

LAW AND DRAMA IN ANCIENT GREECE



edited by

Edward M. Harris, Delfim F. Leão and P.J. Rhodes

B L O O M S B U R Y

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Preface

A few years ago, D.F.L. edited, together with M.C. Fialho and L. Rossetti, a volume on *Nomos* (Coimbra and Madrid, 2004), which had the distinction of being the first book ever published in Portugal and Spain to deal directly with Greek law and its reception in Rome. E.M.H. and P.J.R. were among the fifteen contributors to the volume, and the latter ended up visiting Coimbra in 2005, during one of his aestival *apodêmiai*. It was only then that D.F.L. and P.J.R. personally met and, during a nice dinner which was followed by a pleasant conversation, there came up the idea of producing a volume on the legal background of ancient theatre. *Habent sua fata symposia*. Not long after that, E.M.H. started to work at the University of Durham and the three decided to invite a group of scholars to contribute essays devoted to the topic of law and drama in ancient Greece. The project started in 2006 and took four years to reach its final shape. We should like to thank all the contributors for their willingness to collaborate and for having produced such stimulating analyses. We should also like to express our appreciation to Duckworth for having accepted the volume for publication, and our gratitude to Deborah Blake, for her careful handling of the project.

Abbreviations, for periodicals, are those of *L'Année philologique* with the usual anglophone modifications (e.g. *AJP* for *AJPh*); otherwise, those of the third edition of the *Oxford Classical Dictionary*.

E.M.H., D.F.L., P.J.R.

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Introduction

Edward M. Harris

The laws because of their brevity do not teach but merely order what one should do; the poets on the other hand by representing human life and selecting the noblest deeds persuade men by using both reason and clear examples.

Lycurgus, *Against Leocrates*, 102

One thing we know for certain about the Athenian citizens who attended the Lenaea, City Dionysia, and the Rural Dionysia to watch comedies, tragedies and satyr plays is that many of them spent much time in court.¹ Each year 6,000 Athenian citizens were selected to judge cases in court and swore the judicial oath to vote in accordance with the laws and decrees of the Athenian people.² In the fourth century there were probably around 30,000 citizens and roughly 20,000 or more qualified to judge cases; this means that the average Athenian citizen over thirty spent one year in every three or four hearing trials. Even when the population was higher in the fifth century and there were perhaps as many as 40,000 qualified to serve as *dikastai*, the average Athenian over thirty spent one out of every six or seven years judging cases.³ When an Athenian was selected for court service, he did not hear one or two cases, but dozens. It has been estimated that the courts held trials between 175 and 225 days a year, and anywhere between 1,500 and 2,000 men might be needed to hear cases on any given day.⁴ If a citizen were assigned on a particular day to a public case, he would hear only one case,⁵ but if he were assigned to private cases, he would hear up to four.⁶ If we assume that the courts met 200 days a year on average and needed only 1,500 men each day, half of whom were assigned to public cases, half to private, this would mean that a citizen serving in the courts would hear around 125 cases in a year. One can understand why the Old Oligarch complained that the Athenians 'handle more public and private lawsuits and audits of official conduct than the rest of mankind' ([Xen.] *Ath. Pol.* 3.2-6). This made the Athenian *dikastês* very different from modern jurors, who may hear only two or three cases in their entire life.⁷ Even though the average citizen serving in the courts received no formal training, he would have acquired an extensive legal education from hearing dozens of cases each year. For instance, the citizen Nicobulus, in his speech as defendant against Pantaenetus, assumed that

the court already knew the law about releases without his telling them about it (Dem. 37.18). It would therefore be a mistake to call the Athenian *dikastês* an ‘amateur’ in legal matters.⁸

The average citizen would also receive a legal education from serving in the council or attending meetings of the assembly. In the fifth century five hundred Athenians older than thirty served every year in the council, and some served more than once.⁹ The council oversaw the conduct of all officials. If a private individual accused an official of not following the laws, the case was brought before the council, which heard the charge and sent it to a regular court if the defendant appeared to be guilty.¹⁰ Among the main items on this agenda were proposals for legislation. In the fifth century there was no distinction made between different types of measures, which might all be called either ‘laws’ or ‘decrees’. After 403, however, a distinction was made between ‘laws’ (*nomoi*), rules for general application intended to be permanently valid, and ‘decrees’ (*psêphismata*), measures for specific situations or particular individuals.¹¹ In both periods these measures were first proposed in the council, which discussed them and voted to place them on the agenda of the assembly.¹² In the fourth century all proposals for laws were read out at three consecutive meetings of the assembly and displayed in front of the Eponymous Heroes so that all citizens could read them (Dem. 20.94; 24.25). Even though the final ratification of laws lay in the hands of the *nomothetai* during this period, the assembly heard and could discuss proposals for new laws and approved the appointment of *nomothetai* to consider changes in the laws.¹³

Individual citizens had to know the laws because they had to bring legal charges on their own; they could not hire a lawyer to do it for them. Although litigants might ask a supporting speaker (*synêgoros*) to help them, most Athenians appear to have presented their own cases in court.¹⁴ A litigant might also hire a speech-writer (*logographos*) to compose a speech for him, but the practice was probably not normal for most Athenians.¹⁵ The laws were easily accessible to everyone and not difficult to locate.¹⁶ For instance, the laws about homicide were found at the Stoa Basileios where the archon called the *basileus* presided and received charges in murder cases.¹⁷ In the fourth century copies of all the laws were kept in the Metroon, which had a staff to keep the archives orderly and easy to consult.¹⁸

It should therefore come as no surprise that legal terms and concepts are frequently found in Attic drama. Aristophanes’ *Wasps*, over half of which is devoted to a parody of the courts, is perhaps the best example. The play is filled with specialist vocabulary such as *graphê* (‘indictment’), *diathêkê* (‘testament’), *dryphaktos* (‘railing surrounding a court’), *eisagô* (‘bring into court’), *epibolê* (‘legal fine’), *euthyna* (‘judicial review of official conduct’), *kadiskos* (‘jar used for voting in court’), *klepsydra* (‘water-clock used to time speeches in court’), *klêtêr* (‘witness to a summons’), *timêma* (‘assessed penalty in a public suit’), *thesmothetês* (‘official responsible for

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several courts'). The *Wasps* is not the only play in which such terms are found; many legal terms are found also in the *Acharnians*, *Clouds*, and *Knights*. Aristophanes does not ridicule legal discourse as if it were an arcane form of speech but assumes the audience understood it well. As A. Willi notes, in Athens 'a comparatively advanced mastery of legal vocabulary was recognized as the cultural standard'. The widespread participation in legal affairs 'prevented not only the creation of an inaccessible legal language, but also the folk linguistic idea that legal language is hard to understand and employ'.¹⁹

Even though the action of Attic tragedy takes place in the heroic past (with the exception of Aeschylus' *Persians*), the characters often allude to contemporary laws or use common legal terms.²⁰ Aeschylus draws on the language of Athenian law and legal procedure in several passages.²¹ In the *Choephoroi* Orestes, after killing Aegisthus, tells the chorus that his mother's seducer has received his just punishment (*aischynthêros ... dikên*) according to law (*hôs nomos*) (990). He justifies his killing on the basis of the Athenian law, which granted sons the right to kill those who seduced their mothers when caught in the act. Although Orestes does not kill Aegisthus *in flagrante delicto*, his seduction of Clytemnestra is obvious to everyone.²²

In the *Suppliants*, when Danaus announces to his daughters the decision of the Argives to accept their request for shelter, he uses terminology that would have reminded the Athenians of decrees (*psêphismata*) passed in the assembly. Just as the prescripts of Athenian decrees began with 'it has been resolved (*edoxen*) by the people', Danaus reports that 'decrees (*psêphismata*) with full authority have been resolved (*dedoktai*) by the people' (601) and that 'the Argives have resolved (*edoxen Argeioisin*) unanimously' (605).²³ The decree of the Argives allows the Danaids to live as metics with certain privileges (609: *metoikein*), a legal status well attested in Athens and other Greek *poleis*.²⁴ They are promised protection against seizure and reprisals (610: *k' arrysiastous xyn t' asyliai brotôn*).²⁵ The end of the decree contains a clause threatening those who do not help the Danaids when someone tries to use violence against them with the loss of rights (*atimia*) and exile (612-14). The type of clause and terminology are reminiscent of entrenchment clauses found in laws and decrees from Athens and other *poleis*.²⁶

Sophocles too uses contemporary legal language. The chorus in Sophocles' *Antigone*, after singing about the victory of Eteocles over Polynices and their deaths in the *parodos*, state that they have come to the king's palace because Creon has 'convened this emergency meeting of elders' (159-60). They employ the technical term *synklêtos*, which the Athenians used to describe an extra meeting of the assembly called at short notice to deal with a special situation.²⁷ Sophocles takes advantage of the term's connotations to create a sense of urgency before Creon enters to address the chorus. When Oedipus pronounces a ban on the murderer of Laius

from 'prayers, sacrifices, and libations' (*Oedipus the King* 239-40), his words recall the solemn announcement made by the *basileus* after someone was charged with murder (Dem. 20.158; Antiph. 6.35-6; *Ath. Pol.* 57.2).

Characters in several plays of Euripides use technical legal terms and refer to Athenian legal procedures. In the *Ion* Creusa describes how one of her friends was the victim of sexual violence at the hands of the god Apollo (338-44). After she leaves the scene Ion indignantly asks how it is just for the gods to lay down laws for mortals yet at the same time to disobey them. If they were to pay the penalty for their offences, they would empty their temples to satisfy all the claims against them (442-7). Ion alludes to one of the legal remedies for sexual violence and names the private action (*dikê biaiôn*) which could be brought on behalf of the victim.²⁸ Later in the play Creusa gives her old slave poison to put in Ion's cup at a feast celebrating his 'reunion' with his Xuthus, who he is told is his father. When the plot is discovered before the poison is consumed, Ion seizes the old slave because he is 'clearly' guilty (1214). The messenger who reports the incident uses the technical term *ep' autophôrôi*, which is found in the law about the summary arrest of thieves, 'clothes-snatchers', and enslavers. The term indicates that the defendant's guilt is obvious and does not require proof.²⁹ In the prologue to Euripides' *Alcestis*, Apollo says that he has been working in the house of Admetus as a punishment for killing the Cyclopes. He uses the term *thêteuein*, 'to serve in debt-bondage', a legal institution well attested in Classical Athens.³⁰ Later in the play Admetus becomes angry with his father for refusing to sacrifice his own life to save Alcestis. He declares that he would give up his inheritance if he had to, an allusion to the legal right of parents to disinherit their children (*apokêryxis*) (737-8).³¹ In the *Medea* (724) king Aegeus invites the heroine to Athens and promises to be her *proxenos* or protector. The institution of *proxenia* had no place in the Homeric world but was familiar to all Athenians.³² The epic poets provided Aeschylus, Sophocles and Euripides with the material for their plots and exerted a strong influence on their imagination, but the tragic poets shaped this material to reflect the concerns of a contemporary audience.³³ One of the ways they did this was to employ the language and concepts of Athenian law.

The action of a play may turn on a point of law. In Menander's *Aspis* the right of the eldest relative to marry an heiress (*epiklêros*) creates the conflict between two brothers, Smicrines and Chaerestratus, which drives the main plot.³⁴ Cleostratus, the nephew of the two brothers, has lost his father and wishes to give his sister away in marriage. To provide her with a dowry, he goes on campaign in Asia Minor in pursuit of booty (8-9). In the prologue his slave Daos reports to his uncle Smicrines that Cleostratus died in an ambush near the river Xanthos (67-82), leaving behind 600 gold staters, many cups and a large number of slaves (34-7). Smicrines is avaricious and wishes to exercise his legal right as the nearest male relative to marry Cleostratus' sister, who has now become an heiress as

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the result of her brother's death (141-3, 156-9, 185-7). His brother Chaerestratus however wishes to marry the sister to his stepson Chaereas (133-6). When Smicrines announces his intention to his brother, Chaerestratus proposes that Smicrines take Cleostratus' booty and allow him to give the sister a dowry of two talents so that she can marry Chaereas (261-9). Smicrines rejects this proposal on legal grounds: any child born to the couple could challenge his ownership of the booty in court (261-9).³⁵ Chaereas, who hoped to marry the sister, now falls into despair because he knows that she belongs to Smicrines by law (296-8: 'The law grants another the power over her and rules my claim worthless'). To overcome this legal hurdle, the slave Daos devises the following scheme: Chaerestratus should pretend to be dead, leaving his own daughter as an heiress whom Smicrines can also claim. Because Chaerestratus' fortune is much larger than that of Cleostratus, the greedy Smicrines will naturally choose the former's daughter and allow the latter's sister to be married to Chaereas (348-61). Once Smicrines agrees to this, Chaerestratus can come back to life to prevent his brother from marrying his daughter. The difficulties faced by Chaerestratus and Chaereas are created by the law, and Daos' ruse combines deceit, cunning, and a shrewd knowledge of the law. The audience could not have made sense of the motivations, words and actions of the characters without a basic knowledge of Athenian law.

In Sophocles' *Antigone* the conflict between Creon and his opponents hinges on a legal issue: the interpretation of the word *nomos* and the legitimacy of orders issued by an official. Creon prohibits the burial of Polynices, who has died while attacking the city of Thebes. His sister Antigone does not believe that his order (*kêrygma*) has the authority of law (*nomos*) (26-34) because it violates the will of the gods (450-5) and has not received the approval of the people (508-9). Creon disagrees with Antigone: as the supreme ruler of Thebes, he can enact laws without consulting the people (162-210). Because Polynices came to burn the temples of the gods, the gods cannot be in favour of his burial (282-7). For him the overriding imperative is obedience to authority (668-76). The orders of magistrates must be followed, whether just or unjust (666-7). Haemon sides with his fiancée Antigone: Creon does not exercise absolute power in the *polis* (737) and does not pay respect to his office by trampling on the honours of the gods (745). In the end Creon realizes that he is wrong and that the established laws have higher authority than any orders he may enact (1113-14). Though set in the heroic past, the play approaches tragic conflict in contemporary terms. An understanding of Athenian attitudes about the right of citizens to disobey illegal orders and the need for the laws of the *polis* to conform with the established laws and the laws of the gods can help modern readers to avoid anachronistic readings of the play (e.g. in terms of a conflict between the laws of the state and the laws of the gods or between the *oikos* and the *polis*).³⁶

A legal procedure can also structure the dramatic action in an entire

scene. The most obvious examples would be the trial of Orestes in Aeschylus' *Eumenides* (566-777) or the trial of the dog Labes in Aristophanes' *Wasps* (838-995). Many literary scholars have not however observed that the action of the third scene of Aeschylus' *Eumenides* (397-489) follows the legal procedure of the *anakrasis*.³⁷ After an accuser brought his charge, the magistrate who received it would schedule a meeting with the accuser and the defendant to draw up the *enklêma*, or formal charge, and decide to which court he would send the case. At this meeting the magistrate would ask for the name and deme affiliation of each party and determine the nature of the charge. If the accuser was a metic, the magistrate would assign the case to the polemarch's court. In the *Eumenides*, the Erinyes and Orestes come before Athena, who first asks the accusers who they are (408). In response they give their name, their parents, their place of residence (415-17), and their status (419, 421). They then give the charge, which is homicide (425). Athena then asks if there are any mitigating circumstances (426), and the Erinyes deny there are (427). Athena is trying to discover what kind of homicide the Erinyes believe that the defendant has committed in the same way as the *basileus* had to determine whether the accusation was *phonos ek pronoias*, *phonos akousios*, or *phonos dikaios* so that he could present the case to the correct court (*Ath. Pol.* 57.2-3). Once she has all the information she needs from the accusers, she requests the same from the defendant (436-7: *lexas de chôran kai genos kai xymphoras / tas sas*). Orestes prefaces his response by assuring Athena that he is not polluted (445-56), which is equivalent to saying that he is innocent.³⁸ Orestes then gives his place of residence and his father's name (455-6), presents his version of the facts (456-67) and asks Athena to judge the case (468). Similarly to the *basileus*, Athena does not make a decision about the case but assigns the case to the appropriate court (480-9).

Comedy may supply details about legal procedures not found in prose sources.³⁹ For instance, we learn from Apollodorus' speech *Against Neaera* that if one caught a seducer (*moichos*) with a female relative, one had the right to keep him imprisoned in one's house until he promised to pay compensation. If the alleged seducer thought that he had been unjustly imprisoned, he could bring a public action for wrongful imprisonment. If he won the action, he did not have to pay compensation and could inflict a fine on his opponent. If he lost, however, Apollodorus only says that the defendant could do whatever he wished to do as long as he did not use a knife ([Dem.] 59.66), but does not specify what kind of punishment might be involved (compare the law mentioned at Lys. 1.49). Here Aristophanes (*Nub.* 1083; *Plut.* 168) gleefully fills a gap in our knowledge by alluding to 'radishing'.⁴⁰ To take another example, several orators refer to the punishments for sexual violence,⁴¹ but none mentions the possibility of out-of-court settlements for this type of offence. The plays of Menander reveal that it was possible for the young man who had sexual relations with a woman against her will to offer to marry her as a way of avoiding punishment. There is no reason to

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question the existence of such a practice, which is well attested in several countries in Central and South America.⁴²

Aristophanes makes numerous criticisms of the Athenian legal system in his comedies.⁴³ Some are designed to make the audience laugh, but there is often a serious point to his jokes. In the *Frogs* Aristophanes makes a proposal about disfranchised citizens which was in fact later enacted as a law. After the régime of Four Hundred was overthrown in 411, those soldiers who had supported the régime were punished with a form of disfranchisement (*atimia*): they were allowed to keep some rights but were not allowed to speak in the assembly or become members of the council (Andoc. 1.75). After the Athenians granted the same rights in 406 to the slaves who fought at Arginousae that year as they gave to the Plataeans, Aristophanes protested that it was not right to penalize those who had been misled by Phrynichus, one of the leaders of the Four Hundred (*Ran.* 686-705). The Athenians took his proposal seriously the next year when the Assembly passed the proposal of Patrocleides to restore full rights to the disfranchised (Andoc. 1.80).⁴⁴

The relationship between law and literature is rich and complex. In the past three and half decades the topic has received much attention from literary critics and legal scholars studying modern literature.⁴⁵ Ever since the publication of James Boyd White's *The Legal Imagination* in 1973, there have been numerous books and articles studying the role of law in the plays of Shakespeare or the novels of Dostoevsky, Melville, Kafka and Camus. Some writers have studied works of literature from a jurisprudential perspective; others have applied the tools of literary analysis to legal texts such as statutes, contracts and judicial opinions, which raise questions of interpretation similar to those posed by works of fiction. A few have gone so far as to argue that works of imaginative literature should be required reading in law schools and that metaphor and narrative should take precedence over legal analysis.⁴⁶

Despite the prominence of law in Athenian drama, however, there has been little interest in the subject among Classical scholars.⁴⁷ Two recent *Companions to Greek Tragedy* contain chapters on religion and tragedy, the sociology of Greek tragedy, tragedy and politics, but not any discussion of law and tragedy.⁴⁸ In contrast to numerous studies of Athenian drama and politics there are few studies of the relationship between law and drama.⁴⁹ This is surprising given the frequency with which terms for law and justice occur in Attic tragedy. For instance, words for justice and law occur frequently in the plays of Aeschylus, most prominently in the *Oresteia*. The word *dikê* ('justice', 'penalty', etc.) occurs 24 times in the *Choephoroi* and 41 times in the *Eumenides*. The word *dikê* ('justice') occurs 39 times in the extant plays of Sophocles, and this does not count words derived from the root *dik-* such as *adikos*, *dikaïos*, *endikos*, *ekdikos*, *pandikos*, etc. The word *nomos* ('law') is found 36 times in his plays, most frequently in the *Ajax* and *Antigone* (11 times in each).⁵⁰ (See Appendix to

this chapter.) Another word for law, *themis*, occurs 17 times. By contrast, the word *dēmokratia* is never found in tragedy, and the word *dēmos* is comparatively rare: it is never found in Sophocles, and occurs only nine times in Aeschylus and eleven in Euripides, and most of these in only two plays.⁵¹

This collection of essays does not claim to provide an exhaustive treatment of law and literature in Classical Athens. Rather it provides a sample of different approaches to the topic. Some essays show how knowledge of Athenian law enhances our understanding of individual passages in Attic drama and our appreciation of dramatic techniques. Other essays examine the information provided about legal procedure found in Aristophanes' comedies or the views about the role of law in society expressed in Attic drama.⁵² They do not examine how a study of dramatic language and techniques can enhance our appreciation of the art of forensic oratory, a topic that would repay study.⁵³ Nor do they address subjects like the effect of laws about slander on comic ridicule⁵⁴ or the function of quotations from tragedy in court speeches by Aeschines, Demosthenes and Lycurgus.⁵⁵ In general they tend to focus on the contribution of law to an understanding of literature.

The first two essays examine the trial of Orestes in Aeschylus' *Eumenides*. Many Attic tragedies depict situations where a character has to decide between the conflicting claims of two parties (one thinks of the contest between Andromache and Helen in Euripides' *Trojan Women*), but in only one extant tragedy does a formal trial in an actual court take place: Aeschylus' *Eumenides*. A. Sommerstein notes that the action of the second half of the play contains all the standard features of an Athenian trial: an official presiding over the case, an accuser who speaks first, a defendant who speaks second, a witness who supports one of the litigants, a panel of *dikastai* who cast votes in urns which are then counted to determine a verdict of guilty or innocent.

Despite these standard features, the trial of Orestes does not conform to normal homicide procedure. Before regular homicide trials, both litigants swore oaths, the accuser asserting the defendant was guilty, the defendant stating his innocence. During the trial witnesses swore that the defendant was either innocent or guilty, and after the decision of the court, the winning party swore that the outcome was correct. No such oaths are found in the *Eumenides*. Oaths are mentioned before the trial when the Erinyes insist that Orestes swear an oath that he did not kill his mother, but he refuses to comply, and Athens does not require him to do so. When Orestes swears an oath after the verdict, he promises that the future rulers of Argos will defend Athens if the city is attacked. In trials at Athens, witnesses were differentiated from supporting speakers, but Apollo combines the two roles in a way which has no parallel in contemporary trials. Apollo appears to allude to the judicial oath but in a way that no Athenian litigant ever did: he claims that the will of Zeus has precedence over this oath. Litigants at trials in Athens swore to keep to the

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point and were not supposed to discuss points irrelevant to the charge in the indictment, but both Apollo and the Erinyes make threats that would have been considered out of place in an Athenian trial.

In general, Sommerstein concludes, the procedures followed in the trial of Orestes are closer to those of the regular courts than those of the Areopagus. This is because Aeschylus was presenting not just the foundation of the Areopagus in the *Eumenides* but the origin of the entire judicial system of Athens.

The next essay, by D.F. Leão, approaches the *Oresteia* from a different angle. He starts by reviewing the story of Agamemnon's murder and Orestes' revenge in the *Odyssey*. The function of the myth in the epic is to serve as a contrast to the *nostos* of Odysseus and the loyalty of Penelope and as an example of filial loyalty for Telemachus to follow. In Homer, however, the death of Clytemnestra is the final point in the story and does not give rise to further conflict. In Aeschylus a question arises about Orestes' guilt which can only be resolved by a court. This enables the poet to link the myth of Orestes with the founding of the Areopagus.

Leão then summarizes the evolution of procedure in cases of homicide from Homer to Aeschylus. In the *Iliad* and *Odyssey* there are three possible responses to homicide: (1) the killing of the murderer by relatives of the victim, (2) the exile of the murderer from the land of the victim, and (3) an agreement for the murderer to pay compensation to the victim's kin. Despite the absence of a strong centralized authority there is no evidence for feuding in the Homeric poems. The next stage of evolution is Draco's law about homicide. The interpretation of the first clause of the copy of the law preserved in a decree of 409/8 is controversial, but the remaining clauses require that all relatives must agree to a settlement with the killer before he can return to Attica and indicate the places from which he is banned during his exile. As a whole, the law represents an advance over the Homeric period by providing for the role of a public authority in resolving disputes. Later the Athenians established different courts for different types of homicide. One of these courts, the Areopagus, may have gained additional powers before 462, but if it did, Ephialtes removed them.

The trial of Orestes begins with a preliminary hearing (*anakrasis*) instead of three *prodikasiai* held over several months, which was standard in homicide cases, for reasons of dramatic economy. Other features also mark a departure from standard procedure before the Areopagus: the Erinyes instead of the victim's kin prosecute the defendant, and the exile of Orestes from the city of the victims does not grant him a reprieve. In other respects the play presents the origin of several standard features of the courts: procedures for evidence and proof, the order of speeches, the method of voting, and the decision in favour of the defendant to break a tied vote. The *Eumenides* does not end with the acquittal of Orestes, however, because the principles which the Erinyes represent must be integrated into the civic order.

Dramatists might critique aspects of the Athenian legal system. The best known example is Aristophanes' satire of the courts in the *Wasps*. F.S. Naiden shows how Euripides draws attention to the drawbacks of holding trials in the assembly in the *Orestes*. Several such trials took place in Athens during the fifth century, the most notorious being the trial of the generals after the battle of Arginusae in 406. These trials were often speedy and might result in harsh punishments. The charge was often treason. According to the law of Cannonus those who harmed the Athenians could be tried in the assembly and, if found guilty, put to death. These trials might be preceded by the arrest and detention of the defendants. They also lacked some of the legal safeguards of procedures in the regular courts: there was no secret ballot, the prosecutors did not run the risk of failing to gain one fifth of the votes, and the members of the assembly did not swear an oath binding them to vote according to the laws.

The unusual features of Orestes' trial at Argos for the murder of Clytemnestra, not understood by several literary critics, can be explained by its venue: Orestes is not tried in a regular court but in the assembly. As possible before trials in the assembly at Athens, Orestes is placed under arrest by the people of Argos. This is why he does not have the option of fleeing before conviction. The meeting called to judge his case opens with the herald inviting anyone who wishes to speak, in the same way that meetings of the assembly began in Athens. The charge against Orestes is not just homicide, but much broader: he is accused of setting up bad laws for parents and threatening the community in terms reminiscent of the law of Cannonus. The arguments used by both sides are more political than legal. And just as Xenophon called those who voted to condemn the generals after Arginusae a mob (*ochlos*), one of the characters in the *Orestes* calls the Argive assembly a mob. The play is not a general attack on democracy. Instead it critiques an aberrant form of legal procedure and shows how it might result in a miscarriage of justice. The Athenians appear to have agreed with this critique, for in the middle of the fourth century they discontinued trials in the assembly.

M. de Fátima Silva contrasts the trial of Orestes in Aeschylus' *Eumenides* with that in Euripides' *Orestes*. Aeschylus presented an idealized Athenian judicial system, which is tolerant, merciful and deserving respect; Euripides brings the action of his play down to earth. The foundation of a court consisting of the best Athenian citizens supervised by Athena is replaced with the grim reality of justice in the Argive assembly. The adultery of Clytemnestra resulted from a common situation in Greece: the absence of a husband sent overseas as a soldier for a long campaign. In the *Oresteia* Clytemnestra's crime is primarily a threat to the household; in Euripides' *Orestes* the social consequences of her adultery receive greater emphasis, and Orestes' decision to kill her is motivated in part by his concern for public order. In both plays the collective interests of the city press the main characters to seek a resolution to the conflict through a

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trial, but the outcome is different. Orestes is acquitted by the Areopagus, but convicted and sentenced to death by the Argive assembly. Justice, which was firm and clear in Aeschylus, becomes fragile and insecure in Euripides. Instead of inspiring respect and teaching virtue, the verdict of the Argive assembly stirs up anger and leads to more violence.

R. Brock examines the way tragedy represents the citizen body. The terms used in tragedy to denote citizens are the same as those found in prose works: *astos* and *politês*. Both terms are regularly contrasted with the terms *metoikos* (resident alien) and *xenos* (foreigner). The word *astos* appears to emphasize status and membership in the community while *politês* tends to be found in contexts concerning political activity though with some overlap. Over the fifth and fourth centuries the latter gradually supersedes the former. All three tragedians use both terms but in different proportions, with Sophocles preferring *astos*, Aeschylus and Euripides *politês*. By contrast, the word *dêmos* is rarely used to describe the citizen body, and the word *dêmotês* also is comparatively rare. The tragedians therefore appear to depict 'a more or less generic community' rather than democracy in particular.

Although tragedy often celebrates Athens as a refuge for the oppressed, the genre maintains a strict distinction between citizens and foreigners. Suppliants from abroad normally receive temporary protection, not citizenship. For instance, the Danaids in Aeschylus' *Suppliants* are granted only metic status and, though provided shelter, do not have the right to own land. The treatment of Oedipus in Sophocles' *Oedipus at Colonus* and Heracles in Euripides' *Heracles* is similar. Here tragedy accepts and maintains the boundaries marked out in the laws of Athens and other Greek *poleis*. The only apparent exception is Euripides' *Ion*, in which the illegitimate son of Apollo and Creusa becomes the heir apparent of the Attic king Xuthus. Various legal explanations are possible, but Euripides appears less interested in legal niceties than in providing a divine origin for the Ionian tribes and a satisfying resolution for a tragic conflict. In general, citizenship remains a closed circle in both law and tragedy. Brock ends his essay with an invitation to rethink the interaction between the citizens portrayed on stage and the audience at the Dionysia, which consisted of citizens, metics and foreigners.

The next essay, by Maria do Céu Fialho, turns from citizenship in the *polis* to ties within the family. The Greek notion that parents should nurture and protect their children when young so that their children care for them in old age was rooted in the observation of nature, both human and animal. The moral imperative of *gêrotrophia* (care for aged parents) formed part of the reciprocity between generations: just as parents nurtured and protected their children when young, children were required to repay them by caring for them when they grew old and weak. This duty derived from the unwritten laws about reciprocity and respect for parents, which served as the foundation for the positive law of the *polis*. In Athens

there was a public action against those who harmed their parents (*kakoseos goneon*), and the penalties for conviction were severe. Those who did not give their parents shelter and nurture were disqualified from speaking in the assembly and holding public office.

One of the roles of tragedy is to dramatize situations in which the reciprocity between generations, which the law encourages and protects, breaks down. For the Athenians and the Greeks in general, the dissolution of the family had political implications because the *oikos* was the main unit of the *polis*. The most notorious example is the family of Laius in the Oedipus plays of Sophocles. Instead of protecting Oedipus after birth, Laius and Jocasta give him to a shepherd to be exposed and die. Positive reciprocity is replaced by negative reciprocity: Oedipus kills his father, Oedipus' sons drive him out of Thebes, and Oedipus curses his sons for neglecting him in old age. Roles are inverted when the sons neglect their duty and their sisters do not marry and remain at home to take an active role in looking after their father.

The unnatural relationships of the house of Atreus are brilliantly symbolized by the dream of Clytemnestra in which the mother suckles a snake who drinks her milk until it draws blood. In Sophocles' *Electra* Clytemnestra tries to kill her son Orestes, who is saved by his sister, and is accused of repudiating her own children. Her failure to provide *paidotrophía* disqualifies her from the respect owed to a parent, and she dies at the hands of her son. Admetus in Euripides' *Alcestis* also invokes the duty of parents to protect their children when he asks his father Pheres to die in place of his wife and thereby save his son from death and despair. Pheres rejects his proposal in part because he expects *gêrotrophía* from his son, but Admetus counters that he has lost his right to this because of his failure to sacrifice himself for his son. All these different plays stress the importance of the unwritten laws of reciprocity and respect for parents and remind the audience of the ethical foundations underlying the positive laws of the *polis*.

An understanding of Athenian homicide law can provide a solution to a problem in the interpretation of Sophocles' *Oedipus the King*. Many scholars, most notably E.R. Dodds and J.-P. Vernant, believed that Oedipus in both the plays Sophocles wrote about him was not guilty of deliberate homicide for killing his father Laius. This view clashes however with the pollution caused by the murder: according to Athenian law those who committed just homicide incurred no pollution. Vernant attempted to solve the problem by claiming that there was a clash between human and divine law in the play. Although innocent according to human law, Oedipus was a scapegoat (*pharmakos*) in religious ritual and had to be driven out of Thebes to eliminate the pollution causing the plague.

E.M. Harris re-examines the issue of Oedipus' guilt in Sophocles. He starts by questioning Vernant's assumption that there existed a conflict between divine and human law in contemporary Athens. Quite the oppo-

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site: many sources reveal that the Athenians believed the gods laid down principles of justice and that they were the authors of the city's laws. In courtroom speeches litigants several times state that the laws of Athens are in accord with the will of the gods. Nor is there any reason to believe that pollution was not a concern in the laws of Athens about homicide. The ban on the accused murderer from the agora, temples and sacrifices as well as other aspects of procedure in homicide cases reveals a deep anxiety about pollution. Several litigants use arguments based on the assumption that the court feared the consequences of pollution. One should not therefore assume that the tragic poets held a view of guilt and responsibility different from that applied by the courts of Athens.

Athenian law contained three basic categories of homicide: deliberate homicide (*ek pronoias*), for which the penalty was death or exile with confiscation of property, homicide against one's will (*akousios*), and just (*dikaios*) homicide, for which there was no penalty. The law listed several types of just homicide: killing someone in an athletic contest, killing in ignorance during a battle, killing someone having sex with a female relative, killing a robber or a thief at night, killing a condemned murder who returned from exile, killing a tyrant, and killing someone who attacked from an ambush with intent to kill or enslave. The last one is the most important for Oedipus. Each type of homicide was associated with a different ritual status: deliberate homicide incurred ineradicable pollution, homicide against one's will could be removed by a purificatory sacrifice, and just homicide resulted in no pollution at all.

The murder of Laius in *Oedipus the King* is a case of deliberate homicide. This explains why the killing causes ineradicable pollution and why the oracle of Apollo demands that the murderer be killed or driven into exile. It is not a case of just homicide because Laius did not attack from ambush. The murder of Laius as retold in *Oedipus at Colonus* is different from a legal point of view. Here Oedipus says Laius tried to kill him and that he had no choice but to strike back so as to avoid serious harm. Because Oedipus' actions are different in legal terms, his ritual status is also different in this play: he is 'pure' (*katharos*). Sophocles subtly alters the circumstances of the killing in each play to fit the varying requirements of the different plots.

The next two essays shows how an understanding of law and legal procedure can enhance our understanding and appreciation of Aristophanes' plays. D.M. MacDowell studies several passages Aristophanes' *Clouds* which concern laws about debt. First he examines the question of Pheidippides' age and his legal responsibility. One of Strepsiades' creditors asks him to have his son repay the money he has borrowed, then threatens to bring legal action if the money is not paid. This would appear to indicate that Pheidippides was still a minor, probably in his teens because he is called *meirakion* (990, 1000, 1071). Yet this would appear to clash with another passage in which Pheidippides contemplates taking his

father to court and convicting him of insanity; if he were a minor, he would not be able to initiate legal proceedings. But this passage need not pose an obstacle to the view that Pheidippides is a minor: the son could still have had his uncle Megacles bring the suit on his behalf. Next MacDowell observes that Strepsiades says he dreads the 'Old and New' day, that is, the last day of the month. MacDowell suggests that borrowers were required on the last day of the month to repay either the principal or the interest for that month. If they failed to pay both, the interest was added to the principal and became what we would call compound interest. This would explain the Second Creditor's statement (1287-9) that 'Month by month and day by day the money's always getting more and more, as time flows onwards'.

Aristophanes can also help us to reconstruct the history of Athenian legal procedure. For instance, in the fourth century, two witnesses were required for a summons, but the *Clouds* and the *Wasps* reveal that in the fifth century only one was needed. The plays thus uncover a legal development not attested elsewhere. On the other hand, one should be careful not to read too much into comic dialogue. There is no need to conclude from this that one had to give four days' notice when delivering a summons. The type of case with which Strepsiades is threatened by his creditors is probably a monthly case (*dike emmenos*), one brought for loans 'at a drachma' per month, or 12% p.a. (*Ath. Pol.* 52.2). The charge was probably brought before one of the deme-judges (*Ath. Pol.* 26.3). When Strepsiades is questioned by Socrates, he says that the clerk will record the charge against him, which implies that the accuser did not write it down but stated it orally. According to Strepsiades his creditors will have to pay court fees (*prytaneia*) for bringing their suit for debt. Early in the play Strepsiades complains that he is 'bitten by a demarch in the bedding!' Normally the demarch was responsible for collecting debts owed to the deme, but this passage reveals that creditors distraining on a debtor's property had to be accompanied by the demarch. In these cases Aristophanes provides us with information about Athenian legal procedure not preserved in other sources.

P.J. Rhodes studies Aristophanes' parody of an assembly meeting at the end of the *Knights* and notes many of the allusions to procedures in the courts and assembly. The meeting of the assembly is summoned in language that recalls the terminology of Athenian decrees and meets on the Pnyx. The Paphlagonian and the Sausage-Seller start their speeches with curses, which may have reminded the audience of the curses pronounced by the herald at the beginning of meetings of the assembly or the prayers attached to decrees of the assembly. The Paphlagonian proposes for himself the right to dine in the *prytaneion*, an honour well attested in the historical record, and boasts about his efforts to collect revenue while a member of the council, one of the major duties of that body. The Sausage-Seller alludes to the use of pebbles for voting in the court when he

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threatens the Paphlagonian with prosecution. The *psêphoi* used at trials were manufactured by the state in the late fourth century, but this passage and others in the *Wasps* reveal that everyone brought his own pebble to court in the fifth century. Demos too refers to voting procedure when he speaks of 'making a probe of the funnel', an allusion to the wicker-work funnel placed over the top of the urns so that each *dikastês* could place his hand in the urns without revealing how he had voted. When the Paphlagonian promises to retaliate against the Sausage-Seller, he mentions the trierarchy and the *eisphorai*, two duties imposed by law on wealthy Athenian citizens. Demosthenes, one of the other slaves of Demos, asks the Paphlagonian to act as 'a *hypographeus* of his lawsuits' in the way Phanus did for Cleon. Although the term is normally used to denote an under-secretary, it may indicate that Phanus put his names on indictments for cases brought on Cleon's behalf, a practice known from Demosthenes' speech *Against Meidias*.

After his victory over the Paphlagonian, the Sausage-Seller calls for an end to three well-known abuses known from forensic oratory: the request to convict a rich defendant solely to provide funds for court-pay, the failure to pay Athenian soldiers their money for campaigns, and the transfer of soldiers from one part of the army to another through illegal means. The punishment he proposes for the Paphlagonian, execution by being thrown into the pit (*barathron*), is also known from the sources for Athenian law. The play contains not only numerous allusions to Athenian law and legal practice, but also a critique of common abuses in the courts and those politicians, like Cleon, who commit them.

In the final essay Christopher Carey turns to a work written outside Athens, the second mime of Herodas, in which a pimp addresses a court on Cos. Whether intended for performance or not, the mime is dramatic in form and draws on many themes found in Old and New Comedy, but also recalls subjects often found in forensic speeches: brawls, love affairs, prostitutes, and drunken young men. Even though the action is set on Cos, the speaker alludes to many judicial practices known from Athens: the use of the water-clock to time speeches, orders for the clerk to read out laws, the institution of the *prostatês*, and the practice of torturing slaves to obtain evidence. The pimp also employs the rhetorical tropes of Athenian court speeches. He begins with a *captatio benevolentiae*, claiming that he is at a disadvantage compared with his opponent. He lists his benefactions to the city to win the court's good will and warns the court about the consequences of its verdict. He appeals to the authority of the lawgiver and mentions his ancestors. He insults his opponent's barbarian origin. Like several Athenian litigants he promises not to speak at length. To prove to the court that one of his whores was abused, he strips off her clothes, a manoeuvre reminiscent of the story told about Hyperides unclenching Phryne before the Areopagus. The humour of the mime derives in large part from the incongruity between the pimp's coarse language and the

more elevated discourse of forensic oratory. The comic effect is similar to that created by the political trial with pets as litigants in Aristophanes' *Wasps* or the arbitration in which slaves wrangle with one another in Menander's *Epitrepontes*. Herodes also exploits the language of the law to satirize the pomposity of litigants in court. Other essays in this volume noted how Athenian dramatists assume that their audience had a basic knowledge of law and legal procedure. Carey shows that the audience of Herodas' second mime also was familiar with Athenian law and judicial rhetoric.

These essays are intended to illustrate some of the ways the study of law and drama can contribute insights both for the study of literature and for legal and political history. I would like to end with a plea for further cooperation. In an age of increasing specialization in Classical scholarship, there is a pressing need for scholars from different disciplines within the field to work with each other and to share knowledge and insights. When using literary texts as evidence, ancient historians need to be aware of literary techniques and how artists shape their material for performance before an audience. By the same token, literary critics who attempt to place comedy and tragedy in their contemporary social contexts would profit by discussing issues with ancient historians. All of us in both fields have much to gain from such a dialogue.

Appendix

Words for law and justice in Aeschylus and Sophocles

This list includes occurrences of the words *dikê* ('justice', 'penalty', or 'legal process'), *nomos* ('law'),⁵⁶ and *themis* ('law'), *thesmion* ('law') and *thesmos* ('law') in the completely preserved works of Aeschylus and Sophocles. For Aeschylus I have used the text of Page (1972) and for Sophocles Lloyd-Jones & Wilson (1990). I have also included the *Prometheus Bound* as a work of Aeschylus for the purposes of this list though some deny its authenticity: see Griffith 1977. The list does not include occurrences of these words in the fragments of these authors nor words derived from the roots *dik-*, and *nom-* (such as *adikos*, *dikaïos*, *endikos*, *nomimos*, etc.). Nor does it attempt to differentiate between different meanings of each word (e.g. *dikê* as 'justice', 'lawsuit', or 'penalty'). The list gives only a very rough indication of the occurrence of these words in the two authors. A more detailed study would be a *desideratum*.

AESCHYLUS

Agamemnon

dikê (19): 250, 259, 383, 464, 534, 773, 789, 811, 813, 911, 1229, 1432, 1472, 1511, 1535, 1607, 1611, 1615, 1669.

The word is used with the meaning 'in the manner' (with genitive) at 3, 232, 297, 491, 724, 980, 1050, 1093, 1179, 1181, 1298, 1444, 1472.

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The word *nomos* is used in the sense of ‘manner’, ‘way’ at 312 and 594, in the sense of ‘melody’, ‘strain of music’ at 1142 and 1153.

themis (3): 98, 217, 1431.

thesmion (1): 1564.

At 304 *thesmos* is used in the phrase ‘ordinance of fire (*pyros*)’ and refers to the signals arranged by Clytemnestra.

Choephoroi

dikê (19): 61, 144, 148, 244, 311, 398, 461 *bis*, 497, 641, 646, 788, 805, 884, 935, 949, 987, 990, 1027

The word is used with the meaning ‘in the manner’ (with genitive) at 195, 202, 447, 529, 1048.

nomos (4): 91, 150, 400, 990.

The word *nomos* is used in the sense of ‘melody’, ‘strain of music’ at 424, 822.

themis (1): 641 (?).

Eumenides

dikê (37): 163, 187, 218, 224, 230, 243, 272, 277, 433, 439, 468, 472, 486, 491, 511, 516, 525, 539, 554, 564, 573, 581, 582, 610, 639, 682, 709, 719, 729, 732, 734, 752, 785 *bis*, 795, 815 *bis* (= 785).

The word is used with the meaning ‘in the manner’ (with genitive) at 26, 111, 156, 911.

nomos (6): 171, 448, 576, 693, 778, 808 (= 778).

themis (1): 414.

thesmion (1): 491.

thesmos (5): 391, 484, 571, 615, 681.

Prometheus Bound

dikê (3): 9, 30, 614.

nomos (2): 149, 403.

The word *nomos* is used in the sense of ‘melody’, ‘strain of music’ at 575.

Themis, the name of the goddess, appears at 209 and 874.

Seven Against Thebes

dikê (8): 415, 444, 584, 646, 662, 667, 671, 866.

The word is used with the meaning ‘in the manner’ (with genitive) at 85.

nomos (1): 954.

Supplikes

dikê (10): 231, 343, 384, 395, 430, 703, 709, 733, 916, 1072.

The word is used with the meaning ‘in the manner’ (with genitive) at 408.

nomos (5): 220, 241, 388, 390, 673.

The word *nomos* is used in the sense of ‘melody’, ‘strain of music’ at 69.

themis (4): 37, 336, 360, 436.

thesmia (1): 708.

The words *dikê*, *nomos*, and *themis* do not occur in the *Persians*.

SOPHOCLES

Ajax

dikê (4): 113, 449, 1248, 1335.

nomos (6): 350, 548, 1073, 1130, 1247, 1343.

Antigone

dikê (8): 23, 94, 228, 303, 369, 459, 921, 1270.

nomos (11): 59, 177, 191, 213, 382, 449, 481, 613, 663, 908, 914.

themis (2): 880, 1259.

For the meaning of the word *nomos* at *Antigone* 847 see Harris 2004a, 55-5 n. 92 = 2006, 79 n. 92.

Electra

dikê (15): 34, 70, 248, 298, 476, 528, 561, 583, 610, 1041, 1042, 1211, 1212, 1255, 1505.

nomos (4): 579, 580, 1043, 1506.

themis (4): 127, 432, 493, 565.

The goddess Themis is named at 1064.

Oedipus at Colonus

dikê (3): 546, 760, 1382.

nomos (6): 168, 337, 548, 907, 914, 1382.

themis (5): 644, 1131, 1556, 1641, 1729.

Oedipus the King

dikê (4): 274, 552, 885, 1014.

nomos (1): 865.

Philoctetes

themis (4): 346, 661, 662, 812.

Trachiniae

nomos (2): 616, 1177.

themis (1): 809.

Notes

1. On the question whether women attended dramatic festivals see Goldhill 1997, 61-6.

2. 6,000 Athenians judge cases each year: *Ath. Pol.* 24.3. On the judicial oath see Harris 2008.

3. For the figure of 60,000 citizens in 431 see Hansen 1988, 14-28 and Rhodes 1988, 271-6.

4. Hansen 1991, 187.

5. Aeschin. 2.126.

6. *Ath. Pol.* 67.1.

7. The Athenian *dikastês* also differed from the modern juror in so far as he decided both questions of law and questions of fact and was not required to remain silent during the trial, but could express his disapproval by shouting. See Harris 1994, 136.

8. As do Hansen 1991, 180, and Todd 1993, 77-8. There were several types of experts who could help litigants: see Harris 1991. *Pace* Todd 1996, there is no reason to believe that Athenians were hostile to legal experts. The *exêgêtai* were

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held in high esteem and consulted (Dem. 47.68; Pl. *Ap.* 4d, 9a), and litigants often appeal to the authority of the lawgiver (*nomothētēs*), whose wisdom is unquestioned.

9. For the qualifications and appointment of members of the council see Rhodes 1972, 1-16. For those serving more than once see Rhodes 1990, 197-201.

10. *Ath. Pol.* 45.2 with Rhodes 1972, 147.

11. For the distinction see Hansen 1978.

12. For *probouleusis* by the Council see Rhodes 1972, 52-82.

13. For the role of the assembly in legislation during the fourth century see Hansen 1981, 351-7.

14. According to Rubinstein 2000, 58-9, 'roughly a third of the speeches in our corpus of forensic oratory were delivered in the *dikastēria* by supporting actors', which includes *synēgoroi* and supporting prosecutors elected by the state. This means two-thirds of the extant speeches were delivered by the litigants themselves. The actual proportion in all trials was probably higher.

15. On the *logographoi* see Lavency 1964.

16. Todd 1993, 55-8; 1996, 122-6, claims that it was difficult for litigants to find statutes, but see Sickinger 2004, who shows that the laws were easily accessible.

17. *IG* i³ 104, 5-8. The trierarch who was considering prosecuting for homicide had no trouble in locating the relevant statute: Dem. 47.71. For the *basileus* reading the law to a litigant see Antiph. 6.39.

18. For the Metroon as an archive see Sickinger 1999, 114-38.

19. Willi 2003, 79. Willi's brief study of legal language in Aristophanes is a good starting point, but a detailed study remains a *desideratum*. For an analysis of the legal language in a passage not listed by Willi see Harris 2006, 425-30.

20. On the heroic world of tragedy see Easterling 1997a.

21. For the use of legal language in the *Agamemnon* see Daube 1941.

22. See Garvie 1986, 323.

23. For the language of Attic decrees in the play see Petrie 1986, 25-7. At 604 the phrase 'in what direction the sovereign hand/vote of the people (*dēmou kratousa cheir*) was in the majority (*plēthynetai*)' may recall the use of technical term *dēmos plēthyon* at *IG* i³ 105, lines 36, 37, 40, 42, 43, 46, but the phrase is rare. For discussion see Rhodes 1972, 196-8.

24. For metic status in Athens see Whitehead 1977. For the importance of metic status in the *Supplices* see Bakewell 1997.

25. For the right of reprisal and the protections against it see the extensive study of Bravo 1980; for briefer treatments see Gauthier 1982 and Lintott 2004.

26. See for example Dem. 23.62. For entrenchment clauses see Lewis 1997, Rhodes with Lewis 1997, 524-5 and Harris 2006, 24-5. For an analysis of Aeschylus' *Suppliants* in relationship to the legal procedure of supplication see Naiden 2004.

27. On the term *ekklēsia synklētos* see Harris 1986 and 1991 = 2006, 81-101 and 103-20.

28. On the penalties for sexual violence see Harris 1990 = 2006, 283-93(-5). In his commentary on the play Owen 1939 does not note the allusion to contemporary Athenian law.

29. For the meaning of the term *ep' autophôrōi* see Aeschin. 1.90-2 with Harris 1994 = 2006, 373-89(-90).

30. For debt-bondage in Classical Athens and ancient Greece, see Harris 2002 = 2006, 249-69. In her commentary on the play Dale 1954 does not comment on the use of the term *thēteuein* and its meaning.

31. Dale 1954, 108, believes that Admetus 'would have liked to disown his

parents' in the same way that parents could disinherit their sons. See however Cobetto Ghiggia 2001: 'Admeto dichiara al padre che, se anche egli volesse colpirlo con l'*apokêryxis*, sarebbe ben disposto ad accettare tale decisione'. On this procedure see also Wurm 1972.

32. On the institution of *proxenia* see Herman 1987.

33. In her discussion of anachronism in Greek tragedy, Easterling 1985 does not discuss any of these passages.

34. For the law about the *epiklêros* see Karabélias 2002. On the legal aspects of the play see Karabélias 1970, MacDowell 1982 and Brown 1983.

35. The child would object that the money belonged to his mother and that he gained the right to her inheritance two years after reaching the age of majority: Harrison 1968, 113 n. 2.

36. On Sophocles' *Antigone* see Harris 2004a, 19-57 = 2006, 41-80. Allen 2006 does not place the play in the context of contemporary views about law and legitimacy. Her own approach is undermined by her view of Athenian law as a system of 'anger management', an idea which has drawn much criticism. See for example Rubinstein 2004.

37. My analysis of this passage is taken from Harris 2000, 76-7. Sommerstein 1989, 145, notes the use of the word *ankrisin* at 360-4 and recognizes that Athena later conducts this procedure but does not analyse the scene in detail from a legal perspective.

38. See Harris in this volume, pp. 133-4.

39. On law in comedy see Carey 2000 and MacDowell 1995, whose analysis of Aristophanes' comedies includes analysis of allusions to legal procedures.

40. See Carey 1993.

41. On the punishments for sexual violence see Harris 1990 = 2006, 283-93.

42. For a summary of the 'rape plots' in Menander see Rosivach 1998, 14-23, 27-35. For analysis of the implications of this evidence for our understanding of Athenian attitudes toward sexual violence see Harris 2004b = 2006, 324-8.

43. On the criticisms of the Athenian courts in the *Wasps* see Konstan 1985 with the reply of Olson 1996.

44. For discussion see Harris 2005, 14-15.

45. For a recent survey see Posner 1998.

46. See, for instance, White 1989.

47. Hall 2006, 355 claims, 'It is nothing new to discuss the influence of the legal practices of the Athenians on their drama', but the works she cites in n. 6 are mostly concerned with the relationship between rhetoric and drama, not law and drama. She neglects several recent important works about comedy and the law of slander, a topic not covered in this volume. See Radin 1927, Sommerstein 1986, Halliwell 1991, Henderson 1998 and very briefly Wallace 2006.

48. See Easterling 1997b and Gregory 2005. The essay of Ober & Strauss 1990 in a collection of essays on 'Athenian Drama in its Social Context' analyses both drama and law court speeches in political terms and concentrates more on rhetoric than law.

49. Recent studies of drama and politics include Euben 1986, Halliwell, Henderson, Sommerstein & Zimmermann 1993, Meier 1993 and Goff 1995. There are also essays on tragedy and politics in Pelling 1997.

50. To this should be added the adjective *nomimos*, which occurs at *Ant.* 455 and *El.* 1095.

51. See the essay by Brock in this volume, p. 97 with n. 45. The relative absence of words such as *dêmos* and *dêmokratia* undermines the view of Goldhill 1987 and

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2000 that the City Dionysia was concerned with democratic ideology. See also the criticisms of Rhodes 2003.

52. Ideally this volume would have contained an essay on law in Menander. On this topic see the works listed in n. 34. On Scafuro 1997 see the review of MacDowell 1998.

53. See Hall 2006, who however exaggerates the influence of performance on the decisions of the courts. For instance, Aeschines, who was a trained actor, was almost convicted in 343 by Demosthenes, who lacked his rival's strong voice and dramatic training. In 330 Aeschines was defeated in court by Demosthenes so decisively that he did not gain even one fifth of the votes cast. According to Aeschines (1.92), the courts of Athens should follow the example of the Areopagus, which paid no attention to the quality of a litigant's performance.

