Articles

"Verdict Most Just": The Modes of Classical Athenian Justice

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I. INTRODUCTION

Most comparative lawyers know a great deal about Roman law but almost nothing about the courts of classical Athens. This is no mystery: unlike Roman law, Athenian law produced no jurisprudence and very little legal doctrine, and contributed nothing to the courts of Europe, England, or any other modern legal system. For the most part, Athenians decided legal disputes by empowering juries to apply statutes that were hopelessly broad. Juries could give weight to any sort of fact or plea that a litigant

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cared to bring before them. To us, this looks like lawlessness. Did the Athenians simply fail to grasp the value of the rule of law as we know it? Were legal disputes fundamentally contests for status decided without any pretence to justice? These are the explanations ancient historians commonly give.

In my view, the Athenian legal system was more complex than is generally thought. The Athenians made a conscious decision to reject the rule of law in most cases, and they did so because they thought giving juries unlimited discretion to reach verdicts based on the particular circumstances of each case was the most just way to resolve disputes. But in other cases, such as commercial suits, where the practical importance of more predictable results was high, the Athenians did have rules of admissibility and relevance that limited jury discretion. The Athenian legal system struck a balance between following rules and doing justice that is altogether different from that which may be seen in the pages, for example, of the *Federal Reporter*. Classical Athens thus provides a valuable case study of a legal system that favored equity and discretion over the strict application of generalized rules. But it managed to do so in a way that did not destroy predictability and legal certainty in the parts of the system where they were necessary.

The choice between certainty and fairness permeates a wide variety of contemporary legal issues. In modern legal scholarship, this question arises most often in the form of the debate over the relative advantages of rules and standards in legal directives. Scholars have compared the merits of rules that provide clear and predictable ex ante directives with more flexible standards in property law,[1] contracts,[2] torts,[3] constitutional law,[4] and administrative law.[5] These analyses typically pit the values of predictability, certainty, uniformity, and efficient, neutral decisionmaking associated with bright-line rules against the virtues of flexibility, individualization, discretion, and fairness associated with standards.[6] I argue that the varied approach to legal process we find in classical Athens represents a principled attempt to balance these competing values.

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1. *See, e.g.*, Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

2. *See, e.g.*, P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979) (providing an historical account).

3. *See, e.g.*, Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982).

4. *See, e.g.*, David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L. J. 829 (1993).

5. *See, e.g.*, Book Note, *The Bureaucrats of Rules and Standards: Responsive Regulation*, 106 HARV. L. REV. 1695 (1993).

6. *See, e.g.*, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400-02 (1985) (discussing conventional arguments in support of standards and rules).

One of the most striking features of the surviving popular court speeches from classical Athens is the presence of material that would seem irrelevant or inadmissible in a modern courtroom. Philocleon, the inveterate juror in Aristophanes' comedy *The Wasps*, provides what must be a recognizable, though exaggerated, account of the ploys litigants use to win over the jury:

> I listen to the defendants saying anything to get an acquittal. . . . Some bewail their poverty and exaggerate their troubles. Some tell us stories, others some funny piece of Aesop. Others make jokes to get me to laugh and lay aside my anger. And if we are not won over by these devices, right away he drags in his children by the hand, boys and girls, and I hear them as they bow their heads and wail in a chorus. . . .[7]

The interpretation of this tendency to include information that does not bear on the legal issue in dispute is central to our understanding of the aims and ideals of the Athenian legal system. I use the term "extra-legal" to refer to information and argumentation that does not bear on the application of the formal charge to the facts of the case. In categorizing some types of argumentation as "legal" or "extra-legal," I am not using a modern metric foreign to the Athenian mindset. The Athenians themselves were concerned with what sort of information was considered on or off the point (*eis to pragma* or *exo tou pragmatos*)[8] and employed a rule prohibiting statements "outside the issue" in the homicide courts.[9] By examining Athenian notions of relevance and admissibility, I arrive at a new model of the Athenian legal system. This model is one in which a relatively sophisticated legal culture in most cases consciously embraced levels of jury discretion unknown in modern court systems.

In recent years, Athenian law has become a major field of study among classicists and ancient historians.[10] Scholars have argued that the Athenian

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7. ARISTOPHANES, WASPS 562-70 (F.W. Hall & W.M. Geldart eds., Oxford Univ. Press 1952) [Ar. V. 562-70]. I include the standard classical reference in brackets following each citation. Translations are my own.

8. *See, e.g.*, ANTIPHON, THE SPEECHES 92 (Michael Gagarin ed., Cambridge Univ. Press 1997) [Ant. 6.9]; 4 DEMOSTHENES, PLAIDOYERS CIVILS 31 (Louis Gernet ed., Les Belles Lettres 1960) [Dem. 57.59]; LYSIAS, SELECTED SPEECHES 31-32 (C. Carey ed. Cambridge Univ. Press 1993) [Lys. 3.46].

9. *See infra* Section IV.B.

