment in Athens, or his line of attack could not have had any hope of success.[77] Demosthenes (xix.284) later admitted that Timarchus may have been guilty of committing a crime against himself, which a scholiast tells us is a euphemism for prostitution.[78] All of this proves that Timarchus must at least have had a juicy reputation, and that Aeschines felt that he could exploit it even without strong witness testimony.

In the second place, while Aeschines did not present much evidence, he did present some and made a good fist of explaining why he could not present more. He presented evidence that Timarchus had squandered his paternal estate (i.100). He also summoned Misgolas as a witness to Timarchus' prostitution (i.48), though as the deposition is not preserved it is unclear just how useful it was. His arguments about the difficulty of proving prostitution because nobody will admit to this crime at least sound plausible (i.44-48, 119-24). Overall, the trial of Timarchus probably does prove that a bad reputation could be used to convict someone, but it is worth noting that the reputation alone did not convict Timarchus. Aeschines still had to prove that Timarchus' activities

[73] *IG* II^2.110; E. M. Harris (1988:47-48).
[74] Apollodorus' case, while not overly strong, does provide evidence of the loans, and his comments on Timotheus' lack of witnesses (xlix.39, 45, 56-58) may show that Timotheus' case was weak.
[75] As pointed out by Dobson (1919:175) and Dover (1989:22).
[76] See also the discussion by Harrison (1968-71, II:204-5).
[77] Aeschines (i.80) mentioned the Athenians' laughter at Timarchus' *double entendres* the previous year and at the unwitting comments of Autolycus the Areopagite (i.81-85). He also claimed (i.130) that when the name Timarchus is mentioned Athenians immediately ask "Which Timarchus? Timarchus the prostitute?" and discussed a comedy by Parmenon mentioning "big Timarchian whores" (i.157).
[78] MacDowell (2000:328-29).

were illegal and present some evidence that they actually took place, and the fact that he felt bound to do this surely indicates that Athenian trials could not be reduced to simple contests over honour and status alone.

The traditional view of the trial of Ctesiphon is that it represents a triumph of an appeal to Demosthenes' services over legal argument, though this view has been challenged by E. M. Harris (see Chapter Three). Rather than repeat the discussion in that chapter, I note here that Aeschines and Demosthenes concentrated on the legal issue of Demosthenes' public policies and their benefits (or otherwise) for Athens. There is relatively little nonlegal argument, and it is difficult to see the trial as being decided on any grounds other than the legal issues.

Finally, Demosthenes was prosecuted by ten men after the Areopagus named him as one of several men who had taken bribes. We have two of the speeches that secured his condemnation, an incomplete speech by Hyperides and a long speech by Dinarchus. Both discuss the possibility that jurors will acquit Demosthenes because of his public services, and request the jurors not to place those services above the law (Dinarchus i.11, 13-17, 23-24, 54, 62-63, 114; Hyperides v.1, 7, 26). Hyperides' speech generally concentrates on legal issues, as does Dinarchus', though the latter speech also contains a large amount of nonlegal argument. With both these speeches, however, it must be stressed that the factual and legal issues were taken for granted - Demosthenes had been named by the Areopagus, and while his conviction was not therefore a formality it was a strong likelihood. The fact that the speakers had to convince the jurors that Demosthenes' services did not deserve to override the Areopagus' findings indicates that jurors could sometimes take such things into account, but the fact that Demosthenes was condemned indicates that jurors could also choose to ignore services in favour of the law (as represented here by the Areopagus' *apophasis*).

The Heliastic Oath and Legal and Nonlegal Pleading

The Heliastic oath has played a pivotal role in discussions of Athenian legal procedure. It was the key evidence used, in the nineteenth and twentieth centuries, to support the "positivistic" theory.[79] As E. M. Harris argued, "nothing could make this clearer than the oath that all those who served in the Athenian courts had to swear. This oath, known

[79] Grote (1867[1848]:388-9); Fränkel (1878:454-5); Wolff (1962:10-13, 18); Meyer-Laurin (1965:28-30).

as the dicastic oath, pledged every *dikastes* to vote in accordance with the laws and decrees of the Athenian people." Harris supported his argument by noting that the oath is frequently mentioned by speakers, who clearly placed great weight upon it by raising it in the "most prominent parts of their speeches, namely, at the beginning and at the end."[80]

Dismissing the influence of the oath has always been difficult for "equity" theorists. As noted in Chapter Two, scholars seized upon γνώμῃ τῇ δικαιοτάτῃ, arguing that this in practice allowed juries the freedom to abandon law and impose equity solutions.[81] Aristotle's comment (*Rhet.* 1375a28-1375b4) that, when the written law was against his case, a speaker should ask for γνώμῃ τῇ ἀρίστῃ and appeal for equity, was a key plank in this argument. The argument has always suffered, however, from the fact that Aristotle suggested a counter-argument for speakers to use, that when the written law was on the speaker's side he should argue that γνώμῃ τῇ δικαιοτάτῃ did not justify abandoning the written law (*Rhet.* 1375b16-17). Very few actual appeals to γνώμῃ τῇ δικαιοτάτῃ can be found in forensic oratory, and consequently it is generally interpreted as a desperate expedient for use in extraordinary circumstances.[82]

This has left scholars who downplay any legal emphasis in Athenian procedure with the difficulty of explaining away the clear statement in the Heliastic oath that the juror should judge in accordance with laws and decrees. Hillgruber suggested that the jurors probably interpreted the oath as a direction to vote for justice.[83] He cited eight speeches in which speakers exhorted the jury to vote for what was just in accordance with their oath. His argument was adopted by Christ, who argued that jurors "valued legality and held the laws in high esteem...[but did not feel] bound to apply individual laws to the letter." They evaluated laws and based their decisions on their sense of justice, and in doing so considered they were keeping their oath.[84] As will be demonstrated below, however, this argument is based on a false understanding of what speakers usually mean when they talk about "justice" in Athenian courts. In forensic oratory δίκαιον and its

[80] E. M. Harris (1994:133). Harris identified some 40 occasions in oratory when the oath was cited. He used the term dicastic oath, but our sources tell us that it was called the Heliastic oath (Demosthenes xxiv.148; Hyperides iv.40).
[81] Hirzel (1900:57-60); Weiss (1923:76); Vinogradoff (1928b:42); J. W. Jones (1956:135); Ruschenbusch (1957:265); Guthrie (1971:124-25); Sealey (1994:51-58).
[82] Wolff (1962:18); Meyer-Laurin (1965:28-31); Hillgruber (1988:117).
[83] Hillgruber (1988:112-3).
[84] Christ (1998:194-95). It is important to note here (*contra* Allen 2000:150) that speakers do not ask for a vote *according to* justice, but rather phrase their discussions so that a vote in accordance with the oath is a vote *for* justice, or a determination of the rights of the case.

cognates have a range of meanings, but when speakers were discussing the Heliastic oath the basic meaning was "justice as based on law and legal process." When appealing for justice a speaker was often - but not always - using another expression for a vote in accordance with the laws. As noted in Chapter Two, Hillgruber actually cites speeches where the dominant meaning of appeals to τὸ δίκαιον is justice in accordance with the laws.

Johnstone has provided the most detailed account of the Heliastic oath to date, and he argues that the oath did not permit a vote based on a broad concept of justice that could override laws. Johnstone calculated that the oath was mentioned in some 46 speeches, and noted that it was linked with upholding laws on 51 occasions and with justice 30 times.[85] He further notes that in court a litigant "never used the oath to make a claim based on justice against or opposed to the law."[86] Litigants often tried to claim that the oath and justice both accorded with the laws, and "treated justice and the law as though they were entirely consonant."[87]

Johnstone noted that Athenian litigants rarely mentioned γνώμῃ τῇ δικαιοτάτῃ, and only two made any sort of appeal for it, though a third mentioned it (Demosthenes xx.118 and xxxix.39 are the appeals, while Demosthenes xxiii.96 is the third mention).[88] In both cases, Johnstone suggested that the speakers were not trying to make an appeal for equity beyond the law, but were suggesting that γνώμῃ τῇ δικαιοτάτῃ was in harmony with the laws. Indeed, in one case where a speaker admitted there was no clear law against his opponent (Lycurgus i.7) the oath was not used to support an appeal for equity and γνώμῃ τῇ δικαιοτάτῃ was not raised. As a result, Johnstone claimed that there is little support for the view that a litigant could base an appeal for equity on γνώμῃ τῇ δικαιοτάτῃ.

Table 5.3 presents all the references to the Heliastic oath that I have found. There are 109 references in all, from 45 speeches.[89] This is just under half of the speeches in forensic oratory. All ten orators are represented, though 66 of the references come from

[85] Johnstone (1999:35).
[86] Johnstone (1999:41).
[87] Ibid.
[88] Johnstone (1999:41-42). Meyer-Laurin (1965:29) viewed Demosthenes xxix as the sole appeal for γνώμῃ τῇ δικαιοτάτῃ in Athenian forensic oratory.
[89] Johnstone (1999:36, Table 1) states that the oath was mentioned in 46 speeches, but does not identify how often it was mentioned in those speeches. As he did not itemise his data, I am unable to identify the speech that I have missed, though my guess is that he included Isocrates xix.15, which I have excluded because it was delivered in Aegina, not Attica.

the Demosthenic corpus. Some 32 references are from *graphai paranomon* or *graphai nomon me epitedeion thenai* (Aeschines iii; Demosthenes xviii, xx, xxii, xxiii, xxiv; Hyperides i), confirming that the oath was commonly cited in these procedures,[90] though it was also regularly mentioned in Demosthenes' (xxi) *probole Against Meidias* and his *euthyna On the False Embassy* (xix). Our sample includes 27 public speeches, 14 private and 4 *diadikasiai*,[91] and Johnstone suggests that the difference is significant and that litigants could frequently give the oath different meanings in public cases.[92]

Twenty-nine references occur near the beginning or end of a speech, confirming E. M. Harris' statement that the oath is generally placed in the most prominent parts of speeches (as above), and indicating that jurors did place some weight on the authority that the oath could give to their arguments. In most speeches discussion of the oath took up a fairly minor portion, and in the few speeches where it constitutes a larger proportion of the speech we must suspect that this is simply a function of the number of sections in the speech. The regular appearance of the oath in forensic oratory confirms, however, that it was viewed as a useful part of a speaker's armament. The oath also occurs outside forensic oratory, in the legal fictions by Isocrates (xv.21) and Plato (*Apol.* 35c), and as noted above the use of γνώμῃ τῇ δικαιοτάτῃ was discussed by Aristotle (*Rhet.* 1375a28-1375b4, 16-17). Aristotle also mentioned the oath, and the use of γνώμῃ τῇ δικαιοτάτῃ, at *Politics* 1287a, where he raises it in a discussion of how officials enforce laws. Indeed, the oath appears to have been well enough known in general Athenian society to be parodied in comedy; Pherecrates (*Krapataloi* Fr. 102 [PCG]) claimed that the audience would be breaking their oath if they did not vote for him. Consequently, the oath appears to have been part of an Athenian's general knowledge, and so when speakers alluded to it they must have expected that the jurors would understand the point they were trying to make.

Whether that point was for a lawful decision, or one based on a broader, and nonlegal, concept of justice, requires further analysis of the data. On occasions the speaker would raise the oath simply to note that it dictated that jurors should listen to him with

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[90] As noted before by Johnstone (1999:37-40).

[91] I classify Demosthenes xxxix (*Against Boiotos I*) as a *diadikasia*; my reasons for this are outlined in Appendix One.

[92] Johnstone (1999:37). The main difference he notes is that litigants in public speeches would link the oath to the preservation of the democracy and the *politeia*, but it is difficult to see this as more than a function of our sample. Such arguments were more likely to be made in public procedures that focussed on laws or individuals' past actions.

goodwill,[93] or offer him a fair hearing[94] or an equal hearing.[95] Generally, however, the point a speaker was trying to make by raising the oath was that the jury should vote for him. At times a speaker mentions the oath without linking it to anything else, and here the effect of the claim is that if the jurors do not vote for him then they will be breaking their oath.[96] This is the basic point of the fragment of Pherecrates cited above, so it may have been a fairly common idea. On 11 occasions speakers invoked the oath in relation to the charge that had been made, with the intimation that the opponent was guilty of the charge (or the speaker was innocent) and therefore the jurors should vote accordingly.[97]

More often, speakers would be more specific and indicate that a vote for them would be based on a number of factors. Speakers could invoke the oath to warn the jurors against their opponents' irrelevance,[98] or to claim that a verdict for them would be a pious duty.[99] By far the most common claim was that, by supporting the speaker, the jurors would be upholding the laws. This occurs 56 times as listed in Table 5.3, in 29 speeches.[100] On 17 of these occasions speakers stated that the jurors had sworn to vote in accordance with the laws.[101] On one occasion a speaker stated that the jury had sworn to vote in accordance with decrees (without mentioning laws).[102]

Some 26 of the claims that the jurors will keep their oath if they uphold the law include the claim that they will also render a just verdict.[103] On a further 20 occasions speakers claim that the jurors will keep their oath by delivering a just result (without mentioning laws).[104] All of these bar five are from speeches where the speaker also claims that

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[93] Andocides i.9; Demosthenes xviii.2, xxiii.19; Lysias xix.11.
[94] Demosthenes xxix.4.
[95] Aeschines ii.1; Demosthenes xviii.2, 6-7; Hyperides i. Fr.i.
[96] Demosthenes xix.132, 161, xxii.4, 39, xxiv.90, xxv.99; Dinarchus ii.20; Lysias xv.10, xviii.13.
[97] Aeschines i.154; Demosthenes xix.212, 219-20, 284, xxii.43-36, xxiv.78, xliv.14, xlv.50, lviii.17; Hyperides iv.40; Lysias xiv.47.
[98] Aeschines i.170; Demosthenes xxii.4, 43-46, xxiii.19-21, xxxvi.61, xxix.13, xlv.50, lviii.25; Lycurgus i.13.
[99] Antiphon v.96; Aeschines iii.233; Demosthenes xix.239-40; Lycurgus i.79.
[100] Aeschines iii.6, 8, 31, 198, 257; Andocides i.2, 91, 105; Antiphon v.8, 85, 96; Demosthenes xviii.2, 67, 121, xix.179, 239-40, 297, xx.93, 118-19, 159, xxi.34, 42, 177, 188, 211-12, xxii.20, 43-46, xxiii.19, 101, xxiv.34-35, 188, xxv.11, xxvii.68, xxxiv.45, xxxvi.26, xliii.84, xlv.56-58, xlvi.27, lviii.25, 36, 61, lix.115; Hyperides ii.5, iv.40; Isaeus ii.47, iv.31, vi.65, viii.46, xi.6, 18; Isocrates xviii.34; Lysias x.32, xiv.22, 40, 47, xxii.7.
[101] Aeschines iii.6, 31; Andocides i.91; Antiphon v.85; Demosthenes xx.118-19, xxi.42, xxii.20, xxiii.101, xxiv.34-35, 188, xxxiv.45, xxxvi.26, xlv.56-58, xlvi.27, lviii.25, 36, lix.115; Lysias xxii.7.
[102] Hyperides v.1.
[103] Aeschines iii.8; Antiphon v.85; Demosthenes xviii.2, 67, xix.179, 239-40, xx.118-19, xxi.34, 177, 188, 211-12, xxiv.34-35, xxv.11, xxvii.68, xliii.84, lviii.36, 61.
[104] Andocides i.9, 31; Demosthenes xviii.126, 249, xix.1, xx.167, xxi.4, 24, xxiii.194, xxiv.175, xxix.4, xxxvi.1, 61, xxxix.37-38, 40-41, lvii.68; Isaeus vi.2; Lycurgus i.13, 128; Lysias xv.8-11.

jurors will keep the oath by upholding the laws. The five speeches are Demosthenes xxix, xxxix, lvii, Lycurgus i and Lysias xv. All of these speeches, with the exception of Demosthenes xxxix, have been classified as containing a majority of legal argument (Table 5.1), and each speaker claims that their own case is supported by law.[105] As a result it is difficult to see a verdict for "justice" in accordance with the oath in these five speeches as anything other than a shorthand way of saying that the oath requires the jurors to vote according to the laws.

In addition to claiming that the jurors should uphold the laws, a speaker could claim that they would be keeping their oath if they refused to offer χάρις to his opponent.[106] The speaker of Lysias xiv.22, for example, noted that, if his opponents demanded a favour from the jurors (χαρίζεσθαι), they would be teaching them to break their oath and to disobey the laws. He went on to state (xiv.40) that they should not set pity, or forgiveness, or χάρις above the oath and the laws. The speaker of Isocrates xviii.34 similarly notes that it is not right that the jurors should vote out of favour or equity or anything else other than the oaths.[107] On a further seven occasions speakers argue that the jurors should not set their opponents' character or services above the oath.[108] This evidence shows that speakers could sometimes use the oath against pleas based on character or services, and reinforce the fact that generally a speaker invoked the oath in order to appeal for a decision in accordance with the laws.

Scholars who believe that jurors could disregard law have to explain how it is that jurors could, apparently flagrantly, break their oath. It is generally considered that oaths were respected in Classical Athens, and that the Athenians believed someone who broke an oath would suffer divine retribution.[109] The importance of keeping oaths is regularly attested outside forensic oratory. Euripides, for example, could expect his audience to believe that Aegeus would keep his oath to treat Medea as a suppliant and protect her from vengeance for killing her own children (*Medea* 736), or that Iphigeneia and Pylades would keep their sacred oath to avoid being cursed (*Iphigeneia in Tauris* 735-53). Aristophanes expected his audience to consider Strepsiades' willingness to break

[105] Demosthenes xxix.22, 27, 39, 55-57, xxxix.41, lvii.3, 5, 30, 31-32, 54, 69; Lycurgus i.5, 27, 34; Lysias xv.6, 9, 11.
[106] Aeschines iii.233; Demosthenes xix.1, xxi.211-12, xxiv.175; Isocrates xviii.34; Lysias xiv.22, 40.
[107] ὥστ' οὐκ ἄξιον οὔτε κατὰ χάριν οὔτε κατ' ἐπιείκειαν οὔτε κατ' οὐδὲν ἢ κατὰ τοὺς ὅρκους περὶ αὐτῶν ψηφίσασθαι.
[108] Demosthenes xix.1, 239-40, xxi.186-88, xxii.42-46, xxiii.194; Dinarchus iii.17; Lysias xv.8-11.
[109] Plescia (1970:3-4); Mikalson (1983:31, 36).

his oath to a creditor as one of the unsavoury outcomes of Socrates' teaching (*Clouds* 1228-35). Xenophon expected his readers to believe his account of the oaths sworn between Clearchus and Tissaphernes (*Anabasis* ii.5.5-7) and his claim that Agesilaus was so pious that even his enemies trusted his oaths more than their own ties of friendship (*Agesilaus* iii.2). Treaties between states were confirmed with oaths and imprecations and reaffirmed by oaths.[110]

In forensic oratory, speakers similarly reminded jurors of their oath and expected them to place weight on not breaking the oath. As noted above, they would occasionally remind them that no-one who broke the oath could escape the vengeance of the gods. They would also occasionally point out that respect for the oaths was a major factor in the society, something that held the city together.[111] They could also place the judgements rendered by jurors who had sworn the oath over judgements delivered by people who had not.[112] This perhaps indicates that the oath was seen to be some guarantee of appropriate procedure.

Oaths need to be viewed within the wider context of Athenian religious feeling. This is not a topic on which we have exact knowledge, but there are indications that Athenians could both revere the gods and fear their retribution. The mutilation of the Herms, and the impact it had on the Sicilian expedition, are examples of the depth of religious feeling in Athens.[113] There is also evidence of a degree of superstition at Athens; it is difficult to believe that people could regularly deposit curses against their enemies, at times including "voodoo" dolls, if they did not at least have some belief that such things worked.[114] That being said, there is evidence of some diversity of opinion on this matter, as with most Athenian morals and beliefs. The Athenians could display scepticism about oracles (Euripides *Helen* 744-60, Thucydides v.26, viii.1),[115] and it has been suggested that in private at least Athenians may have entertained some doubts about the efficiency of oaths and curses.[116] Aristophanes could even poke fun at priests for stealing sacrifices offered to the gods (*Wealth* 685-711). We should not, however, use these instances to

[110] Adcock and Mosley (1975:216-22).
[111] Aeschines iii.6; Andocides i.9; Antiphon vi.25; Demosthenes xix.239-40, xxiii.101, xxiv.78; Lycurgus i.79-80.
[112] Demosthenes xxiv.58, 78, 90, 148-52, lv.35.
[113] Powell (1979a:21).
[114] On curse tablets see the references in Chapter One. For "voodoo" dolls possibly linked to Lysias' cases see Trumpf (1958) and Jordan (1988).
[115] See the discussions by Parker (1996:211-48) and Powell (1979b:45-46).
[116] Mikalson (1983:38).

downplay the strength of religion in Athens, or to argue that jurors would not have taken their oaths seriously.

The question is rather how a speaker could convince the jury that they were keeping their oath, even if he was seeking a nonlegal decision. Hirzel argued that the Greeks adopted a flexible method of interpreting oaths, considering that they were only bound under certain circumstances, and this allowed them to keep their oaths while at the same time abandoning them.[117] His argument is ingenious, but it falls down on one key fact - nowhere in forensic oratory do speakers indicate that the oath applied only to certain circumstances, or that it was a flexible oath. The overwhelming thrust of their discussion of the oath is that it bound jurors to vote according to the laws.

The solution may lie in a passage in Demosthenes' *Against Aristocrates* (xxiii.95-7). The speaker, Euthycles, raises the issue that Aristocrates will claim that his decree is lawful because many similar decrees have been subjected to a *graphe paranomon* but not overturned. Euthycles counters that the jurors have been misled, and although the decrees were upheld they were still contrary to the laws. If the decrees had been passed because the prosecutors had failed to make their case, that still did not make them lawful:

> οὐκ ἄρ' εὐορκοῦσιν οἱ δικάσαντες αὐτό; ναί. πῶς; ἐγὼ διδάξω. γνώμῃ τῇ δικαιοτάτῃ δικάσειν ὀμωμόκασιν, ἡ δὲ τῆς γνώμης δόξ' ἀφ' ὧν ἂν ἀκούσωσι παρίσταται· ὅτε τοίνυν κατὰ ταύτην ἔθεντο τὴν ψῆφον, εὐσεβοῦσι. πᾶς γὰρ ὁ μήτε δι' ἔχθραν μήτε δι' εὔνοιαν μήτε δι' ἄλλην
> ἄδικον πρόφασιν μηδεμίαν παρ' ἃ γιγνώσκει θέμενος τὴν ψῆφον εὐσεβεῖ.
>
> Are the jurors who decided that particular case not observing their oaths? Yes. How? I will explain to you. They have sworn to judge with their most just opinion, but their forming their opinion is swayed by what they hear. Well then, when they vote according to this opinion, they keep their oath.[118] For everyone keeps his oath who does not, through enmity or goodwill or some other unjust motive, vote against what he believes (xxiii.96-97).

This passage may well explain how Athenians believed jurors made their decisions. Jurors could only vote for the most convincing argument; if the speakers had tricked them into believing a case was lawful when it was not, the fault lay with speaker, not the juror (as Demosthenes went on to suggest at xxiii.97).

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[117] Hirzel (1902:42-48, 53-56).

[118] Literally, "they are acting piously," though from the context I prefer "they keep their oath."

This leads us to γνώμῃ τῇ δικαιοτάτῃ. As noted above, there are only three occasions in forensic oratory when speakers discuss the issue, though there is also another occasion when a speaker mentions that his opponent struck the clause out of a deme oath (Demosthenes lvii.63).[119] The concept is briefly discussed in the passage from *Against Aristocrates* just cited, though Euthycles did not actually make an appeal to the jurors to use their most just opinion. On two other occasions speakers do suggest that the jury use γνώμῃ τῇ δικαιοτάτῃ. There is a subdued appeal in Demosthenes' *Against Leptines* (xx.118-19), where Demosthenes states that, where there are no laws, the jurors have sworn to judge with their most just opinion. He notes that they should apply this to the law under discussion, and asks them if it is just to honour their benefactors and just to allow a man to keep what has been given to them. If so, then the jurors should do this and uphold their oath (εὐορκῆτε).

As Table 5.2 shows, the vast majority of *Against Leptines* is legal pleading, and there is very little nonlegal material in the speech. Despite this, there was a valid reason for Demosthenes to appeal for γνώμῃ τῇ δικαιοτάτῃ. Most of his argument was based on the benefits of his side's law for the city, and his claim that Leptines' law would not benefit the city. Much of the argument between sections 5 and 154, for example, expands upon these themes, and specific legal quibbles with Leptines' law are briefly dealt with at 29-35, 155-56 and 160-63. Demosthenes uses δίκαιον and its cognates 78 times in the speech, and on many occasions in this speech the word carries a connotation that laws being discussed are just as a consequence of being morally right (e.g. xx.2, 4, 12, 18, 36, 39, 41, 44, 51, 64, 71, 74, 75, 88, 98, 109, 114, 116, 125-26, 132, 139, 146, 164, 166). As Demosthenes' position is largely based on the perceived benefits of his law, and the suggested dangers of Leptines' law, it is not surprising that he concentrated on moral issues, though as he is discussing what makes *laws* just it is clear that he viewed justice as derived from law, rather than something to replace law.

There is ancient authority that Demosthenes won his case (Dio Chrysostom xxxi.128-29; see Appendix One). The decision may have reflected Demosthenes' argument that

[119] Sommerstein (1989:16-17, 212) has argued that Orestes' trial in Aeschylus' *Eumenides* represents a form of γνώμῃ τῇ δικαιοτάτῃ, drawing attention to lines 483 and 674-75. The phrase does not actually occur in the play; at lines 674-75 Athena asks if she is to command the jurors to cast a just vote (ψῆφον δικαίαν) in accordance with their judgement (ἀπὸ γνώμης). The play is largely about the problem of resolving two just claims, and jurors are twice reminded to respect their oath when they vote (680, 709-10; see Podlecki 1989:42-43), so the play may provide an early allusion to γνώμῃ τῇ δικαιοτάτῃ. If so, it indicates that the concept was generally understood in Athens, at least early in the fifth century B.C., though this does not of course mean that it was frequently raised in court.

his proposed law was more just than Leptines', although as Demosthenes appeared as a *synegoros* and the main speech delivered by Phormio is not preserved we cannot be sure of this. Even if the jury did decide that Demosthenes' law was more just, however, this does not prove that they overturned the law and delivered a verdict in favour of equity on this occasion. Speakers in *graphai nomon me epitedeion thenai* make it clear that they need not only to prove that a law is illegal, but also that it is not in the best interests of the polis.[120] This is exactly what Demosthenes was trying to do, and if he did prove that the law was not in the best interests of the polis then he was following the appropriate legal procedure and delivering a legal argument, rather than one based solely on justice or equity.

The other appeal for γνώμῃ τῇ δικαιοτάτῃ occurs in Demosthenes xxxix.40-41, a *diadikasia* over the name Mantitheus. Mantitheus notes that the jurors have sworn to vote according to the laws, and when there are no laws, γνώμῃ τῇ δικαιοτάτῃ. He goes on to state that, since there are no established laws about his case, but his case is more just, the jurors would justly vote for him.[121] Mantitheus' case is largely based on the assertion that he has a more just claim to the name by reason of the difficulties that could arise (xxxix.7-19) and his father's wishes and actions (20-22). As there was no actual law to stop his brother from having the same name, the case was based solely on the apparent justice of his cause.

Mantitheus makes this explicit in sections 40-41, where he states that no juror would give the same name to two of his children; and as they deem this just in relation to their own children, they would make decision for him in accordance with their oath (literally "make a pious decision"). He then notes that, on the basis of the most just opinion, the laws, the Heliastic oath and his opponent's admissions, his claim is reasonable and just.

There is good evidence that Mantitheus lost his case.[122] What is disputed is why he lost the case. It is generally believed nowadays that Mantitheus brought a *dike blabes* against his eponymous half-brother, seeking damages from him.[123] Harris notes that Mantitheus

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[120] Yunis (1988:381). The need to prove that a new law was in the best interests of the *polis* can be seen as the means by which Athenians changed their laws to meet new circumstances. If they were limited simply to considering whether new decrees or laws were consistent with existing statutes, they would have had no flexibility to amend or introduce new ones to fit changed circumstances.

[121] ὥστ' εἰ μηδεὶς ἦν περὶ τούτων κείμενος νόμος, κἂν οὕτω δικαίως πρὸς ἐμοῦ τὴν ψῆφον ἔθεσθε (Demosthenes xxxix.40).

[122] Carey and Reid (1985:167-68).

[123] See Appendix One and E. M. Harris (2000:57-59).

made few real claims to prove damages, and does not prove that his brother caused him to lose money, and therefore finds it unsurprising that Mantitheus lost his case.[124] As I note in Appendix One, however, there are equally strong grounds for viewing this case as a *diadikasia* rather than a *dike blabes*, not least because Mantitheus makes it clear that he is seeking sole ownership of the name - something which only a *diadikasia* could deliver (Demosthenes xxxix.1, 6, xl.35). Accordingly, it is worth considering again why this appeal for γνώμῃ τῇ δικαιοτάτῃ did not succeed. There appear to be two main reasons why Mantitheus lost - his father had indeed registered his brother with his phratry as Mantitheus (xxxix.4, 22) and his brother was older than him (xxxix.27).[125] Mantitheus offers some feeble claims in response to both of these. After admitting that his father had registered his brother with his phratry (xxxix.4) he notes that his brother will claim he was registered as Mantitheus. He attacks his brother's witnesses, claiming they were not intimates of his father (xxxix.22). In response to the claim that his brother is older, he asserts that his brother looks younger than him, and then undercuts this assertion by suggesting that the jurors should consider his brother his father's child from the date he was adopted, since he (Mantitheus the speaker) had been named Mantitheus before then. It seems from this that his brother was going to present witnesses to prove that he was registered as Mantitheus before the speaker, and that Mantitheus the speaker admitted his brother was older.

If this interpretation is correct, Mantitheus lost his case on the facts. He made an effective appeal for justice and γνώμῃ τῇ δικαιοτάτῃ, but this failed to overturn the basic legal right of his brother to use the name he had been given when he was registered as a baby. Mantitheus had not attempted to make a direct assault on his brother's legal right to the name, basing his appeal largely on his more just claim.

These two speeches show that, in situations where speakers wished to make a plea based on the justice of their cause, they could indeed present an appeal for γνώμῃ τῇ δικαιοτάτῃ. Although both speakers relied largely on arguments about justice in their speeches, they were at pains to claim that their case was not only more just but also in accordance with the laws (Demosthenes xx.88-101, xxxix.41). The procedure followed in *Against Leptines* was clearly a legal procedure, and Demosthenes' appeal for γνώμῃ τῇ δικαιοτάτῃ was simply an additional weapon in his armoury of arguments to prove

[124] E. M. Harris (2000:57-59).
[125] Carey and Reid (1985:167) conclude the brother was indeed named Mantitheus as a child.

that Leptines' law was not in the best interests of the polis and his own proposed law was more just. In Mantitheus' case, his appeal was clearly based on justice, rather than law (as he himself admitted at xxxix.40, there was no law preventing two brothers from having the same name). His claims for justice clashed with the legal right of his brother to the same name, and failed. Accordingly, these two speeches prove that an appeal for γνώμῃ τῇ δικαιοτάτῃ that was in harmony with the laws could succeed, but one that contravened them could fail. They show that Vinogradoff's theory is incorrect, as it does not accord with the only appeals for γνώμῃ τῇ δικαιοτάτῃ that we have.

The majority of the references in Table 5.3 are from contexts that I have defined as "legal" pleading. There are three where the oath is discussed as part of nonlegal pleas - Demosthenes xix.212, xxiv.175 and xxxix.40-41. The latter is, as discussed above, nonlegal as the entire case is based on an appeal for justice, although in this context the speaker links justice and the oath to the laws and therefore makes a plea that is superficially legal. The other references occur in contexts where speakers raised opponents' crimes to bolster their case. The references indicate that, although the oath was most commonly linked to upholding the laws, it could be used to support nonlegal arguments (though in all three speeches the speakers are at pains to claim that their cases are based on law, and in fact the first two speeches do contain predominantly legal argument).

Equity Pleas and Justice

The evidence just presented on the Heliastic oath casts considerable doubt on "equity" theories, and on the view that Athenian juries did not feel bound by law but would judge in accordance with more general social norms and their sense of justice.[126] As noted in Chapter Two, "equity" theories had already been attacked on two main grounds. The first is that speakers do not directly challenge laws;[127] the second is that there is no actual evidence that equity pleas were in fact made in court.[128] Some of the major cases used by Vinogradoff to support his theory, such as Isaeus i, Hyperides iii and Demosthenes xxxii, were re-examined by Meyer-Laurin, who argued that they do not in fact contain equity pleas but legal pleas.[129]

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[126] Hirzel (1900:57-60); Vinogradoff (1922:66-69, 1928a:17-21, 1928b:42); Weiss (1923:73-6); Paoli (1926:122, 1933:35, 39-45, 67-8); Gernet (1937:121); Arangio-Ruiz (1946:242-3, n.1).
[127] Meyer-Laurin (1965:2, 35, 39); Harris (1994:140); Carey (1996:36-7, 43).
[128] Wolff (1962:10-13, 1968:15-19, 1969:2); Meyer-Laurin (1965:24-5); Meinecke (1971:280, 355-7).
[129] Meyer-Laurin (1965:4-24).

The response of the "second generation" of equity theorists was to pick holes in Meyer-Laurin's dismissal of nonlegal arguments as "artful proofs," and to reassert that the constant references to "justice" in the forensic speeches must indicate that jurors did not feel bound by the law, but by their general sense of justice. Biscardi and Hillgruber argued this in the greatest detail,[130] but it has since been repeated by Todd, Scafuro, Christ and Allen.[131] Christ asserts that jurors "determined how and whether to enforce laws on the basis of a more fundamental standard - namely, their sense of "what is just" (*ta dikaia*)."[132] This argument was challenged by Johnstone who, as noted above, claimed that speakers generally discuss law and justice together, and that the two are therefore consonant.[133] The precise nature of the meanings speakers sought to evoke when they used "justice" words is worth considering further.

The Meanings of Justice in Forensic Oratory

There is insufficient space here to present an exhaustive analysis of all the occasions on which speakers discussed "justice" or used δίκαιος/ἄδικος and their cognates. I will present some brief comments. I identified a total of 2,467 occasions on which the words were used in the 104 forensic speeches delivered in Attica.[134] I consider that 596 of the 2,467 occasions have a clearly legal meaning. They occur in 432 sections in 76 speeches (Table 5.4). Demosthenes xxiv accounts for a large number of these occurrences (77 in all), though Demosthenes xxiii, xix and xxi are also heavily represented and account for 39, 38 and 30 respectively. Speakers may make it clear that justice is derived from the laws through phrases such as τὰ τῶν νόμων δίκαια (Demosthenes xxv.3, 14; xxxviii.19) or τὰ ἐν τοῖς νόμοις δικαίων (Demosthenes xlii.4, 15). Such phrases are rare, however, and in most of the 596 occurrences speakers simply link justice with the laws by noting that particular actions are just because they accord with law. For example, the speaker of Demosthenes xliv.7 states that adoptions ought to be valid if justly made in accordance with the laws (ὅσοι ἂν κατὰ τοὺς νόμους δικαίως γένωνται), while the speaker of Demosthenes xxxiii.1 links the terms of the *dike emporike* with three "justice" words. Diodorus, in Demosthenes xxiv.31, asked how any

[130] Biscardi (1970:219-21, 227-30; 1982:362-71); Hillgruber (1988:105-20).
[131] Todd (1990a:19, 1993:54-5); Scafuro (1997:53); Christ (1998:207-8); Allen (2000:175-83).
[132] Christ (1998:195).
[133] Johnstone (1999:41). See too Gehrke (1995:30); Carey (1996:41).
[134] The total includes three occasions (Hyperides iii.16, 20) where the word is restored, but the restorations are generally accepted (Jensen 1917:79; Burtt 1954:444). In reaching the total I checked all speeches manually, sometimes with the aid of indices (e.g. Goligher and Maguiness 1961).

private man could commit a greater crime than by subverting the laws (τί γὰρ ἂν τις μεῖζον ἠδίκησεν ἰδιώτης ἀνὴρ ἢ καταλύων τοὺς νόμους αὐτῆς).

These 596 occurrences account for 24.2 per cent of total occurrences, so a far larger number of occurrences are not directly linked to law. Most of these are probably unclassifiable. At times, from the context, they appear to be intended to convey a legal meaning, as for example in Demosthenes lv, where the words are clearly linked back to the charge (Demosthenes lv.6, 7, 8, 12, 17, 19, 26, 29, 32, 33, 35).[135] Sometimes justice words are linked to legal procedure, for example claims that appeals for pity were unjust (Dinarchus i.109; Hyperides ii.9; Isaeus v.35; Lycurgus i.144; Lysias vi.55, xiv.20, xxii.21, xxviii.14; see Chapter Seven); that it was just to produce certain proofs or witnesses to support the case (Demosthenes xxix.17, lvii.8, 23; Isaeus iv.21, vi.53; Lysias vii.33); that relevance was just (Aeschines iii.193; Demosthenes xviii.9; Hyperides iv.32; Isocrates xviii.45; Lycurgus i.10, 149; see Chapter Four); or that the jurors will determine justice with their verdict (Aeschines ii.87, iii.60, 232, 260; Antiphon v.8, 92; Demosthenes xviii.126, 249, xix.4, 239, 240, 335, xx.167, xxi.4, 8, 24, 35, 105, 202, 212, 227, xxii.59, xxiii.19, xxiv.34, 58, 177, 207, 214, xxv.30, xxvii.3, 68, xxviii.23, 24, xxix.4, 28, 35, 41, 58, xxx.25, xxxiii.38, xxxv.5, xxxvi.1, 61, xxxix.40, xl.31, 55, 61, xliii.14, 33, 81, 84, xlvi.4, 28, xlvii.18, 82, xlviii.48, 58, lii.33, liv.42, lvii.5, 6, 36, 56, 61, 69, lviii.7, 25, 70, lix.126; Dinarchus i.5, 6, 106, 111; Hyperides ii.13, iv.40, v.2; Isaeus ii.47, vi.2, 17, vii.45, viii.5, 46; Isocrates xvii.58, xviii.10, 16, 34; Lycurgus i.52; Lysias iii.21, 47, vi.14, x.21, xiii.97, xiv.47, xv.1, 11, xxiv.27, xxvii.2).[136]

Sometimes justice is intended to convey a moral meaning which is not explicitly linked to law. For example, Aeschines (i.136) discusses the nature of "just love," while Demosthenes (xxi.100-101) uses the words in discussing violence and pity. Such moral uses can sometimes occur in passages of nonlegal pleading, such as Isocrates xvi.11, 12, 15, 28, 36, 38. They do not always of themselves carry a nonlegal meaning, however;

[135] Similar 'legal' meanings can be identified in many other speeches (e.g. Andocides i.1 [δικαίως, ἀδίκως], 3 [ἀδικίαν, ἀδικεῖν, δίκαιοι, ἀδικεῖν], 19, 31 [ἀδικοῦντας] 32, 49, 51 [ἀδίκως, ἀδίκως], 53 [δικαίως, ἀδίκως], 60, 68, 119, 123, 132, 135 [ἀδικοῦντα, δικαίως], 136 [τοὺς ἀδικοῦντας], 137; Demosthenes xviii.4, 13 [δίκαιόν], 17, 20 [τὰ ἀδικήματα], 21, 31, 53, 71, 109, 193 [ἀδίκημ', δικαίως], 222, 232, 233 [τἀδίκημ', δικαίως], 248 [δικαίως], 250 [δίκαιον], 251 [ἀδικῶν, δικαίως], 266, 273, 279, 280, 298 [δικαίας, δικαίως], 314, 315).

[136] This use of "justice" contains something of a meaning like "rights", since speakers essentially state that the jurors are deciding the rights of the matter. Miller (1996:882-84) argues that the Athenians did have a concept of "just rights" or claims, though as Allen (2000:150) notes speakers' claims were contestable, so there does not appear to have been an immutable concept of "just rights."

when speakers are criticizing their opponents' crimes, the context may be nonlegal, but the words themselves may carry a legal meaning since it is *crimes* that are being discussed. Sometimes the "crimes" are simply moral wrongs, on which occasion a nonlegal meaning may be inferred (e.g. Demosthenes xlviii.54, 55; Dinarchus ii.11). In ten speeches only do speakers make the claim that it is "just" to take account of their liturgies or character (Andocides i.143; Demosthenes xxi.156, xxxviii.28; Dinarchus i.17; Lysias iii.48, xvi.17, xviii.25, xx.30, xxi.17, xxv.4, 6).

Justice words are used sparingly in forensic oratory, comprising no more than 0.8 per cent of any orator. They occur with much the same frequency in most orators.[137] When used they emphasise claims about particular actions, activities, opinions or pleas. The patterns demonstrated show that they are more often used about legal claims than nonlegal ones.

Direct Attacks on Law

As noted in Chapter Two, speakers never claim that laws are unjust or that the jurors should apply a sense of justice in their place. This contrasts with our extant rhetorical handbooks, which envisage direct attacks on laws. Aristotle (*Rhet.* 1375a30-1375b28) outlines arguments speakers should use when the law was for or against them.[138] The *Rhetorica ad Alexandrum* (1443a11-38) is comparable in its treatment of ambiguous laws, but also suggests that speakers can attack laws as being bad or harmful to the *polis* (1443a20-30).

The closest we get to a direct attack on a law in forensic oratory is in Hyperides iv.4-9, where the speaker claims that his opponent argued that the jurors should not follow the law on *eisangelia* (τῷ εἰσαγγελτικῷ νόμῳ). In this case, the prosecutor Polyeuctus had brought an *eisangelia* which the speaker claims was legally invalid. This is not a direct attack on a law, however, as the prosecutor had brought the case under τῷ εἰσαγγελτικῷ νόμῳ itself; rather, it is an attempt to head off the defendant's likely plea.

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[137] The figures for each orator are: Aeschines 112 (0.2%); Andocides 38 (0.4%); Antiphon 97 (0.8%); Demosthenes 1403 (0.6%); Dinarchus 92 (0.8%); Hyperides 72 (0.6%); Isaeus 109 (0.3%); Isocrates 91 (0.7%); Lycurgus 79 (0.7%); Lysias 368 (0.7%). In calculating these figures I used the tables for the total word counts in forensic speeches published by Berkowitz and Squitier (1986).

[138] If the law was against the speaker he should rely on general Greek customs and equity, and claim that γνώμῃ τῇ δικαιοτάτῃ means that a juror should not apply written laws rigorously. He should also check whether the law is contradictory to another law, or, if the meaning of the law is ambiguous, interpret it to suit his case. If the law supports the speaker's case, he should argue the contrary; γνώμῃ τῇ δικαιοτάτῃ will now no longer afford a juror any justification for deciding contrary to law.

Other possible attacks on law also turn out to be legal arguments. Possible attacks include arguments that the Amnesty for crimes committed before 403 B.C. does not apply, and criticism of the *diamarturia* procedure. Three speakers argue that their opponents should not benefit from the Amnesty (Lysias vi.37-41, xiii.88-90, xxvi.16-20). In all three cases, however, the speakers do not attack the Amnesty itself, but try to show that their opponents are not covered by it.[139] In relation to *diamarturiai*, two did attack the procedure because it would not allow a jury to judge all claims to an estate (Demosthenes xliv.57-59; Isaeus vi.52), and one stated that *diamarturiai* are ἀδικώτατοι of all trials (Demosthenes xliv.57), but neither claimed that the law should not apply. Each relied on his own legal claims to the estate (Demosthenes xliv.2-3, 5-6, 7-8, 15-16, 46-51, 60, 63-64, 65-68; Isaeus vi.3-4, 8-9, 25-26, 42, 44, 47-50, 63-64).[140] Christ suggests that jurors may have taken such claims seriously, but fails to show that such claims were crucial to a case or more important than other legal claims. The attacks on *diamarturiai* were probably made to secure the goodwill of the jury; when it fitted a speaker's case, he could argue that a *diamarturia* was the right and proper course of action (Isaeus iii.43-44).[141]

At times speakers may also display some apparent reluctance to rely solely on law. For example, the speaker of Demosthenes xxxvii.21, having outlined how the laws support his case, adds that in order that the jurors should not believe that he is evading the rights of the case because he has the worst of it, he will also address each of his opponent's charges.[142] In addition to this, it has been suggested that speakers make quite a fuss about being seen to be "legal amateurs," which, it is suggested, reflects a broader suspicion in society of overtly legalistic claims.[143] Many of these claims are, however, rather exaggerated by modern scholars. While speakers do occasionally state that they have been forced to study law because of their opponents (Demosthenes liv.17,

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[139] The speaker of Lysias xiii, for example, argued that Agoratus was not covered as he was in Piraeus not in Athens, while the speaker of Lysias xxvi distinguished between people who stayed in Athens but did not commit crimes and those who were responsible for accusations and arrests. None of these speakers tried to establish a case based on equity, and indeed all claimed their cases were lawful (Lysias vi.8, 12, 51-53, xiii.95, xxvi.5, 9).

[140] There is also a hint of antagonism to the *diamarturia* at Isaeus vii.3.

[141] This point is made by Wyse (1904:492). For Christ's comment, see (1998:216). Christ (1998:213) also claims that litigants could claim that *paragraphai* were similarly an unfair deviation from *euthudikia*, but I cannot find this meaning in the passages he cites (Demosthenes xxxiv.4, xlv.6). The speaker of Demosthenes xxxiv.4 simply outlines the legal basis of a *paragraphe*, while at Demosthenes xlv.6 Apollodorus complains that Phormio had an advantage in appearing first.

[142] ἵνα δ', ὦ ἄνδρες Ἀθηναῖοι, μή τις οἴηται τοῖς περὶ τῶν πραγμάτων αὐτῶν δικαίοις ἁλισκόμενόν μ' ἐπὶ τοῦτ' ἀποχωρεῖν.

[143] See in particular Humphreys (1988:486); Christ (1998:203-8); Todd (2000a:31).

Hyperides iii.13), the point of their remarks may be that they do not wish the jurors to view them as sycophants, rather than being a reaction against some deep-rooted suspicion of law. In 85 speeches, as noted above, speakers make claims that their cases are supported by laws, and it is striking that in the vast majority of these they show no trepidation about discussing law.

Some authors have also suggested that Athens had a very free interpretation of contract rights. Christ, for example, argues that jurors could regularly overturn wills and contracts, though as the only evidence he produces is Hyperides iii *Athenogenes* (contracts) and Aristophanes' *Wasps* 583-86 (wills), it is difficult to place too much faith in his claim.[144] We do not know whether the plea against the contract with Athenogenes was successful, and in other speeches speakers place considerable emphasis on upholding contractual arrangements (Demosthenes xxxiii.3, 35-36, xxxiv.3-5, xxxv.16-22, xxxvi.4-7, xxxvii.17-18, xxxviii.3-4, xlviii.38, lii.3-7, lvi.1-4, 41). Similarly, speakers who did not inherit an estate may claim that wills are invalid or can be forged (Isaeus i.15-21), but if they were in possession they could claim that the will was valid and lawful (Isaeus ii.1-2). Speakers who felt they had been cheated out of an inheritance would rely upon the original will (Demosthenes xxvii.4-8; Lysias xxxii.6-7).[145]

A rather different view of contracts has been offered by Todd, who claims "so absolute at Athens was the doctrine of freedom of contract that you could if you wished contract out of the protection which the law afforded you."[146] He argues that the speaker of Demosthenes xxxv.39 claims that his contract, dealing with obligations for carrying cargo on a voyage, does not allow anything to have greater authority than the terms within it, including a law or a decree. He also states that Demosthenes xlviii proves that two people could enter into an agreement to commit a crime, one of whom later expected a court to hear his claim to force his erstwhile partner to uphold the agreement.

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[144] Christ (1998:218-23).

[145] In this context, Isaeus xi must be discussed, as it has been seen as proving that jurors ignored the law in deciding inheritance disputes. The claims in the speech are based on the degree of relationship of a number of relatives, and turn on the precise meaning of the phrase ἀνεψιοῦ παῖς. Wyse (1904:673-74) considered that it meant the child of a first cousin, but this is disputed (Thompson 1976:4-6). The alternative theory, that the phrase could refer to second cousins, may, if true, prove that the speaker of Isaeus xi did indeed have the best legal claim to the estate (Thompson 1976:5).

[146] Todd (1993:59).

Todd's first point may be disputed. The contract read out at xxxv.10-13 outlines the arrangements for the security in the event that the ship is damaged beyond repair but the security is saved; the contract then reads κυριώτερον δὲ περὶ τούτων ἄλλο μηδὲν εἶναι τῆς συγγραφῆς (Demosthenes xxxv.13). Later in the speech, the speaker complains that his opponent lent the security after the wreck, and argues that this was not permitted under the contract (xxxv.36-38). He states here ἡ μὲν γὰρ συγγραφὴ οὐδὲν κυριώτερον ἐᾷ εἶναι τῶν ἐγγεγραμμένων, οὐδὲ προσφέρειν οὔτε νόμον οὔτε ψήφισμα οὔτ' ἄλλ' οὐδ' ὁτιοῦν πρὸς τὴν συγγραφήν. He is not arguing that the contract has more authority than any law, but that his opponent should have stuck to the letter of the contract in lending the security, and that nothing would have justified departing from it, not even a law or decree. The speaker in fact argues that his stance is in accordance with law (xxxv.3-4, 45). His argument seems specious, but he is certainly not offering a nonlegal plea or claiming that the contract is above the law.

Similarly, it will not do to press Demosthenes xlviii as evidence of criminal collusion. The speaker points out that he came to an agreement with his relative Olympiodorus to put in a claim for an inheritance and to divide it between them, pointing out that this agreement was enacted according to law and in front of witnesses (xlviii.5-11). In the sequence of events that followed he and Olympiodorus first won the estate and then lost it, and then at a further *diadikasia* Olympiodorus won the estate. On this occasion Olympiodorus "said exactly what he wanted to" (καὶ ἔλεγεν ὅ τι ἐβούλετο) and produced false witnesses (xlviii.31, 44). The speaker himself is somewhat equivocal at first about his role in the matter, first indicating that he sat in silence on the other platform (xlviii.31) but later admitting that he corroborated Olympiodorus' account (xlviii.44). The point of the case is not that the contract was fraudulent; indeed, the speaker claims it was lawful and produces witnesses to that effect (xlviii.11). It is rather that the estate may have been won through false testimony. The speaker is not trying to get the jury to uphold a criminal agreement, but to overturn an award that he claims was won through lying. As we do not possess Olympiodorus' response we do not know whether he admitted his witnesses lied.

Overall, given the absence of attacks on law and the fact that speakers generally claim that their cases are lawful, it is difficult to see any real support for the view that notions of equity or justice could be introduced to replace law. One major disputed point

remains - the cases that some modern scholars claim were fundamentally based on equity in opposition to law.

Possible Equity Pleas

Some of the cases used to support the "equity" theory were discussed in Chapter Two. Hyperides iii (*Against Athenogenes*) is probably the "flagship" case. The speaker's claim in that speech to be released from his contract with Athenogenes has been labelled an equity plea by a fairly large number of scholars.[147] As noted in Chapter Two, Meyer-Laurin refuted this view by pointing out that the speaker's case is based on the claim that the contract was illegal, as evidenced by its incompatibility with a range of laws.[148] The speaker is not claiming that it would be more "just" to revoke the contract, but that it would be lawful.[149] Other cases, such as Demosthenes xxxii, which has been viewed as proving a contract could be overturned through a plea based on *exceptio doli*, were similarly discussed in Chapter Two. In this section I shall concentrate on four additional cases that are either viewed as being decided on the basis of justice in opposition to law, or that appear to contain a nonlegal, equity plea. It is important to note here that this thesis does not dispute that cases based on justice or equity could be made; Demosthenes xxxix, as discussed above, was clearly based on justice rather than law. The point is rather that such pleas are extremely rare in forensic oratory and certainly atypical.