54. See the works cited in n. 39.

55. On this topic see North 1952, Perlman 1964, Ober & Strauss 1990, 250-5.

56. For the variety of meanings of *dikê* see Goldhill 1986.

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Orestes' Trial and Athenian Homicide Procedure

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While there are many scenes in Athenian tragedy that are to a greater or lesser extent reminiscent of lawcourt trials, there is only one surviving tragedy in which there takes place on stage a proceeding which Athenians would recognize, if not as an actual lawcourt trial, at any rate as approximating one as closely as the conventions and limitations of drama would allow. This is the trial of Orestes, for the murder of his mother, in Aeschylus' *Eumenides*. It has all the basic features that Athenians expected to see in a judicial proceeding – a presiding officer; a prosecution and defence opposing one another, making speeches and calling witnesses; a sworn panel of judges who hear the speeches, then vote for conviction or acquittal, but never speak; ballots cast secretly in urns and then emptied out and counted; spectators keenly interested in the outcome. To be sure, each of these features has here an unusual twist. The presiding officer is female and divine, and, unlike her counterpart in any real Athenian trial, she casts a vote herself¹ – and gives her reasons; the prosecutors (of whom there are twelve)² are also female and divine, and they do not make a set speech³ but merely cross-examine the accused;⁴ no witness is called by the prosecution,⁵ and the one defence witness quickly takes on the role of advocate,⁶ and both parties address the judges while the voting is in progress. But the essentials are clear. Orestes, at Athens, is being tried in the Athenian way.

But *which* Athenian way is it? That also, at first sight, seems clear. As is well known, the trial court is firmly identified (685-706) as the Council of the Areopagus, very recently a focus of acute political controversy – and, as is also well known, there has never been any consensus on what view, if any, Aeschylus is promoting on the issues of contention.⁷ What is not in dispute, however, is that in the play itself the council is functioning in a role of which it had not been deprived by Ephialtes' reforms, that of a homicide court, and it was a homicide court that Athena said from the first (483) that she intended to establish. This court is trying the (or its) 'first case of bloodshed' (682),⁸ the precursor of many more, some of which will have been attended by members of Aeschylus' audience; and the nature of this trial as a precedent and charter for the court is emphasized by Athena

when she says, four times over (484, 572, 683-4, 707-8), that she is establishing the council 'for the future' or 'for all time to come'. Orestes is being tried, in the Athens of the heroic age, by the same body that still tried murderers in the Athens of Aeschylus. All this is true; but there are features of the trial scene, and of what precedes and follows it, that make things a great deal more complex than they at first sight seem.

In the first place, it is always important to remember, when studying a drama, that the spectator experiences it in real time. Athena announces her intention of establishing a homicide court at line 483; she refers to it in passing as a council (*bouleutêrion*) at 570 (and again at 684), but not until 685-90 is it made clear that the new court is in fact the council of the Areopagus. Thus there is an interval of more than 200 lines in which the nature and identity of the court is left quite vague, with, as we shall see, some evidence that might well suggest to spectators that it was *not* the Areopagus council. Nor can we suppose that Aeschylus expected his audience to fill in this blank from their knowledge of earlier traditions about the trial, since the likelihood is that in the earlier Athenian tradition – if indeed there was any earlier Athenian tradition at all about Orestes' trial – he was judged, not by a panel of Athenian citizens, however distinguished, but by the gods.⁹

Secondly, although the fifth-century Areopagus council did indeed try murderers, a fifth-century Orestes would not have been tried before it. He was not defending himself by claiming he had not killed his mother (he explicitly admits he did kill her: 463, 588), but by claiming that he had done so 'with justice' (468, 612): that is, he was admitting the act but asserting that it was no crime. In the Classical period, such a case would not have come before the Areopagus council, but before the *ephetai* sitting at the Delphinium (*Ath. Pol.* 57.3). Indeed, Demosthenes (23.74) actually mentions the trial of Orestes in illustration of the kind of issue that was tried at the Delphinium, even though he had earlier (23.65-6) made it clear that he accepted the by then universal story that placed the trial on the Areopagus. And while the *ephetai* appear to have been a committee¹⁰ of senior members of the Areopagus council,¹¹ they were in the Athenian mind a quite distinct body from the Areopagus council itself: speakers before the council generally addressed them as ὦ βουλῆ, 'councillors' (e.g. *Lys.* 3.1, 4.1, 7.1), whereas speakers before the *ephetai* addressed them as ὦ ἄνδρες, 'gentlemen' (e.g. *Antiph.* 6.7, *Lys.* 1.1) or even ὦ ἄνδρες δικασταί, '*dikastai*', as if they were an ordinary jury (*Antiph.* 6.1). Thus even after we have been told that the court trying Orestes is the Areopagus council, the trial will still differ from a fifth-century Areopagus trial in a crucial feature – the feature, indeed, that will decide its result (since had Orestes not pleaded justification, his conviction would have been a foregone conclusion).

Nevertheless, trials before the *ephetai* do seem to have followed substantially the same procedures as those before the Areopagus council –

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very special procedures, unique in the Athenian judicial system. And what is truly striking about Orestes' trial is that some at least of these special procedures, and crucial ones at that, are conspicuously absent.

Wilamowitz¹² long ago identified six distinctive features of Areopagus trials which he claims are not present in *Eumenides*.¹³ Several, indeed the majority, of the points he makes are actually far from convincing. He is surely wrong to claim (his second and third points) that Orestes' trial differed from real homicide trials in that it was not conducted in the open air and in a sacred precinct ('im freien, im heiligtume'¹⁴): we are quite certainly invited to locate Orestes' trial in a sacred precinct,¹⁵ and we can see with our own eyes that it is being held in the open air.¹⁶ There is, to be sure, no indication that Athena, as the equivalent of the *basileus* who would have presided over a normal homicide trial, removed her garland of office before voting¹⁷ (Wilamowitz's first point), but then no one would have expected the goddess to be wearing one in the first place.¹⁸ Whether the stones of Hybris and of Shamelessness, on which the contending parties stood to speak,¹⁹ were represented in any way in the stage setting (Wilamowitz's fourth point), we simply cannot tell. And the fact that the prosecution and defence do not make two set speeches apiece (his sixth point) need show no more than that Aeschylus was more concerned with creating effective drama than with photographic reproduction of a real-life model.²⁰

Wilamowitz's fifth point, on the other hand – that we do not find in Orestes' trial 'the solemn oaths sworn by the parties' ('die feierlichen eidschwüre der parteien') – is entirely correct, so far as it goes. Yet Aeschylus does make significant and subtly patterned use of oaths in connection with the trial of Orestes, and the ways in which he does so deserve a detailed investigation. I will also be referring to two other features distinctive, or partly distinctive, of the Areopagus and the other special homicide courts, which do not appear in Wilamowitz's list.

Oaths were, of course, a prominent feature in Athenian judicial procedures generally,²¹ but their role in Areopagite and ephetic trials was unique.²² The preliminary oaths of the prosecutor and defendant had to be taken with special solemnity, over the cut pieces of a sacrificial animal, and with a special imprecation of total destruction of the swearer and his entire family should the oath be false; at the end of the trial, the winner of the case had to swear again that he had told nothing but the truth and that the jury's verdict was right; and every witness had to swear (according to which side he was on) that the defendant was or was not guilty²³ – a rule which was bound to render inadmissible the evidence of many a truthful and highly relevant witness. The alleged murderer of Herodes is highly indignant to find himself, through the procedure of *endeixis*, being tried in an ordinary jury-court, with the witnesses unsworn,²⁴ and demands an acquittal and a retrial before the proper tribunal with the proper solemnities.²⁵

We hear a great deal about oaths in *Eumenides* (and indeed throughout the *Oresteia*²⁶), and much of it is in connection with Orestes' trial. But what are the oaths we hear of? By far the most prominent is the oath of the judges. This is mentioned explicitly four times (483, 489,²⁷ 680, 710), and first the chorus-leader²⁸ (680) and then Athena remind the judges of the importance of respecting it. But the judges were on oath in *all* Athenian trials, and the speakers in those trials were constantly reminding them of the fact²⁹ – *except* in trials before the Areopagus council and the *ephetai*. There are six surviving speeches delivered before these bodies,³⁰ and these contain not one reference to any oath taken by the judges.³¹ Perhaps it was considered discourteous to these distinguished citizens – every one of whom had spent a year presiding over trials as an archon, and was subject to a strict code of conduct³² – to suggest that they needed reminding to be true to their oath; at any rate, it seems that it was not in fact the practice to remind them. Orestes' judges *are* so reminded. There is also a fifth, slightly veiled reference to the judicial oath, to which we shall come in due course.

The three oaths that were particularly distinctive of homicide trials, as we have seen, were the specially solemn oath (*diômosia*) of prosecutor and defendant before the trial, its repetition by the winning party at the end of the trial, and the witness's oath affirming the defendant's guilt or innocence. Curiously enough, leaving aside now the four references to the judicial oath already discussed, we find just three other mentions of oaths in the middle section of *Eumenides* containing the trial (397-777),³³ and their timing, and the identity of the speakers, correspond to these three distinctive oaths. Before the trial, the prosecutors complain that the defendant is unwilling to swear to his innocence, or to allow them to swear to his guilt (429-32). During the trial, there is a reference to an oath in a speech by the only witness called, Apollo (621). And at its end, the winning party swears an oath (762-74). But while these passages do correspond to the three special oaths in timing and in the identity of their speakers, they correspond to them in nothing else.

The language of 429 (ἀλλ' ὄρκον οὐ δέξαιτ' ἄν, οὐ δοῦναι θέλοι:³⁴ 'he will not accept our oath, nor be willing to offer his own') indicates that what is being spoken of is not a compulsory pre-trial oath, but an oath-*challenge*. So far as compulsory pre-trial oaths were concerned – and in this respect, at least, a homicide trial was no different from any other – it was meaningless to speak of either side accepting or rejecting an offer by the other side to swear an oath: both sides *had* to swear, or lose their case by default. Here, on the contrary, *neither* side swears: we know they do not, because they are both present on stage every minute of the time from their arrival in Athens till after the end of the trial. The prosecutors say that they are *willing* to swear (that Orestes killed his mother) while Orestes is unwilling to swear (that he did not), and argue that in view of this he should not be permitted to argue his case.³⁵ This is what happens in challenge situations:

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one side offers to swear to the truth of its account of the case and/or demands that the opposition do so, expecting to make rhetorical hay out of the opposition's refusal to accept the offer or comply with the demand. And here they know for sure that Orestes *will* refuse. But Athena is quite unimpressed: one should not, she says, be allowed to swear one's way to an unjust victory (432). She clearly means, as she has already indicated (426), that she suspects there may be circumstances that explain and excuse the matricide, and insists that Orestes must be free to raise such issues if they exist. And as a result of her decision, both parties go into the trial without having sworn to anything at all – which in a regular Athenian trial, for murder or anything else, would be quite impossible.

Apollo comes to the court to be 'both witness and co-defendant' (καὶ μαρτυρήσων ... καὶ ξυδικήσων, 576-9),³⁶ and no critic will complain of a procedural irregularity when he combines, in what is dramatically a highly effective way, the distinct roles of the witness and the supporting speaker (*synêgoros*). As a witness in an Areopagus homicide trial, he ought to swear to the defendant's innocence. He does not; he merely affirms that as a prophet he does not lie (615). When he mentions oaths, shortly afterwards, it is in another connection altogether. Having asserted that every oracular utterance he makes – including therefore his instruction to Orestes to take lethal vengeance on his mother as well as on Aegisthus – has the authority of Zeus behind it, he tells the judges that it is their duty to comply with Zeus' will, 'because an oath³⁷ is in no way mightier than Zeus' (621). Apollo does not say what oath he is alluding to, but the only one that could possibly be relevant is the oath of the judges: they were sworn to decide in strict accordance with justice (γνώμη τῆ δικαιοσύνη [Dem. 20. 118], cf. *Eum.* 674-5 ἀπὸ γνώμης ... δικαίας), so Apollo is in effect saying that if the will of Zeus is contrary to justice, then the judges must disregard their oath! Needless to say, no real Athenian pleader ever said such a thing, or allowed his judges to entertain for a moment the thought that justice might be against him. Once again, though, the traditional role of oaths in homicide trials has been turned on its head – and in a manner that would have been impossible even in an ordinary Athenian jury-trial. First of all the contending parties were allowed to go into the trial without swearing at all; now a witness, instead of taking an oath himself, has disparaged the oath taken by the judges.

And while Orestes, after his acquittal has been announced, certainly swears an oath, it is not an oath to the effect that the verdict was the right one. Instead he swears (762-74) that no future ruler of Argos will ever attack Athens – or that if one tries, he himself, in his posthumous capacity as a hero, will ensure, through evil omens and other means, that the plan is abandoned. Orestes himself, in fact, has never actually said, with or without an oath, that he killed his mother with justice, even though this was his only possible defence. In the preliminary hearing, he had said that he killed Clytemnestra in revenge for the death of Agamemnon (463-4) and

asked Athena to judge whether he had done so justly or not (468-9); similarly at the trial itself, he says that Clytemnestra was polluted by the murder of her husband, Orestes' father (600-2), but then asks Apollo to expound and judge whether he had acted justly in killing her (609-13). In a real homicide trial, it would be necessary at more than one stage for the defendant not only to assert but to swear to the truth of his claim to be innocent.

Thus Aeschylus, it seems, is playing allusively with the conventions of homicide trials while actually driving a coach and horses through them. He flouts them, too, by the manner in which he designates the judges. The court, as we have seen, is regularly called a 'council' (*bouleutêrion*³⁸); but Athena equally regularly (483, 684, 743) calls its members *dikastai* (cf. also Apollo at 81). This was the regular term for the members of ordinary juries. Could it be applied to members of the Areopagus council? Yes, but it was not normal. It is certain that, in speeches delivered before other bodies, the Areopagus council can be called a judicial court (*dikastêrion*³⁹); once, too, in such a speech, those sitting to judge on the Areopagus are called *dikastai*⁴⁰ – in connection, indeed, with the trial of Orestes (though his judges in this passage are no ordinary Areopagites – they are the Twelve Gods). The Areopagites are also once referred to as *dikastai* in Antiphon 1, a speech that was probably delivered before them,⁴¹ but the speaker never addresses them as such, using instead the formula ὦ ἄνδρες, 'gentlemen' (six times). In a speech by Antiphon this may not be of much significance, because ὦ ἄνδρες is also his normal formula when addressing an ordinary jury;⁴² but it is certainly significant that Lysias, who in nineteen speeches⁴³ composed for trials before ordinary juries calls them ὦ ἄνδρες δικασταί, '*dikastai*', 164 times, never so addresses the Areopagus council (he calls them always ὦ βουλῆ, 'councillors').⁴⁴

Our evidence thus suggests that Athena is describing (and, in 743, addressing) the members of the Areopagus council in language that would normally be considered more appropriate to the members of an ordinary heliastic court. The somewhat oxymoronic phrase δικαστῶν τοῦτο βουλευτήριον,⁴⁵ 'this council of *dikastai*' (684), would point up this incongruity, and so perhaps would Athena's instruction to certain of the judges (742-3) to empty and count the ballots.⁴⁶

The recent review by Rhodes (2004) of the extent and nature of irrelevance in Athenian forensic speeches concludes that it is less ubiquitous than has sometimes been believed, but that the constraints are somewhat (though not vastly) tighter in speeches before the Areopagus or *ephetai* than elsewhere.⁴⁷ In Orestes' trial there are two notable pieces of irrelevance. At the end of his presentation of the defence case (667-73), Apollo promises to do all he can to make Athens great, and in particular says that he has sent Orestes to Athens in order that he and his city may become Athens' eternal allies; he does not explicitly indicate that for this favour he expects the *quid pro quo* of an acquittal for his protégé, but the

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implication is unmistakable. Subsequently – while the judges are actually voting – the Erinyes repeatedly threaten the Athenians with terrible consequences should the Athenians humiliate them by an acquittal (711-12, 719-20, 733). Such promises and threats do not in the least assist the judges to make up their minds on the issue in dispute, namely whether or not Orestes acted justly in killing his mother, and must be regarded as reaching a high level of irrelevance. It is, of course, routine to warn the judges of the evil consequences of letting crime go unpunished, and homicide trials are no exception to this;⁴⁸ similarly a speaker may remind a court that to acquit those guilty of illegal commercial practices will encourage others and drive up food prices (Lys. 22.17-22) or that it is economically essential to give proper protection to those who make maritime loans (Dem. 34.51-2) or even that rich men will not be willing to spend lavishly on liturgies if they see it earns them no immunity from (allegedly) sycophantic prosecutions (Lys. 21.12-14, 25). But it is one thing to remind the jury of the *general, indirect* consequences of this or that verdict; it is another for a speaker *himself* (or an advocate on his behalf) to promise favours if the verdict goes his way, or threaten harm if it does not. Some do, indeed, sail quite near the wind. The speaker of Isocrates 17 mentions, at the very end of his speech (§§57-8), the trading privileges granted to Athens and Athenians in the past by King Satyrus, who had the speaker's father Sopaeus as one of his chief officials and whose son had become brother-in-law to the speaker himself (§§3, 11), and adds 'It would therefore not be reasonable of you to treat their letters slightingly' – clearly hinting that an adverse verdict would be treated by Satyrus and Sopaeus as an offence against them personally, and would make them less willing to treat Athens favourably in future. We find nothing remotely like this in any of the Areopagite or ephetic speeches. The nearest anyone gets to it is when the defendant in Lysias 7 draws attention to his liturgies (§31) and his military record (§41); and even he mentions these only as evidence of his good character and to arouse sympathy for the pathetic plight of one who has done so much for Athens and may now be forced into exile – he does not so much as say at the end, like the speaker of Lysias 21, that if he is acquitted he will continue to show himself as good a citizen as he has always been.⁴⁹ The blatant bribes and threats offered by Apollo and the Erinyes respectively are, so far as we can tell, at, or beyond, the edge of Athenian practice even in the ordinary courts, let alone before the Areopagus where speakers had to take a special oath to keep to the point.⁵⁰ Doubtless the boundaries of the permissible were constantly being tested, and adjusted according to the perceived reactions of the judges; at any rate we can say that whether or not a speaker might sometimes have got away with promises like Apollo's, or threats like those of the Erinyes, before an ordinary court, they could surely never have done so on the Areopagus.

Thus Wilamowitz was right, if largely for the wrong reasons. In at least three ways we have found that the trial of Orestes bears a much closer

resemblance to an ordinary Athenian trial before a heliastic jury than to a homicide trial on the Areopagus – though its participants do not always observe even the basic protocol of ordinary trials. In other words, while respecting tradition by having the trial take place on the Hill of Ares, and probably going beyond tradition⁵¹ by making the judges human rather than divine and identifying them with the contemporary Areopagus council, and while, as we have seen, playing allusively with its terminology and procedures, Aeschylus is also simultaneously encouraging his audience to see the members of this ‘council of *dikastai*’ as performing the same function which they themselves had performed, or (if not yet thirty years old) would one day be performing, as *dikastai* in the regular Athenian courts. They are witnessing the founding, not just of one judicial body (recently under something of a cloud), but of the whole Athenian justice system.⁵² Orestes’ judges – the only males on stage at the end of the *Oresteia*, except possibly for a herald and a trumpeter⁵³ – may be ‘the best’ of the Athenian citizen body (487), but it is not for nothing that Athena addresses them as Ἀττικὸς λαός, ‘Attic folk’ (681): these ten, eleven or twelve men,⁵⁴ who never speak but whose votes help determine the destiny of Athens for all time, are Athenian Everyman. Every Athenian can imagine himself in their place, and every Athenian can hope, like them, to enjoy the blessing of Athena and the Semnai Theai⁵⁵ if, when he comes to judge his fellows, he fulfils his oath to do so

according to the laws and decrees of the Athenian people and the Council of Five Hundred, and concerning matters about which there are no laws⁵⁶ ... according to my perfectly honest opinion, and not from favour nor from enmity ... no[t] myself accept[ing] gifts for judging, nor [letting] any other man or woman do so on my behalf with my knowledge ... giv[ing] an equal hearing to the accuser and the defendant alike, and cast[ing] my vote in relation to the actual matter in issue⁵⁷

as Orestes’ judges, ‘untouched by thought of gain’ (*Eum.* 704) and ignoring alike Apollo’s promises and the Erinyes’ threats, did to the best of their ability in a dispute on which, as their split decision implies, a ‘perfectly honest opinion’ might go either way and there could be no such thing as a verdict that was unequivocally right.

Notes

1. The nature and effect of Athena’s vote are not my concern here. My views on this subject will be found in Sommerstein 1989, 221-6 (cf. Collard 2002, 220-1); for an opposing argument see Conacher 1987, 164-6 (cf. Podlecki 1989, 211-13).

2. Their plurality was not in itself an abnormal feature; it was common for the prosecutor, and sometimes the defendant, to have one or more supporting speakers.

3. Because tragic choruses (or rather their leaders) hardly ever did (see Dale 1965, 18-22). It is possible, but unprovable, that in 585-608 each member of the

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chorus spoke once (cf. *Ag.* 1348-71; see Taplin 1977, 393 n. 1), if there was a change of speaker between 585-6 and 587.

4. On cross-examination in Athenian trials see Carawan 1983 and Todd 2002.

5. Though this is also true of the one prosecution speech that survives from a homicide trial under the traditional procedure (a *dikê phonou*), Antiphon 1, doubtless because in that case the prosecutor was unable to find anyone qualified to be a witness who was prepared to swear, as all prosecution witnesses had to (see pp. 30-1), to the guilt of the accused.

6. Though something like this does seem to have happened occasionally in fifth-century trials; cf. *Andoc.* 1.69, where the speaker neither asks his witnesses specific questions nor offers a prepared statement for them to confirm, but tells the *dikastai* they will 'come up and speak to you for as long as you are willing to hear them' – a neat trick, since while witnesses were on the stand the water-clock for timing speeches was stopped!

7. This too need not be discussed here; see Sommerstein 1989, 31-2, 216-18, and 1996, 392-402.

8. The text (πρώτας δίκας κρίνοντες αἵματος χυτοῦ) could mean that this is the first homicide trial to be held before the new council, or that it is the first to be held anywhere. Athenians would probably take it for granted that it was both, and that fits with the thematics of the trilogy, in which, until now, the only means of punishing murder (or any other crime) has been by individual vengeance 'through raw, bloody strife' (*Cho.* 474).

9. See Sommerstein 1989, 4-5; Podlecki 1989, 4-5; and, for the view that Aeschylus invented the whole idea of a trial of Orestes at Athens, Jacoby 1954, ii.23-5.

10. Chosen by lot (*Ath. Pol.* 57.4), presumably from among all members of the Areopagus council who were qualified by age (see next note). Our evidence does not permit us to say whether the *ephetai* were chosen for a year at a time or whether a fresh sortition was made for each trial; the former system would correspond to that by which *dikastai* were assigned to courts in the fifth century, the latter would approximate that of the fourth (the development of the system is surveyed by MacDowell 1978, 35-40).

11. They had to be at least fifty years old (*Lex. Seg. s.v.* ἐφεταί = Bekk. *Anecd.* i.188.30-2), whereas a man might hold an archonship at thirty and therefore might be a member of the Areopagus council at thirty-one. No source actually states that the *ephetai* were Areopagites, and it was for long generally held that by the later Classical period, at least, they were chosen from among the corps of ordinary *dikastai*, or even that their entire jurisdiction had by then been transferred to ordinary courts; but see now Carawan 1991 and Carawan 1998, 154-67.

12. Wilamowitz 1893, ii.333.

13. Elsewhere in the same chapter (1893, ii.331) he refers to a seventh, the prohibition of irrelevancy; I shall return to this subject (pp. 30-1).

14. In *Aristoteles und Athen* Wilamowitz did not capitalize the initial letters of nouns (or indeed of sentences), except for proper names.

15. Either the Areopagus itself, as has usually been supposed, or the Acropolis, as is the view of Scullion 1994, 77-86. In addition, of course, the theatre itself was part of a precinct of Dionysus.

16. Even if Scullion loc. cit. is right (as I now think he is) to claim that there has been no explicit change of scene since Orestes, at verse 243, embraced the olive-wood image of Athena Polias (which must, of course, be imagined as being *within* her temple), an imaginary indoor setting can easily be forgotten if the

audience are later given the impression that the action is taking place out of doors ('the indoor-outdoor distinction is always flimsy', Taplin 1977, 326, citing Eur. *HF* 1028-38 ~ 1089-90), and no one will imagine Orestes' trial as taking place indoors when they are told (566-9) that the public are present in such numbers that the voice of a herald and the blast of a trumpet are required to bring them to order.

17. Pollux 8.90.

18. Particularly since she is probably at least partly armed and wearing her helmet (cf. Sommerstein 1989, 151, Collard 2002, 211).

19. Paus. 1.28.5.

20. One could argue, indeed, that in this trial the two sides actually have *four* speeches apiece (prosecution, 585-608 – almost entirely taken up by cross-examination of their opponent – 622-4, 640-3, 652-6; defence, 609-21, 625-39, 644-51, 657-73). It is just as well that there is no water-clock to time the speeches; even if we ignore the fact that during the initial presentation of the prosecution case the defendant actually does nearly half the talking, he and his advocate get 53 lines' worth of speaking time to their opponents' 36.

21. They were taken by the *dikastai* at the beginning of the calendar year (see now Mirhady 2007), by the contending parties before the trial (Harrison 1971, 99-100), and by witnesses if they were unwilling to give the testimony desired by the party who had called them (see Carey 1995); in addition either party could offer to swear (or put forward another person willing to swear) to the truth of any matter in issue, or could challenge his opponent (or a person connected with his opponent) to do likewise, though such offers or challenges were normally made only for the purpose of eliciting a refusal (Mirhady 1991, Gagarin 2007). It is not surprising that of the 3700-odd references to oaths (in texts of all kinds down to the year 322) listed in the database of the Nottingham *Oath in Archaic and Classical Greece* project, more than a quarter (nearly 950) appear in the works of the ten Attic orators.

22. See on all this MacDowell 1963, 90-101.

23. In ordinary Athenian trials, witnesses normally were not required to take any oath at all, unless they were *refusing* to give the evidence requested by the party who had called them. There was apparently an exception made for cases arising out of the review of the citizen rolls in 346/5 (cf. Dem. 57.22, 36, 39, 44, 53, 56); doubtless this provision was included in the law authorizing the review, as a special safeguard against false allegations.

24. Antiph. 5.12, 15. He says the prosecutor himself is unsworn too, but by this he means only that the prosecutor has not taken the special oath prescribed for homicide trials.

25. Antiph. 5.90, 94-6. In fact we may be fairly sure that his intention, if acquitted today, would be to leave Athens immediately, and that had there been a retrial he would then have complained that he was being put in double jeopardy (cf. Antiph. 5.16).

26. See Fletcher 2007.

27. This line appears in different places in the two branches of the manuscript tradition, and scholars have transposed it to at least four other locations; but wherever it may originally have stood in the passage, there is little doubt of its genuineness (though Headlam did delete the line).

28. Hardly Apollo, in view of 621; see Winnington-Ingram [1935] 1983, 219-21.

29. For example, the forensic speeches in the Demosthenic corpus contain, according to the Nottingham database, sixty-two references to the dicastic oath.

30. Antiphon 1 (prosecution, homicide, probably Areopagus) and 6 (defence,

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homicide, Palladium); Lysias 1 (defence, homicide, Delphinium), 3 (defence, wounding, Areopagus), 4 (same) and 7 (defence, interfering with the site of a sacred olive-tree, Areopagus).

31. By contrast, in Antiphon 5, a murder defence delivered before an ordinary court, the dicastic oath is mentioned twice (Antiph. 5.85, 96); in the two speeches that Lysias wrote for the prosecution of the younger Alkibiades it is mentioned five times (Lys. 14.22, 40, 47; 15.8-9, 10).

32. An ex-archon could be denied membership of the Areopagus council for having had lunch in a tavern (Hyp. fr. 138 Jensen) – or at least a jury could be credibly told that this had once happened.

33. This stretch of the play begins with the first entrance of Athena, and ends with the final exit of Orestes. Orestes (the defendant) and the Erinyes (the prosecutors) are present throughout, and so is Athena (the president of the court) except during the choral song 490-565 when she has gone off to choose the judges (and apparently to swear them in, since they swear no oath on stage).

34. Conj. Schütz (θέλει *codd.*); see Sommerstein 1989, 157.

35. Line 429 is a response to Athena's observation that two parties are present and she has so far only heard from one of them (428); hence it is meant to imply that Orestes, being unwilling to swear to his innocence, has no *right* to be heard.

36. Likewise Orestes speaks of him as a witness in 594 and 609.

37. Or maybe Horkos, the god of oaths – and nephew of the Erinyes, who assisted at his birth (cf. Hes. *Theog.* 211-32 [the Erinyes are here called Keres, cf. Sommerstein 1989, 8], *Op.* 802-4)?

38. Although by using this word Aeschylus makes a bow to the notion that the Areopagus tribunal was formally a *boulê*, it is worth remembering that their place of meeting was not normally in ordinary speech called a *bouleutêrion* (Aeschin. 1.92 is the only exception in Classical prose); that was the term for the meeting-place of the democratic, lot-chosen Council of Five Hundred.

39. Lys. 1.30; [Lys.] 6.14; Dem. 23.65-6. In two of these three passages the council is being praised as the wisest, most just, most revered, etc., of all Athenian judicial tribunals.

40. Dem. 23.66. In addition, the *ephetai* are three times referred to as *dikastai* – and once addressed as ὁ ἄνδρες δικασταί – in Antiphon 6, written for a man charged with unintentional homicide (Antiph. 6. 19) and therefore tried by the *ephetai* at the Palladium (referred to – Antiph. 6.3, 6.6 [if correctly restored], 6.51; addressed – 6.1).

41. Antiph. 1.23. It has in the past been widely held (e.g. MacDowell 1963, 62-4, Carey 1997, 36) that the charge in this case was one of 'planning' a homicide (*bouleusis*) and that it was therefore tried by the *ephetai* at the Palladium (*Ath. Pol.* 57.3); but Harris 2001, 81-4 = 2006, 398-402, has argued (citing Harpocration s.v. βουλευσεως β 20 Keaney) that anyone sharing responsibility, however indirectly, for an unlawful killing could be charged with homicide proper (*phonos*) and that the charge of *bouleusis phonou* 'would normally [be] brought ... against a person who plotted to kill when the murder was not actually carried out' (like a modern charge of attempted murder or conspiracy to murder). The strongest evidence in support of this view is Dem. 54.25, which refers to a case tried before the Areopagus in which 'it was common ground that [the accused] did not lay a hand on the deceased [but only] encouraged the assailant to strike'.

42. In his only surviving speech for a trial before an ordinary jury, *On the Murder of Herodes*, Antiphon uses ὁ ἄνδρες eighteen times and ὁ ἄνδρες δικασταί only once. Isaeus too prefers the shorter formula.

43. I exclude the spurious *Against Andokides* (6) and *For Polystratos* (20).

44. Twenty-nine times in all in *Lysias* 3, 4 and 7. The ephetic court which tried Euphiletus (at the Delphinium) for the murder of Eratosthenes (*Lys.* 1) is addressed as ὦ ἄνδρες (twenty-four times). Martin 2006, 77, suggests that this form of address was 'conventional for homicide juries'.

45. An emendation by Canter, accepted by all recent editors; the MSS have δ' ἐκάστων (M) or δ' ἐκάστω (cett.)

46. This was how it was done in the ordinary courts (*Ath. Pol.* 66.2, 68.2, 69.1), and there, as here (cf. ὅσοις ... τοῦτ' ἐπέσταλται τέλος, 743), those who were to perform this function were chosen before the trial. In so ancient and august a body as the Areopagus council, is it not more likely that this mechanical role was performed by humbler assistants?

47. Rhodes 2004, 141-2, 143-4, 155; Lanni 2005, 124-6, reaches similar conclusions. Wilamowitz 1893, ii.331, exaggerates considerably when he writes that Apollo's irrelevance 'is inappropriate for the Areopagus but thoroughly appropriate for <ordinary> Athenian courts' ('für den Areopag nicht paßt, um so mehr aber für das attische gericht'; I am grateful to my colleague Katharina Lorenz for resolving my uncertainty about the meaning of the second clause).

48. Cf. *Antiph.* 1.31 (last sentence); *Lys.* 1.36, 47-9 (where, as throughout his speech, the defendant treats his victim, Eratosthenes, as the real criminal).

49. Cf. *Lys.* 21.25.

50. *Antiph.* 5.11-12; *Lyc. Leocr.* 11-13; *Arist. Rhet.* 1.1354a22-3; see Rhodes 2004, 137, 148-9, 156. *Ath. Pol.* 67.1 states that in cases before the ordinary courts the litigants swore 'to speak about the case itself' (like Rhodes 1981, 718-19, and 2004, 156, I do not think the placement of this clause warrants the inference that this oath was confined to private suits); but this oath may have been less watertight than its Areopagite counterpart – our three sources for the latter all say that pleaders there are required to speak *only* about the case itself.

51. See Sommerstein 1989, 2-6.

52. It is in keeping with this that Athena is represented as instituting rules of procedure (that the prosecutor should speak first, 583-4; that on an equal vote the defendant is acquitted, 741) which applied to all Athenian trials alike. My conclusion is, in this respect, the same as that of Kennedy 2006, 53: 'the Areopagus becomes symbolic of all courts in Athens, thereby fostering a democratic identity for the Athenians associated specifically with the concept of justice as trial by jury'. Kennedy's claim, however (2006, 53-62), that we are to see Orestes' trial as the prototype of fifth-century Athenian imperial jurisdiction over citizens of *allied* states, is unacceptable: Orestes, on behalf of Argos, makes an alliance with Athens only after his acquittal (only then, in his own words, does he even become an Argive once more: 757), and Argos, though in 458 an ally of Athens, was not and never had been a member of the Delian League.

53. Two persons, not one; see Sommerstein 1989, 186-7 (on 567-9). Incidentally, those who believe that the *Oresteia* is designed *inter alia* to validate the supremacy of the male in Athenian society rarely if ever seem to take on board the implications of the fact that Aeschylus does not allow any male to utter a word during the last 270 lines of the trilogy, and that the final song, welcoming the Erinyes (now the Semnai Theai) to their new home, is sung by a female chorus specially introduced for the purpose, who, in a direct reversal of traditional gender stereotypes, twice order the male citizenry to keep silence (1035, 1039). This consideration, which Winnington-Ingram ([1948] 1983, 101-31) did not include in his analysis, strongly reinforces the case which he made against the male-

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supremacist interpretation long before that interpretation became the received wisdom.

54. I am not here going to choose between these alternatives; see n. 1 above.

55. As well as of Zeus, Poseidon and Demeter, the deities actually invoked in the dicastic oath.

56. Meaning, primarily if not exclusively, what would today be called questions of fact.

57. This formulation of the essential clauses of the dicastic oath is based on the combined evidence of Dem. 24.149-51, 20.118, and 57.63. Mirhady 2007 reaches slightly different conclusions, rejecting in particular the phrases 'concerning matters about which there are no laws' (while agreeing that it was primarily questions of fact that the *dikastês* undertook to judge according to his 'perfectly honest opinion') and 'not from favour nor from enmity'; he regards these phrases as orators' explanations of, or glosses on, the oath rather than part of its text.

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The Legal Horizon of the *Oresteia*: The Crime of Homicide and the Founding of the Areopagus¹

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1. The *Oresteia* of Aeschylus

Choosing the *Oresteia* to illustrate the cultural and political dimensions of the genre of tragedy has many advantages. The first and the most evident of them is that the trilogy gives us the opportunity to analyse the well-known saga of the Trojan War, according to the *Weltanschauung* of tragedy and at a point when all of the consequences of that enormous enterprise could be evaluated in their entirety. These would include the affront committed by Paris; the decision by the Atreidae to organize a massive punitive expedition; the difficulties and indecisions confronted at the start of the campaign; the magnitude of the punishment of Troy when compared to the nature of the offence; the way the Greek warriors left the *oikos* at home unprotected during their long absence and the *nostos* of the victorious heroes; the various retaliations and the final re-establishment of order. But there is another reason as well, which rests in the fact that the *Oresteia* is the only trilogy that has survived intact to this day. The fact that it is also a thematic trilogy lets us analyse how justice was applied in different moments.

Aeschylus was not, however, the first author to feel attracted, in particular, to Orestes' punitive mission. It will suffice to evoke some of the more significant examples to illustrate clearly the aesthetic and artistic potential in the literary treatment of this event. In fact, the Homeric poems already present a major portion of the elements which are essential to the myth. The *Iliad* never refers to the death of Agamemnon, nor to his son's revenge, a fact which does not seem strange, since the subject of the epic poem is essentially confined to the actions of the Achaean warrior during his lifetime. It does note, however, one curious detail (which presages the signs of familial tension that we find in the first drama of the *Oresteia*): already then it is affirmed that Agamemnon willingly traded the affections of Clytemnestra – his legitimate wife – for those of one of his concubines (Chryseis, in this case).² The *Odyssey* contains a good deal more information, which serves the poem's discursive strategy. By sending

Telemachus to Pylos and Sparta, where he will meet Nestor and Menelaus, the poet wants the youth not only gradually to find out once again who his father is through the stories of people who had spent time directly with him, but also to compare the various *nostoi* of the heroes who fought at Troy. This is the function which Nestor³ fulfils in narrating his own return and the adventures of his companions. Besides, Odysseus meets with the shade of Agamemnon and those of other warriors during his descent into Hades, the question of *nostos* being probably one of the motifs that the bards were in the habit of interpreting, as is suggested in one of the themes sung by Phemius at Ithaca (*Od.* 1.326-7: Ἀχαιῶν νόστον ἄειδε λυγρόν). In addition to this, the specific case of Agamemnon's return permits us to establish important parallels with the adventures of Odysseus, whether through their similarity or their contrast. On the one hand, they both experience a disagreeable welcome and, above all, they both have sons who had taken their parent's side in defending family honour.⁴ On the other hand, it is from the mouth of Agamemnon that, in Hades, the clear contrast between the betrayal and the treachery of Clytemnestra, which unites her with Aegisthus against her husband, and the fidelity of Penelope, which is one of the common themes of the epic, is established.⁵ In the poem of the Epic Cycle entitled *Nostoi*, attributed to Hegias of Troezen, and today lost, the saga of Orestes was also taken up in its fullest form. To cite just a few more examples of the attention paid to this myth, it will be recalled that in the middle of the sixth century Stesichorus had composed an *Oresteia* in at least two books,⁶ Simonides and Pindar took up the subject as well, and it is a theme which is likewise represented in the plastic arts at the end of the sixth and the beginning of the fifth century, one of the most significant examples of which is the group of Attic red-figure vases which portray the death of Aegisthus sitting on his throne.

In short, the essential aspects relative to the house of the sons of Atreus and, in particular, to the revenge of Orestes, had already been established by the time Aeschylus, in 458, brought out his *Oresteia*. The central motif of the *dikê* adapted itself well to the structure of the trilogy, since it allowed for the presentation of a problem whose resolution unfolded along successive generations of the same family and, as such, clarified the nexus of guilt and punishment, as well as the inexorable action of divine justice. What Aeschylus' predecessors could not take into account were the reforms proposed by Ephialtes in 462/1, some time before the performance of this play, which would come to affect the powers of the Areopagus and dictate, besides, the death of the proponent of the measures, in one of the rare examples of political assassination in Athens. An awareness of this fact not only helps us to explain some of the playwright's options, but also allows us to emphasize the depth of his originality just as it enriches our reading of the whole play.

2. *The Legal Horizon of the Oresteia*

1.1. *The ethical and legal problems accompanying the conflict*

The principles delineated by the tragedian in order to adjust relations between men and the gods – using the notion of justice as a guide – are designed to be applied in a free and universal fashion so that, in this sense, a reading of the *Oresteia* is timeless, even though certain conditions which arise out of the context of the epoch and dramatic production of the period should not be ignored. This is why the question becomes more complex, since the resolution of the conflict obliges us to consider various distinctive aspects that contribute to the construction of the drama. The saga of the house of the Atreidae begins to take on ethical implications, inherited, in the main, from older codes that oriented the behaviour of the Homeric heroes in terms of both the rules of combat and, above all, the bonds of hospitality. At this level, the way in which Paris showed disrespect for Menelaus, his host, by kidnapping his wife, was not only an obvious and evident transgression of the most elementary rules of human relations, but also a grave error in foreign diplomacy. In fact, the offence is not only personal and against the family of Menelaus, but it also takes on a political significance, which will bind the *oikos* of the Atreidae to the city of Troy. In other words, it expresses the direct affront of one independent state by another, carried out in the person of one of its highest representatives.

Right away, the question of justice takes on equally important religious connotations, yet ones which make it even more difficult, initially, to resolve the conflict. Indeed, revenge for Paris' crime was demanded by Zeus *Xenios*; as a consequence, Agamemnon is, at this level, a divine emissary, even though he ends up exceeding the mission which was entrusted to him (as in some way to Clytemnestra and Aegisthus as well), yielding to the propensity for excess which characterizes him, and thus exposing himself to the inevitability of punishment. In addition to this, we should not forget that the death of Agamemnon, just as much as the double assassination of Clytemnestra and Aegisthus, has a certain degree of divine sanction, according to the retributive logic of the punishment for homicide. Nevertheless, in this early formula for conceiving the arm of justice, any act of punishment leads to a new demand for divine expiation and a new demonstration of error, which would end up, in the final analysis, by ushering in the extinction of the *oikos* itself. For these reasons, penalization would have to be raised to a level which would be freer and more impartial: it is in this context that the creation of the court of the Areopagus was to be justified. We must also keep in mind that the crime of Orestes could be treated, from a legal perspective, in various distinctive ways. It is enough to remember, for example, that the killing of Aegisthus is forgotten and only the death of Clytemnestra becomes the target of justice. In addition to this, and once various courts had been created to try

the crime of homicide, the unfolding of the process might still have taken another route, according to the logic of the argument adduced.

Briefly: beyond the religious and ethical problems explored in the *Oresteia*, there is also a legal basis, which is part of the historical context of the trilogy's production and merits analysis too.⁷ Aeschylus decided to make the trial of Orestes intersect with the mythical origins of the Areopagus, and this option was possibly related to the fact that, a few years earlier, Ephialtes had proposed a series of measures which affected the legal reach of that body. Therefore, since the basic themes concerning ethics, religion and legality taken up by the trilogy end up being concentrated in the figure of Orestes and in the form in which his trial is conducted, my treatment will focus essentially on the *Eumenides*. Before that, and as the case revolves around the accusation of homicide, it will be useful to elaborate briefly on how the crime had previously been treated.

2. The treatment of homicide before Classical times

In imagining the trial of Orestes by the Areopagus, Aeschylus found that it was necessary to bring together various distinctive factors: the saga of the Atreidae, the founding of the Areopagus, the juridical and judicial tradition of democratic Athens at the end of the first half of the fifth century, as well as the reforms of Ephialtes, the relative recentness of which would not have left the audience indifferent. In other words, the tragedian would end up by fusing elements that ranged in origin from the mythical and proto-historical past all the way up to those that derived from contemporary reality at the time of the production of the *Oresteia*. Though the genius of the author would ensure that this varied group of elements functioned coherently, it will be advantageous nevertheless, in terms of analysis, to recall certain references related to the application of justice as far as cases of homicide are concerned. I will evoke, in particular, two such instances: the information transmitted by the Homeric poems and Draco's law, which represent, respectively, the state of the question at the outset of the archaic period and the basis for the Athenian legal system as it relates to this particular area.

2.1. Homer and the question of intentionality

The use of Homer's epic poetry as a juridical source raises an obvious problem from the beginning, arising from the fact that the two poems do not represent a concrete society at a concrete moment, but, on the contrary, are marked by distinctive linguistic and archeological strata. Knowing this, we should draw our conclusions cautiously, but it does not prevent us from identifying certain general characteristics common to a single system.⁸

In the *Iliad* and in the *Odyssey* there are nearly two dozen passages that take up the theme of homicide.⁹ Generally the perpetrator of the act opts

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for flight and subsequent exile, motivated by the need to escape the vengeance of the dead person's family. It is only when there is no risk of retaliation that the killer does not take flight or feel the need to take some other compensatory measure.¹⁰ Once in exile, the fugitive can continue to be pursued by the relatives of the victim until someone provides him with shelter and integrates him into a new community. From that moment on, he is guaranteed protection and even honours, and is apparently released from carrying the burden of a heavy conscience.¹¹ On the other hand, it seems probable that whether the homicide was intentional or accidental would not have played a part in the verdict, since in none of these examples is it clearly indicated that the innocence or accidental character of the death could have constituted mitigating circumstances for the author of the crime. In reality, the occurrence of a more clearly delineated unintentional homicide seems to favour the opposite hypothesis. When Odysseus kills Antinous (*Od.* 22.1-33), he does so voluntarily and in consciousness of the act, though the rest of the suitors (who still know nothing of his true identity) consider this death to be an accident (22.31: οὐκ ἐθέλοντα); even so, they declare that he must pay for this involuntary killing with his life.¹²

Therefore the response to intentional and unintentional homicide seems to be basically the same. However, the existence of a mechanism for deciding the matter of compensation between the parties can already be noted, as illustrated by the advice Ajax gives to Achilles. He asks him to calm his rage, because the family members of a killed person could choose to be indemnified, allowing the killer to remain in the region.¹³

Even so, the clearest example of compensation for homicide is found in one of the scenes described on the Shield of Achilles (*Il.* 18.478-608). Though Hephaestus sets the various scenes of this famous *ekphrasis* in the world of heroes, this passage is generally considered to comprise more recently composed scenes and therefore could be seen as a kind of microcosm of Greece during the first half of the eighth century. In spite of the fact that the meaning of many of its details is still being argued over, it will be worthwhile to consider certain terms that characterize the trial represented there (*Il.* 18.497-508).

Early on in this passage it is made clear that the identity of the killer is known and that the defendant does not claim to be innocent; for this reason, the trial does not deal with the homicide in and of itself, but rather with the nature of the compensation (18.498: εἵνεκα ποινῆς) to be paid to the family members of the dead man. However, the exact meaning of the plea is open to doubt.¹⁴ One of two interpretations is generally advocated: that the accused claims before the people that he has paid the indemnity agreed upon and the opposing side denies having received it; or that the accused wants to pay the compensation, explaining the case to the people, but the family members of the victim refuse to come to an agreement based on these terms. It is likely that the ambiguity of the text is the result of the coexistence of two distinct forms of punishment for the crime of

homicide: either the exile of the convicted killer, or pecuniary indemnity in favour of the family members of the dead man. Yet, within the logic of retributive justice, these two solutions are not necessarily incompatible: it appears acceptable that the relatives of the dead man were able to moderate their first impulse to kill the killer (an intention which would probably dictate his voluntary flight and exile), substituting for it a process of negotiation and indemnity.¹⁵ The dispute which the passage in Homer refers to could then be justified as the result of the lack of a written law that clearly defined the procedure to adopt and the obligations and rights of both parties.

However, it was precisely to respond to that legal necessity that, throughout the seventh and sixth centuries, all over Greece, moves were made towards legal codification, entailing the rise of various famous legislators. It is in this context that the figure of Draco emerges. Yet, before we move on to analysis of his law on homicide, I should point out another curious aspect that is also related to the epic tradition and which will be significant for my discussion of the *Oresteia*. Generally, the tendency is to think that the insufficiency (or non-existence) of stable legal norms dictating what procedure to adopt in the case of a homicide would translate into multiplication of actions of *vendetta* and *controvendetta*. Nevertheless, in the epic poem, no homicide leads to this extreme outcome, save for that of Agamemnon, which impels Orestes to kill Clytemnestra and Aegisthus, even though their deaths are to remain unavenged.¹⁶ This helps us better to understand Aeschylus' options and the importance that he will concede to the civilizing role of the creation of the Areopagus.

2.2. Draco and the law on homicide in Athens

There are many reasons to believe that Draco also legislated in areas besides those which pertain to blood crimes, but these regulations were, according to the tradition, supplanted by Solon's code. It is, however, the law on homicide to which Draco owes his place in the history of Athenian law. An important part of the text of this law is today known as a consequence of the legislative revision undertaken towards the end of the fifth century. It was as part of this programme that, early in the initial phase, a decree was enacted which authorized the republication of Draco's law on homicide. The date can be established with precision, since at the top of the inscription the decree appears with the name of the eponymous archon, whose year falls in 409/8. A substantial fragment of the copy made at the time and placed in the Agora in front of the *Stoa Basileios* has been preserved and thus constitutes the most significant document on the origins of written criminal law in Athens. The text first published by Köhler in 1867 remained the benchmark edition for a century, until Stroud made an exhaustive study of the original, identifying 218 new letters and providing a reading since then considered to be the best.¹⁷ After the text of the decree, the inscription does not immediately take up the law on

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homicide, since the tenth line has the heading $\pi\rho\acute{o}\tau\omicron\varsigma \acute{\alpha}\chi\sigma\omicron\nu$, the contents of which occupy lines 11-55. Using very careful measurements, Stroud argues that in line 56 there would have been a similar title, which he reconstructs, with a high degree of probability, as being $\delta\epsilon\acute{\upsilon}\tau\epsilon\rho\omicron\varsigma \acute{\alpha}\chi\sigma\omicron\nu$.¹⁸ If the law on homicide was copied from at least two *axones*, then it is not wholly improbable that it was republished in its entirety, although this possibility still remains open to much dispute.¹⁹

The preserved part speaks only of non-intentional homicide, and it is curious that Draco would begin with this area, when it would seem more logical to start with the graver crime of intentional homicide.²⁰ The legislator determined that the person convicted of unintentional homicide be exiled (and not put to death), which could be a way to protect him against reprisals and create conditions for the negotiation of a pardon. This had to be accepted by the family members of the victim, and it was stated that a total consensus should be reached; anything less than that would allow for the wishes of whoever disagreed to outweigh any others. If there were no relatives of the victim, the decision would be remitted to the members of the phratry.²¹ The terms of exile dictated that the convicted person should remain beyond the borders and could not participate in the games and Amphictyonic rites. If, despite fulfilling these requirements, he was still killed, his killer would be subject to criminal proceedings, but if he violated the terms he could be executed within the legal framework.

This law represents an important advance in the legal system, to the extent that it required the dominion of the public authority over an area which had, hitherto, been a fertile battleground for procedural ambiguities on the part of the legal representatives of victims of homicide.²² Until now, I have employed the term 'republication' and not 'revision' to designate the effect of the decree of 409/8 on the regulation of homicide. This implies that I am admitting the possibility that the inscription, of which we possess a significant part, is a copy and not an altered version of Draco's law; consequently, we should also accept that Solon had preserved it as such, without having altered its form in order to integrate it within his new code. Indeed, the law contains traces already obsolete in the fifth century which, even in Solon's day, would certainly not have made much sense, as is the case with the clause which defines the retroactive nature of the law (lines 19-20).²³ Yet these factors taken together help point to the idea that the law on homicide remained nearly intact until the end of the Athenian democracy and therefore constituted the essence of the legislation on this material within the Attic body of law.

3. *The various homicide courts in Athens*

The conservatism demonstrated by the Athenians in relation to the law on homicide can be more easily understood if we take into account that this crime impinged on the religious sphere, as a result of which some kind of

pollution fell upon the author of the crime and those with whom he came into contact.²⁴ The antiquity of this norm and the reluctance to introduce changes led to the fact that homicide, despite being one of the gravest crimes, remained within the scope of private trials (*dikai*), not public ones (*graphai*), as one would expect. It was distinguished from all other private actions by the fact that management of the trial did not fall to the victim himself, for obvious reasons, but rather to his closest representatives, principally his family.²⁵

During the Classical period the Athenian legal system established important distinctions between the various kinds of homicide, which meant that the trial could be held in different courts of law and that these courts had specialized qualifications. From the sources, a categorization can be established which includes five distinct situations, with the *basileus* analysing prior to the trial the nature of each homicide and thus which court it would be tried in. A summary of this framework follows:²⁶

1. If the homicide or the wounds were intentional, the trial would be held in the Areopagus.
2. In cases of involuntary homicide or attempted homicide, as well as those in which the death of a slave, a metic or a foreigner was involved, the trial would fall under the competence of the court of the Palladium.
3. If the killer acknowledged the act, but maintained that he did it within the bounds of legality (for example, if he had come across a situation of adultery *in flagrante delicto*, or had killed someone by mistake, in time of war, or during an athletic event), the case would be tried in the court of the Delphinium.
4. If someone had already been exiled for the crime of homicide and was accused of committing another crime identical to the first he would be tried in the court of Phreatto (the defendant would then have to defend himself from an anchored boat in order to prevent the spreading of pollution that his premature return from exile could lead to).
5. Finally, when the author of a crime was unknown or happened to be an animal or an inanimate being, it would fall to the *basileus* and to the *phylobasileis* to conduct the trial, at the Prytaneion.²⁷

Of these various courts, the most important was the Areopagus, where the gravest cases were tried – those of intentional homicide. This was also the court where the most stable and qualified body of *dikasts* practised, since their ranks were made up of *ex-archons*, who were integrated into this court as soon as their annual office had concluded and they had passed an examination to evaluate their performance in office (*euthyna*).²⁸ Because their new functions were for life, accumulated experience turned this into a formidably specialized body. The life term also strengthened their independence, since the Areopagites had no need to pander to the sympathies of an electorate.²⁹

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3.1. The Areopagus and the reforms of Ephialtes

Between the reforms of Solon (594/3) and those of Ephialtes (462/1) the Areopagus is rarely referred to in the sources;³⁰ they do allow us to deduce, however, that this body continued to command power and respect, having essentially survived undamaged the tyranny of the Peisistratids and the establishment of democracy by Cleisthenes. It is possible as well, as is implied in the Aristotelian *Ath. Pol.* (23.1), that it came to see its importance reinforced by the way in which it enhanced the moral fortitude of the Athenians in the run-up to the battle of Salamis, and that this would have augmented its capacity for political intervention during the next two decades. This is the point at which Ephialtes comes into the picture, which the author of the treatise summarizes in the following terms (*Ath. Pol.* 25.2): first, he presented cases against various Areopagites (ἀγῶνας ἐπιφέρων περὶ τῶν διωκημένων);³¹ then he withdrew all additional functions (τὰ ἐπίθετα) from the council, which had permitted it to be the guardian of the constitution (τῆς πολιτείας φυλακή), and distributed them either to the *boulê* of Five Hundred, or to the people and to the popular courts. Though the general political meaning of these changes appears to be clear (to reinforce the autonomy of power and of democratic principles), the real problem which has divided scholars focuses on the exact interpretation of τὰ ἐπίθετα: in other words, what political prerogatives were contained in this expression and at what moment it was that the Areopagus had usurped them.³² The first question should be directed at the *nomophylakia*, which gave the Areopagus an elevated capacity for intervention in governmental and constitutional issues and in the control of the magistrates (therefore impeding popular sovereignty), the very authority which must have characterized the body since the time of Solon. Nevertheless, if these prerogatives dated back to at least the beginning of the sixth century, it would have been difficult for Ephialtes and the other democrats to define them as 'additions', as they went back to a golden period of Athenian constitutional history, possibly serving as much the interests of the progressives as they did those of the conservatives. However, the *nomophylakia* could have been seen as ἐπίθετα if, with the passing of time, the Areopagus had continued to use its prestige to exercise a type of control which was no longer in accordance with the democratic reality and if, as a consequence, it appeared to be a usurper within the new political context. Another hypothesis would be to interpret ἐπίθετα as a general designation that took in all the functions that had been added to the Areopagus since its foundation as a homicide court.³³

Apart from the relative validity of these interpretations, what is certain is that, starting with the reforms of Ephialtes, the Areopagus lost a good part of its powers, maintaining, essentially, jurisdiction over cases in which intentional homicide was involved.³⁴ This is the competence that Athena will attribute to it in the *Eumenides*, so that is not entirely

improbable that Aeschylus agreed with the meaning of Ephialtes' reforms, especially as the *Oresteia* was performed in 458, that is, at a moment when the whole of the recent polemic would still have been alive in the memory of the audience.³⁵ This gives us a possible indication of political contemporaneity in the drama of Aeschylus, though it would be quite a leap from there to consider the trilogy to be a work of ideological apology. This seems neither viable nor advantageous.