10. The past decade alone has witnessed the publication of 16 significant books on the subject: DANIELLE S. ALLEN, THE WORLD OF PROMETHEUS: THE POLITICS OF PUNISHING IN DEMOCRATIC ATHENS (2000); S. AVRAMOVIC, ISEO E IL DIRITTO ATTICO (1997); ALAN L. BOEGEHOLD, THE ATHENIAN AGORA VOLUME 28: THE LAWCOURTS AT ATHENS (1995); EDWIN CARAWAN, RHETORIC AND THE LAW OF DRACO (1998); MATTHEW R. CHRIST, THE LITIGIOUS ATHENIAN (1998); DAVID COHEN, LAW, VIOLENCE AND COMMUNITY IN CLASSICAL ATHENS (1995); MICHAEL GAGARIN, ANTIPHON THE ATHENIAN (2002); GREEK LAW IN ITS POLITICAL SETTING: JUSTIFICATIONS NOT JUSTICE (L. Foxhall & A.D.E. Lewis eds., 1996); GROSSE PROZESSE IM ANTIKEN ATHEN (L. Burckhardt & J. von Ungern-Sternberg eds., 2000); VIRGINIA J. HUNTER, POLICING ATHENS: SOCIAL CONTROL IN THE ATTIC LAWSUITS, 420-320 B.C. (1994); STEVEN JOHNSTONE, DISPUTES AND

courts did not attempt to resolve disputes according to established rules and principles equally and impartially applied, but rather served primarily a social or political role.[11] According to this approach, litigation was not aimed chiefly at the final resolution of the dispute or the discovery of truth. Instead, the courts provided an arena for the parties to publicly define, contest, and evaluate their social relations to one another, and the hierarchies of their society.[12] On this view, the law under which the suit was brought mattered little to either the litigants or the jurors; the relevant statute was merely a procedural mechanism for moving the feud or competition onto a public stage.[13] Thus, according to these scholars extra-legal considerations trumped law in a process that bore little relation to the functioning of modern court systems.

Two different academic camps have challenged this approach to the Athenian legal system. Both of them credit Athens with attempting to implement a rule of law. Institutional historians argue that the reforms in the late fifth and early fourth centuries, curtailing the lawmaking powers of the popular Assembly, created a moderate democracy committed to a rule of law.[14] Other scholars analyze the surviving court speeches and argue that legal reasoning played a much greater role in Athenian

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DEMOCRACY: THE CONSEQUENCES OF LITIGATION IN ANCIENT ATHENS (1999); LAW AND SOCIAL STATUS IN CLASSICAL ATHENS (Virginia Hunter & Jonathan Edmonson eds., 2000); THE LAW AND THE COURTS IN GREECE (Edward M. Harris & Lene Rubinstein eds., 2004); LENE RUBINSTEIN, LITIGATION AND COOPERATION: SUPPORTING SPEAKERS IN THE COURTS OF CLASSICAL ATHENS (2000); ADELE C. SCAFURO, THE FORENSIC STAGE: SETTLING DISPUTES IN GRAECO-ROMAN NEW COMEDY (1997); RAPHAEL SEALEY, THE JUSTICE OF THE GREEKS (1994); S.C. TODD, THE SHAPE OF ATHENIAN LAW (OXFORD 1993). The University of Texas press has undertaken to publish new translations of all the surviving lawcourt speeches, and *Dike: Rivista di storia del diritto greco ed ellenistico*, a new journal sponsored by the University of Milan, has been created.

11. *See* COHEN, *supra* note 10, at 87-88 (arguing that much Athenian litigation was a form of "feuding behavior," and that the notion that the judicial process is aimed at the discovery of truth does not apply to Athens); Robin Osborne, *Law in Action in Classical Athens*, 105 J. HELLENIC STUD. 40, 52 (1985) (characterizing the courts as a public stage for a social drama and the aim as the regulation of ongoing conflict rather than reaching a final resolution to the dispute). These scholars represent the most extreme form of the "law and society" approach that has dominated Athenian law in recent years. For discussion of the law and society approach, see Stephen Todd & Paul Millett, *Law, Society, and Athens*, *in* NOMOS: ESSAYS IN ATHENIAN LAW, POLITICS, AND SOCIETY 1, 14-18 (Paul Cartledge et al. eds., 1990).

12. *See, e.g.*, COHEN, *supra* note 10, at 87-88 (stating that both litigants and jurors acknowledged that litigation was primarily a form of feuding behavior).

13. *See id.* at 90 (stating that litigants were engaged in a competition for honor and prestige largely unrelated to "the ostensible subject of the dispute"). It should be noted, however, that the choice of whether to bring a private suit or to style the prosecution as a public suit, which would mean a higher profile and more severe penalties, had important consequences in the game of honor. *See* Osborne, *supra* note 11, at 52-53.