The first speech to be considered is probably the weakest case - Demosthenes xviii (*On the Crown*). Recently, Christ has asserted that Demosthenes' response to Aeschines' legal claims was based on justice, claiming that at xviii.111 Demosthenes said his case would be "based on what is right." He argued that Demosthenes presented "his position in a way that is clearly more compatible than Aeschines' with a popular audience's sensibilities: what is simple and right should naturally be preferred over sykophantic (*sic*) legalities."[150] Demosthenes does not say, however, that his case will be "based on what is right", but that he will "discuss the justice of the case in a straightforward and

[147] Vinogradoff (1922:68, 1928a:20-21); Stoffels (1954:33); Gernet (1955:80, n.3); Scafuro (1997:61-63); Christ (1998:221-22); Whitehead (2000:306).
[148] Meyer-Laurin (1965:17-19); and see also E. M. Harris (2000:51-54).
[149] The speaker's claim may have been legally invalid, but that does not automatically make it an equity plea, nor does it indicate that the jurors would have been willing to accept a legally invalid argument.
[150] Christ (1998:208).

direct manner."[151] As Table 5.1 shows, the majority of the *Crown* speech contains legal argument, and Demosthenes spent most of the speech discussing the charges. Demosthenes' comment at xviii.111 in fact led on to a discussion where he sought to refute Aeschines' legal claims, so it is difficult to see xviii.111 as based on justice as opposed to law.

The next case is Isaeus i (*On the Estate of Cleonymus*). In this case the speaker seeks to overturn the will through which his opponent has gained Cleonymus' estate by claiming that attempts to revoke the will were subverted by the opponent and that he was more closely related to the deceased than the opponent (Isaeus i.13-14, 41-43). The speaker urged the jurors to decide on the grounds of closer affinity rather than an unjust will. Wyse interpreted the speech as a particularly weak legal case, but could see no evidence of equity arguments.[152] Others, however, have seen the speech as an equity plea on the grounds that it appealed to affinity over the terms of the will.[153] In response, Meyer-Laurin claimed that, while the speaker's case was weak, it was nonetheless "formaljuristich."[154] The speaker does claim on several occasions that his case is lawful (Isaeus i.4, 26, 40, 43, 49, 50-51). More importantly, however, as a relative the speaker had a right to claim the inheritance. His suit was brought in accordance with Athenian laws which allowed relatives to make a claim for an estate, even if another claimant was named in a will.[155] If such pleas were legally permissible it is difficult to see how the argument in Isaeus i could be an example of a nonlegal equity plea. In fact, the claim that challenges to wills based on a closer relationship were legally invalid is curious to say the least. Such challenges are not unknown in modern family law and it is odd that Vinogradoff should have ignored this.

The third case is Demosthenes lvi (*Against Dionysodorus*). The speaker in this case, Darius, offers a strong literal interpretation of the contract, arguing that as the contract required Dionysodorus to transfer goods in a single ship and send the same ship back to Athens, and as Dionysodorus had not done this, he should pay additional penalties. Vinogradoff pointed out that Dionysodorus was likely to offer an equity plea in reply, claiming that he had sent the goods back by another ship, and that as the ship had been

[151] Demosthenes xviii.111: ἁπλῶς δὲ τὴν ὀρθὴν περὶ τῶν δικαίων διαλέξομαι. This statement is repeated by Demosthenes at xviii.322.
[152] Wyse (1904:177-78).
[153] Seeliger (1876:673-74); Vinogradoff (1922:67, 79-80); Wolf (1956:204, 218 n.8).
[154] Meyer-Laurin (1965:20); see also Hitzig (1897:180-81).
[155] Isaeus iii.30, iv.2-4, vi.3-4; see also Harrison (1968-71, I:158-59).

damaged it was not possible to send them back in the same ship.[156] Meyer-Laurin argued that this was not clear and that both sides debated the precise interpretation of the contract clause. It is probably impossible to tell, as we do not have a copy of the contract. It is worth noting that, if the contract did indeed specify that the same ship had to return to Athens, without offering any other options in case of damage, then on a strict interpretation Darius was right, though it is always possible that Darius is suppressing something, as we know that other contracts did outline some options in the case of damage (Demosthenes xxxv.13). In any event, Vinogradoff may have been correct here in suggesting that Dionysodorus was going to make an equity plea, though in this case the plea would be based on the fact that the basic terms of the contract had been met, albeit using a different ship, rather than on the view that the contract was unconscionable and should be revoked. Darius' case is sycophantic, and it would be interesting to know whether the jurors accepted his strict interpretation of the contract.

The final case to be considered is Lycurgus i (*Against Leocrates*). Lycurgus charged Leocrates with treason, using an *eisangelia*. E. M. Harris has pointed out that the law listed some of the offences that could be considered treason, thus providing some guidance for the jurors.[157] Lycurgus' problem in this speech is that the particular crimes he alleged Leocrates had committed were not detailed in the law, as Lycurgus himself admits (i.9: ὅσα δὲ μὴ σφόδρα περιείληφεν, ἑνὶ ὀνόματι προσαγορεύσας). As a result he has to ask the jurors to innovate with regard to the penalties (i.7-9). Lycurgus' speech depended to a great deal on whether Leocrates had actually fled Athens or simply travelled as a merchant, and his arguments on this matter are not exactly convincing. He fleshed out his case by discussing Leocrates' removal of his ancestral images from Attica (i.25-26), by introducing the irrelevant claim that Leocrates had shipped corn to other cities (i.26-27), and by discussing a challenge he made to Leocrates demanding his slaves for torture (i.28-35). Lycurgus lost his case (albeit by one vote - Aeschines iii.252), and as Harris notes "the majority reasonably rejected his attempt to press the limits of the law's open texture."[158] It might be added that they also considered the evidence poor.

In pressing the law to cover actions which may not obviously have appeared like

[156] Vinogradoff (1922:78-79; 1928a:20).
[157] E. M. Harris (2000:70).
[158] E. M. Harris (2000:75).

treason, Lycurgus could be seen to be appealing to a sense of justice in opposition to the law. Against this, he claims throughout his speech to be following the law (i.1-2, 4-6, 8, 35, 37, 52, 55, 149-50). The very broadness of the *eisangelia* procedure also needs to be considered. The procedure could be used to try cases of alleged treason, and presumably the Assembly considered that there was enough legal basis to Lycurgus' claim to permit the case to go ahead. Lycurgus was making a legal plea, rather than one based on equity.

These four cases, along with those discussed in Chapter Two such as Hyperides iii, do not support the claim that speakers frequently appealed for equity in opposition to law. Speakers generally claimed that law was on their side. Sometimes they pushed the law beyond what it actually allowed, but such cases are very rare in our corpus. The one speech that does contain a plea based on justice - Demosthenes xxxix - failed, as did another speech - Lycurgus i - which stretched the law. As a result, we should be wary of presuming that equity pleas were a normal feature of Athenian litigation. The fact that, when we know the results of the cases, the pleas were unsuccessful of itself explains their rarity in our corpus.

Summary

This has been a long chapter, but necessarily so as it dealt with central issues for this thesis and our interpretation of the application of relevance in Athenian courts. The following major points were made:

- many of the topics identified as 'nonlegal' by modern authors are not;
- relevant topics in a speech can be defined as arguments that sought to prove the charge and the accusations outlined in the charge; both Aristotle and modern advocates have defined these parts of a speech as the statement and the proof;
- analysis of the speeches shows that the vast majority of the sections in Athenian speeches deal with legal arguments;
- in most speeches the proportion of legal arguments is greater than the proportion of nonlegal arguments;
- only a few speeches give any priority to nonlegal arguments, but legal arguments are generally given priority;

- 85 of the 104 speeches considered contain a statement that the speaker's case is lawful;
- the Heliastic oath is used regularly to support a vote in accordance with laws, and not for a nonlegal decision based on justice;
- when "justice" words are used they frequently have a legal meaning and are rarely used to support nonlegal claims;
- there is no good evidence for direct attacks on law;
- there is little good evidence from our speeches for equity claims, though one speech, Demosthenes xxxix, was based on such a claim; and
- significantly, where speakers did invoke concepts of justice that clashed with law, as far as we know their attempts failed.

Chapter Six Evidence in Athenian Courts

Witnesses

In Chapter Three I noted that there has been a longstanding view that Athenian witnesses were habitual perjurers, appearing as partisan supporters of a speaker rather than to confirm facts through their testimony. Proponents of this view argue that it was the status and identity of a witness, rather than the content of his testimony, that was more crucial in determining the outcome of a case.[1] Some suggest that the frequency of perjury led juries to judge speakers on their past character and services, since they could not determine the facts of the case because witnesses for each side would generally present contradictory evidence.[2]

In developing this view modern scholars have relied upon a variety of evidence. The earliest scholars relied upon fragments of Middle and New Comedy such as Eubulus *Olbia* Fr. 74 [PCG] and Diphilus *Emporos* Fr 31 [PCG] which joked about buying witnesses.[3] Cohen relied on a dozen or so claims in forensic oratory that opponents had suborned witnesses, and also curiously interpreted four speeches as proof that witnesses regularly competed with each other and provided contradictory evidence.[4] Todd tabulated the relative frequency of testimonies in forensic speeches, but relied more on the contrasts between modern and Athenian court procedure to support his claim that witnesses were partisan.[5] Humphreys alone carried out a detailed analysis, classifying testimonies by the type of witness and developing a hierarchy of testimonies from "more independent to less independent."[6]

These analyses can all be accused of some selectivity. There are indeed passages in which speakers claim that their opponents' witnesses are lying, though as noted in Chapter Three a speaker's accusation against his opponent's witnesses need not imply that perjury was a regular feature of court procedure. When a speaker accuses his opponent of false witness, the clear thrust of the argument is that perjury is unjust. Indeed, speakers could point out that witnesses would feel it beneath them as καλοὶ κἀγαθοί to give false testimony, even for a friend (Demosthenes xlix.37-8). There is

[1] Humphreys (1985:315, 322-4); Todd (1990b:27); Christ (1998:41).
[2] Cohen (1995a:106-7).
[3] Anon. (1826:345). The fact that the *Emporos* is set in Corinth did not seem to occur to the writer.
[4] Cohen (1995a:109-15).
[5] Todd (1990a:23-4, 27-31, 1993:96-7).
[6] Humphreys (1985:325).

probably not a legal system in the world in which speakers have not at some time claimed that their opponents' witnesses are lying.[7] If one were to take a sample of about 100 speeches over about a hundred years from any legal system, one might well find as many or more claims as Cohen identified in Athenian speeches. In order to prove that perjury really was commonplace, one needs to prove that it occurred more frequently at Athens than at some "norm," however that may be defined. By contrast, although scholars assert that actions for false witness were "common" in Athens,[8] they do not quantify what proportion of witness statements might have been false and the number that might prove that perjury was common.

The dozen or so references collected by Cohen are not exactly overwhelming evidence, especially when one considers the external evidence, presented in Chapter Three, that showed that Athenians commonly viewed perjury as unjust. Todd suggested that the rarity of attacks on opponents' witnesses may indicate that witnesses were recognised as being in court to express support, rather than to confirm facts.[9] However, attacks are not as rare as he claimed and are in fact as common in forensic oratory as claims that an opponent's witnesses are lying.[10] This is hardly surprising, as both are part of a single *topos* of forensic oratory, in which a litigant attempted to attack and undermine his opponent's witnesses.

It is this *topos* that may well explain the occurrence of accusations of perjury. Rhetorical handbooks recommended that speakers claim their opponents' witnesses were perjurers, indicating that such accusations may have been a regular way of undermining the credibility of witnesses (Aristotle *Rhet.* 1376a20-40; *Rhet. ad Alex.* 1431b21-1432a3, 1432a33-1432b4). The author of the *Rhetorica ad Alexandrum* noted:

> ἀντιλέγοντας δὲ μαρτυρίᾳ δεῖ τὸν τρόπον τοῦ μάρτυρος διαβάλλειν ἂν ᾖ πονηρός, ἢ τὸ μαρτυρούμενον ἐξετάζειν ἂν ἀπίθανον ὂν τυγχάνῃ, ἢ καὶ συναμφοτέροις τούτοις ἀντιλέγειν, συνάγοντας τὰ φαυλότατα τῶν ἐναντίων εἰς ταὐτό. σκεπτέον δὲ καὶ εἰ φίλος ἐστὶν ὁ μάρτυς ᾧ μαρτυρεῖ, ἢ εἰ μέτεστί ποθεν αὐτῷ τοῦ πράγματος, ἢ ἐχθρός ἐστιν οὗ καταμαρτυρεῖ, ἢ πένης·

[7] In commenting on this claim some one hundred and seventy years before Cohen, Anon. (1827:251) pointed out: "wherever wine has been, there has been also a due proportion of drunkenness; wherever there are judicial proceedings, there is a fair sprinkling of perjuries."
[8] Cohen (1995a:109).
[9] Todd (1990a:24).
[10] Aeschines i.69; Demosthenes xxix.22, 28, xxx.38-39, xxxiii.37-8, xxxiv.18-20, 28, xxxvii.48, xxxix.22, xl.28, 58-9, xli.12-17, xlvii.39, lii.17, liv.31-6; Isaeus iii.22-5, viii.13. The speakers of Antiphon vi.28-9, Demosthenes xxix.22-24, lvii.53-54, Isaeus xii.4-8 and Lysias i.41-2 anticipate that their opponents will attack their witnesses. These figures are rather higher than Todd's (1990a:24) claim that "there are only three possible examples."

τούτων γὰρ οἱ μὲν διὰ χάριν, οἱ δὲ διὰ τιμωρίαν, οἱ δὲ διὰ κέρδος ὑποπτεύονται τὰ ψευδῆ μαρτυρεῖν.

> When attacking evidence we must slander the character of the witness if he is a rogue, or examine the evidence to see if it is improbable, or even attack both the witness and his evidence together, collecting together the weakest parts of the opponent's case. And we must examine if the witness is a friend of the man for whom he is giving evidence, or if he has some stake in the matter, or if he is an enemy of the man against whom he is giving evidence, or if he is poor; for in these circumstances witnesses are suspected of giving false evidence, some out of favour, some out of revenge, and others out of profit (1431b33-41).

Given this advice, attacks on witnesses may simply be an attempt to undermine an opponent's case, rather than symptoms of a deeper malaise within the Athenian legal system. Accordingly, the simple occurrence of accusations of perjury is not sufficient evidence for traducing Athenian witnesses. A more systematic analysis is required. For example, we need to know whether the majority of witnesses in the corpus of Athenian forensic oratory did not testify to facts, or expressed support for speakers, or testified to irrelevant issues as a means of expressing support. Similarly, we need to know if most witnesses were partisan supporters rather than independent, and where speakers do appear to be partisan, whether this can be explained by specific circumstances or not.

The most detailed analysis of Athenian witnesses to date that purports to answer these questions is that carried out by Humphreys. Humphreys claims that Athenian witnesses were largely partisan supporters. There are, however, a number of flaws in her analysis. In the first place, it is not clear how Humphreys determined that particular categories of witness were more or less independent. Why, for example, is an official more independent than a bystander or a member of a phratry? Athenian speakers could suggest that members of their phratry and deme appearing as their witnesses were too numerous to have been suborned, which suggests that they could be viewed as independent (Demosthenes lvii.24). A member of a phratry or deme is not of necessity a supporter or a member of a speaker's kin group. Witnesses will testify against fellow demesmen (Demosthenes lii.28). As a result, I do not agree with Humphreys' contention that they fall into the "less independent" category.[11]

In relation to bystanders, speakers could clearly see these as offering proof of their arguments (Demosthenes xlv.13).[12] Another speaker notes that although Athenians

[11] Humphreys (1985:342-4).
[12] Scafuro (1997:42-44).

regularly took acquaintances with them as witnesses to important matters, in unforeseen situations they relied on the testimony of people who they came upon by chance (τοὺς προστυχόντας - Isaeus iii.19), which indicates that bystanders could be seen to be independent. Similarly, Ariston's comments in Demosthenes liv.32 that his witnesses were not acquainted with him and would not therefore have borne false witness for him if they had not seen his suffering, indicates that these bystanders were viewed as independent. Humphreys' claim that witnesses without personal ties to the litigant would be viewed as testifying for payment or to make trouble is not substantiated, and is contradicted by these very passages.[13] Humphreys also hints that bystanders may not have been *real* bystanders as "members of the litigating class would probably be able to find an acquaintance of two in most urban gatherings", which is a bold assumption.[14] It is difficult to avoid the conclusion that Humphreys does not want bystanders to be independent as she is committed to seeing all witnesses as supporters of the litigant.

Another problem is that there is a contradiction between Humphreys' claim that witnesses were largely partisan, and her own analysis, which delivers a fairly large number of apparently independent witnesses. Humphreys identifies, for example, eleven occasions when officials testified. Officials are her most "independent" category. It is not stated how we are to reconcile these issues, unless we assume that Humphreys' thesis is that even the most independent category of witnesses is not to be viewed as independent, but simply less clearly partisan than, for example, members of a speaker's family. In other words, she may be arguing that all witnesses are partisan, but some are more partisan than others.

If this is the case, then partiality needs to be demonstrated. Yet this is exactly what Humphreys does not do. Her sole proof of partiality appears to be the claim that sometimes witnesses are testifying to irrelevant matters, noting that what matters to the speakers "is to show that they are solidly supported by a large body of kin."[15] Yet her claims of irrelevance will not stand closer analysis. The following are worth noting:

1. "In [Demosthenes] 49 *Timotheus* 43 we learn that Timotheus had sent Phrasierides of Anaphlystos, who had been granted citizenship on his proposal and enrolled in his deme...to copy bank records which Timotheus needed for his defence against

[13] Humphreys (1985:333).
[14] Humphreys (1985:331).
[15] Humphreys (1985:324).

Apollodorus. In this case Apollodorus got Phrasierides to witness on his own behalf that he had been given full facilities, a testimony which had little strict bearing on the case but...was probably designed to give the jury the impression that all Timotheus' supporters were deserting him and aiding his opponent."[16]

- Leaving aside for the moment the fact that it is not clear that Phrasierides actually testified, Demosthenes xlix is a suit about loans made to Timotheus and not repaid. Timotheus was likely to cast doubt on the bank records, which is why it is relevant to have witnesses testify that one of his representatives checked the books.

2. "In [Demosthenes] 47 *Euergus* 48 fellow-trierarchs are called to testify that they, like the speaker, had seized property from men who had failed to hand over trireme gear: a clear example of the way in which members of the upper class call on their peers for testimony which has little direct bearing on the case, but indicates solidarity with the litigant and legitimizes his behaviour."[17]

- The speaker had experienced difficulty in getting equipment for his trierarchy from his predecessor and had seized it. His opponent was likely to argue that the speaker's behaviour had been excessive and unwarranted, and therefore it was relevant to note that other trierarchs had experienced the same problem and acted in the same way.

3. "In [D.] *Olymp.* 34-5 witnesses who had initially put in a successful claim for the estate of Comon, which had subsequently been awarded to the speaker's opponent, testified that the speaker had duly handed property over to them (a testimony of little relevance serving mainly to suggest that the speaker had the support of his kindred)."[18]

- The speaker was suing his kindred for the property and was claiming that his half-brother had broken an agreement to share it. It was therefore relevant to inform the jury of the history of the agreement and what had previously been handed over.

4. "Though understandably reluctant to commit themselves on the question of Euthycrates' death, the demesmen were prepared to support the speaker (whose own deme is unknown) with testimony that they did not know of a will of his matrilateral half-brother, Astyphilus, in favour of his opponent, Cleon II (§§ 8-9) and that Astyphilus and Cleon II had never attended deme sacrifices together. This is a typical

[16] Humphreys (1985:330).
[17] Humphreys (1985:334).
[18] Humphreys (1985:340).

case where the content of the witnesses' testimony is of little significance, but their presence in court is intended to convey to the jury that the speaker has the opinion of the local community on his side."[19]

- The speaker was trying to overturn a will in favour of Cleon II and assert his own right to the estate on the grounds of relationship and his closer friendship with Astyphilus. It was relevant to prove that Astyphilus had not had a close relationship with Cleon II as this helped to cast doubt on the legitimacy of the will.[20]

An alternative view of Athenian witnesses has been developed in response to claims that witnesses commonly perjured themselves. This view can be traced as far back as 1827, when claims in the *Quarterly Review* that perjury was common in Athens were derided in the *Westminster Review*.[21] More recently, both Carey and Mirhady[22] have argued that Athenian witnesses did generally testify to facts, and were not simply there to express support for a speaker. This picture certainly gains support from forensic oratory. A speaker in one of Demosthenes' speeches claims that all the jurors know that a witness is someone who has no stake in the matter.[23] Speakers frequently claim that their witnesses have proven that what they are saying is true,[24] and that their opponents' assertions, which are not proved by witnesses, should not be believed.[25] They state that

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[19] Humphreys (1985:344).

[20] There are also methodological problems with Humphreys' analysis. She often appears to confuse what is being testified with the identity of the witness. The identity of the witnesses is in many cases not stated in the speech. The following are all cases in which I believe Humphreys has assumed the identity of witnesses: *Officials* Dinarchus i.51-2; Demosthenes xviii.134; *The 'Professions' and the World of Business Relations* Demosthenes xix.169-70, xxvii.27-8, 46, xxxvii.54, xl.52 (twice), xlix.43, l.13, 56, liii.21; Isaeus ii.34, xi.40-3; Isocrates xvii.40-41; *Bystanders* Demosthenes liii.17-18; *Fellow-Voyagers and Fellow-Soldiers* Aeschines ii.19; Antiphon v.20, 22, 24, 28; Demosthenes xix.162, 163-5, xxxii.13, 19, xxxiv.9-10, 37, liv.3-6; Lycurgus i.19-20; Lysias xx.24-9; *Politicians (Rhetores)* Lysias xix.27; Demosthenes xlii.11, 16; *The Opponent's 'Enemies'* Demosthenes xxxvi.21, xxxix.19, xlii.23, xlviii.34-5, liii.20; Isocrates xviii.52-4; Lysias xiii.66, xxiii.13-14; *Neighbours* Demosthenes xxx.26-30, xxxi.4, liii.16-18, 19-20; *Cult Associates* Demosthenes lvii.46; *Clansmen - Phratry* Demosthenes xxxix.4-5, xliv.44, lvii.19, 46; Isaeus vi.26, xii.3, vii.13-17, ix.33; *Clansmen - Deme* Demosthenes xxxix.4-5; Isaeus ii.36-7; Lysias xvi.14; *Friends* Demosthenes xxvii.19-22, xxviii.12, xxxvi.55, xlviii.3-4, 33, lvii.14; Isaeus i.15-16, 31-2 (twice), viii.15-17; Isocrates xvii.40-1 (twice); Lysias xvii.2, 3.

[21] Anon. (1827:251).

[22] Carey (1994a:184); Mirhady (2002:256).

[23] τίς γὰρ ὑμῶν οὐκ οἶδεν, ὅτι μάρτυρες μέν εἰσιν οὗτοι, οἷς μὴ μέτεστι τοῦ πράγματος (Demosthenes xl.58).

[24] Antiphon v.84, vi.28-9; Demosthenes xxii.22, xxix.7, 40, xxvii.47, xxxiii.29-31, 35, xxxiv.46, xxxvi.7, 13, 25, 35, xxxvii.19, 21, 23, xl.19, 39, 54, xli.19, 25, xlii.17, xliii.39, xlvii.3, xlix.33-4, 49, 65, 69, lii.8, liv.33, lv.12, lvii.17, 19, 24-5, 29-30, 37, 44, 54, 62, 86; Isaeus iii.16, vi.15, viii.6, 29; Lysias vii.42, xiv.3. See also Mirhady (2002:257-8).

[25] Antiphon vi.16-19, 28-9, 30-2, 47; Demosthenes xxviii.2, 5, 23, xxix.37, xxxiii.26, xxxiv.34, xl.20-1, 53-4, 60-1, xliii.30, 41, xlix.39, 45, 56-8, lvii.11-12, 34; Isaeus iii.79-80, viii.14, xii.7-8; Lysias vii.19, 20-3, 43.

jurors will reach their verdict based on the testimony of witnesses to the facts.[26] These passages do not prove that perjury did not occur, but they indicate that it was by no means routinely to be expected that witnesses were partisan, or that they were expected to express support rather than testify to facts, or that jurors would be unwilling to decide based on testimony.

There is little evidence that the Athenians had a sophisticated concept of witness independence. They were aware that people could get their friends to testify for them, and that in such cases the witnesses might be lying,[27] though they were also aware that friends may wish to avoid perjury and therefore were not automatically partisan.[28] It is going too far, however, to claim that the "Athenians preferred witnesses who had had many dealings with the litigants, in the course of which they had developed feelings of loyalty or hostility, to impartial witnesses who had only encountered the litigants occasionally."[29] This assertion is contradicted by the importance Athenian speakers placed on witnesses as establishing the facts of the case, by their attacks on partisan witnesses and by the dearth of clear evidence that apparently independent witnesses were actually partisan.

The Athenians did have their own idea of who the best witnesses were. This was set out in a law on witnesses, cited by Apollodorus but generally overlooked in modern scholarship.[30] Apollodorus claims that Stephanos had testified at Phormio's bidding. "But the laws do not say this, but ordain that a man may testify to what he knows and to matters at which he was present."[31] Speakers regularly introduce witnesses as being either people who know about the matters, or people who were present.[32] Lycurgus i.19 introduces both types of witness together. The fact that witnesses were present was a key characteristic of the testimony at Demosthenes xix.130, xxxvi.24, xxxvii.17, xliii.70,

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[26] Demosthenes xlvii.3; lv.7; lvii.56.
[27] Demosthenes xxix.15, 22-24, lii.17, 22, liv.35-6.
[28] Demosthenes xlix.37.
[29] Humphreys (1985:353-4).
[30] I can find no discussion of this law in such standard works as Christ (1998:25-43), Harrison (1968-71, II:136-47), Humphreys (1985), MacDowell (1978:242-7) or Todd (1993:96-7). It is mentioned by Meier and Schömann (1824:878) and Lipsius (1905-15, II:885, n.77).
[31] οἱ δέ γε νόμοι οὐ ταῦτα λέγουσιν, ἀλλ' ἃ ἂν εἰδῇ τις καὶ οἷς ἂν παραγένηται πραττομένοις, ταῦτα μαρτυρεῖν κελεύουσιν (Demosthenes xlvi.6). The law may also be referred to at Isaeus vi.53 (οἷς μὲν γάρ τις παρεγένετο, δίκαιον, ὦ ἄνδρες, μαρτυρεῖν); see too Demosthenes lvii.4. The view that someone who knew the facts should testify can also be found in the *Rhetorica ad Alexandrum* (1431b20), which tells us that "evidence is an admission voluntarily made by someone who is privy [to knowledge] (μαρτυρία δ' ἐστὶν ὁμολογία συνειδότος ἑκόντος)."
[32] Mirhady (2002:262).

xlvii.40, xlviii.49, lvii.43, Isocrates xviii.8 and Lysias i.29, 43, while speakers stress that their cases are enhanced by witnesses who were present at Aeschines ii.162, Demosthenes xix.40, xli.16, xlvi.6-7, lv.5, Isaeus iii.19-21, v.20, viii.14, Isocrates xx.1, Lysias iii.16, 37 and vii.20. The testimony of people who knew facts was important in bolstering the speaker's cases in Aeschines i.77-78, Demosthenes xxxiii.16, lvii, and Isaeus vii.10-11, viii.6, 14 and Lysias xvii.2. On some 26 occasions witnesses are identified only as those who were present,[33] while on eight occasions they are identified only as those who know.[34] Witnesses may also be identified as "those who saw" (Demosthenes xlvii.40) or "those who heard" (Demosthenes xlix.33, Lysias xii.47). Though not identified during the speech, these witnesses could be identified by their testimony. At Demosthenes xxxv.14 the speaker introduces the testimony of "those who were present", and four men are then identified in the testimony preserved in the text.

A witness who was present or who had knowledge was not of necessity independent. The Athenians would regularly take people with them as witnesses to important events, such as repayments or loans, in order to maximise their chances should a dispute arise.[35] On these occasions they would often take their "relatives and the people with whom they were most intimate" (τοὺς οἰκειοτάτους καὶ οἷς ἂν τυγχάνωμεν χρώμενοι μάλιστα - Isaeus iii.19).[36] Such witnesses may not be independent. Apollodorus, for example, presents a deposition witnessed by several of his cronies, including Demosthenes and Deinias, about the challenge he issued to Stephanus (Demosthenes lix.123). Although the independence of the witnesses here is in doubt, it should be noted that the deposition is nonetheless factual and that the witnesses are not expressing support.

This evidence indicates that Athenians placed weight on witnesses who had been present or knew about issues, and that these may have been the key factors jurors examined in determining the value of witnesses. Clearly, speakers could try to undermine their opponent's witnesses by claiming they were lying, though they could

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[33] Demosthenes xix.162, 168, xxvii.41, 42, xxix.12, xxxiv.11, xxxvi.10, 16, 24, xxxvii.17, xli.6, xliii.31, xlviii.3, 49, l.56, lii.16, 31; Isaeus ii.34, v.6, 18-20, vi.7, 37; Lysias iii.14, 20, xvi.14, xx.28.

[34] Aeschines i.50; Demosthenes liii.19; Isaeus ii.37, viii.42, ix.20, 29; Lycurgus i.20, 23.

[35] Demosthenes xxx.20-1, xxxiv.28.

[36] οἰκεῖος has several overlapping meanings, including "relative," "friend" or "intimate" (Goligher and Maguiness 1961:169). At times the choice of which word to use in translation is arbitrary. It is used several times in Isaeus iii, and clearly refers to relatives at iii.34, 73; elsewhere in the speech we cannot be sure whether we should translate as friends or relatives (iii.13, 23, 24, 27). Given iii.34, 73 I have translated "relatives" here.

also claim that their opponents simply did not have relevant witnesses.[37] Issues such as a witness's position or status may have been valuable in proving the respectability of a speaker's witnesses, though if they were really that important one would expect them to be discussed frequently. This simply is not the case, and when speakers mention witnesses' positions or status it is either because it is relevant to the discussion (for example, the witness was an official and the testimony is about matters in which they were involved) or it is presented incidentally. Table 6.1 shows that in the vast majority of cases speakers do not identify their witnesses, which is odd if their status was of such importance to the case.[38] As Mirhady notes, Humphreys' "hierarchy of credibility...seems a largely modern construct. The relative personal anonymity of the witnesses and the emphasis speakers put on their knowledge reflect a democratic view that Athens' courts were blind to issues of status except to the extent that its witnesses were, like the litigants who came before them, free men."[39]

The view that Athenian witnesses were not partisan but appeared to testify to facts does seem to have a lot of support from forensic oratory, but, like the opposing view that witnesses were partisan, it also needs to be tested against the full corpus of forensic oratory. In what follows I will re-examine the evidence for Athenian witnesses, trying to establish the identity of the witness (where possible) and the issues to which they testified. The latter allows us to evaluate whether witnesses testified to facts or simply expressed support. The former allows us to evaluate the degree to which speakers brought forward witnesses who were not independent and likely to lie for them. My test for independence is the presence of any indication that a witness may have had a stake in the outcome of the case, or a relationship with the speaker. If such an indication is present, the witness is not clearly independent.

Discussion of the Evidence

Table 6.1 lists all the occurrences I have found of witness statements in our sample of forensic oratory. There are 404 statements in all, from all orators, and from 72

[37] See for example Demosthenes xxviii.5, xxix.37, xxxiii.26.
[38] This point is also made by Mirhady (2002:262-3).
[39] Mirhady (2002:265).

speeches.[40] All of the speeches by Isaeus are represented in the sample, and most (37) of Demosthenes' speeches; About half of Lysias' speeches (16) are represented. The reasons for the variation are unclear, and may not be significant. The total number of witness statements would be higher if some of the speeches that we have only in fragments were preserved in their entirety, as in several fragments speakers mention earlier witness statements which have not been preserved (Isaeus xii.3, 8; Isocrates xvi.1, xx.1; Lysias xxvi.8), while some of our speeches are *synegoriai* and witness statements were presented in speeches by other speakers on the same side in the trial (Demosthenes xxii.23).

I have not included notations for *synegoroi* in the table, nor occasions when speakers called on witnesses to testify or swear the *exomosia* (Aeschines i.68; Demosthenes xlv.60 and possibly xlix.20; Isaeus ix.18). On these occasions testimony may be read out, but it is unlikely that the speakers expect the witnesses to testify; indeed, they may simply be calling them to undermine their credibility (if they are testifying for their opponent) or to give an air of authenticity to spurious claims. Apollodorus, for example, raises the issue of an important deposition which he claims Stephanus stole during a hearing before an arbitrator, and challenges Stephanus' friends to swear to the testimony he has drafted or swear the *exomosia* (Demosthenes xlv.60). As Apollodorus presents no other evidence for this missing deposition, and does not say what it was nor why it was important, his *exomosia* here may be purely tactical. Aeschines (i.67-9) used similar tactics to undermine Hegesandros, indicating that he was calling him to demonstrate what sort of man Timarchus' way of life produces.

All of the 404 depositions, as far as can be determined from the surrounding context, were made to attest to facts. The facts could at times be specious issues that were introduced to bolster a case, such as Demosthenes' (xxix.53-4) use of witnesses to prove a challenge he made to Aphobus, which was designed to cast his opponent in a poor light. Speakers could also omit witnesses to crucial facts, especially if they were trying to conceal something. Apollodorus, for example, presents numerous witnesses in his suit against Polycles dealing with the various refusals and challenges made

[40] My figures are somewhat different from Todd's (1990a:39). Todd also found 404 statements, but I have rather different figures for some orators. The comparative figures are (Todd's figures second): Antiphon 10 (vs 8), Andocides 7 (vs 9), Lysias 47 (vs 49), Isaeus 67 (vs 69), Lycurgus 4 (vs 5), Hyperides 2 (vs 1), Aeschines 16 (vs 18) and Demosthenes 240 (vs 234). As Todd does not provide details on his figures I cannot determine why my data are different. Some guesses can be made; for example, I suspect that

(Demosthenes li), but does not provide any witnesses to one of the key points of the case, which he tries to obscure - the fact that the general Timomachus appears to have ordered him to continue his trierarchy. Overall, there is not a single testimony that appears to have been a simple expression of support for the main speaker, which casts doubt on one of Todd's and Humphreys' main claims.

This does not mean that people did not appear in court simply to express support for a speaker. The *synegoria* of the Boeotians and Phocians at Aeschines ii.143 has all the appearances of being such an expression of support. Rubinstein has suggested that one of the tasks of defence *synegoroi* may have been to display solidarity with the speaker, and that some *synegoroi* may have been little more than a presence in court, though she also argues that their verbal arguments were more important in court than their presence.[41] *Synegoroi* were procedurally and legally distinct from witnesses, however, and it is significant that expressing support appears to have been limited to *synegoroi* who were not bound by legal restrictions such as suits for false witness or requirements to take oaths.

Of greater interest is the fact that 75 of the 404 depositions were about issues that I have argued could be deemed "nonlegal" or irrelevant in Athenian courts. Most of these (56) were witnesses to crimes or poor services which speakers claim were performed by the opponent or his associates[42] and 19 were witnesses to the speakers' liturgies or services.[43] Nonlegal testimony could be included along with legal testimony in a single speech, for example in Aeschines i, Andocides i, Demosthenes xix, xxxiv, xxxvi, xxxvii, xl, xlii, xliii, xlvii, xlviii, l, liv, lviii, lix, Isaeus ii, v, vii, viii, Isocrates xviii, and Lysias xxxi. In this regard it fits the pattern regularly observed in Chapter Five, where nonlegal arguments supplemented the legal arguments presented in the speech.

In nine speeches nonlegal testimonies were dominant or, indeed, the only testimonies presented (Demosthenes xviii, xix, xxi, xxv; Lysias xii, xiii, xvi, xx, xxi). In Demosthenes xviii, xix and xxv there is comparatively little testimony, and issues

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Todd's figure for Aeschines is greater than mine because he included the *exomosia* at i.68 and the *synegoria* of the Boeotians and Phocians at ii.143.

[41] Rubinstein (2000:149-50).

[42] Aeschines i.50, 66, 115, ii.68; Andocides i.127; Demosthenes xviii.135, 137, 146, xix.200, xxi.93, 107, 121, 168, 174, xxv.58, 63, xxxiv.37, xxxvi.40, 48, 55, 56, xl.33, 35, xlii.25, xliii.70, xlvii.52, 61, 66, 67, 77, 82, xlviii.55, l.68, liv.36, lviii.33, 35, 35, lix.34, 48; Hyperides iii.33, 34; Isaeus iii.37, v.27, 38, viii.42, 46; Isocrates xviii.55; Lysias xii.42, 47, 61, xiii.64, 66, 68, 79, 81, xxxi.19.

[43] Aeschines ii.170; Demosthenes xviii.267, xix.168, 170, 236, xxxiv.39, xxxvi.56, 56, xxxvii.54; Isaeus ii.37, vii.36; Lysias xvi.13, 14, 17, xx.25, 26, 28, 29, xxi.10.

witnessed form a relatively small part of the overall speech. In Demosthenes xxi the testimony forms part of Demosthenes' sustained attack on Meidias, including the story of Straton the arbitrator, all of which I have classified as irrelevant. Similarly, although much of the argument in Lysias xii and xiii is relevant, there are sections containing attacks on opponents which are classed as irrelevant, and witness testimony in the speeches is concentrated in those sections. Lysias xvi, xx and xxi are unusual speeches in that, while the speakers' arguments do rely in part on their legal cases, they also rely to a large degree on their public services. Witnesses are used to prove the public services.

The occurrence of nonlegal testimonies backs up the comments made earlier that, although speakers might commonly label issues such as crimes or public services irrelevant, they could still be used in a speech and ultimately the only means to stop them being used was the displeasure of the jury. Athenian juries seem to have been generally willing to allow speakers to make their case, rather than to prevent particular arguments being made (leaving aside unusual cases such as Demosthenes xxxvi). The fact that witnesses could be presented to prove apparently irrelevant issues indicates that speakers could probably count on being able to discuss them, and that juries rarely intervened.

The majority of testimonies were about issues that were clearly relevant to the case. This does raise the issue whether the nonlegal testimonies were presented by supporters of the speakers, or by enemies of their opponents, and thus by partisan witnesses. Unfortunately, we have good evidence on the identity of the witnesses for only 16 of the nonlegal testimonies: Aeschines i.66, 115, ii.68, 170, Demosthenes xxv.58, 63, xliii.70, xlvii.82, xlviii.55, lviii.33, 35, 35, lix.34, 48, Hyperides iii.34 and Isaeus vii.36. Some of the speakers appear to be independent. For example, Aeschines calls Glaucon of Cholargus to testify to Timarchus' abuse of Pittalacus (i.66), and fellow soldiers and the *strategus* Phocion to testify to his own valour in combat (ii.170) and in a third case he calls Amyntor to testify to Demosthenes' support for the Peace of Philocrates (ii.68). The speaker of Demosthenes xliii.70 called neighbours to testify that Sositheus showed them that olive trees had been uprooted on Hagnias' farm. The speaker of Isaeus vii.36 calls tribesmen to witness his generosity as a gymnasiarch. These appear to be witnesses who knew about the matters in question, or were present. At other times, though the witnesses are named, we know nothing else about them and cannot judge whether or not

they were independent (Demosthenes lviii.33, 35, lix.34, 48). The speaker of Demosthenes lviii.35 also calls Hyperides and Demosthenes to testify to Theocrines' sycophancy, but alleges they are part of a cabal against him. They certainly do not appear to be independent witnesses. On three occasions speakers call witnesses who clearly were enemies of their opponent (Demosthenes xxv.58, 63, xlvii.82, and possibly also Aeschines i.115), while Demosthenes xlviii.55 and Hyperides iii.34 are depositions by relatives of the opponent (and of the speaker as well in Demosthenes xlviii.55). The enemies and relatives are clearly not independent, though they could also be viewed as witnesses who knew about the matters. Overall, though, there is little support even for the view that nonlegal issues will have been supported by witnesses who were partisan supporters of the speaker.

Generally, it is not possible to identify witnesses. Altogether, in 220 of the testimonies listed in Table 6.1 it is not clear who the witnesses were. A further 26 are identified only as "those who were present", eight as "those who know", two as "those who heard" and one as "those who saw". On occasions we may make some reasonable guesses about the identity of these witnesses; Humphreys may be right, for example, in identifying the witnesses in Antiphon v.20-28 as probably fellow-voyagers, or the witnesses in Lysias xvi.14 as the men whose expenses the speaker had paid.[44] It is methodologically unsound, however, to found an argument about the independence or partisanship of witnesses on cases where we do not know the facts for certain. Thus in the case of Lysias xvi, for example, the witnesses may be the lucky recipients of the speaker's largesse, but they may also be friends whom the speaker took with him as witnesses, or bankers, or commanders, or bystanders.

Given this degree of uncertainty, I will restrict my analysis of the identity of witnesses to those cases where they are clearly identified in the speeches. As the resulting sample is much smaller, it should not be taken as representative of the entire sample of 404 testimonies, or of the larger body of Athenian witnesses in general. It is always possible that the identities of the larger body of unknown witnesses may have been concealed for tactical reasons, so the data are suggestive, but no more.

In Table 6.1 there are 55 witnesses whom I would judge to have some stake in the matter, or to have a relationship with the speaker or his opponent. In 18 cases the

[44] Humphreys (1985:330, 335).

witnesses are relatives of the speaker, in five relatives of his opponent and in three relatives of both.[45] Relatives of both parties testify in inheritance suits where the litigation is being conducted within a family. In 12 cases they are friends of the speaker and in three cases friends of his opponent (there is some overlap between relatives and friends as both may testify together at the one time).[46] On 11 occasions those clearly enemies of the opponent testify, often men who have previously opposed him in court or who claim some wrong.[47] On four occasions speakers claim they are calling their own enemies to testify;[48] on these occasions the witnesses are not independent, but if their testimony supports the speaker's case it has the effect of heightening its value as factual support. On two further occasions speakers call witnesses that they claim are friends of both themselves and their opponent;[49] in this case, again, the witnesses are not independent but it seems that speakers expect the jury to believe that their mutual friendship makes their testimony more likely to be factual. Finally, there are two occurrences that I have not included in the 55; Apollodorus twice calls staff from his brother's bank (Demosthenes xlix.33, 43) to testify about his father's dealings with Timotheus. Although the Athenians may have viewed bankers as having a reputation for honesty (Isocrates xvii.2), Apollodorus makes it clear that he retained some control of the bank (xlix.43-7), so the staff could not really be classed as independent. Although a jury may have viewed them as such, I have excluded them.

Relatives could be called as witnesses in a variety of cases, including impiety cases (Andocides i.18, 69) or *dikai blabes* (Demosthenes xlviii.55), but they are most commonly called in cases involving inheritances, such as *diadikasiai* (or resulting *dikai pseudomarturion)* or *dikai epitropes*. Speakers call their relatives in such cases nine times.[50] Relatives are also called in another case involving property, a *diadikasia* over

[45] Relatives of the speaker: Andocides i.18, 68-9; Demosthenes xxvii.17, xlii.9, xliii.35-7, xlv.55, xlix.42, l.28, lvii.21, 22, 38, 39, 43; Isaeus vi.11, viii.13, ix.9, 19, 30. Relatives of the opponent: Aeschines i.104; Hyperides iii.34; Isaeus iii.13, 56; Lycurgus i.24. Relatives of both: Demosthenes xlv.55, xlviii.55; Lysias xxxii.18.

[46] Friends of the speaker: Demosthenes xlii.9, l.28; Isaeus viii.13, 17, ix.4, 9, 30; Lysias i.29, 43, xix.23, 23, 59. Friends of the opponent: Aeschines i.50; Demosthenes xxx.9, xlv.19 and possibly xix.200 (if Diophantos was compelled to testify).

[47] Enemies of the opponent: Demosthenes xxv.58, 63, xlvii.82, lii.21, lviii.9, 21, lix.54, 84, and possibly xlii.29; Lycurgus i.20; Lysias xxiii.4, 8 and possibly 14 (if Aristodicus testified) and Aeschines i.115 (it is not clear if Timarchus is an enemy of the men who bribed him).

[48] Enemies of speaker: Demosthenes xxvii.17 (co-guardians), lvii.14 (the men who wronged him), lviii.35, 43 (members of the plot against the speaker).

[49] Demosthenes xli.18; Isocrates xvii.31-2.

[50] Demosthenes xxvii.17, xliii.35-7, xlv.55; Isaeus vi.11, viii.13, ix.9, 19, 30; Lysias xxxii.18.

an *antidosis* (Demosthenes xlii.4, 9).[51] In addition, in one case involving citizenship the speaker calls relatives on five occasions (Demosthenes lvii.21, 22, 38, 39, 43). In such disputes, relatives are clearly amongst those in the best position to know the details, so although the witnesses are not independent it is difficult to see who else the speakers could have called. Significantly, in Demosthenes lvii the speaker backs up his relatives with friends and members of his phratry and deme, and is at pains to claim they are independent (Demosthenes lvii.24). Speakers in inheritance disputes similarly present members of their phratry and deme along with their relatives (Isaeus vi.11, viii.13, 17, 20, ix.9, 19, 21, 30, Demosthenes xliii.35-7). Even where relatives testify in cases that do not involve citizenship or property, they testify to intimate family details that they could be best expected to know (e.g. Andocides i.69). Accordingly, relatives fit the requirements of the law on witnesses in being people who knew the facts.

Speakers also presented friends in a variety of disputes, such as homicide cases (Lysias i.23, 29, 41-3). They too often testify in cases involving property, including details on loans and payments (Lysias xix.22-3, 59, Demosthenes xlii.9), along with inheritance disputes (Isaeus viii.13, 17, ix.4, 9, 30). Friends, like relatives, appear to testify to intimate details that they could be expected to know and thus fit the requirements of the law on witnesses. For example, the witnesses in Isaeus viii.13, 17 and ix.4, 9, 30 testify to details of family activities associated with inheritances, while the witnesses in Lysias xix.23, 23, 59 testify to details of payments and loans made to them. It is always possible that these witnesses are lying, and indeed we may be suspicious of the testimonies in Lysias xix and Demosthenes l.28 since they are relatively important for the speakers' cases. In all of the cases where relatives and friends testified, however, they testified to facts relevant to the case and do not appear to have appeared simply to express support for the speaker.

There are 81 occasions listed in Table 6.1 when speakers presented apparently independent witnesses. These include 16 occasions when they presented members of their, or their family's, phratry, deme or tribe,[52] 14 when they presented current or

[51] According to Demosthenes xxviii.17 and Isocrates xv.5, an antidosis was resolved by a *diadikasia*.
[52] Demosthenes xliii.35-7, xliv.44, lvii.23, 23, 25, 40, 43, lviii.15; Isaeus ii.16, iii.56, 76, 80, vi.11, viii.20, ix.9, 21, and possibly vii.36 (the identification is not certain).

former officials,[53] nine when they presented military commanders,[54] five when they called on groups of neighbours,[55] three when they rolled out representatives from outside Athens,[56] three when they summoned arbitrators,[57] three when they called on follow-soldiers or voyagers,[58] three when they used other men's demesmen,[59] a doctor who is called twice,[60] bystanders (Demosthenes liv.9), tenants (Lysias vii.10), men who rented an estate (Lysias xvii.9), men who purchased property (Demosthenes xxxvii.17), teachers (Isaeus ix.28), members of the Company of Heracles (Isaeus ix.30), ambassadors (Demosthenes xix.176), a goldsmith (Demosthenes xxi.22), bankers (Demosthenes xxxvi.4), a man who lent money (Demosthenes xxxv.23), people who testified because they held contracts or wills (Demosthenes xxxv.14, xlviii.11, 47), and a range of people identified simply by name rather than occupation, such as the various people who testified for Apollodorus in the trial of Neaira (Demosthenes lix.23, 25, 28, 32, 34, 48). These witnesses are identified as independent because, from the evidence of the speech, they cannot be seen clearly to have a stake in the case or a relationship with either party, and thus it is possible that the jury may have considered them independent.

The occupations of the witnesses are not a sound guide to their independence or partiality. The speaker of Isaeus ii.34, for example, suggests that the arbitrators in his previous case were friends of his opponent, which contrasts with the apparently independent arbitrators mentioned above. A jury may have considered the ambassadors summoned by Aeschines (ii.46, 55, 107, 127) friends of that speaker, whereas the ambassador presented in Demosthenes xix.176 appears independent. An Athenian's friends and enemies were likely to include men who were currently, or had been, officials of some sort. As a result, it is rather misleading to focus on witnesses' occupations.

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[53] Andocides i.46 (*prytaneis*), 112 (herald of *Boule* and Assembly); Demosthenes xix.32 (member of *Boule*), xxv.58 (*poletai*), xlvii.24 (magistrate), 27 (*apostoleis* and archon), 44 (member of *Boule*), l.10 (*apostoleis* and those who collected the *stratiotika*), lviii.8 (secretary of magistrate), 9 (port overseers); Isocrates xviii.8 (members of *Boule*); Lysias xvii.9 (the previous year's magistrates and the current *nautodikai*), xxii.9 (magistrate), xxxi.16 (those appointed to arm the townsmen).

[54] Aeschines ii.86 (*strategoi*), 170 (*strategus*); Demosthenes xxiii.168 (trierarchs), xlvii.24 (trierarch), 48 (trierarchs), l.28 (pentecontarch), lix.40 (polemarch); Lysias xiii.79 (taxiarch), xvi.13 (commander).

[55] Demosthenes xliii.70, lv.21; Isaeus iii.12; Lycurgus i.20; Lysias xvii.9.

[56] Demosthenes xl.37 (Mytileneans); Lysias xxiii.4 (Deceleans), xxiii.8 (Plataeans).

[57] Demosthenes xxv.58, xli.28, lix.47.

[58] Demosthenes xxxv.20, 33-4; Lysias xxi.10.

[59] Demosthenes xxxix.24, lix.61; Isaeus vii.28.

[60] Demosthenes liv.10, 12; Pasiphon at Demosthenes xxx.34 has been identified as a doctor (Humphreys 1985:327), though he is described simply as someone who cared for Aphobus' wife.

The evidence shows that, of clearly identifiable witnesses, rather more appear to have been independent than partisan. The data should not be pushed too far, however. As noted above, we cannot identify who witnessed most nonlegal testimonies, and as most such testimonies are about an opponent's crimes or a speaker's services it is always possible that some of these witnesses were enemies of the opponent or friends of the speaker (though as some of those whom we can identify appear to have been independent it should not be assumed that all of the unidentified witnesses would have been partisan). Similarly, in some cases it seems likely that the witnesses could have been people the speaker took with him, to witness a challenge, for example, or a request. Accordingly, it is probable that partisan witnesses are underrepresented in the sample.

It is also possible that witnesses were only identified because speakers wished to draw attention to some feature about them. As noted above, often speakers simply identify witnesses as those who were present or who know. When they identify relatives, friends, members of phratries or demes and officials, they seem to be identifying these witnesses because they are in a position to know the facts. As a result, it is always possible that many of the witnesses who are not identified may have been in less of a position to know the facts, or may not have been independent. It is impossible to be sure on the issue, however. What is clear is that there seem to be fairly strong grounds for identifying both partisan and independent witnesses in Athens. Significantly, partisan witnesses in general appear to be people who knew facts or were present. There is no real evidence that partisan witnesses appeared simply to express support, and as a result it would be difficult, on the basis of our available evidence, to claim that partisan supporters were more common at Athens than independent witnesses. Given this result, and the fact that all witnesses appear to have testified to facts, it is most unlikely that the majority of Athenian witnesses can be viewed as partisan supporters of a speaker. Accordingly, there is no clear evidence that perjury was likely to have been unusually common at Athens.