4. Conducting a homicide trial

Generally speaking, as soon as the magistrate received a complaint, it was his task to conduct a preliminary examination (*anakrasis*) in order to clarify the nature of the plea, so that it could be sent to the correct court. This being so, scheduling a date on which the *anakrasis* was to be held represented the first victory for the accuser, to the extent that this signified that the process had been formally initiated.³⁶ In this preliminary examination, the magistrate interrogated the accuser and the accused and these parties were also allowed to interrogate each other, all in an attempt to clarify not only the motive for the dispute, but also the arguments and the proofs which both of them would have to put forward during the trial, the date of which would be set at this time. In cases of homicide, the responsible magistrate was, as I have already said, the *basileus*, who would be obliged to begin by making a public proclamation that contained the legal interdictions to which the alleged killer would be subject.³⁷ After this, it fell to him to instigate not the normal *anakrasis*, but an upgraded version, which translated into three preliminary trials (*prodikasiai*), which would be held during three subsequent months, the actual trial itself being held in the fourth month.³⁸ Beyond the fact that both parties gave testimony, details of the exact functioning of these three *prodikasiai* are unknown. It is most likely that their real goal corresponded to that of the *anakrasis*, but with more time allotted, so that an objective analysis of the crime could be made and possible negotiations conducted, which would not necessarily lead to a homicide trial.

The trial took place in the open air, possibly in order to avoid the pollution of the dikasts that would occur if they were assembled under the same roof as the killer. Both parties swore at the beginning of the trial: the accuser swore that the defendant was guilty; the accused, that he was innocent.³⁹ At the end, the winner would swear once again that he had told the truth and that the decision of the court had been correct. Each party gave two speeches, that of the accuser always preceding that of the accused, so that the defendant had the opportunity to choose voluntary exile at the end of his first statement.⁴⁰ At the end of the speeches, the Areopagites voted and the *basileus* delivered the verdict.

2. *The Legal Horizon of the Oresteia*

4.1. *The trial of Orestes in the Eumenides*⁴¹

Given the 'political' dimension of Greek tragedy and the very nature of citizenship in democratic Athens, Aeschylus could not completely ignore the reality of the legal procedure, since his audience would have been quite familiar with the juridical tradition. On the other hand, the demands of producing a theatrical performance would not have allowed for the inclusion of the real characteristics of the three *prodikasiai* and the trial; for these reasons, it will not be surprising that the *Eumenides* gives us something between the empirical practice and the imaginary world of theatre. To do this, Aeschylus had to make choices, and it is upon these that I will now reflect.

The *Eumenides* begins with Orestes in Delphi, where he is trying to guarantee that ritual purifications will be carried out and to secure the help of Apollo. The Erinyes, though at the moment asleep, are in hot pursuit. This situation corresponds, in a way, to the attitude taken to killers in the epic tradition at a time when, as we have seen, there was probably no stable legislation pertaining to this crime. Therefore Orestes begins by choosing exile.⁴² For a common citizen escape would be enough to resolve the situation, at least at first, especially since Orestes was not at immediate risk of being prosecuted: he was the family member closest to Clytemnestra (and the rightful *kyrios*), and none of the other relatives had taken the initiative to start a trial.⁴³ The question resides in the fact that the accusation is in the hands of primitive and 'a-political' divinities, who, for this reason, do not position themselves according to the human scheme of things and the rules of the *polis*. For the same reason, they have no difficulty in pursuing Orestes beyond the borders of Argos. In any case, it is Apollo himself who, in reaffirming his support for Orestes' mission, recognizes that the Erinyes will never stop pursuing him in his exile and that recourse to a trial is thus the only thing that can finally free him from persecution (vv. 74-83).

On a merely hypothetical level, Orestes would have saved himself a lot of grief had he, after the death of Agamemnon (and as the closest family member), accused Clytemnestra and Aegisthus of intentional homicide. The fact that adultery was involved would have meant that this accusation would have had a good chance of resulting in the execution of the two murderers and in the confiscation of their property. Such a notion follows the logic of a state of democratic laws, like the one in which Aeschylus' audience lived. However, the myth's legacy takes us back to an imaginary, proto-constitutional world in which the norms spring directly from divine dictates, which in turn determine the necessity for personal *vendetta*. In addition to this, the human dramas and the resulting contradictions were also of interest to Aeschylus, since the extreme impasse to which such a form of retributive justice had led the family of the Atreidae forced a qualitative leap in the conception of justice, which the creation of the

Areopagus and the conciliatory effort of Athena at the end of the trilogy symbolically mirror.

Until the version presented in the *Oresteia*, it appears probable that the *Erwartungshorizont* of the Athenians was familiar with the idea that Orestes had been tried in the Areopagus (even though he was not the first defendant in the history of the court), before a group of Olympian gods, and that the trial had been instigated by one of Clytemnestra's family members. This being so, Aeschylus innovated, above all, in three ways: he made the case of Orestes the first to be tried in the Areopagus, thus creating an *aition* for the founding of the court;⁴⁴ for Clytemnestra's family members he substituted the powerful Erinyes;⁴⁵ in place of the court of gods⁴⁶ he created a court of Athenian citizens, presided over by their tutelary divinity, Athena.

4.1.1. *The instructional phase of the trial*

With these preliminary aspects in mind, the moment has come to ponder the form in which the trial was conducted and to what extent it followed the legal procedures of Athenian law.⁴⁷ The first phase of the trial begins with Athena's entrance on stage and ends at the moment the goddess absents herself to choose the Athenian citizens who will make up the Areopagus (vv. 397-489). This part corresponds to the preliminary examination of the case, conducted by the *basileus* (identified here with Athena), in order to analyse the consistency of the case and send it to the competent court. The three *prodikasiai* of Athenian law could last for many months; in the *Eumenides* they are, for obvious dramatic reasons, reduced to a few dozen verses. Still, Athena fulfils, in general terms, the necessary formalities: to clarify the identity of the two parties and to hear the arguments of the Erinyes and the defence of Orestes.

However, in relation to the legal tradition, there are certain departures from the norm worth noticing: bringing an action against the accused fell to the family members of the victim and, since Orestes cannot play this role, another descendant of the mother should be the one to do it; yet the Erinyes assume this function, not because they were related to Clytemnestra, but because this diligence derives from their inherent nature, which impels them to pursue killers (v. 421: βροτοκτονούντας ἐκ δόμων ἐλαύνομεν). On the other hand, the Erinyes complain that Orestes refuses to accept their oath or to take one of his own (v. 429: ἀλλ' ὄρκον οὐ δέξαιτ' ἄν, οὐ δοῦναι θέλοι). As we have seen, the oaths were compulsory, so that, by refusing to fulfil this formality, Orestes was, implicitly, recognizing his guilt. However, he did not have the margin for manoeuvre that would have let him act differently, since the practice dictated that the accuser swore that the killer was guilty and the defendant swore to his respective innocence. Yet Orestes could not deny the matricide, which, in any case, he will later admit to Athena (v. 463: ἔκτεινα τὴν τεκούσαν, οὐκ ἀρνήσομαι).

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Another curious aspect of Orestes' argument is that, in acknowledging the act, he is trying to justify it not simply as revenge for the death of his father (v. 464: ἀντικτόνοις ποιναῖσι φιλιάτου πατρός), but also by the authority of Apollo, who becomes, in this way, equally responsible for the decision (v. 465: καὶ τῶνδε κοινῇ Λοξίας μεταίτος). The first justification falls within the scheme of familial *vendetta*, but the second is clearly an attempt at *legally justifying* the killing. As a consequence, Athena acts correctly in declaring that the examination of the case demands a trial, but seems to fail to identify the competent court. Since Orestes confesses the killing, though alleging that it was perpetrated within the realm of legality (as a direct mandate of Apollo, who is, for his part, interpreter of Zeus), the case should have been held at the court of the Delphinium and not at that of the Areopagus. This slight incongruity helps us better understand the options available to Aeschylus and allows us to see the interest of the playwright in joining the resolution of the mythical dispute of the House of the Atreidae to the foundation of the most esteemed Athenian court of homicide.⁴⁸

We have to admit, however, that by interrogating the Erinyes Athena was trying to find out if Orestes would have any extenuating circumstances on his side (v. 426); nevertheless, the response of the chthonic divinities was definite and unequivocal, admitting no possibility that the matricide was justifiable (v. 427: ποῦ γὰρ τοσοῦτο κέντρον ὡς μητροκτονεῖν). This aspect, which will become important in the unfolding of the trial, had already been taken up at Delphi, when Apollo asked the Erinyes the reason why they did not punish the death of Agamemnon at the hands of his wife, to which they responded that this was due to the fact that it was not a crime against someone of the same blood (vv. 210-12). Apollo is firm in his response and accuses them of not treating all homicides in the same way: while some infuriate them, others are handled more calmly (vv. 222-3). On the one hand, this affirmation allows us to maintain that Apollo views them as the pursuers of all killers, as the tradition implied, but recognizes that they are also capable of a graduated approach, as a way to evaluate the gravity of the act.⁴⁹

Athena closes the first phase of the preliminary examination by declaring her intention to found a court for homicide that will be made up of the best among her citizens; then, as she leaves, she advises the parties to gather together testimonies and proofs that are needed for the process of justice (vv. 485-6). As the *prodikasiai* served precisely to clarify the elements that would be necessary for the trial, it can be seen that, in this aspect as well, the goddess follows in the widest terms the usual procedure.

4.1.2. The trial

As we have seen, the trial itself followed a scheme which included two pairs of speeches, with the accuser preceding the accused. Nevertheless, from the dramatic point of view, the play would become ineffective were it

compelled to present four long interventions stuffed with details the audience already knew about: for this reason, Aeschylus opted instead for the intersecting dialogue between the Erinyes and Orestes and the Erinyes and Apollo. With this solution, the playwright respects, in broad strokes, the procedural scheme of the interventions, without neglecting the dramatic effects.

The sharing of the defence between Orestes and Apollo contains a double advantage. On the one hand, it avoids having the material author of the killing repeat the terms already referred to in the instructional part, thus opening the way to vary the arguments; on the other, it allows the defence to include a divine representative, a fact which gives the defence a lot more room for manoeuvre in the discussion with the Erinyes than would have been the case with the mortal figure of Orestes. However, it is Apollo himself who recognizes that he is more than just a simple legal patron or Orestes' spokesperson (vv. 579-80: καὶ ξυνδικήσων αὐτός· αἰτίαν δ' ἔχω τῆς τοῦδε μητρὸς τοῦ φόνου). Apollo does not deny his moral responsibility in the matricide; for that reason he could be accused of *bouleusis*, that is, of having planned or instigated a homicide committed by another person. As such, he exposes himself, from the perspective of Attic law, to the same risk as the material author of the crime: since the case was one of intentional homicide, the sentence would be death. Obviously, for Apollo, such a sentence did not constitute a real threat, but this 'complicity' contributed also to the relevance of his support of Orestes.⁵⁰

In the Areopagus, litigants were prohibited from deviating from the subject under discussion (ἔξω τοῦ πράγματος λέγειν). Certainly this measure would have guaranteed that the Areopagites could concentrate on the essence of the plea.⁵¹ Yet Athena (in a procedural omission) slightly bends the rules for Orestes and Apollo by accepting that they mention the assassination of Agamemnon, which is essential for justifying the killing of Clytemnestra. However, the Erinyes do not accept this argument, countering that Clytemnestra had already paid with her death for the crimes of the past, which, for this reason, are no longer relevant to the case before the court (v. 603).

The trial was already approaching its conclusion when Apollo, after declaring the legality of the matricide, moved to justify it as the will of Zeus (of whom he is the interpreter), because of the superiority of the father over the mother and because of the impossibility of recuperating the blood spilled (vv. 614-56); these arguments, in addition to being easily refuted by the Erinyes, threatened to create a dangerous division on the divine plane, absolutely contrary to the spirit of the *Oresteia*. It is now that Apollo puts forward the idea that the embryo is planted in the mother by the father, so that she would be able to feed it. Conclusion: the mother is not the child's procreator, but simply its feeder.⁵² He offers as proof the figure of Athena, who is only the daughter of Zeus, intending with this to reinforce the congenital bond between Orestes and Agamemnon, and to downplay the gravity of the matricide (vv. 657-73).

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With the conclusion of Apollo's final argument (which I will take up again below), Athena closes the litigant's testimonial phase and prepares the council for the vote, which will be the high point of the trial. Until this moment, the goddess has been establishing before the audience, discreetly yet systematically, the procedures which the Areopagus should follow in the future: the preliminary examination on the cause; the necessity to gather together sworn testimonies and proofs (vv. 485-6); the role of the herald (vv. 566-73); the opening of the trial debate, with precedence given to the prosecution (vv. 582-4); the closing of the speeches and the voting process (vv. 674-5; 708-10; 742-3); the scheduling of meetings at the court of law on the Hill of Ares and its role as moderator guaranteeing an intermediate form of government between anarchy and despotism (vv. 681-708); the definition of the principle that a tie in the voting would absolve the defendant (vv. 734-41; 752-3), a rule that was valid for all of the Athenian courts.⁵³

This last point and the problem of Athena's vote call for further commentary. Here I will not pursue the details of the debate, which constitute a true *vexata quaestio* among scholars of the *Oresteia*, but rather refer to some of the more notable consequences of the possible interpretations. If it is Athena's vote which makes the count come out equal and, therefore, guarantees the acquittal of Orestes, this implies that, on the strictly human plane, matricide was repudiated and the killing was condemned, since the acquittal was the result of special interference on the part of the goddess; in that case, however, Orestes would have less reason to be grateful to the Athenians⁵⁴ and, in addition, there would be more resentment of Athena among the Erinyes, hindering the ultimate goal of pacification. On the other hand, if there had been a tie in the voting, Athena's decision would be, in some way, supplementary, though it would serve to reinforce the pertinence of the judgment of the mortals. In this scenario, Orestes' recognition of the Athenians would be greater and the Erinyes would not believe themselves so close to victory, a contingency which more easily opens the way to an understanding with Athena. For my part, I recognize that both of the positions appear defensible, though I have some preference for the first one. In any case, the most important thing, in my opinion, is the fact that the physiological argument used by Apollo and adopted by Athena in order to justify her vote does not carry determining weight in the dispute. Orestes is acquitted of matricide, in the first instance, on exceptional grounds and through the special grace of the protecting divinity of Athens, in this way putting an end to the continuous succession of assassinations and installing a newer form of the application of justice. This is why the trilogy does not conclude with the acquittal of Orestes, but rather with the efforts Athena makes to integrate the Erinyes into this budding order. *Winning* in court against these divinities of the past was only the first step; it was necessary also to *convince* them (not by force, but with the help of *Peitho*) to become integrated in the new reality

as charitable entities. The trilogy concludes with the expression of a peaceful understanding (vv. 1045-6), celebrated not only among Athena, the Athenians and the Erinyes, but also among the Olympic gods and the ancient powers of Moira, whom the younger divinities had been accused of disrespecting. In this new era, everyone is called upon to contribute to the general prosperity, since eliminating part of the social body would be to make it weaker.⁵⁵

5. Conclusions

The *Oresteia* develops the implications of the concept of *dikê* as much on the divine plane as on the human one. These two planes also find themselves closely interlinked and follow the same impulse to create a new order deriving from a clearer application of the impartiality of justice. The overriding sponsor of this reform is Zeus, because of the way he instates the principle that guilt calls for expiation (παθεῖν τὸν ἔρξαντα) and that a painful experience contains its own and necessary lesson (πάθει μάθος). Taken as a whole, however, the trilogy will still have to resolve certain problems and contradictions which arise from living with this new conception in a world still marked by the past: on one side the Olympian Gods and their relative room for manoeuvre in relation to the ancient chthonic powers; on the other, the inflexible logic of retributive justice, which plays itself out in familial *vendetta* and *controvendetta*, which, carried to their natural outcome, would lead to the extinction of the *polis* itself. The uninterrupted series of assassinations which devastated the house of the Atreidae was the visible expression of the pernicious results which accompanied an inadequate link between the principle that the guilty party must expiate his fault and a limited understanding of the means put in place in the service of his execution. The symbol of this gap in understanding is the impasse resulting from the matricide perpetrated by Orestes in obedience to the instructions of Apollo. Its resolution will depend on a qualitative leap in the mechanisms for the application of justice, embodied in the court of the Areopagus, in whose creation both gods and mortals played a part and which represents also a perfecting of life in society.

Orestes' trial in this court obliged Aeschylus to articulate very different realities: the legacy of myth and earlier literary tradition, as they referred to the saga of Orestes; Attic constitutional history and the legal traditions current in the Athens of his own day; and a consciousness of certain recent political measures, such as the reforms of Ephialtes and the murder of which he was a victim, hardly the norm for democratic standards. These factors, allied with the demands of the dramatic phenomenon itself, led him to introduce new ways of dealing with the myth and to alter some historical and procedural details. He did this, however, with a clear objective in mind: to link the end of Orestes' wanderings to the foundation

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of the Areopagus, the most esteemed of Athenian courts. On examining the competencies which Athena attributed to the court, it seems reasonable to suggest that Aeschylus was not wholly hostile to Ephialtes' measures. It is not necessary, however, to view this attitude as the sign of a marked political ideology. The analysis of the historical and legal context of this dramatic production helps us to understand this reality and reinforces another one, the most important: the timelessness of the civilizational principles developed throughout this trilogy.

Notes

1. In Leão 2005 I made a first approach to this same subject. I would like to express my gratitude to P.J. Rhodes for suggestions and helpful criticism concerning an earlier version of this paper, although he cannot be held responsible for the final perspectives here expressed.

2. *Il.* 1.113-15.

3. *Od.* 3.130ff.

4. In fact, it had been Athena herself who had advised Telemachus to follow the example of Orestes (*Od.* 1.298-302).

5. Cf. *Od.* 11.405-34; 441-56.

6. This version would leave its mark on the *Choephoroi* of Aeschylus in terms of three specific details: in Electra's recognition of Orestes from a lock of his hair; in the presence of the nanny; in Clytemnestra's ominous dream.

7. Although one must keep in mind that 'the Athenian citizen brought markedly different expectations to the courts and to the theatre', as Sealey 2006, 480, rightly states.

8. This subject has fed a fierce controversy between Homeric scholars and scholars of Greek law; in the brief synthesis of it that I have made, I relied, in particular, on the synopses elaborated by Gagarin 1981, 5-19, and Carawan 1998, 45-8.

9. A catalogue of these occurrences can be found in Gagarin 1981, 6-10.

10. This is what happens in the case of Heracles, who kills his guest Iphitus, because of the horses, without fearing retaliatory measures (*Od.* 21.24-30). The case of Oedipus is particularly significant (*Od.* 11.273-80); even though the sovereign of Thebes is tormented by the maternal Erinyes, this is due to the crime of incest and not that of patricide.

11. Cf. the case of Theoclymenus, who after killing a companion in Argos (*Od.* 15.224), escapes to Pylos and entreats the protection of Telemachus, who willingly welcomes him on board (*Od.* 15.271-86). Besides, the prompt measures taken by Odysseus to clean his house after the killing of the suitors seem to have more to do with questions of sanitation than they do with a fear of pollution in the religious sense (*Od.* 22.493-4).

12. It is certain that, because the suitors conclude that Odysseus is a simple beggar, they do not hold the value of his life very highly. Cf. *Il.* 23.85-90, for an unintentional homicide that involved Patroclus.

13. *Il.* 9.632-6.

14. Cf. vv. 499-500. There is probably a dispute over the role of the people (*laoi*) meeting in the assembly, who divide their support between the two litigants, as well as over the figure of the 'arbitrer' or the 'judge' (*histôr*), and the *gerontes* who pronounce in turn over the details of the dispute, and to whom judicial functions

(*dikazein*), in particular, seem to fall. Carawan 1998, 54-7, follows this interpretation. See also Cantarella 2002, 190-202, who sees the first traces of the birth of law in this episode.

15. Even so, and in a first moment, it would have been natural that the killer would try to guarantee his security, and therefore begin by opting for exile. Draco's law suggests this line of action, but this does not mean that it was a normal procedure in earlier times.

16. Cf. *Od.* 1.35-43; 3.303-10. See Gagarin 1981, 18.

17. This inscription is exhaustively analysed by Stroud 1968; Gagarin 1981; Gagarin 1986, 86-9, 109, 112-15. See also Leão 2001, 345-6.

18. Stroud 1968, 16-18.

19. See e.g. the objections expressed by Rhodes 1981, 111-12.

20. See Stroud 1968, 34-40; Gagarin 1981, *passim*. For Stroud, the regulations on intentional homicide appeared in the second position, which is what seems to be suggested by the headings of the inscription and by the fact that, in the time of the orators, the sentence for this crime was death; for Gagarin, the crime was present only by implication, indicating that the procedural and penal material was the same for both types of homicide.

21. Since the *ephetai* confirmed unintentional homicide; the nature of this body is not totally clarified.

22. If, as it seems possible to justify, we place Draco's homicide law after Cylon's coup, the hypothesis that it would have favoured the Alcmaeonidae becomes more persuasive, to the extent that it would have protected them against arbitrary attacks from enemies created by Megacles' actions.

23. Since Draco had legislated nearly three decades earlier, this note would make sense only once the regulations had been implemented for the first time. For more arguments, see Stroud 1968, 60-4.

24. One of the prerogatives of Apollo at Delphi was, precisely, to proceed with the purification of killers. For more on this question, see Parker 1983, esp. 104-43. As we have seen (see section 2.1), the religious implications of the crime of homicide did not yet seem significant in the epic tradition; they are important in tragedy (and even central in the *Oresteia*), but not as visible as one would expect in the extant speeches from trials for homicide. On this, see Sealey 2006, 479-81.

25. A further explanation for homicide's remaining within the private sphere (*dikê phonou*) is that this legal proceeding was instituted by Draco, and so before Solon had introduced the innovation of public procedure. This is the opinion of MacDowell 1978, 57-9.

26. Cf. the Aristotelian *Ath. Pol.* 57.3, and Demosthenes (23.65-77). For more on this material, see MacDowell 1963; Harrison 1968-71, ii.36-43; MacDowell 1978, 109-22; Rhodes 1981, 645-7; Carawan 1998, 84-135.

27. These *phylobasileis* probably constituted a vestige of the tribal system that predated Cleisthenes' reforms, in which there were kings for each of the four ancient Ionic tribes. See Harrison 1968-71, ii.42.

28. If we accept the possibility that the *ephetai* were Areopagites, then we must also recognize that the other homicide courts were also made up of experienced men. For the evidence on this, see Rhodes 1981, 647.

29. Since several of these members were former *basileis*, knowledge of the material was even greater. However, the fact that it was a stable body and a relatively small one within the Attic legal tradition meant that their identities were known and this, therefore, increased the risk of possible attempts at subornation; in spite of the theoretical existence of this inconvenience, what is certain

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is that sources do not refer to any such accusation. On the contrary, the Areopagus always maintained the best of reputations.

30. See Wallace 1989, 70-87, for a brief account of the principal particularities involving this period.

31. These actions initiated by Ephialtes must have to do not with the official business of the Areopagus, but rather with the performance of the Areopagites when they were still archons, that is the settling of accounts (*euthyna*) to which they were subjected upon leaving office. These procedures would, however, have helped Ephialtes to discredit the Areopagus indirectly.

32. The somewhat 'progressive' character of these measures can be gauged by the way in which Cimon and the more conservative faction reacted to it; cf. Plut. *Cim.* 15.

33. Rhodes 1981, 316, suggests that the *nomophylakia* was an old prerogative of the Areopagus, although repeatedly reinterpreted as a kind of adaptation to the changes in political circumstances, and that 'law-enforcing functions assumed in this way rather than conferred by law could easily be represented as accretions by reformers and as part of the established order by conservatives'. See also Wallace 1989, 85-6.

34. For more information on other kinds of criminality dealt with by the Areopagus (such as death by poisoning and during fires), see MacDowell 1963, 44-7.

35. Although I am personally more inclined to think that Aeschylus was not completely hostile to Ephialtes' reforms, it must be kept in mind that this problem has long been submitted to strongly opposing views. For a review of the main interpretations, see e.g. Podlecki 1966, 80-100; Sommerstein 1989, 13-17 and *passim*; Bruyn 1995, 87-110.

36. See MacDowell 1978, 118-20; 239-42.

37. Cf. *Ath. Pol.* 57.2.

38. For this reason, accusations of homicide could not be initiated in the last three months of the year, since the *basileus* would not have time to persevere with the entire process, as he was obliged to do. For this reason, the process could be initiated only with a new magistrate. The Areopagus passed judgments in the three days which preceded the last day of each month: see MacDowell 1963, 43.

39. Except for the cases brought before the court of the Delphinium, those in which the killer admitted the act but maintained that the act had been committed within the legal framework. The testimonies presented were also submitted under oath.

40. And so avoid capital punishment and the confiscation of property, in the case that he was declared guilty of intentional homicide. For unintentional homicide, the accused would be sentenced to exile and forbidden to attend the great religious and athletic festivals which were frequented by people from all over Greece. He was allowed to keep his property and live free of retaliation as long as he never again entered Attic territory. The exile would be for life, unless he could obtain a pardon (*aidesis*) from the family members of the victim. Killing a metic or a slave was, in principle, considered to be less grave and, therefore, would carry a lesser penalty.

41. On Orestes' trial, see in this volume the papers by A.H. Sommerstein, 'Orestes' Trial and Athenian Homicide Procedure', F.S. Naiden, 'The Legal (and Other) Trials of Orestes', M.F. Silva, 'Euripides' *Orestes*: The Chronicle of a Trial'.

42. Even though his expectation was to free himself of the pollution of homicide and not actually to remain exiled from Argos and the governing of his palace.

43. The same could be said about the killing of Aegisthus, which went unpunished; even though, from the legal point of view, Orestes would have more difficulty in controlling the actions of Aegisthus' family, from a juridical perspective he could have alleged legal homicide, because of Aegisthus' adulterous relationship with Clytemnestra, which the inhabitants of the palace could easily have confirmed. Even so, in other treatments of the myth, there is evidence that family members of either Clytemnestra or Aegisthus had brought action against Orestes. These sources are collected in Sommerstein 1989, 4 and nn. 10-11.

44. In fact, the earlier tradition and the name of the court itself implied that the institution had been created in order to resolve the dispute between Ares and Poseidon over the death of Halirrothius. Cf. de Lucia 1998, 86-7.

45. The idea of using the Erinyes (or the *Semnai Theai*) to take the part of the accusation will later be reused by various authors: Eur. *IT* 963; *Or.* 1649-50; Dem. 23.66; Din. 1.87; Aristid. *Or.* 1.48.

46. Directed perhaps by Zeus (cf. Euripides, *IT* 945-6); see Sommerstein 1989, 5-6.

47. The problem of the initial phase's occurring in a period in which, according to the logic of the play, legal procedure still did not really exist, *per se*, is explained by the compromise which the playwright found to locate the action in a somewhat timeless universe, without ignoring the objective context in which the drama was produced. In the present analysis, I am indebted to some of the arguments of de Lucia 1998, esp. 87-94.

48. The 'foundation' of the Areopagus is a determinant point, which helps to get around the problem: if this court of homicide was now to be created and was also the oldest court, then the case could not end up in any other court, for the simple reason that there were no other possibilities.

49. This is the position defended by de Lucia 1998, 89, which seems to be quite pertinent.

50. For more on *bouleusis*, see MacDowell 1978, 115 and 120. De Lucia 1998, 92, already calls our attention to this detail, adducing opportunely the way in which the commentator (schol. *ad Eum.* 579) interpreted the verb ξυνοδικεῖν: not in the usual sense of 'defend, sponsor', but rather as 'share in the defence', which seems to correspond more exactly to Apollo's situation. Besides, it is still curious that the god insists as well, as Orestes does, on the 'just' and 'legal' character of this homicide (v. 615: δικάϊως).

Harris 2001 = 2006, 391-404, maintains that a person who plotted a homicide that was executed by someone else could be charged with murder (*phonos*) and not merely planning (*bouleusis*). His arguments are sound, and accordingly Apollo should be charged with *phonos*. Nevertheless, Harris also recognizes (p. 82 = 400) that 'technically speaking, however, one might also bring this charge [*bouleusis*] against a person who plotted to kill when someone else carried out the murder, although normally in this case one would bring a charge of *phonos ek pronoiias*'.

51. Usually, scholars tend to think that in other Athenian courts speakers were not obliged to 'keep to the point', because digressions and personal attacks on adversaries abounded in the speeches presented. Recently, however, Rhodes 2004 argues convincingly that relevance was formally required in other courts too, although he also admits (156) that 'the Areopagus was perceived to be particularly strict in insisting on relevance'.

52. Which is like the idea of someone's leaving their property in someone else's care, only to reclaim it at a later date (cf. Hdt. 6.86; Pl. *Resp.* 1.331c-332b). We possibly owe this theory to Anaxagoras (fr. 59 A 107 DK).

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53. Cf. *Ath. Pol.* 69.1. Generally, the courts were constituted by an odd number of members so as to avoid ties; however, this could happen in the case that someone suddenly fell ill and could not vote. In the specific case of the Areopagus, the principle would be more useful, since, being made up of ex-archons, its membership was for life and it would never have been possible to control the number of sitting Areopagites.

54. Cf. vv. 754-77. On the other hand, this is equivalent to assuming that the mortals had in some manner condemned the position of Apollo as well and, in the last analysis, that of Zeus.

55. Perhaps Aeschylus was also implicitly criticizing the murderers of Ephialtes, who was killed slightly after the approval of his proposals for reducing the powers of the Areopagus.

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The Legal (and Other) Trials of Orestes

F.S. Naiden

Two Greek tragedies contain trials in which Orestes is the defendant. The legal aspects of one of these plays, Aeschylus' *Eumenides*, are well known. The legal aspects of the other, Euripides' *Orestes*, are not. One recent commentator on *Orestes*, Charles Willink, asked 'Why are three-fifths of the play devoted to Orestes' condemnation to death for the crime of matricide?' but answered his own question by observing, 'Most commentators [speak] in terms of the moral and socio-political issues which they suppose Euripides to have been concerned to "explore".¹ Among these issues are the failings of Athenian democracy, thought to be a feature of the play since the late nineteenth century; legal issues, however, are overlooked.² Another commentator, David Kovacs, asked why Orestes was not allowed to flee, like Homeric or Attic murderers, but like Willink did not give a legal answer to his question.³ A third commentator, M.L. West, has noticed parallels between the play and several Athenian legal proceedings, but West thinks the play is about the conflict between the law and family ties.⁴ He does not answer Willink's and Kovacs' questions. To this writer's knowledge, neither has any other commentator or critic.

For their part, legal scholars have avoided the play. Those writing on Athenian democracy avoid it, perhaps, because of its reputation as anti-Athenian and anti-democratic. But scholars writing on 'political trials' also avoid it.⁵ The difficulties are different for them than for the commentators or other scholars. The defendant, Orestes, does not stand accused of treason or any other 'political' offence, nor has he held any office. The trial occurs in Argos in the Heroic Age, not in Athens under the democracy. It includes a cameo by Diomedes and another by Agamemnon's herald, Talthibius, two Homeric paragons who are not likely to depart so far from the ethos of the *Iliad* that either could symbolize anyone or anything in a 'political trial'.

Eschewing the language of 'socio-political issues' or of a 'political trial', this essay seeks to pinpoint a legal issue in the 'trial' – the presence of numerous parallels to trials in the Athenian assembly. These parallels would have been well known to the audience of Euripides, for they involve famous trials of this kind. More parallels occur during the conversation among Menelaus, Orestes and Tyndareus before the trial.

Interpreted in this way, the trial provides answers to the questions of

both Willink and Kovacs. The answer to Willink's question is that the proceeding against Orestes is not the murder proceeding that might have been expected, and so it is treated at length. This answer dovetails with the answer to Kovacs' question. Because there is no murder proceeding, Orestes cannot go into exile. Deprived of this escape from his predicament, he must turn to the violent reprisal occurring at the climax of the play. The assembly trial serves as a stepping-stone.

This interpretation also adds a chapter to the history of assembly trials. The notorious features of these trials did not escape the notice of contemporary writers or of the Athenian people. In the fourth century, after further illustrations of the same features, the Athenians abolished these trials. For this reform, Euripides can hardly take credit. But his play stands as an example of a dramatic critique of a legal procedure – an entirely human procedure as opposed to the divinely sanctioned procedure found in the *Eumenides*.

This essay has three parts. The first looks at assembly trials as Euripides and his audience would have known them. This part relies on the work of Mogens Hansen, Peter Rhodes and other historians of Greek law. The second part turns to the play. Here the questions asked by Willink and Kovacs offer a starting point.⁶ The third looks briefly at the abolition of assembly trials in the fourth century.

I

Trials in the Athenian assembly may have begun in the archaic period. When Athenian magistrates promised to give safe passage to the Cylonian conspirators, they said, as Herodotus puts it, that the conspirators would be 'legally liable' (or, as Plutarch puts it, that they were to be 'brought to justice'), and since we know of no Athenian courts at this time, save for the Areopagus, the conspirators may have been subject to trial by the assembly.⁷ As this case implies, the charges in an assembly trial would be serious, including treason. The procedure might vary, but one way would be for the assembly to deal with the case from start to finish, without the help of magistrate, council or court. This same way happens to appear in the scene in the *Odyssey* in which the Ithacans assemble and, at the urging of Eupheithes, decide to punish Odysseus for the crime of murdering the suitors. Eupheithes and the seer Halitherses both speak, but no king or other leader takes part, and neither does any council or any panel of judges such as the one summoned to deal with a murder case in a scene on the shield of Achilles in *Iliad* 18. The Ithacans do not vote and their decision is not binding on the entire community, two differences from Athens, but a majority of those present do make the decision.⁸ Another similarity concerns the charge. Murdering 108 suitors is not treason, but is comparably harmful.

Only in the fifth century do attested assembly trials begin. Best attested

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is the trial of the Arginusae generals, which is also the only such trial occurring after the première of *Orestes* – but just two years after, in 406.⁹ Also well attested are a trial and two sets of trials that Herodotus and Thucydides say occur before *ho dêmos* or ‘the Athenians’. The trial is that of Miltiades in 490/89; one set of trials concerns the generals Eurymedon, Pythodorus and Sophocles in 425/4; and the other set of trials concerns some of the mutilators of the Herms in 415.¹⁰ A case of a different sort is one preserved by Lycurgus, who says that *ho dêmos* judged Hipparchus about 480, but who is speaking well over a century after the events on the strength of a decree read aloud in court.¹¹ Also different is the trial of Thucydides himself in 424/3, the venue for which the author does not mention. A *Vita*, however, assigns this case to ‘the Athenians’.¹² Beyond these six cases, the evidence is sketchy, but four more cases are worth noticing in some particulars.¹³ In these cases, the assembly is a possible venue, but so is a court. One of these is the case of Themistocles.¹⁴

The first six cases have several common features. One is negative: they do not begin in any particular way.¹⁵ The Arginusae case began by the assembly’s deposing the generals, presumably by vote, the procedure of *apochreitonia*, and another case, the biggest, involving the mutilation of the Herms, began by means of several denunciations, or *menyseis*.¹⁶ Two cases, that of Thucydides and that of the three generals of 425/4, may begin by public examinations, or *euthynai*.¹⁷ For the remaining two cases, there is no way even to guess.¹⁸ The same is true of the sketchy cases save for that of Themistocles, which began with an assembly decree.¹⁹

A striking common feature is arrest without release. Of the six Arginusae generals who returned to Athens, one, Erasinides, was arrested immediately, and the other five were arrested on the order of the council and bound over for trial.²⁰ In the well-attested cases in Herodotus and Thucydides, one defendant, Miltiades, was arrested not before his trial but afterwards, for failing to pay a fine, but he remained in prison. Since he was fatally wounded in the thigh, arrest before trial may have been superfluous.²¹ In another of these cases, those accused of mutilating the Herms were arrested before trial and bound over.²² In yet another case, that of Eurymedon and the two other generals, we lack information, but in Thucydides’ report of his own case, he leaves open the chance that he fled before trial, and in the case preserved in Lycurgus Hipparchus surely fled before trial. This recourse implies that the defendants would have been arrested and bound over had they remained.²³ The other defendant to mention in this regard, Themistocles, was abroad when charged, and Athenian officials came in pursuit of him, a response confirming this conclusion.²⁴ The sketchy evidence for three other cases includes one defendant who fled before trial.²⁵

Another common feature is that regular procedure was not always followed. In the case of the Arginusae generals, the defendants were tried together, not separately as was normal, and were not given a chance to

present a full case as opposed to a chance to speak briefly at an assembly meeting.²⁶ In the case of Miltiades, the defendant was too ill to speak, but the trial took place nonetheless, by means of *synêgoroi*. The trial of the mutilators of the Herms was apparently not irregular, but the preliminary proceedings – special instructions to the Council, followed by a public panic and a parade of informers – were extraordinary. The rest of the six cases are not irregular, either, but among the four additional cases is that of Phrynichus, in which the assembly decreed that anyone who spoke for the defendant be sentenced to death.²⁷ This case and that of Miltiades show that, besides being irregular, the conduct of the trial might be severe. Certainly it was speedy. None of the cases admits any delay due to procedural concerns. And it was attractive to prosecutors in yet another way: there was no penalty for failing to obtain a fifth of the votes, as in other public cases. This penalty included the loss of the right to bring public cases and a fine.²⁸

These last few features might seem to arise from the nature of the charges. Yet these charges are diverse as well as grave. The Arginusae generals were charged with failing to recover those Athenians who had survived the loss of their ships during a naval battle; in effect, with fatal neglect of duty. Miltiades was charged with deceiving the people, but in the wake of an expedition that he had proposed and led and that then had failed. Nepos glosses this charge as ‘treason’. The mutilators of the Herms were charged with impiety, an offence that members of a commission of inquiry regarded as an attempt to ‘undermine the democracy’, i.e. treason.²⁹ In Thucydides, the author himself is charged with treason and three other generals are charged with taking bribes from the enemy, and presumably with treason also.³⁰ In the remaining case of the six, that of Hipparchus, the charge again was treason.³¹ (The sketchy cases add more treason and ‘undermining’ of the democracy, but no unusual particulars save in the case of Phrynichus, who conducted controversial negotiations with Sparta.³²) These charges might all be characterized as treason or ‘undermining’, but only if fatal negligence, deceit practised on the people, impiety, receipt of bribes and Spartan leanings amount to treason or the like; in other words, if the definition of treason is broad enough to encompass military and diplomatic miscalculations or other errors.³³

The punishments are severe. In four cases, the penalty was death (or death *in absentia*); in one, a fine of 50 talents; in the remaining case, one defendant was fined an unknown sum and the two others were either condemned to death or exiled.³⁴ In the four sketchy cases, death (or death *in absentia*) was the penalty in three, and in the fourth, Phrynichus’ case, the defendant was tried posthumously. In one of the capital cases, the defendant suffered the additional indignity of being denied the right to be buried in Attica, and Phrynichus was denied the same right. Perhaps the same was true of the other capital cases, particularly those involving traitors.³⁵

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As for the arguments made, they survive in just one case, that of the Arginusae generals, for which Xenophon reports three speeches. At the assembly meeting already noticed, the Athenians vote to let the council decide how to try the generals, and after the council considers the matter, Callixenus gives the council's opinion at a second meeting at which he says that the people ought to vote on whether 'the generals did wrong in not rescuing the victors in the sea battle'. A survivor of the battle seconds Callixenus, saying that drowning men told him to complain that the defendants had not rescued those 'who proved themselves to have acted best for their fatherland's sake'. When Callixenus' proposal meets with legal objections, the majority says that it would be 'intolerable ... if anybody prevented the people from doing as they liked'.³⁶ One aspect of these remarks is the charge that the defendants have harmed and also humiliated Athenian heroes and thus Athens itself. Once again, any notion of treason or even undermining has been broadened. Another aspect is the claim that an irregular proceeding is nothing to object to: the people could 'do as they liked'.

Another proposal comes from Euryptolemus, the third and last speaker. He proposes that the people allow the defendants to speak, as provided by a resolution moved earlier by Cannonus, or, failing that, that the people set another day for a trial – a trial in court on a charge of sacrilege. There the defendants would again have a chance to speak, and also be tried one by one, and not together. Euryptolemus is seeking to remove irregularities and also to slow down the proceeding and introduce the possibility of a penalty for an unsuccessful prosecutor, or, as he summarizes, to have the people 'behave piously, according to law'. Changing his tack, he later argues that the defendants were powerless, not disloyal, and that in any event they defeated the enemy, and that the people ought to crown them.³⁷

Here is an attempt first to keep a trial in the assembly from having some of the usual characteristics of such a procedure, and second, to meet the accusers on their own ground, that of the assembly itself, and argue that the assembly should not forget the criterion of military success and should treat the defendants accordingly. The first of these two attempts may not seem consistent with the second, and this may be one reason why the assembly rejects Euryptolemus' proposal. Yet this apparent inconsistency speaks to the paradox of the situation. The assembly is conducting a trial, but without the usual procedures. At the same time it is passing military and political judgment on the defendants. It is thus getting the worst of two worlds: legal severity without legal safeguards and political evaluation without a focus on the larger military issue, in this case, the victory at sea.

The recognition that the assembly might confound legal and political considerations is not original with Xenophon. In Thucydides, the issue arises in regard to the punishment to be given to prisoners taken after the repression of a rebellion on Mytilene in 427. Arguing for clemency for most

of the prisoners, Diodotus observes, 'We are engaged not in a legal proceeding ... so that justice may be done, but in a political deliberation ... so that advantage may be gained'. Diodotus means that his opponent, Cleon, who has argued against clemency, has made the mistake of supposing that an issue of guilt or innocence was appropriate for a meeting of the assembly. Cleon would thus be making the mistake of those who accuse the Arginusae generals, whereas Diodotus would be giving a clearer answer to him than Euryptolemus does to the Arginusae accusers. The reason that Diodotus is clearer is that Euryptolemus switches from legal objections to political (or military ones), but Diodotus sticks to the latter. There is an emotional difference, too. Euryptolemus, by ending with the suggestion that the defendants be crowned, is exhorting his listeners. Diodotus, in contrast, calls for calm.³⁸

The Mytilenaeen debate, admittedly, concerns prisoners taken during a siege, not defendants arrested according to legal process. The charge is not treason, for the prisoners are not Athenian, and the penalty proposed, although capital, is not compounded by the indignities visited on Phrynichus. Yet the threat of a confused procedure is the same, and Thucydides fixes on it, establishing a topic for Xenophon to notice and make use of.

Xenophon and other Athenians did not, however, need to look to Thucydides for a precedent. The resolution of Cannonus mentioned in Xenophon provided that those who 'wronged' the Athenians might be arrested and tried in the assembly.³⁹ This resolution would account for two salient features in the six cases – arrest without release and broad charges – and it may be consistent with the other features. If it were consistent with them, it would provide for a kind of legal proceeding different from most. Most proceedings began in some particular way, often by presentment to a magistrate. Most did not include arrest without release; not even murder proceedings did. Most also gave the defendant a chance to obtain a delay by offering some excuse and having another party swear an oath that the excuse was genuine.⁴⁰ Other procedures were slower; murder might take four months.⁴¹ They imposed the usual penalty on any prosecutor who failed to gain a fifth of the votes. As for the charges made under this kind of proceeding, they would have been striking, too. Athens had other proceedings for all these charges, and, as Christopher Carey has shown, they mostly did not have more than one proceeding for any given charge.⁴² According to this norm, an unsuccessful commander would be subject to *euthyna* followed by a trial in court, not an assembly trial.⁴³ By the same token, an unwise legislator would be subject to a *graphê paranomôn*, a public suit accusing him of proposing unconstitutional measures, and not to a charge of 'undermining the people'.⁴⁴

The last feature to consider, punishments, is more of the same. Most proceedings did not provide for the death penalty.⁴⁵ Many also had fixed penalties. Hardly any provided for indignities such as burial outside Attica.⁴⁶

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Most of all, they were heard in court, not in the assembly, and so they guaranteed a secret ballot.⁴⁷ They also belonged under the umbrella of the dicastic oath, which required that the *dikastai* follow the law, listen to both sides, and attend to the matter at hand. No oath required anything of any assembly members other than those who were also Councillors, and even then the oath only required that they 'take counsel according to the laws' and perhaps also that they not introduce illegal measures.⁴⁸

All this would hold true were the resolution of Cannonus followed. In the Arginusae case, the Athenians violated this resolution. Nor is the record any less striking if the same resolution, valid in 406, was not valid long before that date. In that circumstance, the assembly trials from Miltiades through the mutilators of the Herms (or through Phrynichus in 411/0) may have unfolded not according to any particular decree, but *ad hoc*.⁴⁹

An unusual, even improvised procedure and a string of infamous cases, from trying wounded heroes to trying corpses: these were materials for a playwright.⁵⁰ Let Aeschylus have his charter myth for the Areopagus. Euripides would look here.

II

When Willink noted how long the trial and pre-trial scenes are, and Kovacs noted that Orestes could not flee like a murderer, they touched on only two of the many oddities in the first three-fifths of the play. Some appear before the assembly scene, some during it.

Seven years after fall of Troy, Menelaus, returning with his wife, has landed near Argos. When he reaches the palace of his brother, he finds that Agamemnon is long since dead at the hands of Clytemnestra and her lover, Aegisthus, and that Orestes has killed those two only six days before. That is odd, and it is also odd that Orestes has not given the Argives a feast in connection with the burial of the pair, as Homer says, and has not ascended the throne.⁵¹ Far from it: the Argives shun Orestes and have placed him under house arrest and virtual quarantine. The situation also differs from the one in the *Choephoroi* and the *Eumenides* (and apparently the *Iphigenia in Tauris*) in which Orestes flees Argos immediately after killing his mother.⁵²

On what charge have the Argives arrested him? According to Orestes, it is murder (756). Yet Orestes murdered Aegisthus, and is not charged for it. His coadjutor, Pylades, helped murder both Clytemnestra and Aegisthus, and is charged with neither. The unnamed accusers have proposed death by stoning, a penalty commonly imposed on those guilty of greatly harming the community, not those guilty of murder.⁵³ A statement by Tyndareus, representing Clytemnestra's relatives, also militates against a charge of murder. Tyndareus approves of the custom of allowing murderers to flee, but will not allow Orestes to do so, saying that Orestes did not allow Clytemnestra to flee (512-15). His concern is not murder, but the

violation of this custom by Orestes.⁵⁴ Orestes, defending himself, does not deny the murder, but instead justifies it as a boon to Greece (565-87). One reason is that when killing his mother he rejected an unworthy female suppliant, and thus discouraged other unworthy women from supplicating (566-70). He is protecting the norms of supplication, a practice that should not aid the unworthy.⁵⁵ Another reason is that she betrayed Greece's commander-in-chief, and so she died a traitor (571-5). Just as Tyndareus describes Orestes as a violator of a *nomos*, Orestes describes himself as a defender of a *nomos* and of the community.

But the greatest difference between the situation in this play and in other works, especially the *Eumenides*, is that this play refers to two assembly meetings. The first occurred before the action begins. At this meeting, the Argives decided to place Orestes under arrest. As shown by lines 756 and 884-7, they left the issue of guilt or innocence to a second meeting. They also left the issue of the manner of execution to this meeting, the one that the play includes. This pair of meetings has no Homeric or tragic parallel. It might seem to resemble the two phases of an Athenian trial. It does not. In an Athenian trial, guilt or innocence is the subject of the first phase, and not one of two subjects in the second phase. This pair of meetings is anomalous.

Orestes, of course, wants Menelaus' help, but Menelaus temporizes. Why does Orestes not have the freedom of movement that would let him go and obtain purification, like other killers (429)? Moments later, when Orestes turns from denouncing suppliants to supplicating himself, Menelaus rejects him. Menelaus has good reason to do so. If Orestes cannot obtain purification, he is guilty of murder in the strongest sense of this word, *phonos ek pronoias* or 'deliberate homicide'. Yet Orestes insists that he committed no crime. The issue of guilt or innocence remains unresolved, as does the issue of punishment.

So far, the expected murder trial has given way to house arrest, an unresolved charge and punishment, and some talk of treason and moral norms. More of the same appears in the assembly scene. This scene opens with a herald's invitation that any Argive speak – an invitation modelled not on any judicial practice, but on the practice of the assembly in Athens.⁵⁶ The issue of guilt being unresolved, the speakers should address it, but most do not. Some praise the killing of Clytemnestra, but do not say whether Orestes is innocent or guilty. Others, beginning with the first speaker, Agamemnon's personal herald, Talthybius, say nothing about the issue. Talthybius instead says that 'Orestes has established laws about parents, and these laws are not good' (892-3). The next speaker, Diomedes, lord of nearby Tiryns in the *Iliad* but an Argive citizen here, addresses the second issue, that of the manner of punishment. His view: a punishment of exile, not death (899-900). But most do not agree with Diomedes (901). The next speaker, much less distinguished, is for death, but he does not make an argument (914-15).

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The longest remarks are those of the following speaker, a common man's Diomedes, praised by the messenger as a yeoman farmer. His proposal, to honour Orestes, is another echo of assembly procedure:

He said the town should crown Orestes, Agamemnon's son, because he chose to avenge his father by killing a godless, wicked woman. She was making it impossible for men to bear arms or fight abroad. Those left at home would perish. Wives would [attack and] maim them (923-9).

The messenger adds, 'Good citizens thought he spoke well'. When Orestes comes next (and last), he amplifies these themes:

I killed my mother to defend you. If it is proper for wives to kill their men, you will all be dead soon enough, or be women's slaves. ... If you have me put to death, the law is undone, and not one of you would be dead too soon (934-7, 940-1).

Little moved, the assembly votes to let Orestes commit suicide rather than be stoned. We should not say, however, that they have shown leniency to a murderer. They have evidently accepted the claim that Orestes has established bad laws and rejected the claim that he has preserved good ones or has preserved the fighting power of the community. Perhaps they have also accepted Tyndareus' claim that Orestes is a hypocrite, and should not enjoy the laws' protection. The messenger's view of them is grim: they form an *ochlos*, a mob (884).

The *Eumenides* of Aeschylus would suggest that this failure to try Orestes properly might find correction in his future place of refuge, Athens, for in Aeschylus Athens conducts a paradigmatic murder trial of Orestes. But this play rejects this Aeschylean precedent. There is a trial, or *dikê*, in Athens, but those casting their pebbles about the fate of Orestes are the Olympian gods, among whom there is no tradition of judicial procedures differing from council meetings or other gatherings. This is not a paradigmatic trial (1649-53).

Yet in the light of the ten assembly trials of the fifth century, the oddities in this scene vanish. First, it is not a trial, but a proceeding conducted by the populace as opposed to a judicial panel. It did not have to begin in any particular way; in fact, it began in conformity with an assembly decree. Although no one says exactly when the meeting occurred, Orestes killed Clytemnestra only six days before the second meeting, the one to determine his sentence, and so little time has passed. Orestes apparently had no chance to win a delay. Instead he has been arrested. These are all features of Athenian assembly trials, notably the first and the last.

The charges also suit an assembly trial. Orestes stands accused of taking the law into his own hands (Tyndareus' claim) and of establishing bad laws about parents (the claim during the assembly). Since the 'laws'

about parents are divine as well as human laws, he stands accused of a kind of impiety.⁵⁷ Of these three counts, taking the law into one's own hands was, in a general sense, the charge against Phrynichus, the supporter of Sparta. Impiety was the charge against the mutilators of the Herms. Murder, however, is not the charge, save in passing. Nor do any familiar distinctions among kinds of murder appear. No one says that Orestes killed deliberately or unwillingly or in self-defence.⁵⁸

Orestes' defence also suits an assembly trial. He says that he aided the Greeks, prevented the debasement of supplication, and punished a traitor. These statements amount to rebuttals of any charge that Orestes has harmed the Greeks, acted impiously, or committed treason. Harming the Athenians was the charge against Miltiades, Thucydides and the three generals of 425/4, impious action was the charge against the mutilators of the Herms, and treason was the charge against Themistocles as well as five generals just named. Later, at the meeting, Orestes and others argue that Orestes upheld the law and that he kept Clytemnestra from harming the Argive army. The second contention amounts to a rebuttal of any charge that Orestes harmed the army. Miltiades, Thucydides and the three other generals again offer a parallel.

Charges aside, the audience might have noticed that Orestes, like Miltiades, was prostrate, that he was an aristocratic target, like Miltiades or Hipparchus, and that trial took place in Argos, a sometime Athenian ally. (M.L. West, searching farther, compares the crown proposed for Orestes to another, the crown given to the murderer of the posthumously convicted Phrynichus.⁵⁹) The powerlessness of both Menelaus and Diomedes would remind the audience that this was not a Homeric murder resulting in exile. But they mostly would have noticed what posterity has noticed: placed under house arrest and condemned to death, Orestes has but one recourse, taking hostages. If the assembly remains obdurate, he will have to kill these hostages. For there is no other authority that might respond. The throne is vacant, and no council of elders makes an appearance. This situation distinguishes the play from the Aeschylus' *Agamemnon*, the only other work to deal with the aftermath of the murder of Clytemnestra as opposed to the murder itself.