14. *See* MARTIN OSTWALD, FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW 497-525 (1986); RAPHAEL SEALEY, THE ATHENIAN REPUBLIC: DEMOCRACY OR THE RULE OF LAW? 146-48 (1987). In the fourth century, the Athenians distinguished between general laws (*nomoi*) passed by a Board of Lawgivers (*nomothetai*) and short-term decrees (*psephismata*) of the popular Assembly that could not contradict existing laws. *See* MOGENS HERMAN HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES 161-77 (1991) (providing a detailed discussion of the fourth-century legislation).

litigation than scholars commonly think.[15] They tend to dismiss the extra-legal arguments in the surviving speeches as stray comments reflecting only the amateurism and informality of the system.[16]

I offer here a different account of the aims and ideals of the Athenian courts. I argue that the Athenians did in fact appreciate the ideal of the regular application of abstract principles to particular cases. But the Athenians made this the dominant ideal in only certain types of suit. Rather than approaching the legal system as a homogenous entity, the prevailing mode in modern scholarship,[17] I focus on the differences between ordinary popular cases and two special types of suit—homicide and maritime cases.

In popular court cases—the vast majority of trials in the Athenian court system, and the current focus of scholarship on Athenian litigation—litigants regularly discussed matters extraneous to the application of the relevant statute to the event in question. They made arguments based on, for example, their opponents' actions in the course of the litigation process, or the financial or other effects a conviction would have on the defendant and his innocent family.[18] I argue that these extra-legal arguments were vital components of making a case in an Athenian popular court, rather than aberrations in an essentially modern legal system. However, the prevalence of extra-legal argumentation does not indicate that the triggering event and legal charge were mere subterfuge in a game aimed at evaluating the relative honor and prestige of the litigants. Rather, both legal and extra-legal argumentation were considered relevant and important to the jury's decision because Athenian juries aimed at reaching a just verdict that took into account the broader context of the dispute and the particular circumstances of the individual case.[19] Even the relative

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15. *See* H. MEYER-LAURIN, GESETZ UND BILLIGKEIT IN ATTISCHEN PROZESS (1965); Edward M. Harris, *Open Texture in Athenian Law*, 3 DIKE 27 (2000); J. Meineke, *Gesetzinterpretation und Gesetzanwendung im Attischen Zivilprozess*, 18 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ 275 (1971). Meyer-Laurin and Meineke argue that Athenian litigants and jurors applied the law strictly, while Harris suggests that the open texture of Athenian law left room for creative statutory interpretation. All three share the view that litigants and jurors considered themselves bound by the law and that the goal of the system approximated modern notions of a rule of law. Harris, for example, argues that "litigants pay careful attention to substantive issues and questions about the interpretation of law" and jurors "considered themselves bound to adhere to the letter of the law." Harris, *supra*, at 78 & n.85.

16. *See, e.g.*, Edward M. Harris, *Law and Oratory*, *in* PERSUASION: GREEK RHETORIC IN ACTION 130, 137 (Ian Worthington ed., 1994) (dismissing extra-legal arguments as "aberrations from the norm, not typical examples of the way in which the court regularly behaved").

17. Scholarly arguments over the nature of Athenian litigation and Athenian notions of law tend to treat all the law court speeches together without distinguishing between popular court speeches and other types of suit. This tendency is shared by scholars who emphasize the social role of the law courts, *see, e.g.*, COHEN, *supra* note 10, those who argue that Athenian litigants and jurors were bound by the law, *see, e.g.*, Harris, *supra* note 15, and those who take an intermediate position, *see, e.g.*, CHRIST, *supra* note 10.

18. *See infra* Part III.

19. Of course, some litigants were undoubtedly motivated by a desire to gain honor or to pursue

importance of legal and contextual information in any individual case was open to dispute by the litigants.[20]

Homicide and maritime cases, by contrast, followed (at least in theory) a perceptibly more formal approach. The homicide courts employed a rule prohibiting statements "outside the issue" (*exo tou pragmatos*).[21] A written contract was required to bring a maritime suit. Speeches in this type of case tended to focus more narrowly on the terms of the contract, and less on arguments from fairness and the broader context of the dispute than did comparable non-maritime commercial cases.[22]

The distinctive procedures in homicide and maritime cases cannot be explained as part of an evolution toward a rule of law: the homicide procedures predate the popular courts, while the maritime procedures were introduced toward the end of the classical period. The jarring differences in the level of formality in these courts were the product not of progress, but of ambivalence. In the spectrum of Athenian approaches to law we find, in the first legal system we know very much about, the fissure between following generalized rules and doing justice that has haunted the law ever since.

The varied approach to legal process stems from a deep tension in the Athenian system between a desire for flexibility and wide-ranging jury discretion, and consistency and predictability. The special rules and procedures of the homicide and maritime courts indicate that the Athenians could imagine (and, to a lesser extent, implement) a legal process in which they applied abstract rules without reference to the social context of the dispute. But they rejected such an approach in the vast majority of cases. This choice reflects not only a normative belief that a wide variety of contextual information was often relevant to reaching a just decision, but also a political commitment to popular decisionmaking in a direct democracy. Classical Athens thus serves as an example of a legal system that, by modern standards, employed an extraordinarily individualized and contextualized approach to justice.