Other Evidence

Scholars have tended to concentrate on the witnesses who appeared in Athenian courts. As some have noted, however, witnesses were only one of the kinds of evidence that

could be produced in court.[61] As noted in Chapter Two, in his *Rhetoric* Aristotle (1355b35-56a4) identified witnesses, tortures, contracts, oaths and laws as "artless" or "inartificial" proofs. Artless proofs belonged explicitly to forensic oratory (*Rhet.* 1375a23-4).

Forensic oratory, in fact, draws on a wide variety of evidence, though all forms are similar in that they might be called "documentary" proof - they are derived from written sources, such as laws, decrees, challenges, oaths, contracts or the like. Witness testimonies also began to be written down during the fourth century BC, but the distinction was that witnesses had to appear in court and signify that they accepted the written testimony.

The "documentary" proofs speakers could produce included the charges in the case,[62] contracts,[63] leases (Demosthenes xlv.31), letters,[64] wills,[65] challenges,[66] oaths,[67] *apophaseis*,[68] *diallagai*,[69] *diamarturiai*,[70] oracles,[71] inscriptions,[72] *apokriseis*,[73] verses,[74] curses,[75] *grammata* (Demosthenes xli.10), *gnoseis* (Demosthenes xxxvi.16), *antilexeis* (Demosthenes xxxix.38), claims at an *anakrisis* (Isaeus vi.16) and entries in customs books (Demosthenes xxxiv.7). All of these were produced as evidence to support claims in the speakers' cases. Most commonly, however, speakers produced decrees (Table 6.2) or laws (Table 6.3).

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[61] Allen (2000:175); Biscardi (1970:232); Gernet (1955:67); Scafuro (1997:53); Todd (1993:59-60). See generally Harrison (1968-71, II:147-53).

[62] Demosthenes xviii.53 (*graphe paranomon*), xxxii.23 (*paragraphe*), xxxiv.16, 17 (*paragraphe*), xxxvii.22, 25, 26, 28, 28, 32 (*enklema*), xxxviii.14, 16 (*enklema*), xxxix.38 (*enklema*), xlv.46 (*antigraphe*), lviii.7 (*phasis*), 36 (*graphai*), Isaeus v.2, 4 (*antomosiai*).

[63] Aeschines i.115; Demosthenes xxxiv.7, xxxv.10-13, 37, xxxvi.4, lvi.7, 36, 36, 38; Hyperides iii.12; Lycurgus i.115.

[64] Aeschines ii.90, 128; Demosthenes xviii.39, 77-8, 156-7, 212, 221, xix.38, 40, 51, 187, xxiii.115, 159, 160, 161, 161, 161, 162, 174, 174, 178, 178, 183; Dinarchus i.27; Isocrates xvii.52.

[65] Demosthenes xxxvi.7, xlv.28; Isaeus vi.7.

[66] Aeschines ii.127; Demosthenes xxix.21, xxx.36, xxxvi.4, 7, 40, xxxvii.27, 43, xl.44, xlii.23, xlv.61, xlviii.34, liv.40, lv.27, 34, lvi.17, lix.124; Isaeus vi.16; Lycurgus i.28.

[67] Andocides i.90-1; Demosthenes xix.130, xxiv.149-51, xlix.42, lix.78; Isaeus iii.7; Isocrates xviii.20; Lycurgus i.77.

[68] Demosthenes xlii.25, 26, 27.

[69] Demosthenes lix.47, 71.

[70] Isaeus iii.7; Demosthenes xliv.45.

[71] Aeschines iii.112; Demosthenes xix.297, xxi.52, 53, xliii.66; Dinarchus i.78, 98.

[72] Aeschines iii.190, Demosthenes xviii.289, xix.270; Dinarchus ii.25. To avoid confusion, I am simply including here inscribed epigrams, epitaphs or judgements, rather than laws or decrees. Where a speaker was presenting a law or decree inscribed on a stele, they might indicate that at the time (e.g. Andocides i.96; Lysias i.30).

[73] Demosthenes xviii.166-7, 214.

[74] Demosthenes xix.247, 255-6.

[75] Demosthenes xix.70; Dinarchus i.47.

Decrees are cited 100 times in 18 speeches from nine orators (no decrees are cited by Antiphon).[76] They are naturally concentrated in *graphai paranomon* or *graphai nomon me epitedeion thenai* since such trials would not be possible without discussing decrees (Aeschines iii, Demosthenes xviii, xx, xxiii, xxiv), but occur in a variety of cases, including Lysias' *apagoge* against Agoratus (xiii) and Demosthenes *euthyna* against Aeschines of *parapresbeias* (xix), a *dike blabes* (Demosthenes l), a *graphe xenias* (Demosthenes lix), *dikai pseudomarturion* (Demosthenes xlvii, Isaeus vi), *endeixeis* (Andocides i, Demosthenes xxv, lviii), an *eisangelia* (Lycurgus i) and an *apophasis* (Dinarchus i). Given this diversity, it appears that the concentration of decrees in *graphai paranomon* may not be significant. The subject matter of the trial may be more significant, in that if it involved discussion of honours voted by the *demos* or allies, or resolutions condemning individuals, speakers would cite decrees. Similarly, if the trial occurred early in the fourth century and related to events under the Thirty speakers would cite the Amnesty decree (Andocides i, Isocrates xviii).

Laws are cited 135 times in our corpus, and come from 44 speeches by 7 orators (no laws are present in the preserved works of Antiphon, Dinarchus and Isocrates). A further law may have dropped out of the preserved text of Demosthenes l.57, as the speaker states that he will produce laws but no notation for any laws is present. Laws are spread across a variety of procedures, including private and public actions. The majority of our sample (94) comes from the Demosthenic corpus, and Isaeus is a long way behind with 15 speeches. Laws were produced in 27 (28 if we include Demosthenes l.57) of the speeches attributed to Demosthenes, which is a comfortable majority of speeches attributed to him. Some 35 laws in the Demosthenic corpus come from four *graphai paranomon* or *graphai nomon me epitedeion thenai* (Demosthenes xviii, xx, xxiii, xxiv), confirming the importance of legal analysis in these procedures. Otherwise, laws are distributed across a wide variety of procedures in the Demosthenic corpus, including a *euthyna* (Demosthenes xxi), a *dike epitropes* (Demosthenes xxvii), *dikai pseudomarturion* (Demosthenes xxix, xlvi, xlvii and xliv), *paragraphai* in *dikai emporike* (Demosthenes xxxii, xxxiii, xxxiv, xxxv), *paragraphai* in *dikai blabes* (Demosthenes xxxvi, xxxviii), a *paragraphe* in a *dike metallike* (Demosthenes xxxvii), a *dike proikos* (Demosthenes xl), *diadikasiai* (Demosthenes xli, xlii, xliii), *dikai blabes* (Demosthenes xlviii, plus l.57), a *dike arguriou* (Demosthenes lii), a *dike aikeias*

[76] The data include three decrees referred to in the text as *dogmata* (Demosthenes xviii.154, 155, xxv.63).

(Demosthenes liv), an *ephesis* arising out of an *apospephisis* (Demosthenes lvii), an *endeixis* (Demosthenes lviii) and a *graphe xenias* (Demosthenes lix). This indicates that speakers could regularly present laws in most types of procedure.

Only four speeches by Lysias contain laws, which is unusual as he is the only orator other than Demosthenes to have a reasonably large sample of speeches attributed to him. It is possible that the relative scarcity of laws in the Corpus Lysiacum may reflect a variety of factors. In part, it may be due to the larger number of speeches in that Corpus in which factual, rather than legal, issues appear to be most important, notably the several *dokimasiai*, *apographai*, *euthynai* and *eisangeliai* in the Corpus. It may also reflect the fact that some of the speeches are fragmentary (Lysias iv, v, vi, xviii, xxi, xxxii), or were *synegoria* following earlier speeches in which legal issues may already have been dealt with (Lysias xv, for example, which contains no laws as evidence, was delivered by another speaker in the same case as Lysias xiv, which does contain laws).

Laws were produced as evidence to support claims made by speakers. In presenting laws, speakers regularly link the law to their claims that their opponent has broken a law. Taken together with witnesses and decrees, they show that the emphasis in presenting evidence was on proving facts, rather than simply expressing support for a speaker.

Both decrees and laws could be produced to support irrelevant arguments.[77] Eight decrees were produced in such contexts, as were 11 laws.[78] In the *Crown* case Demosthenes, for example, produces decrees to support his claims that disasters for Athens that could be laid at Aeschines' door included the destruction of Phocis (xviii.37-8) and the Amphictyonic War (xviii.154, 155 and see 143-4, 158-9). Aeschines (ii.170) produced a decree about his martial deeds. The speaker of Hyperides iii.33 produced both laws and a decree to illustrate Athenogenes' crimes at Troezen, while the speaker of Isaeus vi.48, 50 produced both laws and a decree to illustrate his claim that his opponents were guilty of impiety. Laws were also produced to support irrelevant legal claims, such as opponents trading grain to cities other than Athens (Demosthenes

[77] Foxhall and Lewis (1996:6); Scafuro (1997:53).
[78] Decrees: Aeschines ii.170, Demosthenes xviii.37-8, 154, 155, xx.44; Dinarchus i.27; Hyperides iii.33; Isaeus vi.50. Laws: Demosthenes xx.153, xxi.94, 113, xxxiv.37, xxxv.51, xliii.71, xlvii.73, 77. lix.87; Hyperides iii.33; Isaeus vi.48.

Chapter Seven Pity in Athenian Courts

In Chapter Two, I noted that Plato and Xenophon, in their versions of Socrates' defence, both made Socrates castigate the "normal" practice in Athenian courts, whereby defendants make appeals for pity (Plato *Apol.* 34c, 35a-c; Xenophon *Apol.* 22). Plato refers to people begging and supplicating the jurors with many tears, bringing up their children so that they may be greatly pitied, and many other friends and relatives.[1] He goes on to state that such acts are unjust, because the juror does not sit to dispense favours but to judge according to the laws (*Apol.* 35c). Plato's comments were instrumental in convincing early modern scholars that Athenian juries judged on emotional grounds rather than facts and law. In this chapter I will consider how realistic this influential picture actually may be.

There are numerous references in ancient literature to appeals for pity in Athenian courts. The Old Oligarch (i.18) claimed allies had to wait outside courts and seize jurors' hands as a suppliant as they entered, while Aristophanes also joked about litigants supplicating jurors and begging for pity (*Wasps* 555-56). Later, in the mock trial scene in the *Wasps*, Bdelycleon delivers an appeal to pity the dog (967-70, 975-78) which includes bringing on his puppies. Phryne was also seen to have gained her acquittal through supplicating the jurors (Poseidippus *Ephesia* Fr. 13 [PCG]). In later times, Plutarch (*Per.* 32) would describe Pericles getting Aspasia acquitted by bursting into tears during her trial.

Pity has also received a fair degree of discussion in modern literature. Earlier scholars included appeals for pity among the battery of complaints that were brought against Athenian courts, claiming, after Plato, Xenophon and Aristophanes, that such appeals were nonlegal and designed to pervert the course of justice.[2] More recent scholars still identify them as one of the nonlegal aspects of Athenian courts.[3]

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[1] ὁ μὲν καὶ ἐλάττω τουτουὶ τοῦ ἀγῶνος ἀγῶνα ἀγωνιζόμενος ἐδεήθη τε καὶ ἱκέτευσε τοὺς δικαστὰς μετὰ πολλῶν δακρύων, παιδία τε αὑτοῦ ἀναβιβασάμενος, ἵνα ὅ τι μάλιστα ἐλεηθείη, καὶ ἄλλους τῶν οἰκείων καὶ φίλων πολλούς.

[2] Goldsmith (1784, I:379),Young (1786:196-8) and Gillies (1792, III:132-3) discussed pity in relation to the trial of Socrates, showing the influence of Plato's depiction of events. Abbott (1891:261) and Bonner and Smith (1930-38, II:22-4) also highlighted the nonlegal nature of appeals for pity. Other early authors did not dwell on pity in particular, but generally condemned the Athenian populace and juries for being "impassioned" - Ralegh (1820:94); Swift (1701:93-8); Montagu (1760:85); Goguet (1775, III:36-7); Tucker (1781:224); Bisset (1796:83); de Mably (1796, IV:65, 79-80); Mitford (1818, V:14, 88); Keightley (1839:166); Lytton (1874:450-1); Headlam (1891:37, 151-2).

[3] Bonner and Smith (1930-38, II:22-24); Wolff (1969:8); MacDowell (1971:258); Adkins (1972:122); Carey (1994c:33); Allen (2000:148-49).

There have been some important studies by Dover, Brinton, Johnstone and Konstan. Brinton and Dover noted that there are two aspects to pity. It is an emotion, but also an act - one pities another and the action arising from the feeling is mercy or compassion.[4] Both aspects underlie the impact of an appeal for pity in forensic oratory; a speaker made an appeal "in the hope that pity for the predicament in which they would be left by his condemnation would induce the jury to acquit him or at least to reduce his penalty."[5] Dover argued that appeals for pity could be phrased in a variety of ways, and at times pity could effectively mean a vote for justice or an expression of support. Both saw appeals for pity as nonlegal[6] or irrelevant.[7]

Johnstone distinguished between verbal appeals for pity in lawcourts and the more physical act of supplicating the jury. He stated that there were nineteen verbal appeals to be found in forensic oratory (noting that twelve were made by defendants and six were made by prosecutors, with one in a *paragraphe*), and nineteen acts of supplication (seven each by prosecutors and defendants, four in *diadikasiai* and one in a *paragraphe*).[8] Johnstone also stated that, rather than understanding such appeals as attempts to overturn law, they should be understood in their cognitive context. He suggests that "when litigants said "pity", they often meant "acquit"; and as such, pity was the outcome of a process of reasoning."[9] By making an appeal or a supplication, a litigant was submitting himself to the jury and admitting that his fate lay in their hands. Johnstone contends that this action helped to instil "a collective identity", and the implication is that it is this process, rather than the more obvious emotive aspects, that constituted the power and potential success of an appeal for pity.[10]

Konstan has provided another analysis of appeals for pity that is in some ways similar to, but in other ways different from, those above. He takes as his starting point the disjunction between ancient and modern legal practice, noting that, whereas in modern courts appeals for pity are generally viewed as inappropriate, in ancient courts they were practically routine. In modern courts they are viewed as inappropriate because emotional appeals may move jurors to make a decision irrespective of the facts or the law.[11]

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[4] Brinton (1994:29-30); Dover (1974:195-96).
[5] Dover (1974:195).
[6] Dover (1974:196, 198-99).
[7] Brinton (1994:27-8).
[8] Johnstone (1999:111, 118).
[9] Johnstone (1999:122).
[10] Johnstone (1999:122-25; the quote is on p.125).
[11] Konstan (2000b:126-33).

Konstan notes that in modern legal practice pity is commonly discussed in relation to appeals for mitigation, and is therefore often invoked by people who have admitted their guilt. In ancient Athens, by contrast, pity was felt for someone who suffered an "undeserved misfortune"[12] and an appeal presupposed the innocence of the party making it. Appeals were not, therefore, accompanied by contrition or remorse, or a request for forgiveness, but were "designed rather to make vivid to the jury the consequences of condemning an innocent person."[13]

All four authors have noted that there is a variety of meanings in appeals for pity. Konstan and Johnstone, in particular, have highlighted that an appeal need not be viewed as nonlegal, but could be seen as being based on the justice of one's case. Both authors' arguments require further scrutiny, however. Johnstone's view that an appeal for pity enforced a sense of collective identity may have some merit, but seems too subtle. Supplication may have reinforced civic identity, but there were better ways of doing that like discussing one's liturgies and character. As a result, his analysis downplays the emotional and rhetorical impact of appeals. It also ignores the fact that, in making attacks upon their opponents' use of appeals, litigants frequently claim that such actions are unjust, which in itself is to make a stronger appeal to a principle of collective identity - that of judging in accordance with the laws and the oath (Antiphon i.26; Lysias xxviii.14, xxix.8; Isocrates xviii.37; Isaeus v.35, x.22; Demosthenes xxi.99-101, 188, xxv.81-84, xxxvii.49, xxxviii.27, xxxix.35; Lycurgus i.33, 141-45, 150; Hyperides ii.9, v.40; Aeschines iii.209-10; Dinarchus i.22, 103, 108, 111, iii.13, 20). Konstan's analysis may be closer to the mark in noting that an appeal was based on the injustice of one's plight, but his analysis was not comprehensive and some aspects require modification.

Defining Pity

Although many scholars have noted the existence of appeals for pity in Athenian courts, few have studied them in detail, and even fewer have attempted to define what is characteristic about such appeals - what, in a sense, the component parts of an appeal are. The most detailed work is by Cortés Gabaudán, who defined the appeals by the occurrence of verbs denoting some kind of supplication or pleading (δέομαι, ἀντιβολῶ, ἱκετεύω, αἰτοῦμαι, παρακαλῶ, ἀξιῶ).[14] A similar approach appears to have been

[12] Konstan (2000b:133).
[13] Konstan (2000b:144).
[14] Cortés Gabaudán (1986:108).

adopted by Dover and Johnstone, though they do not discuss how they defined appeals for pity or supplication.[15]

δέομαι, ἀντιβολῶ, ἱκετεύω and ἐξαιτοῦμαι may be used singly or in combination by speakers making appeals.[16] Outside forensic oratory these combinations are rare, as we have only δέομαι and ἱκετεύω together in Plato's *Apology* (34c) and *Euthydemus* (282b), and ἱκετεύω with ἐξαιτοῦμαι in Euripides' *Medea* (971) and Sophocles' *Oedipus at Colonus* (1326), though ἱκετεύω appears with οἰκτείρω in Aristophanes' *Wasps* (555-56) and Sophocles' *Oedipus at Colonus* (237). Possibly the repetition of verbs with similar meanings was felt to add to the impact of an appeal, which would explain the doubling or trebling of similar verbs for begging or imploring in forensic oratory.

There is no doubt that these verbs help to identify appeals for pity. ἀντιβολῶ and ἱκετεύω are the verbs Euphiletus uses to describe Eratosthenes' appeal not to be killed (Lysias i.29). The problem with Cortés Gabaudán's approach is that it may mix up different types of appeals. Verbs such as παρακαλῶ and ἀξιῶ, for example, can have a wide range of meanings and need not always denote an appeal for pity, so the analysis may confuse simple requests with appeals for pity.[17] In forensic oratory, speakers can make a wide variety of appeals using verbs like δέομαι, ἀντιβολῶ, ἱκετεύω and ἐξαιτοῦμαι. They can appeal for a favourable hearing (Demosthenes xxi.5-7, Isaeus ii.2) or a fair hearing (Demosthenes xl.4, Hyperides i.19), for favour (Demosthenes xxiii.4, 19, xxvi.57, xliii.83-84, xlv.1, 85, Lysias xxi.21), for justice (Demosthenes xxxv.5, lviii.57, 61; Lysias x.21, 31) for help against injustice (Demosthenes xlii.32, xlvi.28, lvi.4; Dinarchus iii.21; Lysias xviii.27), for goodwill (Demosthenes lvii.1, lviii.3) and for the jurors' vote (Isaeus ii.44, v.34, ix.37; Lysias xv.3, xxi.21).

The variety of appeals may explain why Dover and Johnstone have sought to downplay the emotional aspects of appeals. If a speaker is asking for justice in accordance with the oath and the laws, there is little real emotion in this appeal other than in the verbs the speaker is using. Appeals for pity, however, are explicitly described by contemporary

[15] See Dover (1974:195-96) and Johnstone (1999:117, 172, n.41).
[16] Cortés Gabaudán (1986:195) lists δέομαι and ἱκετεύω together eight times, δέομαι and ἀντιβολῶ together three times, δέομαι, ἱκετεύω and ἀντιβολῶ together ten times, these three verbs together with ἀξιῶ once and ἱκετεύω and ἀντιβολῶ together three times.
[17] Cortés Gabaudán (1986:151-52) does isolate appeals for pardon and compassion, but the attempt is not systematic.

handbooks as being used to arouse jurors' emotions (Aristotle *Rhet.* 1419b; *Rhetorica ad Alexandrum* 1443b15-18, 1444b26-29, 1445a1-10). It is difficult to agree that all appeals containing verbs such as δέομαι, ἀντιβολῶ, and ἱκετεύω are appeals for pity if they do not contain any actual reference to pity as the object of the appeal. The verbs used are beseeching ones, but the speaker is not asking to be pitied but rather to win support. Consider, for example, Isaeus ii.2:

> δέομαι δ' ὑμῶν ἁπάντων καὶ ἀντιβολῶ καὶ ἱκετεύω μετ' εὐνοίας ἀποδέχεσθαί μου τοὺς λόγους.
>
> I beg and beseech and implore you all to receive my words with favour.

Or the ending of Lysias xviii.27:

> ἐγὼ μὲν οὖν καὶ δέομαι καὶ ἀντιβολῶ καὶ ἱκετεύω, καὶ τούτων παρ' ὑμῶν τυγχάνειν ἀξιῶ.
>
> So I beg and beseech and implore you, and think it right to obtain from you what I claim.

In a similar vein, Johnstone identifies Dinarchus iii.21 as an example of a public prosecutor supplicating the jury.[18] Although the prosecutor does use the participle ἱκετεύων here, it follows an appeal to the jury *not* to pity his opponents (iii.20) and he uses the term here in relation to his claim that he is making a more just plea, rather than in an act of supplication or an appeal for pity.

ἱκετεύω is certainly commonly used for appeals for pity in forensic oratory, and indeed in tragedy and comedy (Euripides *Electra* 302-36, *Iph. in Aulis* 1240-51, *Medea* 853, *Orestes* 255, 1326-45, *Suppl.* 43; Sophocles *Ant.* 236-50, *OC* 237-53; Aristophanes *Wasps* 555-57) as well as Plato's *Apology* (34c). However, in other contexts it seems to be better translated "implore" or "adjure" rather than "perform the act of supplication." The act of supplication in ancient Greece not only involved verbal appeals, but also physical acts like grovelling and grasping the knees or the right hand of the person to whom the appeal was addressed.[19] The word was widely used in a looser sense. It is used by Plato (*Euthyd.* 282b) to describe begging for wisdom[20] and elsewhere is the

[18] Johnstone (1999:174, n.60).

[19] Gould (1973:77). Johnstone (1999:116) claims that "corporate" acts of supplication were a regular feature in Ancient Athens, though it is worth noting that such acts appear to have been fairly stylised, and it is not clear whether they also involved appeals for pity. It is possible that one could perform an act of supplication to a group of jurors, though clearly not in the most physical sense of the term. This rather contradicts the distinction between supplications and appeals for pity that Johnstone wishes to make.

[20] δεόμενον καὶ ἱκετεύοντα σοφίας μεταδιδόναι.

verb in a heartfelt appeal to buy property (Demosthenes xxxvii.14, 30). In the *Clouds* (696) Strepsiades uses the phrase μὴ δῆθ', ἱκετεύω, to implore Socrates not to make him work out his own solutions.[21] In *Philoctetes* (1181) Sophocles uses ἱκετεύω to beg someone not to go, while in the *Knights* (1100) Aristophanes uses it to adjure someone to wait. In *Ecclesiazusae* (915) Aristophanes uses it to implore someone to call Orthagoras. The word clearly carries an overall meaning of debasing oneself and imploring, but often the speaker is appealing for something very different from pity. When we meet ἱκετεύω we should not immediately assume we have an appeal for pity or a physical act of supplication.[22]

It could be that by using these verbs a speaker was indicating respect, and that he was in the jurors' hands. In situations where people were at the mercy of others, in particular people in a position of authority, and were in danger of losing their case if they did not convince the jurors, it was probably natural that they should use words calculated to mollify their hearers.

Verbs are simply one part of an appeal. They indicate that the speaker is asking for something, sometimes using a particularly debasing or beseeching term. Before the request becomes an appeal for pity, however, we need to know who is being asked and what the speaker is seeking.[23] Rather than concentrating on the verb alone, perhaps we should examine both the verbs used and the object of the appeal. I will therefore define appeals for pity, in the first place, as an appeal for ἔλεος or οἰκτρός.

Some appeals for pity need not include these words, but will clearly be appeals through the use of other words or descriptions. Passages about crying, tears, weeping or wailing may be associated with appeals for pity, while producing one's children in court is also commonly viewed as associated with such appeals due to being derided by Plato (*Apol.* 34c) and Isocrates (*Ant.* 321) and satirised by Aristophanes (*Wasps* 568-74).[24] Rhetorical handbooks help to define further aspects of appeals for pity. The handbooks concentrate on the sorts of misfortunes speakers could raise to evoke pity. The

[21] The same phrase appears at *Frogs* 168 with the meaning "don't make me do it"; it is also used in a clear appeal for pity at *Thesm.* 751.

[22] Johnstone (1999:116, 172, n.43) notes that the language of supplication was sometimes "attenuated and metaphorical" but claims that the use of ἱκετεύω was always meaningful because of the social practices it evoked. The varied contexts in which the verb was used, however, and the frequent absence of "pity" as an object of an appeal, may indicate that the verb sometimes evokes little more than begging.

[23] Cortés Gabaudán (1986:108).

[24] See Bonner (1927:78); MacDowell (1990:321); Todd (2000b:226 n.23).

Rhetorica ad Alexandrum (1445a3-11) outlines the sort of issues fourth-century appeals for pity should contain:

> τοῦτο δὲ ποιήσομεν ἐπιδεικνύντες ὡς πρὸς τοὺς ἀκούοντας οἰκείως ἔχομεν καὶ ἀναξίως δυστυχοῦμεν, κακῶς πρότερον πεπονθότες ἢ νῦν πάσχοντες, ἢ πεισόμενοι ἐὰν μὴ βοηθῶσιν ἡμῖν οὗτοι, ἐὰν δὲ μὴ τοιαῦτα ὑπάρχῃ, διεξιόντες τίνων ἀγαθῶν ἐστερήμεθα ἢ στερισκόμεθα, ἢ στερησόμεθα ὀλιγωρηθέντες ὑπὸ τῶν κρινόντων, ἢ ὡς ἀγαθοῦ μηδέποτε τετυκήχαμεν ἢ μὴ τυγχάνομεν, ἢ μὴ τευξόμεθα μὴ τούτων ἡμῖν συμβοηθησάντων· ἐκ γὰρ τούτων ἐλεεινοὺς καταστήσομεν ἡμᾶς αὐτούς, καὶ πρὸς τοὺς ἀκούοντας εὖ διαθήσομεν.
>
> We will do this by demonstrating that we have a friendly relationship with the audience and that we are undeservedly unfortunate, having suffered evil before or suffering now, or shall suffer if they do not help us; and if such pleas are impossible, by detailing what good things we have been deprived of or are being deprived of, or shall be deprived of if we are denigrated by the judges, or how we never had any luck or don't have any, or shall not have any if they don't join in helping us. With these pleas we shall make ourselves pitiable, and put ourselves on good terms with our audience.

Aristotle (*Rhetoric* 1386a) and Antiphon's *Tetralogies* (iiβ.13, iiδ.4, iiiα.2, iiiβ.2, iiiδ.3) also tie appeals for pity to discussions of misfortune, as apparently did Thrasymachus (Fr. 6 D-K). Similar connections occur in later handbooks (Cicero *De Inventione* i.106-9; *Rhetorica ad Herennium* ii.50; Quintilian *Inst.* vi.i.18-19; Anonymous Seguerianus *Tech.* 225; Apsines *Tech.* x.15-47). Handbooks will note that speakers could, for example, remind the jurors of their deceased relatives as a means of evoking pity (Cicero *De Inventione* i.108; Apsines *Tech.* x.37-42; and see Antiphon iiiα.2) or by bewailing reversals of fortune (Apsines x.18, 21-22; Cicero *De Inventione* i.107-8; Quintilian *Inst.* vi.i.19).[25] Accordingly, sometimes an appeal for pity may be made through a speaker's discussion of their misfortunes, without any direct mention of ἔλεος or οἶκτρός.

A distinction must be made here between general narratives of sad events which evoke pity and a direct appeal to be pitied. The former are found (for example, Lysias xxxii.11, 18). I have not attempted to catalogue these here as it would, in practice, involve making decisions about the degree to which an event was pitiable - something that is all but impossible to do. The task may also be unnecessary for the task of testing whether Athenian litigants could rely on making an appeal for pity to overturn the law and win their case. When claiming that a speaker could include an appeal for pity along with

[25] See Dover (1974:197) on this point, with examples from outside forensic oratory.

other nonlegal claims and win a case on this basis, modern scholars are discussing direct, rather than subtle, appeals and consequently I have concentrated on these.[26]

Appeals for Pity in Forensic Oratory

Table 7.1 outlines the appeals for pity that I have discovered in Athenian forensic oratory using the definition offered above. Most of the references include an appeal to the jurors for ἔλεος or οἰκτρός, but six do not (Andocides i.148-49; Demosthenes xliii.83-84, lvii.70; Lysias vii.41, xix.33, xxiv.23). These six all discuss misfortunes or the speakers' children or deceased relatives. Andocides i.148-49, for example, is commonly viewed as an appeal to pity[27] because of the speaker uses the verbs ἀντιβολῶ and ἱκετεύω, discussesdead relatives and brings his children up to the platform to plead for him. Demosthenes lvii.70 is identified as an appeal for pity because the speaker uses the same verbs, lists his misfortunes and ends by threatening suicide.[28]

I have not relied on Cortés Gabaudán's and Johnstone's data. As noted above, Cortés Gabaudán mixes together a wide variety of appeals. Johnstone's analysis is impossible to replicate as one sometimes cannot correlate the data in his tables with actual locations in the speeches.[29] On the occasions he does indicate the locations in his tables, I am sometimes unable to agree with his analysis.[30] There are also inconsistencies in his data. He appears to have treated any occurrence of ἱκετεύω as a physical act of supplication (whether direct or "attenuated") yet six of his references to verbal appeals for pity contain the verb.[31]

There are 30 clear appeals for pity in all, derived from 23 speeches. Most of the speeches were delivered by defendants, though one was delivered in a *diadikasia* and

[26] Bonner (1927:78); Dover (1974:195).
[27] For example, by MacDowell (1990:321) and Johnstone (1999:172, n.37).
[28] Johnstone (1999:112).
[29] It is possible to identify the verbal appeals for pity in his Table 4 (1999:111) by reference to the footnote (1999:170, n.7). The acts of supplication are not fully identified.
[30] For example, in his note on his Table 4 covering verbal appeals to pity, Johnstone (1999:170, n.7) includes Isaeus ii.2, which I would view as an appeal for goodwill rather than pity.
[31] Johnstone (1999:116 [on supplication] and 170, n.7 [on verbal appeals]). The references are: Aeschines ii.179-82;, Demosthenes xxvii.66-69, xxviii.20-22, lviii.69-70; Isaeus ii.2; Lysias iv.20.

four were delivered by prosecutors.[32] There do not appear to be any major differences between private and public cases. One of the four prosecutions was a public prosecution, and ten of the eighteen defence speeches were public cases. The eighteen defence speeches containing appeals for pity constitute half of the 36 defence speeches known from our corpus of forensic oratory (Appendix One). This indicates that an appeal for pity, at least in one's defence, was not a rare or desperate strategy. Appeals made by the prosecution, by contrast, amount to about seven per cent of the 54 extant prosecution speeches (Appendix One), which indicates that it was unusual for a prosecutor to make an appeal for pity.

It is not clear why appeals are so rare in prosecutions. Rubinstein has suggested that speakers in public prosecutions, at least, would have had less use for wailing relatives than defendants as they "defined [themselves] rhetorically as the mouthpiece or instrument of the entire community."[33] We need to look more closely at the four speeches delivered by prosecutors which contain appeals for pity. Two were presented in the same case, Demosthenes' (xxvii-xxviii) *dike epitropes*. The prosecution penned by Lysias was also a *dike epitropes*, while the public prosecution (Demosthenes lviii) is based on the procedure known as *endeixis*, in which a man could lodge information against another man for an offence (in this case, not paying public debts). It is notable that three speeches come from two cases where prosecutors were seeking to recover their inheritances, and were ostensibly in a weaker position than the men they were prosecuting. The public prosecution is also delivered by a man who finds himself in a parlous state; he labels himself a μειράκιον, and claims that he is the victim of a cabal involving his opponent and his own *sundikoi* (Demosthenes lviii.41-43). This may indicate that prosecutors delivered appeals for pity if they felt that they were in a weaker position than their opponent.

The other striking thing about the prosecution cases is that in all of them the prosecutor was claiming they were being unjustly deprived of something. In the *dikai epitropes* the speakers were claiming their guardians had unjustly deprived them of their inheritances.

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[32] The list includes all the defence speeches identified by Johnstone (1999:170 n.7) as containing verbal appeals for pity with the exception of Isaeus ii.2, which I consider an appeal for goodwill. Johnstone's list also includes six prosecution speeches. Two of these (Demosthenes xlv.88 and liv.43) I have classified as appeals against pitying one's opponent in Table 7.3. Demosthenes liv.43 is a borderline case, as the speaker there attacks Conon's likely appeal for pity but also claims that he deserves pity more. I have classified it as an appeal against pity because it ends, not by concentrating on the speaker's own misfortune, but by concentrating on the benefits to the *polis* from punishing Conon.

[33] Rubinstein (2000:158).

In the *endeixis* the prosecutor was not only claiming a cabal against him, but was claiming that Theocrines had already treated his father with rank injustice. Konstan has noted that one of the key aspects of pity in Greek rhetoric was that speakers claimed they merited it for undeserved suffering.[34] His comments are borne out by rhetorical handbooks, and by the data in Table 7.1. Aristotle (*Rhet.* 1385b10) defined pity as pain excited by the sight of evil, deadly or painful, for those who do not deserve it (τοῦ ἀναξίου τυγχάνειν). The *Rhetorica ad Alexandrum* (1445a4) similarly includes undeserved misfortune (ἀναξίως δυστυχοῦμεν) amongst the arguments that excite pity.[35] Similar use of the words ἄξιος and ἀνάξιος, to indicate undeserved misfortune, occurs in Antiphon v.73; Lysias iv.20, xxi.25, xxxii.19; Isocrates xvi.48; Demosthenes xxviii.22 and xxxvi.59.

The speakers in Table 7.1 raised examples of their misfortunes. Dead relatives are mentioned four times,[36] poverty six times[37] and the need to support one's remaining family members four times.[38] Seven speakers bewail their potential *atimia* if they lose the case.[39] Aeschines (ii.179) produced his children in court, as possibly did the speaker of Lysias xxi.25. In another speech the speaker concludes by saying that nothing remains for Euxenippus but to summon his friends and bring on the children (καὶ τοὺς φίλους παρακαλεῖν καὶ τὰ παιδία ἀναβιβάζεσθαι, Hyperides iv.41). I have not included this speech in Table 7.1 as it does not actually include an appeal, although one certainly seems to be on the cards. Speakers without children would mention the fact and produce their father instead (Lysias xx.34-36) or ask the jurors to be their family (Andocides i.148).

Fifteen of the references include a claim that the speaker should justly be pitied.[40] Four speakers discuss the evidence they have presented, suggesting that they deserve pity for their misfortune and acquittal for the justice of their cause (Lysias iv.20, Isaeus ii.44-45, Demosthenes xxxvi.59, lvii.70). Demosthenes (lvii.66-70), for example, recites the main points of his case, including his claims, evidence, and the laws, and suggests that if the

[34] Konstan (2000b:136-37).
[35] The view that pity was appropriate for undeserved misfortune is less common in later handbooks, but appears in Cicero's *De Inventione* i.108 and Anonymous Seguerianus *Tech.* 225.
[36] Andocides i.148-49; Demosthenes xliii.83-84, lvii.70; Isaeus ii.44-45.
[37] Demosthenes xxvii.66-69, xxviii.18-22; Isocrates xvi.45-48, xviii.62-65; Lysias xix.33, xxi.15.
[38] Demosthenes xxvii.66-69, xxviii.18-22, lvii.70; Lysias xix.33.
[39] Demosthenes xxvii.66-69, xxviii.21-22, lvii.70; Lysias iv.20, vii.41, xviii.1, xx.35.
[40] Andocides i.67; Antiphon v.73; Demosthenes xxvii.66-69, xxviii.18-22, xliii.83-84, lvii.3, 70, lviii.69-70; Isaeus ii.44-45; Isocrates xvi.45-48, xviii.62-65; Lysias vii.41, xviii.1, xx.15, 34-36.

jurors vote for him they will vote in accordance with their oath and with justice and what is right. The claim that jurors will vote in accordance with their oath if they vote for the speaker, as part of an appeal for pity, is also made in Demosthenes xxxvi.59 and xliii.83-84, while Isaeus ii.44-45 and Demosthenes xliii.83-84 also stress that their cases are founded upon law while making an appeal for pity. These data corroborate Konstan's view that an appeal for pity could be framed within a legal argument.

Frequently, however, speakers will make a nonlegal claim in conjunction with an appeal for pity. For example, the speaker of Lysias iii.48 briefly raises his previous liturgies and services, and argues that as a result he would justly be pitied by the jurors and others. Twelve speakers raised their own or their families' services and liturgies, sometimes including the claim that if they won they would perform such services in the future.[41]

An appeal for pity was made for tactical reasons, and the arguments that were associated with the appeal reflected the basis of a speaker's case. At times speakers can make an appeal that rests on a basis of law and evidence, indicating that the appeal itself should be considered part of a legal plea. At other times, speakers would base the appeal on their services or character, and these arguments were identified above as nonlegal. That being said, one of the twelve contexts where speakers tied their appeals for pity to their services appears to be a legal plea. The speaker of Lysias xx.11-15 answers his opponent's criticisms of his father and his discussion of his father's deeds is actually part of a narrative designed to prove that his father was not an oligarch, but a supporter of the democracy.

Although appeals for pity were relatively common in defence speeches, their importance should not be overestimated. In all the speeches where an appeal was made, the appeal was generally a fairly minor part of any speech, and was designed to supplement, rather than replace, evidence and legal argument. Table 7.2 shows where appeals were located in a speech and relative proportions of the appeal, legal argument and nonlegal argument in a speech. Only in two speeches did the appeal to pity comprise more than a minor percentage of any speech. In Lysias xx and xxiv the appeals to pity make up eleven per cent of the speech. In remaining complete speeches the appeal is far outweighed by legal argument. Even in the few complete speeches which had a relatively large component of

[41] Aeschines ii.179-82; Andocides i.148-49; Demosthenes xxviii.22, xxxvi.59, lviii.69-70; Isocrates xviii.62-65; Lysias iii.48, iv.20, vii.41, xviii.1, xx.11-15, 34-36, xxi.20-25. Andocides i.148-49, Demosthenes xxviii.22 and Lysias xxi.25 raise the prospect of future liturgies.

nonlegal argument (Andocides i; Lysias xix, xx; Isocrates xviii; Demosthenes xxxvi, lviii; Aeschines ii) the appeal is a minor component, with the exception of Lysias xx, where the appeal at xx.34-36 culminates an extended discussion of the speaker's family services and character.

Appeals are commonly located at the end of a speech. In this regard speakers matched the advice of rhetorical handbooks to locate the appeal in the peroration (Aristotle *Rhet.* 1419b, *Rhetorica ad Alexandrum* 1443b15-18, 1444b26-29, 1445a1-2), but the location of an appeal at the end of a speech also had a tactical basis. Speakers would usually lay out their legal and factual arguments first, and then follow those up with nonlegal arguments and appeals. All of the complete speeches in Table 7.2 follow this pattern. Appeals did sometimes come in the body of a speech, and these appear to have been located there for strategic reasons. For example, Andocides (i.67) follows up his narrative of the profanation of the Mysteries with his claim that he was an unwilling accomplice, and then summarises the misfortunes that resulted and makes an appeal. The appeal here is calculated to highlight his claim that his misfortune was undeserved. Demosthenes (xxvii.57, xxix.49) and Lysias (xxi.15) appear to be following a similar strategy when they locate appeals in the body of a speech to undercut opponents' arguments.

An appeal was also located at the end of the speech to highlight the speaker's plight. Jurors might not remember all that was said during a speech, so speakers would concentrate on leaving a strong message at the end of their speech. A convincing appeal in the peroration could have been essential in winning over some more jurors, and also in whipping up antagonism against opponents. The logical opposite to pity, as Aristotle (*Rhet.* 1386b10-11) states, is indignation, and speakers would build on this contrast to suggest that while they deserved pity for their unmerited suffering, their opponent deserved indignation for his unjust gains (Lysias xxxii.19; Aeschines ii.182) or his *hybris*, which in these contexts, carries a meaning of unjustly taking advantage of someone in a weaker position (Isocrates xvi.48; Demosthenes xxvii.68, xliii.84).[42] An unusual peroration, but one whose emotional impact can be felt today, is Demosthenes lvii.70, where the speaker summarises his case and notes that he has proved all his

[42] On anger see Carey (1994c:29-31) and Allen (2000:148-49), who points out that "pitying one party required being angry at the other." For reasons of space, I have not considered appeals to feel *anger* towards an opponent; in any event, such appeals are not labelled irrelevant by forensic orators.

claims with witnesses. The speaker then launches an impassioned appeal for the jurors' vote, asking not to lose his rights as a citizen, so that he can continue to care for his family and bury his mother in their ancestral tomb. At the very last, he proclaims that if he loses, he will kill himself, so that he may then be buried in his country.

The preponderance of legal argument, and the priority given to it in speeches, indicates that a speaker did not expect to win a case on the basis of an appeal for pity alone. In addition, the appeals identified in Table 7.1 are based on both legal and nonlegal factors, but overall the speakers expect to win on the merits of their case, rather than through compassion. As noted above, an appeal could be a useful aid, but we have no example of a speech such as that envisaged by Plato in his *Apology* which solely comprises appeals and flattery. The eighteenth-century authors who condemned Athenian juries on this evidence appear to have been gravely misled. In addition, Plato and those authors were inaccurate about another factor. None of the appeals includes any admission of guilt. There is only one hint that such an appeal might have been made in Athenian courts, and this is of doubtful value. Aeschines (i.113) claims that, in a previous trial, Timarchus admitted his guilt and did not defend himself on the issue, but immediately began imploring the jury about the penalty.[43] As Aeschines did not supply any supporting evidence his claim is probably not to be accepted at face value.

Appeals against Pity in Forensic Oratory

Surviving rhetorical handbooks emphasise how to make an appeal for pity. Only one discusses the opposite, and then only briefly. Quintilian (*Inst.* vi.i.20) notes that prosecutors will need to divert the judges from the temptation to pity their opponent and invite them to deliver a strong and dispassionate verdict.[44] In forensic oratory we have many more examples of this kind of plea than we have appeals for pity, though the relative frequencies of the two are almost the same. In all, 50 per cent of defence speeches contain an appeal for pity, and 52 per cent, or 28 of the 54 prosecution

[43] οὐ περὶ τοῦ πράγματος ἀπελογεῖτο, ἀλλ' εὐθὺς περὶ τοῦ τιμήματος ἱκέτευεν ὁμολογῶν ἀδικεῖν. Apollodorus' claim that Theogenes begged and beseeched the Areopagus at their scrutiny of his marriage (Demosthenes lix.81-83) is a similar case, but the procedure being followed is unclear and may not have been judicial. The speaker of Demosthenes xlvii.43 makes a different claim, stating that after Theophemus was sentenced in a previous trial his supporters began begging and imploring the jurors over the penalty (δεομένων τούτων ἁπάντων καὶ ἱκετευόντων). In this case, however, Theophemus had been found guilty by the court, and then began appealing; Aeschines is suggesting that Timarchus immediately admitted his guilt, which is a different matter altogether.

[44] Sed saepius id est accusatoris, avertere iudicem a miseratione, qua reus sit usurus, atque ad fortiter iudicandum concitare.

speeches, contain appeals against pitying the speaker's opponent. Table 7.3 lists the relevant contexts. There are 53 appeals against pity in all, derived from 36 speeches - 28 prosecutions, four speeches by defendants in *paragraphai*, two *diadikasiai* and two defence speeches (one public, one private).

There are more appeals against pity in public (21) than private (seven) prosecutions. This may be significant, as the 21 public prosecutions represent two-thirds of our total public prosecutions, whereas the private prosecutions represent a quarter of our 24 private prosecutions (Appendix One). It may be that prosecutors in public cases felt it was more likely that the defendants would appeal for pity, though as the analysis in the previous section showed this was not actually the case. The simplest solution may be that the penalties in public cases were generally more severe than in private cases, so a prosecutor may have felt it more likely that, when his livelihood or life was under threat, his opponent would appeal for pity.

Only one scholar has previously identified appeals against pity. Johnstone argued that fifteen speakers suggested that their opponent would weep, identifying eleven prosecution speeches, four *paragraphai* and no defence speeches.[45] The larger list here may reflect a broader definition. I developed the list using the definitions of pity outlined above, which include references to ἔλεος or οἰκτρός as well as weeping and discussion of misfortunes. Eight contexts (from seven speeches) do not contain these words, but contain other words associated with pity, such as ὀδυρεῖσθαι, κλαίω, σχετλιάζω or δάκρυον.[46]

Many of the arguments advanced by these speakers were the reverse image of those encountered in appeals for pity. Four speakers deride their opponents' likely claims for pity on account of their poverty[47] and four also deplore the possibility that their opponents will bring on their children.[48] Four predict that their opponent will appeal for

[45] Johnstone (1999:115). Allen (2000:378, n.8) appears aware of the distinction but mixes appeals against pity with appeals for pity.
[46] Aeschines iii.207, 209; Demosthenes xxxviii.19-20, xxxix.35, xl.53, 61; Hyperides v.40.
[47] Demosthenes xxxvi.36; Isaeus v.35, xi.38; Isocrates xviii.35.
[48] Demosthenes xix.281, 283, 310, xxi.99, 186-88, 195, xxv.84; Hyperides ii.9.

pity on the basis of their past services and belittle those achievements.[49] One speaker criticizes his opponent's claim for pity on account of the need to support his mother.[50] Another denigrates his opponent's claim for pity on account of the likelihood that he will lose his citizenship through not being able to pay the *epobelia* if he loses the case.[51] Two undercut their opponents' claims for pity because they were orphans.[52] The most common argument, however, is that it is unjust to pity the opponent, occurring in 21 speeches.[53] Commonly, these speakers claim that their opponents' previous lack of pity for others, or the magnitude of their crimes, should ensure that they now do not deserve pity. Ten suggest that, rather than indulge their opponent, the jurors should uphold the laws.[54] Three claim that it would be impious to pity their opponent, or provoke the gods.[55] Four claim that an appeal for pity is irrelevant.[56] Several agree that people deserve pity for undeserved misfortunes, but suggest that their opponents' crimes were entered into willingly and therefore they deserve no pity.[57] Four go further, exhorting the jurors to hate their opponent for his crimes.[58]

Isocrates (xviii.35-36) lists several of the misfortunes his opponent is likely to recount in his possible appeal:

> οἶμαι δ' αὐτὸν ὀδυρεῖσθαι τὴν παροῦσαν πενίαν καὶ τὴν γεγενημένην αὑτῷ συμφοράν, καὶ λέξειν ὡς δεινὰ καὶ σχέτλια πείσεται, εἰ τῶν χρημάτων, ὧν ἐπὶ τῆς ὀλιγαρχίας ἀφῃρέθη, τούτων ἐν δημοκρατίᾳ τὴν ἐπωβελίαν ὀφλήσει, καὶ εἰ τότε μὲν διὰ τὴν οὐσίαν τὴν αὑτοῦ φυγεῖν ἠναγκάσθη, νυνί δ' ἐν ᾧ χρόνῳ προσῆκεν αὐτὸν δίκην λαβεῖν, ἄτιμος γενήσεται. κατηγορήσει δὲ καὶ τῶν ἐν τῇ μεταστάσει γενομένων, ὡς ἐκ τούτων μάλισθ' ὑμᾶς εἰς ὀργὴν καταστήσων· ἴσως γάρ τινος ἀκήκοεν, ὡς ὑμεῖς, ὅταν μὴ τοὺς ἀδικοῦντας λάβητε, τοὺς ἐντυγχάνοντας κολάζετε.

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[49] Dinarchus i.111, ii.11; Isaeus v.35-36; Lysias xxviii.14. The speaker of Demosthenes xxxviii.27 does not belittle his opponent's services, but slips in the comment that he has shamelessly and foully squandered his fortune in gluttony and drunkenness with Aristocrates and Diognetus and others of that sort. Demosthenes (xxv.76) notes that some men, being convicted by the facts and unable to prove their innocence, will take refuge in their public service or those of their ancestors, or in similar pleas by which they succeed in evoking pity and goodwill. This leads into the plea against pity (xxv.81-84), in which Demosthenes assassinates Aristogeiton's character.

[50] Demosthenes liii.29.

[51] Isocrates xviii.37.

[52] Demosthenes xxxviii.20, liii.29.

[53] Aeschines iii.209-10; Antiphon i.26-27; Isocrates xviii.37; Demosthenes xxi.99-101, 188, 195-96, xxv.81-84, xxxvii.49, xxxviii.27, xxxix.35, xl.61; Dinarchus i.22, 103, 108, 111, iii.13, 20; Hyperides ii.9, v.40; Isaeus v.35, x.22; Lycurgus i.33, 141-45, 150; Lysias vi.55, xxii.21, xxvii.12-13, xxviii.14, xxix.8.

[54] Demosthenes xix.281, 283, xxi.188, xxv.81, xxxviii.19, 27; Dinarchus iii.20 Isaeus x.22; Lycurgus i.33, 150; Lysias x.26, xv.9, xxii.17-21.

[55] Antiphon i.29; Demosthenes xxv.81; Lysias vi.3.

[56] Aeschines iii.207; Demosthenes xxxviii.19-20, xxxix.35; Lysias xxviii.14.

[57] Antiphon i.26; Demosthenes xix.310; xxi.99, 186, 206, xlv.88, liv.43; Lysias vi.55, xxvii.13.

[58] Demosthenes xxi.186, 195-96, xxiv. 196-97, xxxvii.49; Isocrates xviii.38.

> I suppose he will bewail his present poverty and the misfortune which has befallen him, and he will say that he will suffer terrible cruelty if his money, which he was robbed of under the oligarchy, he will now owe under the democracy as the *epobelia*, and if then he was forced into exile because of his property, and now at a time when he ought to obtain justice, he will lose his citizen rights. And he will also make accusations about the events of the revolution, so that in this way especially he will arouse your anger; for perhaps he has heard from someone, that, whenever you fail to catch the real villains, you punish any who fall into your way.

He goes on to state that it is right to help those whose statements about the facts which they have sworn in the *antomosia* are manifestly more just, rather than those who try to show that they are the most unfortunate.[59]

Another example comes from Demosthenes' speech *Against Meidias*. Demosthenes alludes in that speech on a number of occasions to Meidias producing his children in the hope of evoking pity (xxi.99, 186-99, 195). He remarks (xxi.188):

> ἀλλ' ὅταν οὗτος ἔχων τὰ παιδία τούτοις ἀξιοῖ δοῦναι τὴν ψῆφον ὑμᾶς, τότε ὑμεῖς τοὺς νόμους ἔχοντά με πλησίον ἡγεῖσθε παρεστάναι [καὶ τὸν ὅρκον ὃν ὀμωμόκατε] τούτοις ἀξιοῦντα καὶ ἀντιβολοῦντα ἕκαστον ὑμῶν ψηφίσασθαι.
>
> But when he with his children asks you to give your vote to them, then you consider me to be standing alongside with the laws [and the oath which you have sworn][60] asking and beseeching each of you to vote for them.