Nor could the audience fail to recognize an echo of the resolution of Cannonus. As that resolution would provide, Orestes stood trial in the assembly on a charge of wronging the community. More striking (but of course unrecognized) were several premonitions of the trial of the Arginusae generals. They faced a proceeding in which they were found guilty and likewise condemned to death. So did Orestes. They were condemned together, and so were Orestes and Electra. And they occasioned a debate about the proper course of action. So did Orestes. Xenophon called the assembly meeting that condemned the generals an *ochlos*, the very word used by the messenger. Euripides would seem to have put this word in Xenophon's mouth (although Thucydides used it of the Athenian assembly, too).⁶⁰

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To resume: the trial scene does not showcase the social and political ideas that Willink reports readers have found there. The reason for Orestes' being put under house arrest, the act which is the starting point of the affair, is the assembly's power to take such action, or, to put it another way, the assembly's having no obligation to let Orestes flee. It is a legal power, not a social or political idea. The reason for the multiform charge, with its emphasis on moral examples and social order, is related to this legal power, for the power to place the defendant under arrest arises only when the charge is both serious and communal, such as 'undermining the people' or 'wronging the people'. Nor does the trial showcase any weakness in democracy, be it Athenian or Argive. Arrest without release and broad charges with capital punishment occurred under the Thirty, not just under the democracy. The popularity of the play during late antiquity and the Byzantine period also points away from any criticism of democratic weakness. Readers in these periods would have been interested not in any such criticism, but in the consequences of the interregnum in Argos. Were the throne occupied, the king might have a seat at the front of the assembly, amid the elders, as in *Odyssey* 2, or he might convene the gathering, as in *Iliad* 2, where Agamemnon leans on a sceptre given to his grandfather by Zeus.⁶¹ There would be no question of ignoring him, as happens to Diomedes, and Orestes, the heir apparent, might have fared better. But here, as nowhere else in tragedy, an assembly gathers without a king to guide it.

The late antique and Byzantine reader perhaps focused on this topic. We may focus on the miscarriage of justice, and ask whether the Athenians responded to it, either at the end of the fifth century or later.

III

In the difficult years following the play's première, assembly trials continued. In the fourth century at least eight more occurred, most on charges of treason, but one on a charge of bribe-taking and two on charges of treason and peculation.⁶² Like fifth-century trials, these trials began variously, in one case by *euthyna*, in one by *apochheirotonia*, in others by some unstated procedure. One was probably a public report, or *eisangelia*, for Demosthenes mentions it in connection with another case that surely was, but ended up in court.⁶³ One of these eight cases is the subject of an extant speech, Lysias 28.

But in the middle of the fourth century came reform. Two elements of the law changed. In the 330s, apparently, prosecutors failing to obtain a fifth of the votes became liable to the same penalties as in public cases.⁶⁴ In the late 360s, cases ceased to go to the assembly. Instead all went to *dikastêria*.⁶⁵ A third element, the charges, may also have changed. Hyperides, writing in the 330s, gives the impression that the charge of 'undermining' would not encompass several fifth-century particulars, no-

tably impiety. 'Undermining' might be subject to some stretching, as Hyperides himself complains, but Hyperides and other writers of defence briefs could challenge this process, claiming it had gone too far. Such challenges do not appear in any of the extant fifth-century cases.

So we can imagine a luckier Orestes – would he be a fourth-century Orestes, speaking, as Aristotle says, in a way that is not *politikôs*, not 'community-minded'? – protesting that he should stand trial for murder, not for 'establishing bad laws'.⁶⁶ We can imagine Diomedes prevailing. Nor need we imagine any particular procedure. Orestes need only be allowed to flee, as he does in other plays. But in order to imagine a different play we must also imagine a different legal situation. The fourth-century reform makes it easy to do so.

This reform is all the more remarkable in light of comparable law in the United States today. In that country, assembly trials of federal officials occur in the US Senate, a deliberative body of elected representatives. Similarly, trials of state officials sometimes occur in the Senate of the relevant state. In the US Senate, the charge is 'high crimes and misdemeanors', and in the state Senates it is even broader.⁶⁷ Before the trial, the House of Representatives or a comparable state body conducts a preliminary hearing known as an impeachment. Admittedly, an Athenian assembly trial differs from this procedure in several respects. It may not be a trial of an official, it does not concern (or expand) a category of 'high crimes', and unless the council and the assembly both participate it does not involve two deliberative bodies comparable to the US Senate and House. Nonetheless, Athenian assembly trials do resemble this procedure in other respects. The target is often a powerful member of the executive branch, the procedure is unusual, not to say irregular, and the charges may be broad, if not stretched. Yet the most important American procedure, the federal one, has never undergone any reform. To this writer's knowledge, only one American lawmaker, James Madison, either deliberately or accidentally followed the Athenians' lead by proposing to assign all trials of federal officials to courts.⁶⁸ He met with no support. The main obstacle was the desire of other lawmakers to protect the legislature against the executive branch of the government. The Athenians, who put so many of their generals on trial, might have approved of this desire. Madison also faced another obstacle that a Greek, at least, would have thought important. He could not bolster his case by citing any native poet who had written on the subject.

Notes

1. Willink 1986, xvii-viii. A later survey: Porter 1994, 1-41.
2. E.g. lines 696-703 are attributed to E's dissatisfaction with Athens by Wedd 1895, *ad loc.* Further remarks: Willink 1986, xiii-xv.
3. Kovacs 2002, 400-7.

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4. West 1987a, 32. For West's views, see also West 1987b. The most recent monograph, Holzhausen 1983, envisions an interplay of 'friend and foe, reprisal and rage' (119) to the exclusion of legal issues.

5. Bauman 1990, Hashiba 1987.

6. Hansen 1975, giving a convenient conspectus of the evidence for all the trials in an appendix cited below as 'Hansen #'; Rhodes 1979, with bibliography at n. 2.

7. Hdt. 5.71, *hypengyous*; Plut. *Sol.* 12.1, *epi dikêi*. Th. 1.126 gives no particulars. Rhodes 1979, 103-4, thought that the Areopagus heard treason cases down to 462. The contrary view: Ostwald 1955, 113.

8. *Od.* 24.420-69. A majority with Eupheithes: Heubeck et al. 1988-92, *ad* 24.403-6.

9. Hansen #66 (Xen. *Hell.* 1.7.16-34, Diod. Sic. 13.101.5-102).

10. Hansen #2 (with venue reported at Hdt. 6.136.1); Hansen ##7-9 (with venue reported at Thuc. 4.65.2); and Hansen ##43-60 (or some unknown number among them, as some of the defendants fled to avoid trial; venue reported at Thuc. 6.60.4).

11. Hansen #3 (Hipparchus, with venue reported at Lyc. *Leocr.* 117). Doubting the authenticity of the decree: Rhodes & Osborne 2003, 444, listing this decree among others that do not 'seem certain to be historical'.

12. Hansen #10 (as at Thuc. 5.26.5). 'The Athenians': Marc. *Vit. Thuc.* 55.

13. Hansen #62 (Phrynichus), #63 (Aristarchus), and #64 (Gylon).

14. Hansen #4 (as at Plut. *Them.* 23-4). As noted by Rhodes 1979, 104, cases in the early fifth century (here, Hansen ##2-4) may have gone before a kind of court that was nearly the same as *ho dêmos*. The procedure, however, may still have varied; the following pages try to show that in the ten cases at issue the procedure was distinctive.

15. Hansen 1975 holds that they all begin by *eisangelia*, but this term appears in only one of the ten cases (Hansen #4). Plutarch in the relevant passage, *Them.* 23.1, may be using the term *eisangelia* carelessly. Thucydides at 1.135.2 and 1.138.6 says nothing about this aspect of the case.

16. Hansen #43-60. *mênnyseis*: And. 1.14-17, 1.34-5, 1.61-4. *eisêngeilen* appears at 1.14, but only in regard to denunciations.

17. Hansen #7-9 and #10, as he suggests.

18. Hansen #2 (Miltiades), #3 (Hipparchus).

19. Craterus *FGrH* 324 F 11 at Plut. *Them.* 23.1; for the term *eisangelia* in Plutarch, see n. 15 above.

20. Xen. *Hell.* 1.7.2, 1.7.3.

21. Plut. *Cim.* 4.4. Pl. *Grg.* 516d does not say whether he was imprisoned before or after.

22. Andoc. 1.34.

23. No information: Thuc. 4.65.3. Fled: Lyc. *Leocr.* 117, *ouch hypomeinanta tèn krisin*.

24. Plut. *Them.* 23.6.

25. Aeschin. 3.171 (Gylon).

26. Xen. *Hell.* 1.7.8-11, 1.7.34.

27. Lyc. *Leocr.* 113.

28. Andoc. 1.33; Harrison 1971, 83, holds that the punishment was even more severe, for it included, he argues, a prohibition on appearing in both public and private suits. On the penalty see Harris 2006, 405-22.

29. Deceit: Hdt. 6.136.1. Gloss: Nep. *Milt.* 7.5. Dissolution of the democracy, i.e. *katalysis tou dêmou*: Andoc. 1.36.

30. Marc. *Vit. Thuc.* 55; Thuc. 4.65.3, where no other charge is mentioned.

31. Thuc. 1.138.6 (Themistocles), Lyc. *Leocr.* 117 (Hipparchus).
32. Lyc. *Leocr.* 113 (treason of Phrynichus), Xen. *Hell.* 1.7.28 (treason of and 'undermining' by Aristarchus), Aeschin 3.171 (treason of Gylon).
33. A different view, holding that a fifth-century law of *eisangelia* could account for these diverse charges: Hansen 1975, 9-21. A cautious, nuanced view holding that such a law would need 'consolidation': Rhodes 1973, 107. A view proposing a legislative history to the effect that such a law was changed and narrowed in 411/0: Thalheim 1902, 342-3. A similar view, but holding that the law was changed and narrowed in the mid fourth century: Lipsius 1905-15, i.192-4. The same notion, but earlier: MacDowell 1978, 184-5. The most recent discussion, with additional bibliography: Stein 1998.
34. Death: Hansen #3, #10, #42-60, #66. Fine: Hansen #2. Death or exile, and fine: ##7-9.
35. Thuc. 1.138.6, Lyc. *Leocr.* 113-14.
36. Xen. *Hell.* 1.7.9-14.
37. Xen. *Hell.* 1.7.20-2, 33.
38. Thuc. 3.44.4, 48.
39. Xen. *Hell.* 1.7.20, especially 'wronged', *adikein*, and 'bound', i.e. under arrest, or *dedemenon*.
40. Hyp. *Eux.* 7.
41. Antiph. 6.42.
42. Carey 2004.
43. Or, as Hansen 1975, 46-7, would argue, an *euthyna* followed by *eisangelia* procedure, one that, to judge from the examples in his appendix, would usually end in a court and not in the assembly.
44. Lyc. *Leocr.* 7. Same point, other examples: Hyp. *Lyc.* 12-15.
45. Limited mainly to homicide; treason; theft, burglary, kidnapping, and the like; and impiety: see Gernet 1981.
46. I.e. *hierosylia* and treason, as at Xen. *Hell.* 1.7.22 with Harrison 1971, 59.
47. Hansen 1975, 16-17, with refs. But in one case heard in the assembly, that of the Arginusae generals, balloting was secret (Hansen #66 with Xen. *Hell.* 1.7.9).
48. A short description of the dicastic oath: Harris 2005, 55; and of the bouletic oath, Rhodes 1972, 194-9, esp. 194 n. 13.
49. It was still valid in 392, when Aristophanes alludes to it (*Eccl.* 1087), but in terms that shed no light on Xenophon.
50. Similar view: Cantarella 1991, 80, although she says that an assembly trial was 'juridically illegitimate'. Cf. Barkan 1936, 44, holding that the Argive assembly meets as a regularly constituted court for matricide.
51. *Od.* 3.304-12.
52. Eur. *IT* 79-84.
53. Cantarella 1991, 73-4; at 78 she cites *Orestes* as an example.
54. It is irrelevant whether Tyndareus is thought to refer to Homeric practice, to the law of Draco, or to fifth-century practice, because all permitted exile for some murderers and because, moreover, Tyndareus thinks that Clytemnestra should have been exiled. A different view: Holzhausen 2003, 52-3, arguing that the law of Draco did not permit exile for 'premeditated' murder such as Clytemnestra committed.
55. Naiden 2006, ch. 3.
56. As noticed by Willink 1986, *ad* 884-7.
57. Xen. *Mem.* 4.2.18-24; discussion in Harris 2004, 21-3 = 2006, 44-7.
58. I.e. *phonos ek pronoias*, *akousios*, or *dikaios*. Cf. Gagarin 1981, 126 n. 40,

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holding that Orestes' killing Clytemnestra might be *phonos dikaios* if considered tyrannicide. The killing of Aegisthus is surely tyrannicide, explaining why the Argives do not prosecute Orestes for this act.

59. West 1987a, *ad* 411.

60. Xen. *Hell.* 1.7.13, when 'the mob' insists that the people be allowed to do as they like; Thuc. 4.28.3.

61. *Od.* 2.14, *Il.* 2.109.

62. Hansen #73 (esp. Lys. 28.9 for the venue; a charge of treason and peculation); #75 (esp. Dem. 24.134; a charge of treason); #76 (ditto, a charge of bribe-taking); #80 (esp. Dem. 49.10; a charge of treason); #81 (ditto; charge unknown, but treason is likely in the light of the defendant's connection with Hansen #80); #82 (esp. Dem. 29.31; a charge of treason and peculation); #85 (esp. Aeschin. 2.30; a charge of treason); #86 (esp. Aeschin. 2.30 with Arist. *Rh.* 2.1380b, as noted by Hansen; a charge of treason).

63. *euthyna*: #73 with Lys. 28.5. *apochirotonia*: #80 with Dem. 49.9. *eisangelia*: #74 with Dem. 19.180 and Hyp. *Eux.* 1.

64. Hansen 1975, 29-31.

65. Hansen 1975, 52.

66. See Arist. *Poet.* 1450b. In this passage, however, the alternative to speaking *politikôs* is speaking *rhêtorikôs*. This is not the same as the alternative to speaking about a communal matter such as treason being speaking about a private matter such as murder. The *rhêtorikê technê* comprehends both kinds of matters (*Rh.* 1.1373b). Literature on *Poet.* 1450b7: Gudeman *ad loc.*

67. E.g. 'malfeasance in office' in the constitution of Virginia, language present since the first constitution of that state, written in 1777. Broader even than the federal language, this phrase is typical of state constitutional provisions for trials of officials. See Libonati 2006, 39.

68. Jefferson 1950-, ii.591-2. Background: Hoffer & Hull 1984.

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Euripides' *Orestes*: The Chronicle of a Trial

Maria de Fátima Silva

Staged on the fiftieth anniversary of the *Oresteia*'s outstanding success (in 458), Euripides' *Orestes* was an innovative re-reading of a popular myth during a particularly sensitive moment in the life of Athens and Greece, as well as a homage to Aeschylus. In his famous trilogy, Aeschylus celebrated in the form of a play the foundation of a balanced and humanistic justice that only a city undergoing civilizational and cultural growth could establish. In its project, Athens tried to find an answer to violence punished in the talionic tradition, with a new criterion that would be able to ensure social harmony, in a pedagogical way. Therefore the enlightened Athens responded to the series of crimes that traditionally had been committed in the house of Mycenae with the foundation of a court. This court is presided over by the patron goddess of the city, accompanied by its best citizens, who have the capacity to judge and condemn, or acquit, a defendant whose hands have been sullied with blood, by analysing the act and the reasons that led to it. Thus an institution was created which was able to acquit Orestes of the matricide despite the gravity of his crime. Nevertheless, this new institution was able to stop a chain of violence and bloodshed, bring about a more balanced, fairer social order, and put into practice an exemplary justice.

The fifty years that elapsed between this triumph of the theatre and society and the year which welcomed Euripides and his production, *Orestes*, which we aim to analyse here, was a time of experimentation and evaluation for Athens. In its fifty years of existence, what proofs of success had this rigorous, but tolerant and merciful, justice, built by gods and men in a transcendental universal harmony, shown in a society that prided itself on its civilizational achievements? What testimonies can be found in *Orestes* to describe how the Athenian justice system was actually run, to support its merits and to show the citizens' opinion of it? The task that Euripides sets out for himself and for us is not a small one: to understand the practice of justice, its criteria, games of influence, procedures and results, although within the context of a work of fiction. One must recognise that to understand the core of the litigation and the literary treatment of it is also to ponder the role of judicial order in the pacification or exacerbation of social conflicts, at a time noted for instability and crisis. Euripides' plays are an expressive repertoire of this problematic area.

The poet concentrates on two homicides. According to some opinions expressed in the play, these were acts of the utmost seriousness that could nevertheless be stratified. First is Clytemnestra's adultery, which resulted in the murder of her husband; second is the matricide – arising out of a duty to seek vengeance. For the *oikos*, as well as for society in general, adultery is, in itself, a reproachable crime with more civil consequences than ethical ones. It becomes even more serious when the marital betrayal takes place at the heart of noble families, who should be the models of social respectability (see *Hipp.* 407-12). In the tradition widely spread by tragedy, both Tyndareus' daughters are the perpetrators of marital betrayal, which brings their fellow citizens serious consequences, and which dishonours their family. Helen's escape to follow a seducer resulted in a conflict of unimaginable proportions – the Trojan War, which remained in tradition as the paradigm of great human conflicts. Although prior to the situation which is the main theme of *Orestes*, Helen's adultery is viewed in two different ways in the play: 'error and crime' (ἀμαρτίαν ... ἀδικίαν τε, 649-50) committed by her, as opposed to Agamemnon's 'mere' mistake when he was called to amend the consequences (ἔξαμαρτῶν). Here we can clearly see the double degree of responsibility – the same responsibility that is demanded by decency and by prudence and the one that is given by law and therefore also punishable.¹

Euripides calls greater attention, however, to Clytemnestra's adultery. The poet typifies a social context close to the one at the time of the production of the play, as a consequence of the husband's being away at war (572-5): 'that husband, who left the house for war to defend the interests of the whole of Hellas at the head of the army, was betrayed by her because she did not keep her bed intact'.² This circumstance increases the weight of the adultery because the collective consequences of this act went far beyond the family environment. It is demoralizing behaviour for the great warriors and it damages the interests of the city. Moreover, there is a certain complicity involved in this act of betrayal, if one takes into consideration that the honour of the brave men, kept away from home by war, is brought into question by other men, who dare to trade the honourable service in the name of the homeland for the comfortable cowardice of the rearguard. Not only do they surrender to useless and reproachable slackness, but they also allow themselves to invade houses and corrupt the wives of the heroes that left for war (926-9).

The famous episode of the palace at Mycenae holds yet another last outrage for those who, despite the risks, went away to protect higher interests: the death of the husband, and general, at the hands of the adulterous woman. Contrary to Aeschylus' version in *Oresteia*, in *Orestes* Euripides puts less emphasis on the analysis of the motivations behind the marital crime and focuses solely on its consequences: the murder of a spouse,³ and also an attack against a father, whose children and heirs become victims, too (193,⁴ 196-7). From this point of view, Orestes' assess-

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ment of Clytemnestra's behaviour in front of Tyndareus is particularly meaningful (576-7): 'When she became aware of her own guilt (ἁμαρτοῦσ'), she did not punish herself (αὐτῇ δίκην ἐπέθηκεν),⁵ but rather punished my father with death in order to escape from her husband's justice'. In an unstoppable crescendo, this error demanded another error, just as the irresponsibility and the attempt to escape punishment trigger increasingly more serious actions. What had started out as adultery at a more personal level evolved into an attempt against the *oikos*, affecting the children in its consequences.

Such behaviour is the target of a chorus of censorship, starting with that of the closest family members with particular relevance to its indirect victims. Electra refers to it as a sad attack *contra natura* in its unusual and useless violence (μέλεον ἀπόφονον, 192); and Tyndareus regards it as the most shameful of all behaviour (αἰσχιστον ἔργον, 498). The demand for a corresponding punishment also seems to be consensual, otherwise tolerance will become an incentive to trivialise such extreme behaviour (569-70). Orestes finds encouragement in this disapproval of the adultery to become the avenger. Thus the heir of the household and of the victim's possessions points an accusing finger at the adulterers and must punish them. In Orestes' mind the objectives of the retaliation are clear and focus on all the people implicated in the murder (561-3): Aegisthus, the traitor and the lover, deserved above all a death involving physical violence (κατέκτειν'), while Clytemnestra was to have a type of ritual death, like the person who is burned in the very tomb of the victim of her crime (ἔθυσσά μητέρα), so as bring justice to his father and the brutal way he was murdered (τιμωρῶν πατρί). With this exemplary retaliation, Orestes was also securing the social *nomos* that was endangered by behaviour which resulted from the unpunished anarchy among the families (570-1). Driven by his personal hate and by the belief in the legitimacy of his action, Orestes dared to kill his own mother (μισῶν δὲ μητέρ' ἐνδίκως, 572).⁶ Nevertheless, and despite its motives, the matricide was still a terrible and impious act (*anosia*, 286, 374, 563, *deina*, 571), which no one could approve of (30, 819-24). It is therefore a homicide which can be placed in the double category of 'intentional' and premeditated homicides, but which Orestes wants to defend as a 'legitimate' act.⁷

Another designation for matricide seems to place it under the powers of the courts, just like marital homicide. μητρὸς ... φονεὺς (74), μητροφόντης (479), μητροκτόνος (587, 833) are the designations for the author of the biggest of crimes – the one that targets the progenitors themselves (831-3, 891-3). Menelaus is shocked at the technical nature of this vocabulary, without euphemisms, and at the cold-blooded and peremptory confession of his nephew – 'I am my mother's murderer', 392. Instead, the always ambiguous character of the Atreid would ask for discretion in his words. In general, matricide is considered to be more serious than the homicide of a husband (505-6).⁸ Not only does it cause repudiation in human nature

itself, but it also harms all social codes: the rigorous legality (τὸ δίκαιον, 494) and the cultural practice that reigned in all of Hellas (ἐπὶ τὸν κοινὸν Ἑλλήνων νόμον, 495).

Despite the repugnance caused by the matricide, Orestes' crime also carries tremendous ambiguity. For the Atreid prince, killing his own mother was not a gratuitous act against his progenitor, but a gesture of vengeance for his father's homicide. On the one hand, this act was fair, but on the other hand, it was still unacceptable in a community looking for a wise and peaceful sociability (194). In this chain of violence lies the difficulty of judging the crime. If it was necessary to commit an act of extreme violence to demand justice, then maybe the responsibility of the matricide has to be taken away from its perpetrator and given to the system, which is uncivilized and in need of renewal, and so perhaps the practice of justice would find its appropriate paradigm. The hesitation in all those who witness the case at the time of the reading of the verdict is insistently stated by the people who are more directly targeted, the victim and the defendant. At the time of Orestes' attack, Clytemnestra let out a scream for prudence and denounced the abhorrence of the imminent matricide, which could not be redeemed and justified by the need to avenge the memory of his father (827-30). After this, Orestes himself confesses to having the same dilemma (546-7): 'If I am impious (ἄνόσιος) for killing my mother (μητέρα κτανών), I am also merciful (ὄσιος) for having avenged my father (τιμωρῶν πατρί)'.⁹

The play displays a series of personal and spontaneous reactions to this crime that shook sensitivity and the collective interest to the extent that judicial regulation was needed. Like a mirror of a generalized conscience, the agreement between the various levels of judgment confirms the wisdom of a code that must regulate the workings of a society. The instinctive repugnance triggered in every citizen by the maternal bloodshed corrodes Orestes from the inside. Despite the arguments of legitimacy he pleaded in his favour, when questioned about the reasons for the physical weakness he displays, the murderer of a mother is the first to condemn himself in the court of remorse (396): 'I feel the horror of my act'. Like an echo of various consciences, 'public opinion' promotes the same judgment. 'For everyone without exception', matricide is a repugnant act (30), which demands the social isolation of the person accused of it right from the beginning (428). Therefore Athenian law cannot forget its social and political context and is still directly dependent on the collective judgment, which is based on several personal opinions; in J. Grethlein's¹⁰ opinion, law was not an autonomous segment of reality and was deeply intertwined in political issues.

However, the collective organization, which a city in progress establishes, tends to express, through regulation, the need for a trial that assesses the responsibility of the act in all its inevitable shades and declares the corresponding sentence. Here again, one should note that

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Athenian law places more emphasis on proceedings rather than on substance. Before Athens was able to regulate the crimes of blood in its courts – a conquest highlighted in Aeschylus' *Oresteia* – the accomplishment of justice was granted to the gods (322-3). In this superhuman perspective, the Furies had the prerogative of pursuing the author of a homicide. They are the punishers of the 'bloodshed of one's own kin' (συγγενῆς φόνος)¹¹ and their area of operation is still recalled in *Orestes* 11. The terrible Erinyes are the champions of the victim, who are triggered by the smell of the blood that soaks into the soil and demand retributive justice, thus producing a chain of violence and suffering (335-9). In their automatic reasoning, this punishment feels like a talionic penalty that expresses itself in the crudeness of a talionic principle (195): 'You kill, you die' (ἔκτανες ἔθανες). Also in the name of the same retributive justice Apollo goes against the justice imposed by the Erinyes and greatly encourages the matricide, which the Furies now want to punish (31, 416). But Euripides substitutes another level of judgment within humanity and civility for this conflict of universal orders that enlivens the debate of Aeschylus' *Eumenides*. Orestes' acquittal depends on the foundation of such a new justice.

Besides the bloody consequences of this talionic punishment, it was also unsatisfactory because it was unable to give life back to the victim and to pacify the troubled soul of the avenger. Above all, matricide is measured according to concepts of efficacy or pragmatism rather than being judged from a moral point of view. Agamemnon, the first of the victims in this recent series of crimes, would have repudiated a *vindicta* committed in his name that 'would leave poor Orestes crushed by his action and would not bring himself back to life' (288-93). We are far from the Atreid of *Libation-Bearers*, who in his tomb gave his children a sensitive protection, by making them aware of the need to commit matricide. Euripides changes the Aeschylean view of the monarch of Mycenae and also turns Tyn-dareus into the spokesperson of the reigning opinion on the proverbial system of 'an eye for an eye, a tooth for a tooth'. The once affectionate grandfather now seeks to ridicule the traditional process, in the name of justice and in a demonstration of an unconditional censorship of Orestes' act (508-11): 'Suppose that this man were murdered by his own wife and that in an act of retaliation his son killed his own mother in order to wash the blood of one with the blood of the other. What would this series of crimes lead to?'

There is a judicial void in this repudiation of a paradigm of action that demands the setting up of a new regime of justice. As a representative in the play of the new established order (523-5), Tyn-dareus knows the response to an extreme homicide such as the one carried out against Clytemnestra, in this time of progress. As an alternative to crime, the avenger has at his disposal a regulated and established judicial system with high standards: to prosecute the defendant (ἐπιθεῖναι ... δίκην)¹² and expel her from the family environment as a way of remedying the polluting

effect of the crime, thereby satisfying the expectations involved in the demand for punishment (500-3). This would show a sensible personal behaviour (τὸ σῶφρον), a laudable social respect for the law (τοῦ νόμου τ' ἄν εἶχετ'), and it would appear to be merciful to higher divine demands (εὐσεβής). In this concept of justice, one achieves the same result as new bloodshed used to, but through peaceful means instead (524). Because Athenian law did not exactly have an autonomous method, the language referring to the behaviour of the democratic courts was still linked to a tradition of aristocratic values, once considered to be the ideal ones. The society that watches *Orestes* has long experience of this new judicial order, which makes it seem 'an old law' (512-15): 'The old legislation was laudable for this type of felony; to be seen in public or to contact people was forbidden for those whose hands were covered in blood. Exile was the punishment that would purify, not death as retaliation.' The rule here is that of the law of Draco, being reviewed in 408.¹³ Nevertheless, in Tyn-dareus' observation one can deduce a remarkable lack of coherence or continuity which resulted from the use of different legislation and which corresponded to different historical times. This could cause hesitation, disagreement or inconsistency in its use.¹⁴ According to this old legal text, the court judges the case and the defendant has the possibility of escaping trial through exile (Dem. 23.38).¹⁵

Because the issue here is a homicide which not only victimizes a husband and a father but also eliminates a sovereign, the trial has the greatness of a public cause and it is therefore up to the whole of the people of Argos to deliver the sentence (446).¹⁶ The defence and the prosecution will appeal to the votes of the people gathered in the assembly (612-13, 730, 756). The hearing will take place in a conventional setting that myth had established as the place where 'according to tradition, Danaus had gathered the people in an assembly for the first time in a gesture of reparation to Aegyptus', 871-3).¹⁷ Garner¹⁸ draws our attention to the changes in the management of justice throughout the fifth century which limited the use of this motive, as it occurs in the tragedy. After a period when homicide trials, which should be decided by the Areopagus and the close circle of judges, were not brought to the attention of the people, there came a time when the citizens who served as *dikastai* in the popular courts resembled much more the big audiences of the theatre. Two factors supported this change: Pericles' establishment of payment for the exercising of judicial functions, and the growth of the city and of the empire, which clearly intensified judicial activity. The logical consequence of this historical and cultural context is that the new type of popular courts had a much greater impact on the collective attention.

In accordance with an Argive decree (ἔδοξε δ' Ἀργεῖ),¹⁹ preventive measures were taken until the trial and the reading of the sentence (46-8), which banned any contact with a person accused of matricide, such as the sharing of meals, cohabiting or even exchanging words. This would pre-

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vent the polluting contamination which would result from the contact with a criminal (*miasma*, 75, 428-30, 481).

There are various punishments for matricide, so the circumstances of the homicide and the seriousness of its background must be fully analysed. Death is considered to be the highest possible form of punishment envisaged in the law and this sentence will be applied according to the judging court: either by stoning,²⁰ or by beheading (λευσίμῳ πετρώματι ἢ φάσανον θήξαντ' ἐπ' ἀρχένος βαλεῖν, 50-1, διὰ σιδήρου, 863-4). The former (stoning performed by all the members of the community, 442, 536, 612-14, 625, 914-15) reveals a scene of fury by an enraged population, and has the elements of popular collective justice, which lacks moderation and caution.²¹ It also represents the appropriate punishment for an act of equally collective effects. Other types of sentences that are less harsh than death could be equally applied to homicide, for example exile (431, 441) or the confiscation of property (437-8).

Criminal liability includes the accomplices, whose intervention is assessed in relative terms regarding the moral or the actual responsibility for the crime. The three participants in Clytemnestra's homicide unanimously agree that Orestes is the material perpetrator of the crime; εἰργασμένος (396) shows him as the one that committed the crime. However, assessing the connivance in the crime of each of the accomplices involves greater and more delicate judgement. Electra refers to her own participation by using the word μετέχειν, 'to take part in', which seems to express direct connivance and true co-responsibility (32),²² although in a way that is typical of her female fragility. Whether to Electra being directly involved in the crime means having acted out of sisterly devotion, according to Orestes her participation in the homicide was minor. Out of a similar affection, he wishes to exempt her from any greater responsibilities (284-5): 'You approved (ἐπένευσας) of my behaviour, but it was I who acted (εἰργασται δ' ἐμοί).' The loyal and good friend, Pylades, also participated in the homicide in a subjective way. The same Electra, who says she is wholly co-responsible for the homicide, describes Pylades as having a secondary role in the crime, as a 'collaborator' (συγκατείργασται, 33), who is without doubt an accomplice, but does not prepare or decide to commit the homicide. This assessment of the events is similar to Orestes' regarding his friend (συνδρῶν, 406, 1535). However, the subjectivity of the extent of the responsibility of the three leads to another assessment at the time when the accomplices prepare for a second homicide (the homicide of Helen, the sister of the first victim). The thrill involved in the second attack shows us the process of preparing and executing a new crime, which was a replica of the previous one. Within this symmetry, Orestes evokes other responsibilities when he speaks to Pylades (1158-60): 'You were the one who engineered the ambush for Aegisthus and who stayed by my side at the time of the final attack. Once more you allow me to avenge my enemies.' So Pylades is portrayed as the brain behind a premeditated

crime – the homicide of Aegisthus. Here, too, it is up to him to define the strategy and the timing of the crime. Nevertheless, this does not exempt Orestes from the real responsibility for the crime, nor does it change the network of responsibility for the matricide – the crime that is being tried in the play. Acting on an impulse that they aim to spread among themselves, the three try to consolidate the complicity they had tried out before, by individually claiming to have played a greater role in Clytemnestra's killing (1235-6):

ORESTES: I killed my mother (ἐκτεινά).

ELECTRA: And I touched the sword.²³

PYLADES: And I silenced your doubts with my incitement.

This way the differences in the involvement of each of them in the pursuit of Helen fade and give rise to a loyal and real union that Orestes accentuates (1535-6): 'My sister and I, and my accomplice.'

At the same time as subjectiveness dominates the personal judgment of the accomplices themselves, so public discussion of the outlines of the crime at the assembly multiplies and deepens the divergence of opinions. The mutual affection that brings the perpetrators of the crime together (the *philia* among relatives and friends) is replaced in the assembly by another degree of *philia* – a social and political one. This is dependent on the political parties, connivance of interests or on mere personal reasons.²⁴ Pylades' trial is not within the powers of the Argive assembly. Since he is from Delphi, the Phocian is under its rule (770-1).²⁵ However, we must admit that Strophius has already taken the appropriate preventive measure as to Pylades' responsibility in the matricide. This was part of the practice referred to by Tyndareus and that also existed in Argos: Pylades was expelled from his house (765-7). On the contrary, the trial of Orestes and Electra proceeds quickly²⁶ and the verdict is imminent. In fact, the play is set on the very decisive day of the reading of the sentence.²⁷

Before the public debate which will decide the fate of the defendants, some more resources are considered for defence purposes. This will not be done by a professional who could coherently rebut the files in the suit. The possibility of defence is open only to the defendant and his relatives, especially those who hold greater power or prestige and consequently are actually able to participate.²⁸ In Orestes' case, his physical weakness would need the support of a relative or a friend. The relatives' role was to bring charges against the accused or to offer support to the defendant. There are various reasons mentioned in the play for this obligation: blood ties (ἀνὴρ ὁμογενῆς, 244, τῶν ὁμαμιόνων, 684) between the relatives represent the duty of mutual collaboration between *philoï* (450, 482); a sense of retribution that makes the relatives creditors and debtors of services rendered, as in the case of Menelaus, his brother, for whose benefit Agamemnon encouraged the campaign against Troy, who owes him a

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gesture of retribution (χάριτας ἔχων, 244, χάριτας πατρώας ἐκτίων, 453); and finally, humaneness (484). This duty to cooperate among the members of the same family is the principle that shows Greek thinking, and it is in itself an example of greatness which a civilized people must be proud of (486): 'To be Greek is to honour at all times the race one is part of' (Ἑλληνικόν τοι τὸν ὀμόθεν τιμᾶν αἰεί). The forensic accounts that are left show the importance of the participation of the relatives, mainly to create the impression in the court that the version of the facts presented by the defence was largely consensual.²⁹ Orestes' situation was one of physical weakness and heartbreaking abandonment while being tried. There was not a lot he could expect from his close relatives regarding an intervention in the trial to help him. Tyndareus, his grandfather, was determined to speak for the prosecution and not for the defence. So Menelaus' intervention would have been fundamental as a relative and because of his status and prestige.³⁰

However, reality shows once more that the transparency of principles regarding the contingencies of every situation can be disturbed and can present difficulties. Nevertheless, it is still possible within the close circle of the family. Hermione, who is naive and confined to a very closed daily environment, is the example of this pure *philia* which leads her to run without hesitation to help her cousins, who risk being convicted (1329). Owing to his status as a public man, Menelaus cannot decide so easily and freely as she. Moreover, the Atreid's situation is compromised in every way possible and the expectations regarding his behaviour are contradictory. The way he became aware of Agamemnon's death before setting foot on Argos demands that he avenge him against the murderer, as we can conclude from the line (366-7): 'Menelaus, your brother lies dead, a victim of a trap set by his wife.' Menelaus reacted to these words with the cynical selfishness that is typical of his character in *Orestes*. So, despite the tears running down his face, he pretended not to have understood the insinuation and firmly kept his wish to embrace the son of the victim and Clytemnestra, the murderess (371-2). The purpose of this was to reconcile foreseeable and unforeseeable problems awaiting him and which he wished to solve. As he was unable to fulfil his duty as a relative to pursue the people who were responsible for his brother's death, he then behaved in the same manner and failed to help Orestes, who was now consumed with remorse for the matricide. Shielded by *sophia* and wisdom that stop him from taking unnecessary risks, Menelaus turns the concept of 'timing' into excessive caution. When faced with the urgency of Orestes' request, who believes the arrival of his uncle to be fortunate and well-timed (ἐς καιρὸν, 384), Menelaus takes a step back and promises to act although he will do so only when the situation guarantees him success. And we can guess that the Atreid will deliberately not do it.

What stops Menelaus? At a time when social status was becoming more important than any citizens' or *oikos*' individuality, tensions clearly emerge between the objectivity of the public circle and the unconditional

solidarity of the relatives. Therefore, with equal legitimacy, Tyndareus rebuts Menelaus' argument that 'to be Greek' means 'to put your family's interests first' with another argument, according to which to be Greek is also 'not to behave above the law' (487). This is the Atreid's dilemma. If he supports Orestes in this case, which is highly likely to result in his conviction, he will be putting family interests first before the legal objectiveness that the assembly wants. However, it is not just the possibility of social reproach that stops him. He also meets resistance within his household, above all from Tyndareus, and finally there is a sense of impiety that disrespects the traditional divine order (623-4). A clearly selfish Menelaus faces too many barriers which tip the scales against family *philia*. This is too little for the Atreid's ambitions.

There is one last possibility to be taken into consideration before the beginning of the trial, that of escaping. Although it would be illegal, the defendant could condemn himself to exile and thus save his life. There is perhaps time to escape before a damning verdict is read.³¹ This proposal is first made by Menelaus and later reiterated by Pylades (759). But in both cases Orestes refers to the efficacy of the public authority's surveillance, which prevents a possible escape from the defendant, who awaits trial in freedom (444, 760-2).

Orestes' only possibility is to take charge of his defence personally in court because he does not have a defender and sees the impossibility of escaping (774-82, 846-8). He believes, and so does Pylades, that it would be unworthy cowardice to perish without saying anything in a case that involves life or death. This decision is common in a society where advocacy was not yet a profession. It was the expected behaviour from a litigant, unless his physical condition, gender or age prevented him from doing so.

Everyone attending the trial agreed that the seriousness of the crime demanded a heavy punishment. This seems to be the right balance in true justice (413): 'A terrible crime deserves a terrible punishment.' True justice appeases the victim and restores the honour of the family but it is also highly pedagogical and preventive. To penalize the transgressor is to discourage anyone from committing another crime.³² To castigate the punisher of an adulterous wife is to invite married women to abandon their homes and their household duties. However, if we add the murderer of the husband to the adultery and thus accept that it is the duty of the children to protect the adulteress out of respect for the father, then violence within marriage will surely happen more frequently (564-71, 932-42).

If death is considered to be the penalty for a case of adultery followed by murder, then without a doubt one can understand that the punishment suggested for a crime of greater importance, matricide, will be just as extreme.³³ Humphreys³⁴ reminds us that the Athenian courts made a difference between the verdict and the sentence. After the pronouncement of the defendant's acquittal or conviction, the sentence was set according to the proposal presented to the jury by the parties involved, except when

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the punishment had been established by law. In these circumstances, the relatives of the accused were expected to intervene so as to obtain the lightest possible sentence for him.

Both the courts and the theatre had a catalytic effect on Athenian society regarding the attention and public curiosity that was brought to the great trials in the fifth century. They clearly depict the intrigue and the conflicts involved in the forensic accounts. Theatre allowed a certain excess which turned the conflicts and the legal arguments into paradigms. Although we are told of Orestes' trial through a mere messenger, this trial of a matricide is the strong and colourful description of a family scandal embroiled in political and partisan intrigue.

Throughout the whole process, the defendant's guilt seems to be clear. He himself recognises it and confesses to it (392ff.), but even if he had not, his remorse and depression clearly showed it. In Tyndareus' opinion, Orestes' physical appearance proves this: he is a tormented and sick man. Therefore, the testimonies made by the witnesses called by the prosecutor would almost be needless (532-3). As a member of the family, the father of the victim is even able to give details about the crime. He did not, for example, forget that Electra was an active accomplice of the actual perpetrator of the crime, Orestes. Her responsibility as the instigator of the attack was more decisive than that of the executor.³⁵ In her constant messages she offered every possible reason to commit the crime and this gave her the power to trigger the rage in the defendant: Agamemnon's desire for vengeance expressed through dreams; Clytemnestra's adultery with Aegisthus; and surely also the way Clytemnestra trampled on the children's rights, as no mother should (615-21). Therefore, in Tyndareus' opinion, Electra's punishment must be equal to Orestes'. Although he is a relative of theirs, Tyndareus is willing to intervene against the defendants and not in their favour because he wants them to suffer the most severe punishment (612-14, 915-16).

The guilty verdict is thus a fact. Within the typical characteristics of Athenian jurisprudence,³⁶ judicial procedures are given more importance than the elements of the crime. The assembly that judges Orestes will have to decide only on an appropriate punishment, which is either exile or death (440-2, 885-7).³⁷ Before narrating the different stages in the discussion, the messenger gives a tormented Electra the sad news (857-8): 'The Pelasgians have decided that you, wretched woman, and your brother shall die today.' The sentence given is exemplary and severe, and so both accomplices will get the maximum penalty as decided by the majority in the assembly. Following several proposals, it listened to all sorts of arguments and considered a whole range of contradictory solutions. Either using arguments based on friendship and family bonds so as to hide any political interests, or invoking social and ethical principles, different sentences were put forward. Talthybius, Agamemnon's herald and close collaborator, gave the impression of being a clever prodigy. He proclaimed his friendship and appreciation for the dead Atreid as well as his reproach

for the behaviour of the avenger and matricide, thus condemning Orestes. In this equivocal demonstration of loyalty, Talthybius tries to ingratiate himself with Aegisthus' friends, and in his words one can perceive that ambition and political games (887-97) were greater than loyalty to his master. In fact, the punishment asked for by Talthybius is obscured by the fluidity of the arguments he presents to the assembly. On the other hand, Diomedes, Agamemnon's companion at war, proposed a merciful tolerance through a punishment of exile (898-902), thus placing the actual perpetrator of the crime on the same level as its moral author. After the intervention of these first two people, one as the representative of the opportunistic class of heralds and the other as the model of traditional aristocracy, it was now time for two anonymous people to intervene. First, there was a stranger who presented a fierce and immoral speech in favour of the death penalty, and whose beliefs left no room for appeal (902-15). His arguments were typical of contemporary courts. After this urban speaker, clearly educated in the schools of rhetoric, a more rustic one spoke, who was less elegant or subtle, but who presented a more serious and honourable speech, although somewhat outdated. His proposal matched his conventional presentation: he supported the fairness of the vengeance against a woman who had been adulterous and disloyal to a husband with military honours (917-30). From his conservative point of view, Orestes' acts followed the old *lex talionis* (retributive justice) and were therefore undeniably legitimate. According to him, Orestes had fulfilled his duty as Agamemnon's oldest male son when he avenged him, and so he did not mention his accomplice, Electra, in his final closing arguments. After the discussion, and despite the divergence of opinions, 'the arguments of the dishonest orator, who appealed to the populace by calling for your and your brother's death, won' (944-5). The proposal that prevailed shows the depreciation that the masses felt towards the testimonies of respectable people; instead they favoured fearless arrivistes whose only credentials were their bold rhetoric.³⁸

After his conviction, Orestes still had the right to appeal against the sentence and to ask for it to be commuted from stoning to death by the sword, in the form of a quick suicide. This would at least spare Agamemnon's children and the royal family of Mycenae from the shame of public humiliation (946-9). In court, Orestes fulfilled his duty and protected his sister and accomplice's interests, who as a woman could not speak before the court.

Perhaps this legal obstacle which stopped Electra from appearing before the assembly that convicted her, and which also prevented the assembly from judging Pylades' case (within the powers of the court of Delphi³⁹), explains why in a certain way the trial in the play is not finished but continues in private. It re-examines the involvement of the three accomplices in the homicide at the time of the carrying out of the sentence. More than discussing the type of suicide that should apply to their case – by hanging or by the sword, 1035-6 – the three re-examine their participation

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in the crime. Electra's co-responsibility seems so clear that the punishment is not objected to or rejected; however, Pylades, moved by a pure *philia* that shows total solidarity, wants to be implicated completely in the crime. Finally, the Phocian, perhaps exaggerating the truth of the facts,⁴⁰ confesses (1089-91): 'I have plunged myself into the crime with you (συγκατέκτανον), I don't deny it; I have made the very same decisions for which you now suffer the consequences. I must share death (ζυθαίνειν) with you and her.'

However, hope arises in this environment of extreme despair when death is the only path to take for the three – in the form of personal and social suicide. This is neither hope of redemption nor hope of a just punishment. Instead, the disturbed souls of the murderers are thinking of relapsing into crime because they are not convinced by this justice that lacks austerity, greatness and pedagogical quality. They are moved by a desire for revenge or even for salvation (1098-1102, 1151-2). Just like a serial killer, Orestes believes Pylades' reasoning, according to which he can redeem his name as a matricide through another epithet – 'the killer of a murderess' (replacing μητροφόντης by πολυκτόνου φονεύς, 1140-2). This way true justice would be applied by him (see 1590, 'I will always persecute the perverted ruthlessly').

In 408, at a time when the Greek world was in turmoil and under the effects of a long period of war and social disturbance which was about to result in defeat for Athens, Euripides chose crime and justice as the main themes in his *Orestes*, thus proposing an innovative interpretation of the old popular myth. The trial of the matricides of Mycenae is now held in a human court and challenges the system of justice of the city. Moreover, the review of the old laws of Draco and of Solon, in process at the time, raised issues about the efficiency of the penal system and the judicial rigour of its enforcement. Discouragement and pessimism are clearly present in the play in this exercise of a symbolic and paradigmatic cause. The rigorous assessment of a crime that questioned family and civic order is disturbed by several circumstances and by corrupt and petty interests. Consequently, the verdict and the strength of the punishment do not stir up the feelings of respect that a severe but undeniably appropriate and pedagogical decision would provoke. Instead, they cause perplexity and anger, and inspire more violence. They turn madness into a powerful judge of good and evil. In the end, Apollo is granted the power to make the final decision, thus forcing a look back into the past. And this decision is also terribly strange and paradoxical, in a world that is too material to believe in the power of miracles.

Notes

1. The legal tolerance towards the avenger proves that adultery was a crime considered to be serious; see Dem. 23.53: 'whoever finds someone in bed with the wife, the sister, the daughter or a mistress of his, whom he keeps for the purpose of childbearing to continue his lineage, must not be punished with exile, even when having committed a homicide'; see Lysias 1; Arist. *Ath. Pol.* 57.3.

2. See Aesch. *Eum.* 625ff.

3. The phrase which refers to it – πρὸς δάμαρτος ὄλετο, 361; see 196, 569, 572 – has a technical sense because of the word chosen; the verb *ollymi* from Homeric Greek (see e.g. *Il.* 16.489, *Od.* 3.235) can refer to a violent death caused by the intervention of an aggressor; and the reference to the victim by using the word *damar* emphasises the scope of the crime committed within the marriage. See 367, where the same picture is highlighted: ‘surprised by his wife in a final bloodbath’, and περιπεσὼν emphasises the complete lack of protection of the victim when faced with the aggressor’s strategy, who acted in the unsuspected intimacy of the household. In this description given by the poet, everything serves the purpose of turning Clytemnestra’s act technically into the crime of homicide. One must remember, however, the specialists’ cautions concerning the existence of a true technical judicial terminology; see MacDowell 1976, 24: ‘Athenian law was not put into practice by professional lawyers who used their own terminology; it was rather expressed by Athenian citizens in their own language and for their own use; thus the use of the verb *hybrizein* in Athenian law must be taken for its common meaning in common language.’

4. πατροφόνου ματρός (see Aesch. *Septem* 783; Pl. *Lg.* 9.869b) gives the marital crime an increased intensity because it involves the interests of lineage.

5. Willink 1986, 178, values the intellectual criterion in the way one assesses remorse: ‘to become aware of one’s guilt’ is more relevant than ‘to assess the consequences of actions’ or ‘to fear the exposure of the crime’. Nevertheless, Clytemnestra did not draw the required deductions from recognising her own guilt: that of a self-punishing suicide, such as that of Phaedra.

6. Gagarin 1978, 111-12, refers to the existence in Athenian law of the category of ‘legitimate homicides’, which were tried in the Delphinium court. It was up to the defendant to plead his own case in this judicial sphere, ‘and he should admit to killing but claim to have done it legitimately’ (see 505, 538, 782, 1599; Dem. 23.74, ἐννόμως ... δεδρακέναι; Arist. *Ath. Pol.* 57.3, κατὰ τοὺς νόμους; Ael. *VH* 5.15; schol. Dem. 23.74, δικάσιως).

7. The Athenian code recognised three categories for the conditions in which a homicide occurred: intentional, incidental and legitimate; see Gagarin 1978, 112.

8. Tyndareus analyses the two crimes with technical terminology: ‘Although with just cause he considered her to be guilty (κακὴν ... ἐνδίκως), he ended up surpassing her guilt when he killed his mother (κακίων μητέρ’ ... κτάνων)’.

9. For Orestes’ similar doubts see 600-1, 646, 782.

10. Grethlein 2004, 119.

11. Garner 1987, 106, points out that the technical terminology of litigation still reflects the description of the process of pursuit and traditional escape, in the fight for vengeance (*diōkein*, *pheugein*, *agôn*, *dikê*).

12. The relatives of the victim should bring the charges against the accused in a case of *dikê phonou*, ‘a private suit for homicide’; see Gagarin 1979, 301. According to the same scholar, the position defended by MacDowell that other people could file a suit is not consensual; see also *IG* I³ 104, which includes the rules in the law of Draco on this matter. Also there were certain legal procedures that should be followed in cases of crimes of adultery; see Carey 1995, 410.

13. On the reviewing, transcription and publication of the laws of Draco at the time of the performance of *Orestes*, see Rhodes 1991, 89-90.

14. See Galaz 2004, 179.

15. According to Gagarin 1986, 88, before Draco the regular procedure in a case of homicide would be exile; after the confirmation of the punishment, the old

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legislator sets up the judicial practices that allow the return of the defendant after the exile and after a phase of negotiation with the relatives of the victim, with a likely indemnification.

16. Athenian justice divided the cases into 'private cases' (*dikai idiai*) and 'public cases' (*dikai dêmosiai*); see Osborne 1985, 40. See Hansen 1978 on the competence of the various bodies invested with public authority in the management of justice. Garner 1987, 121, points out that the trial in *Orestes* takes place in Argos and that the criticism made of this system applies to Athenian justice only indirectly. In fact, in strictly judicial terms, a popular court would never be qualified to make the judgment of a homicide. See A.H. Sommerstein, 'Orestes' Trial and Athenian Homicide Procedure' and F.S. Naiden, 'The Legal (and Other) Trials of Orestes' in this volume, pp. 25-38, 61-76.

17. See Paus. 2.20.7. Euripides locates this trial mythologically, which in Willink's opinion, 1986, 228, 'authenticates the poet's innovation in locating Orestes' trial in Argos'. According to the old tradition, Aegyptus, the father of the persecutors of the Danaids, had come to Argos either with his fifty children, or later to avenge their murder. Danaus prepared himself to face him on the battlefield, but Lynceus, the only survivor, persuaded him to choose public discussion, in front of an Argive assembly.

18. Garner 1987, 96-7.

19. Hansen 1978, 128, quotes epigraphical sources in favour of the model of formulae that introduced the transcription of a decision taken by the assembly: ἔδοξε τῷ δήμῳ or ἔδοξε τῇ βουλῇ καὶ τῷ δήμῳ.

20. Rosivach 1987, 244ff., remarks that the sentence of stoning applied to a matricide is referred to only in *Orestes*. He concludes that this choice 'possibly has less to do with the crime than with the globally brutal environment in the play'.

21. Despite the extreme violence that it involves, there are testimonies that prove that it was put into practice at the end of the Peloponnesian War (see Xen. *Hell.* 1.2.23). In his article on stoning, Rosivach 1987 hints at a case similar to stoning in the year 409 which both the poet and the audience may remember.

22. This same idea of co-responsibility between accomplices is found in the use of the word μετέχειν in Ar. *Plut.* 880; Hdt. 8.132.2.

23. This line is attributed to Electra both in Diggle 1994 and in Chapouthier & Méridier 1968, 81-2; however, the latter justifies this by saying that she specifies her participation in the murder that Euripides also attributes to her, in *El.* 1224. Other editors (Weil and Murray, for example) believe that the inversion of the lines results from the connivance in the attack's being addressed to Pylades and the exhortations to feminine participation. Perhaps the first version, where Electra's position dominates, is more in accordance with the general reading of *Orestes* regarding the issue of complicity.

24. To the audience of Euripides, it is obvious that the description of the Argive assembly is similar to the Athenian *ekklêsia*. Porter 1994, 128, analyses in detail the processes in the play that suggest this similarity.

25. Willink 1986, 206, informs us that Pylades' exclusion from the Argive trial is for dramatic purposes, because it was not an actual practice in Greece at the time.

26. Galaz 2004, 179, emphasizes the delicate and difficult task of judging in Athens because the time given to reflect and ponder on the verdict was practically non-existent. Therefore the decision depended more on the strength of the arguments presented than on the context of the crime duly assessed through a meticulous analysis of all the elements available or on the presentation of evidence.

27. κυρία ... ἡμέρα (48) is the exact phrase used for the decisive day when the sentence will be given, διοίσει ψῆφον Ἀργείων πόλις (49).