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personal enmity. Moreover, I do not doubt that the courts at times functioned in a manner far from the ideal, or that popular court trials may have also served a variety of social or ideological roles in society. I am concerned with the *primary* aim of the popular courts, as it was understood by the majority of the participants. I argue that litigants and jurors by and large considered the purpose of the trial to be the arrival at a just resolution to the dispute. The primary goal was to resolve the specific dispute that gave rise to the litigation, using social context as an instrument toward that end.

20. My contention that Athenian jurors attempted to reach a "fair" or "just" decision based on the evidence before it rather than strictly applying the laws to the case is in accord with the views expressed by CHRIST, *supra* note 10, at 195-96, SCAFURO, *supra* note 10, at 50-66, and Sally Humphreys, *The Evolution of Legal Process in Ancient Attica*, *in* TRIA CORDA 238 (E. Gabba ed., 1983). These scholars do not catalogue the various types of extra-legal information in the popular court speeches and explain why this information was deemed relevant to a just verdict. Most important, these scholars do not distinguish between approaches taken in different types of suit.

21. *See infra* Section IV.A.

22. *See infra* Part V.

The remainder of this Article proceeds as follows: Part II provides a brief introduction to Athenian legal procedure and the historical sources for Athenian trials. In Part III, I examine the broad standard of relevance employed in the popular courts. I first discuss the types of extra-legal argumentation commonly used in the surviving speeches and argue that this information was considered relevant and important to the jury's verdict. I also describe the status of law in these courts, which was not considered a determinative guide to a verdict. Rather, law was simply one source of information that the jury could consider in reaching its decision. Part IV focuses on the unusual procedures of the homicide courts that made these courts more congenial (at least in theory) to arguments based on the formal legal charge, and less receptive to extra-legal argumentation. I also discuss the reasons for the homicide courts' stricter approach, and what these differences reveal about the Athenian conception of judicial process. In Part V, I discuss the narrow approach to relevance used in maritime cases. I argue that this approach stems from a need to facilitate trade by offering a predictable procedure for enforcing contracts, and thereby attracting foreign merchants to Athens.

II. HISTORICAL SOURCES AND THE ATHENIAN LEGAL SYSTEM

There is no surviving statement of Athenian democratic legal theory. The theoretical texts that we have—principally the works of Plato and Aristotle—are hostile to the democracy and offer little insight into the aims of the court system. We are forced to draw inferences from the structure and practices of the courts themselves. Although the Athenians liked to tell themselves that their legal system and laws were the product of a single intelligence, "the lawgiver" of the distant past,[23] Athenian court procedures developed from a combination of laws passed at different times by the popular assembly and an accumulation of custom and practice. There was, of course, no single, unified vision of the aims of the Athenian courts or procedures. But whatever their hodge-podge origins, the practices of the courts constituted an Athenian tradition that reflected a shared understanding of how justice was and should be done.[24] I am seeking to uncover the values and concerns that seem to underlie the practices and procedures of the Athenian courts—values and concerns of which the various individual participants in the legal system may have

23. *See, e.g.*, Rosalind Thomas, *Law and Lawgiver in the Athenian Democracy*, *in* RITUAL, FINANCE, POLITICS 119, 119-35 (Robin Osborne & Simon Hornblower eds., 1994) (discussing the trope of the lawgiver in Athenian ideology).

24. That is, the Athenian courts do tell us something about the "Athenian mind" that is more than the historian's convenient fiction: the product of many generations and many hands may bear the imprint of the collective more deeply than that of any individual's work; that a group's traditions may be arbitrary in origin does not make them less valuable in assessing the group's peculiar understanding of the world.

been only vaguely aware at any given time.

The Athenian lawcourts are remarkably well-attested, at least by the standards of ancient history: roughly one hundred forensic speeches survive from the period between 420 and 323 B.C.[25] These speeches represent not an official record of the trial proceedings, but the speech written by a speechwriter (*logographos*) for his client (or, at times, for himself) and later published, in some cases with revisions.[26] Only speeches that were attributed to one of the ten Attic orators who were subsequently deemed canonical were preserved.[27] The speeches in the corpus run the gamut from politically-charged treason trials and violent crimes to inheritance cases and property disputes between neighbors.[28]

The most distinctive feature of the Athenian legal system is the lack of a professional class of legal experts. Classical Athens was a participatory democracy run primarily by amateurs: with the exception of military generalships and a few other posts, state officials were selected by lot to serve one-year terms.[29] In the legal sphere, the Athenian hostility toward professionalism resulted in the requirement that private parties initiate lawsuits and, with some exceptions, represent themselves in court.[30]

Athenian courts were largely, but not entirely, the province of adult male citizens. Foreigners and resident aliens were permitted to litigate in certain circumstances, most notably in commercial suits.[31] With a few

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25. *See* JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS 341-48 (1989) (providing a catalogue of forensic and political speeches). Plato's *Apology*, by far the most famous Athenian court speech, is generally put in a different category from our surviving forensic speeches because the relationship between Plato's account and the speech actually delivered by Socrates in court is unclear. The other version of Socrates' defense, written by Xenophon, is so different from that of Plato's that both speeches cannot be accurate, and it has been suggested that these literary pieces may be idealized versions of Socrates' response to the charges with no attempt at historical accuracy. *See, e.g.*, DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 201-02 (1978).