Several of the speakers in Table 7.3 also mention συγγνώμη along with their appeals against pity, and the author of the *Rhetorica ad Alexandrum* also recommended that speakers should use arguments about the laws to deprive their opponents of pleas for *sungnome* (1443b11-14). Konstan has argued that defendants who asked for *sungnome* were not seeking "mercy, or undeserved pardon...but rather a favorable disposition toward a just case."[61] He notes that in some contexts it is preferable to render *sungnome* as indulgence or even forgiveness, but this does not mean that in these contexts the plea is an admission of guilt. Konstan cites Lysias xxxi.10-12, whose speaker draws a contrast between unwitting misfortunes deserving *sungnome* and intentional crimes which do not merit it. A similar contrast also appears at Demosthenes xviii.274, xxiv.49, 67 and lviii.24.

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[59] πρὸς μὲν οὖν τοὺς ὀδυρμούς, ὅτι προσῆκει βοηθεῖν ὑμᾶς, οὐχ οἵτινες ἂν δυστυχεστάτους σφᾶς αὐτοὺς ἀποδείξωσιν, ἀλλ' οἵτινες ἂν περὶ ὧν ἀντωμόσαντο δικαιότερα λέγοντες φαίνωνται.

[60] These lines are sometimes considered a gloss; see MacDowell (1990:410).

[61] Konstan (2000b:138).

Konstan does not actually mention any appeals for pity that contain an appeal for *sungnome*, and I have not found any. The word is fairly rare in defence speeches, occurring for example at Lysias i.3, 18, iii.4, 13, 19, ix.22, xviii.20, xix.56, xxiv.17, xxv.1, 35; Isaeus x.1; Demosthenes xviii.274 and liii.3. In several of these contexts it may carry some meaning of forgiveness, but none of these contexts are appeals. I know of three occasions only when a speaker appeals for *sungnome*, and none of these are appeals for pity. Isaeus (vi.2) uses the term to appeal for a favourable hearing and to listen with goodwill,[62] and also uses it to beg favour for prosecuting at such a young age (Fr. 8 [Forster]).[63] Demosthenes (xl.4) similarly uses it to appeal for a favourable hearing, and his speaker adds that if he should seem to the jurors to have suffered cruelly, they should "forgive" him for seeking to recover his property.[64]

Those speakers in Table 7.3 who mention *sungnome* were all prosecutors, and in these contexts the word could be translated as "showing favour" or "forgiving."[65] The speaker of Lysias x, for example, argues that the jurors should not pity Theomnestus for the harsh things that they have heard about him, nor show him favour for his *hybris* and speaking contrary to the laws.[66] Later in the speech (x.30) the speaker twice uses the word when he instructs the jurors not to forgive Theomnestus for breaking the laws. It seems that the word can allude to the possibility that the jurors will show compassion and forgive a man's crimes, an event that prosecutors would seek to forestall. If *sungnome* does at times mean "forgive," this may explain why it does not occur in appeals for pity. A speaker who appealed for it might have been seen as undermining his case by admitting guilt.

The large number of appeals against pity provide a crucial insight into the legal concept of relevance in Athenian courts. Scholars have generally highlighted appeals for pity but, as noted above, only one has mentioned that the opposite might be the case. As a result, we have only had one side of the picture. If speakers only appealed for pity, and never appealed against it, then there would appear to be a strong case for presuming that

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[62] δέομαι οὖν ὑμῶν συγγνώμην τε ἔχειν καὶ μετ' εὐνοίας ἀκροάσασθαι.
[63] δέομαι οὖν ὑμῶν συγγνώμην ἔχειν, εἰ καὶ νεώτερος ὢν λέγειν ἐπὶ δικαστηρίου τετόλμηκα.
[64] δέομαι οὖν ἁπάντων ὑμῶν, ὦ ἄνδρες δικασταί, μετ' εὐνοίας τέ μου ἀκοῦσαι οὕτως ὅπως ἂν δύνωμαι λέγοντος, κἂν ὑμῖν δεινὰ δοκῶ πεπονθέναι, συγγνώμην ἔχειν μοι ζητοῦντι κομίσασθαι τἀμαυτοῦ.
[65] The contexts are: Lysias x.26, xii.79, xiv.40; Demosthenes xix.281, 283, xxi.100, 198, xxv.81, 83, 84; Lycurgus i.148; Hyperides ii.7.
[66] μὴ τοίνυν ἀκούσαντά [τε] Θεόμνηστον κακῶς τὰ προσήκοντα ἐλεεῖτε, καὶ ὑβρίζοντι καὶ λέγοντι παρὰ τοὺς νόμους συγγνώμην ἔχετε.

Athenian juries could, on occasion, feel compassion and overturn the laws. The fact that appeals against pity were just as common as appeals for pity indicates that Athenians were aware that pity could be used to divert jurors from the law and the facts of the case. Appeals against pity show that Athenian juries were expected to reach decisions largely on legal grounds. Speakers could try to subvert that expectation through appeals for pity; but their opponent could suggest that such a procedure was unjust and appeal instead to the jurors not to forgive his opponent's crimes.

Chapter Eight Conclusions

In Chapter One I set out as an objective of this thesis to test the three prevailing theories on relevance in Athenian courts. I also set out to present a picture of relevance based on forensic oratory as a whole, rather than on selected highlights from it.

Of the three theories, the "equity" theory must be considered severely damaged, if not untenable. There is no evidence that speakers regularly appealed for fairness or a concept of justice that was opposed to law. Generally, when discussing justice, speakers went to some length to argue that their more just case was also legally sound. Nonlegal appeals based solely on justice could indeed be made - Demosthenes xxxix is the sole example, although there are also some examples of legal pleas where the meaning of the law was clearly being stretched, such as Hyperides iii and Lycurgus i. Such appeals are very rare and, when we know the results of the case, unsuccessful (e.g. Demosthenes xxxix and Lycurgus i). The more technical aspects of "equity" theory, such as appeals for γνώμη τῇ δικαιοτάτῃ, have also been shown to be rare and, when founded upon nonlegal pleas, fruitless.

The "social competition" theory is also untenable. There is no evidence that jurors placed speakers' status and honour above the law and the facts of the case. Speakers do discuss their services, though not as frequently as Adkins, Garner and Cohen would have us believe. They also regularly attack their opponents' characters and services. Such discussions are, however, essentially supplementary to legal cases. Legal pleas generally occupy a larger proportion of any speech than nonlegal pleas, and also are given priority by being dealt with first, and are often linked to the Heliastic oath. Of complete speeches, only in two by Lysias do we find any attempt to give services and character greater weight than legal pleas, and only one, Lysias xxxi, gives priority to attacks on the opponent. As that speech was presented in a *dokimasia*, where it is possible that a discussion of general character and services was permitted, we should not place undue emphasis on it.

The "positivistic" theory of Athenian juries has proven to have the most solid foundations, although Wolff, Meyer-Laurin and others have drastically underestimated the occurrence of nonlegal pleading. The evidence presented in Chapters Five to Seven shows that speakers did generally make a legal case and gave legal pleas priority. They supported the legal case with witnesses and other evidence, and witnesses usually

testified about facts that were relevant to the legal case. There is no clear evidence that witnesses appeared simply as supporters, or that perjury was more common at Athens than anywhere else. Where the theory falls down is in underestimating the importance of nonlegal pleas; it is therefore a limited description of Athenian legal procedure.

The only way to fill out that picture is to understand the legal concept of relevance as it was determined in Athenian courts. In the past, our understanding of relevance has been hampered by a number of things - by methodologies that have been based on a selective, rather than a holistic, approach to oratory; by an over-reliance on Aristotle and later authors of the Roman period; and indeed by the pernicious influence that Plato's *Apology* and Aristophanes' *Wasps* have had on modern scholars by prejudicing them against Athenian juries. These barriers to a clearer understanding were laid in the eighteenth century, and have structured modern theories ever since.

In order to obtain a better understanding we need to evaluate Plato, Aristophanes and Aristotle against forensic oratory, rather than the other way round. The major, and most relevant, evidence about the practices of Athenian lawcourts is contained in these 104 forensic speeches. That evidence shows that speakers would identify as irrelevant discussions of character and services, slanders and unrelated accusations. Relevant arguments were defined in relation to the charge under which the case was brought, and the specific allegations contained in the charge. There was probably a law against irrelevance on the Areopagus, and possibly at the Palladion, though there does not appear to have been any law against irrelevance in *dikasteria*. Instead, the jurors swore in their Heliastic oath to judge on the actual matter and speakers also probably swore to speak to the matter in their preliminary oaths at the trial.

When these definitions are applied to forensic oratory as a whole we find that the vast majority of that oratory, and in most cases of each speech, was relevant pleading. Such pleading should usually be considered "legal" and irrelevant discussion "nonlegal," though some care is necessary in this area as we need to bear in mind contexts and the legal cases being made. In some cases, pleas that would be irrelevant in one context could be relevant in another.

A key issue is working out *how* speakers could make irrelevant pleas. Such pleas, we are led to believe, would be stifled at once by a judge in a modern court. Adkins, Garner and Cohen claimed that character discussion was really relevant and in fact the main

issue of the trial. As we have seen, this is a very selective view of forensic speeches. Most modern scholars have focussed on "weaknesses" in the Athenian legal system which they claim inevitably led to irrelevant pleading. The speeches actually present a rather more subtle picture. Speakers clearly wanted to win the goodwill of the jurors, and we can only interpret the speeches as proving that they tried to do that, fundamentally, by focussing on legal discussions and evidence. This is the best interpretation of the dominance of legal discussion and the prominence it is given by speakers. Those speakers also, however, generally expected to raise nonlegal issues and to get away with it. If nonlegal pleading was so risky (because speakers could lose the goodwill of the jurors) it is difficult to believe that it would be so common, or that speakers could plan to present witnesses and laws about nonlegal issues unless they felt that they had a good chance of raising those issues.

The key is, as Meyer-Laurin realised, that nonlegal arguments are usually supplementary to the legal pleas. If there was a weakness in the Athenian legal system, it was that a large body of 501 or so jurors was likely to have divergent views about what sort of pleas were irrelevant. Speakers could probably count themselves unlucky if a majority of jurors shouted them down on a particular point. They could probably also count on the fact that jurors had to hear the plea first to decide whether it was relevant or not. Nonetheless, they appreciated that there was a risk in raising irrelevant arguments, which is why they often tried to justify them as relevant. It is also why they usually presented their legal case first. If the jurors shouted down their irrelevant points, they could still hope to win the trial on the basis of their legal case. If they had not yet presented that case when the nonlegal pleas were shouted down, they ran the risk of not being allowed to present the legal case at all - or of having lost the good opinion of the jury.

The risks were there, though it also seems that the Athenians, by and large, were prepared to let speakers have their day in court. Athens, as has frequently been remarked, did not have jurists or jurisprudence, so we should expect speakers to have some freedom to make their case, even if it involved stretching the law. Where we do have evidence of speakers being shouted down, it appears that their claims were especially outrageous, such as Demosthenes' slander about Aeschines and the Olynthian woman.

Relevance, then, could be characterised as a flexible concept within the parameters of a general respect for law and evidence. This characterisation helps us resolve one of the key dilemmas of Athenian legal procedure. Scholars have presented apparently solid, yet mutually contradictory, cases to prove that jurors commonly voted in favour of equity, or character and services, or on the basis of facts and the laws alone. Each theory has been supported by a range of citations from oratory. Clearly, as all three theories generally contradict each other they cannot all be right. For two hundred years, however, we have not been able to move beyond this point, so that discussion has been reduced to a kind of sniping from deep-dug trenches across the No-Man's-Land of the data.

The key to understanding these apparent contradictions lies in understanding that the general concept was that speakers should stick to the laws and facts, but speakers enjoyed great freedom to make their case.

A final point is that forensic orations need to be analysed as a statistical population. In order to understand relevance, we need to characterise the variance amongst the speeches and know the range and the mean. Without this background, we may be misled into characterising extremes as typical of the population. This is clearly what happened with "equity" theory. Its insistence on γνώμῃ τῇ δικαιοτάτῃ and pleas based on justice was based on very few speeches, and has considerably obscured the general character of forensic oratory. A similar charge could be laid against the "positivistic" theory. This theory correctly saw that the general trend in forensic oratory was towards legal discussion, but its failure to examine variance has meant that the trend has been isolated from other trends almost as common, notably the use of nonlegal pleas. This thesis has shown that forensic oratory was generally characterised by legal discussion, and that nonlegal discussion was usually presented to supplement the legal discussion. It has shown that stand-alone nonlegal pleas were rare; they are part of the overall presentation of a case, but certainly do not characterise the genre.

Appendix One Forensic Orations Analysed in the Thesis

Author	Title	Procedure	Date	Result
Antiphon i	*Against the Stepmother*	dike phonou (bouleusis)	420-411	Not known
Antiphon v	*On the Murder of Herodes*	apagoge	c.417	Not known
Antiphon vi	*On the Choreutes*	dike phonou (bouleusis)	419/18	Not known
Andocides i	*On the Mysteries*	endeixis	400	Successful[1]
Lysias i	*On the Murder of Eratosthenes*	dike phonou	403-380	Not known
Lysias iii	*Against Simon*	traumatos ek pronoias	394-380	Not known
Lysias iv	*On a Wound by Premeditation*	traumatos ek pronoias	403-380	Not known
Lysias v	*For Callias*	graphe hierosulias?	403-380	Not known
Lysias vi	*Against Andocides*	endeixis	400	Unsuccessful[2]
Lysias vii	*On the Olive Stump*	graphe asebeias?	397/6-380	Not known
Lysias ix	*For the Soldier*	apographe	395-87	Not known
Lysias x	*Against Theomnestus*	dike kakegorias	384/3	Not known
Lysias xii	*Against Eratosthenes*	euthuna	403	Not known
Lysias xiii	*Against Agoratus*	apagoge	c.399	Not known
Lysias xiv	*Against Alcibiades I*	graphe astrateias	395	Not known
Lysias xv	*Against Alcibiades II*	graphe astrateias	395	Not known
Lysias xvi	*For Mantitheus*	dokimasia	394-80	Not known
Lysias xvii	*On the Property of Eraton*	diadikasia	mid-390s	Not known
Lysias xviii	*On the Property of Nicias' Brother*	apographe	mid-390s?	Not known
Lysias xix	*On the Property of Aristophanes*	apographe	388/7	Not known
Lysias xx	*For Polystratus*	euthuna	410/9	Not known
Lysias xxi	*Defence Against a Charge of Taking Bribes*	euthuna	403/2	Not known
Lysias xxii	*Against the Corn Dealers*	eisangelia	387/6	Not known
Lysias xxiii	*Against Pancleon*	antigraphe in dike	400/399?	Not known
Lysias xxiv	*On the Refusal of a Pension to an Invalid*	dokimasia	403/2	Not known
Lysias xxv	*Defence Against a Charge of Subverting the Democracy*	dokimasia	401-399	Not known
Lysias xxvi	*On the Scrutiny of Evandros*	dokimasia	382	Possibly unsuccessful[3]
Lysias xxvii	*Against Epicrates*	euthyna?	395-87	Not known
Lysias xxviii	*Against Ergocles*	eisangelia	388?	Successful[4]
Lysias xxix	*Against Philocrates*	apographe	388	Not known
Lysias xxx	*Against Nicomachus*	eisangelia?[5]	399	Not known

[1] *Vit. Dec. Orat.* 834B-C.
[2] *Vit. Dec. Orat.* 834B-C.
[3] Todd (1993:285-86, 2000b:272-73).
[4] Lysias xxix.2.
[5] The precise procedure is not known; Harrison (1968-71, I:50) and Todd (1996:104-6) suggested an *eisangelia.*

Author	Title	Procedure	Date	Result
Lysias xxxi	*Against Philon*	dokimasia	398?	Not known
Lysias xxxii	*Against Diogeiton*	dike epitropes	400	Not known
Isocrates xvi	*Concerning the Team of Horses*	dike blabes	397	Not known
Isocrates xvii	*Trapeziticus*	dike parakathetes	c.393	Not known
Isocrates xviii	*Against Callimachus*	paragraphe in dike	402	Not known
Isocrates xx	*Against Lochites*	dike aikeias	402-400	Not known
Isocrates xxi	*Against Euthynus*	dike parakathetes	403/2	Not known
Isaeus i	*On the Estate of Cleonymus*	diadikasia	390-43	Not known
Isaeus ii	*On the Estate of Menecles*	dike pseudomarturion	c.355	Not known
Isaeus iii	*On the Estate of Pyrrhus*	dike pseudomarturion	350s-40s?	Not known
Isaeus iv	*On the Estate of Nicostratus*	diadikasia	374?	Not known
Isaeus v	*On the Estate of Dicaeogenes*	dike engues	389	Not known
Isaeus vi	*On the Estate of Philoctemon*	dike pseudomarturion	364	Not known
Isaeus vii	*On the Estate of Apollodorus*	diadikasia	355?	Not known
Isaeus viii	*On the Estate of Ciron*	diadikasia	383-63	Not known
Isaeus ix	*On the Estate of Astyphilus*	diadikasia	371-43	Not known
Isaeus x	*On the Estate of Aristarchus*	diadikasia	378-71	Not known
Isaeus xi	*On the Estate of Hagnias*	eisangelia	359	Successful[6]
Isaeus xii	*On Behalf of Euphiletus*	ephesis	344/3	Not known
Demosthenes xviii	*On the Crown*	graphe paranomon	330	Successful[7]
Demosthenes xix	*On the False Embassy*	euthuna	343	Unsuccessful[8]
Demosthenes xx	*Against Leptines*	graphe nomon me epitedeion thenai	355	Successful[9]

[6] Demosthenes xliii.45-46.

[7] Plutarch *Dem.* xxiv; Philostratus *Vit. Soph.* 509; *Vit. Dec. Orat.* 840C, 846A.

[8] Plutarch *Dem.* xv; *Vit. Dec. Orat.* 840B-C.

[9] Dio Chrysostom xxxi.128. Despite Dio's testimony, Pickard-Cambridge (1914:118) asserted that the result of the case was uncertain, while Sealey (1993:127) claimed that there is no reason to suppose that Demosthenes was successful. Neither discusses the matter in any detail or even mentions Dio. Schaefer (1858-85, I:413-14) argued on the basis of an inscription found in the south wall of the Acropolis recording that Ctesippus, son of Chabrias, was *choregus* for the Cecropidae, that Leptines' law was actually upheld, as Ctesippus must have lost his immunity from liturgies. Vince (1930:491) responded that the inscription may record a voluntary liturgy, and added that it may even pre-date Demosthenes' speech. Dio was writing in the first century A.D., and therefore some considerable time after Demosthenes delivered his speech, but he was clearly familiar with it (C. P. Jones 1978:35), taking up some eleven sections in discussing it (xxxi.128-39). He makes no erroneous comments on the speech and we should not assume, therefore, that he had no good authority that the speech was successful.

Author	Title	Procedure	Date	Result
Demosthenes xxi	*Against Meidias*	probole	347/6	Possibly successful[10]
Demosthenes xxii	*Against Androtion*	graphe paranomon	355	Not known
Demosthenes xxiii	*Against Aristocrates*	graphe paranomon	352	Not known
Demosthenes xxiv	*Against Timocrates*	graphe nomon me epitedeion thenai	353	Not known
Demosthenes xxv	*Against Androtion I*	endeixis	338-24	Successful[11]
Demosthenes xxvi	*Against Androtion II*	endeixis	338-24	Successful[12]
Demosthenes xxvii	*Against Aphobus I*	dike epitropes	364	Successful[13]
Demosthenes xxviii	*Against Aphobus II*	dike epitropes	364	Successful[14]
Demosthenes xxix	*Against Aphobus III*	dike pseudomarturion	364	Not known
Demosthenes xxx	*Against Onetor I*	dike exoules	c.364	Not known
Demosthenes xxxi	*Against Onetor II*	dike exoules	c.364	Not known
Demosthenes xxxii	*Against Zenothemis*	paragraphe in dike emporike	344-40?	Not known
Demosthenes xxxiii	*Against Apaturius*	paragraphe in dike emporike	360s-30s?	Not known
Demosthenes xxxiv	*Against Phormio*	paragraphe in dike emporike	327/6	Not known
Demosthenes xxxv	*Against Lacritus*	paragraphe in dike emporike	350s-40s?	Not known
Demosthenes xxxvi	*For Phormio*	paragraphe (in dike blabes?)	350	Successful[15]
Demosthenes xxxvii	*Against Pantaenetus*	paragraphe in dike metallike	346	Not known
Demosthenes xxxviii	*Against Nausimachus*	paragraphe (in dike blabes?)	340s?	Not known
Demosthenes xxxix	*Against Boeotus I*	diadikasia[16]	348	Unsuccessful[17]

[10] Plutarch *Dem.* xii and *Vit. Dec. Orat.* 844D claim that Demosthenes dropped his suit for money, but this is probably an interpretation of Aeschines' claim (iii.51-52) that Demosthenes sold the *hybris* and the people's vote against Meidias in the precinct of Dionysios for 30 mnai. Several authors believe that Demosthenes dropped his case, but as MacDowell (1990:24) notes, this is inconsistent with the speech and is stretching what Aeschines actually says. Grote (1853[1848], XI:343-44, n.2 [chapter lxxxviii]) suggested that Demosthenes won his case but proposed a fine of 30 mnai as a penalty. This eminently sensible suggestion has won little recent support, though see MacDowell (1990:24-25).

[11] Dinarchus ii.13.

[12] Dinarchus ii.13. Demosthenes xxvi was the second speech delivered by Demosthenes in the same trial as Demosthenes xxv.

[13] Demosthenes xxix.1-3, xxx.8; Plutarch *Dem.* vi.

[14] Demosthenes xxix.1-3, xxx.8. Demosthenes xxviii was the second speech delivered by Demosthenes in the same trial as Demosthenes xxvii.

[15] Demosthenes xlv.6.

[16] Modern scholars generally believe that Demosthenes xxxix was a *dike blabes* (Blass 1893, III.1:473; Lipsius 1905-15, II:660, n.89; Carey and Reid 1985:166; Todd 1993:281; E. M. Harris 2000:57-59). There is another view, now largely discounted, that the case was a *diadikasia* (Leist 1886:14-15; Beauchet 1897:45; Vinogradoff 1922:195; Meyer-Laurin 1965:30-31). The view that the case was a *dike blabes* rests largely on the occurrence of βλάπτειν at xxxix.5, and on the reference to the case at Demosthenes xl.35 where Mantitheus used the verb βλάπτεσθαι. This argument can be faulted on two grounds. In the first place, at Demosthenes xl.35 Mantitheus notes that he did not bring the case to obtain money, but to secure the right to the name Mantitheus. This is precisely the *opposite* of what is usually argued by those who consider Demosthenes xxxix a *dike blabes*, as speakers would use that procedure to obtain some sort of redress (presumably financial) rather than to secure an exclusive right to something (E. M. Harris 2000:57-59). In the second place, βλάπτειν and its cognates are not always found in cases which we have good grounds for considering *dikai blabes* (e.g. Demosthenes xlviii). They occur in cases which we know were not *dikai blabes* (e.g. Demosthenes xviii.293, xix.7, 180, 228, xx.28, 35, 49, xxii.3, xxv.18, xxvi.2, 3, xxviii.18, xxxiii.190). Leist (1886:15) argued that Demosthenes xxxix was a *diadikasia* because of the

Author	Title	Procedure	Date	Result
Demosthenes xl	*Against Boeotus II*	dike proikos	347?	Not known
Demosthenes xli	*Against Spudias*	diadikasia	350s-30s?	Not known
Demosthenes xlii	*Against Phaenippus*	diadikasia[18]	350s?	Not known
Demosthenes xliii	*Against Macartatus*	diadikasia	c.345	Unsuccessful?[19]
Demosthenes xliv	*Against Leochares*	dike pseudomarturion?[20]	350s-30s?	Not known
Demosthenes xlv	*Against Stephanus I*	dike pseudomarturion	349	Not known
Demosthenes xlvi	*Against Stephanus II*	dike pseudomarturion	349	Not known
Demosthenes xlvii	*Against Evergus and Mnesibulus*	dike pseudomarturion	after 356	Not known
Demosthenes xlviii	*Against Olympiodorus*	dike blabes	343/2	Not known
Demosthenes xlix	*Against Timotheus*	dike chreos	362[21]	Successful[22]
Demosthenes l	*Against Polycles*	dike blabes	c.358	Not known
Demosthenes li	*On the Trierarchic Crown*	diadikasia	c.359	Not known

occurrence of the word ἀμφισβητῶ at xxxix.11, 18, 28. This is certainly the word used regularly to refer to claims in property disputes (Harpokration s.v. ἀμφισβητεῖν καὶ παρακαταβάλλειν; *Lex. Rhet.* s.v. ἀμφισβητεῖν καὶ παρακαταβάλλειν [Bekker 1814, I:197]; *Lex. Sabb.* s.v. διαδικασία [Papadopulos-Kerameus 1965[1892-93]:48, l.20]; Demosthenes xl.18, xli.7, 23, 25, xliii.3, 5, 6, 7, 8, 16, 31, 55, xlviii.10, 22, 41; Isaeus i.1, 5, 8, iii.1, 3, 44, 61, 66, iv.3, 5, 10, 11, 15, 16, 17, 18, 22, 25, v.1, 7, 14, 18, 20, 21, vi.3, 12, 59, vii.1, 2, viii.1, 14, 25, 37, 38, 44, ix.2, 10, 24, 35; Lysias xvii.5, 7, 8, 9). The word is not automatically used for all types of *diadikasiai*, being absent from Demosthenes xlii. As a result we should be cautious; its presence does not automatically mean we have a *diadikasia*. In this case, I consider the case is a *diadikasia* because Mantitheus makes it clear that he wants sole rights to the name - which (*contra* Todd 1993:282) he could get with a *diadikasia*, but not a *dike blabes*.

[17] Demosthenes xl.17; IG II^2 1622; see discussion by Carey and Reid (1985:167).

[18] Disputes over trierarchies were resolved by *diadikasiai* (*AP* lxi.1; Demosthenes xxviii.17; Isocrates xv.5; Old Oligarch iii.4; see also Lipsius 1905-15, II:775).

[19] Broadbent (1968:62) pointed out that an inscription dated 324/3 B.C. records Hagnias son of Macartatus of Oion, and concluded that, as Macartatus' son was named Hagnias, this indicated continued possession by his family of Hagnias' estate. For the inscription see Leonardos (1918:75-76).

[20] This speech is usually considered a *dike pseudomarturion* arising out of a *diamarturia* presented by Leochares himself (Gernet 1955:89, n.3; Isager and Hansen 1974:132, n.11; Todd 1993:138, n.19; Rubinstein 2000:34). The matter is complicated by the fact that the speaker claims that the case is a *diadikasia* (Demosthenes xliv.7). It is possible that he is simply referring to the dispute in general.

[21] Two dates have been proposed for this speech - 369/8 or 362 B.C. (Blass 1893:522-23). The higher date has recently been supported by E. M. Harris (1988). Schaefer (1858-85, IV:139-43) preferred 362 B.C., primarily on the grounds that Apollodorus' brother Pasicles was a minor until 364 B.C. and could not have testified before then, and Apollodorus was away from Athens performing a trierarchy between 364 and 362 B.C. His date has recently been upheld by Trevett (1992:35-36). Harris' date relies on the assertion that a minor could testify in court, and also on the claim that Timotheus was unlikely to have been able to conquer 20 cities in northern Greece in only a few years, so was unlikely to have been back in Athens in 362 B.C. Harris is correct to note that there is no direct evidence that minors could not testify in court, but the weight of negative evidence (we never hear of one testifying) surely must count against his argument. Harris notes that an inscription (IG II^2 110) records honours for Menelaus proposed by Satyrus (probably on behalf of Timotheus) in the sixth prytany of 363/2 B.C. Tod (1948:134) viewed this inscription as proving that Timotheus must still have been on campaign in early 362. Even if this assumption is correct, there was still time for Timotheus to return to Athens that year and be sued by Apollodorus.

[22] Plutarch *Dem.* xv.

Author	Title	Procedure	Date	Result
Demosthenes lii	*Against Callippus*	dike arguriou	369/8?	Not known
Demosthenes liii	*Against Nicostratus*	apographe	c.350	Not known
Demosthenes liv	*Against Conon*	dike aikeias	355 or 341	Not known
Demosthenes lv	*Against Callicles*	dike blabes	350s-30s?	Not known
Demosthenes lvi	*Against Dionysodorus*	dike emporike	330-26?[23]	Not known
Demosthenes lvii	*Against Eubulides*	ephesis	345?	Not known
Demosthenes lviii	*Against Theocrines*	endeixis	344/3?	Not known
Demosthenes lix	*Against Neaera*	graphe xenias	343-40	Not known
Aeschines i	*Against Timarchus*	dokimasia rhetoron	346/5	Successful[24]
Aeschines ii	*On the Embassy*	euthuna	343	Successful[25]
Aeschines iii	*Against Ctesiphon*	graphe paranomon	330	Unsuccessful[26]
Lycurgus i	*Against Leocrates*	eisangelia	330	Unsuccessful[27]
Hyperides i	*For Lycophron*	eisangelia	333?	Not known
Hyperides ii	*Against Philippides*	graphe paranomon	338-36	Not known
Hyperides iii	*Against Athenogenes*	dike blabes?	330-24	Not known
Hyperides iv	*For Euxenippus*	eisangelia	330-24?	Not known
Hyperides v	*Against Demosthenes*	apophasis	323	Successful[28]
Dinarchus i	*Against Demosthenes*	apophasis	323	Successful[29]
Dinarchus ii	*Against Aristogeiton*	apophasis	323	Successful[30]
Dinarchus iii	*Against Philocles*	apophasis	323	Successful[31]

[23] Schaefer (1858-85, IV:312-14) originally dated the speech to 322 B.C., holding that the aorist participle ἄρξαντος proved that Cleomenes' period of office was over. His argument was recently upheld by Carey and Reid (1985:201-2), who argued that the speech should be dated to 323 B.C. Paley and Sandys (1874:214-15) argued, on historical grounds, that the reference to high corn prices in lvi.8 would indicate a date between 330-26 B.C., and noted further that the aorist ἄρξαντος "need only imply that Cleomenes *was in power at the time* of the transactions described" (1874:215, emphasis in original). Their date is possible if ἄρξαντος in lvi.7 is taken to be an inceptive aorist - "ever since Cleomenes took power in Egypt." A higher date counters the possible difficulty presented by the fact that the speaker calls Demosthenes to speak for him (lvi.50), which could have been of dubious benefit after the Harpalus affair.

[24] Demosthenes xix.2, 257, 283-84; it is not clear whether the claim in *Vit. Dec. Orat.* 840F that Timarchus hanged himself is based on any source.

[25] Plutarch *Dem.* xv; *Vit. Dec. Orat.* 840B-C.

[26] Philostratos *Vit. Soph.* 509; Plutarch *Dem.* xxiv; POxy 1800.52-60; *Vit. Dec. Orat.* 840C, 846A.

[27] Aeschines iii.252.

[28] Dinarchus ii.14; *Vit. Dec. Orat.* 846C.

[29] Dinarchus ii.14; *Vit. Dec. Orat.* 846C.

[30] Demosthenes *Ep.* iii.37-38, 42.

[31] Demosthenes *Ep.* iii.31. Burtt (1954:288) concluded from an inscription that Philocles was acquitted, but Worthington (1989) has argued that the Philocles in the inscription is a different man.

Appendix Two Revision of Forensic Speeches

The idea that forensic speeches could be revised for publication is as old at least as the eighteenth century, when Taylor proposed that the published version of a speech could have differed from the version delivered in court.[1] The possibility of revision is a crucial methodological question for this thesis. As Dover pointed out in one of his discussions on the issue,

> The relevance of this to our present enquiry is that it would have been open to the orator to adopt in the written version, which would have been of interest chiefly to educated people, a standpoint different from that which he adopted in addressing the jury.[2]

For example, an orator could have carried out such a thorough revision of his speech that the sort of evidence he presented, the sort of arguments he used, even the number of witnesses and the points to which they testified, could be utterly spurious in a published speech. In such a case the speeches of Attic orators would tell us very little about the concept of relevance in Athenian courts. It is obvious therefore that we need to gain some kind of view of whether speeches were revised, how often they were revised and how deep the changes were to the version delivered in court. These issues resolve themselves into a series of questions about each speech:

- Who wrote the speech, and when?
- Do we have the version prepared before delivery?
- If so, was this actually delivered in court?
- Was the speech revised after delivery in court?
- Why was it revised, and for whom?
- How was the version disseminated in antiquity?

Most of these questions cannot be answered in any systematic manner. At times the answer to one is linked to our ability to answer another. For example, our views on who wrote a speech may depend upon how it was disseminated. As Todd[3] has argued, revisions could be made for a variety of reasons, and we are presented with "a series of

[1] Cited by Dorjahn (1935:293).
[2] Dover (1974:9).

imponderables" in trying to determine these reasons. The best we can do is grope towards some kind of general view.

It is generally assumed that speeches came into circulation because the logographer distributed the written copy of the speech.[4] This is sometimes obvious; Antiphon, for example, became famous in antiquity for being the first to release his speeches to the public (*Vit. Dec. Orat.* 832C-D; Quintilian *Inst.* iii.1.11). Ancient scholars accepted that Aeschines, Demosthenes, Hyperides and Lycurgus wrote the speeches they delivered themselves (Dionysios of Halicarnassus *Demosthenes* xv, xlv, li; Philostratus *Vit. Soph.* 509-10; Plutarch *Dem.* xv, xxiv). Modern scholars have spent considerable amounts of time debating whether Demosthenes wrote all the speeches attributed to him. Some at least were probably written by Apollodorus and others by other orators.[5] It is also possible that a friend of the litigant sometimes composed a speech and distributed it.[6] Dover has claimed that a logographer may have prepared an initial speech, and then he or his client may have revised the original draft after the trial.[7] Dover's arguments are generally not accepted, perhaps because, as Usher pointed out, ancient authors considered that orators had distinctive styles, which surely vitiates any suggestion of mixed authorship.[8] The question cannot be resolved satisfactorily without knowing the answers to another question - how the speech was disseminated. It is sometimes assumed that speeches were disseminated by the logographer as samples of his skill,[9] but Dover is correct to point out that this is not certain.

It is unclear whether differences in authorship might be correlated with differences in accuracy. The answer to the question depends on whether the author revised the speech or not, and whether the purpose of the revision was to exclude matters raised in court or to include new material. This separate issue will be discussed further below.

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[3] Todd (1990b:167).
[4] For example, Usher (1976:37-8).
[5] Sigg (1873:430-31); Demosthenes lviii is unlikely to have been written by Demosthenes as the speaker accused Demosthenes of being part of a conspiracy against him (lviii.42-44).
[6] A possibility raised by Dover (1968:159).
[7] Dover (1968:160-63).
[8] Usher (1976:34); see also Winter (1973:35-37) for criticisms of Dover's stylometric methodology.
[9] Usher (1976:37). Early rhetoricians became famous for their handbooks or for their speeches in defence of mythical characters (for example, Gorgias' *Helen*). Antiphon appears to have recognised that there was a greater market amongst prospective litigants for real speeches from actual trials. These authors published only a few speeches. Lysias was the first to publish a large number of his speeches (*Vit. Dec. Orat.* 836A records that 425 speeches were attributed to Lysias, of which scholars regarded 233 as genuine). It is unclear why this change took place; a market seems to have arisen for forensic speeches, but we do not know why, although it is possible that the innovation of publishing real speeches took a few years to establish a market amongst prospective litigants and orators as well as the public.

Identifying whether we have the version of a speech prepared before delivery is seldom easy. MacDowell has argued that we have the pre-trial version of Demosthenes' (xxi) *Against Meidias* as a result of some word-for-word repetitions (xxi.101, 184-85), and sections that have the air of being intended to be clarified later (xxi.94, 113, 208-12, 213-18). He concluded that Demosthenes intended to use the bulk of the speech, but simply to dip into other parts and expand on some points.[10] In dealing with Demosthenes' (xix) *On the False Embassy* MacDowell suggested that we again have the pre-trial version, claiming that several passages show that Philocrates had not yet been condemned (even though the trial was held after he fled).[11]

MacDowell's arguments are plausible, but there is a risk in pushing them too far. It is difficult to judge how Demosthenes felt he should organise his speeches (as MacDowell notes),[12] and we cannot therefore be sure that the repetitions in *Against Meidias* were not intended, or that Demosthenes chose not to elaborate some arguments because he thought that they were not crucial to his case. The passages in *On the False Embassy* do not explicitly state that Philocrates was still in Athens and are actually rather vague on this point. Accordingly, I would not agree that we can identify these two orations as pre-trial versions.

It is sometimes suggested that Demosthenes did not publish many of his deliberative speeches, but they were discovered after his death and published then,[13] though it is generally believed that Demosthenes circulated his forensic speeches.[14] MacDowell's arguments rely on the unlikely proposition that Demosthenes did not circulate *Against Meidias* and *On the False Embassy*, even though he probably published others. Demosthenes' reputation amongst his contemporaries as a logographer[15] can only be explained if he was known for writing speeches, and this may indicate that he also published his speeches to advertise his wares. Aeschines' (i.173-76) jibe that Demosthenes has brought his students into court and that he will discuss his speech in his lectures afterwards could indicate that Demosthenes also circulated his speeches to

[10] MacDowell (1990:26-28).
[11] MacDowell (2000:24).
[12] MacDowell (1990:25).
[13] Trevett (1996:433-35).
[14] Adams (1912:10-11).
[15] Aeschines ii.165; Dinarchus i.111.

such small groups of friends and students.[16] As a result, it is unclear why we should single out Demosthenes xix and xxi and argue that they were never circulated, but admit that other forensic speeches probably were circulated.

Modern scholars generally agree that we can identify comments made in speeches that could not possibly have been inserted prior to the trial. Speakers sometimes refer to claims made by their opponents in their speeches, and these cannot have been included in a version prepared prior to trial.[17] For example, the speakers of Demosthenes xxxvii.45-47 and Lysias vii.3 claim that their opponents have introduced new charges,[18] Aeschines (ii.4) notes Demosthenes attempt to discuss the Olynthian woman, and the speaker of Hyperides iv.9-10 discusses his opponent's attempt to stop him from using the laws. The *eroteseis* in Lysias xii.25 and xxii.5 and the interrogation of the witness in Andocides i.14 could have been added after delivery (though it is possible that Lysias and Andocides had a pretty good idea of what the answers were likely to be). There are also a number of passages in speeches which appear to have been extemporized.[19]

Dover claimed that the speeches delivered on both sides in the *Embassy* and *Crown* trials indicated the speeches had been revised to take account of the other side's arguments. Aeschines and Demosthenes discuss allegations that cannot be found in the opponent's speech.[20] Dover suggested[21] that these passages could either refer to arguments which were used in court but excised from the published version, or arguments which were written in the original speech in anticipation of their use, and

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[16] If Demosthenes did discuss his forensic speeches with students and friends, then he could also have circulated his deliberative speeches to them. This could explain how Aesion came to view such speeches (Plutarch *Dem.* xi.4).

[17] It was once argued that any form of anticipation of an opponent's argument must have been a later revision, leading scholars to bracket large portions of speeches. Dorjahn (1935:276-85) demonstrated that speakers could have gained information on their opponents' cases before the hearing through a variety of means, such as gossip, preliminary hearings and arbitrations and friends and family. Nevertheless, some scholars have since suggested that "some, and perhaps most" of the passages anticipating arguments were composed after the trial (Dover 1974:9). It is often simply impossible to be sure. Specific comments such as Aeschines' complaint about the slander over the Olynthian woman must surely have been added in the trial since Aeschines also notes that the jury would not listen to Demosthenes' accusations. But many comments are far more general. Demosthenes (xviii.9-17), for example, makes some claims about Aeschines' charges which could easily have been written beforehand on the basis of his overall knowledge of Aeschines' case. In the case of Demosthenes xix, where Demosthenes was the prosecutor and thus spoke first, his comments on Aeschines' defence could have been made out of knowledge or as guesses; see MacDowell (2000:25-26). The ambiguity of many passages means that it is difficult to attempt a precise classification of the number of possible occurrences of revision.

[18] As pointed out by Dover (1968:167).

[19] Dorjahn and Fairchild (1972:10).

[20] Dover (1968:168-9), referring to Aeschines ii.10, 86, 124, 156, and Demosthenes xviii.95, 238.

[21] Dover (1968:169); see also Buckler (2000:149); MacDowell (2000:25); Milns (2000:207-9).

then not uttered in the court. "In either case, a substantial gulf is opened between what was uttered and what was put in writing.[22]"

Dover did not conclude that the passages were definitive evidence for revision. He argued that it may have been profitable for a speaker to refer to an argument that he knew the other side was unlikely to use. When the other speaker did not use the argument, the jury might view the omission as suspicious, or view the original speaker's arguments in a more favourable light. If the other speaker *did* use the argument, they might use up time that could have been spent on more vital issues.[23]

Dover did not suggest that revision occurred on a large scale. On the contrary, he suggested that revision must have been a fairly minor occurrence, as other ancient sources, and in particular Aristophanes' plays, satirise the lawcourts using material which is familiar from lawcourt speeches.[24] Dover's arguments here are a trifle forced. It is true that appeals for pity are familiar from Aristophanes and Plato (see Chapters Two and Seven), but these sources actually tell us very little about Athenian lawcourts and even less that we could consider accurate. It is true, however, that the amount of material in any speech that we can be sure was added after the trial appears to be very small.

E. M. Harris has argued that speakers might also seek to obscure what their opponent has said, in the hope that jurors might not clearly remember the opponent's argument, and thereby seek to strengthen their own case. This could explain discrepancies in matching texts. Harris suggests that we could look for statements that jurors would have remembered because they were striking or important, and if this is not found in the opponent's speech then we should have clear evidence for revision. He accepted only two of the passages identified by Dover as possible instances of revision (Aeschines ii.10, 86), neither of which could be labelled crucial to the case.[25] His method can only be applied to matching speeches, but if those speeches are any guide to the remainder of

[22] Ibid. Lämmli (1938:17-57) similarly attempted to show, from a comparison of arguments in Lysias vi and Andocides i that the speeches were altered after delivery. Todd (1990b:167) found Lämmli's thesis unconvincing, as Lysias vi is only one of the prosecution speeches delivered in the case, and we should not expect too close a match between it and Andocides' defence.
[23] Dover (1968:170). Speakers do complain about opponents who introduce irrelevant arguments to distract them from the main charge (Dem. xli.13, xlv.47, 50; cf. Bonner 1905:15, Wolff 1969:9).
[24] Dover (1974:9-10), since followed by Edwards and Usher (1985:10), and E. M. Harris (1995:9-10).
[25] Harris (1995:10-11, 178-9, nn.6-8).

the forensic corpus, and taking Dover's arguments into account as well, revision does not appear to have been a major factor.

Overall, there are some relatively clear examples of material that must have been inserted into a speech after the trial, and a few ambiguous instances of revision. The material inserted after the trial does not undercut attempts to define relevance; in fact, it supports it. The passages cited above show that speeches appear to have been revised to capture what was actually *said* in a lawcourt. In such cases, it does not matter for the purpose of analysing relevance whether the speech was written by the logographer or his client, or whether it was released to the public by the logographer or his client.

The information just discussed is not the limit of modern views on revision. Some modern scholars have argued that revision could be more intrusive, and that any speech might include a substantial proportion of new material. Worthington has suggested that the speeches of Attic orators may have undergone wholesale revision prior to publication, and that the delivered and published versions of a speech may have little in common.[26] He argues that many speeches are far too long to have been delivered in the restricted time allocated to speakers in lawcourts, even in cases where (he claims) a trial might have taken two or three days.[27] He suggests that the speeches of Dinarchus and Aeschines' speech *Against Ctesiphon*[28] show evidence of complex ring composition, and maintains that ring composition is a feature of most Athenian literature, and is found in works that were written to be performed orally, such as tragedies. He claims that Dinarchus and Aeschines exhibit more complex structures than are found in the work of poets, and, interpreting Aristotle (*Rhetoric* 1413b3-5) as proof that different styles were used for oral and written composition, suggests that a very complex ring composition is evidence for revision. The original speech would also have utilised ring composition, but at a much simpler level:[29]

> It is possible that some of the complex levels of ring structuring we find in speeches, with their deliberate echoes of subject matter and theme uniting

[26] See in particular Worthington (1991:62-8, 1994b:115-8, 1996:166-7).
[27] Worthington (1991:57). A similar position is argued by Buckler (2000:149) and MacDowell (2000:23), though the latter disagrees with Worthington's premise that public trials could last several days. This particular claim seems unlikely, since Harpocration (s.v. διαμεμετρημένη ἡμέρα; abridged in Lex. Sabb. s.v. διαμεμετρημένη ἡμέρα) states that the day was divided into three portions, one for the prosecutor, one for the defendant and one for the giving of verdicts, and that this procedure was used περὶ τῶν μεγίστων ἀγῶνες. Aeschines (ii.126) notes that he 11 amphorae were allocated to the trial ἐν διαμεμετρημένῃ τῇ ἡμέρᾳ. These sources are unequivocal; public trials were heard in a day.
[28] Worthington (1991:59-62, 1994b:122-6).
[29] Worthington (1991:62).

> them, and thus the overall work, in a stylistic symmetry, would be lost on a listening audience, especially one hearing the work only the one time - in a law court, for example. If this were the case, that is, if it were thought that certain subtleties would be lost on the listening audience, then perhaps we might say that orations were revised after oral delivery with a different audience in mind, a non-listening one, or at least one not subject to distractions from noisy neighbours in a law court or with more time to listen and appreciate subtleties of style and composition.[30]

Worthington suggests, on the basis of his examination of Dinarchus' and Aeschines' speeches, that "ring composition was common to all the orators."[31] He noted that it is difficult to identify precisely what may have been in the original speech, and what was added later, but proposed that the slanders hurled at each other by Demosthenes and Aeschines, and complex passages of historical narrative designed to denigrate an opponent, would have been added later.[32]

This thesis has so far attracted little comment.[33] There are a number of arguments against it, including the attitude of ancient authors, differences in the interpretation of ring-composition and uncertainties in our knowledge of the length of Athenian trials.

Ancient authors always treat forensic orations as if the written speech before them was the speech as delivered in court. Dionysios of Halicarnassus, for example, discusses the styles of orators and whether they were suited to the lawcourts (*Isocrates* 12, *Demosthenes* 15, 45, 51). The implication is that the written record is faithful to the speech as delivered. A similar attitude is conveyed by Alcidamas *On Sophists* 13,[34] Plutarch (*Demosthenes* 15, 19, 24) and Aristotle (*Rhetoric* 1397b32-5, 1413b19-26). This could indicate that logographers' works were generally viewed as being available as delivered. This evidence probably should not be pushed too far, as it would not exclude the possibility that logographers made revisions in an oral style. It may show, however, that orators' works (even when they did contain ring composition) were still

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[30] Worthington (1996:166); see also Worthington (1994b:116).
[31] Worthington (1991:64).
[32] Worthington (1991:65-8, 1994b:126).
[33] Gagarin (1997:7, n.21) dismissed it out of hand as a "doubtful analysis," while Johnstone (1999:142, n.63) noted that Worthington has not actually demonstrated that a complex overall structure has to be characteristic of written work. For similar terse remarks see Todd (1993:132) and E. M. Harris (1995:178, n.5).
[34] Alcidamas noted that those who write speeches for lawcourts avoid great precision of expression and imitate the style of extemporaneous speakers, and that they appear to write best when they produce speeches that are least like those that are written (οἱ γὰρ εἰς τὰ δικαστήρια τοὺς λόγους γράφοντες φεύγουσι τὰς ἀκριβείας καὶ μιμοῦνται τὰς τῶν αὐτοσχεδιαζόντων ἑρμηνείας, καὶ τότε κάλλιστα γράφειν δοκοῦσιν, ὅταν ἥκιστα γεγραμμένοις ὁμοίους πορίσωνται λόγους).

viewed as oral in style, and this surely undercuts Worthington's point that their style is not oral.

Harris noted that the presence of ring-composition in Homer and Pindar need not indicate that their manuscripts differed from their oral presentations.[35] Although Worthington noted that ring composition occurs in Homer, he did not demonstrate that it is less complex in Homer than in forensic oratory. It might be expected, as the *Iliad* and the *Odyssey* were composed during oral delivery, that such composition would be fairly simple. Yet several authors have shown that ring composition occurs within the Homeric works at a variety of levels and that it can be very complex.[36] Recently Worthington has slightly revised his views to take account of this issue, noting that the main difference between oratory and Homer is that forensic speeches were designed to be heard once, and as Homeric poems "are meant to be recited/heard time and time again" we should expect them to be complex.[37]

This reasoning contradicts the earlier argument on why a complex structure must indicate revision. It is not clear how complex ring structuring "would be lost on a listening audience," and yet people listening to Homer would understand complex structures because they can turn up and listen to the poems "time and time again." It is also unclear why such complexity would be beyond the comprehension of the audience in the first place. In a society that was still only partially functionally literate, and in which oral evidence and communication were widely used, we might expect that people could cope with complex forms of oral literature.[38]

If ring composition in oral work may be as complex as in written work, what does this tell us about ring composition? It may indicate that the belief that ring composition requires careful planning may be a misnomer. Minchin has shown, by comparing modern storytellers' methods of composition to episodes in the *Iliad*, that patterns similar to ring composition can be produced simply because they fall into a natural pattern for telling a story, and need not indicate any complex planning or revision

[35] Harris (1995:178, n.5).
[36] In particular Gaisser (1969:3-5, 37-41). For further discussions of ring composition in Homer see Edwards (1991:44-8); Miller (1982:84-5); Schein (1984:33).
[37] Worthington (1996:166-7).
[38] For information on literacy in ancient Greece, including the use of oral evidence and gradual developments in literacy, see Davison (1962:220); Fantuzzi (1980:608); Nieddu (1984:214-6); Thomas (1989:15-23, 35, 39-43) and Green (1994:2-5).

process.[39] The sort of narrative structures that she outlines could easily describe the rings identified by Worthington in the speeches of Dinarchus and Aeschines. In a genre that was devoted to telling stories to convey a message we should not be surprised that such methods occur.

Finally, we have very little good knowledge of the length of an ancient trial. Speeches were timed by a κλεψύδρα, and a fragmentary late fifth-century B.C. example has been recovered from the Agora.[40] Measures of the amount of time it takes for water to pass through this single clepsydra have been given considerable authority as proving how long a trial could last,[41] and these measures are used by Worthington to "prove" that speeches were too long to be delivered in the time available and therefore must have been revised to include new material.[42]

There are two grounds for doubting these measures - it is not clear that the Agora clepsydra was for dikastic use, and it may have been constituted differently enough in antiquity to release water at a slower rate than when it was tested in the 1930s.

The clepsydra has a name painted on it which Young reconstructed as Ἀντιοχ[ίδος].[43] This indicates some kind of tribal function, which seems incompatible with our knowledge of Athenian *dikasteria*.[44] Young suggested that the clepsydra could have been used by the Boule in carrying out one of its judicial activities, or by the thirty deme judges.[45] It is worth noting that there were different types of clepsydras in Athens, including a closed, perforated model described by Aristotle (*Prob.* 914b9-915a24). There is evidence that clepsydras could have been used outside lawcourts. Aeneas Tacticus described the use of clepsydras for measuring night watches, and they are also

[39] Minchin (1995:27).
[40] For a description and date see Young (1939:275). The excavators did not find a complete clepsydra, but enough sherds to reassemble the profile; the vessel was reconstructed with plaster.
[41] Rhodes (1993:726-27); MacDowell (2000:23). Young (1939:281) stated that water poured through this clepsydra at a mean rate of six minutes. Rhodes (1993:720) noted that "it is of course possible that by the time of the *A.P.* more sophisticated κλεψύδραι were used, and (independently of that possibility), that the time taken by that quantity of water to pass through the κλεψύδραι then used was different," but noted there was little evidence for the idea (1993:726-27).
[42] Worthington (1991:57).
[43] Young (1939:282).
[44] MacDowell (1978:250).
[45] Young (1939:282-84).

mentioned in Athenian comedies in non-forensic contexts.[46]

Even if we accept that the Agora example was basically the same as clepsydras used in *dikasteria*, this does not mean that we should accept Young's measurement of a mean rate of six minutes. As Lang notes, *AP* 67.4 tells us that the days of Poseidon (December/January) were used as a standard. As the the approximate length of daylight in Athens at this time is 570 minutes, this should be the length of the average court day. If we use the clepsydra, however, this gives us an average day of only 396 minutes. Lang suggests that the days may have been measured differently, or included some periods when the clepsydra was not used, or that the bronze tube in the clepsydra may no longer be accurate as it may have lost some width from corrosion.[47]

- The first suggestion is refuted by Harpocration s.v. διαμεμετρημένη ἡμέρα, which clearly places trial procedures within a single "measured" day.