28. See Humphreys 1986, 57-91.

29. Humphreys 1986, 58, points out that the witnesses did not participate at the time of the closing arguments from both the defence and the prosecution. For her, it is a fact that from 378 onwards the witnesses' depositions were recorded in writing before the court session started and only confirmed, under oath, during the session.

30. See Garner 1987, 64, on the importance of the social status of the parties in litigation.

31. The most famous possibility of escape for a convicted man with the help of friends and the bribery of law officers, in a case already sentenced, is the one suggested by Socrates. See Plato's *Crito*, *passim*. However, Dem. 23.69 refers to the possibility of a defendant in a homicide case tried by Areopagus being authorized to go into exile, before a second pleading from the defence came before the jury. Pollux 8.117 seems to mention a clause that makes the crime of homicide against one's parents an exception to this possibility. Those accused of killing their parents were not allowed to go into voluntary exile while in the middle of a court trial, nor before it. They should stay till the verdict of the jury was given. Note that escaping to another country was possible in the epic tradition, so as to avoid the negative effects of having committed a crime. Gagarin 1986, 112-13, summarizes the possible behaviour of a defendant. He could leave immediately for exile, making a conviction easy, or subject himself to a court trial which would keep him under public protection until the verdict, or, lastly, he could remain indifferent to the conviction which might lead him to being arrested or even killed immediately.

32. This prophylactic concept of justice seems to be quite consensual in literature in the mid fifth century: see, e.g., Aesch. *Eum.* 516-25, 699; Hdt. 7.104.4; Thuc. 2.37.3.

33. See above, pp. 79-80.

34. See Humphreys 1986, 86 n. 39.

35. See Antiph. *Tetral.* 4.2.6, 4.3.4, 4.4.4-5, who testifies that the law 'sees the instigator of a homicide as the true accused'. According to Gagarin 1978, 114, this was probably a legal rule imported from the law of Draco and was most probably one of the punishments given for intentional homicide.

36. See Carey 1998, 93-4.

37. See Porter 1994, 73-5.

38. On the contrast between the demagogical and emotional workings of popular courts, and the more serious austerity demanded and practised by prestigious courts like the Areopagus, see Lanni 2000.

39. See above, p. 84.

40. See above, p. 83.

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Citizens and Non-Citizens in Athenian Tragedy

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A great deal of scholarly attention has been devoted in recent decades to exploring the relationship between Athenian tragedy and civic ideology, and while the nature of that relationship continues to be the topic of lively controversy, there has emerged as a by-product a consensus (which has indeed become almost a commonplace) that tragedy is thoroughly engaged with the *polis* and its citizens.¹ However, while devoting much attention to the social and political background of tragedy in fifth-century Athens, the scholars engaged in this debate have not given much consideration to the nature of the citizen body in tragedy itself and the questions of how it is conceived, defined and represented; in addressing these questions, I shall be suggesting that they can illuminate Athenian attitudes to citizenship in the fifth century, as well as contributing to the debate over the civic character of tragedy.

One obvious approach to the topic is to examine the language used in tragedy to denote and describe citizens. Since we are dealing with a poetic genre, this turns out, not surprisingly, to be somewhat elastic and imprecise, as is also the case for tragic terminology for monarchy;² however, it is possible to discern a broad distinction between the usage and significance of *astos* and *politês*, the two terms generally applied to citizens, as opposed to *metoikoi* and *xenoi*.³ Both are already found in Homer, though sparsely compared with the collective term *laos*, and since they are always used in the plural, to refer to the community, their significance is in practice not very different.⁴ On Lévy's account, in archaic literature *astos* is more oriented towards status and community membership, *politês* to political rights and activity, hence perhaps the development whereby the latter supersedes the former in the Classical period.⁵ The former distinction might suggest that *astos* was also the more neutral and flexible term,⁶ while the latter trend might have made it appear the more poetic. There are certainly significant differences in usage among the three tragedians: *politês* predominates in Aeschylus (26 instances, as against 19 of *astos*),⁷ but the pattern is reversed in Sophocles, against the general trend of development just noted (*politês* 8 times,⁸ but *astos* 17 times). The pattern for Euripides is in line with that for Aeschylus,⁹ but once we allow for a corpus almost three times as large, the frequency of these terms is greatly reduced (and, as we shall see, his usage also tends to be looser).

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In tragedy both words are likewise mainly applied to the community at large, and predominantly used in the plural.¹⁰ At its most basic, *astoi* denotes the members of the community, as for example in a string of instances in the second half of *Eumenides*, where Athena speaks of ‘her’ *astoi*.¹¹ In other cases, the reference is to the community as the body affected by some external factor or development in the *polis*: these are more commonly negative ones such as disease and warfare, but *astoi* can be beneficiaries as well.¹² Where the community labelled as *astoi* is represented as taking action, this is frequently a matter of its relationship to individuals, for instance in terms of social sanction (or often the fear of this)¹³ or refusal to associate,¹⁴ and activity by the *astoi* is likewise often communal, for example religious practice;¹⁵ positive action by *astoi* of (in a loose sense) a political character is relatively rare – at least before Euripides, whose practice is more elastic than that of Aeschylus and Sophocles (see below). Sometimes the *astoi* are invoked for consultation¹⁶ or witness,¹⁷ though direct invocation of the *astoi* is very uncommon.¹⁸ There is a handful of passages where *astoi* are represented as more positively active: in Aeschylus’ *Agamemnon*, they are to be mobilized against Clytemnestra and Aegisthus by the *boê* (1349), and in Euripides’ *Orestes*, although the political face of the community as *dêmos* is unusually prominent (below, n. 45), it is the *astoi* who are represented as condemning Orestes and Electra to death, perhaps because the mode of execution, stoning, is itself an archaic form of communal justice.¹⁹ By contrast, *astos* is distinctively used as a marker of civic status and membership of the community. In one form, this finds expression in a binary opposition between *astos* and *xenos*, which by the Classical period is a commonplace also found widely in prose authors;²⁰ however, the fact that it is also attested epigraphically by the sixth century suggests that the antithesis enjoyed some kind of recognition in Athenian public affairs.²¹ A handful of passages is more explicit, as when Oedipus contrasts his former status as ‘a stranger’ to earlier events (*xenos* twice in *OT* 219-20) with his present status as a community member (‘now I am enrolled as an *astos* among *astoi*’: 222); a concern with Oedipus’ status is a persistent undercurrent in the play, picked up later in the scene, where Tiresias prophesies that the wanted man, purportedly a *xenos metoikos*, will prove to be a native-born Theban (*engenês Thêbaios*: 452-3).²² A similar situation seems to be alluded to in similar terms when Telephus speaks of the ‘*astoi* throughout the Mysian country’ giving him his new name.²³ In Euripides’ *Ion*, a play which is intensely preoccupied with questions of status and legitimacy (below, p. 99), Creusa similarly describes her Aeolian husband Xuthus as ‘not *astos* but imported (*epaktos*) from another land.’²⁴ The association of *astos* with civic status must have been substantially strengthened by the use of the term in the definition of citizenship in Pericles’ citizenship law (*Ath. Pol.* 26.4).

Politês is much less prominently associated with status in tragedy, in

line with the pattern for archaic literature (above, p. 94). It is grouped in a binary opposition with *xenos* at Aesch. *Sept.* 924, and implicitly contrasted with it at Eur. *Med.* 12 and 224.²⁵ In Euripides *IT* 495 and *Rhes.* 946, both of which refer to an individual's membership of a particular *polis* community, it may be significant that the speaker speaks from a non-Greek perspective.²⁶ In Eur. *Phoen.* 887 (bracketed by Diggle, but accepted by Craik and Mastronarde) the noun is appropriate, since Tiresias is recommending that the offspring of Oedipus be disenfranchised, that is, in Athenian terms, made *atimoi*. Soph. *OT* 1164 is perhaps closest to the specific usage of *astos*, in as much as Oedipus' underlying concern is clearly with his own status as Theban-born, as we have already noted.²⁷

There is likewise a fair degree of overlap in the application of *politai* to the community as a whole.²⁸ There is a similar concern with the community as beneficiary,²⁹ and as adversely affected by external factors such as war,³⁰ disease and pollution³¹ and political decisions;³² the last of these is perhaps a little more strongly characterized than for *astos*, as for example in allusions to the usurpation of Aegisthus and Clytemnestra in the *Oresteia*.³³ Like the *astoi*, the *politai* can be invoked as an audience, particularly in an assembly, or as witnesses,³⁴ but a significant difference here is the frequent use of the vocative,³⁵ in contrast to its virtual absence in the case of the *astoi*. The *politai* are also capable of taking positive action, not only in the looser and more communal manner of *astoi*, imposing civic sanctions or performing religious acts,³⁶ but also by functioning as decision-makers, judges and legislators.³⁷ They are also to be found conferring honours, including that of public burial.³⁸ This greater degree of public prominence also prompts reflection on the public character of the *politai*, and an awareness that this is not always beyond reproach, in terms either of their decision-making or their moral character, both of which can adversely affect individuals and the community.³⁹

The picture which emerges from this analysis is reasonably clear. *Astos* and *politês* are not simply interchangeable terms: the former is much more likely to be used where membership of the community is in question, while the latter is more frequently applied to community action, particularly of a formal or official nature.⁴⁰ Nevertheless, between the two broad poles of status and political activity also identified by Lévy (above, p. 94), there is a considerable degree of overlap, facilitated by a marked tendency to use either term in the plural. Tragedy thus perceives both *astoi* and *politai* very largely in terms of the community as a whole: events and actions tend to be figured as performed by or relating to the collective, with little or no attention to individuals and their concerns. Indeed, decisions and actions are ascribed at least as frequently to the collective in the form of singular collective nouns (notably *laos*, *polis* and *plêthos*), effacing even the weak sense of plurality inherent in *astoi* and *politai*. It may be that literary factors such as an inclination to archaism played some factor in this choice, but it is attractive to see it as aligned with other respects in which tragedy

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avoids unduly specific reference to particular contemporary realities, and to take this also into account in explaining why the appeal of tragedy extended well outside Athens;⁴¹ in particular, a focus on a more or less generic *polis* community will have enabled the genre to retain its appeal even in radically different political environments such as Macedon and Syracuse.⁴²

It is consistent with these conclusions that the language of the *dêmos* as citizen body is sparsely distributed in tragedy. *Dêmotês*, widespread in comedy,⁴³ is only found nine times in tragedy, most frequently in the sense 'ordinary citizen, commoner'.⁴⁴ *Dêmos* is a similar rarity, not found in Sophocles, and only nine times in Aeschylus and eleven in Euripides. The majority of these are strongly clustered in two plays with marked political overtones, the *Suppliants* of Aeschylus and Euripides, where democracy and democratic values are specifically at issue, and hence more contemporary political language is to the point.⁴⁵

If the usage of *astos* and *politês* reveals a tragic conception of the citizen body essentially as a collective, the regular appearance of the binary opposition between *astoi* (and to a lesser extent *politai*) and *xenoi*⁴⁶ might be taken to indicate that tragedy is also concerned with the distinction between those within and those outside that citizen body: that hint can be substantiated by examining the plots of those plays in which outsiders enter, or seek to enter, the dramatic *polis*.⁴⁷ As is well known, Athens prided herself on a tradition of offering refuge and assistance to the weak and oppressed which was conceived as stretching back to the mythological past and which was regularly aired in funeral speeches and other patriotic rhetoric and provided the plots for a number of tragedies.⁴⁸ If one looks at these tragedies a little more closely, however, it becomes clear that the attitude which they reflect to the refugees concerned is less warm-hearted than rhetorical generalisations might imply, in as much as their reception is represented almost entirely in terms of alien or metic residence. In several cases, in fact, all that the suppliants in question require of Athens is temporary refuge until such time as Athens has vindicated their cause. Thus after the victory of the Athenians in Euripides' *Heraclidae* Alcmena anticipates the return of her children to their *polis* and estates (873-8) – as we shall see, it is Eurystheus who remains in Attica (below, p. 98), while at the conclusion of his *Supplikes* (1183-1226) Athena not only looks ahead to the revenge of the Epigonoï, but, before they can return home, has Theseus bind them and all Argos to Athens by a formal oath. Likewise, once the Areopagus has found in favour of Orestes, he is free to return to his native land, his Argive citizenship and his ancestral estates (Aesch. *Eum.* 754-6).

Other situations, in which the refugees cannot or will not return home, require a more permanent resolution, and in almost every instance this takes the form of a grant of metic status. The earliest example is the case of Danaos and his fifty daughters in Aeschylus' *Suppliants* (of 463), which is also both the most extensive in the number of beneficiaries and the fullest and most explicit treatment: as Bakewell has persuasively argued,

the treatment of the suppliant Danaids by Pelasgus and the Argives is closely aligned with the Athenian institution of *metoikia*,⁴⁹ which was at most a generation old, and perhaps a good deal more recent than that.⁵⁰ Despite their hereditary links with Argos (274-326), the suppliants are kept somewhat at arm's length, and only received as metics, albeit on favourable terms.⁵¹ The grant of metic status is reported by Danaus in a speech which, from the opening words *edoxen Argeioisin* on, is strikingly reminiscent of Athenian decrees in its language⁵² and of honorific decrees in its provision of immunity from seizure and distraint, reinforced by sanctions in the form of a threat of *atimia* against any citizens who fail to enforce this.⁵³ Their status is made explicit by the appearance of technical terminology in the use of the verb *metoikein* here (609), and in the later statement of Pelasgus that he and all the *astoi* will serve as *prostatês* (963-5). In that speech, specific provision is also made for their residence: clearly, like Athenian metics, they do not have the right to own real property (*gês enktêsis*), and so have to be provided with housing, though they are favoured with a choice of residence (957-63) and exemption from rent (1009-11).⁵⁴

There is an oblique indication that an Athenian audience was alert to the issue of property rights in some of the plots which involve the establishment of hero-cult at Athens, in as much as the establishment of such a cult could be represented as a form of *metoikia*, since it required the permanent occupation of Attic soil, albeit on a small scale. Hence Eurystheus speaks of himself as a *metoikos* in the context of his heroisation,⁵⁵ and Sophocles' *Oedipus at Colonus* likewise displays a concern not only with the reception of the suppliant but also with his lodging and his final resting-place which is coloured by the nature and rights of *metoikia*, and in the same way Theseus' transfer of his *temenê* to Heracles both provides him with a residence during his life and provides for the continuation of his *metoikia* after death.⁵⁶ The motif is pointed up by the more conventional oath of Orestes to intervene from his grave in Argos against Argives who transgress his bond of friendship with Athens (Aesch. *Eum* 762-74).

Since there is general consensus among those who have reconstructed the rest of Aeschylus' Danaid trilogy that it did not end happily either for the Danaids or Argos,⁵⁷ we might be inclined to put an unfavourable construction on the acceptance of the Danaids as metics, but it is perhaps preferable to read it as a positive but provisional resolution problematized by subsequent events.⁵⁸ However, even if we accept the attractive suggestion that the original audience⁵⁹ will have responded favourably to the gesture in this particular context, it remains the case that tragedy has at best an equivocal perception of metic status⁶⁰ and of the implications of conferring it on refugees,⁶¹ and we should therefore be aware that even in a case such as the *exodos* of Aeschylus' *Eumenides*, where the reception of the Furies is strongly marked as honorific and a recompense for the promise of future benefaction,⁶² at some level (perhaps only subcon-

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sciously) there is likely to have been a feeling of constraint, of a limit beyond which the *polis* should not go: no matter how deserving they might be, the status of metic represents the limit to which the tragic *polis* can accommodate outsiders.

This pattern is reinforced by what appears at first sight the one exception, Euripides' *Ion*. The process of introducing Ion to Athens goes through two stages: in the initial and abortive phase in which he is 'recognized' as the illegitimate son of Xuthus by an unknown mother, it is presumably envisaged that he would enter Athens as a metic, since although Xuthus' status is not made clear, it is spelt out that he is not native-born (above, p. 95), though he is apparently functioning as a kind of Prince Consort. Even if, as Ogden suggests, he has been granted *epigamia*,⁶³ Ion would still not be a citizen under the terms of Pericles' citizenship law, because his mother is not (or cannot be shown to be) a citizen. However, it is also clearly envisaged that, should there be no legitimate children born to Xuthus and Creusa, Xuthus might be able to arrange for the throne to devolve on Ion, a prospect which rouses Creusa and her supporters to homicidal fury. Meanwhile, Ion for his part feels anxiety at the implications of his alien status which reflect Athenian ideas of and pride in autochthony.⁶⁴ The mutual recognition of Ion and Creusa suffices to resolve both issues in terms of the economy of the plot: the re-discovery of his mother Creusa means that he does not have to be enfranchised because he turns out always to have belonged, a resolution which finds an echo in many a Menandrian scenario.⁶⁵ In point of fact, however, it is not entirely clear just how the earlier legal problems have been resolved; for Ogden, 'he is still technically bastard even now',⁶⁶ although he does not spell out whether this is because he is born out of wedlock, or because he still does not have two Athenian parents. The latter objection might have been resolved by the provisions of *epigamia*, or perhaps, as Burnett suggests,⁶⁷ by the perception of Creusa as an *epiklêros*, with Xuthus adopted into the Erechtheid house. Alternatively, if Apollo is thought of as the true father, it might be suggested that a god who has a shrine and cult at Athens is indeed *engenês*, and further that in that case the issue of marriage is irrelevant, since gods do not marry mortals.⁶⁸ A further alternative might be that in the dramatic context autochthonous descent through Creusa takes priority over mere legislation, and so as long as Ion is her son, no other factors matter.⁶⁹ Such legalistic hair-splitting may be beside the point, however:⁷⁰ if Euripides was not concerned to spell out the resolution, that may well be because it was not important. What is important is that he chose to diverge from the dominant version of the myth, which made Ion simply the son of Xuthus, in favour of assigning him divine parentage,⁷¹ and that that clearly contributed in an important way to an emotionally satisfying resolution for the audience – indeed, it is not at all clear that Xuthus and the Athenians are to be informed of the true state of affairs.⁷²

Thus the citizen body of the tragic *polis* remains a closed circle, never enlarged by the creation or admission of new citizens, even before the citizenship law of Pericles imposed tighter conditions on Athenian citizenship. Indeed, even by that time the Athenians had started to make honorific grants of citizenship, and the first mass enfranchisement, that of the Plataeans in 427, dates from before Euripides' *Suppliants* and *Ion*; even as Athenian practice started to relax, at least under certain circumstances,⁷³ tragedy seems to remain firmly committed to preserving a demarcation between insiders and others which was in fact a relatively recent feature of Athenian history.⁷⁴

In conclusion, then, the tragic citizen body is a more complex and subtle institution than has often been suggested. Certainly, its characterisation does owe something to heroic vagueness, notably in the considerable overlap between *astoi* and *politai*, but it is precisely overlap, rather than identity or interchangeability, and the semantics of either term in itself are clearly distinct. Again, the concentration of tragedy on the plural and collective is only partly a matter of vagueness, since the kinds of communal action which appear are clearly selected: the overtly political is significantly downplayed both in frequency of occurrence and in terms of any role for the individual *politês*, and where issues of that kind are foregrounded, there is a tendency for more contemporary and technical language to supplement or displace the more regular and neutral terminology of citizenship. There is also a diachronic variation, with a greater prominence in Aeschylus both of citizen terminology, particularly of the terms more associated with political action, *politês* and *dêmos* (and cognates), and of the language of *metoikia*; if one has a sense that there is overall a greater tendency to vagueness later on in Sophocles, with his preference for *astos* over *politês*, and Euripides, who uses the terminology less frequently and precisely, the fact that when they make use of language with a more specific resonance for a fifth-century audience, they often do so in a strikingly concentrated manner suggests that the degree to which heroic past and political present did or did not interact was being consciously chosen and manipulated, rather than taken for granted or going unconsidered. This is even more the case for issues of status: while juxtaposition of heroic past and realistic present need not have prompted any deep reflection on the part of the audience, and may only have taken the form of a 'double perspective' which might knowingly register anachronism or difference,⁷⁵ the manipulation of plot and, particularly, the evocation of more or less technical language, seem actually intended to draw attention to possible tensions between past and present and to prompt the audience to make connections between the two – and since that audience regularly included metics and foreigners as well as citizens, the interaction between the theatre audience and the citizens of tragedy is likely to have been a considerably more complicated process than many have assumed.⁷⁶

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Notes

1. Easterling 2005, 50-2, provides a judicious summary of the current state of the debate; the classic statement of a specifically democratic association is Goldhill 1990, the most recent and more cautious contribution, Heath 2006. Easterling 1997 includes a rare detailed examination of the tragic citizen body, in Eur. *Or.* and Soph. *OC* (28-36).

2. See (e.g.) Andrewes 1956, 22-3, Parker 1998, 153, 158-61.

3. Lévy 1985 provides an exhaustive treatment of *astos* and *politês* down to the time of Herodotus, covering Aeschylus but not Sophocles or Euripides; Blok 2005, 10-17, 28-31, surveys both in a broader treatment of citizenship terminology and status, chiefly at Athens, with particular attention to gender. Note also the brief but useful discussion of both in relation to *metoikos* and *xenos* in Whitehead 1977, 60-1. Another term for an individual citizen, *etês*, is found very rarely in tragedy and always in the singular, in contrast to the *polis* or a figure in authority: Aesch. *Supp.* 247, *TrGF* fr. 281a28; Eur. fr. 1014 Nauck; for *dêmotês*, see below, nn. 6, 44.

4. Though Lévy 1985, 56, 61, argues for a more affective quality for *astos*; Whitehead 1977, 60 (quoting Diller 1937), 87 n. 20) sees the sense as 'locative rather than ... legal'. The full list of examples is *astos*: *Il.* 11.242, *Od.* 13.192; *politês*: *Il.* 15.558, 22.429, *Od.* 7.131 = 17.206; the Odyssean formula is copied at *Hymn. Hom. Cer.* 99.

5. Summary: Lévy 1985, 66; for the statistics on usage, *id.* 53-4.

6. Contrast the preference for *astos* (22 : 5) of Pindar, writing for a variety of political contexts which frequently involve autocracy, with the marked predominance of *politês* in Aristophanes (26 : 6); the influence of political context is suggested also by Aristophanes' even stronger enthusiasm for *dêmotês* (52 instances), a word not found in Pindar.

7. Neither is to be found in *PV*, despite that play's political character.

8. Plus one instance of *politês* (below, n. 35). Distribution is also striking: neither *astos* nor *politês* appears in *Ajax* or *Philoctetes*.

9. By my reckoning, 40 instances of *politês*, 30 of *astos*; Lévy's figures are 40 and 32 (1985, 54 n. 8, excluding *Rhesus* but presumably including some interpolations bracketed by Diggle in the *OCT*, notably in *Orestes*), but these minor variations do not affect the overall pattern.

10. Lévy 1985, 54 and n. 11; Blok 2005, 15. Instances of *astos* in the singular in tragedy are Soph. *OT* 222, Eur. *Ion* 290, 674 (all with reference to individual status: see below), *Med.* 223 (Medea is thinking of individual behaviour) and fr. 626.5 Nauck (*Pleisthenes*) where the context concerns the rise of a (single) tyrant. For *politês*, see n. 28, below.

11. Aesch. *Eum.* 487, 707-8, 862 cf. 697, 1045. There is a close parallel in the mouth of Athena, again establishing ordinances for her citizens, in the *exodos* of Euripides' *Erechtheus* (fr. 370.77) and the mortal monarch Demophon speaks in similar terms at Eur. *Heracl.* 412; more generally, compare Aesch. *Pers.* 914, *Cho.* 188.

12. Disease: Aesch. *Supp.* 684; war: Aesch. *Ag.* 404, Eur. *Supp.* 234 – in the latter case this is the result of bad political leadership, for which cf. *Or.* 906 (if not interpolated: Diggle brackets the passage); civil war: Eur. fr. 173 (*Antiope*); unspecified *atê*: Soph. *Ant.* 186. Positive factors may be a benign climate (Aesch. *Eum.* 908), good reputation (Eur. *HF* 1334) or a tangible benefit (Soph. *OC* 287-8), and young *astoi* are a resource for the *polis* at Eur. *Supp.* 443.

13. Aesch. *Sept.* 7, *Ag.* 456, 1411, 1413: note *dêmothrour* in this line, and cf.

démorripheis in 1616 (below with n. 19, for stoning and the *astoi*); Eur. *Med.* 297, *Heracl.* 166, *Or.* 709. Informal public censure would also presumably be at issue if Sommerstein 1989 is correct in suggesting that Aesch. *Eum.* 691 may be construed as an objective genitive, i.e. ‘fear of the citizens’ on the part of Areopagites. Public censure of course depends on public knowledge: Eur. fr. 411 (*Ino*). The *paidagôgos* in Eur. *Phoen.* 99 is perhaps also thinking of civic censure: Craik 1988 on 94-5. The importance of this aspect of the *astoi* in earlier literature is underlined by Lévy 1985, 58, with copious references.

14. Soph. *OT* 1489-90.

15. Aesch. *Eum.* 807; Eur. fr. 370.94 (*Erechtheus*).

16. Aesch. *Supp.* 369 (note the use of the communal *laos* in 367), Eur. *Heracl.* 335 (and N.B. 412), *Supp.* 355 (again, note the use of the inclusive *plêthos*); the restriction to ‘political plays’ is surely significant.

17. As the audience of a proclamation: Soph. *Ant.* 27, 193, Eur. *Alc.* 1154 (supplemented by mention of ‘the whole tetrarchy’; note that Admetus’ instructions are for communal religious activity [above and n. 15]); as the audience of a funeral speech: Eur. *Supp.* 843. At Eur. *Bacch.* 1201 the sense is two-edged: *prima facie*, the Thebans are to witness Agave’s hunting prowess, but the true object of their attention is her murder of her son at Dionysus’ instance. At Soph. *OC* 1528 there is perhaps a consideration of the citizens as possible keepers of state secrets (*viz.* the resting-place of the heroized Oedipus).

18. Lévy 1985, 54 n. 14: in tragedy the only instances are Soph. *Ant.* 1183, where the speaker Euridice, though of royal blood, is not a political figure and Eur. *IT* 1422 (‘O all you *astoi* of this barbarian land’; the speaker is the Taurian king Thoas), surely intended to contribute to an undertone of satire in the closing scenes. For the contrasting frequency of *politai* in the vocative see n. 35, below.

19. Stoning: Eur. *Or.* 536 (= [625], also in 442 [bracketed by Diggle]) and cf. 746 (‘die at the hands of the *astoi*’); more generally 446, 775; in 874 there is both allusion to the assembly (N.B. *laon* in 873) and a more specific sense: as Willink 1986 notes *ad loc.*, ‘the speaker emphasizes that he himself is not a “townsman”’. For the threat of stoning as communal sanction we can compare Aesch. *Ag.* 1615-16 (*démorripheis ... leusimos aras*), and the *dêmos* is also linked to stoning at *Sept.* 199.

20. Whitehead 1977, 60, calls it ‘a mere *cliché*’: see *id.* 68 n. 129 for some examples.

21. Lévy 1985, 54 n. 9, cites *IG* i³ 1194 bis (c. 575-550?) and *IG* i³ 138 (before 434 [partially restored]). Instances in tragedy are Soph. *El.* 975, *OT* 817, *Trach.* 187, *OC* 13, 928 (the antithesis is also implicit at 171-2 and, perhaps, 1528, if the implication is *a fortiori* – ‘not even to citizens or my own children’); Eur. *Med.* 223, *El.* 795, *Ion* 674; cf. also Aesch. *Supp.* 618: ξενικὸν ἄστικὸν θ’.

22. Cf. *TrGF Adesp.* 536 for this contrast, perhaps in disparagement of Cadmus.

23. Eur. fr. 696.10 (*Telephus*). His status as a Greek would seem likewise to be at issue in fr. 727b (*astos* appears in line 10), if that fragment is in fact Euripidean and to be assigned to this play: see Cropp *ad loc.* in Collard, Cropp & Lee 1995. The link to status is doubtless the reason why it is the Argive *astoi* who serve as *prostatai* to the Danaids (Aesch. *Supp.* 964).

24. Eur. *Ion* 290; compare Ion’s anxiety regarding his own status as an immigrant: 673-5 with Ogden 1996, 170-2, and, for criticism of the immigrant citizen as an ill-fitting peg, Eur. fr. 360.11-13 (*Erechtheus*).

25. Although the text is corrupt in *Med.* 12 the implication is clear; with 224 note *aston* in the previous line, implying that Euripides is effectively using the terms interchangeably.

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26. Though in the former passage the speaker is in fact Iphigenia. The adjective *semnos* attached to the noun in the *Rhesus* passage might be intended to suggest with bitter irony a divide between Athenian civic pride and Athena's narrow partisanship.

27. In Eur. *Andr.* 669 Menelaus speaks of giving a daughter in marriage to 'one of the *politai*', but this passage is bracketed as an interpolation by Diggle. For Eur. fr. 360.13, see n. 24, above.

28. As with *astos* (above, n. 10), the singular is distinctly uncommon: Eur. *IT* 495 (where the reference is specifically to Orestes), Eur. *Bacch.* 271 (individual behaviour, cf. fr. 512 [*Melanippe*]); *Phoen.* 887, *Rhes.* 946 (civic status of individuals: above, p. 95); in frs. 360.13 (*Erechtheus*) and 886 Nauck the reference is to a type, the unpatriotic citizen. Both the rarity and the common association of the singular with behaviour are characteristic of Attic literature as a whole: Blok 2005, 12-14.

29. Aesch. *Eum.* 927, 991 (divine blessings); Soph. *OC* 1095 (divine intervention); Eur. *IT* 1417 (capture of an enemy), *Phoen.* 898 (salvation), 1399 (partisan satisfaction), *Rhes.* 317 (divine favour).

30. Aesch. *Pers.* 556 (with Broadhead 1960 on 554-7), *Sept.* 191, 237 (both specifically concerned with the impact of the female chorus on civic morale), 299, 317, 924, *Ag.* 715 (the passage is corrupt but the general sense is clear), *Eum.* 980; Eur. *HerACL.* 281. Note also Aesch. *Ag.* 1210 (Cassandra's prophecies of doom for the Trojans) and Eur. *HerACL.* 436 (the need for a human sacrifice resulting from the protection of the Heracleidae).

31. Eur. *IT* 1226; cf. *Phrixus A* fr. II.8-9 Diggle (death), fr. 910 Nauck (harm from fellow-citizen).

32. *Stasis*: Eur. *Andr.* 475; cf. Eur. *Hipp.* 1158, 1462, of a disaster for the community at large.

33. Aesch. *Cho.* 302-4; cf. *Ag.* 1638-9, where Aegisthus presents himself as ruler of Argos, while in *Eum.* 927 Athena is ruler of Athens, a relationship more frequently denoted by reference to her *astoi* (above, n. 11). For Lévy 1985, 62-4, the separation between leaders and *politai* is a key element of the term. For *politai* as soldiers, N.B. Aesch. *Ag.* 808-9, implying a normal expectation of military service by the able-bodied.

34. Audience: Eur. *Supp.* 247 (implicitly alluding to an assembly), *Hipp.* 1158; as witnesses: Aesch. *Supp.* 484 (N.B. *leôs* in 485); as objects of behaviour in public: Eur. *Supp.* 871 (~ *oiketas*), *TrGF Adesp.* 415.

35. Aesch. *Sept.* 1, *Ag.* 855; Soph. *OT* 513, *Ant.* 806, *OC* 1579; Eur. *Phoen.* 1758, fr. 360.50 (*Erechtheus*); Ion *TrGF* 19 F 41. There are also two instances in the feminine (Soph. *El.* 1227, Eur. *El.* 1335), one of which must be the coinage, and the other a conscious imitation, of a word which became regularized in prose in the fourth century (Whitehead 1977, 68 n. 128; Lévy 1985, 53 and n. 6); I would suggest that this development is best understood as an imitation of an appeal to the chorus as community, but with a specific resonance of feminine solidarity.

36. Sanctions: Aesch. *Sept.* 1061 (almost certainly a later interpolation; cf. 1044, where the term is *dêmos*), *Supp.* 484-5; Eur. *HerACL.* 422, *Phoen.* 93 (above, n. 13); cf. *Or.* 431, of personal political hostility. Religious acts: Eur. *Hipp.* 12 (and N.B. n. 38 for public burial). However, Antigone's concern not to act 'in defiance of the citizens' (Soph. *Ant.* 79, 907) seems closer to the informal restraint normally exercised by *astoi*.

37. Decision by vote: Eur. *Or.* 756, 975, cf. 766. Judges: Aesch. *Eum.* 789 = 819. Legislators: Aesch. *Eum.* 693.

38. Aesch. *Cho.* 431 (where the *politai* should have been able both to honour Agamemnon and to function as witnesses of Clytemnestra's action), Eur. *El.* 1276-7 (Argives will bury Aegisthus publicly). Other honours: rewards to a benefactor: Eur. *HF* 1326; public honour: *Hec.* 625; cf. Aesch. *Eum.* 1013 (expression of gratitude).

39. Poor decision-making: Eur. *IA* 368; compare Theseus' reflections on the political shortcomings of two of the three *politôn merides* in *Supp.* 238-43, and *Bacch.* 270-1 for the bold clever speaker as *kakos politês*. Immoral *politai* bring down the just man, too: Aesch. *Supp.* 605-9. Such passages of course entail an assessment by the speaker, and we therefore have to make allowances for their agenda: see Easterling 1997, 30-1, on Menelaus' verdict on the *dêmos* at Eur. *Or.* 696-701 and other characters' views of the community in that play.

40. So even *politai* in tragedy only perform a fraction of the roles of citizens enumerated by Davies 1977/8, 106; particularly notable is the virtual absence of economic aspects, on which see also Whitehead 1991, 143-50.

41. See Easterling 1997 on the capacity of 'heroic vagueness' to provide 'something for everyone' and *ead.* 2005, 54-62, on the carefully selective presentation of Thebes in tragedy, and 52-3 on the capacity of tragedy for transplantation.

42. This analysis is therefore consistent with the arguments of Rhodes 2003 that tragedy is concerned with the *polis* rather than, specifically, the democratic *polis*.

43. For Aristophanes, see n. 6, above. In Menander there are 2 instances to 1 for *astos* (but 7 of *politês* plus 1 *politês*).

44. So in Soph. *Ant.* 690, *Aj.* 1071 (N.B. Stanford 1963 *ad loc.*), Eur. *Ion* 625, *IA* 340, fr. 362.25 (*Erechtheus*). In Eur. *Alc.* 1057 and *El.* 643 the reference is to rulers' fear of popular censure, while at Eur. *Supp.* 895 *dêmotês* is in antithesis with *xenos*, in reference to appropriate behaviour for metics; in these passages it is arguably being assimilated to *astos*. Only at Soph. *OC* 78 does it connect with contemporary Athenian realities in more or less the technical sense 'demesman' (so Kamerbeek 1984 *ad loc.*, in line with the other steps taken by Sophocles to make his audience conscious of the specific local setting of the play – though Easterling (1997) 34 argues for the general and specific sense being in play together).

45. Aesch. *Supp.* 398, 488, 601, 604, 624; Eur. *Supp.* 351, 406, 418, 425, 442. To these may be added one instance in *Orestes* (696), another 'political' play, and cf. *Andr.* 700 (= 'the common people'; likewise fr. 92 [*Alcmene*]), again in a context of class conflict (though the passage is bracketed as an interpolation by Diggle). Fr. 626.1, 3 (*Pleisthenes*) refers to a ruler's subjects, as perhaps does fr. 861 (in the plural). In Aesch. *Pers.* 732 the word means 'people' in the broad sense; in fr. 281a28 *dêmos* is contrasted with *etês* and *polis* (above, n. 3).

46. Above, p. 95 with nn. 20-2; Lévy 1985, 57-8.

47. In all but one case the action is set in Athens; in the exception, Aesch. *Supp.*, Argos is generally agreed to be closely assimilated to Athens, as the argument below assumes.

48. See Brock 1998 for a discussion with further bibliography.

49. Bakewell 1997, especially 211-16.

50. Cleisthenes' reorganisation of citizenship is taken on general grounds as the *terminus post quem* (Whitehead 1977, 140-7), but the earliest unequivocal evidence for the institution (*IG* i³ 244) dates from c. 460: Bakewell 1997, 219-23, Whitehead 1977, 27-8. It is striking that the language of *metoikia* (i.e. *metoik-* and *prostat-*) is significantly more frequent in Aeschylus (some 9 relevant instances) than Sophocles (6 instances) or Euripides (4 instances).

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51. Bakewell 1997, 211, 215.

52. Bakewell 1997, 212-13; see also Petre 1986, 25-7 for the concentration in the passage of language reminiscent of Athenian decrees. The unusual prominence of the *dēmos* in this play (above, n. 45) is also relevant here: cf. *dēmēlatoi* (614), *dēmēgorous* (623).

53. Though in fact Athenian decrees tend to express themselves in terms of protection more generally (Henry 1983, 171-6) and explicit provision of *asylia* is rare (id. 245-6, Rhodes & Osborne 2003, 370).

54. Bakewell's discussion (1997, 214-15) deftly explains a feature which had puzzled earlier commentators.

55. Eur. *Herac.* 1030-44; the technical term *metoikos* appears at 1033. Note also the language of benefaction (here of the *polis*: 1026) in 1029 and 1043-4.

56. The concern with Oedipus' residence is noted by Edmunds 1996, 113-14: Theseus formally receives Oedipus at 637. Heracles: Eur. *HF* 1325-33; Bond 1981 observes (on 1331-3) that no apotheosis is envisaged here.

57. E.g. Garvie 1969, 197-9.

58. For a negative reading of the reception of the Danaids, see Sommerstein 1997, esp. 74-6; Bakewell, on the other hand, suggests that the Athenian audience saw the play as validating their self-image as 'calculated risk-takers' (226-7).

59. Or at least, a majority; we should never assume a uniform response (a point well made by Pelling 2000: e.g. 181-2, 199-200, 247).

60. Whitehead 1977 perceives a resonance of pathos in passages such as Aesch. *Pers.* 319, *Cho.* 684, *Soph. Ant.* 852, 868, Eur. *Hipp.* 837, *Bacch.* 1355; perhaps, in view of other passages such as *Soph. Ant.* 890 and *OC* 934, we should think rather in terms of a basic implication of deracination or displacement which may be viewed sympathetically (and generally is), without this necessarily being so. Tragedy is also keenly aware of the pressure of social convention on the metic's behaviour, exemplified in Adrastus' account (in Euripides' *Suppliants*) of the model metic Parthenopaeus (Eur. *Supp.* 890-5, cf. Aesch. *Sept.* 547-8 [suspected by Hutchinson 1985 *ad loc.*]); Tiresias' contemptuous denial of metic status at *Soph. OT* 411 (with the technical use of *prostatēs*) is likewise revealing, as are passages such as Aesch. *Supp.* 994-5 and Eur. *Med.* 222-4 which are couched in terms of normative behaviour for the *xenos* (*sc.*) *metoikos* (above, nn. 10, 21).

61. Even if we exempt Aeschylus' *Supplices*, this anxiety is clearly present in the case of Euripides' *Medea* (824-65, esp. 846-50), who is clearly envisaged as becoming resident in Athens indefinitely (713, 724-30, 1384-5) and hence a metic, even if this is not described in technical terms (so Vidal-Naquet 1997, 111, who observes (*à propos* the *exodos* of *Eumenides*) that 'even if this law serves as a point of reference, it is none the less necessary to take into account a certain vagueness in tragic discourse').

62. Which is not only marked by specific allusions to *metoikia* (1011, 1019), but also signalled visually by the Furies' red cloaks, which echo those worn by metics at the Panathenaea (1028 with Thompson 1938, ii.315-19).

63. Ogden 1996, 170-1.

64. Anxiety: above, n. 24. Autochthony is central to Loraux's reading of the play (1993, 184-236); cf. Ogden 1996, 170-2.

65. The point is regularly made, e.g. Ogden 1996, 172, Lape 2001, 99-101; Loraux 1993, 185-6, specifically adduces Menander's *Epitrepontes*.

66. Ogden 1996, 172.

67. Burnett 1971, 106 n. 6, but N.B. Loraux 1993, 203, 208-13.

68. Loraux 1993, 204, notes that in epic and myth ‘the son of a god is no bastard’, but argues that in tragedy ‘a god transmits no legitimacy’.

69. This seems to be the essential thrust of Loraux’s reading of the play. It is possible that before Pericles’ law citizenship could be inherited through the mother, as suggested by Blok 2005, 20-1, who sees some equivocation in the play between the historical and contemporary positions.

70. N.B. Loraux 1993, 203-4, for the legal tangle at the play’s close.

71. See Rhodes 1981, 66-7, for a summary; apart from the removal of a foreign father, the significance of the cult of Delian Apollo for the Ionians (e.g. Thuc. 3.104) may have influenced his choice.

72. The resonance of the status distinction is nicely pointed up by a different approach to property rights: whereas metics lack them, Ion’s status as insider raises issues of inheritance, which Creusa sees Apollo as having providentially addressed by concealing his true parentage (1540-5).

73. For the grants to the end of the Peloponnesian War see Osborne 1981-3, i.28-37 (D1-5), ii.11-26 (commentary), iii/iv.20-39 (T1-7), 108-10 (PT124-6); on the decree for the Plataeans see Kapparis 1995; the grants to those who fought at Arginusae and to the Samians also involved significant numbers. The controversy over the honours for non-citizens who supported the democratic counter-revolution of 404-403 implies that such measures were more problematic when applied closer to home.

74. On the shift involved see the interesting discussion of Strauss 1994, esp. 257-61.

75. So Parker 2005, 144 and n. 35.

76. I am grateful for helpful advice to Sue Hamstead, Malcolm Heath and Eleanor OKell.

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Paidotrophía and *Gêrotrophía*: Reciprocity and Disruption in Attic Tragedy¹

Maria do Céu Fialho

Before human beings allowed themselves to succumb to a technological way of thinking and turned into inhabitants of large concrete cities, the structural references for their experience of nature and of life were much more evident, with the latter constantly renewing and enduring far beyond the finitude of any existing mortal thing.

The Greeks felt *physis*, or nature, as the core of an identity that was passed on to them by their parents, which they in turn would pass on to their descendants like a kind of seed, and which drew its inspiration from the model of plant life.² It would blossom in a way that would show the chain of mutual belonging that connected them. This model is the foundation of the aristocratic view of the innate and immutable human *physis*, suitable for perpetuation. The specimens appear and grow until the seed ripens, and then die or are harvested, yet they leave behind seeds from which new and identical shoots will blossom. The Homeric simile of the leaves of trees, which compares generations of mortals who are constantly renewed to the perpetual renewal of the leaves, expresses this ancient viewpoint (*Il.* 6.144-9).

This reference intertwines with another from the animal kingdom: life made possible and maintained through nourishment, *boskêma* or *trophê*. Whereas plant renewal has a circular rhythm, the provision of food for the newborn offspring by his or her progenitors is instinctive and is the instinct of the survival of the species and of one's very own survival. The simile of the leaves of trees makes the connection between the animal and plant kingdoms – the recurring image of Earth as the mother that feeds human beings as well as animals inversely completes this connection.³

For the Greeks, the laws of nature and life, according to which humans are the thinking particle of the universe, are strong 'unwritten laws', *agrapta nomima*, because they are primordial and prior to any specific regulation of society. Moreover, because humans belong to this same universe and are subject to these laws, they then prove to be the true source of inspiration for positive law in an ideal human community. The aim is to make this positive law conform to the global order of a cosmos ruled by a sacred Justice.

6. Paidotrophia and Gêrotrophia

The bond of life and natural belonging which joins progenitors and progeny together in the animal kingdom (as practised through the provision of food and of care) is not only observed by humans, but also a projection of human expectation itself. By idealizing animal behaviour which they observe, humans project on to it their hopes about an ideal human society and about the strength of animal instinct. This attitude in fact represents a social-ethical expectation about human behaviour in society.

Thus the belief arises that, among animals of the same species and lineage, there is a natural process of reciprocity on the part of the offspring towards the progenitors who fed and protected them, to behave accordingly when age burdens the latter. This can be seen very clearly in early poetic texts.

The earliest choral lyric sings about the legendary example of the *kêrylos* which the young *alkyones* carry in their wings, above the waves, when it becomes old, as in Alcman, fr. 26 Page.

In the *Birds* (1353-7 = fr. 55a in Ruschenbusch 1966), Aristophanes has Peisetairos refer to an 'old law, which appears in the *kyrbeis* of the storks, that says: when the male stork has fed its offspring to the point when they are fit to fly, it will then be their duty to feed him'.

Although the exact date of Sophocles' *Electra* is not known, we are certain that it was composed at about the same time as the performance of Aristophanes' comedy. In the context of the perverted relationships between Clytemnestra and her descendants, after Agamemnon's murder, Electra's plans for vengeance against her mother and her lover are now the expression of pure despair. She realizes that her brother Orestes, whom she saved from certain death at the hands of his mother when he was a child, and whom she raised to become an avenger, is now dead. And so the Chorus of Mycenaean Young Women sings in lines 1058-62:⁴

Why, when we see the most prudent (*phronimôtatous*) birds on high caring for the nurture (of those) from whom they are sprung and from whom they derive benefit (*onêsin*), do we not pay these dues on an equal footing?

What Greek man believes to be true of animals, particularly of birds, as the expression of a natural tendency and of a biological law in its pure state, is now interpreted and regarded as a strong example of an ethical axiology which must govern humans, their organized community and its basic unit – the home: *oikos*. The foundation for this interpretation is rooted, after all, in an idealized anthropomorphic understanding of animal behaviour. The principle of reciprocity supports this axiology. According to the Chorus, the chain binding the progenitor and nurturer to the offspring and nurtured, and vice versa, is unbreakable in birds. Non-human and human nature seem to grow apart when one realizes that *phronêsis* resides outside the Atridae's *oikos* and outside the human world, in a place

where the strength of ethical values maintains its spontaneity and sovereignty. The strength of these values must therefore be a powerful foundation for positive law which the legislator shapes according to natural law, and consequently for the cosmic order itself.

In the fourth century, Attic orators still refer to the ancestry of laws such as *gêrotrophia* or *gêroboskia*, which were enforced by the ethical strength of their very content, and possibly laid down by Solon. Any infringement of them would bring about a punishment directly proportional to its seriousness, and could lead to the loss of civic rights.⁵ Lysias, who was born in the mid-fifth century, claims in his speech *Against Agoratus* (13.91) that a man who has physically attacked his biological father, denied him any means of subsistence and deceived his stepfather should suffer the most severe of all punishments laid down in the law (*nomos kakôseôs*): namely, death. In his opinion, such acts are within the specific scope of the *graphê kakôseôs goneôn*.⁶

In his speech *Against Timarchus* (1.28), Aeschines calls for a prohibition, permitted by law, that prevents citizens of unworthy character from speaking in public. As an example, he mentions those who break the duty of *gêroboskia* or those who go even further and mistreat their parents. Following the legislator's logic, he also asks:⁷ 'Because if a man is mean towards those whom he ought to honour as the gods, how ... will he treat the whole city?'

Timarchus was such a man. Among other terrible acts committed, he had sold a piece of land that his mother had requested be kept for her burial plot and he had also spent his entire inheritance.

Aeschines' reasoning, already present in *Lysias* (31.21-3), shows that a citizen's attitudes in his own *oikos* have a political implication in the sense that they illustrate the negative potential of his behaviour in the wider context of the city.

The role of tragedy is to dramatize, through myth, situations of crisis, of paradox in human existence, which offer spectators an opportunity to reflect on and to gain a possible understanding of their own temporal life and condition in a world marked by finitude. Even Aristotle notices the preferred choice in Attic tragedy of a restricted number of families from mythology, to show this experience of human limitation. This preference derives from the deep knowledge that the Athenian public possesses about those family groups, so that it is not distracted from the plot by the introduction of new main characters. This previous knowledge of the structure and distortions within that *oikos* was fundamental. Until the end of the Classical period, the understanding that Greeks had of their role in the world was basically that of 'being in the *oikos*', and thus 'being in the city'. The former was already the basic element for the latter.

One can then understand that tragic conflict does not have the narrow dimension of an individual conflict for the Athenian man, as in Romanticism, but instead has a political magnitude. The paradoxes and the crises

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played out in the lives of humans, and in their *oikos*, are also the paradoxes and the crises undermining the safety of the very foundations of the city. They oppose or exclude the individual and his house from the political order, to which they pose a threat. It is this threat and the unsuspected fragility of bonds, which appear very strong, that simultaneously jeopardize the purpose of human life and the balance of the cosmos in which human beings live as the only *zôon politikon*.

One of the elements suitable for tragedy, in some of these mythological families, is precisely the extreme distortions in the family relationship. The failure to carry out the principle of reciprocity in obligations between generations is present and plays an important role. The essence of this reciprocity takes the form of an (unfulfilled) duty to protect life, connected to the essential element that provides for it – nourishment. I therefore speak of the correlation *paidotrophia/gêroboskia*, which for the spectators of Attic tragedy was not only an ethical imperative, in accordance with the laws of nature and natural law, as we have seen, but also had the strength of an ancestral law.

One example immediately springs to mind. It is that of Laius' house and his descendants, especially through the tragic dramatization of Oedipus' last moments of life, in *Oedipus at Colonus*. The cycle of aggression against the natural bonds comes from the past – a past for which Oedipus feels no guilt. It results from the very evolution of the concept of guilt, which occurred between the composing of *Oedipus the King* and this play.⁸ Oedipus committed the bloodshed and the incest unaware of their full implications; however, his progenitors made a deliberate attempt on his life (*OC* 266ff.). Sophocles omits any references here to the ancient Oracle of Apollo to Laius, in order to highlight the attack against the blood tie that bonds parents to children. Instead of offering Oedipus nourishment and life, Laius and Jocasta planned his bloodshed and death. So Oedipus believes that he was not an active force in the crimes that were committed but a passive element instead. One must remember the methodology followed by Antiphon in his *Tetralogies*, which was to find the initial cause that triggered a situation that resulted in someone's death or injury.

On the other hand, Sophocles aims to highlight failures to carry out filial duties towards Oedipus and to put him at the centre of the progenitors and the descendants' attacks, in a house that is defined by the criminal infringements in the chain of family bonds. Thus he develops the theme of Oedipus' exile, dividing it into two phases: according to Oedipus' own memory of the events, in the *agôn* with Creon, his first impulse was to go into exile after recognizing the evils that his *oikos* was suffering from (765ff.); some time later, when he wanted to remain in the palace, he was cruelly expelled from it by Creon, who did not respect their blood ties.

For certain, given Oedipus' situation in that distant past, Creon took on the status of the *kyrios* in the house, and this led to a period of time when both heirs agreed to hand him the power, as Ismene points out in episode

I. Sophocles omits the age of the two children at the time and brings their fight for power to the play.

Meanwhile, an aberrant situation arises between these children and their aged father, now weakened by physical suffering. This state of affairs seems to confirm the law-breaking nature of the royal house of Thebes which Oedipus will curse.⁹ The male descendants never sought out Oedipus in order to care for him; they abandoned him, and left him without a roof over his head, both unprotected and unfed. On the other hand, his daughters would be destined to live in the palace as aristocratic women and they would be exempt from family and civic responsibilities of *gêroboskia*. However, in this case, they move around outside, beyond the city limits, subject to dangers, and they take on the obligation of *gêroboskia*. They are after all unprotected and unfed by the *kyrios* of the house, whoever he may be.

Antigone accompanies her father right from the start of her adolescence and Ismene ventures out of the palace whenever it is necessary to protect her father (337ff.). This anomaly in status leads Oedipus to come closer to Greek procedures rather than to barbarian ones – namely those of the Egyptians.¹⁰ Later, both young women, who follow in their father's footsteps, will face real danger from within their own home.

The old blind man surrenders to Athens when he gradually becomes aware of the terrible power of protection that the gods reserve for the place that will welcome Oedipus. In fact, this will be the place Oedipus believes to be worthy of protection against the enemies whom he aims to destroy. And so the city of exemplary and merciful behaviour welcomes him and promises to keep him safe.

Oedipus dissociates himself from the twisted ties of the royal court of Thebes and destroys this house where the laws of *physis* and civilization are systematically broken. Athenian law had set them out and the audience expected the characters to conform to them. He can do so by exercising the power of the curse on his male descendants, who will only receive burial space in the land of Thebes.¹¹

Oedipus is a real *paidotrophos* who received the *onêsis* of *xenostasis* and of *gêrotrophia* from Athens, as if he had been adopted by the city, and gives the source of fertility and eternal survival to this land, which will be protected from the aggressions of enemies.

The house of the Atreidae is another example of a family where the chain of infringements shows the distortion of bonds. There one can observe inappropriate nourishment and the denial of food, as well as attacks on life or on the social status that the family members are entitled to. It poses one of the greatest sources of inspiration in tragedy. There is the motif of the banquet where Atreus acts out of vengeance and gives his brother his own children to eat. Such a crime will haunt the following generations and cast a shadow over them all. It will become an innate tendency and an inheritance from *physis*.

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Agamemnon sacrifices his own daughter, apparently under the 'yoke of *anankê*' in Aeschylus. For that blind sacrifice, worsened by other motives of guilt, he will be left at the mercy of Clytemnestra and Aegisthus. Cassandra clearly sees the connection between the facts. However, the open ending of the first play in the trilogy continues a vengeance which must be carried out by the male descendants.

From that moment on, for Agamemnon's descendants – and particularly for Orestes – Clytemnestra becomes the woman to whom they are connected through blood ties and the nourishment of breast-feeding, but also the woman whose blood has to be spilled because of the crime she committed against their father. Within this tangled conflict, Orestes is aware that any decision he makes, either by obeying or disobeying Apollo, will lead him to be persecuted by the Erinyes.

The connection between the two motives – the blood and the breast-feeding – is very important in *The Libation-Bearers*. This alliance is particularly emphasised by the symbolic language in Clytemnestra's dream (*Cho.* 523ff.) because the person who suckles on the milk does so until he sucks the blood from the mother's breast. The child is portrayed as a serpent coming out of the maternal womb. It is simultaneously the symbol of the Atreid's own fertility and the symbol of betrayal. Orestes sees himself in it and thus identifies with that same act of betrayal.

Blood and milk are joined in the very last moments of Clytemnestra's life. Either by pointing to her breasts or by showing them, she appeals to the primordial relationship between a mother who breast-fed and a son who suckled on the life-giving milk (*Cho.* 896-8). Thus the queen wishes to make the ancient force of *paidotrophia* prevail over the justice of the imminent bloodshed. And Orestes hesitates.