26. We know that Demosthenes and Aeschines, for example, both revised their published pieces in the case *On the Crown* in response to each other's courtroom presentations. *See* HARVEY YUNIS, DEMOSTHENES: ON THE CROWN 26-27 (2001). On the revision for publication more generally, see, for example, Jeremy Trevett, *Did Demosthenes Publish his Deliberative Speeches*, 124 HERMES 437 (1996); and Ian Worthington, *Greek Oratory, Revision of Speeches, and the Problem of Historical Reliability*, 42 CLASSICA ET MEDIAEVALIA 55 (1991).

27. *See* Ian Worthington, *The Canon of the Ten Attic Orators*, *in* PERSUASION: GREEK RHETORIC IN ACTION, *supra* note 16, at 244, 244.

28. Usher provides a summary and brief discussion of most of the forensic speeches in chapters organized by orator. *See* STEPHEN USHER, GREEK ORATORY *passim* (1999).

29. *See* HANSEN, *supra* note 14, at 233-37.

30. In some high profile political cases, the Assembly or Council could appoint a team of men to prosecute the case, and a board of magistrates selected by lot was responsible for prosecuting officials accused of financial mismanagement. *See* MACDOWELL, *supra* note 25, at 61-62. A litigant could also donate some of his speaking time to a *sunegoros* ("co-speaker"). The prevalence and role of co-speakers is a matter of some debate. *Compare* RUBINSTEIN, *supra* note 10, at 58-65, 123-71 *with* TODD, *supra* note 10, at 94-95.

31. *See* MACDOWELL, *supra* note 25, at 234 (noting that the mercantile laws made no distinction between foreigners and citizens); *see also id.* at 221-24 (discussing the circumstances in which foreigners could litigate in Athens); TODD, *supra* note 10, at 196 (discussing the legal capacity of metics); DAVID WHITEHEAD, THE IDEOLOGY OF THE ATHENIAN METIC 92-95 (1978) (same); Cynthia Patterson, *The Hospitality of Athenian Justice: The Metic in Court*, *in* LAW AND SOCIAL STATUS IN

exceptions, slaves could serve neither as plaintiffs nor defendants.[32] When a slave was involved in a dispute, the case was brought by or against the slave's owner. Similarly, women were forced to depend on their male legal guardians to act on their behalf in court, as in almost every forum in Athenian society.[33]

In private cases (*dikai*), the victim (or his family in the case of murder) brought suit, while in public cases (*graphai*), anyone at all was permitted to initiate an action, though in our surviving *graphai* the prosecutor tends to be the primary party in interest or at least a personal enemy of the defendant with something to gain by his conviction.[34] With few exceptions, litigants were required to deliver their own speeches to the jury.[35] As already stated, litigants could obtain the services of speech-writers to help them prepare their case,[36] but litigants never mentioned their *logographos* and generally pretended to be speaking extemporaneously in court. In fact, speakers often boasted of their inexperience in public speaking and ignorance of the lawcourts.[37] Specialized legal terminology never developed in Athens, and forensic speeches were dramatic recreations of the events told in laymen's terms.

Each Athenian litigant was allotted a fixed amount of time to present his case. Some private cases were completed in less than an hour, and no trial lasted longer than a day.[38] Although a magistrate chosen by lot presided over each popular court, he did not interrupt the speaker for any reason or permit anyone else to raise legal objections, and did not even instruct the jury as to the relevant laws. The Athenian laws were inscribed on stone *stelai* in various public areas of Athens (some of which have been preserved for history);[39] beginning at the end of the fifth century, copies

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CLASSICAL ATHENS, *supra* note 10, at 93, 102-11.

32. *See* TODD, *supra* note 10, at 187.

33. *Id.* at 208.

34. Although no ancient source explains the distinction between *graphai* and *dikai*, *graphai* seem to have been cases regarded as affecting the community at large. This division is not quite the same as the modern criminal-civil distinction; murder, for example, was a *dike* because it was considered a crime against the family rather than the state. *See id.* at 102-09.

35. A litigant could donate some of his time to another speaker. *See supra* note 30.

36. It is not clear whether the *logographos* generally wrote a complete text for the litigant to memorize or collaborated with his client in composing his speech. *See* KENNETH J. DOVER, LYSIAS AND THE CORPUS LYSIACUM (1968); Stephen Usher, *Lysias and His Clients*, 17 GREEK, ROMAN, & BYZANTINE STUD. 31 (1976). Logographers may also have assisted in other stages of the proceedings. *See* 4 DEMOSTHENES, *supra* note 8, at 48 [Dem. 58.19] (arranging a settlement).

37. *See, e.g.*, ANTIPHON, *supra* note 8, at 69 [Ant. 5.1]; 1 DEMOSTHENES, *supra* note 8, at 32 [Dem. 27.2]; ISAEUS, SPEECHES 117 (William Wyse ed., Cambridge Univ. Press 1904) [Is. 8.5]; LYSIAS, ORATIONES 119-20 (Carolus Hude ed., Oxford Univ. Press 1912) [12.4]; LYSIAS, *supra* note 8, at 17 [Lys. 1.5].