- The second suggestion is possible as Harpocration tells us that "trials sometimes took place without water in the divided day, sometimes in accordance with water,"[48] but the evidence is ambiguous at best and we have no real idea what activities were not measured by water and how long they may have taken, or even whether they were included within the period of the "measured" day. It is difficult to accept suggestions that empanelling procedures were included within the "measured" day[49] as Harpocration explicitly states that the day was divided into three parts reserved for the speeches by the prosecutor and the defendant and the giving of verdicts.

- Lang's last suggestion is also difficult to test as there is no adequate description of the tube in the Agora publications.

There is another possibility: Aeneas Tacticus (*Poliorch.* xxii.25) tells us that the insides of clepsydras used for timing night watches should be coated with wax, which could be

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[46] Aeneas Tacticus *Poliorch.* xxii.24-25; see too chapter xlviii from Julius Africanus *Kestoi.* Eubulus (*Clepsydra* Fr. 54 [PCG]) described a prostitute who timed her clients with a clepsydra, and Epinicus (*Hypoball.* Fr. 2 [PCG]) had characters discuss drinking in time with a clepsydra. Pattenden (1987:170) argued that Aeneas was discussing the closed clepsydras described by Aristotle, but this must be wrong. As Pattenden himself notes, Aeneas' discussion of adding and removing wax does not fit a closed clepsydra. An open clepsydra of the judicial type, however, fits Aeneas' discussion as it is easy to see how layers of wax could be added and removed to alter the flow of water.

[47] Lang (1995:77-78).

[48] ἐπισκεπτέον δὲ τὸ παρ' Ἰσαίῳ ἐν τῷ κατ' Ἐλπαγόρου καὶ Δημοφάνους, πῶς μεμετρημένης τῆς ἡμέρας ὁτὲ μέν φησι χωρὶς ὕδατος γίνεσθαι τοὺς ἀγῶνας, ὁτὲ δὲ πρὸς ὕδωρ.

[49] Rhodes (1993:726-27).

reduced or increased as desired to change the amount of time. We do not know that judicial clepsydras were also coated with wax, so it is unclear how direct the parallel may be, but Aeneas' comment shows that we should not place too much reliance on experiments carried out on a single pot.

In summary, the claims of extensive revision are based on a dubious methodology, though there is good evidence that some parts of speeches, at least, were written after trials. It is difficult to know what might have motivated authors to make such changes. It is possible that the mode of dissemination of a speech may have had some influence. Isocrates (xii.200-233) discusses how he revised some of his deliberative speeches after discussions with students and feedback from his audience.[50] If Isocrates, one of the ten Attic orators, revised deliberative speeches it is difficult to deny that he could have revised forensic speeches (though the matter is clouded by Isocrates' denial [xv.36] that he ever wrote such speeches), and it is also possible that other forensic orators could have adopted the same approach as Isocrates and revised their forensic speeches after discussions with friends. As argued above, Demosthenes may have done so. This need not have been the case all the time; professional logographers like Antiphon, Lysias and Isaeus would probably have welcomed publicity and may therefore have issued their speeches to booksellers.[51] Authors could have adopted both methods, circulating a speech amongst friends before publishing it more generally. Ultimately, we can never know the precise relationship between what was said in court and what was published. If speeches were substantially revised, without external evidence we could not tell whether the balance of arguments and evidence had been dramatically altered. Where we can identify clear changes made after the trial, however, the revision does not dramatically change the balance of the speech. Consequently, we can accept that the speeches provide a reasonably accurate view of the sorts of arguments and evidence that speakers thought would convince a jury.[52]

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[50] Kelly (1996:153-4).

[51] Usher (1976:37-38). We know that Antiphon's speeches circulated shortly after his death, at least, since Thucydides (viii.68.1-2), who had been exiled from Athens in 424 B.C., could comment on Antiphon's speech in his defence delivered in 411 B.C.. He could not have been present to hear the speech so must have read a copy.

[52] Pelling (2000:301 n.89) argues that, even if speeches were substantially revised, they may still be viewed as the sort of speech that could have been delivered in a court as the author would be trying to retain verisimilitude. The argument is reasonable, but difficult to sustain. We have no idea what revisions an author may have made, and why he made them, so we do not know for sure that in revising a speech an orator did not alter it to include a large amount of discussion that would have been considered unusual in court. That being said, any single forensic speech often covers the same sort of issues as a number of other speeches, so Pelling's point can probably be accepted.

Tables

Table 4.1. Terminology of Relevance in Athenian Forensic Oratory.

No.	Source	Terminology
1	Antiphon v.11	• ἦ μὲν μὴ ἄλλα κατηγορήσειν ἐμοῦ ἢ εἰς αὐτὸν τὴν φόνον, ὡς ἔκτεινα, ἐν ᾧ οὔτ' ἂν κακὰ πολλὰ εἰργασμένος ἡλισκόμην ἄλλῳ ἢ αὐτῷ τῷ πράγματι
2	Antiphon v.90	• περὶ αὐτοῦ τοῦ πράγματος ἀπολογήσεσθαι
3	Antiphon vi.7-10	• περὶ αὐτοῦ τοῦ πράγματος κρίνεσθαι • εἰς αὐτὸ τὸ πρᾶγμα κατηγορεῖν • εἰς ἄλλα κατηγορεῖ ἢ ἃ διώκει ἐν πράγματι τοιούτῳ
4	Lysias iii.44-6	• οὐ νόμιμόν ἐστιν ἔξω τοῦ πράγματος λέγειν
5	Lysias vii.42	• ταῦτα μὲν ἐνθάδε οὐκ οἶδ' ὅ τι δεῖ λέγειν
6	Lysias ix.1-3	• τοῦ μὲν πράγματος παρημελήκασι • περὶ τοῦ πράγματος προσήκει λέγειν • ἡγούμενοι δὲ λήσειν περὶ [τοῦ] παντὸς πλείω λόγον ἢ τοῦ προσήκοντος ποιοῦνται • οὐκ ἐμοῦ καταφρονήσαντες ἀλλὰ τοῦ πράγματος τοὺς λόγους ποιοῦνται • περὶ τοῦ ἐγκλήματος, οὐ περὶ τοῦ τρόπου τὸν ἀγῶνά μοι προκεῖσθαι
7	Lysias xii.37-40	• πρὸς μὲν τὰ κατηγορημένα μηδὲν ἀπολογεῖσθαι
8	Lysias xiv.16-19	• περὶ μὲν τοῦ νόμου καὶ αὐτοῦ τοῦ πράγματος οὐχ ἕξειν αὐτοὺς ὅ τι λέξουσιν
9	Lysias xvi.9	• περὶ αὐτῶν μόνων τῶν κατηγορημένων προσήκειν ἀπολογεῖσθαι
10	Lysias xxvi.3-5	• ὑπὲρ μὲν τῶν αὐτοῦ κατηγορουμένων διὰ βραχέων ἀπολογήσεσθαι, ἐπισύροντα τὰ πράγματα καὶ διακλέπτοντα τῇ ἀπολογίᾳ τὴν κατηγορίαν
11	Lysias xxviii.12-14	• περὶ μὲν Ἀλικαρνασσοῦ καὶ περὶ τῆς ἀρχῆς καὶ περὶ τῶν αὐτῷ πεπραγμένων οὐκ ἐπιχειρήσειν ἀπολογεῖσθαι
12	Lysias xxxii.21	• οὐκ ἄτοπον γὰρ μοι δοκεῖ καὶ περὶ τούτου μνησθῆναι
13	Isocrates xvi.2-3	• περὶ ὧν ἀντώμοσαν διδάσκοντες
14	Isocrates xviii.36	• κατηγορήσει δὲ καὶ τῶν ἐν τῇ μεταστάσει γενομένων, ὡς ἐκ τούτων μάλισθ' ὑμᾶς εἰς ὀργὴν καταστήσων· ἴσως γάρ τινος ἀκήκοεν, ὡς ὑμεῖς, ὅταν μὴ τοὺς ἀδικοῦντας λάβητε, τοὺς ἐντυγχάνοντας κολάζετε. •
15	Isocrates xviii.40	• περὶ οὗπερ ὑμᾶς δεῖ ψηφίζεσθαι
16	Isaeus iv.5-6	• πλείονι λόγῳ εἰπεῖν • οὐ μόνων περὶ τῶν διαθηκῶν ἀλλὰ καὶ περὶ τοῦ γένους λόγον ἐμβεβλήκασιν
17	Isaeus vi.59	• οἴεται ἐξαρκέσειν ὑμῖν παρεκβάσεις, ἐὰν δὲ τοῦτο μὲν μηδ' ἐγχειρήσῃ ἐπιδεικνύναι ἢ καὶ κατὰ μικρόν τι ἐπιμνησθῇ, ἡμῖν δὲ λοιγορήσητμι μεγάλῃ τῇ φωνῇ
18	Isaeus xi.47	• τοῖς γὰρ μηδὲν δίκαιον ἔχουσι περὶ τῶν πραγμάτων λέγειν ἀνάγκη πορίζεσθαι τοιούτους λόγους

Table 4.1 (Cont.).

No.	Source	Terminology
19	Isaeus Fr. 1 [Forster]	• περὶ ὧν ἐγκέκληκε καὶ ἔξω τοῦ πράγματος διαβέβληκεν
20	Demosthenes xviii.9-11	• εἰ μὲν οὖν περὶ ὧν ἐδίωκε μόνον κατηγόρησεν Αἰσχίνης, κἀγὼ περὶ αὐτοῦ τοῦ προβουλεύματος εὐθὺς ἂν ἀπελογούμην • οὐκ ἐλάττω λόγον τἄλλα διεξιὼν ἀνήλωκε • τοῖς ἔξωθεν λόγοις • τοὺς περὶ τῶν πεπραγμένων καὶ πεπολιτευμένων λόγους ἀφέντα
21	Demosthenes xviii.34	• ὅτι μὴ κατηγορήσαντος Αἰσχίνου μηδὲν ἔξω τῆς γραφῆς, οὐδ' ἂν ἐγὼ λόγον οὐδέν' ἐποιούμην ἕτερον
22	Demosthenes xviii.59	• καὶ με μηδεὶς ἀπαρτᾶν ὑπολάβῃ τόν λόγον τῆς γραφῆς
23	Demosthenes xix.88	• οἶδα τοίνυν ὅτι τοὺς μὲν ὑπὲρ τῶν κατηγορημένων αὐτοῦ λόγους Αἰσχίνης φεύξεται, βουλόμενος δ' ὑμᾶς ὡς πορρωτάτω τῶν πεπραγμένων ἀπάγειν
24	Demosthenes xix.92	• ἐὰν μὴ πάνθ' ἅμα ἐᾶτε ταράττειν αὐτόν • περὶ γὰρ τῶν ἀμφισβητουμένων καὶ τοὺς μάρτυρας παρέχεσθαι καὶ τὰ τεκμηρία δεῖ λέγειν τὸν φεύγοντα, οὐ τὰ ὁμολογούμενα ἀπολογούμενον ἐξαπατᾶν
25	Demosthenes xix.97	• εἰς δὲ τοὺς ὑπὲρ τῶν πεπραγμένων ἐμβιβάζετε
26	Demosthenes xix.192	• μικρὸν ἀκούσατέ μου ἔξω τι τῆς πρεσβείας ταύτης
27	Demosthenes xix.202	• ἔστι δ' ὑπὲρ μὲν τῶν πεπραγμένων οὐτε δικαία οὐτε προσήκουσα ἡ τοιαύτη ἀπολογία
28	Demosthenes xix.242	• "εἶτ', ἐὰν ὑμᾶς ἀπαγάγῃ τῷ λόγῳ νεανιεύσεται καὶ περιιὼν ἐρεῖ "πῶς τι τοὺς δικαστὰς ἀπαγαγὼν ἀπὸ τῆς ὑποθέσεως ᾠχόμην τὸ πρᾶγμ' αὐτῶν ὑφελόμενος;"" μὴ σύ γε, ἀλλ' ὑπὲρ ὧν ἀγωνίζῃ, περὶ τούτων ἀπολογοῦ."
29	Demosthenes xix.335-6	• ἂν τοίνυν ταύτα μὲν φεύγῃ, πλανᾷ δὲ καὶ πάντα μᾶλλον λέγῃ, ἐκείνως αὐτὸν δέχεσθε
30	Demosthenes xx.1-2	• ὅτι Λεπτίνης, κἀν τις ἄλλος ὑπὲρ τοῦ νόμου λέγῃ, δίκαιον μὲν οὐδέν ἐρεῖ περὶ αὐτοῦ
31	Demosthenes xx.98	• ἃ δὲ πρὸς τοὶς θεσμοθέταις ἔλεγε, ταῦτ' ἴσως λέγων παράγειν ὑμᾶς ζητήσει
32	Demosthenes xxii.4	• ἐξαπατᾶν δ' ὑμᾶς πειράσεται πλάττων καὶ παράγων πρὸς ἕκαστα τούτων κακούργους λόγους
33	Demosthenes xxii.21	• φενακίζειν αἰτίας καὶ λοιδορίας κενὰς ποιουμένος, καὶ ἐνοχλεῖν οὐ δικασταῖς τούτων οὖσιν ὑμῖν
34	Demosthenes xxii.42-6	• τρόπον ὑμᾶς ἀπαγαγὼν ἀπὸ τοῦ νόμου παρακρούεσθαι ζητήσει
35	Demosthenes xxiii.19-21	• διεξίω τὸν τρόπον ὃν πεφενάνισθ' ὑπ' αὐτοῦ
36	Demosthenes xxiii.90	• τοῦθ' ὑφαιρεῖσθαι πειράσεται
37	Demosthenes xxiii.95-7	• ἀπαγωγὰς δὲ τοιαύτας τινὰς ἐρεῖ • προφάσεις εἰσὶ δι' ἃς πολλάκις ὑμεῖς ἐξηπάτησθε
38	Demosthenes xxiii.191	• ἔστιν τοίνυν τις αὐτοῖς τοιούτος λόγος, δι' οὗ προοδοκῶσιν παράξειν ὑμᾶς

Table 4.1 (Cont.).

No.	Source	Terminology
39	Demosthenes xxiii.219	• τὰς μὲν παραγωγὰς, ἃς οὗτοι ποιήσονται, χαίρειν ἐᾶτε καὶ μὴ ἐπιτρέπετε λέγειν αὐτοῖς
40	Demosthenes xxiv.6	• ἔσται δὲ οὐκ ἄπο τοῦ πράγματος
41	Demosthenes xxv.5	• οὐ τοὺς ὑπὲρ αὐτοῦ τοῦ πράγματος λόγους δικαίους
42	Demosthenes xxv.36	• οἶδα τοίνυν ὅτι τὴν μὲν ὀρθὴν καὶ δικαίαν ὁδὸν τῆς ἀπολογίας οὗτος φεύξεται, ἔξωθεν δὲ κύκλῳ περίεισι λοιδορούμενος καὶ διαβάλλων καὶ ὑπισχνούμενος κρινεῖν, εἰσάξειν, παραδώσιν
43	Demosthenes xxv.38	• τοῦ παρακρούσασθαι καὶ φενακίσαι ὑμᾶς ταῦτ' ἐρεῖ
44	Demosthenes xxvii.53	• ταῦτα δ' εἶπειν, ἵν' εἰ μὲν καὶ νῦν προσδοκήσαιμ' αὐτὸν ἐρεῖν, ἀπολογούμενος περὶ αὐτῶν διατρίβοιμι, δέον ἕτερα μ' αὐτοῦ κατηγορεῖν πρὸς ὑμᾶς
45	Demosthenes xxix.13-14	• περὶ οὗ μάλιστα προσῆκεν αὐτῷ τὸν λόγον ποιεῖσθαι
46	Demosthenes xxxv.41	• καὶ ῥᾳδίως λόγους ποριεῖσθαι περὶ ἀδίκων πραγμάτων, οἴεται παράξειν ὑμᾶς ὅποι ἂν βούληται
47	Demosthenes xxxvi.54-5	• ἡγούμαι τοίνυν, ὦ ἄνδρες Ἀθηναῖοι, πάντων μάλιστ' εἰς τὸ πρᾶγμ' εἶναι τούτων μάρτυρας παρασχέσθαι • ταῦτ' εἰς τὸ πρᾶγμ' εἶναι πρὸς ὑμᾶς εἰπεῖν
48	Demosthenes xxxvi.61	• ἐὰν δ' ἀπορῶν αἰτίας καὶ βλασφημίας λέγῃ καὶ κακολογῇ, μὴ προσέχετε τὸν νοῦν, μηδ' ὑμᾶς ἡ τούτου κραυγὴ καὶ ἀναίδει' ἐξαπατήσῃ
49	Demosthenes xxxviii.9	• τοῦτο γὰρ πλάττουσιν οὗτοι καὶ παράγουσι
50	Demosthenes xxxviii.19-20	• ἀκούω τοίνυν αὐτοὺς τὰ μὲν περὶ τῶν πραγμάτων αὐτῶν καὶ τῶν νόμων δίκαια φεύξεσθαι • δι' ὧν ὑμᾶς ἐξαπατήσειν οἴονται
51	Demosthenes xxxix.35	• ἂν δὲ φῇ δεινὰ πάσχειν καὶ κλάῃ καὶ ὀδύρηται καὶ κατηγορῇ μου, ἃ μὲν ἂν λέγῃ, μὴ πιστεύετε (οὐ γὰρ δίκαιον μὴ περὶ τούτων ὄντος τοῦ λόγου νυνί)
52	Demosthenes xl.20-21	• ψευδόμενος δὲ καὶ παραγωγὰς λέγων ἤδη τις δίκην οὐκ ἔδωκεν
53	Demosthenes xl.61	• ἐὰν δὲ μὴ ἔχων περὶ ὧν φεύγει τὴν δίκην μήτε μάρτυρας ἀξιόχρεως παρασχέσθαι μήτ' ἄλλο πιστὸν μηδέν, ἑτέρους παρεμβάλλῃ λόγους κακουργῶν, καὶ βοᾷ καὶ σχετλιάζῃ μηδὲν πρὸς τὸ πρᾶγμα
54	Demosthenes xli.12-14	• πρὸς μὲν ταῦτ' οὐδὲν ἀντερεῖ • πρῶτον μὲν οὐχ ἡγούμαι δικαίαν εἶναι τὴν ἀπολογίαν τοιαύτην, οὐδὲ προσήκειν, ὅταν τις φανερῶς ἐξελέγχηται, μεταστρέψαντα τὰς αἰτίας ἐγκαλεῖν καὶ διαβάλλειν
55	Demosthenes xlv.47-50	• ὑπὲρ δὲ τῶν ἄλλων οὐκ ἂν οἷος τ' εἴην λέγειν ἅμα καὶ τούτους ἐλέγχειν περὶ τῆς μαρτυρίας • οὔτε νῦν ἐστιν χαλεπὸν περὶ ὧν μὴ κατηγόρηται λέγειν • μὴ δὲ τοῦτ' ἀφεὶς περὶ ὧν οὐκ ἀγωνίζεται λεγέτω μηδ' ὑμεῖς ἐᾶτ', ἂν ἄρ' οὗτος ἀναισχυντῇ

Table 4.1 (Cont.).

No.	Source	Terminology
56	Demosthenes xlv.87	• ἐὰν παράγειν ἐπιχειρῶσιν ὑμᾶς
57	Demosthenes xlvi.1	• παράγων τῷ λόγῳ, ὡς οὐ πάντα μεμαρτύρηκε τὰ ἐν τῷ γραμματείῳ γεγραμμένα, καὶ ἐξαπατῶν ὑμᾶς
58	Demosthenes xlviii.36	• ἵνα μὴ αὐτίκ' ἐξαπατήσωσιν ὑμᾶς οἱ ῥήτορες
59	Demosthenes li.3	• χρῆν μὲν οὖν, ὦ ἄνδρες Ἀθηναῖοι, καὶ δίκαιον ἦν, τοὺς τὸν στέφανον οἰομένους δεῖν παρ' ὑμῶν λαβεῖν, αὑτοὺς ἀξίους ἐπιδεικνύναι τούτου, μὴ 'μὲ κακῶς λέγειν
60	Demosthenes lii.1-2	• μηκέτι περὶ τοῦ πράγματος μόνον λέγειν, ἀλλὰ καὶ περὶ τοῦ λέγοντος, ὡς οὐκ εἰκὸς αὐτῷ διὰ τὴν δόξαν πιστεύειν
61	Demosthenes liv.13	• ἀπὸ τῆς ὕβρεως καὶ τῶν πεπραγμένων τὸ πρᾶγμ' ἄγοντ' εἰς γέλωτα καὶ σκώμματ' ἐμβαλεῖν πειράσεσθαι
62	Demosthenes liv.26	• οὐδὲν πρὸς τὸ πρᾶγμα, ἀλλ' ἐξ ἑταίρας εἶναι παιδίον αὐτῷ τοῦτο καὶ πεπονθέναι τὰ καὶ τά
63	Demosthenes lvii.7	• τὸ γὰρ εἰς αὐτὸ τὸ πρᾶγμα πάντα λέγειν τοῦτ' ἔγωγ' ὑπολαμβάνω, ὅσα τις παρὰ τὸ ψηφισμα πέπονθ' ἀδίκως καταστασιασθεὶς ἐπιδεῖξαι
64	Demosthenes lvii.33-4	• ὥστε τούτῳ μὲν ἔξεστιν ἔξω τοῦ πράγματος βλασφημεῖν καὶ πάντα ποιεῖν
65	Demosthenes lvii.59	• νομίζω γὰρ ὑμῖν τὴν τούτων πονηρίαν εἰς αὐτὸ τὸ πρᾶγμα λέγειν τὸ γενόμενόν μοι
66	Demosthenes lvii.60	• ἐρῶ δ' εἰς αὐτὸ τὸ πρᾶγμ', ὦ ἄνδρες Ἀθηναῖοι
67	Demosthenes lvii.63	• ἀλλ' ἴσως ἔξω τοῦ πράγματος ὑπολῆφεσθε ταῦτ' εἶναι
68	Demosthenes lvii.66	• ἐπειδὴ δ' ἔξω τοῦ πράγματος νομίζετ' εἶναι, ἐάσω
69	Demosthenes lviii.22-5	• αἰτίας καὶ προφάσεις εὑρίσκειν, αἵτινες τοῦ παρόντος ὑμᾶς ποιήσουσι πράγματος ἐπιλαθόμενους τοῖς ἔξω τῆς κατηγορίας λόγας προσέχειν
70	Demosthenes lviii.41	• ὑπὲρ αὐτοῦ τοῦ πράγματος σκεψαμένους, εἰ μὲν δίκαια λέγω καὶ κατὰ τοὺς νόμους • ὅσῳπερ ἂν ἧττον ἐξαπατήσειαν ὑμᾶς
71	Demosthenes lviii.48	• περὶ τῆς ἐνδείξεως οὐδὲν ἔξει δίκαιον λέγειν
72	Demosthenes lviii.52	• ἀλλ' οὐ καθ' ὃν εἰσελήλυθας, τοῦτον ἀπολογῇ;
73	Demosthenes lviii.69	• ὑπὲρ αὐτῆς τῆς ἐνδείξεως ἀπολογεῖσθαι
74	Demosthenes lix.6	• ἔξω τῆς γραφῆς πολλὰ κατηγορῶν
75	Hyperides i.Fr.2	• καὶ μηδεὶς ὑμῶν ἀπαντάτω μοι μεταξὺ λέγοντι, "τί τούθ' ἡμῖν λέγεις;" μηδὲ προστίθετε τῇ κατηγορίᾳ παρ' ὑμῶν αὐτῶν μηδέν, ἀλλὰ [μᾶ]λλον τῇ ἀπολογίᾳ...
76	Hyperides i.Fr.3	• ἵνα δὲ μὴ πρὸ τοῦ πράγματος πο[λλ]ο[ὺς] λόγους ἀναλ[ώσω], ἐπ' αὐτὴν τὴν [ἀπολογ]ίαν πορεύσομαι
77	Hyperides i.9-11	• οὐ μόνον ἃ ἔχουσιν αὐτοὶ δίκαια περὶ τοῦ πράγματος λέγουσιν, ἀλλὰ συσκευσάντες λοιδορίας ψευδεῖς κατὰ τῶν κρινομένων ἐξιστᾶσιν τῆς ἀπολογίας • περὶ τῶν ἔξωθεν διαβαλῶν τῆς [περὶ τοῦ πράγματος ἀπολογία]ς ἀπολελ[εῖφθαι] • περὶ ὧν μὴ ἐὰν λέγειν

Table 4.1 (Cont.).

No.	Source	Terminology
78	Hyperides iv.4	• πρὶν [ἂν] αὐτὸ τὸ κεφάλαιον τοῦ ἀγῶνος καὶ τὴν ἀντιγραφὴν ἐξετάσωσιν εἰ ἔστιν ἐκ τῶν νόμων ἢ μή
79	Hyperides iv.10	• ἐὰν ἔξω τοῦ νόμου λέγωσιν
80	Hyperides iv.19	• τοῦτο γὰρ ὑπολαμβάνεις, ἐφόδιον ἑαυτῷ εἰς τὸν ἀγῶνα τὸ ἐκείνης ὄνομα παραφέρων καὶ κολακείαν ψευδῆ κατηγορῶν Ευξενίππου, μῖσος καὶ ὀργὴν αὐτῷ συλλέξειν παρὰ τῶν δικαστῶν
81	Hyperides iv.31-2	• ἵν' ἐὰν μὲν ἀφέμενοι τῆς εἰσαγγελίας περὶ τῶν ἔξω τοῦ πράγματος κατηγορηθέντων ἀπολογῶνται, ἀπαντῶσιν αὐτοῖς οἱ δικασταί· τί ταῦθ' ἡμῖν λέγετε; • ἃ εἰς μὲν τὸν ἀγῶνα τοῦτον οὐδὲν δήπου ἐστίν • ὡς ἄλλοθί που οὗτοι τὴν γνώμην ἂν σχοίησαν ἢ ἐπ' αὐτοῦ τοῦ πράγματος
82	Lycurgus i.11-13	• οὔτε ψευδόμενος οὐδὲν, οὔτ' ἔξω τοῦ πράγματος λέγων • πάντα μᾶλλον ἢ περὶ οὗ μέλλετε τὴν ψῆφον φέρειν • ὑπὲρ ὧν μὴ βουλεύεσθε • τοῖς ἔξω τοῦ πράγματος λέγουσιν
83	Lycurgus i.90-1	• οὐ γὰρ τοῦ πράγματός ἐστι • οὐ γὰρ τοῦτο δεῖ λέγειν
84	Lycurgus i.149	• ἀποδέδωκα τὸν ἀγῶνα ὀρθῶς καὶ δικαίως, οὔτε τὸν ἄλλον τούτου βίον διαβαλὼν οὔτ' ἔξω τοῦ πράγματος οὐδὲν κατηγορήσας
85	Aeschines i.113	• οὐ περὶ τοῦ πράγματος ἀπελογεῖτο, ἀλλ' εὐθὺς περὶ τοῦ τιμήματος ἱκέτευεν ὁμολογῶν ἀδικεῖν
86	Aeschines i.166-70	• πολλαὶ παρεμβολαὶ λόγων ὑπὸ Δημοσθένους εὑρεθήσονται, καὶ ταῖς μὲν ὑπὲρ τοῦ πράγματος κακοηθείαις λεγομέναις ἧττον ἂν τις ἀγανακτήσειαν· ἃ δὲ ἔξωθεν ἐπεισάξεται λυμαινόμενος τὰ τῆς πόλεως δίκαια, ἐπὶ τούτοις ἄζιόν ἐστιν ὀργισθῆναι • ὅλως δέ, ὦ ἄνδρες Ἀθηναῖοι, τὰς ἔξωθεν τοῦ πράγματος ἀπολογίας μὴ προσδέχεσθε
87	Aeschines i.174	• λήσειν μεταλλάξας τὸν ἀγῶνα καὶ τὴν ὑμετέραν ἀκρόασιν
88	Aeschines i.175-6	• ἀπαγαγὼν γὰρ αὐτοὺς ἀπὸ τῶν περὶ Τίμαρχον αἰτιῶν • πανταχῇ παρακολουθοῦντας μηδαμῇ παρεκκλίνειν αὐτὸν ἐᾶν, μηδὲ τοῦ πράγματος ἐξαγωνίοις λόγοις διισχυρίζεσθαι. ἀλλ' ὥσπερ ἐν ταῖς ἱπποδρομίαις εἰς τὸν τοῦ πράγματος αὐτὸν εἰσελαύνετε
89	Aeschines i.177-9	• πολλάκις ἀφέμενοι τῶν εἰς αὐτὸ τὸ πρᾶγμα λόγων • ἐπειδὰν δ' ἀπὸ τῆς ἀπολογίας ἀποσπασθῆτε καὶ τὰς ψυχὰς ἐφ' ἑτέρων γένεσθε, εἰς λήθην ἐμπεσόντες τῆς κατηγορίας • ταῖς γὰρ ἀλλοτρίαις αἰτίαις ἀποτριψάμενος τὰ ὑπάρχοντα αὑτῷ ἐγκλήματα ἐκπέφευγεν ἐκ τοῦ δικαστηρίου
90	Aeschines iii.76	• ἵνα δ' ἐπὶ τῆς ὑποθέσεως μείνω

Table 4.1 (Cont.).

No.	Source	Terminology
91	Aeschines iii.176	• ἵνα δὲ μὴ ἀποπλανῶ ὑμᾶς ἀπὸ τῆς ὑποθέσεως
92	Aeschines iii.190	• ἵνα δὲ μὴ ἀποπλανῶ ὑμᾶς ἀπὸ τῆς ὑποθέσεως
93	Aeschines iii.193	• μετενήνεκται γὰρ ὑμῖν τὰ τῆς πόλεως δίκαια • ὧν δ' οὐκ εἰσί δικασταί περὶ τούτων ἀναγκάζονται τὴν ψῆφον φέρειν • ἂν ἄρα ποθ' ἅψηται τοῦ πράγματος
94	Aeschines iii.197	• τοῖς εἰς αὐτὸ τὸ πρᾶγμα λέγουσιν
95	Aeschines iii.201-8	• οὐ γὰρ τῶν φευγόντων τὰς δικαίας ἀπολογίας εἰσεληλύθατε ἀκροασόμενοι, ἀλλὰ τῶν ἐθελόντων δικαίως ἀπολογεῖσθαι • ἑτέρων παρεμβολῇ πραγμάτων εἰς λήθην ὑμᾶς βούλεται τῆς κατηγορίας ἐμβαλεῖν. ὥσπερ οὖν ἐν τοῖς γυμνικοῖς ἀγῶσιν ὁρᾶτε τοὺς πύκτας περὶ τῆς στάσεως ἀλλήλοις διαγωνιζομένους, οὕτω καὶ ὑμεῖς ὅλην τὴν ἡμέραν ὑπὲρ τῆς πόλεως περὶ τῆς στάσεως αὐτῷ τοῦ λόγου μάχεσθε, καὶ μὴ ἐᾶτε αὐτὸν ἔξω τοῦ παρανόμου περιίστασθαι, ἀλλ' ἐγκαθήμενοι καὶ ἐνεδρεύοντες ἐν τῇ ἀκροάσει, εἰσελαύνετε αὐτὸν εἰς τοὺς τοῦ παρανόμου λόγους, καὶ τὰς ἐκτροπὰς αὐτοῦ τῶν λόγων ἐπιτηρεῖτε
96	Dinarchus i.113	• μὴ ἀποδέχεσθ' αὐτῶν, ἀλλὰ κελεύετ' ἀπολογεῖσθαι περὶ τῶν κατηγορημένων

Table 5.1. Legal and nonlegal arguments in Athenian forensic speeches.

Speech	Total sections	Legal argument	Discussion of laws or decrees	Nonlegal argument	Sections double counted	Sections not allocated
Antiphon i	31	1-31 (total 31)	--	--	--	--
Antiphon v	96	1-76, 78-96 (total 95)	8-10, 48 (total 3)	77 (total 1)	--	--
Antiphon vi	51	1-51 (total no. 51)	36 (total no. 1)	--	--	--
Andocides i	150	1-91, 103-23, 132-40 (total 121)	71-79, 83-84, 85, 86-87, 88-91, 110, 115-16 (total 21)	92-102, 124-31, 141-50 (total 29)	--	--
Isocrates xvi	50 (beginning lost)	1-4 (total 4)	--	25-50 (total 26)	--	5-24 (total 20)
Isocrates xvii	58	1-32, 35-57 (total 55)	--	33-34, 57-58 (total 4)	57 (total 1)	--
Isocrates xviii	68	1-47, 68 (total 48)	2-3, 4, 19, 20 (total 5)	16, 47-68 (total 23)	16, 47, 68 (total 3)	--
Isocrates xx	22 (beginning lost)	1-22 (total 22)	--	--	--	--
Isocrates xxi	21 (end lost)	1-21 (total 21)	--	--	--	--
Lysias i	50	1-50 (total 50)	4, 26, 27, 29, 30, 31, 32-33, 34 (total 9)	--	--	--
Lysias iii	48	1-43, 46 (total 44)	28, 41-43 (total 4)	44-48 (total 5)	46 (total 1)	--
Lysias iv	20 (beginning lost)	1-18, 20 (total 19)	6, 7 (total 2)	19-20 (total 2)	20 (total 1)	--
Lysias v	5 (fragment)	1 (total 1)	--	2-5 (total 4)	--	--
Lysias vi	55 (beginning lost)	1-6, 8-10, 13-25, 35-45, 50-55 (total 39)	9, 24, 37, 50-55 (+26) (total 9) + (1)	6-7, 11-12, 26-32, 33-34 (total 13)	6 (total 1)	46-49 (total 4)
Lysias vii	43	1-30, 34-43 (total 40)	--	30-33, 41 (total 5)	30, 41 (total 2)	--
Lysias ix	22	1-22 (total 22)	--	--	--	--
Lysias x	32	1-26, 30, 31-32 (total 29)	6-10, 15-20 (total 11)	9, 23, 24, 26-29, 31 (total 8)	9, 23, 24, 26, 31 (total 5)	--
Lysias xii	100	1-37, 79-98, 100 (total 58)	6, 30, 34 (total 3)	20, 99 (total 2)	20 (total 1)	38-61, 62-78 (total 41)
Lysias xiii	96 (excluding § 91)	1-61, 83-97 (total 75)	2, 4, 85-87, 88-90 (total 8)	18, 62-69 (total 9)	18 (total 1)	70-82 (total 13)

Table 5.1 (Cont.).

Speech	Total sections	Legal argument	Discussion of laws or decrees	Nonlegal argument	Sections double counted	Sections not allocated
Lysias xiv	47	3-22, 32-34, 40, 47 (total 25)	5, 6-8 (total 4)	1-2, 10, 35-42, 46-47 (total 13)	10, 40, 47 (total 3)	23-31, 43-45 (total 12)
Lysias xv	12	1-12 (total 12)	--	--	--	--
Lysias xvi	21	3-8 (total 6)	6-8 (total 3)	1-3, 9-21 (total 16)	3 (total 1)	--
Lysias xvii	10	1-10 (total 10)	--	--	--	--
Lysias xviii	27 (beginning lost)	15-19 (total 5)		1-15, 20-27 (total 23)	15 (total 1)	--
Lysias xix	64	1-54 (total 54)	--	2, 9-10, 14-17, 19, 55-64 (total 18)	2, 9-10, 14-17, 19 (total 8)	--
Lysias xx	36	1-5, 7-22, 27 (total 22)	--	2, 4, 5-6, 22-25, 26, 28-36 (total 18)	2, 4, 5, 22 (total 4)	--
Lysias xxi	25 (beginning lost)	--	--	1-25 (total 25)	--	--
Lysias xxii	22	1-13, 17-22 (total 19)	5, 6, 7, 9, 17 (total 5)	14-16 (total 3)	--	--
Lysias xxiii	16	1-16 (total 16)	--	4, 11, 14 (total 3)	4, 11, 14 (total 3)	--
Lysias xxiv	27	1-23, 26, 27 (total 25)	--	24-25 (total 2)	--	--
Lysias xxv	35 (end lost)	1-35 (total 35)	--	12-13, 17 (total 3)	12-13, 17 (total 3)	--
Lysias xxvi	24 (beginning lost)	1-3, 6-13, 15-20 (total 17)	--	8, 13-14, 21-24 (total 7)	8, 13 (total 2)	4-5 (total 2)
Lysias xxvii	16	1-8, 12-16 (total 13)	--	9-12 (total 4)	12 (total 1)	--
Lysias xxviii	17	1-11 (total 11)	--	--	--	12-17 (total 6)
Lysias xxix	14	1-14 (total 14)	5 (total 1)	--	--	--
Lysias xxx	35	1-9, 15-25, 35 (total 21)	--	2, 6, 9-14, 26-35 (total 18)	2, 6, 9, 35 (total 4)	--
Lysias xxxi	34	--	--	1-34 (total 34)	--	--
Lysias xxxii	29 (end lost)	1-29 (total 29)	3, 23, 24, 25 (total 4)	--	--	--
Isaeus i	51	1-51 (total 51)	-			--
Isaeus ii	47	1-34, 38-47 (total 44)	13-15, 17 (total 3)	35-37, 42 (total 4)	42 (total 1)	--
Isaeus iii	80	1-80 (total 80)	35, 42, 58, 64, 67-68, 69 (total 7)	37, 40 (total 2)	37, 40 (total 2)	--

Table 5.1 (Cont.).

Speech	Total sections	Legal argument	Discussion of laws or decrees	Nonlegal argument	Sections double counted	Sections not allocated
Isaeus iv	31	1-26, 31 (total 27)	14, 16 (total 2)	27-28, 28-30 (total 4)	--	--
Isaeus v	47	1-9, 12-26, 28-34 (total 31)	--	10-11, 26-27, 39-45 (total 11)	26, 45 (total 2)	35-38, 45-47 (total 7)
Isaeus vi	65	1-37, 43-46, 51-59, 62-65 (total 54)	9, 44 (total 2)	38-42, 47-50, 55, 59, 61 (total 13)	55, 59 (total 2)	--
Isaeus vii	44	1-35, 43-44 (total 37)	19-22 (total 4)	34, 35-36, 37-42 (total 9)	35, 35 (total 2)	--
Isaeus viii	46	1-37, 43-46 (total 43)	31-32 (total 2)	40-42, 44, 46 (total 5)	44, 46 (total 2)	--
Isaeus ix	37	1-37 (total 37)	--	--	--	--
Isaeus x	26	1-24, 26 (total 25)	2, 9-10, 12 (total 4)	25 (total 1)	--	--
Isaeus xi	50 (end lost)	1-50 (total 50)	1-3, 5, 10-11, 12-13, 17, 22, 23, 29 (total 12)	50 (total 1)	50 (total 1)	--
Isaeus xii	12 (beginning lost)	1-12 (total 12)	--	--	--	--
Demosthenes xviii	303 (§§ 29, 54-55, 74, 77-78, 84, 90-91, 116, 157, 164-65, 167, 181-87 bogus)	1-31, 42-126, 160-251, 267, 270-324 (total 244)	36-39, 110-25 (total 19)	10, 35-42, 126-59, 252-66, 268-69 (total 59)	10, 42, 126 (total 3)	32-34 (total 3)
Demosthenes xix	338 (no §§ 105-9)	1-168, 174-91, 202-5, 215-40, 263-81, 283-86, 288-330, 332-36, 341-43 (total 285)	48-51, 63, 86-87, 131, 275, 279 (total 10)	169-73, 192-201, 206-14, 229-30, 237-38, 241-62, 281-82, 287, 314, 331, 337-40 (total 59)	229-30, 237-38, 281, 314 (total 6)	--
Demosthenes xx	167	1-13, 15-142, 145, 154-67 (total 156)	27, 28, 29, 89, 94, 96, 97, 127-28, 129-30, 155-56, 160 (total 14)	13-14, 143-44, 146-53 (total 12)	13 (total 1)	--
Demosthenes xxi	225 (§§ 22, 168 bogus)	1-18, 24-82, 97, 126-27, 169-70, 175-83, 186-96, 211-27 (total 124)	9-11, 30, 32-35, 43-46 (total 12)	19-23, 83-125, 128-42, 160-68, 171-74, 184-85, 189, 197-212 (total 93)	97, 189, 211-12 (total 4)	143-59 (total 17)

Table 5.1 (Cont.).

Speech	Total sections	Legal argument	Discussion of laws or decrees	Nonlegal argument	Sections double counted	Sections not allocated
Demosthenes xxii	77 (§ 74 bogus)	1-20, 25-46 (total 42)	5-7, 8-11, 24, 34 (total 9)	21-24, 47-78 (total 35)	--	--
Demosthenes xxiii	220	1-220 (total 220)	16, 18, 19-21, 22-28, 28-36, 37-43, 44-50, 51-52, 53-59, 60-61, 62, 83-84, 86, 87, 143, 215-18, 219-20 (total 57)	--	--	--
Demosthenes xxiv	218	1-122, 131-57, 187-99, 204-18 (total 177)	24-27, 27-32, 34, 41, 43-44, 46-49, 51-53, 55-56, 57-58, 59-60, 72-74, 79-81, 82-83, 84-85, 86, 87, 88-89, 90 (total 41)	123-30, 158-87, 197-203 (total 45)	187, 197-99 (total 4)	--
Demosthenes xxv	101	1-38, 69-75, 81-101 (total 66)	--	35, 38-68, 74 (total 33)	35, 38, 74 (total 3)	76-80 (total 5)
Demosthenes xxvi	27	1-15, 19-27 (total 24)	--	--	--	16-18 (total 3)
Demosthenes xxvii	69	1-69 (total 69)	17, 58 (total 2)	--	--	--
Demosthenes xxviii	24	1-23 (total 23)	--	22, 24 (total 2)	22 (total 1)	--
Demosthenes xxix	60	1-60 (total 60)	29, 36 (total 2)	4 (total 1)	4 (total 1)	--
Demosthenes xxx	39	1-39 (total 39)	--	--	--	--
Demosthenes xxxi	14	1-14 (total 14)	--	--	--	--
Demosthenes xxxii	32 (end missing)	1-32 (total 32)	1-2, 24 (total 3)	--	--	--
Demosthenes xxxiii	38	1-38 (total 38)	1-3, 4, 27 (total 5)	--	--	--
Demosthenes xxxiv	52	1-35, 40-52 (total 48)	32, 33, 42, 43 (total 4)	36-37, 38-39, 40 (total 5)	40 (total 1)	--
Demosthenes xxxv	56	3-40, 43-49, 55-56 (total 47)	8, 10-13, 18-19, 21-23, 24-25, 27, 37 (total 13)	1-2, 41-42, 44, 50-54 (total 10)	44 (total 1)	--

Table 5.1 (Cont.).

Speech	Total sections	Legal argument	Discussion of laws or decrees	Nonlegal argument	Sections double counted	Sections not allocated
Demosthenes xxxvi	62	1-35, 60-62 (total 38)	23-24, 25, 26-27 (total 5)	43-59 (total 17)	--	36-42 (total 7)
Demosthenes xxxvii	60	1-60 (total 60)	1, 18-19, 21, 33, 35-38 (total 9)	48, 54 (total 2)	48, 54 (total 2)	--
Demosthenes xxxviii	28	1-24, 27-28 (total 26)	1-3, 4, 5, 16, 17-18, 27 (total 9)	28 (total 1)	28 (total 1)	25-26 (total 2)
Demosthenes xxxix	41	--	--	1-41 (total 41)	--	--
Demosthenes xl	61	1-31, 36-56, 58-61 (total 56)	19 (total 1)	32-35, 57 (total 5)	--	--
Demosthenes xli	30	1-30 (total 30)	7, 10 (total 2)	--	--	--
Demosthenes xlii	32	1-20, 26-32 (total 27)	1, 4, 5, 7, 9, 10-14, 17, 26, 27, 28 (total 14)	--	--	21-25 (total 5)
Demosthenes xliii	84	1-67, 73-84 (total 79)	16, 17, 27, 51-52, 54-55, 57-58 (+71-72) (total 9) + (2)	68-72 (total 5)	--	--
Demosthenes xliv	68 (end lost)	1-30, 41-56, 60-68 (total 55)	2, 7, 12, 14, 25, 45-51, 60-68 (total 21)	31-40, 57-59 (total 13)	--	--
Demosthenes xlv	88	1-52, 57-62, 86-88 (total 61)	--	53-56, 63-84, 85 (total 27)	--	--
Demosthenes xlvi	28	1-28 (total 28)	6-8, 9-10, 12-13, 14-17, 18-23, 24-25, 25-26, 27 (total 21)	--	--	--
Demosthenes xlvii	82	1-48 (total 48)	8, 21, 23, 25, 29, 30, 33, 40, 44 (+70, 72, 77) (total 9) + (3)	49-82 (total 34)	--	--
Demosthenes xlviii	58	1-51, 57-58 (total 53)	11, 30 (+56-57) (total 2) + (2)	52-57 (total 6)	57 (total 1)	--
Demosthenes xlix	69	1-69 (total 69)	20, 56 (total 2)	9, 14, 46, 65, 66 (total 5)	9, 14, 46, 65, 66 (total 5)	--

Table 5.1 (Cont.).

Speech	Total sections	Legal argument	Discussion of laws or decrees	Nonlegal argument	Sections double counted	Sections not allocated
Demosthenes l	68	1-58, 65-67 (total 61)	57-58 (total 2)	58-59, 60-62, 63, 64, 68 (total 8)	58 (total 1)	--
Demosthenes li	22	1-22 (total 22)	1, 4 (total 2)	--	--	--
Demosthenes lii	33	1-33 (total 33)	-	26, 29 (total 2)	26, 29 (total 2)	--
Demosthenes liii	28	1-28 (total 28)	11, 27 (total 2)	--	--	--
Demosthenes liv	44	1-36, 38, 40-44 (total 41)	17-21, 24-25 (total 7)	16-17, 36-37, 39-40, 44 (total 7)	16-17, 36, 40 (total 4)	--
Demosthenes lv	35	1-35 (total 35)	--	--	--	--
Demosthenes lvi	50	1-7, 9-50 (total 49)	2, 10 (total 2)	7-8, 10 (total 3)	7, 10 (total 2)	--
Demosthenes lvii	70	1-57, 61-62, 66-70 (total 64)	4, 29, 30-32 (total 5)	58-61, 62-65, 66 (total 9)	61, 62, 66 (total 3)	--
Demosthenes lviii	70	1-26, 36-65, 68-70 (total 59)	6-7, 11-13, 14-15, 17, 21-22, 48-49, 50-52 (total 15)	27-35, 66-68, 69-70 (total 14)	68, 69-70 (total 3)	--
Demosthenes lix	126	1-32, 35-44, 49-63, 72-84, 88-107, 110-26 (total 107)	4, 16-17, 52-53, 75-79, 89-90, 92-93, 105-6 (+66-67, 85-87) (total 16) + (5)	27-28, 33-34, 36, 41-43, 45-48, 64-71, 85-87, 107-9 (total 26)	27-28, 36, 41-43, 107 (total 7)	--
Lycurgus i	150	1-24, 28-150 (total 147)	37, 113-16, 117-19, 120-21, 122-23, 125-26, 146 (total 15)	25-27 (total 3)	--	--
Hyperides i	20 + 4 (fragmentary)	1-13, 19-20, Frr. i-iv (total 15 + 4)	12, Fr. iii (total 1 + 1)	14-15, 16-18 (total 5)	--	--
Hyperides ii	13 (beginning lost)	1-13 (total 13)	--	9, 10 (total 2)	9, 10 (total 2)	--
Hyperides iii	36 (beginning and end lost)	1-28 (total 28)	13, 14-18, 22 (+33) (total 7) + (1)	3, 29-36 (total 9)	3 (total 1)	--
Hyperides iv	41	1-27, 30-41 (total 39)	3, 4-10 (total 8)	23, 28-30 (total 4)	23, 30 (total 2)	--

Table 5.1 (Cont.).

Speech	Total sections	Legal argument	Discussion of laws or decrees	Nonlegal argument	Sections double counted	Sections not allocated
Hyperides v	36 (fragmentary; no §§ 16, 23, 27, 33)	1-15, 19, 22, 24-26, 29, 31-32, 34-40 (total 30)	24 (total 1)	17-18, 20-21, 28-29, 30 (total 7)	29 (total 1)	--
Aeschines i	190 (§§ 12, 16, 21, 35, 66, 68 bogus)	1-42, 44-57, 65-106, 117-69, 174-96 (total 168)	1, 3, 9-11, 13-14, 15-17, 18-20, 22-25, 27, 28-32, 33-34, 73, 119, 138-40, 160 (total 30) + (1)	26, 39, 43, 58-64, 107-16, 170-73, 189 (total 25)	26, 39, 189 (total 3)	--
Aeschines ii	184	1-21, 24-33, 36-39, 44-107, 113-45, 153-65, 171-78, 183-84 (total 155)	54-55, 60-62, 65-66, 91-92 (total 9)	3, 22-23, 34-35, 40-43, 54, 55, 62, 78, 79, 88, 93, 99, 108-12, 113, 121, 146-52, 153, 165, 166, 167-70, 179-82 (total 42)	3, 54, 55, 62, 78, 79, 88, 93, 99, 113, 121, 153, 165 (total 13)	--
Aeschines iii	260	1-50, 54-75, 79-170, 177-212, 215-30, 232, 233, 234-40, 254-60 (total 232)	2, 11-12, 14-16, 18-22, 26, 27-28, 29-30, 31, 32-34, 35-40, 45, 47, 48, 49-50, 204 (total 32)	51-53, 76-78, 171-76, 207, 209-10, 213-14, 230-31, 241-53 (total 32)	207, 209-10, 230 (total 4)	--
Dinarchus i	114	1-17, 37-77, 82-90, 103-14 (total 79)	16, 82-84 (+78-82) (total 3) + (5)	17, 18-36, 46, 78-82, 91-98, 99-102 (total 39)	15, 17, 46, 82 (total 4)	--
Dinarchus ii	26	1-4, 5-7, 14-18, 20-26 (total 19)	--	1, 2, 3, 4, 14, 15, 18-19, 20 (total 9)	1, 2, 3, 4, 14, 15, 18, 20 (total 8)	8-13 (total 6)
Dinarchus iii	22	1-5, 11-14, 17-22 (total 15)	4 (total 1)	1, 6-10, 15-16 (total 8)	1 (total 1)	--

Table 5.2. Relative Proportions of Legal and Nonlegal Argument

Speech	Type of Case	Total Sections	Legal (%)	Nonlegal (%)
Andocides i	Public Defendant	150	80.7	19.3
Antiphon v	Public Defendant	96	99	1
Isocrates xvi	Private defendant	50 (incomplete)	--	--
Isocrates xvii	Private prosecutor	58	94.8	6.9
Isocrates xviii	Private defendant (paragraphe)	68	70.6	33.8
Lysias iii	Private defendant	48	91.7	10.4
Lysias iv	Private defendant	20 (incomplete)	--	--
Lysias v	Private defendant	5 (incomplete)	--	--
Lysias vi	Public prosecutor	55 (incomplete)	--	--
Lysias vii	Public defendant	43	93	11.6
Lysias x	Private prosecutor	32	90.6	25
Lysias xii	Public prosecutor	100	61	40
Lysias xiii	Private prosecutor	96	78.1	22.9
Lysias xiv	Private prosecutor	47	53.2	53.2
Lysias xvi	Public defendant	21	28.6	76.2
Lysias xviii	Public defendant	27 (incomplete)	--	--
Lysias xix	Public defendant	64	84.4	25
Lysias xx	Public defendant	36	61.1	50
Lysias xxi	Public defendant	25	--	--
Lysias xxii	Public prosecutor	22	86.4	13.6
Lysias xxiii	Private prosecutor (antigraphe)	16	100	18.75
Lysias xxiv	Public defendant	27	92.6	7.4
Lysias xxv	Public defendant	35 (incomplete)	--	--
Lysias xxvi	Public defendant	24 (incomplete)	--	--
Lysias xxvii	Public prosecutor	16	81.3	25
Lysias xxviii	Public prosecutor	17	64.7	35.3
Lysias xxx	Public prosecutor	35	60	51.4
Lysias xxxi	Public prosecutor	34	0	100
Isaeus ii	Private defendant	47	93.6	8.5
Isaeus iii	Private prosecutor	80	100	2.5
Isaeus iv	Diadikasia	31	87.1	12.9
Isaeus v	Private prosecutor	47	66	36.2
Isaeus vi	Private prosecutor	65	83.1	20
Isaeus vii	Diadikasia	44	84.1	20.5
Isaeus viii	Diadikasia	46	93.5	10.9
Isaeus x	Diadikasia	26	96.2	3.8
Isaeus xi	Public defendant	50 (incomplete)	--	--
Demosthenes xviii	Public defendant	303	80.2	20.8
Demosthenes xix	Public prosecutor	338	94.1	17.5
Demosthenes xx	Public prosecutor	167	93.4	7.2
Demosthenes xxi	Public prosecutor	225	52.9	48.9

Table 5.2 (Cont.).