In his *Electra*, Sophocles annuls the potential effect of such a relationship by presenting a much more linear and inhuman Clytemnestra. Together with Aegisthus, she was Agamemnon's ruthless murderess, who now tries to justify her act by referring to Iphigenia's sacrifice. She celebrates the murder with Aegisthus but her relationship with her descendants is basically dominated by fear of retaliation. Above all, the queen sees her children (277-81), and Agamemnon's children, as potential threats who must be silenced.

In the past, Electra had abducted Orestes from his mother because she posed a possible threat of death to her helpless brother (293ff.). By saving him and sending him away from the *oikos*, she took on the role of a mother as a source of life and fed Orestes with the desire for vengeance (603-4).

Consequently, Clytemnestra's dream presents other symbolic language in which nothing can be interpreted as the betrayal of an offspring. Agamemnon's reappearance, for a *deuteron homilian*, and his sceptre planted in the fireplace, with all the sexual ambiguity that this involves (417-21), represent a threat to the killer and a sign of hope for the descendants.¹²

In the past, the mother had withdrawn food from her children, and still does so in the present, at the 'empty tables' which Electra draws close to (192) – she points out to Orestes that 'no one else in this house raised you, except me' (1147-8). The word *trophos*, as we know, refers both to the person who educates and to the one who provides food for someone else during the first years of life. The same semantic context is enclosed in the root of the word (including the verb *trephô*). Sophocles uses it in other lines to refer to his mother (*Aj.* 849; *OC* 760).

In contrast, this mother destroys the vitality of the father to find a source of abundance for her existence in this destruction. Electra accuses Clytemnestra of a murder within a feast, as if the two murderers had fed on Agamemnon's blood (208). She accuses her of repudiating her legitimate children (589-90). After the replacement of the bonds that naturally and reciprocally unite mother and children with ones of hatred and destruction, Electra turns the sorrow for her dead father into the 'food' that revitalizes her and gives meaning to her life. With it she expects to strengthen Orestes' desire for vengeance. And Clytemnestra senses this when she realizes that Electra feeds off the blood of her existence to the last drop like the Erinyes (785-6). Since her father's death, Electra drew on this maternal blood and found in it a source of vitality that would bring the deceased to life again. Consequently, her incessant cry of sorrow and accusation makes him more present.¹³

In the desperate excess of her suffering and waiting, Electra anticipates Orestes' return to vengeance as a *sui generis* way of bringing the paternal *physis* back to plenitude. Her Erinyes-like behaviour is a type of *gêroboskia* in relation to her extremely weakened father, whom she does not consider to be dead – Clytemnestra's dream confirms this perception; for Electra, the Pedagogue is like a father whom she salutes as *philtaton phôs* (1354ff.).

In the first stanza of the choral song III (1058ff.), mentioned previously, the Chorus also shows the connection between Electra's daughterly devotion and natural laws, which are more effective among birds. In fact, this devotion prevails over the distortions of the relationships in the house of the Atreidae. Clytemnestra's non-existent *paidotrophia* towards Orestes has a particular significance for Electra – to ensure vengeance for her father, which she herself will carry out within her own limitations, thereby nourishing him with the vitality stolen from the mother. It is a figurative *gêrosbokia* in the disturbed universe of the *oikos*, far beyond the ancient motive for blood justice, already outdated by the time *Electra* was composed. To a certain extent, Electra's behaviour matches Clytemnestra's vision in the Aeschylean dream. In the end, Electra will use the blood that she sucks from the mother's breasts to care for her father.

Radically different from the previous elaborate Sophoclean construction, we have a third example of the theatrical building-up of expectations regarding the reciprocal solidarity between parents and children through

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family bonds. It is the Euripidean play designed to replace satyr-drama in the group of four plays presented at the contest: *Alcestis*, performed in 438.

According to Lesky,¹⁴ Euripides changed the very motif of the popular short-story that Phrynichus and Aeschylus had used, and altered its characteristics. The apparent painful solution for the problem in the house of Admetus – the imminent threat of death to his *kyrios* – actually becomes the starting-point for other evils which lead to a deeper assessment of the true meaning and basis of the *oikos*. In my opinion, death in the *oikos* constitutes the trigger for tensions which will reveal the essence of human affection and will consequently give meaning to human existence within the social structure.

Euripides aimed to highlight the catastrophic implications of fragmentation in the *oikos* through the loss of one of its members or through the emptiness created in the relationships between generations. Consequently he revealed the powerful strength of the *philia* relationships with strangers. One of the expressive means used by the playwright for this purpose is precisely the recurring use of words semantically related to 'house': *oikos* / *dôma* / *stegê* / *melathron*,¹⁵ combined with the constant use of *philia* / *philos* and *xenos*.¹⁶

As Goldfarb¹⁷ points out, the words *philia* / *philos* are especially used when associated with family ties. But with the character Heracles, in his gesture of gratitude for hospitality that went beyond a mere obligation, *philia* is portrayed as a powerful force that can unite strangers. This behaviour is the result of the gratitude of a *xenos* who, at the end of the play, redirects the mother and the lost wife to the *oikos* – an essential element in regaining happiness and harmony.

In this experience of death and loss, young Eumelus laments his situation of *philas monostolos te matros* (406-7) and, looking at his mother's body, he declares (415): *olôlen oikos*, 'the house has just died'.

Bonds of *philia*, within *Alcestis*' family, represent not only blood ties but also solidarity that results from a blood connection which brings consistency to the family and the house. The transfer of these ties to outside the house, thus creating a new meaning of community, will be fundamental to the plot in *Oedipus at Colonus*. This relationship between *Alcestis* and *Admetus*, *Alcestis* and her children, and even between the Chorus and *Admetus*' house, is very clear and is translated meaningfully into words. The absence of other *philoî* to express themselves led *Alcestis* to sacrifice her own life for *Admetus*. As for her parents, she says that they proved to be '*philoî* in words, but not in deeds' (333).

The poet sees much more in *Alcestis*' decision than the altruistic offer of a passionate woman to sacrifice her own life. According to Greek mentality and law, *Admetus* is the *kyrios* of the house. In the absence of the *kyrios*, *Alcestis*' position as a widow with her orphan children is very fragile. Later *Admetus* refers to *Alcestis* as a foreign woman (*othneios*, 533) when he talks to *Heracles*, and this weakens her situation and her

children's situation even more. Thus sacrificing her own life is Alcestis' only solution if she wishes to bring stability to the house and to the children's future, especially since no other member of the family was willing to sacrifice himself or herself to protect Admetus. And so Alcestis is worried about her children's future until the end, and makes Admetus promise that he will never give a stepmother to her descendants (299ff.).

The tension between Admetus and Pheres must be analysed in this context. Even Alcestis denounces the selfishness of the elderly parents-in-law in their non-natural behaviour of abandoning and betraying the ties of *physis* (290-2): *σ' ὁ φύσας χῆ τεκοῦσα προὔδοσαν* ('the man who begot you and the woman who bore you betrayed you').

In the prologue, Apollo had already highlighted the complete abandonment of Admetus: 'after reaching out to all the *philoí*,¹⁸ one by one, he found nobody willing to die in his place (15-18), not even his father or his old mother who gave birth to him – the only exception was his wife'.

This frustrated and verbalized expectation will cause a true generational conflict which will raise the issue of the moral legitimacy of *gêroboskia* as a universal right without the corresponding obligations. The tragedy of Admetus' house is very clear. There is an attack on the very core of its vitality, affection and guarantee of continuity, and on the safety of its younger members.

Alcestis acknowledges the contradiction: Pheres and his wife had a son but they refuse to die for him. They generated life and potentially perpetuated their house; however, as they become old they refuse to guarantee their son's life (although they are no longer able to create another life at the time). Focusing on themselves alone, these venerable old people will certainly be the ones to claim the right to *gêroboskia* for a life which they created but which they did not save. The Chorus also criticizes the behaviour of these progenitors and refers to them as *schetliô* (470), as opposed to the wife's acknowledged *philia*.¹⁹

The question arises: how far will the progenitors' blood obligations to their descendants extend, given that the duties of lineage appear to be so clear, are clearly set out in the law and are policed by the Athenian state?

Positive law consists of rules that derive from an inspirational source – *Dikê*, which underlies it and underpins the very dynamic of nature with its sacred foundations. However, when positive law starts to differ from its source and neglects it, the power of its laws is both impoverished and reduced.

As we saw at the beginning of this essay, *gêroboskia* is interpreted within the everlasting ethical principle of reciprocity – which humans project onto the animal world. Is there a clear boundary between the obligation of *paidotrophia* and the obligation of *gêroboskia* so that we can say that where one begins the other ends? In the excerpt quoted from *Electra* 1058-62, Sophocles formulated poetically the law governing birds, and its construction suggests an overlapping of both obligations, in a sort

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of timeless interaction. The mutual assistance provided between parents and children seems to be one which is imposed by the laws of nature and the needs of the moment.

Euripides also seems to need to demonstrate that the secret in articulating them resides essentially in the everlasting interaction of the *philia*, beyond the actual law of the city. *Philia* gives meaning to gestures of solidarity.

In Admetus' house, the strongest ties of *philia* are those that bind him to a 'foreign woman who is necessary to the house' (533). Despite his mourning, he explains it to the guest this way. In fact, Admetus greets another foreigner, Heracles, whose ties of *philia* consolidate and lead to the return of favours, and welcomes him into his home despite his circumstances. According to the Chorus, the gesture demonstrates Admetus' *to eugenes* (600). By bringing Alcestis back from Hades, Heracles showed his noble nature of a grateful friend (*eugenes*, 1136), and Admetus pointed out that (1138): 'you alone rebuilt my house'.

The *agôn* Admetus / Pheres lies between the welcoming of Heracles and his gesture of gratitude. Admetus is treated by all the characters, except his father Pheres,²⁰ as a king who is worthy of respect. Pheres, on the other hand, has already been unkindly referred to by Apollo, and criticized by Alcestis, Admetus and the Chorus. All of this occurs even before he sets foot on stage.²¹

After the anticipated criticism directed at this character, Pheres' first intervention was certainly received by the audience as a demonstration of selfish blindness or cynicism. In the context of the funeral honours, Pheres salutes the deceased young woman as a noble and prudent woman (ἐσθλῆς ... καὶ σώφρονος γυναικὸς, 615-16), who avoided making Pheres a childless elderly man. By treating her as someone who 'lifted us up from ruin again' (625-6) Admetus' father gives the impression that the ruin he refers to is his own, that of being a childless elderly father. Finally he recognizes that this is a profitable type of marriage – another kind would not be worth it (627-8).

This conclusion contrasts with the demonstration of the value and strength of the ties between spouses – a much stronger reality than Admetus would imagine and of which he is now becoming painfully aware. Pheres' initial speech is centred on himself. He presents himself as someone only willing to receive favours. The reasons behind this attitude will be formulated in the answer given to Admetus: his duty in the *oikos* of carrying out his most elementary ethical and civic obligations has ceased. There had been a time to fulfil them – to generate and nurture a son, an heir to his estate, but from then on he declares (658-86): 'it is to yourself, unhappy or happy, that you were born. What you had to receive from us, you have already'. Pheres is surely referring to the gift of life, which is made possible through education and nourishment, for only afterwards will he mention the inheritance that Admetus will one day receive.

The father, through this narrow perspective, contradicts himself. The perpetuation of the house was threatened by Pheres' own attachment to life, which dominated everything. The time to receive favours and care has come. With his death, Alcestis made sure that this right was guaranteed. Here, Pheres is different from old Iolaus from *Heraclidae*, who does not hesitate to take on the huge task of taking care of Heracles' lineage in his old age.

It is in these circumstances that Admetus repudiates his father, because of his *apsychia* (642), and denies his connection to his parents. Owing to the elders' selfishness, the ties of solidarity and matrimonial alliance, on which the fertility of that *oikos* is underpinned, were broken and sacrificed. In this way, Admetus sees his father as the true cause of the disintegration of that *oikos*, which he views not as the institution which perpetuates itself – since lineage already exists – but as a space of harmony and a source of *eudaimonia*. These values are possible only if the man / woman alliance is preserved through marriage, which is the very pillar of the house. Admetus learns this through the loss of Alcestis. It enables him to understand the value of what he recovers, thanks to the *philia* of an exceptionally able stranger to the house.

Pheres' expectation is without question to be guaranteed care in his old age. Admetus feels himself free of that obligation: in the words of rejection that he utters regarding his father, and which obviously include his mother (658-68), he denies them the funereal care that children are obliged to provide for their parents by law. He then asks them to find another source of *gêroboskia* (663), given that the ties of solidarity had been destroyed and that family interaction meant nothing to Pheres. He was wrapped up in his expectation of having the right to receive favours and so the time to give them to others has now ended. In that same speech Admetus spontaneously proclaims himself adoptable as a son to that man from whom he received favours and to whom he will serve in old age, from *philon gêrotrophon* (668) – namely Heracles.

A sort of transfer of family ties will also occur, as had already been said in *Oedipus at Colonus*. The curse Oedipus places on his sons, changing himself from old *paidotrophos* into a deadly force of destruction of both life and home, results from the break in solidarity of his house towards him. In compensation, Oedipus voluntarily becomes the guarantor of life and perpetuation for the city of Athens, which had unreservedly welcomed him in old age and in suffering.

The transfer of ties will also occur in *Electra*, who turns herself into her brother's *paidotrophos*. After all the chain of perversion and death created in the house of the Atreidae, the food she granted him is understood in a wider sense – it was not the milk but the possibility of surviving and living, away from the threat his mother personified. Electra raised her brother Orestes for the purpose of vengeance; therefore this *paidotrophia* represented a figurative *gêroboskia* towards a father who called for his killers'

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blood, in order to avenge his death. And Electra is the voluntary guardian of this cycle.

But while this transfer occurs figuratively in *Electra* inside the same house, in *Alcestis* and in *Oedipus at Colonus* it occurs from the inside out. In the latter, the cause resides in a *gêroboskia* that is disrespected by the male descendants, when it is not yet possible for them to predict that their father, who is damned and frail, can still be the carrier of an important source of life and power. And he would have been willing to grant it to Thebes and to the royal house, had the chain of care not been broken.

In *Alcestis* the chain of care was broken by the most elderly. In these two plays, set over twenty years apart, the possibility of the consolidation of ties which are stronger than family is left open. This happens owing to a demonstration of *philia* with the strength of solidarity that overcomes the ties of *physis*. This *philia* may represent a true source of revitalization and re-enforcement for the institution of *oikos* and ultimately for the city.

The acknowledgement of the political-ethical role of friendship, which Aristotle will make in his *Nicomachean Ethics*, appears early on in Greek tragedy (including in the play *Alcestis*, although it may be considered a tragedy). In this play Euripides seems to want to draw attention, in the generational conflict Admetus / Pheres, to the limits of the understanding of the relationships within the house, when these relationships limit themselves to the fulfilment of a rule and forget the natural source that gives meaning to this rule. The nourishment in question, which the parents give to their children and they in turn to the parents, cannot be subject to deadlines nor can it be understood as simple education and nourishment. This nourishment is life itself renewed by the constant interaction of solidarity and of affection. The great threat that endangers this understanding is the selfishness and the individualism that ultimately can destroy houses and lead the *polis* into a profound crisis.

On the other hand, the house cannot be regarded as a completely closed entity, as it does not feed nor perpetuate itself. Euripides' play dramatizes the process through which the *oikos* gains awareness of the value of affections and the supreme importance of harmony between spouses. The latter was restored and strengthened by the return of Alcestis. Thus we reach the core of the vitality and perpetuation of the *oikos* – ethical rather than biological. This concept should bring together all the members of the house: both those united by blood ties and the one entering it for the first time and ensuring its continuity. The house feeds on the strength of these ties and then feeds all its members. Their expected interaction must be analysed within this context, which also gives consistency to *gêroboskia*.

Notes

1. This paper was written as part of the research project of the Centre for Classical and Humanistic Studies at the University of Coimbra.

2. The plant life model that underlies the concept of the Greek *physis* was duly analysed by Patzer 1945.

3. See mainly Aesch. *Sept.* 16; also, e.g., Aesch. *Cho.* 66, Pl. *Ti.* 40b.

4. I quote Kells' translation from Kells 1973, 178-9, whose comments I agree with.

5. Hunter 1994 dedicates ch. IV of his book to Attic law, particularly to children's obligation to nurture and shelter their parents, or other elderly relatives, and to the public denouncement of the infringements of these rules by Attic orators, in the fifth and fourth centuries. However, Solon also set the boundaries for the obligation of *gêrotrophia*: prostitutes' children – bastards – were excused from this obligation, as were those whose parents had not taught them a profession (frs 56, 57 in Ruschenbusch 1966). The principle of reciprocity is applicable here in its negative sense. See Leão 2001, 374-5, on this law. See also Leão 2005, 26-7, for a commentary on the verses quoted. See Stroud 1979, 5, on the origin of this law and Solon.

6. See Harrison 1971, 76ff., on the concept and limits of the *graphê goneôn kakôseôs*. See Hunter 1994, 125. The state protected the unfit from filing legal suits (orphans, *epikleroi*, and aged parents) after a complaint by the damaged party.

7. This is the translation of C.D. Adams' Loeb edition.

8. Adkins 1960, 86-115.

9. Rosenmeyer 1952, 92-112; Fialho 1992, 107-56.

10. In this comparison there is a clear reference to Hdt. 2.35.

11. It seems that the reason for Oedipus' curse, in the lost trilogy that includes Aeschylus' *Seven against Thebes*, would be linked to filial disrespect for Oedipus' status at a banquet.

12. See Fialho's (1992) chapter on Electra.

13. See Segal 1966 on the expressiveness of the repetition of vocabulary within the same semantic context of 'grow', 'generate', and 'feed'.

14. Lesky 1972, 289-300.

15. Luschign 1992.

16. Goldfarb 1992, Thury 1988.

17. In this article Goldfarb 1992, 110-12, mentions that the Chorus and Admetus refer to Alcestis as *philtata* (e.g. 1133).

18. I quote here from the Greek to show the ambiguity of the word – 'friends' or 'relatives'.

19. Homer had already referred to the praising of the harmony in a house, built on the alliance between the spouses (e.g. *Od.* 6.180-1). Aeschylus consecrates it with regard to the city: *Eum.* 213ff.

20. Smith 1968.

21. We must take into account what Harrison points out (1971, 74): 'the Athenian father never in historical times enjoyed a power remotely resembling the Roman father's *ius vitae ac necis*. There is not a trace of anything comparable with the Roman father's emancipation of his son, without which the latter could not himself become a *paterfamilias* during his father's lifetime'.

6. Paidotrophia and Gêrotrophia

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Is Oedipus Guilty? Sophocles and Athenian Homicide Law

Edward M. Harris

Almost half a century ago, Professor E.R. Dodds was examining Honour Moderations and was shocked to read what Oxford students were writing about Sophocles' *Oedipus the King*. Dodds had set the question 'In what sense, if in any, does the *Oedipus Rex* attempt to justify the ways of God to man?' Aside from a small number who 'either failed to make up their minds or failed to express themselves clearly', the answers fell into three main groups. The first group thought that the play shows 'we get what we deserve'. Another set of answers thought the play 'proves ... that man has no free will but is a puppet in the hands of the gods who pull the strings that make him dance'. The third group 'was much smaller, but included some of the more thoughtful candidates'. These students thought 'Sophocles was a pure artist and was therefore not interested in justifying the gods' and that the 'gods are simply part of the machinery of the plot'. Dodds found none of these answers entirely satisfactory: 'It was a shock to me to discover that all these young persons, supposedly trained in the study of Classical literature, could read this great and moving play and so completely miss the point'.¹

Dodds was the Regius Professor of Greek and felt he had a duty to 'clear up some of these ancient confusions' shared by many students and scholars. To enlighten the misguided, Dodds therefore published an essay entitled 'On Misunderstanding the *Oedipus Rex*'. Anyone who wanted to know how to write an essay about the play for Honour Moderations would now know where to find the right answer. Dodds started by looking for a moral fault in Oedipus that would explain his downfall but found none in his character. In fact, he notes that the characters in the play find him admirable: in the prologue the priest calls him the 'greatest and noblest of men', and the Chorus places its complete trust in him.² But then why does Oedipus blind himself 'if he is morally innocent'? Dodds notes that 'the Athenian courts took account of intention: they distinguished as ours do between murder and accidental homicide or homicide committed in the course of self-defence. If Oedipus had been tried before an Athenian court he would have been acquitted – of murdering his father. But no human court could acquit him of pollution; for pollution inhered in the act itself,

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irrespective of motive.³ Dodds here seems to imply that Oedipus killed Laius in self-defence and that the Athenian courts took a different approach to the question of guilt and responsibility from the view implicit in the religious notion of pollution. Dodds was not alone in his opinion: 'To mention only recent works in English, the books of Whitman, Waldo, Letters, Ehrenberg, Knox, and Kirkwood, however much they differ on other points, all agree about the essential moral innocence of Oedipus'.⁴

J.-P. Vernant, in an essay that has become influential in some circles, agreed that Oedipus is morally innocent. Vernant finds Oedipus innocent of the crimes of parricide and incest. He also absolves him of murder for killing Laius: 'When he kills Laius, it is in a state of legitimate self-defence against a stranger who has struck him first.'⁵ According to Vernant, tragedy arises 'in a divided world, where one type of justice struggles against another type of justice, one god against another, where law is never fixed, but during the course of the action is displaced, evolves, and transforms itself into its opposite'.⁶ Tragedy is the product of this struggle between internal inherent contradictions: 'For there to be tragic consciousness, it is indeed necessary that the human sphere and the divine sphere be distinct enough to be opposed to each other (that is, that the idea of human nature has liberated itself) without nevertheless becoming inseparable.'⁷ Oedipus is therefore caught between two standards of justice: 'Innocent and pure from the human point of view, he is guilty and polluted from the religious point of view.'⁸ The reason that Oedipus blinds himself and must be driven out of the city is that he is a *pharmakos*, an *agos* or stain that must be expelled ('*l'agos*, la souillure qu'il faut expulser') to avert the plague. Though innocent himself, 'Oedipus in reality carries the weight of all the misfortune that devastates his fellow-citizens'.⁹

The essays of Dodds and Vernant have been very influential in recent scholarship and are frequently cited with approval.¹⁰ Both authors, though coming from very different intellectual traditions, and many other scholars now agree on one basic point: that Oedipus is innocent according to Athenian law and that his legal status is the same both in *Oedipus the King* and in *Oedipus at Colonus*.

This essay will re-examine the issue of Oedipus' guilt in Sophocles' two surviving plays about the Theban hero.¹¹ The first part of the essay examines the relationship between the laws of the *polis* and the laws of the gods and that between homicide law in Athens and the fear of pollution. This section questions the assumption shared by Dodds and Vernant that the Athenian courts took a different approach to questions of justice from the religious view implicit in beliefs about pollution. The second part studies the categories of homicide in Athenian law and their relationship to levels of pollution and ritual purity. The third part examines Sophocles' accounts of the murder of Laius in the *Oedipus the King* and in *Oedipus at Colonus*.

I

If any land knows how to pay reverence
to the gods with honours, this one is superior in that regard.

Sophocles, *Oedipus at Colonus*, 1006-7

Before examining the laws on homicide and pollution for murder, three preliminary issues must be addressed. The first is the relationship between the laws of the gods and the laws of Athens. The second is the role of beliefs about pollution in Athenian law and legal procedure. The third is the attitudes about guilt and responsibility for homicide found in Attic tragedy and Athenian law.

Vernant believed that there was a conflict between the law of men and the laws of the gods in fifth-century Athens. According to Vernant, Oedipus may have been innocent according to the laws of Athens, but in the eyes of the gods he was guilty, and his guilt brought about the pollution that caused the plague in Thebes. Implicit in this argument is the assumption (apparently shared by Dodds) that the laws of the gods and the laws of the *polis* represented two different standards of justice, which could come into conflict. Is this assumption correct?

Far from believing that the law of the *polis* might clash with the laws of the gods, the Athenians and other Greeks considered the gods the authors of the laws of the *polis*.¹² According to Heraclitus (fr. 253 Kirk & Raven; 114 Diels & Kranz), 'all laws of men are nourished by one law, the law of the gods; for it has as much power as it wishes and is sufficient for all and prevails' (tr. adapted from Kirk & Raven). In Plato's *Crito* (54c6-7) the laws of the *polis* warn Socrates that if he breaks his agreement with them 'our brothers in Hades will not receive you kindly, knowing that you tried to destroy us to the best of your ability'. Here the two sets of laws are related and work together to punish those who break them. The view that the gods are the authors of the laws is found both in Attic tragedy and in oratory. In Aeschylus' *Eumenides* (484), Athena sets up the court of the Areopagus and declares she will 'lay down a law for all time'.¹³ Demosthenes (23.81) holds a similar view: he says that the gods established the courts for homicide. Demosthenes does not know who created the procedures for homicide but says it was either gods or heroes. According to Antiphon (1.3) the Athenians received their laws about homicide from their ancestors and the gods.

The Athenians thought that the laws of their city did not clash with the will of the gods but were in harmony with the will of the gods. A plaintiff in an inheritance case has the clerk of the court read out an oracle from Delphi about rites for the dead so that the court can see that 'the god speaks in the same terms about relatives as the laws of Solon'. After the oracle is read out, he says that the court has now heard that 'Solon in his laws and the god in his oracle say the same things' (Dem. 43.66-7).

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Demosthenes (19.297-8) has oracles read out to strengthen his arguments for punishing the traitor Aeschines. The message contained in the oracle is identical to that found in the laws: those who betray Athens deserve harsh treatment. Demosthenes (21.54-5) also has oracles from Delphi and Dodona read out in his speech against Meidias to show that the gods command the Athenians to honour them with choruses. The laws of the *polis* that regulate these choruses therefore have divine sanction. The Athenians often invoked divine support by placing the word 'gods' above the prescripts of their laws and decrees.¹⁴ In similar fashion, when Cleisthenes created the system of ten tribes in 508/7, he sought divine approval from the Pythia at Delphi (*Ath. Pol.* 21.6).¹⁵

Because the laws of the *polis* had the approval of the gods, anyone who violated these laws offended both gods and men. In the *Third Tetralogy* attributed to Antiphon the accuser states 'Whoever kills someone in violation of the law sins against the gods and breaks the rules of human society' (Antiph. 4.1.2). The accuser who charged his step-mother with the murder of his father asserts that those who commit crimes do not fear 'gods or heroes or men' (Antiph. 1.27). According to the accuser who prosecuted the son of the general Alcibiades, those who parodied the Mysteries and mutilated the Herms committed sacrilege against the gods and wronged the city (Lys. 14.42). When another accuser charged Agoratus with the murder of his cousin, he told the court that his punishment would improve their standing both with gods and with men (Lys. 13.3). In Antiphon's *On the Chorister* (6.3) the defendant says that it is important for judges to decide cases of homicide correctly for their own sake and out of respect for the gods. To find an innocent man guilty is an offence against both gods and men (Antiph. 6.6). Lycurgus (*Against Leocrates* 93) believed that Apollo brought back Callistratus from exile so that he could receive the punishment he deserved from the laws of Athens.¹⁶

The laws of the gods were sometimes called 'the established laws' or 'the unwritten laws'.¹⁷ The principles embodied in these laws were the same as those found in the laws of the *polis*. For instance, one of the unwritten laws was to respect one's parents. In Athens the obligation to respect one's parents was enforced in Athens by the *graphê kakôseôs goneôn*, a public action against harming parents (Andoc. 1.74; Dem. 24.60, 103, 107). Beating one's parents was considered such a serious crime that those guilty of this offence were barred from speaking before the council, assembly and law courts (Aeschin. 1.28). When candidates for the archonship had their qualifications for office examined, the council asked them if they treated their parents well (*Ath. Pol.* 55.3-4). If they did not, they were disqualified. These specific laws of the *polis* served to uphold the general duty to respect one's parents found in the unwritten laws of the gods.

The evidence from the Attic orators and other authors shows that the Athenians did not view the laws of the gods and the laws of men as two different forms of justice, which might clash. The laws of Athens were

based on the laws of the gods, and the standards that men should follow are those established by the gods.

This brings us to a separate, but related issue: was the view that certain types of homicide created pollution, which might cause damage to the entire community through plague or other natural disaster, an opinion found only in the poets, especially those of tragedy?¹⁸ Or did this view influence and shape the laws and legal procedures concerning homicide? This is a key issue for understanding the relationship between law and drama. If the poets of drama inhabited a separate world from the world of the courts, it would be risky to apply evidence from Athenian law to our understanding of Attic tragedy.¹⁹ But if poets and lawgivers shared basic conceptions about religion, guilt and responsibility, there is no reason to question such an approach.

The view that homicide causes pollution, which in turn threatens the entire community with harm, is most prominent in the *Tetralogies* attributed to Antiphon. In the *First Tetralogy* (2.1.3) the accuser says 'We know that the entire city is polluted by the murderer until he is prosecuted' (cf. Antiph. 3.1.2). The murderer brings his pollution on the shrine of the gods if he sets foot there and on innocent men if he shares their table (Antiph. 2.1.10-11; cf. Pl. *Euthphr.* 4b-c). Judges must condemn the guilty to avoid having pollution fall on them (Antiph. 3.3.12). On the other hand, if the accuser prosecutes the wrong man and the court convicts him, the entire pollution falls on the community. But if the court convicts and punishes the guilty man, the entire city is purified (Antiph. 2.3.11).

The fear of pollution from murder accounts for several distinctive features in Athenian procedures for homicide. First, the 'king' (*basileus*), the archon who received charges of homicide and brought them to court, made a proclamation that anyone accused of homicide keep away from lustral water, libations, bowls of wine, holy places, and the agora (*Ath. Pol.* 57.2; Dem. 20.158; Antiph. 6.36). The aim of this ban was clear: the community was afraid that the pollution from the killer might attract the wrath of the gods, who would punish everyone who came into contact with him. If a polluted person attended a sacrifice, he might cause the ritual to fail (Antiph. 5.82-3).²⁰

Second, trials for homicide were held in the open air, not in a building with a roof. According to Antiphon (5.11), this was to prevent the killer from sharing a roof with the courts and the accuser. If they were under the same roof, the latter would be tainted by the killer's pollution.

Third, when a person convicted of unwilling homicide was charged with another murder, his case was heard in a special court in Phreatto. The defendant pleaded his case standing in a boat offshore (Dem. 23.77-8; *Ath. Pol.* 57.3). The aim of the procedure was in part to ensure that the convicted killer 'did not infringe his exile by touching Attic ground' (Dem. 23.78).²¹ But this does not explain the requirement that the boat in which the killer stood could not place a gangway or an anchor on the land (Poll.

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8.120). The aim behind these rules was obviously to prevent any contact between the killer and the land of Attica and thus avoid pollution.

Fourth, when someone convicted of unwilling homicide was granted pardon by the relatives of the victim, he was also required to perform purification to rid himself of pollution (Dem. 23.72).²²

Litigants took it for granted that the members of the court believed that homicide caused pollution. The best-known example of a litigant's appealing to Athenian beliefs about pollution is found Antiphon's speech *On the Murder of Herodes* (5.81-3). The defendant has been accused of killing Herodes on the island of Lesbos. After answering the main charges, he tells the court that the signs sent by the gods should influence their verdict. He observes that many murderers who are polluted have caused the destruction of ships they were sailing on and brought about the deaths of innocent people. Murderers have also prevented rituals from obtaining favourable results because they were unclean.²³ This defendant assumes that the court believes that pollution for homicide causes ships to sink and sacrifices to fail and bases his argument on this belief. Orestes uses a similar argument in Aeschylus' *Eumenides* (285) when he claims that he is not guilty of murder because he has not caused harm to any of the households that have welcomed him. Andocides in his defence against a charge of impiety also appealed to divine signs to prove his innocence. The Athenians also believed that those who committed sacrilege were polluted and therefore banned them from sanctuaries. To prove his innocence, therefore, Andocides (1.137-9) tells the court that he has gone on many sea voyages but has always returned safely. This demonstrates that the gods do not think that he has done them wrong and are therefore not angry at him. If they were angry, they would not have saved him from danger at sea.

There are other passages in which a litigant assumes that the members of the court believe homicide causes pollution.²⁴ If an accuser associated with someone he later accused of homicide or did not prevent him for performing religious rituals, the defendant could use these facts to show that the accuser did not believe in the truth of his charge. For instance, Meidias alleged that Demosthenes murdered Nicodemus and tried to get the victim's relatives to bring a charge against him (Dem. 21.104). If Demosthenes had been guilty, Meidias should have objected when he performed sacrifices for the council and led a sacred embassy to Delphi, because he was polluted by the murder. Because Meidias allowed him to do these things, he must not have believed that Demosthenes was polluted, which in turn indicated that Meidias did not really think that he had murdered Nicodemus (Dem. 21.114-15):

This man is so impious, so foul, so ready to stoop to say or do anything – whether it be true or false, against an enemy or a friend, and so on, he makes no distinction at all – that even after accusing me of murder and bringing such a serious charge, he still allowed me to conduct the inaugural rites for

the council and to conduct the sacrifice and to preside over the rituals for you and the entire city, then allowed me to head the sacred delegation sent out on behalf of the city and lead it to Nemean Zeus, and did not stop me from being elected out of all Athenians along with two others to serve as *hieropoios* for the August Goddesses and to preside over their rites. If there were a shred or shadow of truth in any of the charges that he was trumping up against me, would he have allowed these things to happen? I do not think so.

Aeschines (2.148) later repeated Meidias' allegation and attacked Demosthenes for entering the agora while being polluted (*ou katharos*).²⁵ His words are a clear attempt to stir up the court's fear of pollution and its consequences.

The defendant in Antiphon's speech *On the Chorister* (6.41-6) attempts to undermine his accusers' charges in the same way. The defendant had been selected to produce a chorus at the Thargelia and had recruited several boys to train for the performance. One of the boys, who was named Diodotus, died after being given a potion to improve his voice. The boy's father Philocrates brought a charge of unwilling homicide (*phonos akousios*) against the chorus-producer before the *basileus*.²⁶ The defendant claims that he did this at the request of Philinus and others whom he had denounced for embezzlement. The *basileus* refused to accept the charge because there were not enough months left in the year for him to make his three proclamations and to bring the case to court. When the new *basileus* entered office the following year, the defendant became a member of the council and served as a *prytanis* during the first prytany. During this time he offered sacrifices and prayers on behalf of the Athenian people (45). If the accusers truly thought that he was responsible for the boy's death, he would have been polluted and should not have performed these rituals. The accusers also associated with the defendant. If they thought that he was guilty and therefore polluted, they would not have done so. The defendant takes it for granted that the court believes that those guilty of homicide are polluted and that average Athenians do not associate with polluted individuals because they fear being tainted by their pollution. In other words, the defendant's argument would not have had any persuasive force if the members of the court did not accept the view that homicide causes pollution.

In several passages in the Attic Orators the term 'clean' (*katharos*), meaning free from pollution, is often used interchangeably with the words or phrase indicating innocence or lack of guilt. For example, Demosthenes (19.66) says that if the ancestors of the Athenians who judged Aeschines' case in 343 were considering the guilt of those responsible for the destruction of the Phocians, they would have considered themselves 'ritually pure' (*katharous*) even if they stoned these criminals to death. Because the punishment of the guilty would be justified, the killing would incur no pollution.²⁷ There is a similar use of the term in Demosthenes' *Against Pantaenetus* (37.59) where the litigant mentions the rules set down by the

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lawgiver in a case in which ‘someone convicts a defendant of unwilling homicide and demonstrates that he is unclean’. The law therefore does not address only the question of guilt, but also the ritual status of the killer. In his speech *Against Leptines*, Demosthenes (20.158) reminds the court how the lawgiver ‘does not eliminate all considerations of justice but specifies in what circumstances it is permitted to kill, and if one does so in the correct way, he sets him apart as free from pollution’. According to Demosthenes, therefore, the lawgiver was concerned both with defining the nature of just homicide and with determining his ritual status. His view is confirmed by two laws about killing tyrants, the law of Demophantus (Andoc. 1.95: *hosion*) and the law of Eucrates,²⁸ which states that whoever kills is *hosios*, ritually clean. In both laws the legislator clearly and explicitly reveals a concern with pollution by stating that the tyrannicide is ritually pure.

All these passages show that concern about pollution resulting from homicide was not an artistic invention found mainly in the fictional world of tragedy. The laws and legal procedures of Athens were aimed in part at preventing pollution. Those who spoke in Athenian courts also assumed that their audience was concerned about pollution.

The evidence examined so far shows that no difference existed between attitudes toward pollution found in tragedy and those evident in forensic oratory. But did the poets and the lawgivers share certain basic conceptions about guilt and responsibility for homicide? Or did they take different approach to these issues?

In three important matters, the views of the tragic poets and the lawgivers were identical.

(1) If the victim of murder granted pardon to his killer before dying, the laws of Athens did not allow his kin to bring an action against him. In cases where exile or death would have been the penalty upon conviction, the man released from guilt by the victim’s pardon suffered no punishment (Dem. 37.59). The same idea is found in Euripides’ *Hippolytus*. Theseus, believing that his son Hippolytus has raped his wife Phaedra, calls down a curse on him (887-90). Hippolytus leaves Troezen in a chariot and is killed when a monster appears from the sea and frightens his horses, who drag him to death (1198-1242). After Theseus learns that his curse has worked, Artemis appears and tells him that the son is innocent (1203-1324). When the dying Hippolytus returns in the final scene of the play, Theseus asks him ‘Are you leaving my hand unclean?’ (1448). Hippolytus assures his father that he will not be polluted because he frees him from responsibility for his death (1449). Theseus then asks, ‘What are you saying? Are you releasing me from (responsibility for) bloodshed (*haimatos*)?’ (1450). The words of Theseus and Hippolytus echo the view found in Athenian law that the victim’s pardon exonerates the killer from responsibility.²⁹

(2) According to Athenian law, the person who plotted to kill could be

prosecuted for homicide and punished even if his plot did not succeed and his victim did not die (*dikê bouleuseôs phonou*).³⁰ The same principle is recognized in two tragedies. In Sophocles' *Ajax* the protagonist plots to kill Menelaus, Agamemnon, and Odysseus, but is driven mad by the goddess Athena and kills some cattle instead. Even though he does not succeed in killing his intended victims, Menelaus still holds him guilty and says that he deserves punishment (1062-5). In Euripides' *Ion* Creusa gives her slave poison to place in Ion's cup (1001-40). The slave follows the orders of his mistress and pours the poison in his cup. When Ion pours a libation from this cup before drinking, a dove drinks the wine, goes into convulsions, and dies (1207). The slave is seized because he is clearly guilty, and confesses the entire plot after being tortured (1214-16). Ion then denounces Creusa to officials at Delphi and accuses her of attempting to kill him (1217-21). These officials vote to condemn her to death by stoning for plotting to kill him in a sacred precinct (1222-5). Just as in Athenian law, the judges in this tragedy condemn Creusa on a charge of murder even though her intended victim did not die.

(3) In all the Athenian statutes concerning homicide, the verb used to denote the crime is (*apo*)*kteinēin*, 'to kill' (*Ath. Pol.* 57). This verb covers not only cases in which the agent ends the life of his victim by direct physical violence, but also those in which the agent causes death by plotting, by giving orders to others who kill the victim (Aeschin. 2.77), by denouncing someone to officials who execute him (Andoc. 2.7), or even by encouraging an assailant to keep beating his victim (Dem. 54.25).³¹ This gave rise to the principle that the person who killed with his own hand and the person who plotted a murder were liable to the same treatment (Andoc. 1.94). The same view is found in Aeschylus' *Agamemnon*. Aegisthus plots with Clytemnestra to kill Agamemnon, but Clytemnestra carries out the plot by herself (1608, 1635). When he boasts about his plot, the chorus is shocked that he should admit to killing Agamemnon. In the *Choephoroi* Orestes hold Aegisthus equally guilty of his father's murder with his mother Clytemnestra.

We can now summarize our findings. The evidence examined here reveals no clash between the laws of the gods and the laws of men. The standards found in both sets of laws are the same, not different. One cannot therefore argue that Oedipus was innocent according to the laws of men but guilty in the eyes of the gods. Nor can one claim that the pollution from homicide and other crimes was only a religious concern and had no effect on the laws of the *polis*. Finally, the tragic poets and the lawgivers held similar views about pollution and responsibility for homicide. When an Athenian citizen left the court and took his seat in the theatre of Dionysus, he did not change his attitudes about guilt and legal responsibility.³²

II

Before examining the two accounts of Oedipus' murder of Laius, it is necessary to study the categories of homicide in Athenian law. If we are trying to understand how Sophocles and his Athenian audience viewed Oedipus' actions, we must analyse them in terms of their categories, not ours. Above all, one must not impose modern ideas about homicide and violence on the ancient evidence.

There were three main private actions (*dikai*) for homicide, which had to be brought by the relatives of the victim.³³ There was also a private action for attempted homicide, but this procedure is obviously not relevant here.³⁴ The first category was 'deliberate homicide' (*phonos ek pronoias*), which was tried by the Areopagus.³⁵ Some scholars translate the phrase *ek pronoias* with the modern term 'premeditated', but this translation is inaccurate and anachronistic. Although the expression is relatively rare, an analysis of the passages in which it is found rules out this translation. The meaning of the term is perhaps best seen in the story told by Herodotus (8.87-8) about Artemisia at the battle of Salamis. Artemisia's ship was being pursued by an Athenian trireme and was unable to get away because a friendly ship was blocking its path of escape. Instead of stopping or attempting to change course, Artemisia rammed the friendly ship, which Xerxes, who was observing the battle from afar, thought was a Greek ship, and he therefore praised her for her valour. Herodotus adds that is uncertain whether Artemisia did this *ἐκ προνοίας* or happened to collide *κατὰ τύχην*. The contrast is between an action undertaken on purpose or as a product of happenstance, not between planned and unplanned action. There can be no question of premeditation since Artemisia found herself in an unexpected predicament and acted on the spur of the moment.³⁶

The penalty for conviction on this charge was death if the defendant remained until the end of the trial. The punishment was then administered by a public official (Dem. 23.69). If the defendant feared conviction and fled Attica before the court voted, the court could impose a sentence of permanent exile.³⁷ In both cases, the property of the defendant was confiscated and sold.³⁸ If the man exiled on a charge of homicide returned, the *thesmothetai* could arrest and execute him.³⁹

If a man killed someone against his will (*akôn*), the relative of the victim could prosecute him at the Palladium (*Ath. Pol.* 57.3; Dem. 23.71).⁴⁰ The penalty on this charge was exile (Dem. 23.72). If the convicted man could convince the relatives of the victim to pardon him, he could return to Athens. Once pardon was granted, it could not be revoked (Dem. 37.59).

If the relatives of the victim accused a man of murder, and the accused did not deny killing the victim, but claimed that he did it justly (*dikaiôs*) or in accordance with the laws (*kata tous nomous*), the case was tried at the Delphinium (*Ath. Pol.* 57.3; Dem. 23.74).⁴¹ The laws of homicide did not leave this term undefined, but listed the specific cases falling under this

rubric. The defendant could claim that he had killed justly in the following circumstances:

1. He killed his victim in an athletic contest and against his will (Dem. 23.53; *Ath. Pol.* 57.3).
2. He killed his victim in ignorance during battle (Dem. 23.53; *Ath. Pol.* 57.3).
3. He killed his victim when caught in sexual intercourse with his wife, mother, sister, daughter, or concubine kept for the purpose of (bearing) free children (Dem. 23.53; *Lys.* 1.30). The law did not take into account the woman's consent and applied both to those who seduced and to those who used force.⁴²
4. He killed someone carrying off his property without justification (Dem. 23.60). The substantive provision was carefully worded to cover only those taking property without just cause. In other words, it did not apply to those who used deadly force against creditors distraining on property given as real security or against those who had won a court decision awarding them property. The law also required that the killing take place immediately, that is, during the commission of the theft. It therefore did not allow the killing of someone caught with someone else's property several days after the theft occurred.⁴³
5. He killed someone stealing at night (Dem. 24.113)
6. He killed someone who had been condemned for murder and returned to Attic soil (Dem. 23.28).
7. He killed a tyrant, someone aiming at tyranny, or someone attempting to overthrow the democracy (Dem. 20.159; *Lyc. Leocr.* 124-7). This provision was included in several statutes in different periods, the latest being the law of Eucrates.
8. He killed someone 'in the road' (Dem. 23.53: ἐν ὁδῷ καθελάων). This cryptic phrase is helpfully glossed by Harpocration *s.v.* ὁδός (ο 2 Keaney) as 'in ambush' (ἐν λόχῳ καὶ ἐνέδρῳ). The meaning of this part of the law has never been carefully examined but repays study; it is key for our analysis of the murder of Laius. The word *lochos* appears first in Homer, where it is used several times to describe the attempt of the suitors to kill Telemachus on his return from Pylos. The suitors plan their attack in advance and choose a hiding place; their intent is to kill Telemachus (see Appendix I to this chapter). One should also note that when Bellerophon kills in self-defence those who attack him from an ambush, the king of the Lycians does not hold him guilty of murder and demand retribution (*Iliad* 6.187-90) but regards the killing as justified. The meaning of the term does not change in Classical literature, where it retains the meaning of 'ambush' (see Appendix II to this chapter). The word *enedra* is a virtual synonym and is used to describe the same kind of plot. In all the passages where the two words are found there are three main elements either implicit or explicitly mentioned. First,

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the person who sets an ambush plans ahead and anticipates the arrival of his intended victim. Second, the person lying in ambush is concealed from view until he emerges from his hiding place and attempts to take advantage of surprise. Third, the person who attacks from ambush intends either to kill or to capture his intended victim.

This clause of the law on just homicide therefore absolved from guilt the man who killed someone who plotted to kill or capture him and lay concealed, then attacked him suddenly. It did not cover the case of the person who killed someone who had merely struck him on the spur of the moment. This is clear from a case described by Demosthenes (21.73-6) who recounts how Euaeon killed Boeotus, who had struck him in an insulting way. The two were at a party, and Boeotus was drunk and acted spontaneously. Euaeon did not have to strike back to avoid being killed because Demosthenes (21.73) says that he could have restrained himself and won the approval of others present. The court was divided in its votes, but a majority found Euaeon guilty of murder (Dem. 21.75). Had it been permissible to kill someone merely in retaliation for a single insulting blow where there was no threat of deadly harm, the court would have acquitted him unanimously.⁴⁴ We will return to this case later.

Each type of homicide had different ritual consequences. Pollution did not arise automatically from bloodshed. There was not one type of pollution from homicide, but several levels, each one calibrated to express different levels of culpability. Those convicted on a charge of deliberate homicide incurred the most serious or ineradicable pollution. In this case nothing could remove pollution from them in the land of the victim. Those convicted of unwilling homicide could remove the pollution attached to them if they gained pardon from the relatives and performed purificatory rites (Dem. 23.72). The person who killed justly or according to the laws was 'pure' or 'clean'.⁴⁵ Several passages make it clear that this person incurred no pollution at all:

Dem. 9.44: 'It has been written in the laws about homicide in cases where it is not permitted to bring a suit for murder, but the killing is sanctified (*euagos*) and says "let him die without honour (*atimos*)". Indeed, this means the killer of these men is ritually pure (*katharos*).'

Dem. 20.158: 'Just the same, he (i.e. Draco) does not eliminate all considerations of justice but specifies in what circumstances it is permitted to kill, and if one does so in the correct way, he sets him apart as free from pollution (*katharos*).'

Lycurgus *Against Leocrates* 125: 'They voted and swore that if anyone tried to set up a tyranny or destroy the city or subvert the democracy, the person who saw this and killed him was free from pollution (*katharon*).'

Rhodes & Osborne 2003, no. 79, lines 7-11: 'If anyone rebels against the people to set up a tyranny or joins in setting up a tyranny or overthrows the Athenian people or the democracy at Athens, whoever kills the person doing any of these things is ritually pure (*hosios*).'

Pollution was therefore not indifferent to motive.⁴⁶ The levels of pollution and ritual purity were calibrated to indicate different levels of culpability. There was thus no conflict between the categories of legal responsibility in human courts and the severity of pollution in the divine sphere. Both the laws of Athens and beliefs about pollution took into account intention and extenuating circumstances. *Pace* Dodds and Vernant, the laws of the *polis* and the justice of the gods did not take different views of human responsibility in cases of homicide.

III

When examining the accounts of Laius' murder in *Oedipus the King* and *Oedipus at Colonus*, it is necessary to examine each one separately in its immediate context. What one should not do is to assume *a priori* that Sophocles presented an identical version of the murder in both plays and did not alter details in a significant manner. Greek poets inherited traditional stories from earlier generations, but they were not required to retell myths without making any major changes in the narrative. An individual playwright might even present very different versions of a myth in different plays. For instance, Euripides significantly alters the actions and character of Phaedra in his two plays about Hippolytus. In one play Phaedra shamelessly confronts Hippolytus and attempts to seduce him. In the other, she attempts to control her passion and declares she would rather die than reveal it to her stepson. When her nurse tells Hippolytus about her love for him, she expresses her rage at what she has done.⁴⁷ By the same token, one should not expect Sophocles to have been strictly consistent in his two accounts of Laius' murder.

In *Oedipus the King* the story of Laius' murder is told by Oedipus to Jocasta during the search for the killer. The investigation begins when Oedipus promises to find the murderer and places a curse on those who do not help in the search (252-75). Teiresias arrives in response to his summons and tells Oedipus that he is the murderer whom he seeks (362). The king is incredulous and angrily accuses the seer of plotting with Creon to overthrow him (380-403). Creon hears about Oedipus' charges and arrives to defend himself (513-615). His defence does not convince Oedipus but only increases his rage (615-33). The two men trade insults until Jocasta enters and urges them to part and each go to his own house (634-8). Jocasta tries to reassure Oedipus by telling him about the oracle Laius received from Apollo that he would die at his son's hand and how Laius cast his child out in the hills after binding his feet (707-25). Oedipus

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then asks her about Laius' appearance and his murder, and she describes his features, how he and several companions met their deaths in Phocis at a place where the road from Thebes divides, and that a single slave escaped to tell her the story (726-64). Oedipus summons the slave and then tells his wife how he grew up thinking that his parents were Polybus and Merope of Corinth until a drunken man at a party said he was not their child (774-80). When he told Polybus and Merope, they were angry about this insult, but Oedipus was still troubled and decided to consult Apollo's oracle at Delphi (781-6). When he received the response that he was destined to lie with his mother and kill his father, he decided not to return to Corinth but set out in the direction of Thebes (787-99). Oedipus then tells Jocasta what happened after he left Delphi (800-13):

My wife, I will tell you the truth. When I was 800
travelling near this place where the road forks,
there I met a herald and a man
mounted on a chariot drawn by horses,
as you say. The man in front and the old man
attempted to drive me out of the road by force.
For my part I struck the man pushing me aside,
the charioteer, in anger. The old man, seeing this,
watched until I was alongside the chariot and
hit me right in the face with his two-pronged lash.
He did not pay an equal (*isen*) penalty, but suddenly 810
struck by the stick in my hand, he collapsed right away,
falling on his back from the middle of the chariot.
Then I killed every last one of them.

Several features of this careful narrative deserve scrutiny. First, Laius was not waiting in ambush. Oedipus does not suggest that Laius knew that he was coming or had made any preparations to attack him. He was not hiding and did not emerge from a concealed place to make his assault. Second, Laius and his companions did not intend to kill Oedipus; they only attempted to drive him out of the road (*êlaunetên*). When he struck the charioteer, Oedipus describes the charioteer as 'pushing me out of the way' (*ektrepontá*). Third, when Oedipus struck the charioteer he did so not to protect himself but out of anger and a desire to retaliate for an insult. Fourth, nothing in the account indicates that Oedipus' life was in danger; he could have yielded and let Laius and his entourage pass without suffering further harm. Fifth, when Laius struck Oedipus, it was to retaliate for his blow to the charioteer, an exchange of insult for insult. The whip was not a deadly weapon, and the blow struck with it did not threaten his life. Oedipus' motive was anger, not fear for his safety. Sixth, Oedipus himself says that Laius paid a penalty greater (*ouk isên*) than his offence.⁴⁸ This means that what Laius suffered (death) was not proportionate to what he inflicted (grievous insult).

Oedipus' account of his killing of Laius clearly does not fit into any of

the categories of just homicide. It obviously did not take place during an athletic contest; Laius was not caught having sex with Oedipus' wife or any of his female kin; Laius was not attempting to carry off Oedipus' property; Oedipus did not kill him for overthrowing the democracy or attempting to set up a tyranny; Laius had not laid an ambush for Oedipus. In short, Oedipus' murder of Laius was not a form of legitimate self-defence.⁴⁹

The story of Oedipus' killing of Laius bears a strong resemblance in certain regards to Euaion's murder of Boeotus (Dem. 21.70-6). In the latter case, there was only one victim, but there are otherwise several parallels. In both cases the killer received an insulting blow from the victim. In both cases the killer acted in anger and on the spur of the moment. In both cases the killer could have restrained himself without suffering further harm. The Athenian court that tried Euaeon evidently found this a hard case, but a majority voted for conviction. Demosthenes (21.75) speculates that the majority voted this way was because Euaeon struck in such a way that he caused death (*apokteinein*). In other words, Euaeon chose to strike as the result of a conscious decision, and his deliberate blow brought about the victim's death. Those who voted to acquit were willing to allow an excessive amount of retribution (*hyperbolên tês timôrias*) to someone suffering physical insult. In other words the minority took extenuating circumstances into account (*epieikeia*).⁵⁰ The parallel with Oedipus' account of his killing of Laius is striking: he says that Laius 'did not pay an equal (*isên*) penalty'. In both cases the victim suffered a disproportionate amount of harm for the insult he inflicted. Demosthenes is probably exaggerating the closeness of the court's vote because he wishes to stress the anger and humiliation felt by the victim of *hybris* and to create sympathy for his own suffering at the hands of Meidias. Because the case was apparently a *cause célèbre*, however, there is no reason to doubt the basic outline of Demosthenes' analysis.