38. A public suit was allotted an entire day. ARISTOTLE, ATHENAION POLITEIA 47 (M. Chambers ed., Teubner 1994) [Ath.Pol. 53.3]. Private cases varied according to the seriousness of the charge and were timed by a water-clock. MacDowell estimates the length of various types of suit based on the one surviving water-clock. *See* MACDOWELL, *supra* note 25, at 249-50.

39. On the difficulties presented by these sources, see TODD, *supra* note 10, at 45-46.

were kept in a public building, but it is unclear whether this archive was sufficiently organized to serve as a reasonably accessible source of law for potential litigants.[40] Litigants were responsible for finding and quoting any laws they thought helped their case, though there was no obligation to explain the relevant laws, and, in fact, some speeches do not cite any laws at all. There was no formal mechanism for correcting a speaker's misrepresentation of the laws,[41] though knowledgeable members of the jury and the crowd could heckle orators whose speeches were misleading.[42]

Cases in the popular courts were heard by juries[43] chosen by lot, generally ranging in size from 201 to 501 persons.[44] Although all citizen men over thirty were eligible to serve as jurors, it seems likely that the poor, the elderly, and city-dwellers were disproportionately represented.[45] There was no process like our *voir dire*, meant to exclude from the jury those with some knowledge of the litigants or the case. On the contrary, Athenian litigants at times encouraged jurors to base their decision on preexisting knowledge.[46] Although the jury might have known something of a party's reputation or of the facts of the case, especially in high profile cases, the jurors were nothing like the self-informing juries of medieval England. Jurors did not bring the local knowledge of a small community into court with them; they were randomly chosen from a city with a population in the hundreds of thousands.[47] A simple majority vote of the jury, taken without deliberation, determined the outcome of the trial. No

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40. *Compare* JAMES P. SICKINGER, PUBLIC RECORDS AND ARCHIVES IN CLASSICAL ATHENS 114-38, 160-69 (1999) *with* ROSALIND THOMAS, ORAL TRADITION AND WRITTEN RECORD IN CLASSICAL ATHENS 39-94 (1989).

41. There was, however, a law punishing the citation of a non-existent law with death, *see* Dem. 26.24, though there are no attested examples of prosecutions brought under this law.

42. *See* Victor Bers, *Dikastic Thorobos*, *in* CRUX 1 (Paul Cartledge & David Harvey eds., 1985) (discussing heckling by jurors); Adriaan Lanni, *Spectator Sport or Serious Politics*, 117 J. HELLENIC STUD. 183 (1997) (discussing heckling by spectators).

43. I have been using the term "jurors" as a translation for the Greek *dikastai* to refer to the audience of these forensic speeches, but some scholars prefer the translation "judges." *See, e.g.*, Harris, *supra* note 16, at 136. Neither English word is entirely satisfactory, since these men performed functions similar to those both of a modern judge and a modern jury. I refer to *dikastai* as jurors to avoid the connotations of professionalism that the word judges conjures up in the modern mind.

44. *See* HANSEN, *supra* note 14, at 187.

45. *Cf.* A.H.M. JONES, ATHENIAN DEMOCRACY 36-37 (1957) (arguing that juries were selected primarily from the middle and upper classes). *See generally id.* at 183-86; OBER, *supra* note 25, at 122-24; R.K. SINCLAIR, DEMOCRACY AND PARTICIPATION IN ATHENS 124-27 (1988); S.C. Todd, *Lady Chatterly's Lover and the Attic Orators*, 110 J. HELLENIC STUD. 146 (1990);

46. *See, e.g.*, AESCHINES, ORATIONES 47-48 (M.R. Dilts ed., Teubner 1997) [Aesch.. 1.93] ("First, let nothing be more persuasive for you than what you yourselves know and believe concerning Timarchus [the defendant] here. Examine the issue not from the present but from the past. For the statements made in the past about Timarchus and about what this man is accustomed to doing were made with a view toward the truth, while those that are going to be spoken today are for the purpose of deceiving you in order to get a decision. Cast your ballot according to the longer time and the truth and the fact you yourselves know.").

47. On the Athenian population, *see* HANSEN, *supra* note 14, 90-94.

reasons for the verdict were given, and there was no provision for appeal.[48]

While the punishment for some offenses was set by statute, in many cases the jury was required to choose between the penalties suggested by each party in a second speech. It was not permitted to give a compromise punishment. It is through this practice, known as *timesis*,[49] that Socrates virtually signed his own death warrant. After suggesting that the state reward him with free maintenance, he finally agreed to propose a very small fine as a penalty. The jury, which only narrowly voted for conviction, was thereby induced to vote overwhelmingly for the prosecutors' proposal of execution.[50] Imprisonment was rarely, if ever used as a punishment;[51] the most common types of penalties in public suits were monetary fines, loss of citizen status (*atimia*), exile, and execution, which involved either poisoning by hemlock or, more gruesomely, being shackled to wooden planks and left to die.[52]

The vast majority of Athenian cases were heard in the popular courts. Jurisdiction over cases involving homicide, wounding,[53] and some religious offenses was divided between five separate homicide courts that were presided over not by juries but by members of the Areopagus, a council of elders who served life terms.[54] Maritime cases were most likely heard in the popular courts before ordinary jurors,[55] but employed a variety of special procedures and rules that set them apart from ordinary popular court cases.