Speech	Type of Case	Total Sections	Legal (%)	Nonlegal (%)
Demosthenes xxii	Public prosecutor	77	59.7	40.3
Demosthenes xxiv	Public prosecutor	218	81.2	20.6
Demosthenes xxv	Public prosecutor	101	65.3	37.6
Demosthenes xxvi	Public prosecutor	27	88.9	11.1
Demosthenes xxviii	Private prosecutor	24	95.8	8.3
Demosthenes xxix	Private defendant	60	100	1.7
Demosthenes xxxiv	Private prosecutor (paragraphe)	52	93.3	9.6
Demosthenes xxxv	Private prosecutor (paragraphe)	56	83.9	17.9
Demosthenes xxxvi	Private defendant (paragraphe)	62	61.3	38.7
Demosthenes xxxvii	Private defendant (paragraphe)	60	100	3.3
Demosthenes xxxviii	Private defendant	28	92.9	10.7
Demosthenes xxxix	Diadikasia	41	0	100
Demosthenes xl	Private prosecutor	61	91.8	8.2
Demosthenes xlii	Diadikasia	32	84.4	15.6
Demosthenes xliii	Diadikasia	84	94	6
Demosthenes xliv	Private prosecutor	68	80.9	19.1
Demosthenes xlv	Private prosecutor	88	69.3	30.7
Demosthenes xlvii	Private prosecutor	82	58.5	41.5
Demosthenes xlviii	Private prosecutor	58	91.4	10.3
Demosthenes xlix	Private prosecutor	69	100	7.2
Demosthenes l	Private prosecutor	68	89.7	11.8
Demosthenes lii	Private defendant	33	100	6
Demosthenes liv	Private prosecutor	44	93.2	15.9
Demosthenes lvi	Private prosecutor	50	98	6
Demosthenes lvii	Private defendant	70	91.4	12.9
Demosthenes lviii	Public prosecutor	70	84.3	20
Demosthenes lix	Public prosecutor	126	84.9	20.6
Lycurgus i	Public prosecutor	150	98	2
Hyperides i	Public defendant	20 + 4 (incomplete)	--	--
Hyperides ii	Public prosecutor	13 (incomplete)	--	--
Hyperides iii	Private prosecutor	36 (incomplete)	--	--
Hyperides iv	Public defendant	41	95.1	9.8
Hyperides v	Private prosecutor	36 (incomplete)	--	--
Aeschines i	Public prosecutor	190	88.4	13.2
Aeschines ii	Public defendant	184	84.2	22.8
Aeschines iii	Public prosecutor	260	89.2	13.3
Dinarchus i	Public prosecutor	114	69.3	34.2
Dinarchus ii	Public prosecutor	26	73.1	57.7
Dinarchus iii	Public prosecutor	22	68.2	36.4

Table 5.3. The Heliastic Oath in Athenian Forensic Oratory

Reference	Type of Case	Total Sections	Legal Argument	Nonlegal Argument	Proportion dealing with Oath
Antiphon v.8, 85, 96	Private defendant	96	1-96	--	3%
Andocides i.2, 9, 31, 91, 105	Public defendant	150	1-91, 103-23, 132-40	92-102, 124-31, 141-50	3%
Lysias x.32	Private prosecutor	32	1-23, 25-26, 30-32	9, 23-24, 26-29, 31	3%
Lysias xiv.22, 40, 47	Public prosecutor	47	3-34, 40, 43-45, 47	1-2, 10, 23-31, 35-47	6%
Lysias xv.8-11	Public prosecutor	12	1-12	--	25%
Lysias xviii.13	Public defendant	27 (beginning of speech lost)	13-19	1-12, 20-27	--
Lysias xix.11	Public defendant	64	1-54	2, 9-10, 14-17, 19, 55-64	2%
Lysias xxii.7	Public prosecutor	22	1-13, 17-22	14-16	6%
Isocrates xviii.34	Private defendant (paragraphe)	68	1-47, 68	16, 47-68	1%
Isaeus ii.47	Private defendant	47	1-34, 38-47	35-37, 42	2%
Isaeus iv.31	Diadikasia	31	1-26, 31	27-30	3%
Isaeus vi.2, 65	Private prosecutor	65	1-37, 43-46, 51-59, 62-65	38-42, 47-50, 55, 59-61	3%
Isaeus viii.46	Diadikasia	46	1-39, 43-46	40-42, 44, 46	2%
Isaeus xi.6, 18	Public defendant	50 (end of speech lost)	1-50	50	--
Demosthenes xviii.2, 6-7, 121, 126, 249	Public defendant	303 (21 sections bogus)	1-34, 42-126, 160-251, 270-324	10, 32-34, 126-59, 252-69	2%
Demosthenes xix.1, 132, 161, 179, 212, 219-20, 239-40, 284, 297	Public prosecutor	338 (no 105-9)	1-168, 174-91, 202-5, 215-40, 263-81, 283-86, 288-330, 332-36, 341-43	169-73, 192-201, 206-14, 237-38, 241-62, 281-82, 287, 314, 331, 337-40	3%
Demosthenes xx.93, 118-19, 159, 167	Public prosecutor	167	1-13, 15-142, 145, 154-67	13-14, 143-44, 146-53	3%

Table 5.3 (Cont.).

Reference	Type of Case	Total Sections	Legal Argument	Nonlegal Argument	Proportion dealing with Oath
Demosthenes xxi.4, 24, 34, 42, 177, 188, 211-12	Public prosecutor	225 (2 sections bogus)	1-18, 24-82, 97, 126-7, 143-50, 169-70, 175-83, 186-96, 211-27	19-23, 83-125, 128-42, 151-68, 171-74, 184-85, 189, 197-212	4%
Demosthenes xxii.4, 20, 39, 43-46	Public prosecutor	77 (1 bogus)	1-46	47-78	9%
Demosthenes xxiii.19, 96-97, 101, 194	Public prosecutor	220	1-220	--	2%
Demosthenes xxiv.2, 34-35, 58, 78, 90, 148-51, 175, 188	Public prosecutor	218	1-122, 131-57, 187-99, 204-218	123-30, 158-87, 197-203	6%
Demosthenes xxv.11, 99	Public prosecutor	101	1-38, 69-101	35, 38-68, 74, 76-80	2%
Demosthenes xxvii.68	Private prosecutor	69	1-69	--	1%
Demosthenes xxix.4, 13, 53	Private defendant	60	1-60	4	5%
Demosthenes xxxiv.45	Private prosecutor (paragraphe)	52	1-35, 40-52	36-40	2%
Demosthenes xxxvi.1, 26, 61	Private defendant (paragraphe)	62	1-42, 60-62	36-59	5%
Demosthenes xxxix.37-38, 40-41	Diadikasia?	41	--	1-41 (but relevant)	10%
Demosthenes xliii.84	Diadikasia	84	1-67, 73-84	68-72	1%
Demosthenes xliv.14	Private prosecutor?	68	1-30, 41-56, 60-68	31-40, 57-59	1%
Demosthenes xlv.50, 86-88	Private prosecutor	88	1-52, 57-62, 86-88	53-56, 63-85	5%
Demosthenes xlvi.27	Private prosecutor	28	1-28	--	4%
Demosthenes lv.35	Private defendant	35	1-35	--	3%
Demosthenes lvii.17, 68	Private defendant	70	1-57, 61-62, 66-70	58-66	3%
Demosthenes lviii.17, 25, 36, 61	Public prosecutor	70	1-26, 36-65, 68-70	27-35, 66-69	6%
Demosthenes lix.115	Public prosecutor	126	1-32, 35-40, 43-44, 49-63, 72-84, 88-107, 110-26	27-28, 33-34, 36, 41-43, 45-48, 64-71, 86-87, 107-9	1%
Hyperides i. Fr.i	Public defendant	20 + 6 (much missing)	1-13, 19-20, Frr.i-iv	1, 14-18	--

Table 5.3 (Cont.).

Reference	Type of Case	Total Sections	Legal Argument	Nonlegal Argument	Proportion dealing with Oath
Hyperides ii.5	Public prosecutor	13 (beginning of speech lost)	1-13	9-10	--
Hyperides iv.40	Public defendant	41	1-27, 30-41	23, 28-30	2%
Hyperides v.1	Public prosecutor	36 (much missing)	1-15, 19, 22-26, 29, 31-40	17-18, 20-21, 28-30	--
Lycurgus i.13, 79, 128	Public prosecutor	150	1-24, 28-150	25-27	2%
Aeschines i.154, 170	Public prosecutor	190 (6 bogus)	1-25, 27-57, 65-106, 119-96	26, 49, 43, 58-64, 107-16, 189	1%
Aeschines ii.1	Public defendant	184	1-21, 24-33, 36-39, 44-107, 113-45, 153-65, 171-78, 183-84	22-23, 34-35, 40-43, 54-55, 62, 88, 93, 99, 108-13, 156-53, 166-70, 179-82	1%
Aeschines iii.6, 8, 31, 198, 233, 257	Public prosecutor	260	1-170, 191-212, 215-40, 249-60	51-53, 76, 171-90, 207, 209-10, 213-14, 230-31, 241-49	2%
Dinarchus ii.20	Public prosecutor	26	1, 5-7, 14-26	2-4, 8-13	4%
Dinarchus iii.17	Public prosecutor	22	1-5, 11-14, 17-22	1, 6-10, 15-16	5%

Table 5.4. Occurrences in Forensic Oratory where "Justice" is clearly linked to laws.

Orator	References
Aeschines	i.13, 36, 91, 161, 176, 177, 178 (δικαίοις, ἀδίκου, τὸ δίκαιον), 196, 196; ii.6 (οὐκ ἀδικεῖ), iii.1, 3, 7 (ἀδικημάτων, τὸ δίκαιον), 12 (ἀδίκημα, ἀδικεῖται), 16, 50, 199, 200 (τοῦ δικαίου, τὴν δικαίαν), 201 (τὰς δικαίας, δικαίως), 202, 260 (ἀδικημάτος).[1]
Andocides	i.2 (τῷ δικαίῳ, τὰ δίκαια, ἀδίκως, δικαίως), 33, 110.
Antiphon	i.24 (ἠδίκηκε, ἠδίκηκε), 31; v.7, 9, 15, 19, 85, 87, 95, 96; vi.6, 9 (ἠδίκουν, ἀδικοῦντα, ἀδικεῖται, ἀδικεῖσθαι), 21, 25, 36.
Demosthenes	xviii.6, 13 (ἀδικοῦντα, τἀδικήματα), 58, 102 (τὰ δίκαια, ἀδικουμένος), 113, 117, 121 (ἀδικημάτος, δίκαιον), 123 (ἀδικήματ', ἠδικηκώς), 124 (ἠδίκουν), 125, 170, 250 (δικαίως); xix.131, 133, 179 (τοῖς δικαίοις, ἠδίκει), 283; xx.1, 12 (τοῖς ἠδικηκόσιν, τὰ δίκαια), 18, 36, 63 (ἀδικήμασι), 67, 93, 94 (δίκαια, δικαίων), 96, 97 (δίκαια, ἀδικοῦντων), 98 (ἀδίκως, δίκαιον, δικαίως), 99, 109 (τὰ δίκαια), 155 (ἀδικεῖ, ἀδικοῦντων), 158 (τοῦ δικαίου, δικαίως, δικαίως), 164; xxi.9, 11, 20, 30 (τῶν ἀδικοῦντων, ἀδικηθῇ, τῶν ἀδικημάτων, τοῖς ἀδικήσουσιν, τοῖς ἀδικησομένοις, ἀδικηθῇ), 34 (ἠδίκηκεν, δίκαιός), 35 (δίκαια, δικαίως), 40 (δικαίως), 45 (ἀδικήματα, ἀδικεῖν), 66, 82, 96, 102, 126 (ἠδίκημασι, ἀδικήμασιν), 127, 177, 179, 188, 211, 224, 225 (ἀδικούΦενῳ, ἀδικήματα); xxii.7, 11, 18, 25 (τῶν ἀδικημάτων, τῶν ἀδικοῦντων), 26, 33 (ἀδικεῖς), 43 (ἀδικοῦσί, ἀδικεῖ, ἀδίκημα), 62; xxiii.2, 20, 38, 48 (ἀδίκως, δικαίως, δίκαια), 50 (ἀδίκων, ἀδικεῖ, ἀδίκως, δικαίως), 51, 54, 55, 59, 60 (ἀδίκως, δικαίως), 61 (ἀδίκως, ἀδίκων), 64 (δικαίως, δίκαια), 69, 74 (δίκαιόν, δίκαια), 75 (δικαίως, δικαίου, ἀδίκου, δίκαι', ἄδικον, τὴν δικαίαν), 82, 83, 84, 88, 101, 217, 219 (δικαίως, ἀδίκως, ἠδίκει), 220; xxiv.1, 2, 5, 10, 29 (ἀδικεῖν, ἀδίκων), 31 (ἠδίκησθαι, ἠδίκησεν), 32, 34 (δικαίως, τὰ δίκαια), 37, 38 (τῶν ἀδικημάτων, δικαίως), 43, 47, 48, 52 (δίκαια), 55, 58 (ἀδικήματα, ἀδικεῖν, δικαίως), 65 (δίκαιον, ἀδικεῖν), 69 (τῶν ἀδικοῦντων, ἀδίκως), 73 (δίκαιον, ἠδίκει), 74 (ἠδίκεις, δίκαιον, ἀδικήμασιν, ἀδικοῦντες), 76, 81, 84, 85, 87 (ἀδικεῖ, τοῖς ἀδικουμένοις), 89, 95, 99, 102, 104, 109, 110 (ἀδικεῖ, ἠδικημένου, τῶν ἠδικηκότων, ἀδικησόντων), 113, 116 (ἠδικηκὼς, τοῖς ἀδικήμασιν, τοὺς ἀδικοῦντας), 118 (τὸ ἀδίκημα, τοῦ ἠδικηκότος), 122 (ἀδικήσειν), 152, 156, 178 (δίκαιος, δίκαιον), 179, 187, 194, 204, 205 (ἀδικεῖν, ἀδικεῖ), 207 (τὰ δίκαια, τἀδίκημα), 211 (δικαίως, δίκαιον), 212, 214 (τἀδίκημα, δικαίως), 215, 217 (τοῖς ἀδικοῦσιν, ἀδικεῖν), 218; xxv.3, 11 (δίκαια), 14, 16, 17 (δίκαιον), 18, 70 (ἀδικεῖ), 72, 74, 76, 81, 92; xxvi.2, 5, 7, 12, 14 (δικαίαν, ἄδικον, δικαίως, δίκαια), 20; xxvii.28; xxxiii.1 (ἀδικῶνται, τοῖς ἀδικοῦσι, ἀδικῇ), 2 (ἀδικουμένοις, ἀδίκως), 38 (τὰ δίκαια); xxxv.45 (δίκαιον, τὸ αὐτὸ δίκαιον), 49 (δίκαιόν τι, δίκαιον), 54 (ἀδικεῖσθε, οὐκ ἀδικεῖσθε, ἀδικεῖ); xxxvi.25 (δίκαιον, δικαιότερον), 27 (ἀδικουμένοις, τοῦ δικαίου), 32; xxxvii.1 (τοῦ δικαίου, ἠδίκηκα), 18, 19, 20 (δικαίως, δικαίοις), 21, 33, 34, 36 (ἀδικῇ, δίκαιον), 39 (ἠδίκηκα, δίκαιον), 46 (ἠδικηκότι, ἀδικοῦντας), 47, 49 (τὰ δίκαια, ἠδίκεις), 57; xxxviii.17, 18, 19, 27 (δίκαιόν); xxxix.33, 40 (δικαιοτάτῃ), 41 (τὴν δικαιοτάτην); xl.20, 39, 40; xli.7, 26; xlii.1, 2, 4, 8, 10, 11 (δικαίως, τὰ δίκαια), 15 (τοῦ δικαίου, δικαίων, τῶν ἠδικημένων, ἠδικηκότων), 17, 18, 27, 30 (ἀδίκως, δικαίως); xliii.17, 52, 60 (δίκαιον, τὸ δίκαιον); xliv.3 (ἀδίκου), 6, 7, 25, 29, 36, 45, 63, 66; xlv.45; xlvi.9 (ἀδικημάτων, ἀδικοῦμαι), 23, 27, 28; xlvii.1, 2, 3 (δικαίως, ἀδικῶνται, ἠδικήθην), 7, 8, 15, 25, 26, 37, 39, 40, 42 (ἀδικοῦντι, ἀδικεῖν), 45, 47 (ἀδίκων), 48;

[1] Where "justice" words occur more than once in a section, the brackets indicate which of the words I consider to be clearly linked to law.

Table 5.4 (Cont.).

Orator	References
Demosthenes (continued)	xlviii.9, 17, 19, 30, 32, 36 (τῶν δικαίων, ἄδικός); l.65, 66; li.12; lii.32, 33 (τὰ δίκαια, ἀδίκως); liii.3, 17; liv.2 (ἠδικῆσθαι, τὰ δίκαια), 16; lvi.12; lvii.4, 5, 7, 27 (δικαίως), 46, 51 (δίκαιον); lviii.11, 12 (ἀδικεῖ, δικαίως, δικαίως), 13, 16, 17, 21, 22 (δικαίως, δικαίως), 26, 36, 41, 45, 61 (τῶν δικαίων, τὰ δίκαια), 65; lix.12, 15 (τοῦ δικαίου), 66 (ἀδίκως, ἀδίκως), 74, 77, 105, 117, 126 (τὰ δίκαια).
Dinarchus	i.1, 3, 4, 47, 54 (τὰ δίκαια, ἀδικεῖν), 60 (ἀδικήμασι, ἀδικημάτων), 63, 71; ii.12, 15, 17, 21, 22; iii.4, 5, 11, 20, 21, 22.
Hyperides	ii.13; iii.16 (δικαίοις, δικαίας, δικαίας), 17, 20, 21, 22 (δίκαιον, τὰ ἀδικήματα, δικαίως, ἀδίκους); iv.5, 6, 8, 14, 29; v.24 (ἀδικοῦσιν), 38 (τοῖς δικαίοις).
Isaeus	i.6, 26, 35, 40 (δίκαιον, δίκαια); ii.26, 39, 47; iv.22, 31 (τὰ δίκαια); vi.8, 42, 65; vii.4 (δικαίως); viii.1, 46; ix.35 τοῦ δικαίου); x.2, 3, 6, 8 (τὸ δίκαιον, δικαίως), 14, 15 (ἀδίκως, δικαίως, δικαίως), 21 (δίκαιον, δικαίως), 22; xi.15, 18, 30, 32, 33, 34, 36 (δίκαιον, τὸ δίκαιον); xii.12 (ἀδικεῖν, ἀδίκως).
Isocrates	xvi.2; xviii.34, 45; xx.1, 2 (τῶν ἀδικημάτων, τοὺς ἀδικοῦντας), 6, 9, 21; xxi.16 (δίκαιος), 17 (ἀδικήσαντας, δικαίους).
Lycurgus	i.1 (δικαίως), 2, 3, 4 (τἀδικήματα, τοὺς ἀδικοῦντας), 6 (τῶν ἀδικημάτων), 8 (ἀδίκημα, ἀδικημάτων), 9 (ἀδικήματος, ἀδικημάτων), 26, 33, 66 (τὸ ἀδίκημα, δικαίως), 93 (δικαίως, ἠδικηκόσι, τοῖς ἠδικημένοις), 119, 122, 124, 125, 126 (ἀδικοῦντων, τῶν ἀδικουμένων), 128 (τῶν δικαίων, τὴν δικαίαν), 129.
Lysias	i.29 (ἀδικεῖν, δικαιοτάτην), 31, 34, 35; vi.15 (τοῦ ἀδικηθέντος, ἀδικήσῃ); ix.8, 9 (ἀδίκως, δίκαιός), 10 (ἠδικηκὼς, ἠδικηκότες), 19 (δικαίως, ἠδικηκότες, τοῦ δικαίου); x.13, 14; xiii.51; xiv.4, 7, 8 (ἠδίκει, δικαίως), 47; xv.8 (δικαίως), 9, 11; xvii.3; xviii.2; xxii.2 (τὰ δίκαια, ἀδικοῦσιν), 6; xxviii.13 (τοῦ δικαίου, τοὺς ἀδικοῦντας); xxxi.27 (ἀδίκημα, ἀδικημάτων, τοῦ ἀδικήματος), 28; xxxii.2, 3, 23.

Table 6.1. Witness Testimonies in Athenian Forensic Oratory.

No.	Reference	Identity of Witness	Issue witnessed
1	Antiphon v.20	Not clear	Purpose of voyage
2	Antiphon v.22	Not clear	Why they changed ships at Methymna
3	Antiphon v.24	Not clear	Search for Herodes
4	Antiphon v.28	Not clear	Absence of boat
5	Antiphon v.30	Not clear	Sheep's blood and tortures; second man tortured many days later (§31)
6	Antiphon v.35	Not clear	Slave's changed testimony and killing
7	Antiphon v.56	Not clear	Conflict between note and evidence from torture
8	Antiphon v.61	Not clear	Lycinus' absence of motive
9	Antiphon v.83	Not clear	Voyage and sacrifices prove no malice from gods
10	Antiphon vi.15	Not clear	Speaker was not present, did not give drink to boy, did not order him to drink it or force him to drink
11	Andocides i.18	Callias, Stephanus, Philippus and Alexippus. Callias is Andocides' brother-in-law, Philippus and Alexippus are relatives of two men who fled because of the information laid by Lydos. First not independent	Andocides' account of the denunciations
12	Andocides i.28	Not clear	Rewards for informants
13	Andocides i.46	The Prytaneis who were in office at that time, Philocrates and the rest. Apparently independent	Mutilation of the Herms
14	Andocides i.69	"The actual men who were released because of me." Andocides' relatives (§68). Not independent	Why Andocides informed and what happened as a result
15	Andocides i.112	Eucles (herald of Council and Assembly). Apparently independent	That Andocides is telling the truth about the suppliant branch
16	Andocides i.123	Not clear	Confirm Andocides' statement about Callias' motives. Legal issue
17	Andocides i.127	Not clear	Callias' son. Nonlegal issue
18	Lysias i.29	Probably Euphiletos' friends (§23). Not independent	Killing of Eratosthenes
19	Lysias i.43	Probably Euphiletos' friends (§41-42). Not independent	How Euphiletos gathered his friends as witnesses
20	Lysias iii.14	τοὺς παραγενομένους (§16, 37)	Fight did not take place where Simon said it did, and nobody had his head broken there or was hurt
21	Lysias iii.20	τοὺς παραγενομένους	Simon's friends' apologies and Simon's silence for four years
22	Lysias vii.10	Previous tenants of the plot of land (§11). Independent	Previous leases and absence of an olive stump on the plot (§11, 18)
23	Lysias x.5	Not clear	Speaker's non-involvement in his father's deeds and his brother's guardianship
24	Lysias xii.42	Not clear	Eratosthenes' actions under the 400. Nonlegal issue

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
25	Lysias xii.47	Those who heard it from Eratosthenes himself (§46)	Eratosthenes' actions as one of the five ephors. Nonlegal issue
26	Lysias xii.61	Not clear	Eratosthenes' role in Pheidon's deal with Sparta. Nonlegal issue
27	Lysias xiii.28	Not clear	Agoratus' plot in relation to Boule's decree
28	Lysias xiii.42	Not clear - possibly speaker's family members as the testimony refers to speaker's father's statements on his deathbed. If so, not independent	Dionysodorus charged speaker to take vengeance on Agoratus
29	Lysias xiii.64	Not clear	Agoratus' father was a slave. Nonlegal issue
30	Lysias xiii.66	Not clear	The crimes of Agoratus' brothers. Nonlegal issue
31	Lysias xiii.68	Not clear	Agoratus' conviction for adultery. Nonlegal issue
32	Lysias xiii.79	The taxiarch. Apparently independent	Agoratus' deeds at Phyle. Nonlegal issue
33	Lysias xiii.81	Not clear	How Agoratus was driven off by Aesimus from the procession from the Peiraeus to the city. Nonlegal issue
34	Lysias xvi.8	Not clear	Speaker's cavalry service
35	Lysias xvi.13	Orthobulus (previous commander). Apparently independent	How speaker asked Orthobulus to strike him off the cavalry roll so he might face greater danger. Nonlegal issue
36	Lysias xvi.14	Not clear	How he funded the service expenses of two men. Nonlegal issue
37	Lysias xvi.17	Not clear	His courage in battle. Nonlegal issue
38	Lysias xvii.2	Those before whom the money was paid	That Eraton received 2 talents from the speaker's grandfather, and the use he made of it
39	Lysias xvii.3	Not clear	Speaker's father's successful suit for the property against Erisistratus
40	Lysias xvii.9	Those who rented the estate from speaker at Sphettus, the neighbours at Cicynna, last year's magistrates and the current *nautodikai*. Independent	Details of previous trials and actions in relation to the two properties
41	Lysias xix.23	Eunomus. Probably friend (§22) and not independent	Payment for expenses for campaign in support of Evagoras
42	Lysias xix.23	Not clear. Probably friends (§22) and not independent	That they lent money and have been repaid (§24)
43	Lysias xix.27	Not clear	Demus' proposed gift of a gold cup to Aristophanes
44	Lysias xix.41	Not clear	Conon's property and bequests
45	Lysias xix.58	Not clear	Father's liturgies. Possibly nonlegal, but also relevant to proving the family have no money left

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
46	Lysias xix.59	Father's friends and thus not independent	Payment's for needy citizens' dowries, ransoms and funerals. Possibly nonlegal, but also relevant to proving the family have no money left
47	Lysias xx.25	Not clear	Speaker's actions on campaign in Sicily. Nonlegal issue
48	Lysias xx.26	Not clear	Speaker's speech against the Syracusan peace proposal. Nonlegal issue
49	Lysias xx.28	τοὺς παραγενομένους	Brother's actions against oligarchs. Nonlegal issue
50	Lysias xx.29	Not clear	Eldest brother's deeds on campaign. Nonlegal issue
51	Lysias xxi.10	Nausimachus (fellow sea-captain at Aegospotami); apparently independent	Speaker's good service in the navy. Nonlegal issue
52	Lysias xxii.9	Anytus (magistrate). Independent	Anytus' advice to the corndealers
53	Lysias xxiii.4	Deceleans and people who have convicted Pancleon before the Polemarch. Deceleans independent	Pancleon is not a Plataean
54	Lysias xxiii.8	Euthycritus, other Plataeans and Nicomedes who said he was Pancleon's master. Independent, with exception of Nicomedes	Pancleon is not a Plataean
55	Lysias xxiii.11	Not clear	Securities taken for Pancleon and then he was carried off by force
56	Lysias xxiii.14	Not clear. May include Aristodicus (§13)	Aristodicus' previous suit against Pancleon showed he was not a Plataean and the *diamarturia*
57	Lysias xxiii.15	Not clear	Pancleon lived for a long time in Thebes
58	Lysias xxx.20	Not clear	Ancestral sacrifices not funded due to new sacrifices using up the funds
59	Lysias xxxi.14	Not clear	That Philon lived at Oropus under the protection of a *prostates*, that he possessed sufficient property and than he neither took up arms in the Peiraeus nor in town
60	Lysias xxxi.16	Diotimus of Acharnae and those appointed to arm townsmen from funds contributed. Independent	That Philon did not contribute funds
61	Lysias xxxi.19	Not clear	Philon's profiteering. Nonlegal issue
62	Lysias xxxi.23	Not clear	Philon's mother's refusal to let him bury her
63	Lysias xxxii.18	Includes relatives of both parties. Not independent	Mother's complaint to Diogeiton
64	Lysias xxxii.27	Not clear. Perhaps the witnesses speaker took with him to see Aristodicus (§26). If so, probably not independent	Diogeiton's duplicitous accounting for fitting-out a warship

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
65	Isocrates xvii.12	Not clear	Speaker taken before Polemarch and made to pay bond; possibly also Cittus and the initial deposit and testimonies of Philomelus and Menexenus
66	Isocrates xvii.14	Not clear	Cittus found, Pasion claimed he was a freedman although he had paid a bond for him
67	Isocrates xvii.16	Not clear	Pasion's actions over the torture of Cittus
68	Isocrates xvii.32	Agyrrhius, a friend of both Pasion and the speaker (§31), though we only have the speaker's word for it. Possibly not independent	Pasion was at first eager to annul the agreement
69	Isocrates xvii.37	Not clear	Dealings with Stratocles, Pasion stood as guarantor
70	Isocrates xvii.41	Those who knew the speaker had received much money from Pontus; those who saw him as a patron of Pasion's bank, and the people from whom at the time he bought more than a thousand gold staters (§40). Not clear if independent. May also include other *epigrapheis* (§41); if so, they are independent	Speaker's wealth and liturgies. Prove speaker didn't need to borrow Pasion's money, so legal issue.
71	Isocrates xviii.8	Those who were present from the beginning; Rhinon and his colleagues; members of the Boule. The second and third groups are apparently independent; the first group could include friends	That speaker did not arrest Callimachus nor touch his money; that he did not make an accusation against him but Patrocles; that that fellow was the accuser
72	Isocrates xviii.10	Not clear. Possibly Nicomachus of Bate, in which case a friend of the speakers (§13); not independent	Arbitration
73	Isocrates xviii.55	Not clear	Callimachus' suit against Cratinus. Non-legal issue
74	Isaeus i.16	Not clear	Cleonymus' motive in making the will was not any grievance against the speaker but hatred for Deinias; after Deinias' death he looked after speaker and took him into his house and brought him up; and he sent Poseidippus for the magistrate, but Poseidippus failed to summon him and then sent him away when he came to the door (§15)
75	Isaeus i.16	Not clear	Friends of opponents including Cephisander believed that the parties should share the estate and that speaker should have one third of Cleonymus' property
76	Isaeus i.32	Not clear	Cleonymus' enmity for Pherenicus

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
77	Isaeus ii.5	Not clear	Menecles received a dowry of 20 minae with speaker's sister
78	Isaeus ii.16	τοὺς φράτορας καὶ τοὺς ὀργεῶνας καὶ τοὺς δημότας. Apparently independent	Speaker legally adopted
79	Isaeus ii.34	Arbitrators if willing (for they are opponent's friends), but if not, τοὺς παραγενομένους	Menecles' arbitration with speaker's brother and their oath, opponents have much of Menecles' property, and their aim is to make Menecles childless
80	Isaeus ii.34	Not clear	Land sold for 70 minae
81	Isaeus ii.37	τῶν εἰδότων	Speaker did the rites for Menecles; nonlegal issue
82	Isaeus iii.7	Nicodemus (present opponent)	Nicodemus' testimony at the previous trial (the testimony that is the subject of this *dike pseudomarturion*)
83	Isaeus iii.12	τῶν ἄλλων οἰκείων καὶ...τῶν γειτόνων (§13). Apparently independent	Woman was a *hetaira*. Evidence from previous case
84	Isaeus iii.14	Same deposition as Isaeus iii.12	Revelries and ribaldry at woman's house. Evidence from previous case
85	Isaeus iii.15	Not clear	Those who associated with the woman to prove that she was a *hetaira*. Evidence from previous case
86	Isaeus iii.37	Not clear	Nicodemus indicted for usurping the rights of citizenship. Nonlegal issue
87	Isaeus iii.43	Not clear	Speaker's brother claimed estate and nobody contested his claim
88	Isaeus iii.53	Not clear	Same depositions as Isaeus iii.43 and iii.12
89	Isaeus iii.53	Nicodemus' deposition	Same deposition as Isaeus iii.7
90	Isaeus iii.56	Husband of defendant's niece (against speaker so not independent, but used as it supports the speaker's case)	Husband's testimony at a previous trial involving claims for Endius' estate
91	Isaeus iii.76	Members of Endius' phratry. Apparently independent	Endius never held a marriage feast for Phile, nor introduced her to the phratry
92	Isaeus iii.76	Not clear	Pyrrhus adopted speaker's brother
93	Isaeus iii.80	Pyrrhus' fellow demesmen. Apparently independent	Pyrrhus never entertained wives of his fellow demesmen at the Thesmophoria
94	Isaeus v.2	Not clear	Dicaiogenes gave speaker two-thirds of his estate and Leochares became his surety
95	Isaeus v.6	τοὺς τότε παρόντας	Will produced by Proxenus and its terms
96	Isaeus v.13	Not clear	Menexenus' agreement with Dicaiogenes
97	Isaeus v.18	τοὺς παρόντας (§20)	Agreement with Dicaiogenes and the sureties
98	Isaeus v.24	Not clear	Dicaiogenes' claims and speaker's suit against Micion
99	Isaeus v.27	Not clear	Dicaiogenes deceived Protarchides. Nonlegal issue
100	Isaeus v.33	Not clear	Arbitration
101	Isaeus v.38	Not clear	Dicaiogenes' poor record on performing liturgies. Nonlegal issue

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
102	Isaeus vi.7	οἱ παραγενόμενοι μαρτυρήσουσι	Philoctemon's will and its terms
103	Isaeus vi.11	Relatives and members of phratry and deme. Relatives not independent	Androcles is not Euctemon's legitimate son
104	Isaeus vi.16	Speakers' depositions at previous *anakrisis*	Claims in reply to challenge. Evidence from a previous *anakrisis*
105	Isaeus vi.26	Not clear	Androcles the child of Alce, Euctemon introduced Androcles to phratry but never married Alce
106	Isaeus vi.34	Not clear	Euctemon's will, revocation and later sale of properties for Androcles
107	Isaeus vi.37	τοὺς παραγενομένους	Plot to gain Euctemon's estate by deceit and the unsuccessful case
108	Isaeus vi.42	Not clear	Opponents refuse to allow house search after Euctemon's death
109	Isaeus vi.46	Opponent's testimony from previous trial	Conflict in claims made by opponent over the estate in previous trial and this trial
110	Isaeus vii.10	Not clear	Previous enmity and lawsuits involving Eupolis and Apollodorus, and good relationship between Archedamus and Apollodorus
111	Isaeus vii.17	Not clear	Speaker's adoption by Apollodorus
112	Isaeus vii.25	Not clear	Thrasybulus obtained half of Apollodorus' estate
113	Isaeus vii.28	Apollodorus' demesmen (§28-29)? Apparently independent	Speaker's adoption and registration in the deme as the son of Apollodorus
114	Isaeus vii.32	Not clear	Opponent's indifference to their brother's childlessness and possession of his fortune and allowing a family to die out
115	Isaeus vii.36	Not clear. Possibly his fellow tribesmen (§36). If so, apparently independent	Speaker's generosity as a gymnasiarch. Nonlegal issue
116	Isaeus viii.11	Not clear, but possibly the witnesses the speaker took with him when he made the challenge	Opponent refused *basanos*
117	Isaeus viii.13	Relatives and friends (§14) of grandfather and mother. Not independent	Mother's betrothal and legitimacy (§14)
118	Isaeus viii.17	Intimate friends of grandfather. Not independent	Speaker's family viewed as family by grandfather and included in rites and sacrifices
119	Isaeus viii.20	Members of phratry and deme. Apparently independent	Father gave wedding banquet when he married speaker's mother and held a wedding banquet for phratry; mother's role in the Thesmophoria; speaker's registration with phratry as legitimate.
120	Isaeus viii.24	Not clear	Diocles' instructions about Ciron's funeral
121	Isaeus viii.27	Not clear. Possibly evidence from torture of slaves (§28, 45)	Requests for payments for funeral and dispute with Diocles at the tomb
122	Isaeus viii.42	τοὺς εἰδότας. Not clear if independent	Diocles' crimes. Nonlegal issue

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
123	Isaeus viii.46	Not clear	Diocles' adultery. Nonlegal issue
124	Isaeus ix.4	Astyphilus' friends who were among those present. Not independent as speaker claims a close friendship with Astyphilus (§30)	Speaker performed rites for Astyphilus
125	Isaeus ix.6	Not clear	Hierocles said he had the will from Astyphilus when Astyphilus was about to sail to Mytilene
126	Isaeus ix.9	Astyphilus' friends, relatives and members of phratry and deme. Not independent with probable exception of members of phratry and deme	They have no knowledge that Astyphilus made the will (§10)
127	Isaeus ix.19	Husband of Astyphilus' aunt (and aunt of the speaker and his opponent). Not independent	Euthycrates directed his relatives never to allow any of Thudippus' family to come near his tomb
128	Isaeus ix.20	τοὺς συνειδότας.	Astyphilus never spoke to Cleon throughout his life
129	Isaeus ix.21	Astyphilus' demesmen. Possibly independent	Astyphilus never attended the sacrifices accompanied by Cleon
130	Isaeus ix.25	The actual people to whom Hierocles went proposing a scheme of faking a will. Apparently independent	Hierocles' scheme for faking a will
131	Isaeus ix.28	Includes teachers (apparently independent) testifying to joint education; first witness not clear	Astyphilus lived with speaker from childhood and was brought up by speaker's father, and they were educated together
132	Isaeus ix.28	Not clear	Speaker's father managed Astyphilus' paternal estate and doubled its value
133	Isaeus ix.29	οἱ εἰδότες	Astyphilus' sister's betrothal by speaker's father
134	Isaeus ix.30	Members of the Company of Heracles. Independent	Speaker's father took him and Astyphilus to religious ceremonies and enrolled them in the Company of Heracles
135	Isaeus ix.30	Speaker's and Astyphilus' family and friends. Not independent	Friendship and affection between speaker and Astyphilus
136	Isaeus ix.33	Not clear	Cleon's claims about degree of relationship
137	Isaeus x.7	Not clear	Cyronides was adopted into Xenaenetus' family and was in that family when he died; Aristarchus died before his son Democharas; Democharas died while he was a child, as did the other sister, so that the estate became the speaker's mother's.
138	Isaeus xi.43	Not clear	Stratocles' property
139	Isaeus xi.46	Not clear	Amount of speaker's property, and his son's, who has been adopted into another family; and speaker has brought suits for perjury about Hagnias' estate
140	Isaeus xii.11	Not clear	Arbitration

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
141	Demosthenes xviii.135	Not clear	Council of Areopagus removed Aeschines as speaker. Nonlegal issue
142	Demosthenes xviii.137	Not clear	Aeschines caught with the spy Anaxinus at Thason's house. Nonlegal issue
143	Demosthenes xviii.267	Not clear	Demosthenes' public services. Nonlegal issue
144	Demosthenes xix.32	Man who proposed the decree - apparently independent	Decree of Boule in response to Demosthenes' report
145	Demosthenes xix.130	οἱ συμπρεσβεύοντες καὶ παρόντες	Aeschines attended the banquet which the Thebans and Philip held to celebrate their victory, and wore a garland and sang the paean with Philip and drank his health
146	Demosthenes xix.145	Witnesses from Olynthus. Apparently independent	The loss of Olynthus. Nonlegal issue
147	Demosthenes xix.162	τοὺς ἐκεῖ παρόντας μάρτυρας	To show that we would have caught up with Philip, if anyone had taken my advice and had carried out your instructions in accordance with the decrees
148	Demosthenes xix.162	Not clear; possibly Eucleides (another ambassador); if so, apparently independent	The answer Philip gave to Eucleides
149	Demosthenes xix.165	Not clear	Other ambassadors didn't hurry on the second Embassy
150	Demosthenes xix.168	Apollophanes and τὴν τῶν ἄλλων τῶν παρόντων	How Demosthenes subverted Philip's bribery of the ambassadors. Nonlegal issue
151	Demosthenes xix.170	Not clear	How Demosthenes ransomed prisoners. Nonlegal issue
152	Demosthenes xix.176	Demosthenes' own written testimony and other ambassadors called on to testify or take the *exomosia*. Here the witnesses' apparent lack of independence is used to prove the point	Aeschines suborned by Philip on the Embassy
153	Demosthenes xix.200	Not clear, but one may include Diophantos if he was compelled to testify (§198); if so, not independent	Aeschines' past crimes. Nonlegal issue
154	Demosthenes xix.214	Not clear	Aeschines prevented Demosthenes from rendering his accounts twice
155	Demosthenes xix.233	Not clear	How Phrynon sent his son to Philip
156	Demosthenes xix.236	Not clear	How Demosthenes dined Philip's ambassadors before any offence against the city had been committed. Nonlegal issue
157	Demosthenes xxi.22	Goldsmith. Apparently independent	Meidias' attack on the crowns
158	Demosthenes xxi.82	Not clear	Demosthenes' previous problems with Meidias
159	Demosthenes xxi.93	Not clear	Arbitration with Meidias and the consequences for Straton. Nonlegal issue

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
160	Demosthenes xxi.107	Not clear	Meidias' recent attacks on Demosthenes. Nonlegal issue
161	Demosthenes xxi.121	Not clear	Meidias' dealings with Aristarchus. Nonlegal issue
162	Demosthenes xxi.168	Not clear	Meidias' conduct on voyage home from Styra, showing how he was profiteering rather than performing a liturgy. Nonlegal issue
163	Demosthenes xxi.174	Not clear	Meidias' inadequate liturgies. Nonlegal issue
164	Demosthenes xxiii.151	Not clear	Charidemus' actions against Athens at the outset of his mercenary career - he sold his services to Athens' enemy, sailed to a place where he had a chance of operating against Athens, and was the main reason why Athens failed to take Amphipolis
165	Demosthenes xxiii.168	Trierarchs. Independent	Events at Perinthus and Alopeconnesus
166	Demosthenes xxv.58	The man who buried Aristogeiton's father without payment, the arbitrator in the suit which his brother brought against him. Zobia's *prostates*, and the *poletai* before whom Aristogeiton brought her. The *poletai* and arbitrator are independent, but the other two would appear to have enmity towards Aristogeiton	Aristogeiton's past crimes. Nonlegal issue
167	Demosthenes xxv.63	The man whose nose Aristogeiton bit off and ate. He would appear to have a grudge against Aristogeiton and therefore not to be independent	More of Aristogeiton's past crimes. Nonlegal issue
168	Demosthenes xxvii.8	Not clear	That Demosthenes' guardians agreed to the 20 per cent tax for the *sumphoria*, and that Demosthenes' father did not leave him a poor man nor on[illegible] estate of only 70 minae
169	Demosthenes xxvii.17	Demophon and Therippides; Democharés of Leuconion (§14), and others. Demophon and Therippides are co-guardians and also being sued by Demosthenes, so not independent. Democharés is the husband of Demosthenes' aunt, so not independent	Aphobus received the dowry and lived in the house and is lying. Democharés' argument with Aphobus over caring for Demosthenes' mother
170	Demosthenes xxvii.22	Not clear	Aphobus' income from the workshop
171	Demosthenes xxvii.26	Not clear	Aphobus has lied about the couch-makers and has not handed them over

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
172	Demosthenes xxvii.28	Not clear	Moeriades' loans
173	Demosthenes xxvii.33	Not clear	The ivory and the iron
174	Demosthenes xxvii.39	Not clear	Each of the guardians admits receiving money but claims he has spent it all
175	Demosthenes xxvii.41	The witnesses to the questions Demosthenes asked about the will - probably witnesses that Demosthenes took with him so possibly not independent	The guardians actions over the will
176	Demosthenes xxvii.42	Witnesses to the *apokrisis* - possibly witnesses that Demosthenes took with him and therefore not independent	The *apokrisis*
177	Demosthenes xxvii.46	Not clear	Aphobus' dealing and lying over the will
178	Demosthenes xxviii.10	Not clear	Guardians' possession of Demosthenes' property and the assessment for the *sumphoria*
179	Demosthenes xxviii.11	Not clear	Aphobus had the dowry and never repaid it, not provided food for Demosthenes' mother
180	Demosthenes xxviii.11	Not clear	Aphobus never repaid profits from workshop to Demosthenes
181	Demosthenes xxviii.12	Not clear	Aphobus' lies about the slaves
182	Demosthenes xxviii.12	Not clear	The iron and ivory which Aphobus sold (§13)
183	Demosthenes xxviii.13	Not clear	The extra money - Aphobus has five talents plus interest
184	Demosthenes xxviii.13	Not clear	Additional property held by guardians as outlined in the will, and received by them as proved by their testimony against each other
185	Demosthenes xxix.12	ἐν τῇ ἀγορᾷ μέσῃ πολλῶν παρόντων	Aphobus refused the *Basanos*
186	Demosthenes xxix.18	Not clear	Aesios didn't deny his testimony in the first trial and refused the *Basanos*
187	Demosthenes xxix.21	Not clear	Challenge to Aphobus and his admission before the arbitrator that Milyas was a freedman (§31)
188	Demosthenes xxix.26	Not clear - possibly not independent as testifying to Demosthenes' and his mother's intentions rather than actions	"That we were ready to do these things" - hand over female slaves for torture to show that Milyas had been freed, and Demosthenes' mother was ready to swear an oath that Milyas had been freed
189	Demosthenes xxix.39	Not clear	Depositions about the dowry, the fraud and "all the rest" - ie, the rest of Demosthenes' property

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
190	Demosthenes xxix.53	Not clear	Demosthenes' challenge to Aphobus to admit he previously agreed the testimony about Milyas was true and that Aphobus previously only wanted Milyas to be examined over a dispute about 30 minae
191	Demosthenes xxix.54	Not clear	Probably the same issue as xxix.53
192	Demosthenes xxx.9	First Timocrates (Onetor's friend) and then others who may be the witnesses Demosthenes brought with him. Timocrates is not independent; if others are Demosthenes' witnesses, not independent	Onetor agreed to hold the dowry as a loan and continued to pay interest on that loan to Aphobus according to the contract; then Aphobus himself admitted he had received the interest from Timocrates
193	Demosthenes xxx.17	Not clear	Onetor's sister married before Demosthenes laid his charges
194	Demosthenes xxx.17	Not clear	After the marriage Demosthenes brought his suit
195	Demosthenes xxx.18	Not clear	Onetor's sister was divorced after Demosthenes brought his suit
196	Demosthenes xxx.24	Not clear, but probably the witnesses Demosthenes took with him (§19) and hence not independent	Demosthenes' questioning of Onetor and Timocrates about the dowry paid to Aphobus
197	Demosthenes xxx.30	Not clear	Aphobus worked the farm until Demosthenes brought his action; he was unwilling to agree to the torture because he was still living with Onetor's sister, and after Aphobus lost he stripped the farm of everything except τῶν ἐγγείων
198	Demosthenes xxx.32	Not clear	Onetor supported Aphobus in his suit and pleaded for him
199	Demosthenes xxx.34	Pasiphon - who cared for Aphobus' wife when she was ill. Apparently independent	He saw Aphobus sitting next to his wife this year, when Demosthenes' suit against Onetor had already been instituted
200	Demosthenes xxxi.4	Not clear	Onetor first set up *horoi* around the house then removed them after Demosthenes won his trial against Aphobus
201	Demosthenes xxxii.13	Not clear	Hegestratos' death and Zenothemis wanted to go to Massalia
202	Demosthenes xxxii.19	Not clear	Zenothemis refused to be dispossessed by anyone except Demon, refused the challenge to sail back to Sicily and deposited the contract during the voyage
203	Demosthenes xxxiii.8	Not clear, but possibly including Heracleides the Banker (§7); if so apparently independent	Loan of 30 minae to Apaturios and speaker taking over Parmeno's loan for 10 minae; possibly also Parmeno's and Apaturios' falling out
204	Demosthenes xxxiii.12	Not clear	Sale of ship, repayment of loan, end of contract and release from obligations

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
205	Demosthenes xxxiii.13	Not clear	Parmeno challenged Apaturios to swear an oath about the charges and Apaturios accepted
206	Demosthenes xxxiii.15	Not clear	The terms of the arbitration - there were three arbitrators (§29), and perhaps the sureties and the people with whom they deposited the agreement
207	Demosthenes xxxiii.18	Not clear	Aristocles pretended that he had lost the agreement
208	Demosthenes xxxiii.26	Not clear	Apaturios was in town last year when the courts were open (and is therefore lying about the speaker being his surety)
209	Demosthenes xxxiv.7	Not clear	Probably the three loans and Phormio's obligations under the contract
210	Demosthenes xxxiv.9	Not clear. Possibly the ship's captain; if so, apparently independent	Phormio didn't sail on the ship with the goods he should have bought with the speaker's money
211	Demosthenes xxxiv.10	Not clear	Lampis' shipwreck
212	Demosthenes xxxiv.11	τὴν μαρτυρίαν τῶν παραγενομένον. Probably the witnesses brought by the speaker (§20) and therefore not independent	Those who heard Lampis say after the shipwreck that Phormio put no goods on the ship nor gave Lampis any gold
213	Demosthenes xxxiv.15	τὴν μαρτυρίαν τῶν κλητήρων. The summons was sent by the speaker (§13) so perhaps not independent	Lampis' and Phormio's reaction to the summons
214	Demosthenes xxxiv.20	Not clear	Possibly Lampis' statements at the arbitration
215	Demosthenes xxxiv.37	Not clear	Lampis sold grain outside Athens, although he lived there. Nonlegal issue
216	Demosthenes xxxiv.39	Not clear	Speaker's gifts to the city and liturgies. Nonlegal issue
217	Demosthenes xxxv.14	Archemonides - apparently independent	Androcles, Nausicrates and Artemon and Apollodorus deposited the contract with him
218	Demosthenes xxxv.14	τῶν παραγενομένων. Theodotus ἰσοτελής, Charius, Phormio, Cephisodotus and Heliodorus. Possibly the witnesses brought by Androcles and thus not independent	They were present when Androcles lent Artemon three talents of silver, and they know that Androcles deposited the contract with Archemonides
219	Demosthenes xxxv.20	Erasicles, pilot of the ship; Hippias, who sailed on the ship; written *ekmarturiai* by Archiades, Sostratus, Eumarichus, Philtiades and Dionysius. Independent	Apollodorus only carried 450 jars of Mendean wine on the ship, no more, and no other cargo