Sophocles' careful selection of details in Oedipus' narrative is part of his aesthetic strategy. For Oedipus' actions to cause the plague, he must be guilty of murder, but for Oedipus to gain pity from the audience for his suffering, he must not be entirely wicked. If Oedipus had killed Laius to take his money or from some other evil motive, he would have alienated the sympathies of the audience. His overreaction to Laius' insult may not be pardonable, but it is understandable. Sophocles had to maintain a delicate balance to prevent his audience from despising Oedipus and gain for the hero a measure of pity and understanding. This hard case in Athenian law provides him with the perfect means to achieve this end.

Because Oedipus was guilty of deliberate homicide and therefore polluted, the failure to avenge Laius brought contagion on the community of Thebes. In the prologue the priest speaks of the people's misfortunes: crops are failing, cattle are diseased, and children are born dead (22-30). During the *parodos* the chorus describes the suffering in greater detail (151-215).

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When Creon returns to Thebes from Delphi, he reports the oracle of Apollo. The cause of the plague is the pollution (97: *miasma*) brought about by the murder of Laius (95-104). What Apollo does not say is just as significant as what he states: the cause of the plague is not parricide or incest. The fact that Laius was Oedipus' father makes no difference. When Teiresias says that Oedipus is the cause of the plague (350-3), he also attributes it to murder (362), not to parricide or incest.

The remedy for the plague is to rid the country of pollution by punishing the killers (107). The form of the pollution and the punishment ordered are significant: the pollution is incurable (98: *anêkeston*) and the punishment is either exile (*andrêlatountas*) or execution (100-1: *phonôî phonon palin lyontas*). This is the type of pollution resulting from deliberate homicide, and the two alternative punishments are those established for this offence in Athenian law. This type of pollution cannot be removed by purification. This indicates that the murder of Laius was not unwilling homicide (*phonos akousios*) because the pollution resulting from that kind of homicide could be washed away by sacrifice if the victim's relatives granted pardon. The verdict of the gods is quite plain and fully in accord with the principles of Athenian law. The gods have found Oedipus guilty because he is responsible for deliberate homicide. This explains why Oedipus must be driven out of Thebes. There is no need to believe that Apollo is demanding that the Thebans expel a guiltless *pharmakos*, an explanation never given by any of the characters in the play.

In the *Oedipus at Colonus* Sophocles presents a different version of Laius' murder. It is important to place this version in context. In this play Oedipus arrives in Attica after wandering for many years accompanied by his daughter Antigone (1-74). When the people of Colonus meet him, Oedipus supplicates them and asks for their protection (259-91). They reply that their rulers must decide, and send for Theseus (292-307). When Theseus arrives, Oedipus repeats his request and promises to protect the Athenians from their enemies after his death, an allusion to his future status as a hero (551-628). Theseus then grants him the right to dwell in Attica and pledges that no one will remove him from the land against his will (631-7). After Theseus leaves, Creon enters and asks Oedipus to return to Thebes (728-60). When Oedipus refuses, Creon seizes Antigone and has his men take her away in an attempt to force Oedipus to leave Attica (761-847). Theseus arrives in response to Oedipus' cries for help and demands an explanation from Creon for his arrogant and unlawful behaviour (887-936). Creon expresses his surprise that the Athenians would be willing to accept a wanderer who has committed parricide and incest when the court of the Areopagus does not permit such people to dwell in Attica (939-49). He justifies his attempt to remove Oedipus as retribution for his curses on him and his family (950-9).

Oedipus delivers a lengthy reply to Creon's accusations and protests his innocence (960-5). He is not guilty of parricide because he did not know

that he was killing his father (973-7). Oedipus here invokes a standard principle of Athenian law that one cannot be held guilty for acts committed in ignorance.⁵¹ He also stresses that both deeds took place against his will (982-90). Next he answers the charge of murder (992-6):

If here and now a man stood near you, the righteous one, and tried to kill you, would you ask if the would-be killer was your father or would you strike at once? I think you would strike back at the guilty one (tr. Lloyd-Jones).

The circumstances described in this play differ significantly from those given in *Oedipus the King*. Here Laius is attempting to kill Oedipus (*kteinoi*), and Oedipus has no choice but to strike back without delay. Oedipus does not have the time to ask questions or reflect; he must act quickly or die. In the version given in *Oedipus the King* Laius merely struck Oedipus in an insulting way and did not threaten his life. From a legal point of view the situations described in the two plays are quite different. In *Oedipus the King* the murder of Laius is deliberate homicide (*phonos ek pronoias*) in response to provocation; in *Oedipus at Colonus* the homicide is just or according to the laws (*dikaïos phonos* or *phonos kata tous nomous*) because Laius was attempting to kill, and Oedipus acted under compulsion, not in anger.⁵² For this reason, Oedipus confidently states that he is 'ritually pure by law' (*OC* 548: *nomôi de katharos*).⁵³ The chorus accepts his view. When the inhabitants of Colonus ask who he is and discover his identity (203-23), they are horrified and ask him to leave (224-36). Antigone attempts to calm their fears by saying that his deeds were done against his will (239-40: *ergôn akontôn*). Oedipus tells the chorus that it fears not what he did but what happened to him (265-7). His words implicitly disclaim responsibility for what happened to Laius and Jocasta. When he killed Laius, he did not know who he was, but even if he did, he still would not have been morally wrong: 'Yet in my nature how am I evil, I who struck back when I had been struck, so that if I had acted knowingly, not even then would I have been evil?' (270-2) (tr. Lloyd-Jones). These words convince the chorus, which then allows him to perform libations, say prayers and enter the sanctuary of the Eumenides (466-92). Had the chorus considered Oedipus guilty and polluted, it would have forbidden him to carry out these rites.

Sophocles alters the circumstances of Laius' murder in the *Oedipus at Colonus* to suit the needs of the plot and the message of the play. In *Oedipus the King* Oedipus must be guilty and polluted to bring the plague on Thebes and set the entire plot in motion: the suffering of the Thebans motivates Oedipus to send Creon to Delphi and consult the oracle of Apollo. If Oedipus were not guilty of murder and not polluted, there would be no plague and no promise to the Thebans to find the killer. Without a need to search for the killer, Oedipus would never have started on his quest for the truth about his own past.

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The action in *Oedipus at Colonus* takes place many years later and concerns the origin of his hero-cult in Attica.⁵⁴ In this play Oedipus is rehabilitated to provide the Athenians with a worthy protector. The emphasis in this play is therefore on Oedipus' innocence: he married his mother without knowing her identity and killed his father in self-defence.

The answer to the question, 'Is Oedipus guilty?' turns out to be 'both yes and no'. In *Oedipus the King* he kills Laius after being provoked to avenge an insult. His retaliation is greater than the harm he suffers, and he is therefore guilty of deliberate homicide. The Athenian courts appear to have found this a hard case, but one in which there were strong grounds for conviction. A modern court would find Oedipus guilty of voluntary manslaughter and innocent of intentional homicide and give him a less severe sentence. But the laws of Athens did not make this modern distinction, and the Athenian courts had to use the categories found in the laws. In *Oedipus at Colonus* the situation is different: Laius attempts to murder Oedipus, who strikes back to avoid being killed. Sophocles does not therefore give the same answer in the two plays, but alters the circumstances of Laius' death because the main themes of each play are very different. In *Oedipus the King* two of the major themes are the ignorance of mortals and the instability of human fortune. Oedipus must be guilty to cause the plague that sets in motion the chain of events leading to his self-discovery. After the truth about his past is revealed, the chorus takes his fate as a lesson, which shows that human life is never without sorrow (1193-5). Oedipus enjoyed extraordinary success by solving the riddle of the Sphinx and becoming king of Thebes (1196-1203), but now he is the most wretched of men, and his sufferings are unbearable (1204-22; cf. 1524-30). In *Oedipus at Colonus* the hero has come to terms with his past, but now looks to find the reward promised him by Apollo after many years of suffering (84-110). The play concerns the origins of a hero cult and shows the hero's anger that will protect Athens in the future and wreak vengeance on his enemies. Because one of the main themes of the play is revenge for injustice, Oedipus must appear as someone who is innocent and has been unjustly treated. The themes of each play demand therefore a different type of protagonist.

The findings of this essay should call into question any attempt to reduce all the tragedies of Sophocles or any other tragic poet to a single pattern. Nor should one attempt to isolate certain essential features of the main characters in Sophocles' tragedy in a search for 'the tragic hero'.⁵⁵ Such reductionist and essentialist approaches do not do justice to the rich diversity found in the plays of Aeschylus, Sophocles and Euripides. The tragic poets explored many aspects of human life and did not repeat the same basic message in every play. One should also be sceptical about the assumption that tragic conflict arises from a clash of values or the conflict of incompatible principles. In Sophocles' plays about Oedipus there is no difference between the judgment of the gods and the opinions of men,

between the values of Greek religion and the laws of the Greek *polis*. The study of Athenian law and attitudes towards justice and religion enables us to avoid anachronistic readings of Attic drama and enhances our appreciation of Sophocles' artistry.

What are the implications of these findings for our understanding of Aristotle's analysis of *Oedipus the King* and the best kind of tragic plot in ch. 13 of his *Poetics*? That is a topic in literary criticism, but this is a volume about law and drama. A discussion of this question will have to wait for another occasion.

Appendix I

The meaning of *en lochôî* in Homeric epic

Iliad 4.391-47: Cadmeians set an ambush for Tydeus, but Tydeus kills all his assailants in self-defence except for Maeon.

Iliad 6.187-90: In response to a request from Proetus, the king of the Lycians plots to kill Bellerophon, who slays all his assailants in self-defence.

Iliad 8.521-2: Hector orders the Trojans to set a guard in Troy to protect the city from an ambush while they are in the plain.

Iliad 13.370-9: Paris hides behind a pillar atop a burial mound and strikes Diomedes with an arrow.

Iliad 18.510-29: On the shield of Achilles, Hephaestus depicts soldiers in a city plotting an ambush against their besiegers, then taking their herds and flocks and killing some shepherds.

Iliad 24.778-9: Priam tells the Trojans not to fear an ambush because Achilles has promised a truce for eleven days.

The term *lochos* is also used at *Iliad* 1.226-7 and 13.277-85, but the context in these passages does not help to determine the meaning of the term.

Odyssey 4.388, 395, 441, 463: Menelaus and others set an ambush for Proteus to capture him and force him to reveal secrets.

Odyssey 4.667-72: Antinous plots an ambush with the suitors to kill Telemachus. Cf. 4.842-7; 13.425-6; 14.180-2; 15.28-30; 16.369-70, 462-3; 22.53.

Odyssey 4.529-35: Aegisthus plots an ambush to kill Agamemnon.

Odyssey 8.514-15: Achaeans leave the Trojan Horse, a 'hollow ambush', and kill many. Cf. 4.277; 11.523-5.

Odyssey 13.267-8: In a lying tale, Odysseus tells Eumaeus how he killed Orsilochus after lying hidden in ambush.

Odyssey 14.216-18: In another lying tale, Odysseus tells Eumaeus how he set ambushes and killed many. Cf. 14.469.

Appendix II

The meaning of *lochos* and *enedra* during the Classical period

- Harpocration *s.v.* ὁδός (o 2 Keaney): Δημοσθένης ἐν τῷ Κατ' Ἀριστοκράτους φησίν· “ἢ ἐν ὁδῷ καθελών” ἀντὶ τοῦ ἐν λόχῳ καὶ ἐνέδρῳ.
- Harpocration *s.v.* ῥοῶδ': Demosthenes in the *Against Aristocrates* says: 'Or taking him in the road' instead of 'in an ambush or surprise attack'.
- Herodotus 4.22.2: The Thussagetai live by hunting: they climb trees, then when they see an animal, they pursue on their horse with a dog, both of which have been trained to lie low.
- Herodotus 5.121: Carians set an ambush for some Persians, who are killed.
- Herodotus 6.37: The people of Lampsacus set an ambush for Miltiades and capture him alive. After Croesus demands his release with threats, they release him.
- Herodotus 6.87: The Aeginetans lay an ambush for an Athenian ship on a sacred mission and place its crew in prison.
- Herodotus 6.138: The Pelasgians lay an ambush for women celebrating the festival of Artemis at Brauron, capture them, and take them to Lemnos where they are kept as concubines.
- Thucydides 2.81.5: Stratians ambush the Chaonians and kill many of them (hiding is implied in the way the Stratians emerge and fall upon the Chaonians).
- Thucydides 3.90.2-3: Messenians in Sicily lay ambush for Athenians and their allies, but are routed with many killed (the Messenians fail to achieve the aim of the ambush, but there is advance planning and hiding in a concealed location).
- Thucydides 3.107.3 and 108.1: Demosthenes stations Acarnanians in a sunken road covered by bushes. The Acarnanians attack Peloponnesians from ambush and put them to flight.
- Thucydides 3.112.6: Amphilocheians attack Ambraciots from 'ambushes previously prepared' and many Ambraciots are killed.
- Thucydides 7.32.2: Sicels ambush Siceliots and kill eight hundred of them and several ambassadors.
- Xenophon *Agésilas* 11.5: The king is open toward others but guards against deceitful people (*krypsinous*, 'those who hide their thoughts') as if they were ambushes (an ambush is associated with hiding).
- Xenophon *Hellenica* 4.4.15: Iphicrates sets an ambush in the territory of Phlius and kills several who leave the city without taking precautions.
- Xenophon *Hellenica* 4.8.35-9: Iphicrates sets an ambush in the territory of Abydos and sends his triremes toward the Hellespont to give the impression that he has left the area. Iphicrates keeps his troops hidden until Anaxibius' leading troops are in the plain of Cremasta, then charges when the Spartans and their allies are stretched out in a long line. The Athenians kill over 250 of the enemy.
- Xenophon *Hellenica* 5.1.10-13: Chabrias sets an ambush on Aegina. When Gorgopas leads Spartan and other troops past the ambush, the Athenian troops emerge and kill Gorgopas and roughly 350 others.
- Xenophon *Hiero* 6.3: The tyrant avoids drunkenness and sleep like an ambush (if the tyrant becomes drunk or falls asleep he becomes vulnerable to an attack on his life).
- Xenophon *Hipparchikos* 4.10-12: The commander sets out hidden outposts and

guards, which protect friends and provide ambushes. Guards posted in the open distract the enemy from the presence of men concealed in ambush.

Xenophon *Hipparchikos* 8.20: Those who fall into ambushes are terrified (they are surprised by the unexpected because they are not prepared for a sudden attack).

Notes

1. Dodds 1966, 37-8. The paper was originally read at a 'refresher course' for teachers, London Institute of Education, 24 July 1964. It was reprinted in Dodds 1973, 64-77.

All translations of Greek texts in this essay are mine unless otherwise indicated.

2. Dodds 1966, 39. Dodds overlooks the ignorance of the Priest and the chorus about Oedipus' past at this point in the play.

3. Dodds 1966, 43.

4. Dodds 1966, 42.

5. Vernant in Vernant & Vidal-Naquet 1972, 110: 'Quand il tue Laios, c'est en état de légitime défense contre un étranger qui l'a frappé le premier.' The word *étranger* can mean either 'foreigner' or 'stranger', but the latter meaning seems most appropriate here.

6. Vernant in Vernant & Vidal-Naquet 1972, 82.

7. Vernant in Vernant & Vidal-Naquet 1972, 82. Vernant in Vernant & Vidal-Naquet 1972, 124 n. 115, acknowledges the influence of L. Gernet and his views about the survival of *prédroit* in Athenian law. According to Gernet 1948-9 (= Gernet 1968, 175-260), the legal systems of the Greek *poleis* were preceded by a stage of *prédroit*, in which norms were enforced and disputes were resolved by religious and magical procedures. Even after the Greeks passed through this evolutionary stage, relics of *prédroit* survived in fossilized form in the laws and legal procedures of Athens and other *poleis*. This view rests on outdated views about primitive societies, which have now been rejected by recent work in legal anthropology. See Pospisil 1971. For a critique of Gernet's view of *prédroit* see Burchfiel 1994.

8. Vernant in Vernant & Vidal-Naquet 1978, 110-11: 'Innocent et pur du point de vue du droit humain, il est coupable et souillé du point de vue religieux.'

9. Vernant in Vernant & Vidal-Naquet 1972, 122. The absence of the word *pharmakos* in the play does not appear to have presented an obstacle to Vernant.

10. E.g. Hester 1977, 32, who follows Dodds in finding Oedipus innocent. In Appendix C Hester provides a list of scholars who hold a similar view of Oedipus' innocence; in Appendix A Hester gives a list of scholars who believe that Oedipus is guilty. These scholars, however, believe that in the eyes of Sophocles and contemporary Athenians 'guilty intention' was not 'necessary for an act to be labelled a crime'. This assumption is incorrect: for the importance of intention in Athenian law see Dem. 21.42-6. More recently see Rehm 2003, 69, 159, citing Dodds with approval. The most prominent adherent of Vernant's view that Oedipus is driven out of Thebes as a *pharmakos* is Segal 2001. For an exhaustive summary of earlier views about Oedipus' guilt see Lurje 2004, who endorses Dodds' view.

11. This essay does not discuss Freudian interpretations of the play. That approach, once popular, now has few adherents. For an excellent criticism of Freudian approaches see Vernant in Vernant & Vidal-Naquet 1972, 77-98 (=

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Vernant 1967). The view that Oedipus is innocent because the murder of his father and the marriage with his mother were determined by fate as revealed by the oracle at Delphi rests on a misunderstanding of the Greek view of the relationship between fate and free will. On the Greek view of double determination see Lesky 1961, a work apparently unknown to Dodds, but not to Vernant. See also Lesky 1966.

12. The analysis in this section draws on my discussion in Harris 2006, 50-7.

13. For the gods as the authors of the laws see also Sophocles *OT* 863-70; Eur. *Ion* 442-3.

14. See, for example, *IG* ii² 6, 23, 107, 108, 111, 113, 116, 119, 129, 135, 1366, 140, 142. For the meaning of the practice see Pounder 1984.

15. Compare the story that Lycurgus sought approval from Delphi for his laws in Xen. *Lac. Pol.* 8.5) and the statement of Demosthenes (20.161): 'since we are human beings, we ought to propose and enact laws that would not stir the gods' wrath'.

16. For a similar argument see Andoc. 1.139.

17. For the established laws as equivalent to the divine laws see Thuc. 3.82.6. For the gods as the authors of the unwritten laws see Xen. *Mem.* 4.4.19.

18. For this view see Sealey 2006; Arnaoutoglou 2000.

19. See, for example, Sealey 2006, 480: 'The conclusion should be that the Athenian citizen brought one set of expectations (beliefs, values, mentality) when he went to the theatre of Dionysos to watch a tragedy but another when he went to court to judge a case.'

20. MacDowell 1963, 145, notes that Dem. 20.158 does not mention pollution as the reason for the ban and expresses doubt about this explanation, but does not take into account Aeschin. 2.148, which confirms the fear of pollution behind the ban.

21. MacDowell 1963, 84.

22. Even MacDowell 1963, 148, who tries to minimize the fear of pollution in Athenian law, has to admit that this rule 'proves that the doctrine of pollution was recognized in the law'.

23. Parker 1983, 129, misrepresents the passage when he claims 'the only specific risk which Antiphon refers to is that of shipwreck'. For the requirement that priests, who conducted sacrifices, be ritually pure see Aeschin. 1.19; [Dem.] 59.92 with Parker 1983, 96-7.

24. Parker 2005, 101, claims that 'it is exceptional when a defendant on a murder charge appeals to "divine signs" as actual proof of his innocence', but overlooks Andoc. 1.137-9 and passages like Dem. 21.104, Aeschines 2.148 and Antiphon 6.41-6, where the litigant assumes the murder causes dangerous pollution. For concern about pollution in a case of homicide see also Pl. *Euthyphro* 4c-d. Cf. Isaeus 9.19.

25. For a similar argument in a case of impiety see Andoc. 1.132.

26. For the charge see Harris 2006, 399-400.

27. MacDowell 2000, 236, does not discuss the use of the word *katharos* in this passage.

28. For a text and translation of the law see Rhodes & Osborne 2003, no. 79.

29. Noted by Barrett 1964, 415.

30. See *Ath. Pol.* 57.3 with Harris 2006, 400-4. Gagarin 1990 attempts to deny the existence of this action because 'Once the Athenians had designated this action by the name βούλευσις, they would naturally be unlikely to use the same name for a completely unrelated action'. But this objection rests on an error: the name of the action for plotting homicide was *dikê bouleuseôs phonou*, and that for wrongful inscription of a state debtor was *graphê bouleuseôs*.

31. See Harris 2006, 394-8.

32. Pace Sealey 2006.

33. For the requirement that a *dikê phonou* be brought by a relative of the victim, see [Dem.] 47 with Tulin 1996. Killers could also be prosecuted by the procedure of *apagôgê kakourgôn*. On this procedure see Harris 2006, 373-90. Normally this procedure applied only to three types of *kakourgoi*, thieves, 'clothes-snatchers' and enslavers (*kleptai*, *lôpodytai*, *andrapodistai*) who were manifestly guilty (caught *ep' autophôrôî*). The terms of the law could be stretched to cover murderers. See Harris 2000, 68-9, and Gagarin 1997, 179-82.

34. See n. 30.

35. Dem. 23.22; *Ath. Pol.* 57.3.

36. See also Hdt. 1.159 with the analysis of Harris 2004a, 245-51.

37. Antiph. 5.13 and Dem. 23.69 with MacDowell 1963, 114.

38. Dem. 21.43; 23.45; Pollux 8.99; *Ath. Pol.* 47.2 with MacDowell 1963, 115-17.

39. Dem. 23.31, 51 with MacDowell 1962, 122.

40. For the meaning of the term *akôn* (which is often mistranslated 'unintentional') see Rickert 1989. The adjective covers all actions done against the will of the agent even if they are done intentionally. For instance, a captain who throws cargo overboard in a storm to save his ship acts intentionally, but the loss of the cargo is against his will.

41. On this court and on just homicide see MacDowell 1963, 70-81.

42. *Ath. Pol.* 57.3 is misleading when it implies the law applied only to *moichoi* (seducers). Cole 1980 claims that the law originally applied to seducers and rapists but was later narrowed to cover only seducers. But see Dem. 23.53-4, which shows that the law covered both seducers and rapists in the fourth century, with Harris 2006, 283-93. This view is now generally accepted: see Harris 2006, 293-5.

43. A similar principle is found the law about the arrest of *kakourgoi*, who had to be caught in circumstances where their guilt was obvious. See Harris 2006, 373-89.

44. Gagarin 1978 and MacDowell 1963, 77, and 1990, 292, believe that this was a case of self-defence, but see Harris 1992, 78.

45. For sources and discussion see Hewitt 1910; MacDowell 1962, 128-29; Parker 1983, 366-8.

46. Pace Williams 1993, 58: '*Miasma* was incurred just as much by unintentional as by intentional killing'. Williams cites Parker 1983, but does not appear to have read Appendix 5. For a similar view see Adkins 1960, 98: 'It must be held that certain acts *per se* engender "pollution", and the emotions originally engendered by despair and disaster will be transferred to the act of killing in its own right. There will thus be a horror of the killer, but not a moral horror which will conform to moral categories ...'

47. For the fragments of Euripides' *Hippolytos Kalyptomenos* and its relation-ship to his other play on the same theme see Barrett 1964, 11-12, 18-22.

48. Grene in Fitzgerald, Grene and Wyckoff 1954, 46, translates οὐ μὴν ἴσην γ' ἔρεισεν 'he was paid in full'. This is both inaccurate and misleading, for it implies that Oedipus' retaliation was proportional to the threat posed by Laius' blow.

49. Pace Vernant in Vernant & Vidal-Nacquet 1972, 110.

50. On the meaning of *epieikeia* and its role in Athenian courts see Harris 2004b. The concept should not be confused with the modern idea of 'jury nullification'.

51. See [Dem] 58.24 with Harris 2006, 74-5. For this principle in homicide law see Dem. 23.53; *Ath. Pol.* 57.3 (one who kills an Athenian in ignorance during battle is innocent).

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52. At *OC* 547 Lloyd-Jones emends the reading καὶ γὰρ found in the manuscripts to ἄτᾳ ἀλόως and translates ἄτᾳ ‘power that sent me mad’, but there is no indication in the rest of the play that Oedipus was insane either when he killed his father or when he married his mother. If one accepts this emendation, the word should have its objective sense (‘disaster’), not its subjective sense (‘madness’).

53. This refutes the idea of Edmunds 1996, 134-8, that Oedipus is guilty of *akousios phonos* (a term mistranslated by Edmunds as ‘unintentional homicide’). In this play, Edmunds also believes that Oedipus ‘fulfils the pattern of exile and return’ for this crime. But to gain return from exile, one must gain pardon from all the immediate relatives of the victim and perform purification for homicide, neither of which Oedipus does in this play.

54. For Oedipus as an Attic hero see Kearns 1989, 50-2. For the problem about the location of his tomb see Kearns 1989, 208-9.

55. As does Knox 1964.

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Aristophanes and Athenian Law

Douglas M. MacDowell

Comedy and law: in modern times these may seem to be two very different subjects, having little connection with each other. But in Classical Athens the connection was closer, and that is why it makes sense to study the two subjects together. The main reason for the connection was that many Athenians, perhaps a majority of the male citizens, participated in both of them. On the one hand, the festivals of the Dionysia and the Lenaia were occasions when a large proportion of the citizen population met together, and the performances of comedies were not only watched by thousands of spectators, but were also performed by quite a large number. At each of those festivals there were normally five comedies, each with a chorus of twenty-four members and probably four actors, all probably amateurs in the fifth century; that makes a hundred and forty men performing in comedies at each of those festivals. If comedies were performed also in local theatres in Peiraieus and elsewhere, that will make still more citizens who had actually performed in comedies, besides the much larger number who had watched them. The lawcourts, on the other hand, were notoriously prominent in Athenian life; there is, for instance, the joke in Aristophanes' *Clouds* 207-8, when Strepsiades sees a map for the first time but does not believe that it shows Athens because he cannot see any lawcourts in session on it. We are told that six thousand citizens served as *dikastai* in the courts every year; others were picked by lot to preside over trials as archons or other officials; and of course some were involved in trials as prosecutors or defendants or witnesses, or just attended the trials as spectators. We should therefore assume that a great many of the citizens of Athens regarded both comedy and law as parts of their life, and either consciously or subconsciously they allowed each of those activities sometimes to influence the other.

This mutual influence might take various forms. It is possible that legal proceedings had an influence on the general structure of Old Comedy: the adversarial format of Athenian trials, with a speech for the prosecution followed by a speech for the defence, may have encouraged the development of the *agôn* structure familiar in early comedy. But here I shall concentrate rather on passages in which Aristophanes refers explicitly to law and legal proceedings, and I shall suggest that these can provide information for us, in both directions: that is, knowledge of Athenian law

can help us to understand individual lines of Aristophanes, and study of Aristophanes can give us information about points of Athenian law.¹

The first of those two possibilities is obvious: when Aristophanes mentions a feature of legal proceedings, perhaps to make a joke about it, clearly we shall not see the point of the reference or the joke unless we understand what the legal feature is. At the same time, such references sometimes tell us things we do not otherwise know about the law. In general our knowledge of Athenian law comes mainly from the lawcourt speeches of the fourth century, with only a few from the late fifth century, and for this purpose it is useful that most of the plays of Aristophanes are earlier in date than most of the speeches. Thus on some points of law Aristophanes provides our earliest evidence, or perhaps our only evidence for a legal provision of the fifth century which was altered in the fourth. At least, Aristophanes provides such evidence if you think we can believe him. Some people dismiss the evidence of comedy as being unreliable fiction. I take the opposite view. I think that Aristophanes' references to legal procedures can generally be taken as accurate, for the very reason that ordinary Athenians did devote so much time to their courts. The audience for any of Aristophanes' plays must have included many citizens who had experience of the courts and would have been scornful, rather than amused, if the legal references in the plays had been wrong.

The play with the most legal references is of course *Wasps*, but since I have written a great deal about that play before, I am going to take examples here from a different play, *Clouds*. This is a play with many problems; in particular, there is the difficulty of knowing which parts of the text belong to the original play performed in 423 and which were altered or added when Aristophanes set about revising it a few years later. However, I shall not discuss that problem here, because it does not affect the legal significance of my examples.

1. In *Clouds* the old man Strepsiades has got into debt and is desperately worried that he will not be able to satisfy his creditors. The reason for his indebtedness is the extravagance of his aristocratic wife and his son Pheidippides, and in particular his son's indulgence in horses and chariot-racing. At the beginning of the play Strepsiades mentions two debts in particular: he owes twelve mnai to Pasiyas, which he borrowed in order to pay for a horse (21-3), and 3 mnai to Amynias to pay for a chariot board and wheels (30-1). Later in the play two of Strepsiades' creditors appear, demanding their money. In some of the manuscripts they are called Pasiyas and Amynias, but recent editors have denied that they should be identified with the two creditors named earlier. I think there is really no strong reason why they should not be regarded as Pasiyas and Amynias, but it hardly affects the interpretation of the scene whether they are so identified or not. They are not professional moneylenders. The first makes clear that his loan was a friendly one; he belongs to the same deme as Strep-

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siades (1219), and would have been embarrassed to refuse Strepsiades' request (1215-16). The second is a man who is groaning and wailing because he has been injured by falling off his chariot; perhaps we are to assume that he is one of Pheidippides' chariot-driving friends and now wants to get his money back in order to pay for medical treatment. He says to Strepsiades, 'Tell your son to pay me the money which he received' (1267-8); and when Strepsiades asks, 'What money is that?', he replies, 'The money which he borrowed' (1270). A few lines later he says, with the emphatic pronoun σὺ, 'You will be summoned by me if you don't pay the money' (1277-8).

This raises the question: who is actually in debt, Strepsiades or Pheidippides? In lines 1268 and 1270 Pheidippides borrowed the money; yet in 1277 Strepsiades is going to be prosecuted for it. Nowhere in the play is there any suggestion that Pheidippides might be prosecuted for debt. Apparently, whichever of them physically received money from a lender and paid it out to a seller, it is the father who is legally responsible for the transactions; and that must mean that Pheidippides is still a minor, below the age of eighteen, so that his father is his *kyrios*. Probably we should imagine him as being sixteen or seventeen. At some points in the play he is called *meirakion* (990, 1000, 1071); that word does not have a precise definition, but it usually means a teenager. Dover, in the introduction to his edition,² maintains that Pheidippides is over eighteen, but the only reason he gives is that he speaks 'as if already a member of the cavalry'. What he actually says, as the reason for his refusal to become a student in the Thinkery, is 'I wouldn't dare to see the horsemen with my colour scraped away' (119-20). That hardly seems conclusive, because 'the horsemen' here will be the other youths who drive chariots, for whom there was no minimum age; there is no reference here to service in the army. So we may accept that Pheidippides is still a minor, and that is why Strepsiades has legal responsibility for the debts he has run up.

I may mention in passing two other passages which might be thought to refer to Pheidippides' legal responsibility, though I think they do not. When Strepsiades says to him, 'You can be sure that all these debts will turn upon your head' (39-40), he could possibly mean 'One day you will inherit these debts, if I die without having paid them.' That is the interpretation adopted by both Dover and Sommerstein.³ However, in general imprecations misfortunes are often invoked on someone's head (e.g. *Acharnians* 833, *Peace* 1063, *Wealth* 526), and the verb *τρέπομαι* is often used in this connection (e.g. *Acharnians* 833, 1019, *Clouds* 1263, *Lysistrata* 915). So I think the remark is probably just a vague threat, 'You'll suffer for these debts!', 'I'll get my own back on you!', and has no legal significance. Later in the play, when Pheidippides thinks his father is going mad, he soliloquizes, 'Should I take him to court and get him convicted of insanity?' (845). We know from other sources that if a man was mentally incapable of looking after his property, he could be formally

prosecuted for insanity (παράνοια), and if the jury decided against him his property would be taken over and administered by his nearest relatives.⁴ When Pheidippides considers taking this action, he uses a first-person singular verb (ἔλω), and if that is interpreted strictly it might mean that he himself would be the prosecutor, and thus that he is over eighteen, since a minor could not prosecute in person. However, a relative could present a prosecution on behalf of a minor, and I think we can, if we wish, imagine Pheidippides going to his uncle Megakles, already mentioned earlier in the play (124), and getting him to present his prosecution. So my view is that we can still regard Pheidippides as being under eighteen.

2. We can now move on to the time when Strepsiades is required to repay the money. At the beginning of the play he is worried because 'the moon is going through her twenties; interest is coming on' (16-18). Later he is counting up the days to the end of the month. You will remember that in Athens the last ten days of the month are counted downwards: δεκάτη φθίνοντος, ἑνάτη φθίνοντος, and so on. So Strepsiades' reckoning goes like this:

The fifth, the fourth, the third, and after that
The second; and then next – of all the days
The one I fear and dread and loathe the most –
The next one after that is Old and New. (1131-4)

Old and New (ἔνη τε καὶ νέα) was the traditional name of the last day of the month, apparently because that day was transitional between the old moon and the new. In due course Pheidippides, after his lessons in rhetoric, produces the sophistic argument that a summons for the Old and New cannot be valid, because one day cannot be both old and new. But here I am not concerned with astronomy but with the legal calendar. What exactly is Strepsiades afraid will happen on the Old and New? Obviously it is a day when he will be expected to pay some money, but does that mean that he has to pay all his debts at the end of the month, or only that he has to pay the interest on them? At some points in the play he refers only to interest (e.g. 18), at others there is a demand for the entire sum borrowed (e.g. 1224). But the most revealing passage is the conversation with the Second Creditor (the one sometimes called Amynias), who first demands return of the entire sum borrowed (1267-70), but then says (in a line which is slightly corrupt, but the main point is clear), 'If you don't have the money, pay at least the interest' (1285-6). This implies that either is possible: at the end of a month a debtor might repay the whole of a loan or might pay only the interest on it. I note also a line earlier in the play where Strepsiades says money is lent by the month (κατὰ μῆνα, 756).

I conclude that the custom in Athens was to lend money for one month at a time. At the end of one month the lender could demand the return of

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the entire sum lent, together with one month's interest; but if the borrower was unable or unwilling to repay the capital sum, the lender might agree to continue the loan for a further month, and in that case the borrower would just pay the month's interest. But if he could not pay even the interest, the lender might agree that the interest should be added to the capital, increasing the amount of the loan. This is what we call compound interest, compounded at the end of each month. And this is what Strepsiades is referring to when at one point he cries out, 'O weep, you money-lenders! Yourself, your capital sums, and interest on interest!' (τόκοι τόκων, 1156). So also is the Second Creditor when he says, 'Month by month and day by day the money's always getting more and more, as time flows onwards' (1287-9).

3. If the lender was unwilling to extend the loan or to wait for his interest beyond the end of the month, and yet the borrower failed to pay up, the lender might decide to prosecute. This meant that first of all he must issue a summons and pay a fee called *prytaneia*. In Athens a summons was issued by the prosecutor himself, not by a court official, and it was oral, not written: the prosecutor had to go to his opponent and tell him to appear on a specified day at the office of the appropriate magistrate or official. The issuing of a summons had to be witnessed; the summons-witness (*klêtêr*) would then be able, if required, to testify that the summons had been duly delivered, so that the defendant would not be able to absent himself and afterwards claim that he had never been summoned. In the fourth century there is evidence that two summons-witnesses were required,⁵ but in *Clouds* the First Creditor clearly has only one summons-witness (1218), and so do the two prosecutors in *Wasps* (1408, 1416). We may infer that at this period the number of witnesses required for a summons was one, not two. That is a point of legal procedure known only from Aristophanes.

However, there is another point about summons procedure which I think it is not safe to infer, and that is the amount of notice required. How long before the date of appearance before the magistrate did the summons have to be issued? At line 1131, as we have seen, Strepsiades is counting down from the fifth day before the end of the month, and at line 1221 he receives a summons. From this it has been deduced that 'The summons had to be made at least four days before the day on which the appearance before the magistrate was required'.⁶ But we cannot be sure that the First Creditor is issuing his summons on the last possible day; nor, in Aristophanes, can we necessarily assume that no days have elapsed between line 1131 and line 1221. So this rule that four days' notice was required, though it may have existed, is not certain.

4. The First Creditor summons Strepsiades for the Old and New (1222), and it is clear throughout that the last day of the month is the one on which

Strepsiades fears that legal action will be taken. We may infer from this that prosecutions for debt were monthly cases, *dikai emmenoi*. Monthly cases were ones for which applications to prosecute were accepted on a particular day every month.⁷ Various types of case which fell into this category are listed in Arist. *Ath. Pol.* 52, and some are known from other fourth-century sources. By Aristotle's time they included prosecutions for battery, claims to slaves and draught animals, claims to a dowry, and so on, and one of the cases listed is 'if anyone obtains a loan at a drachma and defaults' (κάν τις ἐπὶ δραχμῇ δανεισάμενος ἀποστερή, *Ath. Pol.* 52.2). It seems not to have been noted before that this is the particular type of action to which Strepsiades is liable, and *Clouds* is the earliest evidence of it. We can assume that the loans which Strepsiades had obtained were all loans 'at a drachma' (ἐπὶ δραχμῇ), since that was the most usual rate of interest. It means one drachma per mna per month, so that on the loan of twelve mnai made to Strepsiades by Pasiyas, for example, the interest would be twelve drachmas a month. If Pasiyas wanted to recover his money at the end of the month and suspected that Strepsiades would not pay it, he could issue a summons to him to appear before the magistrate on the last day of the month; and that in fact is what is done by the First Creditor, whether or not we identify him as Pasiyas. Of course, if Strepsiades then unexpectedly handed over the money, the legal proceedings would go no further; but otherwise the prosecution would proceed. All this is consistent with such other evidence as we have about monthly cases.

5. At no point in the play does Strepsiades or anyone else say which particular magistrate is the one to whom his creditors would apply. I think that it would have been one of the deme-judges (*dikastai kata dêmous*). Deme-judges were originally appointed by the tyrant Peisistratos in the sixth century, and then after a lapse they began to be appointed afresh in 453/2.⁸ At that period there were thirty of them, perhaps one for each trittys or group of demes, and they held trials in their own districts for minor cases. Whether they still held trials in rural areas at the time of the Peloponnesian War and the Spartan invasions of Attika is not known. Possibly at the time of *Clouds* they held their sittings within the town of Athens. But anyway we can assume that Strepsiades' creditors would take their accusations to the judge for Strepsiades' deme. We are told that his deme was the small rural deme of Kikynna (134). The deme-judge would have had authority to decide summarily claims up to a certain figure; if a claim exceeded that figure he would have made arrangements for a trial by jury.

6. When the Old and New day arrived, and the creditor and the debtor presented themselves before the magistrate, the creditor would present his charge to the magistrate. That point is not mentioned explicitly in *Clouds*, but there is a passage in the play which shows that at this stage

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the charge would be written down. It is part of the scene in which Socrates is setting Strepsiades conundrums to solve.

SOCRATES: Suppose a prosecution for five talents
Against you: how would you dispose of it?
STREPSIADES: How? How? I don't know. I must find a way.
SOCRATES: Don't keep your thought wrapped close around yourself,
But give your mind free rein into the air,
Like a cockchafer, tethered by the foot.
STREPSIADES: I've found a way of disposing of the case!
A brilliant one, you must agree.
SOCRATES: What is it?
STREPSIADES: Have you ever seen that stone drug-sellers have –
The beautiful transparent one, I mean,
With which they kindle fire?
SOCRATES: Do you mean glass?
STREPSIADES: That's it! Now, how would it do if I got that,
And when the clerk was writing down the case
I stood like this, some way towards the sun,
And melted the record of my case right out? (758-72)

The point of 'melted the record out' (τὰ γράμματα ἐκτίξαιμι, 772) must be that the magistrate's clerk (ὁ γραμματεὺς) writes the details of the case on a waxed tablet, and the rays of the sun when concentrated on it melt the wax. At this period, it would seem, the prosecutor does not hand in a written charge; he just makes his accusation orally and it is the clerk who writes it down. That is a procedural detail which is not known from elsewhere.

7. On the same day the creditor or prosecutor would pay the fee called *prytaneia*: Strepsiades says in lines 1136 and 1180 that the prosecutors will pay the *prytaneia* on the Old and New day. It is stated by Harrison that the defendant also had to pay the *prytaneia*,⁹ but that is based solely on a statement in Pollux 8.38. There seems to be no other evidence on this point, but if the defendant as well as the prosecutor had to pay this fee, it seems to me surprising that Strepsiades laments that his creditors are going to pay the fee and never mentions that he himself will have to pay it too. I am therefore tempted to use this argument from silence to suggest that Pollux is mistaken and *prytaneia* were really paid only by prosecutors, not by defendants. We know from other sources that *prytaneia* were not payable in all cases, and the fourth-century speeches provide some examples of cases in which they were or were not payable, but none of those examples happens to be a claim for debt, so that it is only from *Clouds* that we know that *prytaneia* were payable in this kind of case.

8. Another disaster which Strepsiades fears is that some of the creditors may seize some of his goods or property as a substitute for the money he

owes them. This is the act denoted by the Greek verb ἐνεχράζω, which may be translated 'distrain'. This verb is used twice in *Clouds*. In line 241 it is passive: 'I'm robbed and raided, and I'm having my goods distrained upon.' That is too vague to be much use for understanding the legal procedure.¹⁰ The other instance of ἐνεχράζω is a little clearer: in lines 34-5 Strepsiades says, 'I've lost some lawsuits, and other men say they will distrain for interest.' The reference to 'other men' (ἄλλοι) seems to mean that the creditors who are threatening to distrain upon Strepsiades' goods are distinct from those who have already prosecuted him.

At this point there is some disagreement among the commentators. The disagreement is on the question whether Strepsiades, at the time when he borrowed the money, specified some items of his property which the lenders might take possession of if he failed to pay the interest or repay the loan. From fourth-century evidence it is clear that a loan could be arranged either with a security of this sort or without it.¹¹ If the borrower had agreed to it at the time of receiving the loan, and then had defaulted, the lender could simply take possession of the specified item; but if this had not been agreed when the loan was made, the lender would first have to prosecute the defaulting debtor, and would not be able to seize any of his goods until the court authorized him to do so. Which of these situations does Aristophanes mean us to imagine in Strepsiades' case? Sommerstein in his note on 34-5 cautiously leaves both possibilities open: 'either these creditors have lent Strepsiades money on condition that they are entitled to distrain on his property if interest is not paid, or they are threatening legal proceedings with distraint to follow'.¹² Millett takes the view that Strepsiades cannot have given any security to his creditors, because he is so hopelessly burdened with debts that he has no property;¹³ but that interpretation seems hardly consistent with line 241, where he says that his property actually is being seized. The opposite view is taken by Dover in his note on line 34, where he says that Strepsiades 'is referring now to creditors who lent him money on condition that they could take securities'.¹⁴ I think that the wording of lines 34-5 supports Dover's view: 'I've lost some lawsuits, and *other men* say they will distrain for interest' implies that the second group of creditors will seize goods without needing to prosecute. If so, that means that for some of his loans Strepsiades agreed to the seizure of items of his property if he defaulted on payment, though for others he did not.

9. One other line of *Clouds* may refer to distraint, but its point is not very clear. This is line 37. Strepsiades cannot sleep, and when his son asks him, 'Why do you grumble and twist around all night?', he replies, 'I'm bitten by a demarch in the bedding!' The joke, of course, is that the word δῆμαρχος is unexpectedly substituted for a bedbug; but why is a demarch relevant to Strepsiades' situation? At first sight one might wonder whether the demarch was the magistrate in charge of the case, and that

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view might be supported by a fragment of Demetrios of Phaleron which says, 'Solon and his party also established demarchs in great haste, so that officials, deme by deme, might give and obtain justice from one another.'¹⁵ But several details of this quotation are puzzling, and there are surely some mistakes in it. In particular, demes did not yet exist as administrative units in the time of Solon, and there is no other evidence that demarchs held trials at any period. They must be distinguished from the deme-judges. In the fifth century there were only thirty deme-judges altogether, but every deme had a demarch, making well over a hundred of them. The demarch was the chairman at meetings of the deme, he had charge of the list of members, and he had various other financial and administrative functions,¹⁶ but there is no other evidence that he held trials. There is, however, some evidence that he was involved in distraint on property. A fragment of Aristophanes' lost play *Σκηνὰς καταλαμβάνουσα*, *Women Encamping*, says simply that 'the demarchs distrained' (fr. 500), and in a passage of the Demosthenic speech *Against Euboulides* the speaker, named Euxitheos, recounts that as demarch he got into a dispute with some men when he was exacting some payments from them.¹⁷ It is clear enough that, if money was owed to a deme, the demarch would have the duty of collecting it, with distraint upon property if necessary.

Should we then conclude that, when Strepsiades feels threatened by the demarch, that means that he owes money to his deme?¹⁸ That is certainly a possible interpretation of line 37. Yet nothing else in the play suggests that he owes money to the deme; elsewhere his debts are all to private individuals. It therefore seems better to conclude that, when a creditor needed to distrain upon a debtor's property to recover what was owed to him, he might be accompanied by the demarch. It is well known that it was considered wrong for a man to enter another man's house uninvited, especially if there were women in it; but the presence of the demarch would show that the act had legal authority. This would apply both to a case in which the debtor had been convicted in court and also to a case in which the debtor had specified a security which the creditor was entitled to seize without resort to the court (and not to the latter case only, as Dover assumes in his note on line 37).¹⁹ In fact this explanation was already seen long ago by a scholiast on line 37, who says, 'The demarch had to bring those distraining into the houses.' This may be just a conjecture by the scholiast,²⁰ but it may still be correct. Anyway, whatever the precise interpretation should be, we do seem to have here another point of legal procedure for which Aristophanes provides the only evidence, even though it leaves the details uncertain.

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Much of this paper has been about points of detail which may seem to be of minor importance individually, but collectively they show two things. First, Aristophanes is ready to use points of law or legal procedure as a basis for jokes, and that means that he assumes that his audience is familiar with them. The Athenians were litigious people, and could be expected to know about the *prytaneia* or the demarch's functions without needing to have them explained.²¹ The second conclusion is complementary to the first: since the spectators were knowledgeable about the law, Aristophanes had to get his facts right, and that means that his comments about the law, though of course they are very incomplete, can, as far as they go, be used by us as historical evidence to supplement the information that we have from other sources.

Notes

1. Aristophanes' references to law are discussed by Carey 2000. He argues that they reflect public anxiety about the legal system. There is also a shorter comment in Todd 1993, 148-50.

2. Dover 1968, xxvii.

3. Dover 1968, 98, Sommerstein 1982, 161.

4. Xen. *Mem.* 1.2.49, Aeschines 3.251, *Ath. Pol.* 56.6; cf. Harrison 1968-71, i.80-1.

5. Demosthenes 40.28, 53.14.

6. Harrison 1968-71, ii.87.

7. Cohen 1973, 23-59, MacDowell 1978, 231-3.

8. Arist. *Ath. Pol.* 26.3.

9. Harrison 1968-71, ii.92-3.

10. Harris 2002, 423 = 2006, 260, has suggested that ἄγομαι in line 241 is a reference to debt-bondage, but, as Dover 1968, 129, shows, ἄγομαι, φέρομαι is a rhetorical expression for 'I am being harassed'. I do not find any clear reference to debt-bondage in this play.

11. For example, Demosthenes 49.2.

12. Sommerstein 1982, 160.

13. Millett 1991, 184.

14. Dover 1968, 97.

15. *FGrH* 228 F 31.

16. For details see Whitehead 1986, 121-39.

17. Demosthenes 57.63.

18. This possibility is entertained by Millett 1991, 276-7 n. 48.

19. Dover 1968, 98.

20. Whitehead 1986, 126 n. 29, calls this 'the excellent scholion', but it should be noted that it seems not to have good authority. It is included in Dübner's edition of the scholia, but Dübner does not identify the manuscript in which it is found. It is excluded from Holwerda's edition of the *scholia vetera*, Koster's edition of the *scholia recentiora*, and Holwerda's edition of the commentary of Tzetzes.

21. On ordinary Athenians' knowledge of the laws cf. Harris 1994, 135-6.

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The 'Assembly' at the End of Aristophanes' *Knights*

P.J. Rhodes

A theme which is important in many of the chapters of this book is that the Athenian dramatists frequently show a thorough knowledge of Athenian substantive law and of Athenian judicial and other public procedures, which needs to be taken into account both by students of the plays and by students of law and institutions. Here I show that this applies in Aristophanes not only to episodes which overtly reflect Athenian institutions but also to the fantasy at the end of *Knights*.

In the contest between Paphlagon and the Sausage-Seller for the favour of personified Demos, one episode takes place in the council, whose meeting is not represented on stage but reported by the Sausage-Seller (611-82). After that the two do compete on stage, in the presence of Demos (foreshadowed 691ff.), and at 746-8 Paphlagon calls on Demos to hold an assembly forthwith (ποιήσας αὐτίκα μάλα ἐκκλησίαν) and to decide (*diakrinein*) between the two of them. What follows is therefore to be regarded as a kind of assembly (and it would be nice to think that the meeting of the council had ended with a *probouleuma*, a pronouncement of the council to be taken forward to the assembly, though there is no indication of that in the text).¹

Normally the assembly was called on to decide for or against a proposal; but often a proposer would include in his proposal an invitation to decide between (*diacheirotonein*, 'vote between') two alternative courses of action, and commonly the proposer specified that that was to be done forthwith (*autika* or *autika mala*).² Here Aristophanes does not directly reproduce but he does echo that: *poiein ekklesian* is a regular term for summoning an assembly;³ 'forthwith' is transferred from the particular decision to the holding of the assembly; and for the personified Demos we have not *diacheirotonein*, which perhaps would have seemed forced in this context, but the more general *diakrinein* ('judge between'), which is not used in any pre-403 Athenian inscription.

The Sausage-Seller wants the metaphorical assembly to be held elsewhere than on the Pnyx, but Demos replies that he will not sit (*kathizesthai*) anywhere else (749-51). By the late fifth century the Pnyx, south-west of the acropolis, had become the normal meeting-place of the

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assembly, though it was never the only meeting-place: it is particularly worth noting that in 411 the assembly which ushered in the oligarchy of the Four Hundred was held not there but outside the city walls at Colonus, while the *ad hoc* assembly which deposed the Four Hundred four months later did meet on the Pnyx, 'the place where they had been accustomed to meet at other times'.⁴ It is not certain when the Pnyx was first laid out for meetings of the assembly,⁵ but Aristophanes mentions it as the meeting-place in *Acharnians* 20 (in 425, i.e. one year before *Knights*). Sitting was the normal practice in the Athenian assembly, and indeed in Greek assemblies generally.⁶ Demos then says 'You must move forwards (εἰς τὸ πρόσθε χρῆ παριέν) to the Pnyx' (751), and that seems to reflect the official proclamation at the beginning of a meeting, that those attending should move forwards so as to be within the consecrated area (πάριτ' εἰς τὸ πρόσθεν, πάριθ' ὡς ἄν ἐντόξ ἦτε τοῦ καθάρματος, *Ach.* 43-4).

Paphlagon begins with a prayer, that he may be rewarded if he proves to be the best servant of Demos or put to death if he does not, and the Sausage-Seller adds his own variation on the theme:

PA.: I pray to the lady Athena who cares for the city, that if I have become the best man with regard to the people of the Athenians – after Lysicles, Cynna and Salabaccho⁷ – I may as now dine in the *prytaneion* for having done nothing. But if I hate you, and am not the only man who stands out and fights for you, may I perish and be sawn apart and cut up to make yoke-straps.

S.S.: And, Demos, if I do not love you and cherish you, may I be cut up and boiled with mincemeat; and if that does not convince you may I here be grated with cheese in a savoury dish and dragged by the balls with the meat-hook to the Ceramicus. (763-72)

Here I think we have an interesting conflation of two things. A normal meeting of the assembly began with a prayer, invoking success on the assembly and on what it decided, and a curse, invoking misfortune on enemies and traitors: this is best known from Aristophanes' parody of it in the *Thesmophoriazusae* (295-311, 331-51).⁸ It was also possible for the proposer of a decree to attach a prayer for a good outcome to his particular proposal: we have no clear instance of this from the fifth century, but for instance we have two (from different proposers) from the year 362/1. One reads:

The herald shall vow forthwith to Zeus Olympios and to Athena Polias and to Demeter and Kore and to the Twelve Gods and to the August Goddesses, that, if what is resolved about the alliance is to the advantage of the people of the Athenians, a sacrificial procession shall be made on the accomplishment of these things as the people shall resolve.⁹

Here in the *Knights* the combination of prayer and curse echoes the general prayer and curse which began the assembly, but the attachment of them to a particular proposal resembles what is epigraphically attested

in the fourth century (and, though not attested, may already have been used in the late fifth).

Paphlagon appeals to Athena ‘who cares for the city’, τῇ τῆς πόλεως μεδεούσῃ (763): that cult title appears in the inscribed ‘decree of Themistocles’, and Meiggs & Lewis cited this passage in *Knights* against the suggestion that it was more appropriate to Athena as seen from outside Athens than to an internal Athenian decree.¹⁰ His description of his achievement is that he has ‘become the best man with regard to the people of the Athenians’, περὶ τὸν δῆμον τὸν Ἀθηναίων γεγένημαι βέλτιστος ἀνὴρ (764-5). Athenian decrees which honour a man regularly do so because ‘he is a good man with regard to the people of the Athenians’, ἀνὴρ ἐστὶν ἀγαθὸς περὶ τὸν δῆμον τὸν Ἀθηναίων,¹¹ and Paphlagon, appropriately in the context of his rivalry with the Sausage-Seller, trumps that with the superlative. The reward which Paphlagon proposes for himself is the continuation of the right to dine in the *prytaneion*.¹² In the fifth century that was one of the greatest honours which Athens conferred on its citizens (statues were not awarded until the fourth century, beginning with Conon after the battle of Cnidus in 394¹³); a decree possibly of the 430s had regulated that honour, the prime recipients of which were the senior descendants of Harmodius and Aristogeiton, who had assassinated Hipparchus in 514¹⁴ – and this may be why, a few lines later, Demos says to the Sausage-Seller, ‘Who are you, man? You are not a descendant of that family of Harmodius, are you?’ (786).¹⁵

At the beginning of this metaphorical assembly, then, there are many reflections of procedure in actual Athenian assemblies, and it is clear that the suggestion that this is a kind of assembly should be taken seriously. Once the contest gets under way, these reflections do not continue, but there are various allusions to Athenian public institutions.