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48. A dissatisfied litigant might, however, indirectly attack the judgment by means of a suit for false witness or might bring a new case, ostensibly involving a different incident and/or using a different procedure. Some of our surviving speeches point explicitly to a protracted series of connected legal confrontations. *See, e.g.*, Osborne, *supra* note 11, at 52.

49. *See* TODD, *supra* note 10, at 133-35 (discussing *timesis*).

50. PLATO, APOLOGY 55 (E.A. Duke et al. eds., Oxford Univ. Press 1995) [Pl. Ap. 36a]. Todd estimates from a passage of Diogenes Laertius that Socrates was convicted by a vote of approximately 280 to 220, but sentenced to death by a vote of 360 to 140. *See* TODD, *supra* note 10, at 134 n.12.

51. *See* Virginia Hunter, *The Prison of Athens: A Comparative Perspective*, 51 PHOENIX 296 (1997).

52. On capital punishment in Athens, see generally EVA CANTARELLA, I SUPPLIZI CAPITALE IN GRECIA E A ROMA (1991); Louis Gernet, *Capital Punishment*, *in* THE ANTHROPOLOGY OF ANCIENT GREECE 252 (John D.B. Hamilton & Blaise Nagy trans., 1981); S.C. Todd, *How to Execute People in Fourth-Century Athens*, *in* LAW AND SOCIAL STATUS, *supra* note 10, at 31; Ian Barkan, Capital Punishment in Athens (1935) (unpublished Ph.D. dissertation, University of Chicago). On penalties generally, see ALLEN, *supra* note 10, at 197-243; TODD, *supra* note 10, at 139-44; M. Debrunner Hall, *Even Dogs Have Erinyes: Sanctions in Athenian Practice and Thinking*, *in* GREEK LAW IN ITS POLITICAL SETTING, *supra* note 10, at 73.

53. The definition of "wounding" is unclear, but it may be a form of attempted murder, i.e., wounding with intent to kill. In any case, it was certainly more narrow than the modern notion of assault, which was regularly tried in the popular courts.

54. For a recent discussion of the debate over how the *ephetai*, the judges in the four homicide courts excluding the Areopagus court, were chosen, see CARAWAN, *supra* note 10, at 14-15, 155-60.

55. Scholars differ on whether or not the special maritime procedure was heard in separate courts before specialist judges. *Compare* E.E. COHEN, ANCIENT ATHENIAN MARITIME COURTS 93-95 (1973) *with* TODD, *supra* note 10, at 336.

III. THE POPULAR COURTS

The popular courts, which had the broadest jurisdiction in the Athenian system and have been the focus of scholarly attention,[56] exemplify the discretionary and equitable aspects of the Athenian legal system. The modern reader of a speech intended for delivery in these courts is immediately struck by a bizarre amalgam of the familiar and the foreign. Alongside a narrative of the events in question, bolstered by witness testimony and the discussion and citation of laws, Athenian popular court speeches often contain a variety of material that would be considered inadmissible in a modern courtroom, including stinging character attacks, general arguments from fairness unrelated to the applicable statute, and florid appeals for the jurors' pity. Modern accounts of the Athenian legal system tend to privilege one or other of these aspects of Athenian argumentation.[57]

In my view, both extra-legal and legal information were considered relevant[58] and important to the jury's decision because Athenian popular court juries aimed at reaching a just verdict taking into account the particular circumstances of the individual case, as opposed to focusing exclusively on the application of abstract rules and principles provided by statutes. It was up to the jury to decide on a case-by-case basis which of the variety of legal and extra-legal arguments presented at trial should be determinative, and, indeed, the relative importance of legal and contextual evidence was often explicitly disputed by the parties. That these aspects of Athenian popular court presentation now seem unusual to us stems from their different sense of what constituted justice—one that emphasized individualized and contextualized assessments rather than the regular and predictable application of abstract, standardized rules.

There appears to have been no rule setting forth the range and types of information and argument appropriate for popular court speeches. The *Athenaion Politeia*, a partial history and description of Athenian political and legal institutions probably written by Aristotle or his students, states that litigants in private cases took an oath to speak to the point.[59] However, this oath is never mentioned in our surviving popular court speeches and if in fact it existed, it appears to have had no effect.[60]

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56. *See supra* note 17; *see also supra* notes 11-16 and accompanying text (describing the current debate over the nature of litigation in Athens).

57. For discussion, see *supra* notes 11-17 and accompanying text.

58. I discuss Athenian notions of evidence that should be presented to a jury as "relevant" rather than "admissible" because the Athenian popular courts had no rules limiting admissibility, and because Athenian litigants explaining why they are making certain arguments speak in terms of whether the evidence is relevant (literally, on or off the issue or point). In modern courts, of course, much of this extra-legal argumentation is considered relevant but inadmissible.