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
220	Demosthenes xxxv.23	Aratus of Halicarnassus - another lender to Apollodorus, but apparently independent in this case	He lent eleven minae in silver to Apollodorus on the cargo he was carrying in Hyblesius' ship to Pontus, and on the goods to be bought there for the return voyage; he was unaware that the speaker had lent money to Apollodorus, as he would not otherwise have lent the money
221	Demosthenes xxxv.33-34	Apollonides, Erasicles (the ship's pilot), Hippias plus written *ekmarturiai* by Euphiletus, Hippias, Sostratus, Archenomides and Philtades. Independent	Apollonides testifies that Antipater lent money to Hyblesius for a voyage to Pontus and that the ship was wrecked (as his slaves reported to him). Erasicles testifies that the ship had no cargo on board, and Apollodorus had no wine on board, but 80 jars of Coan wine were being carried for a man of Theodosia. Hippias testifies that Apollodorus only put in some wool, salt fish and goat skins
222	Demosthenes xxxvi.4	Bank manager (§7); independent	How the lease was made
223	Demosthenes xxxvi.7	Those with whom the will is deposited. Open to interpretation if independent - if the will was fake, then Phormio's accomplices; if genuine, then apparently independent	Will deposited with the speakers
224	Demosthenes xxxvi.10	Those who were present (§24)	Apollodorus divided the property with Pasicles, who was a child, and they released Phormio from the lease and all other obligations
225	Demosthenes xxxvi.13	Not clear	Apollodorus chose the shield factory in the division, and subsequently leased the bank to four men, but delivered no private capital to them, but they leased only the deposits and the right to the profits on those
226	Demosthenes xxxvi.16	τῶν παραγενομένων	After arbitration Phormio was granted a release from all claims by Apollodorus
227	Demosthenes xxxvi.21	Not clear	Apollodorus won suits on the basis of his father's papers, which he now claims are lost
228	Demosthenes xxxvi.22	Not clear	Pasicles is not bringing any suit against Phormio
229	Demosthenes xxxvi.24	τῶν παρόντων	The release from the lease and all other obligations (repeated from §10 for emphasis)
230	Demosthenes xxxvi.35	Not clear	Apollodorus took the lodging-house under the terms of the will and made no claims against Phormio
231	Demosthenes xxxvi.40	Not clear	Apollodorus' money and paltry liturgies. Nonlegal issue
232	Demosthenes xxxvi.48	Not clear	Pasion was Achestratus' slave and was later freed just as was Phormio. Nonlegal issue

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
233	Demosthenes xxxvi.55	Not clear	Apollodorus' litigiousness and sycophancy (§54). Nonlegal issue
234	Demosthenes xxxvi.56	Not clear	Apollodorus' wickedness. Nonlegal issue
235	Demosthenes xxxvi.56	Not clear	Phormio's character (§55). Nonlegal issue
236	Demosthenes xxxvi.56	Not clear	Phormio's liturgies. Nonlegal issue
237	Demosthenes xxxvi.62	Not clear	Not clear - perhaps the releases, as summarizing the legal case
238	Demosthenes xxxvii.8	Not clear	Pantaenetus sold speaker the property, rented the workshop and the slaves according to the contract, speaker was not present at the subsequent transactions or even in Athens, Pantaenetus sued Evergus and never brought a charge against the speaker
239	Demosthenes xxxvii.13	Not clear	Dealings with extra debtors, challenge to take money or settle, speaker agreed to take his money but opponents would not pay unless he became the seller to them of the property
240	Demosthenes xxxvii.17	Those present when speaker was released of his obligations by Pantaenetus	Speaker's release from obligations by Pantaenetus
241	Demosthenes xxxvii.17	Purchasers; apparently independent	Speaker sold the property at Pantaenetus' bidding, and to the people to whom he was told to sell it
242	Demosthenes xxxvii.30	Not clear	Speaker sold the property when Pantaenetus requested it and on the same terms as those upon which he bought it
243	Demosthenes xxxvii.31	Not clear	Pantaenetus himself later sold the property for three talents and 2600 drachmae
244	Demosthenes xxxvii.54	Not clear	Speaker's character in lending money and giving aid. Nonlegal issue
245	Demosthenes xxxviii.3	Not clear	Opponents brought a *dike epitropes* about the inheritance, dropped their action and have the money agreed upon (§4)
246	Demosthenes xxxviii.13	Not clear	Father died after the agreement, opponents never sued Demaretus and he didn't go to sea nor to the Bosporus
247	Demosthenes xxxix.5	Not clear	How Mantitheus was enrolled in the phratry and the deme
248	Demosthenes xxxix.19	Not clear	Boeotus' past court cases and his actions in claiming Mantitheus' magistracy (legal issue as dealing with confusion caused by possessing the same name, but also provides an opportunity to slur opponent)
249	Demosthenes xxxix.20	Not clear	Speaker has been called Mantitheus since he was ten days old

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
250	Demosthenes xxxix.24	Those who went with Boeotus to dance in the boys' chorus. Independent?	Boeotus was sent to dance in another deme
251	Demosthenes xxxix.36	Not clear	Speaker's father named him Mantitheus and the opponent Boeotus
252	Demosthenes xl.7	Not clear	Speaker is 'telling the truth' about his mother's marriages and his sister's dowry
253	Demosthenes xl.15	Not clear	Speaker and opponent divided the inheritance but kept apart the house and their father's slaves, in order that whoever established a right to the dowry could gain it from the value of the house, and so that the slaves could be tortured in any search for father's property
254	Demosthenes xl.18	Not clear	Arbitrations and judgements; Boeotus called himself Mantitheus
255	Demosthenes xl.33	Not clear	Boeotus and Menecles brought speaker before the Areopagus on a charge of intentional wounding but lost the case. Nonlegal issue
256	Demosthenes xl.35	Not clear	Speaker's litigation with Boeotus and Boeotus' attempts to annex speaker's taxiarchy. Nonlegal issue
257	Demosthenes xl.37	Mytileneans. Independent	Father received the gift in person from the Mytileneans and no debt was owed to him in Mytilene
258	Demosthenes xl.44	Not clear	Boeotus refused a challenge, and would not allow the arbitrator to decide the suit about the name
259	Demosthenes xl.52	Not clear	Speaker's debts to Blepaeus the banker and Lysistratus of Thoricus and how he repaid them - legal issue as refuting opponent's claims that speaker has wasted father's inheritance
260	Demosthenes xli.6	τοὺς παραγενομένους (for betrothal). Not clear who testified to other issues	Polyeuctus betrothed his daughter to Spudias with a dowry of 40 minae; he received less than 1000 drachmae; Polyeuctus always admitted the debt and at his death directed that *horoi* should be set up on the house for 1000 drachmae for the debt of his wife's dowry
261	Demosthenes xli.10	Aristogenes - not clear if independent	Polyeuctus, when about to die, stated that Spudias owed him two minae with interest (for the price of a slave) and also 1800 drachmae
262	Demosthenes xli.11	Not clear	Three other debts incurred by Spudias which he refuses to repay
263	Demosthenes xli.18	Mutual friends of speaker and Spudias - defended as telling the truth at §14-16. It is possible that they are not really Spudias' friends, but only the speaker's friends, in which case they would not be independent	Speaker did not induce Polyeuctus to favour him over Spudias

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
264	Demosthenes xli.24	Not clear	Papers on the 20 minae were sealed, the seals were acknowledged by Spudias' wife and speaker's, they broke the seals and took copies, resealed the papers and deposited them with Aristogenes
265	Demosthenes xli.26	Not clear	The dowry Spudias received when he married Polyeuctus' other daughter
266	Demosthenes xli.28	Arbitrators - independent	Relative value of dowries, Leocrates brought a suit about Spudias' receiving far more than the speaker; verdict of the arbitrators
267	Demosthenes xlii.9	Includes friends and relatives (§4); not independent	Original state of farm and mine and subsequent state (§26)
268	Demosthenes xlii.16	Not clear	Phaenippus' delays, including putting speaker off, not turning up to conferences and handing over the inventory late
269	Demosthenes xlii.23	Not clear	Phaenippus inherited two estates that supplied liturgies
270	Demosthenes xlii.25	Not clear	Possibly about Phaenippus' chariot; if so, nonlegal issue
271	Demosthenes xlii.29	Aeantides and Theoteles - previous creditors of Phaenippus. Apparently independent of this case, though it is possible they bear some enmity toward Phaenippus	Phaenippus declares he owes them 4000 drachmae, but he long ago paid the debt, unwillingly, but after losing a suit.
272	Demosthenes xliii.31	People present before the arbitrator	Phylomache won Hagnias' estate
273	Demosthenes xliii.35-37	1. Fellow demesmen (independent) 2. grandchildren of Stratonides (family, so not independent) 3. relative (not independent) 4. relative (not independent) 5. husband of relative (not independent)	1. Phylomache is Polemon's sister by the same father and mother 2. Heard from their father that Polemon never had a brother but had a sister, Phylomache 3. Heard from his father and other relatives that Polemon never had a brother but had a sister, Phylomache 4. Heard from Archimachus and his other relatives that Polemon never had a brother but had a sister, Phylomache 5. His mother often told them that Phylomache, the mother of Eubulides, was sister of Polemon and that Polemon never had a brother
274	Demosthenes xliii.70	Neighbours and the witnesses we summoned (first independent; second not independent)	Sositheus showed them that the olive trees had been uprooted at Hagnias' farm. Nonlegal issue
275	Demosthenes xliv.14	Not clear	Family relationship is ὥσπερ καὶ λέγομεν
276	Demosthenes xliv.30	Not clear	Leochares' family background and the adoptions, and Archiades' tomb has a loutrophoros proving he died childless

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
277	Demosthenes xliv.44	Members of phratry and deme. Independent	Leostratus returned to his deme, leaving a son in Archiades' family; his father had done the same thing; Leostratus' son died childless, and Leochares was enrolled in the deme before he was enrolled in the phratry
278	Demosthenes xlv.8	Stephanus (the opponent)	Stephanus' testimony from the first trial
279	Demosthenes xlv.19	Cephisophon - apparently on opponent's side so not independent	Cephisophon's original testimony that his father left him a document entitled "the will of Pasion"
280	Demosthenes xlv.24	Stephanus	Stephanus' original testimony (repeated for further examination)
281	Demosthenes xlv.25	Stephanus	Stephanus' original testimony (parts read out three times with comments - a closer examination)
282	Demosthenes xlv.55	Deinias - relative of both Apollodorus and Stephanus; not independent	Stephanus' mother is the sister of Apollodorus' father; and he didn't know that Apollodorus released Stephanus from his claims
283	Demosthenes xlv.61	Not clear	Apollodorus challenged Stephanus to give up a slave for torture concerning the theft of the written document and Stephanus refused
284	Demosthenes xlvi.21	Not clear	Apollodorus challenged Phormio about corrupting his mother before marriage; Phormio refused to hand over female slaves
285	Demosthenes xlvii.10	Not clear	Evergus and Mnesibulus won't give up the woman, though they said Theophemus was ready to give her up
286	Demosthenes xlvii.17	Not clear	Same deposition as before; repeated for emphasis
287	Demosthenes xlvii.24	Magistrate who gave the names to the speaker and brought the case into court (independent); members of the *symmory* when speaker was *epimeletes* and trierarch (independent)	Law of Periander and decree compelled speaker to recover debts from opponents
288	Demosthenes xlvii.27	Those who served the summons on Theophemus - not clear if independent	Speaker summoned Theophemus to court
289	Demosthenes xlvii.27	The *apostoleis* and the archon - independent	Theophemus was brought into court
290	Demosthenes xlvii.32	Not clear	Theophemus did not pay the debt but tried to shift it to Aphareus and then Democharés
291	Demosthenes xlvii.40	Those who saw Theophemus strike the speaker first - not clear if independent	Theophemus struck the speaker first, and thus committed *aikeia*
292	Demosthenes xlvii.44	All those speaker could find who were members of the *Boule* when Theophemus was impeached - independent	Theophemus was impeached and fined

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
293	Demosthenes xlvii.48	Other trierarchs - independent	Speaker was one of several who took such actions against debtors
294	Demosthenes xlvii.52	Not clear	Speaker's agreement with Theophemus to delay paying the fine. Nonlegal issue
295	Demosthenes xlvii.61	Not clear. Possibly Hagnophilus and the neighbours (as discussed at §60-61) - if so, independent	Opponents plunder speaker's house. Nonlegal issue
296	Demosthenes xlvii.66	Not clear	Speaker pays fine; further plunder. Nonlegal issue
297	Demosthenes xlvii.67	Not clear, but could include the witnesses he took when he demanded the opponents take care of the nurse; so probably not independent	Death of nurse and speaker's demand the opponents take care of her. Nonlegal issue
298	Demosthenes xlvii.77	Not clear	Possibly about extending the time for paying the fine (§78). Nonlegal issue
299	Demosthenes xlvii.82	Those wronged by Evergus and Mnesibulus - not involved in this dispute, but not independent	Evergus and Mnesibulus' previous crimes. Nonlegal issue
300	Demosthenes xlviii.3	τῶν παραγενομένων	Speaker offered reasonable and appropriate terms to Olympiodorus
301	Demosthenes xlviii.11	Androcleides - independent	Agreement between speaker and Olympiodorus
302	Demosthenes xlviii.33	Not clear	Speaker and Olympiodorus, having settled their dispute, each took an equal share of the property left by Comon that they knew about
303	Demosthenes xlviii.34	Not clear	When opponents put in an *epidikasia* they took everything from the speaker except the money which Olympiodorus got from the man who was tortured
304	Demosthenes xlviii.47	Androcleides - independent	Olympiodorus never asked him for the agreement
305	Demosthenes xlviii.49	The people in front of whom the speaker made the challenge - probably the witnesses he took with him so not independent	Olympiodorus refused challenge to copy and submit the agreement as evidence
306	Demosthenes xlviii.55	Olympiodorus' relatives and speaker's relatives - not independent	Olympiodorus' mistress - nonlegal issue
307	Demosthenes xlix.33	Bank staff including Phormio (§18) and apparently independent, and Timosthenes (friend and partner of Phormio - §31 - so apparently independent). Although Apollodorus did not own his father's bank, he clearly had some control (§43) so the witnesses may be on his side	Bankers paid money to people whom Timotheus told them to pay it, and Pasion paid Timosthenes the value of two bowls and entered the debt on his books as owing to Timotheus
308	Demosthenes xlix.33	Those who heard Timotheus before the arbitrator (§34)	Timotheus' testimony before the arbitrator on Philondas' timber

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
309	Demosthenes xlix.42	Pasicles (Apollodorus' brother but in charge of the bank). Not independent	Pasion's record of all debts owed; Pasion told Apollodorus and Pasicles during his illness of all the debts and who owed them and for what purpose they received the money
310	Demosthenes xlix.43	Not clear. Probably bank staff Phormio and Euphraeus as mentioned at §44. Apparently independent, but given Apollodorus' partial control of bank may be on his side	Apollodorus allowed Phrasierides to inspect the bank's books and to copy out all the entries on debts owed by Timotheus
311	Demosthenes xlix.61	Not clear	Timotheus borrowed money from other citizens without security, since he had no security to offer
312	Demosthenes l.10	Those who collected the *stratiotika* and the *apostoleis*. Independent	How much Apollodorus paid each month, and the sailors and how much was paid to each one, as proof of Apollodorus' zeal and of Polycles' reluctance to take over the trierarchy because of the expense
313	Demosthenes l.13	Not clear	Apollodorus' additional expenses and mortgages and borrowings to pay them
314	Demosthenes l.28	Not clear, but possibly Euctemon, Deinias, Pythodoros of Acharnae and Apollodoros of Leuconoe (§§26-27). Euctemon is the pentecontarch so independent; Deinias is Apollodorus' father in law so not independent, and the other two are friends of Apollodorus' (§27) so not independent	Various people told Polycles about the costs of the equipment and that none of it was from the public stores, and about the pay given to crew and the additional sums paid after the trierarchy had expired, and urged him to take over the ship. They were willing to negotiate an agreement with Polycles over the wear and tear on the equipment but Polycles refused
315	Demosthenes l.37	The scene in the agora is witnessed by "as many of the citizens as I could [take] and the marines and rowers" (§29) - the witnesses Apollodorus took with him so not clearly independent. However, Apollodorus says he went by himself to the house where Timomachus was staying (§32) so it is not clear who witnesses these remarks	Polycles refused to take over the ship and repay Apollodorus' extra expenses when requested in the agora, and his second refusal in the house where Timomachus was staying to take over the ship and crew due to Apollodorus' extravagance, or to take over the trierarchy as his fellow trierarch had not yet turned up
316	Demosthenes l.40	Not clear	Compromise offer and Polycles' further refusal
317	Demosthenes l.42	Not clear	Mnesilochus and Hagnias reached a compromise over a similar dispute

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
318	Demosthenes l.56	τῶν παραγενομένων (§57). The request for a loan from Polycles may be witnessed by those Apollodorus took with him (§55) so may not be independent; the actual loan may be witnessed by Cleanax and Eperatus as mentioned at §56; as friends of his father they may not be independent	Apollodorus asked Polycles to lend him one but Polycles refused; he borrowed from Cleanax and Eperatus, friends of his father
319	Demosthenes l.68	Not clear	Polycles' previous malfeasance in not performing a trierarchy. Nonlegal issue
320	Demosthenes lii.7	Some not known, but include Archebiades of Lamptrae (§28), who was known to Cephisiades, and possibly too Phormio as identified at §7 as οὗτοσί. Both independent	Callippus visited bank and was shown Lycon's ledger, and did not claim any money. Later Phormio paid the money to Cephisiades in the presence of Archebiades and Phrasias and other witnesses.
321	Demosthenes lii.16	The people who were present at the arbitration	Callippus' claim that he challenged Pasion before the arbitrator
322	Demosthenes lii.19	Not clear	Apollodorus and Phormio were ready to swear oaths about Lycon's acts and the payment to Cephisiades
323	Demosthenes lii.21	Megacleides (previous opponent of Lycon in a lawsuit) - not independent	Throughout the long lawsuit with Megacleides Lycon never called in Callippus, but Archebiades and his friends
324	Demosthenes lii.31	Those who were present at the arbitration	Lysitheides made his award without swearing an oath
325	Demosthenes liii.18	Not clear	Apollodorus' suit against Arethusius and that man's attack on his farm; Nicostratus' assault on Apollodorus; Apollodorus convicts Arethusius for false summons
326	Demosthenes liii.19	τοὺς εἰδότας, but not clear who they are	Cerdon was Arethusius' slave
327	Demosthenes liii.20	Not clear	Arethusius received wages from the people for whom Cerdon worked, and paid or received compensation whenever any damage was done
328	Demosthenes liii.20	Not clear	Archepolis gave Manes to Arethusius in payment of a debt
329	Demosthenes liii.21	Not clear	Whenever Cerdon and Manes bought up the produce from an orchard, or hired themselves out to reap a harvest, or did any other farming work, Arethusius made the purchase or paid wages for them
330	Demosthenes liii.25	Not clear	Arethusius' challenge and Apollodorus' counter-challenge
331	Demosthenes liv.6	Not clear	Conon's sons' actions on campaign (the origin of the dispute)

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
332	Demosthenes liv.9	Lysistratus, Paseas, Niceratos and Didodorus (§32) - men who did not know the speaker and came upon the fight by chance - so independent	They saw speaker being beaten by Conon and stripped of his cloak and τἄλλ' ὅσ' ἔπασχον ὑβριζόμενον
333	Demosthenes liv.10	Not clear. Possibly Euxitheus (speaker's relative) and his friend Meidias, so not independent	Speaker's condition after the fight; doctor called, speaker kept at Meidias' house
334	Demosthenes liv.10	Doctor - independent	Severity of assault
335	Demosthenes liv.12	Doctor (independent) and those who visited the speaker (not clear who they are)	After assault speaker was at point of death
336	Demosthenes liv.29	Not clear	Conon's challenge and its timing
337	Demosthenes liv.36	Not clear	Conon's witnesses and their character. Nonlegal issue? Attack on opponent's witnesses
338	Demosthenes lv.14	Not clear	Land is private land and no watercourse; it contains trees, vines, figs and tombs, there since before speaker's father built the wall while tombs were there before his family acquired the land; this proves that the land was walled during the lifetime of Callicles' father without any opposition from them or any other neighbours
339	Demosthenes lv.21	Neighbours - independent	They have also suffered from floods and don't blame it on the speaker's family
340	Demosthenes lv.27	Not clear	Callicles threw rubbish into the road and made it narrower
341	Demosthenes lv.34	Not clear	Callicles made false charges and got his cousin to bring suits against Callarus to get the speaker's property
342	Demosthenes lv.34	Not clear	"The remaining depositions" - perhaps to prove speaker's willingness to submit to arbitration by "fair and impartial men" and to swear the lawful oath
343	Demosthenes lvii.14	The very men who wronged me - opponents, used here to prove the point.	Votes were not given out when everybody was present and the number of votes was greater than the number of people present. No reference to *exomosia* so it appears they do testify
344	Demosthenes lvii.19	Not clear	Euxitheus' father was taken prisoner and ransomed, when he reached home he received from his uncles his share of the inheritance and no member of the phratry or deme ever accused him of being a foreigner
345	Demosthenes lvii.21	Thucritides, Charisiades, Niciades and Nicostratus - relatives of Euxitheus on his father's side. Not independent	Euxitheus' father's citizenship

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
346	Demosthenes lvii.22	Those related to Euxitheus' father on the female side. Not independent	Euxitheus' father's citizenship
347	Demosthenes lvii.23	Members of phratry and tribe - independent	Euxitheus' father's citizenship
348	Demosthenes lvii.23	Members of deme and members of tribe - independent	Euxitheus elected Phratriarch
349	Demosthenes lvii.25	Members of deme - independent	Euxitheus' father elected to deme magistracies and passed *dokimasia*
350	Demosthenes lvii.27	Not clear	Deme register lost during Antiphilus' time as demarch and subsequent *diapsephisis*; nobody brought any charge against Euxitheus' father
351	Demosthenes lvii.28	Not clear	Euxitheus' brothers were buried in the family tomb
352	Demosthenes lvii.38	Mother's relatives - not independent	Euxitheus' mother's citizen status
353	Demosthenes lvii.39	Euxitheus' mother's nephew and his three sons - not independent	Euxitheus' mother's citizen status
354	Demosthenes lvii.40	Members of mother's tribe, phratry and deme - independent	Euxitheus' mother's citizen status
355	Demosthenes lvii.43	Sons of Protomachus (Euxitheus' mother's first husband and her children) and those who were present when she was engaged to his father; members of phratry and family who were present when Euxitheus' father gave a marriage feast; Eunicus of Cholargus, who received Euxitheus' sister in marriage from Cholargus, and her son. Most not independent; members of phratry apparently independent	Euxitheus' mother's citizen status
356	Demosthenes lvii.45	Cleinias and his relatives - independent	Euxitheus' mother was once their nurse
357	Demosthenes lvii.46	Not clear	Euxitheus was inducted into phratry and deme, was nominated to draw lots for the priesthood of Heracles and served on deme magistracies δοκιμασθείς
358	Demosthenes lviii.8	Euthyphemus, the secretary of the magistrate - independent	Phasis against Theocrines for denouncing Micon of Cholleidae and then accepting money to give up the case
359	Demosthenes lviii.9	Not clear	Those who saw the phasis put up in public
360	Demosthenes lviii.9	The port overseers and Micon. First independent; second not independent (Theocrines lodged the denunciation against him)	Proof of Theocrines' denunciation

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
361	Demosthenes lviii.15	Members of Theocrines' tribe - independent	Theocrines owes 700 drachmae after being condemned in his *euthyne* but has not paid
362	Demosthenes lviii.21	Cephisodorus - previously subject to a wrongful accusation by Theocrines, so likely to be an enemy of his	Theocrines wrongfully claimed Cephisodorus' slave was free
363	Demosthenes lviii.33	Not clear	Theocrines brought an eisangelia against Polyeuctus for mistreating an orphan, but withdrew the case after receiving 200 drachmae from Polyeuctus
364	Demosthenes lviii.33	Philippides of Paeania - not clear if he is independent	Theocrines' statement that he would have let speaker's father off for 1000 drachmae. Nonlegal issue
365	Demosthenes lviii.35	Aristomachus - the bribe was paid in his house, but not clear if he is independent	Theocrines received a mina and a half to drop the *graphe paranomon* against Antimedon. Nonlegal issue
366	Demosthenes lviii.35	"Other depositions of the same sort" and the deposition by Hyperides and Demosthenes. Apparently involved in other cases and thus not independent; Demosthenes is allegedly in collusion with Theocrines	Theocrines' other attempts to extort money through sycophancy. Nonlegal issue
367	Demosthenes lviii.43	Cleinomachus and Eubulides, apparently involved in the cabal with Theocrines and Demosthenes. Speaker's enemies; called here to prove the point. Not clear if they do testify but speaker says he will compel them (§42)	Theocrines and Demosthenes have come to terms and Theocrines has withdrawn his *graphe* against Demosthenes
368	Demosthenes lix.23	Philostratus - independent	Neaira was Nicarete's slave and they were residents of Corinth; they stayed at his house when they came to Athens for the mysteries and Lysias placed them there
369	Demosthenes lix.25	Euphiletos and Aristomachus - independent	Simus the Thessalian came to Athens with Nicarete and Neaira; they lodged with Ctesippus and Neaira drank with them like a courtesan while many others were present and joined in the drinking at Ctesippus' house
370	Demosthenes lix.28	Hipparchus - apparently independent	Xenocleides and he hired Neaira in Corinth as a courtesan for hire and they drank together with her in Corinth
371	Demosthenes lix.32	Philagros of Melite - independent	He was present in Corinth when Phrynion paid 20 minae for Neaira to Timanoridas and Eucrates; and after paying he took Neaira to Athens with him
372	Demosthenes lix.34	Chionides and Euthetion - independent	They were at Chabrias' banquet at Colias, as were Phrynion and Neaira; they all laid down to sleep and during the night several men went to Neaira, including Chabrias' slaves. Nonlegal issue

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
373	Demosthenes lix.40	Aietes, Polemarch when Neaira was compelled to post securities by Phrynion - independent	Neaira was compelled to post securities; Stephanus, Glaucetes and Aristocrates were the securities
374	Demosthenes lix.47	Satyrus, Saurias and Diogeiton - arbitrators in dispute between Phrynion and Stephanus over Neaira. Independent	Arbitration between Phrynion and Stephanus over Neaira; the terms of the arbitration were as Apollodorus' states
375	Demosthenes lix.48	Eubulus, Diopeithes and Cteson - independent	They often dined with Stephanus and Phrynion after the arbitration and drank in the company of Neaira at both men's houses. Nonlegal issue
376	Demosthenes lix.54	Phrastor - not independent as apparently an enemy of Stephanus	He married and Phano and divorced her because she was Neaira's daughter; Stephanus indicted him for the dowry, Phrastor replied with a suit for offering him a non-Athenian in marriage. Their reconciliation
377	Demosthenes lix.61	Timostratus, Xanthippus, Evalces, Anytus, Euphranor and Nicippus - members of Phrastor's tribe and apparently independent	They prevented Phrastor from registering his son with the tribe as he was the son of Neaira's daughter
378	Demosthenes lix.71	Nausiphilus, Aristomachus - securities for Epaenetus and thus not independent	They became sureties for Epaenetus when Stephanus claimed he had caught him in adultery; when Epaenetus had got away from Stephanus he indicted Stephanus for wrongful imprisonment; they were appointed arbitrators and brought about a reconciliation between the two, and the terms of the reconciliation were as Apollodorus states
379	Demosthenes lix.84	Theogenes - not independent given his past relationship with Phano and Stephanus	When he was *Basileus* he married Phano believing she was Stephanus' daughter, and when he found out he had been deceived he threw the woman out no longer lived with her, and sacked Stephanus from his post as *paredros*
380	Demosthenes lix.123	Hippocrates, Demosthenes, Diophanes, Deinomenes, Deinias and Lysimachus - probably the witnesses Apollodorus took with him so not independent	They were present in the agora when Apollodorus challenged Stephanus to hand over female slaves for torture in regard to the matters which he had accused Stephanus and Neaira; Stephanus refused; the challenge was the one that Apollodorus produces
381	Hyperides iii.33	The Troezenians; not clear if independent	Athenogenes' previous wrongdoing in Troezen; nonlegal issue
382	Hyperides iii.34	Athenogenes' father-in-law; not independent	Not clear, but apparently another item from Athenogenes' private life. Nonlegal issue

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
383	Lycurgus i.20	The neighbours and the men living in this place who know Leocrates ran away during the war and sailed from Athens; the men present at Rhodes when Leocrates delivered his news, and Phrynicus who accused Leocrates in the Assembly as having harmed the two per cent tax (§19). Apparently independent with the exception of Phrynicus, who would seem to be an enemy of Leocrates'	Leocrates' flight from Athens and claim at Rhodes that Athens had fallen, the Peiraeus had been blockaded and he was the only one who had escaped, and the Rhodians' subsequent actions
384	Lycurgus i.23	τοὺς συνειδότας; not clear if independent	Leocrates sold his house and slaves to Amyntas; Amyntas then resold the slaves to Timochares
385	Lycurgus i.24	Not clear; perhaps Philomelus and Menelaus? If so, apparently independent	Philomelus of Cholargus and Menelaus received from Amyntas 40 minae owed to them
386	Lycurgus i.24	Timochares (husband of Leocrates' younger sister so not independent)	Timochares bought slaves from Amyntas, using a loan from Lysicles to pay and paid Amyntas interest of one mina
387	Aeschines i.50	Those who know that Timarchus lived in Misgolas' house; Phaedrus; and Misgolas. Friends of Timarchus so not independent	Timarchus' prostitution with Misgolas; and his crime against the foreigners at the inn. The second issue is a nonlegal issue
388	Aeschines i.66	Glaucon of Cholargus and others. Glaucon is apparently independent	Crimes against Pittalacus - nonlegal issue
389	Aeschines i.100	Nausicrates; Metagenes of Shpettus; and others (possibly including Cleanetus the *choregus* and Mnesitheus of Myrrinoussa as mentioned at §98. Independent	Timarchus sold his father's city house and suburban house and the estate at Alopeke; he sold his father's slaves; and also collected and spent loans due to his father (proving Timarchus squandered his inheritance)
390	Aeschines i.104	Arignotus of Sphettus (Timarchus' uncle, so not independent)	Timarchus' neglect of his uncle - did not support him but allowed him to receive a pension for disabled men. Did not speak for him at his *dokimasia*
391	Aeschines i.115	Philemon and Leuconides - previous cronies of Timarchus.	Timarchus bribed to abandon his case against Philotades. Nonlegal issue
392	Aeschines ii.19	Witnesses to the deposition made by Aristodemus (a fellow ambassador and apparently a friend of Demosthenes'). Not clear who they are	Demosthenes' actions to ensure Aristodemus could join the Embassy
393	Aeschines ii.46	Colleagues on the Embassy - also abused by Demosthenes (§44), so may not be independent	Aeschines' actions on the Embassy and Demosthenes' own praise of his actions

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
394	Aeschines ii.55	Colleagues on the Embassy - also abused by Demosthenes (§44), so may not be independent	Aeschines' and Demosthenes' reports to the Assembly
395	Aeschines ii.68	Amyntor - independent	When the people were deliberating on the subject of the alliance with Philip, according to Demosthenes' decree, at the second meeting of the Assembly, when there was no opportunity to address the people but when the decrees were being voted on, Demosthenes was sitting next to him and showed him a decree he had written and asked him if should give it to the *proedroi* to put to the vote; this decree contained the terms on which Demosthenes claimed the peace and the alliance should be made, and the terms were the same as Philocrates had moved. Nonlegal issue
396	Aeschines ii.85	Aleximachus - independent	Demosthenes' unwillingness to allow the representative of Cersobleptes to join the other allies in giving the oath to Philip
397	Aeschines ii.86	The *strategoi* and the *synedroi* of the allies - independent	Demosthenes' claim that Aeschines drove Critobulus, Cersobleptes' ambassador, from the oath-giving ceremony
398	Aeschines ii.107	Fellow-ambassadors on the second Embassy - enemies of Demosthenes (§97) so not independent	Demosthenes' comments before meeting Philip, and the vote that each should say what they thought was in their interests
399	Aeschines ii.127	Fellow-ambassadors on the second Embassy - enemies of Demosthenes (§97) so not independent	Aeschines was never away from Aglaocreon and Iatrocles at night during the Embassy and so could not be meeting Philip in secret
400	Aeschines ii.134	The bearers of the truce of the Mysteries, and the ambassadors Callicrates and Metagenes, whom Proxenus the *strategus* sent to the Phocians. Independent	Actions by the Phocians and their bearing on the peace with Philip
401	Aeschines ii.155	Aristophanes the Olynthian, and those who heard his story and reported it to Aeschines - Dercylus and Aristeides. The first is independent; the last two may be friends of Aeschines' and not independent	Demosthenes' attempt to fake the story about Aeschines and the Olynthian woman
402	Aeschines ii.170	Temenides and those who fought with Aeschines at Tamynae; Phocion the *strategus*. Independent	Aeschines' martial deeds. Nonlegal issue

Table 6.1 (Cont.).

No.	Reference	Identity of Witness	Issue witnessed
403	Dinarchus i.27	Not clear	Downfall of Thebes and Demosthenes' role through avarice
404	Dinarchus i.52	Not clear	Deposition from a previous *eisangelia* about charges made against speaker. Speaker's innocence of any charges by the Areopagus

Table 6.2. Number of Decrees Cited in Athenian Courts.

Orator	Number Cited	References
Andocides	2	i.77-9, 83-4
Aeschines	22	ii.19, 46, 55, 55, 60, 61, 65, 73, 91, 170 iii.27, 32, 68, 70, 75, 76, 93, 102, 105, 124, 187, 188
Demosthenes	49	xviii.29, 37, 73-4, 75, 84, 90-1, 92, 105, 115, 116, 118, 154, 155, 164, 165, 181-7, 218, 222 xix.31, 47, 61, 63, 80, 154, 161, 267, 276, 286 xx.35, 44, 54, 63, 70, 86, 115 xxiii.88, 151, 177 xxiv.27 xxv.63 xlvii.20, 24, 33, 40, 44 l.6, 13 lviii.18, 57 lix.104
Dinarchus	6	i.16, 27, 79, 80, 82, 83
Hyperides	1	iii.33
Isaeus	1	vi.50
Isocrates	1	xviii.19
Lycurgus	7	i.36, 114, 118, 120, 122, 125, 146
Lysias	9	xiii.22, 28, 33, 35, 51, 55, 59, 71, 72

Table 6.3. Number of Laws Cited in Athenian Courts.

Orator	Number Cited	References
Aeschines	10	i.12, 16, 21, 35 iii.15, 22, 30, 32, 39, 47
Andocides	4	i.85, 87, 87, 96-8
Demosthenes	94	xviii.120 xx.27, 92, 95, 96, 97, 127, 128, 153 xxi.8, 10, 47, 94, 113 xxiii.22, 28, 37, 44, 51, 53, 60, 62, 82, 86, 87 xxiv.20-3, 33, 39-40, 42, 45, 50, 54, 56, 56, 59, 63, 64, 71, 105 xxvii.58 xxix.39 xxxii.23 xxxiii.3, 27 xxxiv.37, 42 xxxv.51 xxxvi.24, 26, 62 xxxvii.18, 33, 35 xxxviii.4 xl.19 xli.10 xlii.16, 23 xliii.16, 51, 54, 57-8, 62, 71, 75 xliv.14 xlvi.8, 10, 10, 14, 18, 20, 22, 24, 26 xlvii.24, 73, 77 xlviii.11, 30 lii.19 liv.24 lvii.31, 32 lviii.5, 11, 14, 21, 21, 49, 51 lix.16, 52, 87
Hyperides	1	iii.33
Isaeus	15	ii.16 iii.38, 42, 53 vi.8, 48 vii.21, 22, 22 viii.34 x.10 xi.1, 4, 11, 22
Lycurgus	1	i.129
Lysias	10	i.28, 30, 31 ix.8 x.14, 15, 16 xiv.5, 8, 47

Table 7.1. Appeals for Pity in Athenian Courts

No.	Reference	Type of Case	Phrasing
1	Antiphon v.73	Public defendant	• εὖ δὲ ἴστε ὅτι ἐλεηθῆναι ὑφ' ὑμῶν ἄξιός εἰμι μᾶλλον ἢ δίκην δοῦναι· δίκην μὲν γὰρ εἰκός ἐστι διδόναι τοὺς ἀδικοῦντας, ἐλεεῖσθαι δὲ τοὺς ἀδίκως κινδυνεύοντας
2	Andocides i.67	Public defendant	• τῆς μὲν τύχης ᾗ ἐχρησάμην δικαίως ἂν ὑπὸ πάντων ἐλεηθείην
3	Andocides i.148-49	Public defendant	• τίνα γὰρ καὶ ἀναβιβάσομαι δεησόμενον ὑπὲρ ἐμαυτοῦ; τὸν πατέρα; ἀλλὰ τέθνηκεν. ἀλλὰ τοὺς ἀδελφούς; ἀλλ' οὐκ εἰσί. ἀλλὰ τοὺς παῖδας; ἀλλ' οὔπω γεγένηνται. ὑμεῖς τοίνυν καὶ ἀντὶ πατρὸς ἐμοὶ καὶ ἀντὶ ἀδελφῶν καὶ ἀντὶ παίδων γένεσθε· εἰς ὑμᾶς καταφεύγω καὶ ἀντιβολῶ καὶ ἱκετεύω· ὑμεῖς με παρ' ὑμῶν αὐτῶν αἰτησάμενοι σώσατε
4	Lysias iii.48	Private defendant?	• ὥστε δικαίως ἂν ὑφ' ὑμῶν καὶ ὑπὸ τῶν ἄλλων ἐλεηθείην
5	Lysias iv.20	Private defendant?	• πρὸς οὖν παίδων καὶ γυναικῶν καὶ θεῶν τῶν τόδε τὸ χωρίον ἐχόντων ἱκετεύω ὑμᾶς καὶ ἀντιβολῶ, ἐλεήσατέ με, καὶ μὴ πώριίδητε ἐπὶ τούτῳ γενόμενον
6	Lysias vii.41	Public defendant	• πάντων γὰρ ἀθλιώτατος ἂν γενοίμην, εἰ φυγὰς ἀδίκως καταστήσομαι, ἄπαις μὲν ὢν καὶ μόνος, ἐρήμου δὲ τοῦ οἴκου γενομένου, μητρὸς δὲ πάντων ἐνδεοῦς [οὔσης], πατρίδος δὲ τοιαύτης ἐπ' αἰσχίσταις στερηθεὶς αἰτίαις
7	Lysias xviii.1	Public defendant	• οἷοί τινες ὄντες πολῖται καὶ αὐτοὶ καὶ ὧν προσήκοντες ἀδικούμενοι ἀξιοῦμεν ἐλεεῖσθαι ὑφ' ὑμῶν καὶ τῶν δικαίων τυγχάνειν
8	Lysias xix.33	Public defendant	• πῶς ἂν οὖν εἶεν ἄνθρωποι ἀθλιώτεροι, ἢ εἰ τὰ σφέτερ' αὐτῶν ἀπολωλεκότες δοκοῖεν τἀκείνων ἔχειν; ὃ δὲ πάντων δεινότατον, τὴν ἀδελφὴν ὑποδέξασθαι παιδία ἔχουσαν πολλά, καὶ ταῦτα τρέφειν, μηδ' αὐτοὺς ἔχοντας μηδέν, ἐὰν ὑμεῖς τὰ ὄντ' ἀφέλησθε
9	Lysias xix.53	Public defendant	• εἰ οὖν δοκοῦμεν εἰκότα λέγειν καὶ ἱκανὰ τεκμήρια παρέχεσθαι, ὦ ἄνδρες δικασταί, πάσῃ τέχνῃ καὶ μηχανῇ ἐλεήσατε
10	Lysias xx.15	Public defendant	• καὶ οὐ φθονῶν τούτοις λέγω, ἀλλ' ἡμᾶς ἐλεῶν· οἱ μὲν γὰρ δοκοῦντες ἀδικεῖν ἐξῃτημένοι εἰσὶν ὑπὸ τῶν ὑμῖν προθύμων ἐν τοῖς πράγμασι γενομένων, οἱ δ' ἠδικηκότες ἐκπριάμενοι τοὺς κατηγόρους οὐδ' ἔδοξαν ἀδικεῖν. πῶς [ἂν] οὖν οὐκ ἂν δεινὰ πάσχοιμεν;
11	Lysias xx.34-36	Public defendant	• δεόμεθα οὖν ὑμῶν πρὸς τῶν ὑπαρχόντων ἀγαθῶν ἑκάστῳ, ὅτῳ μὲν εἰσὶν υἱεῖς, τούτων ἕνεκα ἐλεῆσαι, ὅστις [δ'] ἡμῖν ἡλικιώτης τυγχάνει ἢ τῷ πατρί, ἐλεήσαντας ἀποψηφισασθαι
12	Lysias xxi.15	Public defendant	• πένητα γενόμενον ἐλεῆσαι μᾶλλον ἢ πλουτοῦντι φθονῆσαι

Table 7.1 (Cont.).

No.	Reference	Type of Case	Phrasing
13	Lysias xxi.25	Public defendant	• ἀξιῶ, ἐν τοῖς κινδύνοις ἐμοῦ τοιαύτην περὶ ὑμῶν γνώμην ἔχοντος, ὑμᾶς νυνὶ ἐν τῷ θαρραλέῳ ὄντας ἐμὲ καὶ τοὺς παῖδας τούτους περὶ πολλοῦ ποιήσασθαι, ἡγουμένους ἡμῖν μὲν δεινὸν ὑμῖν δὲ αἰσχρὸν εἶναι, εἰ ἀναγκασθησόμεθα ἐπὶ τοιαύταις αἰτίαις ἄτιμοι γενέσθαι, ἢ στερθέντες τῶν ὑπαρχόντων πένητες εἶναι καὶ πολλῶν ἐνδεεῖς ὄντες περιιέναι, ἀνάξια μὲν ἡμῶν αὐτῶν πεπονθότες, ἀνάξια δὲ τῶν εἰς ὑμᾶς ὑπηργμένων
14	Lysias xxiv.6-7	Public defendant	• ἐμοὶ γὰρ ὁ μὲν πατὴρ κατέλιπεν οὐδέν, τὴν δὲ μητέρα τελευτήσασαν πέπαυμαι τρέφων τρίτον ἔτος τουτί, παῖδες δέ μοι οὔπω εἰσὶν οἵ με θεραπεύσουσι. τέχνην δὲ κέκτημαι βραχέα δυναμένην ὠφελεῖν, ἣν αὐτὸς μὲν ἤδη χαλεπῶς ἐργάζομαι, τὸν διαδεξόμενον δ' αὐτὴν οὔπω δύναμαι κτήσασθαι. πρόσοδος δέ μοι οὐκ ἔστιν ἄλλη πλὴν ταύτης, ἣν ἂν ἀφέλεσθέ με, κινδυνεύσαιμ' ἂν ὑπὸ τῇ δυσχερεστάτῃ γενέσθαι τύχῃ. μὴ τοίνυν, ἐπειδή γε ἔστιν, ὦ βουλή, σῶσαί με δικαίως, ἀπολέσητε ἀδίκως· μηδὲ ἃ νεωτέρῳ καὶ μᾶλλον ἐρρωμένῳ ὄντι ἔδοτε, πρεσβύτερον καὶ ἀσθενέστερον γιγνόμενον ἀφέλησθε· μηδὲ πρότερον καὶ περὶ τοὺς οὐδὲν ἔχοντας κακὸν ἐλεημονέστατοι δοκοῦντες εἶναι νυνὶ διὰ τοῦτον τοὺς καὶ τοῖς ἐχθροῖς ἐλεινοὺς ὄντας ἀγρίως ἀποδέξησθε· μηδ' ἐμὲ τολμήσαντες ἀδικῆσαι καὶ τοὺς ἄλλους τοὺς ὁμοίως ἐμοὶ διακειμένους ἀθυμῆσαι ποιήσητε
15	Lysias xxiv.23	Public defendant	• πῶς οὖν οὐκ ἂν δειλαιότατος εἴην, εἰ τῶν μὲν καλλίστων καὶ μεγίστων διὰ τὴν συμφορὰν ἀπεστερημένος εἴην, ἃ δ' ἡ πόλις ἔδωκε προνοηθεῖσα τῶν οὕτως διακειμένων, διὰ τὸν κατήγορον ἀπαιρεθείην; μηδαμῶς, ὦ βουλή, ταύτῃ θῆσθε τὴν ψῆφον
16	Lysias xxxii.19	Private prosecutor	• ἀξιῶ τοίνυν, ὦ ἄνδρες δικασταί, τῷ λογισμῷ προσέχειν τὸν νοῦν, ἵνα τοὺς μὲν νεανίσκους διὰ τὸ μέγεθος τῶν συμφορῶν ἐλεησητε, τοῦτον δ' ἅπασι τοῖς πολίταις ἄξιον ὀργῆς ἡγήσασθε
17	Isocrates xvi.45-48	Private defendant	• δέομαι δ' οὖν ὑμῶν βοηθῆσαί μοι καὶ μὴ περιιδεῖν ὑπὸ τῶν ἐχθρῶν ὑβρισθέντα μηδὲ τῆς πατρίδος στερηθέντα μηδ' ἐπὶ τοιαύταις τύχαις περίβλεπτον γενόμενον. δικαίως δ' ἂν ὑφ' ὑμῶν ἐξ αὐτῶν τῶν ἔργων ἐλεηθείην, εἰ καὶ τῷ λόγῳ τυγχάνω μὴ δυνάμενος ἐπὶ τοῦθ' ὑμᾶς ἄγειν, εἴπερ χρὴ τούτους ἐλεεῖν, τοὺς ἀδίκως μὲν κινδυνεύοντας, περὶ δὲ τῶν μεγιστων ἀγωνιζομένους, ἀναξίως δ' αὑτῶν καὶ τῶν προγόνων πράττοντας, πλείστων δὲ χρημάτων ἀπεστερημένους καὶ μεγίστῃ μεταβολῇ τοῦ βίου κεχρημένους

Table 7.1 (Cont.).

No.	Reference	Type of Case	Phrasing
18	Isocrates xviii.62-65	Private defendant (paragraphe)	• πένητας γενόμενους ἐλεεῖν οὐ τοὺς ἀπολωλεκότας τὴν οὐσίαν ἀλλὰ τοὺς εἰς ὑμᾶς ἀνηλωκότας. ὧν εἷς ἐγὼ φανήσομαι γεγενημένος, ὃς πάντων ἂν εἴην δυστυχέστατος, εἰ πολλὰ τῶν ἐμαυτοῦ δεδαπανημένος εἰς τὴν πόλιν εἶτα δόξαιμι τοῖς ἀλλοτρίοις ἐπιβουλεύειν καὶ περὶ μηδενὸς ποιεῖσθαι τὰς παρ' ὑμῖν διαβολάς, ὃς οὐ μόνον τὴν οὐσίαν ἀλλὰ καὶ τὴν ψυχὴν τὴν ἐμαυτοῦ περὶ ἐλάττονος φαίνομαι ποιούμενος τοῦ παρ' ὑμῖν εὐδοκιμεῖν
19	Isaeus ii.44-45	Private defendant	• ἐγὼ οὖν δέομαι ὑμῶν πάντων, ὦ ἄνδρες, καὶ ἀντιβολῶ καὶ ἱκετεύω ἐλεῆσαί με καὶ ἀποψηφίσασθαι τοῦ μάρτυρος τουτουί
20	Demosthenes xxvii.57	Private prosecutor	• καὶ τίς ἂν πιστεύσειεν; οὐκ ἔστι ταῦτ', ὦ ἄνδρες δικασταί, οὐκ ἔστιν, ἀλλὰ τὰ μὲν χρήματ', ὅσα κατέλιπεν ὁ πατήρ, πάντα τούτοις παρέδωκεν, οὗτος δ', ἵν' ἧττον ἐλεηθῶ παρ' ὑμῖν, τούτοις τοῖς λόγοις χρήσεται
21	Demosthenes xxvii.66-69	Private prosecutor	• δέομαι οὖν ὑμῶν, ὦ ἄνδρες δικασταί, καὶ ἱκετεύω καὶ ἀντιβολῶ, μνησθέντας καὶ τῶν νόμων καὶ τῶν ὅρκων, οὓς ὀμόσαντες δικάζετε, βοηθῆσαι ἡμῖν τὰ δίκαια, καὶ μὴ περὶ πλείονος τὰς τούτου δεήσεις ἢ τὰς ἡμετέρας ποιήσασθαι. δίκαιοι δ' ἔστ' ἐλεεῖν οὐ τοὺς ἀδίκους τῶν ἀνθρώπων, ἀλλὰ τοὺς παρὰ λόγον δυστυχοῦντας, οὐδὲ τοὺς ὠμῶς οὕτως τἀλλότρι' ἀποστεροῦντας, ἀλλ' ἡμᾶς τοὺς πολὺν χρόνον ὧν ὁ πατὴρ ἡμῖν κατέλιπε στερομένους καὶ πρὸς ὑπὸ τούτων ὑβριζομένους καὶ νῦν περὶ ἀτιμίας κινδυνεύοντας
22	Demosthenes xxviii.18-22	Private prosecutor	• τίς δ' οὐκ ἂν ὑμῶν τούτῳ μὲν φθονήσειε δικαίως, ἡμᾶς δ' ἐλεήσειεν • μηδαμῶς, ὦ ἄνδρες δικασταί, γένησθ' ἡμῖν τοσούτων αἴτιοι κακῶν· μηδὲ τὴν μητέρα κἀμὲ καὶ τὴν ἀδελφὴν ἀνάξια παθόντας περιίδητε • βοηθήσατ' οὖν ἡμῖν, βοηθήσατε, καὶ τοῦ δικαίου καὶ ὑμῶν αὐτῶν ἕνεκα καὶ ἡμῶν καὶ τοῦ πατρὸς τοῦ τετελευτηκότος. σώσατ', ἐλεήσατε, ἐπειδή μ' οὗτοι συγγενεῖς ὄντες οὐκ ἠλέησαν. εἰς ὑμᾶς καταπεφεύγαμεν. ἱκετεύω, ἀντιβολῶ πρὸς παίδων, πρὸς γυναικῶν, πρὸς τῶν ὄντων ἀγαθῶν ὑμῖν.
23	Demosthenes xxix.49	Private defendant (paragraphe)	• ἵν' εὔπορος εἶναι δοκῶν μηδενὸς τύχω παρ' ὑμῶν ἐλέου, τούτοις χρῆται τοῖς λόγοις
24	Demosthenes xxxvi.59	Private defendant (paragraphe)	• οὔκουν ἄξιον, ὦ ἄνδρες Ἀθηναῖοι, τὸν τοιοῦτον ἄνδρα προέσθαι τούτῳ, οὐδὲ τηνικαῦτ' ἐλεεῖν ὅτ' οὐδὲν ἔσται τουτῳὶ πλέον, ἀλλὰ νῦν ὅτε κύριοι καθέστατε σῶσαι· οὐ γὰρ ἔγωγ' ὁρῶ καιρόν, ἐν ᾧ τινι μᾶλλον ἂν βοηθήσειέ τις αὐτῷ.

Table 7.1 (Cont.).