Paphlagon begins his claim to be the most faithful servant of Demos by stating that, when he was a member of the council, he extracted money from individuals in various ways so as to produce a surplus in the state treasury (*to koinon*) (773-6). The council was indeed the general overseer of the administration which the fifth-century democracy partitioned among a large number of officials and boards, and finance was one of its principal concerns: in the pamphlet of the ‘Old Oligarch’, probably written about the same time as *Knights*, finance is second only to war in the list of the council’s responsibilities,¹⁶ while a speech of Lysias suggests that the council was tempted to miscarriages of justice when the state was short of funds.¹⁷ It is usually assumed on the basis of this passage that Cleon had recently been a member of the council, perhaps in 427/6.¹⁸ And it is true that in the fifth century (as opposed to the fourth) the Athenian state’s secular funds were kept, we do not know in what location, in a central treasury: Thucydides uses *to koinon* in this sense; inscriptions use either *to koinon* or *to dêmosion*.¹⁹

The Sausage-Seller accuses Paphlagon of spurning envoys (*sc.* from

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Sparta) who offered Athens a peace treaty (794-6): in connection with the affair of Pylos in 425 Thucydides represents Cleon as denouncing in the assembly the Spartans who went on a mission to Athens during the period of truce, and Cleon was presumably involved again when after the Athenian success the Spartans once more attempted negotiations but the Athenians rebuffed them.²⁰ Paphlagon's reply on his spurning of envoys is:

PA.: In order that [Demos] may rule all the Greeks. For it is written in the oracles that he must some time be an *élias-tês* in Arcadia for 5 obols, if he endures. But in any case I shall nourish him and care for him, discovering by fair and by foul means sources from which he can receive his 3 obols. (797-800)

And the Sausage-Seller's response to that includes:

S.S.: If he ever returns to the countryside and lives in peace, ... he will acknowledge what benefits you have cheated him out of through stipend-earning; and then he will come back, a fierce rustic, hunting for a pebble (*psêphos*) to use against you. (805-8)

Whatever the name and nature of the Solonian court out of which the fifth-century *dikastêria* had developed,²¹ it is clear that *élieia* and *élias-tês* could be used of a *dikastêrion* and its *dikastai* in the 420s.²² Payment for Athens' *élias-tai* / *dikastai* was introduced by Pericles, probably in the 450s, and had been increased perhaps by Cleon from 2 obols a day to 3 obols.²³ While the assembly usually voted by show of hands,²⁴ the courts voted by ballot: the ballots described by *Ath. Pol.* were manufactured objects, discs with a hollow axle to vote for the plaintiff or a solid axle to vote for the defendant, but they seem to have been introduced in the fourth century,²⁵ and it appears, particularly from passages in *Wasps*, that in the late fifth century each *dikastês* brought with him to the court a pebble (*psêphos*) or a mussel-shell (*choirinê*: cf. *Knights* 1332), which he placed in one of two urns to vote for the plaintiff or the defendant.²⁶

The Sausage-Seller continues:

S.S.: Whenever you are gaping, [Paphlagon] also snaps off the stalks of the *euthynai* and gulps them down, and with both hands he scoops up the public funds. (824-7)

Retiring officials were subject to *logos* and *euthynai*, a financial and general examination of their conduct in office,²⁷ and the implication here is that Paphlagon takes bribes to abstain from prosecuting guilty officials, thus enriching himself and impoverishing the state.

Another accusation made by the Sausage-Seller is that if Demos were to be harsh and put on *ostrakon*-looks Paphlagon's supporters might take military action (847-57). *Ostrakon*-looks refers overtly to a children's

game, but in a political context we must think of the institution of ostracism, by which each year the assembly had an opportunity to exile a man for ten years without finding him guilty of any offence.²⁸ There is no reason to think that there was any danger of an uprising, or that there was any attempt to ostracize anybody, in the 420s, but Paphlagon frequently accuses his opponents of being conspirators or would-be tyrants, and it may well be that that was a characteristic of Cleon,²⁹ and that some of his opponents in return accused him of trying to make himself tyrant and threatened him with ostracism.³⁰

Athenian institutions of another kind appear later in the contest. Two of the threats which Paphlagon utters against the Sausage-Seller are:

PA.: I shall make you serve as a trierarch, spending from your own funds, having an old ship, on which you will never stop spending money and having work done; and I shall contrive that you receive a rotten sail. (912-18)

PA.: You will pay a fine penalty to me, when you are squeezed by the *eisphorai*; for I shall make an effort to have you registered among the rich. (923-6)

Here we have two of the institutions through which the Athenians obtained money for public purposes from the rich.³¹ The trierarchy was the liturgy (public service) by which a rich man was allocated one of the navy's ships for a year and had to take personal and financial responsibility for it; and a man who was given a ship and equipment in bad condition might well need to spend more money than a man allocated a ship and equipment in good condition. How men were appointed and allocated ships in the late fifth century we do not know; in the fourth century the generals were involved in their appointment, and the ships and equipment were allocated by the *epimelêtai* of the dockyards,³² and Sommerstein in commenting on this passage notes that not long after the production of *Knights* Cleon was elected general for 424/3.³³ *Eisphora* was a tax on the property of the richer citizens, levied not regularly but in years when and at a rate which the assembly decided: again we know more about how it was organized in the fourth century than in the fifth, but Thucydides refers to a levy in 428 which raised 200 talents and which was in some sense 'the first'.³⁴

When the contestants come to give an account of the attractive oracles which they are about to produce, among the topics offered by the Sausage-Seller is 'about those who measure out the barley-groats dishonestly in the agora' (1009). Honest use of weights and measures was of course a concern of every city, but in Athens with its dependence on imported grain and its many state stipends for citizens there was probably more purchasing of basic foodstuffs than in most cities, and the involvement of the citizens in rowing ships and in fighting, and the Peloponnesian invasions of Attica in the early years of the war (but discontinued after Athens' capture of

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Spartans at Pylos in 425), will have added further to the Athenians' reliance on purchased food.

One of Paphlagon's oracles mentions 'a wooden wall and iron towers' (1040), and the Sausage-Seller interprets this as meaning a wooden frame with five holes, i.e. the stocks (1045-9). Stocks could still be used in Athens in the fourth century: a man convicted of theft in a *graphê klopês* could in addition to the financial penalty be imprisoned in the stocks for five days if the court so decided.³⁵

The Sausage-Seller sees in one of his own oracles an allusion to 'fast revenue-collecting (*argyrologoî*) ships', which Paphlagon keeps asking for (1070-2). There are three passages in Thucydides which refer to Athens' sending out revenue-collecting ships during the Archidamian War:³⁶ he does not in any of these cases attribute the sending of them either to Cleon or to anybody else, but consciousness of the need to raise more money seems to have been characteristic of the Athenians after Pericles' death as it was not characteristic of Pericles, and Thudippus, the proposer of the decree which in 425 increased the tribute 'because it was too little', may well have been connected with Cleon.³⁷

The Pnyx reappears at 1107-9:

DE.: Since, whichever of them does me more good, to him I shall hand over the reins of the Pnyx.

We then have the passage in which the chorus describes Demos as a mighty tyrant, yet easily led astray by flattering speakers, but Demos replies that he knows what he is doing, that he fattens up a leader (*prostatês*) for a time but strikes him down when he is full, 'making a probe of the funnel' (*κιμὸν καταμηλῶν*) to make him disgorge his ill-gotten gains (1111-50). *Prostatês* here is a political term but not an institutional term: it is used by Thucydides particularly of leaders of the common people, who are usually not themselves men of the common people.³⁸ The urns into which the *dikastai* cast their ballots had a wicker-work funnel on the top, so that the voter could place his hand in each of the two and others could not see in which he had dropped his ballot: Sommerstein suggests that there were two ways in which Demos might have 'made a probe of the funnel', and that Aristophanes might have intended either or indeed both.³⁹

The contest then becomes a race (1158), such as was held in the course of festivals in Athens and elsewhere, with the Sausage-Seller telling Paphlagon not to 'cut in' (*hypothein*) ahead of him (1161); and there is another festival allusion when Demos takes a gift from Athena to be an expression of gratitude for the robe (*peplos*) with which Athena's statue was clothed at the Panathenaea (1178-80). The contest ends with Paphlagon's admitting defeat and bidding farewell to his garland, in parodies of tragedy (1232-53). Demosthenes, one of Demos' other slaves at the beginning of the play, probably reappears at this point, and he asks that

he may be the Sausage-Seller's Phanus, 'a *hypographeus* of his lawsuits' (1256). Phanus appears in *Wasps* 1220 as an associate of Cleon: in other contexts *hypographeus* is equivalent to *hypogrammateus*, an under-secretary; here the suggestion seems to be that he put his name to prosecutions for Cleon, perhaps that he acted as nominal prosecutor on behalf of Cleon as Midias allegedly hired Euctemon to prosecute Demosthenes for desertion.⁴⁰

We are not yet at the end of the play: the Sausage-Seller now changes his character, and restores Demos to his earlier and better self; and in the final scene there are further echoes of Athenian institutions:

S.S.: You must speak fair (*euphêmein*), close your mouths, abstain from giving evidence and close the *dikastêria* in which this city delights; and in recognition of the new good fortune the theatre must raise the paean. (1316-18)

The command to 'speak fair' and keep silence commonly preceded a religious ceremony,⁴¹ and on major festival days the lawcourts were closed.⁴² The revived Demos is not going to spend his time in the lawcourts:

S.S.: Not smelling of mussel shells [i.e. ballots: cf. above] but of libations / peace treaties. (1332)

He will be active in the assembly; but no longer, as in the past, will he be taken in by flattery (1340-9), or

S.S.: By Zeus, if two orators were speaking, one for building warships and the other for spending this money on stipends, the one proposing the stipends would go off having outrun the one proposing the triremes. (1350-3)

That the assembly would rather spend money for its immediate advantage than for Athens' military success is a common complaint from those who want military expenditure,⁴³ but it was not always justified: it is likely that it was in the 420s that pay for *dikastai* was increased from 2 obols to 3 obols (cf. above), but in the Peloponnesian War there is no sign that Athens' war effort was hampered by failure to pay what was needed.

Instead of being a bad assembly-man, restored Demos would put an end to various abuses:

S.S.: Now tell me, if some ribald lawcourt-speaker were to say, 'There will be no barley-groats for you *dikastai* unless you condemn in this case', what will you do, say to me, with this lawcourt-speaker?

DE.: I shall lift him up in the air and throw him into the pit, hanging Hyperbolus from his windpipe. ... First, to the men who row the warships I shall give their pay complete when they come into harbour. ... Then no hoplite who has been entered in the register shall be transferred as a result of pressure, but he shall stay where he was first registered. (1357-71)

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For pressure on courts to condemn for irrelevant financial reasons cf. Lysias, cited above; hurling into the pit (*barathron*) was one of the forms of capital punishment used at Athens, employed in cases where killing was seen as the removal of pollution, and it is mentioned on a number of occasions by Aristophanes.⁴⁴ There are various texts which mention failure to make full payment to soldiers and sailors when it was due;⁴⁵ and there are also texts alleging that a man got himself transferred from one military category to another.⁴⁶

That personified Demos chooses between two villainous slaves, that the winner then becomes virtuous and restores Demos to his earlier and better self, is an Aristophanic fantasy; but, like much of Aristophanes' comedy, it assumes as part of its background the realities and the public institutions of contemporary Athens. At the beginning of this last part of the play, the assumption is that Demos is to constitute himself as an assembly, in whose presence the rival slaves are to put forward alternative proposals, and from 746 to 789 there are many passages which reflect the Athenian assembly and its procedures. After that the assembly is largely forgotten, but various Athenian institutions are featured: payment for *dikastai*, and voting in the *dikastêria* (797-808); the *euthynai* of retiring officials (824-7); the trierarchy and *eisphora* (912-26); the need to check that traders use honest weights and measures (1009); the stocks (1045); revenue-collecting ships (1070-2); *prostatai* of the people and the funnel through which *dikastai* inserted their vote into an urn (1111-50); and later there seems to be a suggestion that a man called Phanus used to act as formal prosecutor on Cleon's behalf (1256). Before that we change to the image of a festival, with the contest seen as a race (1158), and an allusion to Athena's *peplos* (1178-80). There is more religious imagery after the Sausage-Seller has won the contest and has restored Demos (1316-8); and the restored Demos will be a good assembly-man rather than an addicted *dikastês*, and will put a stop to various abuses (1331-71).

Notes

1. In an earlier paper on 'Aristophanes and the Athenian Assembly' (Rhodes 2004), I discussed the council of 611-82 but not this episode: I thank Prof. Harris for alerting me to my omission and encouraging me to rectify it here, and for his helpful comments on a draft.

2. e.g. ML 65 = *IG* i³ 61 ~ Fornara 128, 5. For Aristophanes' habit of echoing the language of decrees cf. Harris 2002 = Harris 2006, 425-9(30).

3. Cf., e.g., ML 46 = *IG* i³ 34 ~ Fornara 98, 19.

4. Thuc. 8.67.2, 97.1.

5. This is usually, for reasons of historical appropriateness rather than on archaeological grounds, dated c. 500 and associated with the liberation of Athens from the Pisistratid tyranny: e.g. Travlos 1971, 466; Calligas 1996, 3; Whitley 2001 (a book in which the text is much more cautious than the chapter and section headings about connections between buildings and political history), 336. However, a *horos* of the Pnyx (*IG* i³ 1092) has been dated c. 450, on the basis of

letter-forms which would not now be regarded as a strong indication of that date, and that eventually led H.A. Thompson to suggest a mid-fifth-century date and a connection with the reforms of Ephialtes (a different view of historical appropriateness) for the laying-out of the Pnyx (1982, 136-7).

6. e.g. Thuc. 6.13.1; and notice ἀναστῆτω, 'stand up', when the Spartan assembly was, exceptionally, called on to divide and vote: Thuc. 1.87.2.

7. A demagogue and two courtesans: Rogers 1910 *ad loc.* repeats the suggestion of J.H. Frere that Cleon claimed to be the best after Pericles, Cimon and Themistocles (cf. Paphlagon's mention of Themistocles at 811-12).

8. Cf. the notes of Austin & Olson 2004.

9. *IG* ii² 112 = Rhodes & Osborne 41, 6-12. Cf. *IG* ii² 114 = Tod 146 ~ Harding 58, 6ff.

10. ML 23 ~ Fornara 55, 4-5, with ML p. 50. Outside Athens: e.g. *IG* i³ 37, 15, in an Athenian decree for Colophon.

11. E.g. *IG* i³ 65, 9-11.

12. This had apparently been conferred on Cleon after the Athenian success at Pylos in 425: cf. 280, 709, 1404, with, e.g., Kagan 1974, 248-9. He had apparently been given also the right to a front seat in the theatre: 702-4.

13. Dem. 20. *Leptines* 68-70; cf. (not mentioning Conon but contrasting the fifth and fourth centuries) Dem. 23. *Aristocrates* 196-8, also Aeschin. 3. *Ctesiphon* 181-2.

14. *IG* i³ 131.

15. Sommerstein 1981 *ad loc.* notes the suggestion of J.K. Davies that Cleon's wife was connected with Harmodius' family (1971, 145, 320, 476-7).

16. [Xen.] *Ath. Pol.* 3.2. For the date see Marr & Rhodes 2008, 3-6, 131-5.

17. Lys. 30. *Nicomachus* 22.

18. Cf. Rhodes 1972, 4; Develin 1989, 195.

19. Thuc. 8.1.2, cf. (of the Peloponnesians) 1.141.3; *to koinon* *IG* i³ 258, 31, 36 (referring to a deme treasury), *to dêmosion* ML 69 = *IG* i³ 71 ~ Fornara 136, 29-30.

20. Thuc. 4.21-2, 41.3-4.

21. The orthodox view that it was called (*h*)*êliaia* and was a meeting of the assembly held for judicial purposes has been challenged by Hansen 1982 = Hansen 1989, 219-57(-61).

22. ML 69 = *IG* i³ 71 ~ Fornara 136, 13-14. For the use of *êliaia* cf. A.L. Boegehold in Boegehold et al. 1995, 5.

23. Pericles: *Ath. Pol.* 27.3-4. Cleon: associated with 3 obols by Aristophanes in this and other passages, cf. schol. *Wasps* 88 (emended), 300.

24. *Ath. Pol.* 44.3.

25. *Ath. Pol.* 68.2-4, cf. M.L. Lang in Boegehold et al. 1995, 82-6.

26. Cf. MacDowell 1971, 142-3.

27. *Ath. Pol.* 48,4-5, 54.2.

28. See *OCD*³ s.v. ostracism and works cited there; Hansen 1991, 35-9.

29. 236, 252, 476, 628, 862; cf. *Wasps* 345, 483-507, 953.

30. Cf. Rhodes 2000, 131.

31. See *OCD*³ s.vv. trierarchy, *eisphora*, and works cited there; Hansen 1991, 110-15.

32. Appointment: [Dem.] 35. *Lacritus* 48, Dem. 39. *Boeotus* 1. 8, *Ath. Pol.* 61.1. Ships and equipment: [Dem.] 47. *Evergus & Mnesibulus* 22-3.

33. Cf. Develin 1989, 133.

34. Thuc. 3.19.1.

35. Dem. 24. *Timocrates* 105. This is in one of the laws inserted in the speech,

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whose authenticity could be challenged, but Demosthenes' own words in §§103, 114, refer to an additional penalty of imprisonment for five days in such cases 'so that all might see', and the crucial passage in this or another law was cited and discussed by Lys. 10. *Theomnestus* 1. 16 as an example of the use of archaic language (*podokakkê*, perhaps = *podokatoché*, 'foot-retainer', rather than *xylon*, 'wood', for stocks). On the question whether Lysias was citing the same law (C. Carey's OCT retains the manuscripts' 'ten days') see Todd 2008, 679-81. Earlier in *Knights* Paphlagon had threatened the Sausage-Seller with the stocks, using the word *xylon*: 705.

36. Thuc. 2.69.1, 3.19, 4.50.1, probably referring each time to special efforts to raise money rather than to the regular collection of the Delian League's tribute.

37. On finance before and after Pericles' death see Rhodes 2005, 92. Thudippus' decree: ML 69 = IG i³ 71 ~ Fornara 136, quotation ll. 16-17, Thudippus and Cleon ML p. 197.

38. Thuc. 3.82. 1, contrasting the *prostatai* of the *dêmoi* with the *oligoi*; cf. 3.75.2, 4.46.4, 66 3, 6.35.2, 8.89.4, also *prostasia* in 2.65.11, 6.89.4.

39. On the voting-urns and the *kêmos* see MacDowell 1971, 142-3; for the use of the *kêmos* here see Sommerstein 1981, *ad loc.*

40. Dem. 21. *Midias* 103. On straw men as prosecutors see Rubinstein 2000, 201-4: straw men could be employed by politicians wishing to harass their opponents without risking the penalties for frivolous prosecution (her p. 203), on which see Harris 1999 = 2006, 405-21(-2).

41. Cf., e.g., *Ach.* 237-41.

42. Closed on 'festival days', [Xen.] *Ath. Pol.* 3.8. But as for other forms of public business this seems to have meant closed on annual festival days but not monthly festival days: e.g. 1991, 186.

43. E.g. Dem. 21. *Midias* 203, 3. *Ol.* 3. 19, 8 *Chersonese* 46-8.

44. See Gernet 1924 = Gernet 1968, 302-29, English translation Gernet 1981, 252-76; and cf. Ar. *Nub.* 1450, *Ran.* 574, *Plut.* 431, 1109.

45. See Pritchett 1971, 24-9 = Pritchett 1974, 24-9.

46. The younger Alcibiades, from the hoplites to the cavalry: Lys. 14. *Alcibiades* 1. 7-11, 15. *Alcibiades* 2. 5-8. Mantiheus, from the cavalry to the hoplites, when other men were switching in the other direction: Lys. 16. *Mantiheus* 13, cf. *Plut. Cimon* 5.2-4.

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Pimps in Court

Chris Carey

Herodas is perhaps a surprising presence amid the grander texts in this book. His work is not drama as we normally think of it. In scale, duration, complexity it resembles classical drama neither in its Attic nor in its Roman forms. Drama however his work certainly is. Herodas is the heir not to the grand civic theatre of classical Athens but to the various small-scale, informal, popular dramatic entertainments which were widely established throughout Greece by the classical period.¹ These popular forms had been given literary dress (in prose) by the Syracusan Sophron in the fifth century; Herodas and his near contemporary Theokritos took the further (and more ambitious) step of recreating the popular mime in verse form. We do not know if the works were ever actually staged;² but they are in essence dramatic. Events take place in real time before the audience/reader, all words are uttered in direct speech and in dramatic character, whether by one or more voices, and there is no narrative frame to set the speeches within a larger story (all *analépsis* comes from the characters themselves); this is drama. My interest here is in the second mime in the papyrus collection. Its content makes it unique within the surviving text of Herodas. Unlike the other mimes, which are either domestic in setting and theme or at least focus on individual relationships, this one has a formal setting. It takes the form of a courtroom speech. The speaker is a pimp (*pornoboskos*) named Battaros (75), who is arguing in court as the plaintiff in a suit arising from an attack on his brothel and the abduction of one of his girls. The text is not quite a monologue, since a second voice, the clerk of the court, briefly intervenes to read a law. The reading is cut short by the pimp, who takes over the role of reader, allowing him a rhetorically effective accumulation of laws in contrast to the dry voice of the court official. So for the most part we are dealing with continuous forensic discourse in the manner of the texts of the Athenian orators. With such an uneven distribution of roles, it is easier to imagine this text as performed (if performed) by a single speaker with appropriate change of voice.³ Apart from the two speakers, the text calls into existence a gallery of imaginary figures, the dikasts, the opponent, and a slave prostitute⁴ allegedly manhandled by the opponent.

Like the rest of Herodas' work, this mime exists at a point of confluence between Athenian comedy, popular mime and late archaic iambos, with

the added ingredient in this case of forensic oratory. Iambos – and specifically Hipponax – is advertised at a fundamental level in the choice of metre, not just iambic trimeters but scazons. The thematic influence of Hipponax, less pronounced in the rest of the corpus, is given prominence in this mime through the choice of a lowlife speaker. Athenian comedy both Old and New lurks behind the drunken escapades which give rise to the fictive suit we witness in the mime. The behaviour of Philokleon in *Wasps*, who turns from dikast to party animal and abducts a flute-girl from a party before violently assaulting everyone he meets, and the young roughnecks who take part in the mutual theft of prostitutes between Athens and Megara which (at least in this comic fiction) causes the Peloponnesian War, represent the strand in surviving Old Comedy. But the more important comic intertextual background is Middle and New Comedy. This is a world in which drunken young men inflamed with love and lust go in pursuit of their favourite *hetairai* and get into brawls as a result. The present case evidently arises out of a *kômos* (25, 34-7). The defendant, a man named Thales, is – or claims to be – in love with one of the girls in the brothel (79). He has forced his way into the brothel and taken her away by force (36-7, 71). According to our speaker, the defendant has also beaten him personally and tried to set fire to the brothel. This is the world inhabited for instance by the parasite in Menander's *Dyskolos* (57-68):

This is the way I am about such things, Sostratos.
One of my friends brings me along
because he loves a callgirl. At once I snatch her and carry her off.
I'm drunk, I set fire to the place, I listen to no one.
Before asking who she is, one has to get her.
For delay sorely increases desire
and in speed lies a speedy end to it.
Someone mentions marriage and a free girl,
then I'm a different man, I ask her family,
situation, character. For all the rest of time
I leave a memory for my friend
of how I handle these things.

But whores and brawls are not just the stuff of comedy. They are also the stuff of law. They find a home in Attic oratory, where drink, sex and violence are common enough to make this a substantial strand in the oratorical tradition, often peripheral or tangential, sometimes irrelevant and prejudicial, occasionally central. It emerges for instance in Lysias 3, a case of wounding, where a (seemingly professional) *erômenos* is the prize in a fight between rival lovers, and this rivalry is placed in a larger context of fights over *hetairai* and boys (Lys. 3.43). It forms part of a maladroit defence and an astute counter-attack in Demosthenes 54.14, where the defendant (allegedly) intends to argue that the fight in which the plaintiff was hurt is simply one of many fights over girls between rival Athenian

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street gangs. In Lysias 4 the (allegedly near-fatal) fight concerns a shared slave girl, not an *hetaira*, but it shares the theme of erotic rivalry. The world of fighting lovers makes an appearance (again in homoerotic form) in the prosecution of Timarchos, where Aeschines is compelled to admit with some embarrassment that he gets into scrapes because of his affection for boys (Aeschin. 1.135). Love (again homosexual) is part of the chemistry in the violent assault which occasioned Lys. Speech CXXIX (*Against Teisis*). This world of experience, in which man's sexual desire both subverts his reason and gets him into legal difficulties, is the Hinterland to the speech of Hypereides *Against Athenogenes*, where the speaker claims to have been cheated on a transaction largely because his opponent manipulated his love for a boy with the connivance of a female brothelkeeper. *Hetairai* have walk-on parts in accusations of extravagance or immorality (Dem. 36.45, [Dem.] 48.55, Aeschin. 1.42, 75, 115, Lycurgus *Leoc.* 17). The most prominent example is the prosecution of Neaira in [Dem.] 59, whose earlier life allows Apollodoros to bring across his stage a range of characters from the world of transactional sex, pimps, prostitutes and brawling clients. It would be a mistake to try to force all of this diverse and fascinating material into a single frame. But love and law, and more particularly sex and violence, frequently with the explosive additional ingredient of drink, are an important part of the oratorical (and legal) tradition. And it is this confluence of love and law which, together with the filter of Athenian oratory which provides the format and much of the rhetorical detail, brings to the second mime an additional element to complement the already complex mixture of the Hellenistic mime.

The interest of Athenian comedy (both fifth- and fourth-century) in law is well documented.⁵ But in its interest in the law this mime also picks up on a much older comic tradition and another strand in its complex ancestry. At least a century before Aristophanes in the criminal demi-monde⁶ of Hipponax we find features of legal procedure. One fragmentary text (fr. 79.17 West) has someone turn up at a bar with witnesses. A mention of Hermes, the god of thieves, and of a dog, in the same fragment suggests (though it cannot prove) that this poem includes a theft. It is possible that in the visit to the bar we have a self-help process, for instance the exercise of a right to search for stolen property, such as we know existed in classical Athens. Or it could be a preparation for litigation with the issue of a summons by a plaintiff accompanied by summons witnesses (*klêtêres* in the Athenian system). Either way, the witnesses are evidently part of a legal procedure. How extensive was the interest in the law in iambos or the mime is not entirely clear on present evidence.⁷ But interest there was.

Though most commentators assume (rightly in my view) that Athenian forensic oratory of the fourth century provides the structure, forensic context and rhetorical detail of this poem, the poem works hard to distance itself geographically from the Athenian courts. Line 22 places us explicitly

outside Attica with the reference to Attic currency (not *mnai* but *Attic mnai*), since no Athenian text needs to specify the currency in this way. We know where we are not. Where we are becomes fixed only at the very end of the poem. For much of the speech, insofar as the text gives us a sense of space, it places us close to the Asiatic mainland and predominantly among the islands (references to Brikindera, Samos, Tyre, Phaselis, with Abdera as the only location on the European mainland). The trial takes place explicitly in Cos, as we discover at the close (95-8).⁸ But the attempt to invoke Coan myth is cursory and there is no visible attempt to give a Coan legal colouring to the text. At one point it looks as though we are located in Sicily. At line 48 Charondas (under the Ionic form of his name) is identified as the source of the law cited. Charondas is associated with the lawcode of Catana. We know that the code of Charondas was influential and that it was adopted by other states.⁹ It is not inconceivable that Cos was one of them. But the text makes no attempt to associate Charondas historically with Cos. Instead it associates him explicitly and specifically with the founding of Catana. This does not rule out a connection between the lawcode of Cos and that of Charondas. But the quiet refusal to associate Charondas specifically with Cos suggests rather that he is simply cited as a venerable lawgiver. The text therefore situates us in a jurisdictional limbo. We are presented with a deracinated forensic system which becomes fixed in space only at the close and at no point becomes fixed in time. It therefore becomes all the more significant that the lawgiver cited is Charondas and not Solon, the obvious choice of lawgiver for anyone immersed in Attic oratory. We are placed explicitly outside Attica.

The same sense of indeterminacy is presented by the lawcode which is cited. We are given a rapid survey of delicts and penalties (46-54), which embraces rape and assault on a slave (46-8), damage to a door (50-1), assault (51-2), arson and trespass (52-4), damage (54). Structurally the clauses have a veneer of plausibility, since they all begin with a conditional ('if anyone'), a common format in ancient laws.¹⁰ The plausibility goes beyond the form, however. Herodas has researched his laws (or at least citations and paraphrases in literary texts) well enough to reproduce elements of real penology accurately, if only in outline. The notion of double damages/penalties occurs in many contexts. So there is nothing unusual in its presence in this speech. But it is noteworthy that the specific usage in this speech is paralleled in actual laws known to us. The idea of double damages in cases of rape (46-7)¹¹ is one which occurs in Lysias (1.32):

You hear, gentlemen, that he bids that if anyone forcibly shames a free man or boy, he is to pay double the damage, if a woman, in cases where killing is permitted, he is liable to the same penalty.¹²

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The idea of double reparation recurs with reference to damage in 53, where again there is good parallel, this time in Demosthenes (21.43):

Firstly, all these laws on damage – to begin with these – order a man to pay double penalty if he damages voluntarily but single penalty if involuntarily.

So we have at least a superficially plausible set of legal prescriptions here. But ultimately what we are offered is a list of offences and penalties with a couple of realistic details. The survey here is so brisk and lacking in precision that it could come from virtually anywhere. It is most unlikely that we are given the essence of (sections of) a real lawcode.

But one point should already be clear from this brief discussion of Herodas' laws. Not far beneath this mixture of east Aegean and Sicilian elements the courts of Athens are visible. It is difficult to tie political structures and institutions with confidence to Attica. The reference to the *dêmos* in line 18 is not decisive, since Cos either was or represented itself as a democracy at this date;¹³ but anyway the text does not explicitly speak of democratic structures, merely the *dêmos*. The institution of the *prostatês* (line 10) was not exclusive to Athens. But the legal procedures taken together do seem to put us in Athens. Though we cannot assume that Athens was alone in using the waterclock to time trials (43), the specific process of stopping the clock for the reading of the law in a private case is very close to what we find in the orators.¹⁴ Likewise the role of the clerk in the reading of the laws (41, 46-8). The penology implied in the brisk survey of the laws, like that of Athens, seems¹⁵ to be a binary system of fixed and variable penalties, with penalties arrived at by assessment by dikasts (47); by implication trials in this court like those in Athens are classified into *agônes timêtoi* and *agônes atimêtoi*. The invitation to resort to *basanos* to extract the truth in lines 87-90 again suggests the courts of Athens,¹⁶ though here with the twist that the speaker offers himself for *basanos*, where in Athens a litigant would offer one or more slaves for torture or demand those of his opponent.¹⁷ Another suggestive detail is the request to the dikasts (86) to decide the case by their honest judgement, which resembles a clause of the dikasts' oath¹⁸ in classical Athens. The context is completely different, since in Athens this clause applies in cases where there are no laws to guide the dikasts' decision, while in this speech it applies where there are no witnesses;¹⁹ but the phrasing, '(most) just opinion', is suspiciously close (*γνώμη δικαίη* in Herodas, *γνώμη τῆ δικαιοσύνη* in the dikasts' oath). None of these features can be absolutely ruled out as Coan. We can identify some legal procedures across a number of jurisdictions in the Greek world and there must have been more now invisible to us; intermittently too we find convergence in elements of substance.²⁰ But alongside similarities there were divergences; and this text lacks any sense of Coan individuality. Though it is far from being a smoking gun, the similarity to Athens is so pervasive that it is difficult to resist the (generally unargued) scholarly

consensus that Athens lurks behind Cos in this text. This is not an attempt to give an accurate picture of Coan courts in the Hellenistic period; it is Athenian procedural law transposed to Cos to create a fictive forensic world.²¹

The link to Athens is created not only by elements of legal procedure but also by the structure of the mime and by the forensic rhetoric it deploys. Again, as with procedure, one cannot rule out the possibility that the tropes we can identify were commonplace in trials across the Greek world and even beyond. But the number of parallels between this speech and Athenian oratorical texts is so great that coincidence is unlikely. The poem is saturated with the Athenian orators and not only the tropes of Attic oratory but even the influence of specific speeches and cases can be detected. It is also influenced in a more fundamental way by the oratorical corpus in its structure. This was not the first comic-dramatic text which dramatized a trial. Surviving hearings from Athenian comedy (the mock trial in *Wasps*, the private arbitration in *Epitrepontes*) are precisely that, judicial hearings. They reproduce the full trial format, with plaintiff and defendant each speaking in turn. The same probably applied to the trial of Hagnon in Cratinus' *Ploutoi*. Here however we have only half a trial. Herodas gives us only one side of the case, leaving us to extract the defence from the plaintiff's speech. In this he reflects the nature of the forensic speeches which reached Alexandria and which subsequently became the medieval and modern corpus, all of which provide only one side of a case, and all (or almost all) are left hanging with the verdict unknown, as in this case.

The oratorical antecedents to the speech have been well explored by the commentators and I can therefore deal briefly with the tropes:

1. The speech opens with a *captatio benevolentiae* based on the unequal situation of the two litigants. One of the earliest securely identifiable commonplaces of oratory is the opening appeal for sympathy on the grounds that the speaker is at a disadvantage. It is identified as a commonplace by the uncanny resemblance between the opening of Andocides 1 and Lysias 19, where the basis for the appeal is the advantage given to the opponents by the time they have had to prepare their plot. But it can take other forms, as in the disparity in oratorical skill (Isaeus 10.1) or the relative ages and experience ([Dem.] 58.3). Here the disparity is financial, between the wealthy trader and the pauper, nicely crystallized in the hyperbolic wealthy of Thales, who has a trading ship with the implausible value of five talents,²² and the poor pimp who cannot even afford bread (3-4).

2. Claims of *euergesia* are a means of creating a sympathetic bond with the audience. Speakers in the orators insist that they have always performed their civic duty or more than their duty (and sometimes that the opponent has not). More dramatic acts of *euergesia* are also cited, as with

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Agoratos' claim to have assassinated the oligarch Phrynichos in Lysias 13. For those involved in trade the most readily available form of *euergesia* was contribution to the grain supply.²³ Here the trope appears both in a 'classic' and in a distorted form, the first in the opponent's cargo of grain which saved the city from famine and the second in the pimp's cargo of whores. Each supplies a basic need and each, as Battaros observes, does it at no cost to himself. The opponent fits the pattern neatly, in that grain is the obvious way for a metic to demonstrate loyalty to the *polis*. Battaros puts a stop to a different kind of famine, shortage of sex (18).

3. Prudential arguments are common in Athenian forensic oratory. Speakers frequently ask the *dikasts* to bear in mind the larger implications of the verdict before they vote. One regular trope is that if the defendant is acquitted, the order of the city is put at risk. A good example is Dem. 21.225:

And what is the strength of the laws? Is it that if one of you cries out when a victim of injustice they will run to his side to support him? No, they're letters in writing, and they couldn't do this. What then is their power? If you for your part confirm them and always offer them as authoritative to anyone who needs them. And so your laws will be strong because of you and you will be strong because of the laws. So then a man must support them just as he would himself as victim of injustice and consider wrongs committee against the laws as common to all, in whosever case they are found, and that neither public services nor pity nor any man nor any means be found through which a man who has broken the laws will escape punishment.

This is represented in our poem at 21-7:

If because he sails the sea or has a robe
worth three Attic *mnai*, and I live
on the land and wear a thin cloak and drag worn sandals,
he is to take what's mine without my consent,
and that at night, the protection we have
from the city is gone, gentlemen, and your source of pride,
your independence, will be subverted by Thales.

The motif can take other forms in the orators, as when a case involving two individuals is expanded to affect the whole community, as at Demosthenes 54.42:

So I urge you, *dikastai*, now that I proved my case in full justice, and have given you a pledge in addition, that just as each of you would personally hate the perpetrator if he had suffered this, he should feel the same anger against Konon here on my behalf, and not regard as a private matter any such thing which might perhaps befall anyone. Whoever it befalls, you should give aid and grant justice, and hate people who in the face of their crimes are bold and impetuous and when put on trial are shameless and wicked and care nothing for custom or anything else in their efforts to escape punishment.

This form occurs at 92-4:

For the rest, gentlemen, do not think your vote
Is for the pimp Battaros, but
For all the foreigners who live in the city.

4. The appeal to the authority of the lawgiver at 48-50 and 55 reflects another common feature of Athenian rhetoric,²⁴ where it can come either as a reference to an anonymous *nomothetês* or to Solon. Here Charondas is substituted.

5. In a society where the sense of the family remains strong, appeal to the deeds of one's ancestors complements appeal to one's own merits as a means of securing goodwill. The motif naturally requires a distinguished lineage and a family history of service to the *polis*. So for instance Andocides 1.147-8:

[My ancestors] have held countless military commands, and have set up many victory trophies over your enemies on land and sea. They have held countless other offices and handled public money but they have never been found guilty of fraud. There has been no wrong from us against you nor of you against us. Our house is the oldest in Athens, and has always been most open to those in need. And never once was any those men put on trial before you and asked you to show your gratitude for these services.

In the present case the trope is turned on its head, as the speaker displays his family credentials: he comes from a continuous line of brothel-keepers (74-7):

You laugh? I'm a bugger and I don't deny it.
And my name is Battaros and my grandfather
Sisymbros and my father Sysimbriskos,
And all of them were pimps.

6. As well as appealing to the dikasts' good will for oneself, one also needs to generate ill will toward the opponent. One method used intermittently in the orators is to attack the racial origin of the opponent, alleging foreign birth, as in Lysias 30, Lysias 13 and most memorably Aeschines 1.180 ('I beg you to rescue me and not to hand me over to the speechwriter, the Scythian', i.e. Demosthenes). Here the claim that Thales is really the Phrygian Artimmes (39-41) is an allegation at least of barbarian origin and probably of servile extraction (in view of the proverb cited at the end, 100-1, 'the Phrygian will be better for a beating').

7. Appeals for pity are another part of the litigant's stock-in-trade. Battaros calls for no pity for himself, beyond the appeal latent in his claim to poverty. But he does appeal for pity for the allegedly abused girl (65-71). This allows him his greatest coup. He asks the girl to step up and expose her body to the dikasts to show the ill treatment she has received. There

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is a transparent attempt to titillate the dikasts. The girl – redefined by Battaros for the occasion as a model of maidenly modesty in defiance of her trade – is invited to think of the dikasts as her relatives (and therefore people whose thoughts in looking at her are chaste), while the request to the dikasts to focus on her pubic region indicates that they are being asked to enjoy the opportunity for a little cost-free voyeurism. The voyeurism is increased by the specific features of her crotch. We are asked (68-70) to see the depilation of her crotch as evidence of the defendant's brutal handling of the girl; given her trade, it looks more like the aesthetic removal of pubic hair common in ancient Greece. The result is an exquisite ambiguity of tone, as the dikasts are simultaneously invited to enjoy the view and cover their scopophilia with moral indignation against the opponent.

8. Like many Athenian forensic speeches, the poem makes use of the tropes of epideictic oratory. Athenian political speeches commonly draw on the motifs of epitaphian orations to exploit the reverence felt for the ancestors of the audience. So for instance Lysias, *Leocrates* 83:

Consider, gentlemen: you are the only Greeks for whom it is impossible to ignore any of these acts. Let me remind you of a few deeds from the past; and if you take them as examples you will reach a better verdict in this case and in the rest. The greatest virtue of your city is that she has become an example of noble conduct for Greece. In age she the most ancient city of all, and in courage too our ancestors have equally surpassed the rest of mankind. In the time of Kodros ...

In the present case the epideictic style is allowed free rein in a private speech, as the tone rises at the end to place this trial in the glorious mythical tradition of Cos (95-8), resulting in a degree of hyperbole which verges on the grotesque.

9. Finally, the promise not to go on at length (60) is again a commonplace of forensic oratory (Dem. 21.21; 27.3, 12; 36.3; 37.3; 43.18; 45.2; 54.2, [Dem.] 40.5).

As well as plundering the orators for clichés, Battaros has also drawn on some particular Athenian texts and cases. The resemblance of the law in lines 46-8 to the text of Lys.1, noted above, suggests that Lysias may well have been the source. Less certain, but suggestive in terms of the combination of moral indignation with appeal to voyeurism is the speech of Apollodoros against Neaira which has survived as [Demosthenes] 59. There is in line 9 ('we live not as we wish but as circumstance forces us') what looks like a verbal reminiscence of Demosthenes 57.31, nimbly transposed from the relatively innocuous selling of ribbons to the peddling of flesh.²⁵ Against this background the shared use of the proverb of the mouse in the tar in lines 62-3 (in a garbled form) and (more accurately) at [Demosthenes] 50.26 looks like more than coincidence. But the most important influence is not an intertext but an anecdote. As Cunningham

notes, the salacious invitation to Myrtale to strip off and show her perfectly trimmed pubic hair to the dikasts is very reminiscent of the anecdote about Hypereides which Athenaeus found in Hermippos (Ath. 13.590e):

Hypereides as supporting speaker for Phryne, when his speech was achieving nothing and the dikasts were expected to convict, brought her forward where she could be seen and ripped her robes and exposed her breasts and based the rhetoric of his pleas for pity in the epilogue on her appearance and instilled in the dikasts a superstitious dread of killing the prophetess and servant of Aphrodite out of pity. She was acquitted and a decree was passed after this that nobody speaking on behalf of another should appeal for pity and that no man or woman on trial should be judged while visible.'

The tale is clearly an invention and tells us more about Hypereides' posthumous image (and a little about his rhetoric) than about any real trial in Athens. But the tale certainly gained early currency. Its occurrence in Hermippos suggests that it may go back to the beginning of the third or end of the fourth century; certainly there is no reason to doubt that the story was in circulation by Herodas' day. Battaros here reproduces one of the apocryphal *coups de théâtre* in the Athenian legal system.

Battaros turns out to have read his orators and their biographers. He also deploys his laws well. His laws seem to have been pulled together from different parts of the system. But each and every one of them relates to the alleged action of Thales, the breaking down of the door (50, 63), the alleged physical abuse of the girl (46-8, 66-71), the physical blows to himself (51, 63) the burning of the house (35, 52). The trespass (54) is an astute touch. The language is that of encroachment on land, not invasion of a house; but it is used here to add the charge of forced entry to the list.

There is, however, a tension in the speech between its oratorical veneer and the *persona loquens*. He may be an able manipulator of rhetorical cliché. But in the manner of the poetic monologues of Robert Browning, Herodas creates a gap between the pretensions of the speaking voice and the reality. This is partly effected by the juxtaposition of oratorical trope with clumsiness (as in his misuse of the proverb of the mouse in the tar at 62-3) and by his coarseness of language; where the orators occasionally speak of stopping the water for the reading of texts, our man proceeds from a precise reference to the hole at the bottom of the pitcher to the human anus, gratuitous, crude and at odds with the rhetorician he seeks to be. Likewise, when he drops the guise of parental concern for his girl, he says that if Thales buys the girl he can 'grind' his own property. The gulf between aspiration and reality is also achieved through the inconsistencies and shifts in tone. Despite his insistence on the justice of his claim and his supposed concern for his girl (65ff.), he is perfectly happy to reduce her to an object and trade her for cash (79-83). As he neatly observes (79-80): 'You love Myrtale? Nothing wrong there. I love wheat. Give the one and you'll have the other.' He also puts her body on display in a transparent

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attempt to win his case through voyeurism (66-71). This and his cheerful admission that he is both a *kinaidos* and the third-generation pimp in his family undermine his case in the key area of *ethos*. This is not a man to inspire any kind of confidence. This effect is reinforced by his account of his *prostatês* in 13-14, where despite the lacunose text it is clear that he is describing a *lôpodytês*. In contrast to the orators, where associates introduced in court are, where possible, chosen for their ability to inspire the respect of the dikasts, our man associates with the dregs of society. Battaros' attempts to destroy the character of his opponent introduce us to a young man of substance (20), a trader (55ff.), a man with associates of high social standing (10-11) and a man who has benefited the community at a time of crisis (16-17). We are left therefore with a forensic farrago, a scholarly knowledge of the texts of the orators with a garrulity and an inability to conceal his own grasping and unscrupulous nature.

The effect of the complex mixture of law and comedy, high and low in this speech is varied. Titillation is part of the chemistry, in the use of crude language and pronounced eroticism in a civic and literary environment which approaches the world of sex largely through a linguistic filter of euphemism.²⁶ This eroticism has a strong visual appeal (65-71), a feature shared with the element of scopophilia which we find in the dialogues in the corpus of Herodas in which women converse about dildos.

Another aspect of this humorous mixture is the pleasure created by inversion of social norms. Our pimp is evidently a man without moral scruple, a man for whom everything has a price and whose only concerns are his own comfort, safety and profit. Yet for all the repulsion he would inspire in real life, his overt hypocrisy and uncompromising cynicism give the speaker a certain grotesque appeal, not unlike the narrator in Hipponax.²⁷ Both comedy and iambs rely for at least part of their humorous effect on an antinomian tendency toward inversion of social norms, a tendency shared by this mime.

Part also of the fun is the element of incongruity created by introducing this grotesque character into a courtroom setting. Pimps may exist in the world of the orators but they are confined to the narrative and generally to the margins of the case. They exist perpetually in the third person. They do not take centre stage as litigants; nor do they appear as witnesses or supporting speakers. What the poet does with Battaros is to inject the demi-monde of archaic iambs into the courts.²⁸ The pimp belongs to a larger social grouping which does not find its way into the clientele of the orators and therefore into the sociology of the Athenian legal system as transmitted from the Hellenistic period onwards. Though we cannot hope at this remove to produce a clear picture of the real sociology of Athenian litigation, we can recognize the sociology of surviving speeches. Without exception both in surviving oratory and in what we can verify of the lost remains of the forensic oratory of the classical period what we appear to have is a collection made up almost entirely of speeches produced by

professional speechwriters or professional politicians; in the former case, this means that we are dealing with bought speeches. This in turn probably reflects the Athenian book-market of the fourth century, where published speeches circulated.²⁹ Neither in classical Athens nor in Alexandria in the Hellenistic period was there any desire to preserve speeches as the raw material of social history; these were texts circulated for their oratorical merit. The nature of the speeches dictates the status of the litigants in the oratory which survived to become the oratorical canon. With few and contentious exceptions we have a world of either rich or at least comfortably off Athenians. Our pimp may or may not be wealthy (his claim of poverty in 4 and 21-3 is doubly unreliable as both uncannily close to the poverty of his generic ancestors in Hipponax and rhetorically convenient, as well as being implausible in the mouth of a type notorious for greed) but in the corpus of forensic oratory socially he is an interloper. This is further underlined by his low character. In a world where the literary *dramatis personae* all aspire to the impression of decency our man stands out as an all but transparent rogue, crafty enough to know his oratory but venal, crude and ultimately inept.

The incongruity created by admitting this character into the fictive forensic world has something in common with the distorting effects achieved in classical comedy. Aristophanes in *Wasps* stages a political trial within the household using household pets and domestic objects. Menander (as the arbitrator himself observes at *Epit.* 228-30) stages an arbitration in which the disputants are slaves, people who in the real world have no legal personality and whose legal right to a say in disputes is confined to their role in torture. Herodas' inversion is slightly different, in that he reverses the relationship between centre and periphery. But at base it rests on the distortions created by playing with the relationship between the forensic world and new locations or persons, as with Aristophanes and Menander. As well as the simple incongruity created by the presence of this character in court, there is an element of satire on the self-importance of legal pleaders and the pretensions underlying the tropes of forensic oratory. In the mouth of this lowlife they are themselves demeaned. Herodas was not the first to note that claims of *euergesia* in public contexts are as much evidence of self-aggrandizement as of civic virtue. Theophrastus' *Alazon* claims to have spent five talents on grain for the poor at a time of shortage.

One potential target which is not used in this poem is the law itself. Aristophanes is capable of majestic distortion of the language of law. His most impressive example is the farrago he creates as Peisetairios hoodwinks Heracles at *Birds* 1643ff. The constraints of a more realistic setting prevent this kind of imaginative play in Herodas.

Herodas' parody of Athenian forensic argumentation also offers evidence for the circulation of Athenian forensic texts in the Hellenistic world. By the end of the first third of the third century³⁰ Herodas could

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confidently demand of an educated audience³¹ a high degree of familiarity with the works of the orators alongside the verse tributaries of his mimes.

Notes

1. Despite the differences Herodas is firm about his affinity with Athenian drama. The kinship is firmly signalled in the quasi-autobiographical eighth mime. See Hutchinson 1988, 237.

2. See Mastromarco 1984 for a detailed (and in my view inconclusive) attempt to argue for performance. The question is one which cannot admit of a single answer. By the time Herodas wrote, plays written specifically for reading were already an established part of the Greek literary tradition. In the Hellenistic world, texts circulated as books; so even if the *mimiamboi* were premiered as performances (which we cannot know), the author must have anticipated that most if not all of his public would encounter the work on the page. Or, to use a more useful formulation, the work does not rely on performance for effect and can easily be staged in the head of the reader.

3. For antecedents in popular culture see Cunningham 1971, 6.

4. Cunningham 1971, 81, describes her as a *kôphon prosôpon*, which implies physical presence; rather she is a figure created in the imagination of reader or viewer.

5. See in this volume pp. 147-68. For Old Comedy see also Carey 2000 and for New Comedy see especially Scafuro 1997.

6. See Carey 2003 and 2009.

7. A lost mime of Sophron (Demetrius *De eloc.* 3.153) which appears to have a lowlife character 'speechifying' (*rhêtoreuôn*). This certainly offers an antecedent for the formal oratory of our pimp. But how far this relates to the situation in our text is unclear, especially since the verb used of this text leaves unclear whether we have a speech in court or an exercise in political oratory.

8. For the possible connection of Herodas with Cos, or at least with the East Aegean, see Cunningham 1971, 2.

9. See Nairn 1904 *ad loc.* His attempt to link the laws here with the text cited by John of Stobai 4.2.24 is not persuasive.

10. See Carey 1998, 95.

11. Though the verb *aikizein* in 46 is a generic term for humiliating abuse and the text in 40-1 speaks of τῆς αἰκείης τὸν νόμον, which in Attic law would suggest battery, this law evidently incorporates rape as well as blows. The explicit gender difference makes this clear, as does the presence of *helkein*, which though like *aikizein* entirely compatible with non-sexual violence is used of sexual maltreatment at Lys. 1.12.

12. Cunningham 1971 *ad loc.* may be right to see Herodas 'humorously inverting the facts of real life' in attaching the double damages to slave and not to free. Reference to double reparation recurs in relation to a slave at Lys.10.19, where it is unclear from the text whether we are dealing with reparation for damage done to or by a slave. If the former, we would have a close parallel to this text.

13. See most recently Carlsson 2004.

14. Most explicitly at Dem. 45.8, 54.36, 57.21, Isae. 2.34, 3.12, 3.76, Lys. 23.4, 23.8, 23.11, 23.14 and *Ath. Pol.* 67.3.

15. This is not absolutely certain, since *timêma* in 47 could conceivably be 'estimated value', the slave being treated as a commodity.

16. For the role of (challenges to) slave torture in Athenian courts the standard

treatment is still Thür 1977. The language of the challenge (αἰτεῖν 87, παραδίδόναι 88) also reflects that of Athenian texts, as Headlam & Knox 1966 observe (note *ad loc.*).

17. The departure is lessened by his introduction to the challenge (87-8), literally ‘if you are keen on servile bodies and request (them) for the test’. The first part neatly picks up on the alleged violence of the opponent, linking the supposed assault on the girl and the potential torture of the speaker as parts of the same behaviour pattern. But it also suggests that the brothel-keeper like many in the trade is of servile extraction.

18. See on this clause most recently Harris 2006.

19. Edward Harris draws my attention to the clause in the Gortyn code requiring the dikast to decide (*krinen*) where there is no witness (*IC* iv 72, 14). If this or a comparable provision elsewhere lies behind the clause in Herodas, we would have a hybrid between procedural laws from different Greek states.

20. See Gagarin 2005, Chaniotis 2004.

21. The Athenian presence is all the more marked for the fact that the lawcode of Cos enjoyed sufficient prestige for it to serve as the lawcode for the projected synoecism of Teos with Lebedos, *Syll.*³ 344, translated Austin 2006 no.48.

22. Cunningham *ad loc.* See Headlam & Knox 1966, 70, on the *topos* that wealth and position do not convey the right to ignore the law.

23. Headlam & Knox 1966 on 16-20 cite Dem. 34.38, 20.33, Isoc. 17.57, Lys. 6.49.

24. For the role of the lawgiver see Thomas 1994.

25. This is not entirely certain. Also relevant is Menander fr. 45, ζῶμεν γὰρ οὐχ ὡς θέλομεν, ἀλλ’ ὡς δυνάμεθα (‘for we live not as we wish but as we can’).

26. See Carey 1999.

27. See Carey 2008.

28. For this *demi-monde* see Carey 2003, 2009.

29. For the the fourth-century book-trade and the transmission of oratorical texts see Dover 1968, 25-6.

30. See Cunningham 1971, 84.

31. I have left aside until now the question of Herodas’ audience. Though we cannot assess the scale of his readership or the geographical distribution of copies of his corpus, we can be confident that these poems were written for a select section of society. The best guess of the levels of literacy in the Hellenistic period points inescapably in this direction. Harris 1989, 139-46 notes the difficulty of quantifying literacy in Hellenistic Egypt on the limited evidence available and also the variations according to geography and class; he concludes however that any community whose level of literacy reached 20-30% had ‘achieved something truly remarkable’. Thomas 1992, 150 observes: ‘We probably should assume that comparatively few had very complex literate skills.’ And complex literate skills (not merely the ability to decode writing but the capacity to tease out intertextual references) were exactly what a dense text like the eighth mime required. This is not poetry for a mass readership, even if such a readership were conceivable in Ptolemaic Egypt.

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