No.	Reference	Type of Case	Phrasing
25	Demosthenes xliii.83-84	Diadikasia	• νομίζετε δὴ τὸν παῖδα τουτονί, ὦ ἄνδρες δικασταί, ἱκετηρίαν ὑμῖν προκεῖσθαι ὑπὲρ τῶν ἀπὸ τοῦ Ἀγνίου, καὶ ἱκετεύειν αὐτοὺς ὑμᾶς τοὺς δικαστάς, ὅπως μὴ ἐξερημωθήσεται αὐτῶν ὁ οἶκος ὑπὸ τῶν μιαρῶν τούτων θηρίων • δέομαι δὲ καὶ ὑνῶν, ὦ ἄνδρες δικασταί, καὶ ἱκετεύω καὶ ἀντιβολῶ, μὴ περιίδητε μήτε τὸν παῖδα τουτονί ὑβρισθέντα ὑπὸ τούτων, μήτε τοὺς προγόνους τοὺς τουτουὶ ἔτι μᾶλλον καταφρονουμένους ἢ νῦν καταπεφρόνηνται, ἐὰν διαπράξωνται οὗτοι ἃ βούλονται· ἀλλὰ τοῖς τε νόμοις βοηθεῖτε καὶ τῶν τετελευτηκότων ἐπιμελεῖσθε, ὅπως μὴ ἐξερημωθῇ αὐτῶν ὁ οἶκος
26	Demosthenes lvii.3	Private defendant	• ἐγὼ γὰρ οἶμαι δεῖν ὑμᾶς τοῖς μὲν ἐξελεγχομένοις ξένοις οὖσιν χαλεπαίνειν, εἰ μήτε πείσαντες μήτε δεηθέντες ὑμῶν λάθρᾳ καὶ βίᾳ τῶν ὑμετέρων ἱερῶν καὶ κοινῶν μετεῖχον, τοῖς δ' ἠτυχηκόσι καὶ δεικνύουσι πολίτας ὄντας αὑτοὺς βοηθεῖν καὶ σῴζειν, ἐνθυμουμένους ὅτι πάντων οἰκτρότατον πάθος ἡμῖν ἂν συμβαίη τοῖς ἠδικημένοις, εἰ τῶν λαμβανόντων δίκην ὄντες ἂν δικαίως μεθ' ὑμῶν, ἐν τοῖς διδοῦσι γενοίμεθα καὶ συναδικηθείημεν διὰ τὴν τοῦ πράγματος ὀργήν.
27	Demosthenes lvii.70	Private defendant	• ἐγὼ δὲ τοῦ μὲν πατρὸς ὀρφανὸς κατελείφθην, τὴν δὲ μητέρ' ἱκετεύω ὑμᾶς καὶ ἀντιβολῶ διὰ τοῦτον τὸν ἀγῶν' ἀπόδοτέ μοι θάψαι εἰς τὰ πατρῷα μνήματα καὶ μή με κωλύσητε, μηδὲ ἄπολιν ποιήσητε, μηδὲ τῶν οἰκείων ἀποστερήσητε τοσούτων ὄντων τὸ πλῆθος, καὶ ὅλως ἀπολέσητε. πρότερον γὰρ ἢ προλιπεῖν τούτους, εἰ μὴ δυνατὸν ὑπ' αὐτῶν εἴη σωθῆναι, ἀποκτείναιμ' ἂν ἐμαυτόν, ὥστ' ἐν τῇ πατρίδι γ' ὑπὸ τούτων ταφῆναι.
28	Demosthenes lviii.69-70	Public prosecutor	• ἵν' οὖν, εἰ μηδὲν ἄλλο, ταύτην γ' ἔχωμεν παραψυχήν, τὸ καὶ τοῦτον ὁρᾶν ἡσυχίαν ἄγοντα, βοηθήσασθ' ἡμῖν, ἐλεήσατε τοὺς ὑπὲρ τῆς πατρίδος ἡμῶν τετελευτηκότας, ἀναγκάσατ' αὐτὸν ὑπὲρ αὐτῆς τῆς ἐνδείξεως ἀπολογεῖσθαι, καὶ τοιοῦτοι γενέσθ' αὐτῷ δικασταὶ τῶν λεγομένων, οἷος οὗτος ἐγένεσθ' ἡμῶν κατήγορος, ὃς ἔξαπατήσας τοὺς δικαστὰς οὐκ ἠθέλησε τιμήσασθαι μετρίου τινὸς τῷ πατρί, πόλλ' ἐμοῦ δεηθέντος καὶ τοῦτον ἱκετεύσαντος πρὸς τῶν γονάτων, ἀλλ' ὥσπερ τὴν πόλιν προδεδωκότι τῷ πατρὶ δέκα ταλάντων ἐτιμήσαντο. δεόμεθ' οὖν ὑμῶν καὶ ἀντιβολοῦμεν, τὰ δίκαια ψηφίσασθε.
29	Hyperides iii.36	Public defendant	• κ[αὶ ἐγώ, ὦ ἄνδρες δι]καστaί, δέομαι ὑμῶν [καὶ ἀντιβολῶ ἐλεήσαί] με, ἐκεῖνο σκεψαμέ[vous, ὅτι προσήκει ἐν τα]ύτῃ τῇ δίκῃ.....ιν ἐλεεῖν οὐ τὸν φ.....

Table 7.1 (Cont.).

No.	Reference	Type of Case	Phrasing
30	Aeschines ii.179-82	Public defendant	• κἀμοὶ συνδεησόμενοι πάρεισιν ὑμῶν πατὴρ μέν, οὗ τὰς τοῦ γήρως ἐλπίδας μὴ ἀφέλησθε, ἀδελποὶ δέ, οἳ διαζυγέντες ἐμοῦ ζῆν οὐκ ἂν προέλοιντο, κηδεσταὶ δὲ καὶ ταυτὶ τὰ μικρὰ παιδία καὶ τοὺς μὲν κινδύνους οὔπω συνιέντα, ἐλεινὰ δέ, εἴ τι συμβήσεται ἡμῖν παθεῖν. ὑπὲρ ὧν ἐγὼ δέομαι καὶ ἱκετεύω πολλὴν πρόνοιαν ποιήσασθαι, καὶ μὴ τοῖς ἐχθροῖς αὐτοὺς μηδ' ἀνάνδρῳ καὶ γυναικείῳ τὴν ὀργὴν ἀνθρώπῳ παραδοῦναι. • παρακαλῶ δὲ καὶ ἱκετεύω σῶσαί με πρῶτον μὲν τοὺς θεούς, δεύτερον δ' ὑμᾶς τοὺς τῆς ψήφου κυρίους, οἷς ἐγὼ πρὸς ἕκαστον τῶν κατηγορημένων εἰς μνήμην εἶναι τὴν ἐμὴν ἀπολελόγημαι, καὶ δέομαι σῶσαί με καὶ μὴ τῷ λογογράφῳ καὶ Σκύθῃ παραδοῦναι

Table 7.2. Relative proportions of appeals for pity, legal and nonlegal argument.

Reference	Total Sections	Legal Argument	Nonlegal Argument	Proportion of Appeals
Antiphon v.73	96	1-96	--	1%
Andocides i.67, 148-49	150	1-91, 103-23, 132-40	92-102, 124-31, 141-50	2%
Lysias iii.48	48	1-43, 45, 48	44-47	2%
Lysias iv.20	20 (beginning of speech lost)	1-18, 20	19	---
Lysias vii.41	43	1-30, 34-43	30-33, 41	2%
Lysias xviii.1	27 (beginning of speech lost)	15-19	1-14, 20-27	---
Lysias xix.33, 53	64	1-54	2, 9-10, 14-17, 19, 55-64	3%
Lysias xx.15, 34-36	36	1-5, 7-22, 27	2, 5-6, 22-26, 28-36	11%
Lysias xxi.15, 25	25 (beginning of speech lost)	---	25	---
Lysias xxiv.6-7, 23	27	1-23, 26-27	24-25	11%
Lysias xxxii.19	29 (end of speech lost)	29	---	---
Isocrates xvi.45-48	50 (beginning of speech lost)	1-4	(5-24), 25-50	---
Isocrates xviii.62-65	68	1-47, 68	16, 47-68	6%
Isaeus ii.44-45	47	1-34, 38-47	35-37, 42	4%
Demosthenes xxvii.57, 66-69	69	1-69	---	7%
Demosthenes xxviii.18-22	24	1-23	22, 24	8%
Demosthenes xxix.49	60	1-60	4	2%
Demosthenes xxxvi.59	62	1-35, 60-62	(36-42), 43-59	2%
Demosthenes xliii.83-84	84	1-67, 73-84	68-72	2%
Demosthenes lvii.3, 70	70	1-57, 61-62, 66-70	58-66	3%
Demosthenes lviii.69-70	70	1-26, 36-65, 68-70	27-35, 66-69	3%
Hyperides iii.36	36 (Beginning and end lost)	1-28	3, 29-36	---
Aeschines ii.179-82	184	1-21, 24-33, 36-39, 44-107, 113-45, 153-65, 171-78, 183-84	22-23, 34-35, 40-43, 54, 55, 62, 76, 79, 88, 93, 99, 108-12, 113, 121, 146-52, 153, 165-70, 179-82	2%

Table 7.3. Appeals against Pity in Athenian Forensic Oratory

No	Reference	Type of Case	Phrasing
1	Antiphon i.26-27	Private prosecutor?	• πῶς οὖν ταύτην ἐλεεῖν ἄξιόν ἐστιν ἢ αἰδοῦς τυγχάνειν παρ' ὑμῶν ἢ ἄλλου του, ἥτις αὐτὴ οὐκ ἠξίωσεν ἐλεῆσαι τὸν ἑαυτῆς ἄνδρα, ἀλλ' ἀνοσίως καὶ αἰσχρῶς ἀπώλεσεν; οὕτω δέ τοι καὶ ἐλεεῖν ἐπὶ τοῖς ἀκουσίοις παθήμασι μᾶλλον προσήκει ἢ τοῖς ἑκουσίοις καὶ ἐκ προνοίας ἀδικήμασι καὶ ἁμαρτήμασι.
2	Lysias vi.3	Public prosecutor	• ἀδύνατον δὲ καὶ ὑμῖν ἐστι, περὶ τοιούτου πράγματος φέρουσι τὴν ψῆφον, ἣ κατελεῆσαι ἢ καταχαρίσασθαι Ἀνδοκίδῃ, ἐπισταμένοις ὅτι ἐναργῶς τὼ θεὼ τούτω τιμωρεῖτον τοὺς ἀδικοῦντας
3	Lysias vi.55	Public prosecutor	• ἀντιβολήσει καὶ ἱκετεύσει ὑμᾶς· μὴ ἐλεεῖτε. οὐ γὰρ οἱ δικαίως ἀποθνῄσκοντες ἀλλ' οἱ ἀδίκως ἄξιοί εἰσιν ἐλεεῖσθαι
4	Lysias x.26	Private prosecutor	• μὴ τοίνυν ἀκούσαντά [τε] Θεόμνηστον κακῶς τὰ προσήκοντα ἐλεεῖτε, καὶ ὑβρίζοντι καὶ λέγοντι παρὰ τοὺς νόμους συγγνώμην ἔχετε
5	Lysias xii.79-80	Public prosecutor	• ἦκει δ' ὑμῖν ἐκεῖνος ὁ καιρός, ἐν ᾧ δεῖ συγγνώμην καὶ ἔλεον μὴ εἶναι ἐν ταῖς ὑμετέραις γνώναις, ἀλλὰ παρὰ Ἐρατοσθένους καὶ τῶν τούτου συναρχόντων δίκην λαβεῖν
6	Lysias xiii.33	Public prosecutor	• ὡς τοίνυν ἁπάντων τῶν κακῶν αἴτιος τῇ πόλει ἐγένετο καὶ οὐδ' ὑφ' ἑνὸς αὐτὸν προσήκει ἐλεεῖσθαι, ἐγὼ οἶμαι ὑμῖν ἐν κεφαλαίοις ἀποδείξειν
7	Lysias xiii.44	Public prosecutor	• ἀνιῶμαι μὲν οὖν ὑπομιμνήσκων τὰς γεγενημένας συμφορὰς τῇ πόλει, ἀνάγκη δ' ἐστίν, ὦ ἄνδρες δικασταί, ἐν τῷ παρόντι καιρῷ, ἵν' εἰδῆτε ὡς σφόδρα ὑμῖν ἐλεεῖν προσήκει Ἀγόρατον
8	Lysias xiv.40	Public prosecutor	• ὥστε νῦν χρὴ ἡγησαμένους πατρικὸν ἐχθρὸν τοῦτον εἶναι τῇ πόλει καταψηφίσασθαι, καὶ μήτε ἔλεον μήτε συγγνώμην μήτε χάριν μηδεμίαν περὶ πλείονος ποιήσασθαι τῶν νόμων τῶν κειμένων καὶ τῶν ὅρκων οὓς ὠμόσατε
9	Lysias xv.9	Public prosecutor	• εἴ τῳ δοκεῖ μεγάλη ἡ ζημία εἶναι καὶ λίαν ἰσχυρὸς ὁ νόμος, μεμνῆσθαι χρὴ ὅτι οὐ νομοθετήσοντες περὶ αὐτῶν ἥκετε, ἀλλὰ κατὰ τοὺς κειμένους νόμος ψηφιούμενοι, οὐδὲ τοὺς ἀδικοῦντας ἐλεήσοντες, ἀλλὰ πολὺ μᾶλλον αὐτοῖς ὀργιούμενοι καὶ ὅλῃ τῇ πόλει βοηθήσαντες
10	Lysias xxii.21	Public prosecutor	• καὶ μὲν δὴ οὐδ' ἐὰν ἀντιβολῶσιν ὑμᾶς καὶ ἱκετεύωσι, δικαίως ἄν αὐτοὺς ἐλεήσαιτε, ἀλλὰ μᾶλλον τῶν τε πολιτῶν οἳ διὰ τὴν τούτων πονηρίαν ἀπέθνῃσκον

Table 7.3 (Cont.).

No	Reference	Type of Case	Phrasing
11	Lysias xxvii.12-13	Public prosecutor?	• τὸ δὲ πάντων ὑπερφυέστατον, ὅτι ἐν μὲν τοῖς ἰδίοις [οἱ] ἀδικούμενοι δακρύουσι καὶ ἐλεινοί εἰσιν, ἐν δὲ τοῖς δημοσίοις οἱ μὲν ἀδικοῦντες ἐλεινοί, ὑμεῖς δ' οἱ ἀδικούμενοι ἐλεεῖτε. καὶ νῦν ἴσως ποιήσουσιν ἅπερ καὶ πρότερον ἦσαν εἰθισμένοι καὶ δημόται καὶ φίλοι, κλαίοντες ἐξαιτεῖσθαι αὐτοὺς παρ' ὑμῶν. ἐγὼ δ' οὕτως ἀξιῶ γενέσθαι· εἰ μὲν ἀδικεῖν τούτους μηδὲν νομίζουσιν, ἀποδείξαντας ὡς ψευδῆ τὰ κατηγορημένα, οὕτως πείθειν ὑμᾶς ἀποψηφίσασθαι· εἰ δὲ νομίσαντες ἀδικεῖν αἰτήσονται, δῆλον ὅτι τοῖς ἀδικοῦσιν εὐνούστεροί εἰσιν ἢ ὑμῖν τοῖς ἀδικουμένοις, ὥστ' οὐ χάριτος ἄξιοι τυχεῖν ἀλλὰ τιμωρίας, ὁπόταν ὑμεῖς δύνησθε
12	Lysias xxviii.11-14	Public prosecutor	• ἀλλὰ παράδειγμα πᾶσιν ἀνθρώποις ποιῆσαι καὶ μήτε κέρδος μήτε ἔλεον μήτ' ἄλλο μηδὲν περὶ πλείονος ποιήσασθαι τῆς τούτων τιμωρίας
13	Lysias xxix.8	Public prosecutor	• ἐγὼ δ' ὑμᾶς ἀξιῶ ὑμῖν αὐτοῖς βοηθῆσαι, καὶ πολὺ μᾶλλον τοὺς ἀδικοῦντας τιμωρεῖσθαι ἢ τοὺς τὰ τῆς πόλεως ἔχοντας ἐλεινοὺς ἡγεῖσθαι
14	Isocrates xviii.35-41	Private defendant (paragraphe)	• οἶμαι δ' αὐτὸν ὀδυρεῖσθαι τὴν παροῦσαν πενίαν καὶ τὴν γεγενημένην αὑτῷ συμφοράν, καὶ λέξειν ὡς δεινὰ καὶ σχέτλια πείσεται, εἰ τῶν χρημάτων, ὧν ἐπὶ τῆς ὀλιγαρχίας ἀφῃρέθη, τούτων ἐν δημοκρατίᾳ τὴν ἐπωβελίαν ὀφλήσει, καὶ εἰ τότε μὲν διὰ τὴν οὐσίαν τὴν αὑτοῦ φυγεῖν ἠναγκάσθη, νυνί δ' ἐν ᾧ χρόνῳ προσῆκεν αὐτὸν δίκην λαβεῖν, ἄτιμος γενήσεται. • πρὸς μὲν οὖν τοὺς ὀδυρμούς, ὅτι προσῆκει βοηθεῖν ὑμᾶς, οὐχ οἵτινες ἂν δυστυχεστάτους σφᾶς αὐτοὺς ἀποδείξωσιν, ἀλλ' οἵτινες ἂν περὶ ὧν ἀντωμόσαντο δικαιότερα λέγοντες φαίνωνται. • καίτοι πῶς οὐκ ἄλογόν ἐστιν ἐν τούτῳ τῷ κινδύνῳ ζητεῖν αὐτὸν ἐλέου παρ' ὑμῶν τυγχάνειν, οὗ κύριος αὐτός ἐστι, καὶ εἰς ὃν αὐτὸς αὑτὸν καθίστησι, καὶ ὃν ἔτι καὶ νῦν ἔξεστιν αὐτῷ μὴ κινδυνεύειν • μηδ' ὡς αὐτὸς δεινὰ πέπονθεν ἀποφαίνειν, ἀλλ' ὡς ἐγὼ πεποίηκα ἐξελέγχειν, παρ' οὗπερ ἀξιοῖ τἀπολωλότα κομίζεσθαι
15	Isaeus v.34-35	Private prosecutor	• Δικαιογένην γὰρ, ὦ ἄνδρες, οὔτ' ἐλεεῖν ἐστε δίκαιοι [ὡς] κακῶς πράττοντα καὶ πενόμενον, οὔτ' εὖ ποιεῖν ὡς ἀγαθόν τι εἰργασμένον τὴν πόλιν· οὐδέτερα γὰρ αὐτῷ τούτων ὑπάρχει, ὡς ἐγὼ ἀποφανῶ, ὦ ἄνδρες
16	Isaeus x.22	Diadikasia	• περὶ δὲ τοῦ τεθνεῶτος λέξουσιν, ἐλεοῦντες ὡς ἀνὴρ ὢν ἀγαθὸς ἐν τῷ πολέμῳ τέθνηκε, καὶ ὅτι οὐ δίκαιόν ἐστι τὰς ἐκείνου διαθήκας ἀκύρους καθιστάναι

Table 7.3 (Cont.).

No	Reference	Type of Case	Phrasing
17	Isaeus xi.38	Public defendant	• βούλομαι δὴ καὶ περὶ τούτων εἰπεῖν· ἐλπίζει γὰρ διὰ τῶν λόγων ἐμοὶ μέν τινα φθόνον γενήσεσθαι παρ' ὑμῶν περὶ τῶν προσγεγενημένων χρημάτων, τοῖς δὲ παισὶν ἔλεον, ἂν ἄποροι παρ' ὑμῖν εἶναι δόξωσιν
18	Demosthenes xix.281	Public prosecutor	• τούτους μέν πάντας τὴν ἐκ τῶν νόμων δίκην ὑπεσχηκέναι, καὶ μήτε συγγνώμην μήτ' ἔλεον μήτε παιδία κλαίοντα ὁμώνυμα τῶν εὐεργετῶν μήτ' ἄλλο μηδὲν αὐτοὺς ὠφεληκέναι· τὸν δὲ Ἀτρομήτου τοῦ γραμματιστοῦ καὶ Γλαυκοθέας τῆς τοὺς θιάσους σμναγούσης, ἐφ' οἷς ἑτέρα τέθνηκεν ἱέρεια, τοῦτον ὑμεῖς λαβόντες, τὸν τῶν τοιούτων, τὸν οὐδὲ καθ' ἕν χρήσιμον τῇ πόλει, οὐκ αὐτόν, οὐ πατέρα, οὐκ ἄλλον οὐδένα τῶν τούτου, ἀφήσετε;
19	Demosthenes xix.283	Public prosecutor	• οὐκ ἀναμνησθήσεσθε ὧν κατηγορῶν ἔλεγεν Τιμάρχου, ὡς οὐδέν ἐστ' ὄφελος πόλεως ἥτις μὴ νεῦρα ἐπὶ τοὺς ἀδικοῦντας ἔχει, οὐδὲ πολιτείας ἐν ᾗ συγγνώμη καὶ παραγγελία τῶν νόμων μεῖζον ἰσχύσουσιν, οὐδ' ἐλεεῖν ὑμᾶς οὔτε τὴν μητέρα ὁρᾶν, ὅτι, εἰ προήσεσθε τὰ τῶν νόμων καὶ τῆς πολιτείας, οὐχ εὑρήσετε τοὺς ὑμᾶς αὐτοὺς ἐλεήσοντας
20	Demosthenes xix.310	Public prosecutor	• ἀλλ' ὑπὲρ αὐτοῦ κλαιήσει τοῦ τὰ τοιαῦτα πεπρεσβευκότος, καὶ τὰ παιδία ἴσως παράξει καὶ ἀναβιβᾶται. ὑμεῖς δ' ἐνθυμεῖσθε, ὦ ἄνδρες δικασταί, πρὸς μὲν τὰ τούτου παιδία, ὅτι πολλῶν συμμάχων ὑμετέρων καὶ φίλων παῖδες ἀλῶνται καὶ πτωχοὶ περιέρχονται δεινὰ πεπονθότες διὰ τοῦτον, οὕς ἐλεεῖν πολλῷ μᾶλλον ὑμῖν ἄξιον ἢ τοὺς τοῦ τοιαῦτα ἠδικηκότος καὶ προδότου πατρός, καὶ ὅτι τοὺς ὑμετέρους παῖδας οὗτοι, "καὶ τοὺς ἐκγόνοις" προσγράψαντες [εἰς] τὴν εἰρήνην, καὶ τῶν ἐλπίδων ἀπεστερήκασι· πρὸς δὲ τὰ αὐτοῦ τούτου δάκρυα, ὅτι νῦν ἔχετε ἄνθρωπον, ὃς εἰς Ἀρκαδίαν ἐκέλευεν ἐπὶ τοὺς ὑπὲρ Φιλίππου πράττοντας πέμπειν τοὺς κατηγορήσοντας

Table 7.3 (Cont.).

No	Reference	Type of Case	Phrasing
21	Demosthenes xxi.99-101	Public prosecutor	• τί οὖν ὑπόλοιπον; ἐλεῆσαι νὴ Δία· παιδία γὰρ παραστήσεται καὶ κλαιήσει καὶ τούτοις αὐτὸν ἐξαιτήσεται· τοῦτο λοιπόν. ἀλλ' ἴστε δήπου τοῦθ', ὅτι τοὺς ἀδίκως τι πάσχοντας, ὃ μὴ δμυνήσονται φέρειν, ἐλεεῖν προσήκει, οὐ τοὺς ὧν πεποιήκασι δεινῶν δίκην διδόντας. καὶ τίς ἂν ταῦτ' ἐλεήσειεν δικαίως, ὁρῶν τὰ τοῦδε οὐκ ἐλεηθέντα ὑπὸ τούτου • τίς οὖν ὑβρίζων παύσεται καὶ δι' ἃ ταῦτα ποιεῖ χρήματα ἀφαιρεθήσεται, εἰ τοῦτον ὥσπερ δεινὰ πάσχοντα ἐλεήσετε, εἰ δέ τις πένης μηδὲν ἠδικηκὼς ταῖς ἐσχάταις συμποραῖς ἀδίκως ὑπὸ τούτου περιπέπτωκεν, τούτῳ δ' οὐδὲ συνοργισθήσεσθε; μηδαμῶς· οὐδεὶς γάρ ἐστιν δίκαιος τυγχάνειν ἐλέου τῶν μηδένα ἐλεούντων, οὐδὲ συγγνώμης τῶν ἀσυγγνωστόνων. ἐγὼ γὰρ οἶμαι πάντας ἀνθρώπους φέρειν ἀξιοῦν παρ' αὑτῶν εἰς τὸν βίον αὑτοῖς ἔρανον παρὰ πάνθ' ὅσα πράττουσιν· οἷον ἐγώ τις οὑτοσὶ μέτριος πρὸς ἅπαντάς εἰμι, ἐλεήμων, εὖ ποιῶν πολλούς· ἅπασι προσήκει τῷ τοιούτῳ ταὐτὰ εἰσφέρειν, ἐάν που καιρὸς ἢ χρεία παραστῇ. ἕτερος οὑτοσί τις βίαιος, οὐδένα οὔτ' ἐλεῶν οὔθ' ὅλως ἄφθρωπον ἡγούμενος· τούτῳ τὰς ὁμοίας φορὰς παρ' ἑκάστου δίκαιον ὑπάρχειν. σὺ δή, πληρωτὴς τοιούτου γεγονὼς ἐράνου σεαυτῷ, τοῦτον δίκαιος εἶ συλλέξασθαι
22	Demosthenes xxi.186-88	Public prosecutor	• οἶδα τοίνυν ὅτι καὶ τὰ παιδία ἔχων ὀδυρεῖται, καὶ πολλοὺς λόγους καὶ ταπεινοὺς ἐρεῖ, δακρύων καὶ ὡς ἐλεεινότατον ποιῶν ἑαυτόν. ἔστι δ' ὅσῳ περ ἂν αὐτὸν νῦν ταπεινότερον ποιῇ, τοσούτῳ μᾶλλον ἄξιον μισεῖν αὐτόν, ὦ ἄνδρες Ἀθηναῖοι • ἐνοὶ παιδία οὐκ ἔστιν, οὐδ' ἂν ἔχοιμι ταῦτα παραστησάμενος κλαιειν καὶ δακρύειν ἐφ' οἷς ὑβρίσθην· διὰ τοῦτ' ἄρα τοῦ πεποιηκότος ὁ πεπονθὼς ἔλαττον ἕξω παρ' ὑμῖν; μὴ δῆτα· ἀλλ' ὅταν οὗτος ἔχων τὰ παιδία τούτοις ἀξιοῖ δοῦναι τὴν ψῆφον ὑμᾶς, τότε ὑμεῖς τοὺς νόμους ἔχοντά με πλησίον ἡγεῖσθε παρεστάναι [καὶ τὸν ὅρκον ὃν ὀμωμόκατε] τούτοις ἀξιοῦντα καὶ ἀντιβολοῦντα ἕκαστον ὑμῶν ψηφίσασθαι
23	Demosthenes xxi.195-96	Public prosecutor	• σὺ τὰ σαυτοῦ παιδία ἀξιώσεις ἐλεεῖν ἢ σὲ τούσδε, ἢ σπουδάζειν εἰς τὰ σά, τοὺς ὑπὸ σοῦ δημοσίᾳ προπεπηλακισμένους • οὐκ ἔστιν οὐδαμόθεν σοι προσήκων ἔλεος οὐδὲ καθ' ἕν, ἀλλὰ τοὐναντίον μῖσος καὶ φθόνος καὶ ὀργή· τούτων γὰρ ἄξια ποιεῖς

Table 7.3 (Cont.).

No	Reference	Type of Case	Phrasing
24	Demosthenes xxiv.196-97	Public prosecutor	• οὐδ' ἐκεῖν' ἂν ἔχοις εἰπεῖν, ὡς ἐλεήσας δεινὰ πάσχοντας ἀξθρώπους εἴλου διὰ ταῦτα βοηθεῖν αὐτοῖς. οὔτε γὰρ τὰ τούτων πολλοστῷ χρόνῳ μόλις ἄκοντας, ἐν τρισὶν ἐξελεγχθέντας δικαστηρίοις, κατατιθέναι, τοῦθ' ἡγήσω τὸ δεινὰ πάσχειν εἶναι· ποεῖν γάρ ἐστι τοῦτό γε δεινά, καὶ παροξύνειε μᾶλλον ἄν τινα μισεῖν ἢ προτρέψειεν ἐλεεῖν· οὔτ' ἄλλως πρᾶος καὶ φιλάνθρωπος σύ τις τῶν ἄλλων διαφόρως ὢν ἐλεεῖς αὐτούς
25	Demosthenes xxv.81-84	Public prosecutor	• τί οὖν λοιπόν, ὦ ἄνδρες Ἀθηναῖοι; ἃ κοινὰ νὴ Δία πᾶσιν ὑπάρχει τοῖς ἀγωνιζομένοις παρὰ τῆς τῶν ἄλλων ὑμῶν φύσεως, καὶ οὐδεὶς αὐτὸς ἑαυτῷ ταῦτα φέρει τῶν κρινομένων, ἀλλ' ὑμῶν ἕκαστος ἔχων οἴκοθεν ἔρχεται, ἔλεον, συγγνώμην, φιλανθρωπίαν. ἀλλὰ τούτων γ' οὔθ' ὅσιον οὔτε θέμις τῷ μιαρῷ τούτῳ μεταδοῦναι • τίνος δὲ συγγνώμης ἢ ποίων ἐλέων οἱ σεσυκοφαντημένοι τετυχέκασιν παρὰ τούτου, οἷς οὗτος θανάτου πᾶσιν ἐτιμᾶτ' ἐν τουτοισὶ τοῖς δικαστηρίοις • ἀλλ' ἥ γε τούτου πικρία καὶ μιαιφονία καὶ ὠμότης παρῆν καὶ ἐξητάζετο. οὐχὶ παιδία, οὐχὶ μητέρας τῶν κρινομένων ἐνίων γραῦς παρεστώσας ὁρῶν οὗτος ἠλέει. εἶτα σοὶ συγγνώμη; πόθεν ἢ παρὰ τοῦ; ἢ τοῖς σοῖς παιδίοις ἔλεος; πολλοῦ γε καὶ δεῖ. σὺ τὸν εἰς ταῦτ' ἔλεον προδέδωκας, Ἀριστογεῖτον, μᾶλλον δ' ἀνῄρηκας ὅλως
26	Demosthenes xxviii.16	Private prosecutor	• τὰ χρήματά με πάντ' ἀπεστερηκὼς μετὰ τῶν συνεπιτρόπων, ἐλεεῖσθαι νῦν ὑφ' ὑμῶν ἀξιώσει, μνῶν οὐδ' ἑβδομήκοντ' ἄξια τρίτος αὐτὸς ἀποδεδωκώς, εἶτα καὶ τούτοις αὐτοῖς πάλιν ἐπιβεβουλευκώς
27	Demosthenes xxix.2	Private defendant	• ἡγούμενος διὰ τὸ μέγεθος τοῦ τιμήματος τῆς δίκης, ἣν ὤφλεν, ἐμοὶ μὲν ἂν γενέσθαι τινὰ φθόνον, αὑτῷ δ' ἔλεον
28	Demosthenes xxxvi.36	Private defendant (paragraphe)	• ἵνα τοίνυν εἰδῆτ', ὦ ἄνδρες Ἀθηναῖοι, ὅσα χρήματ' ἔχων ἐκ τῶν μισθώσεων καὶ ἐκ τῶν χρεῶν ὡς ἀπορῶν καὶ πάντ' ἀπολολεκὼς ὀδυρεῖται, βραχέ' ἡμῶν ἀκούσατε
29	Demosthenes xxxvii.48-49	Private defendant (paragraphe)	• καίτοι τὸν ἐκείνους ἐξηπατηκότα τοὺς δικαστάς, ἆρ' ὀκνήσειν ὑμᾶς ἐξαπατᾶν οἴεσθε; ἢ πεπιστευκότα εἰσιέναι τοῖς πράγμασιν, ἀλλ' οὐ τοῖς λόγοις καὶ τοῖς συνεστῶσι μεθ' αὑτοῦ μάρτυσι, τῷ τ' ἀκαθάρτῳ καὶ μιαρῷ Προκλεῖ, τῷ μεγάλῳ τούτῳ, καὶ Στρατοκλεῖ τῷ πιθανωτάτῳ πάντων ἀνθρώπων καὶ πονηροτάτῳ, καὶ τῷ μηδὲν ὑποστελλόμενον μηδ' αἰσχυνόμενον κλαήσειν καὶ ὀδυρεῖσθαι; καίτοι τοσούτου δεῖς ἐλέου τινὸς ἄξιος εἶναι, ὥστε μισηθείης ἂν δικαιότατ' ἀνθρώπων ἐξ ὧν πεπραγμάτευσαι

Table 7.3 (Cont.).

No	Reference	Type of Case	Phrasing
30	Demosthenes xxxviii.19-20	Private defendant (paragraphe)	• καὶ τὴν ὀρφανίαν ὀδυρεῖσθαι • καὶ γὰρ ὀρφανοὶ καὶ νέοι καὶ ὁποῖοί τινές εἰσιν ἀγνῶτες ἦσαν· ταῦτα δὲ πάντες φασὶν μεγάλων δικαίων ἰσχύειν πλέον παρ' ὑμῖν
31	Demosthenes xxxviii.27	Private defendant (paragraphe)	• οὐ τοίνυν θαυμάσαιμ' ἄν, εἰ καὶ δακρύειν καὶ ἐλεινοὺς ἑαυτοὺς πειρῶντο ποιεῖν. ἐγὼ δ' ἀξιῶ πρὸς ταῦθ' ὑπολαμβάνειν ἅπαντας ὑμᾶς, ὅτι τῶν αἰσχρῶν ἐστι, μᾶλλον δ' οὐδὲ δικαίων, τὰ μὲν ὄντα κατεσθίοντας καὶ παροινοῦντας μετ' Ἀριστοκράτους καὶ Διογνήτου καὶ τοιούτων ἑτέρων αἰσχρῶς καὶ κακῶς ἀνηλωκέναι, τὰ δ' ἀλλότρι' ὥστε λαβεῖν, δακρύειν νυνὶ καὶ κλάειν. ἐπ' ἐκείνοις ἐκλάετ' ἄν, οἷς ἐποιεῖτε, δικαίως. νῦν δ' οὐ δεῖ δακρύειν, ἀλλ' ὡς οὐκ ἀφήκατε δεικνύναι, ἢ ὡς εἰσὶν ὧν ἀφήκατ' αὖθις ὑμῖν δίκαι, ἢ ὡς εἰκοστῷ λαγχάνειν ἔτει δίκαιόν ἐστι, τοῦ νόμου πέντ' ἔτη τὴν προθεσμίαν δεδωκότος
32	Demosthenes xxxix.35	Diadikasia	• ἂν δὲ φῇ δεινὰ πάσχειν καὶ κλάῃ καὶ ὀδύρηται καὶ κατηγορῇ μου, ἃ μὲν ἂν λέγῃ, μὴ πιστεύετε (οὐ γὰρ δίκαιον μὴ περὶ τούτων ὄντος τοῦ λόγου νυνί)
33	Demosthenes xl.53	Private prosecutor	• ἀλλ' ὑμεῖς, ὦ ἄνδρες δικασταί, πρὸς Διὸς καὶ θεῶν μὴ καταπλαγῆτε ὑπὸ τῆς κραυγῆς τῆς τούτου
34	Demosthenes xl.61	Private prosecutor	• ἐὰν δὲ μὴ ἔχων περὶ ὧν φεύγει τὴν δίκην μήτε μάρτυρας ἀξιόχρεως παρασχέσθαι μήτ' ἄλλο πιστὸν μηδέν, ἑτέρους παρεμβάλλῃ λόγους κακουργῶν, καὶ βοᾷ καὶ σχετλιάζῃ μηδὲν πρὸς τὸ πρᾶγμα, πρὸς Διὸς καὶ θεῶν μὴ ἐπιτρέπετε αὐτῷ, ἀλλὰ βοηθεῖτέ μοι τὰ δίκαια
35	Demosthenes xlv.88	Private prosecutor	• ἐὰν δ' ὀδύρωνται, τὸν πεπονθότ' ἐλεινότερον τῶν δωσόντων δίκην ἡγεῖσθε
36	Demosthenes liii.29	Public prosecutor	• ἐὰν οὖν ἐνθυμηθῆτε, ὅτι οὐδέποτ' ἔσται ἀπορία τῶν ἀμφισβητησόντων ὑμῖν περὶ τῶν ὑμετέρων - ἢ γὰρ ὀρφανοὺς ἢ ἐπικλήρους κατασκευσάσαντες ἀξιώσουσιν ἐλεεῖσθαι ὑφ' ὑμῶν, ἢ γῆρας καὶ ἀπορίας καὶ τροφὰς μητρὶ λέγοντες, καὶ ὀδυρόμενοι δι' ὧν μάλιστ' ἐλπίζουσιν ἐξαπατήσειν ὑμᾶς, πειράσονται ἀποστερῆσαι τὴν πόλιν τοῦ ὀφλήματος - ἐὰν οὖν ταῦτα παριδόντες πάντα καταψηφίσησθε, ὀρθῶς βουλεύσεσθε
37	Demosthenes liv.43	Private prosecutor	• ἀλλὰ δεήσεται Κόνων καὶ κλαιήσει. σκοπεῖτε δὴ πότερός ἐστιν ἐλεινότερος, ὁ πεπονθὼς οἷ' ἐγὼ πέπονθ' ὑπὸ τούτου, εἰ προσυβρισθεὶς ἄπειμι καὶ δίκης μὴ τυχών, ἢ Κόνων, εἰ δώσει δίκην;
38	Hyperides ii.7	Public prosecutor	• εἰ δ' ο[ἶει] κορδακίζων καὶ γελ[ωτ]οποιῶν, ὅπερ ποι[εῖν] εἴωθας ἐπὶ τῶν δικαστη[ρί]ων, ἀποφεύξεσθαι, ε[ὑήθ]ης εἶ, ἢ παρὰ τούτ[ο]ις συγγνώμην ἢ ἔ[λεόν] τινα παρὰ τὸ δίκαι[ον ὑπ]άρ[χ]ειν

Table 7.3 (Cont.).

No	Reference	Type of Case	Phrasing
39	Hyperides ii.9	Public prosecutor	• καὶ τὰ παιδία ἥκεις ἔχων εἰς τὸ δικαστήριον, καὶ ἀναβιβάσας αὐτίκα δὴ ἀξιώσεις ὑπὸ τούτων ἐλεεῖσθαι; ἀλλ' οὐ δ[ί]καιον. ὅτε γὰρ ἡ πόλις ὑπὸ τῶν ἄλλων ᾠκ[τ]ίρετο διὰ τὰ συμβάν[τα], τόθ' ὑφ' ὑμῶν ἐξυβρίζετο. καίτοι οὗτοι μὲν τὴν Ἑλλάδα σῴζειν προελόμενοι ἀνάξια τῶν φρονημάτων ἔπασχον, σὺ δὲ τὴν πόλιν εἰς τὰς ἐσχάτας αἰσχύνας ἀδίκως καθιατὰς νυνὶ δικαίως τιμωρίας τεύξῃ
40	Hyperides v.40	Public prosecutor	• μηδ[ὲ τοῖς] δακρύοις τοῖς Ἀγ[νω]νίδου προσέχετε [τὸν] νοῦν, ἐκεῖνο λο[γιζό]μενοι, ὅτι ἀτυχ[ήσαν]τι μὲν ο.....(desunt v. VIII) [ἐφοδι.....] οὗτος δ' ἂν [κλαίων] οὐ δίκαια ποιήσ[ειεν], ὥσπερ καὶ οἱ λ[ῃσταὶ] οἱ ἐπὶ τοῦ τροχ[οῦ κλαί]οντες, ἐξὸν αὐ[τοῖς] μὴ ἐμβαίνε[ιν εἰς] τὸ πλοῖον. οὕτω καὶ Δη[μο]σθένης τί προσ[ῆκον] κλαιήσει, ἐ[ξὸν αὐτῷ] μὴ λαμ[βάνειν]....
41	Lycurgus i.33	Public prosecutor	• τίνας δὲ δυνατόν εἶναι δοκεῖ τοῖς λόγους ψυχαγωγῆσαι, καὶ τὴν ὑγρότητα αὐτῶν τοῦ ἤθους τοῖς δακρύοις εἰς ἔλεον προαγαγέσθαι; τοὺς δικαστάς
42	Lycurgus i.141-45	Public prosecutor	• ἐχρῆν μὲν οὖν, ὦ ἄνδρες, εἰ καὶ περὶ οὐδενὸς ἄλλου νόμιμόν ἐστι παῖδας καὶ γυναῖκας παρακαθισαμένους ἑαυτοῖς τοὺς δικαστὰς δικάζειν, ἀλλ' οὖν γε περὶ προδοσίας κρίνοντας οὕτως ὅσιον εἶναι τοῦτο πράττειν, ὅπως ὁπόσοι τοῦ κινδύνου μετεῖχον ἐν ὀφθαλμοῖς ὄντες, καὶ ὁρῶμενοι καὶ ἀναμιμνῄσκοντες ὅτι τοῦ κοινοῦ παρὰ πᾶσιν ἐλέου οὐκ ἠξιώθησαν, πικροτέρας τὰς γνώσεις κατὰ τοῦ ἀδικοῦντος παρεσκεύαζον. ἐπειδὴ δ' οὐ νόμιμον οὐδ' εἰθισμένον ἐστίν, ἀλλ' ἀναγκαῖον ὑμᾶς ὑπὲρ ἐκείνων δικάζειν, τιμωρησάμενοι γοῦν Λεωκράτη καὶ ἀποκτείναντες αὐτὸν ἀπαγγείλατε τοῖς ὑμετέροις αὐτῶν παισὶ καὶ γυναιξὶν ὅτι ὑποχείριον λαβόντες τὸν προδότην αὐτῶν ἐτιμωρήσασθε • καὶ δεήσεται καὶ ἱκετεύσει ἐλεῆσαι αὐτόν· τίνων; οὐχ οἷς τὸν αὐτὸν ἔρανον εἰς τὴν σωτηρίαν εἰσενεγκεῖν οὐκ ἐτόλμησε; Ῥοδίους ἱκετευετω· τὴν γὰρ ἀσφάλειαν ἐν τῇ ἐκείνων πόλει μᾶλλον ἢ ἐν τῇ ἑαυτοῦ πατρίδι ἐνόμισεν εἶναι. ποία δ' ἡλικία δικαίως ἂν τοῦτον ἐλεήσειε
43	Lycurgus i.148	Public prosecutor	• ἔπειτα τούτου τις ἀποψηφιεῖται, καὶ συγγνώμην ἕξει τῶν κατὰ προαίρεσιν ἀδικημάτων; καὶ τις οὕτως ἐστὶν ἀνόητος ὥστε τοῦτον σῴζων τὴν ἑαυτοῦ σωτηρίαν προέσθαι τοῖς ἐγκαταλιπεῖν βουλομένοις, καὶ τοῦτον ἐλεήσας αὐτὸς ἀνηλέητος ὑπὸ τῶν πολεμίων ἀπολέσθαι προαιρήσεται, καὶ τῷ προδότῃ τῆς πατρίδος χάριν θέμενος ὑπεύθυνος εἶναι τῇ παρὰ τῶν θεῶν τιμωρίᾳ

Table 7.3 (Cont.).

No	Reference	Type of Case	Phrasing
44	Lycurgus i.150	Public prosecutor	• νομίζοντες οὖν, ὦ ᾽Αθηναῖοι, ἱκετεύειν ὑμῶν τὴν χώραν καὶ τὰ δένδρα, δεῖσθαι τοὺς λιμένας [καὶ] τὰ νεώρια καὶ τὰ τείχη τῆς πόλεως, ἀξιοῦν δὲ καὶ τὰ ἱερὰ βοηθεῖν αὐτοῖς, παράδειγμα ποιήσατε Λεωκράτη, ἀναμνησθέντες τῶν καταγορημένων, ὅτι οὐ πλέον ἰσχύει παρ᾽ ὑμῖν ἔλεος οὐδὲ δάκρυα τῆς ὑπὲρ τῶν νόμων καὶ τοῦ δήμου σωτηρίας
45	Aeschines iii.207	Public prosecutor	• οὗτος κλάει μὲν ῥᾷον ἢ οἱ ἄλλοι γελῶσιν, ἐπιορκεῖ δὲ πάντων προχειρότατα
46	Aeschines iii.209-10	Public prosecutor	• περὶ δὲ τῶν δακρύων καὶ τοῦ τόνου τῆς φωνῆς, ὅταν ὑμᾶς ἐπερωτᾷ· "ποῖ καταφύγω, ἄνδρες ᾽Αθηναῖοι; περιεγράψατέ με· οὐκ ἔστιν ὅποι ἀναπτήσομαι," ἀνθυποβάλλετε αὐτῷ· "ὁ δὲ δῆμος ὁ ᾽Αθηναίων ποῖ καταφύγῃ, Δημόσθενες; πρὸς ποίαν συμμάχων παρασκευήν; πρὸς ποῖα χρήματα; τί προβαλλόμενος ὑπὲρ τοῦ δήμου πεπολίτευσαι • ὅλως δὲ τί τὰ δάκρυα; τίς ἡ κραυγή; τίς ὁ τόνος τῆς φωνῆς; οὐχ ὁ μὲν τὴν γραφὴν ἐστὶ Κτησιφῶν, ὁ δ᾽ ἀγὼν οὐκ ἀτίμητος, σὺ δ᾽ οὔτε περὶ τοῦ σώματος οὔτε περὶ τῆς ἐπιτιμίας οὔτε περὶ τῆς οὐσίας ἀγωνίζῃ
47	Dinarchus i.22-24	Public prosecutor	• ἢ προσήκειν αὐτὸν ὑφ᾽ ὑμῶν ἐλέου τινὸς τυγχάνειν τοιαῦτα διαπεπραγμένον, ἀλλ᾽ οὐ τῆς ἐσχάτης τιμωρίας καὶ ὑπὲρ τῶν νῦν καὶ ὑπὲρ τῶν πρότερον γεγενημένων ἀδικημάτων • διὰ δὲ τοῦτον τὸν προδότην παῖδες καὶ γυναῖκες αἱ Θηβαίων ἐπὶ τὰς σκηνὰς τῶν βαρβάρων διενεμήθησαν, πόλις ἀστυγείτων καὶ σύμμαχος ἐκ μέσης τῆς ῾Ελλάδος ἀνήρπασται, ἀροῦται καὶ σπείρεται τὸ Θηβαίων ἄστυ τῶν κοινωνησάντων ὑμῖν τοῦ πρὸς Φίλιππον πολέμου. ἀροῦται, φημί, καὶ σπείρεται· καὶ οὐκ ἠλέησε, φημί, ὁ μιαρὸς οὗτος πόλιν οἰκτρῶς οὕτως ἀπολλυμένην, εἰς ἣν ἐπρέσβώυσεν ὑφ᾽ ὑμῶν ἀποσταλείς, ἧς ὁμόσπονδος καὶ ὁμοτράπεζος πολλάκις γέγονεν, ἣν αὐτός φησι σύμμαχον ἡμῖν ποιῆσαι
48	Dinarchus i.92	Public prosecutor	• εἰ δέ τι κηδόμεθα τῆς πατρίδος καὶ τοὺς πονηροὺς καὶ δωροδόκους μισοῦμεν καὶ μετοιωνίσασθαι τὴν τύχην καὶ μεταλλάξασθαι βουλόμεθα, οὐ προετέον ἐστὶν ὑμᾶς αὐτούς, ὦ ᾽Αθηναῖοι, ταῖς τοῦ μιαροῦ καὶ γόητος τούτου δεήσεσιν, οὐδὲ προδεκτέον τοὺς οἴκτους καὶ τοὺς φενακισμοὺς [τοὺς] τούτου· ἱκανὴν γὰρ εἰλήφατε πεῖραν αὐτοῦ καὶ τῶν ἔργων καὶ τῶν λόγων καὶ τῆς τύχης

Table 7.3 (Cont.).

No	Reference	Type of Case	Phrasing
49	Dinarchus i.103	Public prosecutor	• καὶ σύ, πάντων ἐναντίον τῶν Ἑλλήνων διελεγμένος Νικάνορι καὶ κεχρηματικὼς [ἐν Ὀλυμπίᾳ] περὶ ὧν ἐβουλήθης, ἐλεεινὸν νῦν σεαυτὸν κατασκευάζεις προδότης ὢν καὶ δωροδόκος, ὡς ἐπιλησομένους τούτους τῆς σῆς πονηρίας, καὶ οὐ δώσων δίκην ὑπὲρ ὧν εἴληψαι πεποιηκώς
50	Dinarchus i.108-11	Public prosecutor	• μὴ οὖν ἄχθεσθ' αὐτοῦ κλαίοντος καὶ ὀδυρομένου· πολὺ γὰρ ἂν δικαιότερον ἐλεήσαιτε τὴν χώραν, ἣν οὗτος καθίστησιν εἰς τοὺς κινδύνους τοιαῦτα πράττων, ἢ τοὺς ἐξ αὐτῆς γεγενημένους ὑμᾶς ἱκετεύει, παραστησαμένη τὰ ὑμέτερα τέκνα καὶ γυναῖκας, τιμωρήσασθαι τὸν προδότην καὶ σῴζειν ἑαυτήν • καὶ ὅταν Δημοσθένης ἐξαπατῆσαι βουλόμενος καὶ παρακρουόμενος ὑμᾶς οἰκτίζηται καὶ δακρύῃ, ὑμεῖς εἰς τὸ τῆς πόλεως σῶμ' ἀποβλέψαντες καὶ τὴν πρότερον δόξαν ὑπάρχουσαν αὐτῇ ἀντίθετε, πότερον ἡ πόλις ἐλεεινοτέρα διὰ τοῦτον γεγονεν ἢ διὰ τὴν πόλιν Δημοσθένης • ἀφέντες οὖν τοὺς ἐλέους καὶ τοὺς φενακισμοὺς τοὺς τούτου τὴν ὁσίαν καὶ δικαίαν φέρετε ψῆφον, καὶ σκοπεῖτε τὸ τῇ πατρίδι συμφέρον, μὴ τὸ Δημοσθένει· τοῦτο γάρ ἐστι καλῶν κἀγαθῶν δικαστῶν ἔργον
51	Dinarchus ii.11	Public prosecutor	• ἔπειτ' εἰρωνεύεσθε πρὸς ὑμᾶς αὐτούς, καὶ περὶ Ἀριστογείτονος μέλλοντες φέρειν τὴν ψῆφον ἐλεεῖτε, ὃς τὸν αὑτοῦ πατέρα κακῶς διατιθέμενον ὑπὸ τοῦ λιμοῦ οὐκ ἠλέησεν
52	Dinarchus iii.13	Public prosecutor	• ἔπειθ' ὑποστείλασθαί τι δεῖ πρὸς τὸν τοιοῦτον ὑμᾶς, καὶ αἰσχυνθῆναι τοὺς ἠδικημένους, ὃς οὐκ ᾐσχύνθη τοιαῦτα πράττων καθ' ὑμῶν καὶ τῶν ἄλλων; οὐχ οἱ τοιοῦτοι τῶν ἀνθρώπων ἐλεοῖντ' ἂν εἰκότως παρ' ὑμῖν, ὦ Ἀθηναῖοι
53	Dinarchus iii.20	Public prosecutor	• μηδεμίαν οὖν δέησιν, ὦ Ἀθηναῖοι, μηδ' ἔλεον εἰς ὑμᾶς λαμβάνοντες αὐτούς, μηδὲ τὴν ἐξ αὐτῶν τῶν ἔργων καὶ τῆς ἀληθείας ἀποδεδειγμένην ὑμῖν κατὰ τῶν κρινομένων ἀδικίαν.....ἄκυρον ποιήσαντες, βοηθήσατε κοινῇ τῇ πατρίδι καὶ τοῖς νόμοις

Bibliography

Abbreviations

The following abbreviations are used in addition to those listed in the *Oxford Classical Dictionary*:

AP	The *Athenaion Politeia* attributed to Aristotle.
Ath. Pol.	The *Athenaion Politeia* attributed to the Old Oligarch.
IG	*Inscriptiones Graecae*, various volumes published since 1873, Berlin, George Reimer.
LSJ	Liddell and Scott *Greek-English Lexicon* (ninth edition, revised by Stuart Jones and McKenzie, Oxford, at the Clarendon Press, 1940).
PCG	R. Kassel and C. Austin (eds.), *Poetae Comici Graecae*, 8 Vols, 1983-2001. Berlin: Walter de Gruyter
POxy	Papyrus Oxyrhynchus.
SEG	*Supplementum Epigraphicum Graecum*, various volumes published since 1923.

Vit. Dec. Orat. The *Vitae Decem Oratorem* attributed to Plutarch.

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