59. ARISTOTLE, *supra* note 38, at 61 [Ath. Pol. 67.1].

60. Whereas speeches made before the homicide courts or referring to them make frequent

Speakers were limited only by the time limit and their own sense of which arguments were likely to persuade the jury. Although anything was fair game in the popular courts—Lycurgus' extended quotations from Euripides, Homer, and Tyrtaeus on the honor and glory of battle in his prosecution of a citizen who left Athens when the city was threatened with attack[61] is perhaps the most creative use of speaking time in our surviving speeches—there are discernible categories of extra-legal evidence that appear repeatedly in the corpus.[62] Experienced speechwriters undoubtedly had a good feel for the types of arguments and information that were likely to appeal to the jury and constructed their speeches accordingly. Indeed, there is evidence that juries at times expressed their displeasure at a litigant's choice of arguments: one speaker tries to head off such criticism, pleading, "And let none of you challenge me while I am in the middle of my speech with shouts of 'why are you telling us this?'"[63]

Athenians therefore perceived some types of information and argumentation as more relevant to popular court decisions than others, despite the absence of formal restrictions on the presentation of evidence. Because we rarely know the outcome of an ancient case and generally do not have the opposing litigant's speech to allow a comparison, it is impossible to know which strategies were most persuasive to an Athenian jury, and, as we will see, the categories of relevant evidence were fluid and contestable. Nevertheless, the surviving speeches clearly show the popular court juries' receptivity to three sorts of argument: (1) the expansion of the litigant's plea beyond the strict limits of the event in question to encompass the broader background of the dispute; (2) defense appeals for the jury's pity based on the potential harmful effects of an adverse verdict; and (3) arguments based on the character of the parties.

Before we examine in detail each of the three types of extra-legal argumentation considered relevant in the Athenan popular courts, a few general comments may help to clarify my approach. I discuss types of evidence and argument that are common enough in our surviving speeches

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mention of the relevancy rule that applied in those courts, speeches delivered in the popular courts never mention such a legal requirement. In the few allusions in popular court speeches to speaking to the issue, most of which are found in a single speech (Demosthenes 57), nothing in the phraseology suggests a duty imposed by law to avoid straying from the issue at hand. Compare 4 DEMOSTHENES, *supra* note 8, at 31 [Dem. 57.59] and LYSIAS, *supra* note 37, at 114 [Lys. 9.1] with references to the homicide court rule in LYSIAS, *supra* note 8, at 31-32 [Lys. 3.46], and ANTIPHON, *supra* note 8, at 71, 92 [Ant. 5.11; 6.9].

61. LYCURGUS, AGAINST LEOCRATES 64-68, 69 (Felix Durrbach ed., Les Belles Lettres 1956) [Lyc. 1. 100, 103, 107].

62. Rhodes argues that the court speeches focus mostly on the issue in dispute. *See* P.J. Rhodes, *Keeping to the Point*, *in* HARRIS & RUBINSTEIN, THE LAW AND THE COURTS IN GREECE, *supra* note 10, at 137. My own view, which I outline in this section, is that most popular court speeches contain a mixture of legal and extra-legal information. In any case, the repeated use of a particular type of extra-legal information in our surviving speeches suggests that this sort of evidence was considered relevant to a popular court jury's verdict, even if it accounts for only a small portion of litigants' arguments.

63. HYPERIDES, ORATIONES 1.43 (F.G. Kenyon ed., Oxford Univ. Press 1906) [Hyp. 1.col.43].

to indicate that logographers and jurors thought them relevant to popular court decisionmaking. In any individual case, however, litigants might dispute the relevance and relative importance of different types of argument. The corpus of forensic speeches contains, for example, impassioned arguments both for and against the relevance of character evidence.[64] Indeed, speakers sometimes contend that the jury should ignore extra-legal evidence and focus solely on the legal arguments made in the case.[65] Such arguments were themselves part of the remarkably individualized and case-specific approach to justice employed in the popular courts: it was left to the jurors to decide which sorts of evidence were most important given the particular circumstances of the case.[66]

In what follows, there is an implicit, and, in a few instances, explicit, comparison between the Athenians' broad notion of relevance and the stricter approach of the modern American system. In practice, of course, modern trial lawyers are often able to communicate to a jury a good deal of information that is not strictly related to proving the elements of the charge or claim.[67] Even under the most cynical view of modern trial practice, however, contemporary evidence regimes are different from that of ancient Athens in one vital respect: while the Athenians openly recognized the relevance of extra-legal information, in modern courts the law's status as the authoritative rule of decision is not in doubt and arguments based on extra-legal factors are always sub rosa, couched in terms that permit the presiding judge and court of appeals to accept the verdict as the jury's application of the law based solely on the relevant evidence presented at trial.[68]

A. Background information and arguments from equity

Modern lawyers translate a client's story into legal form in large part by winnowing down the client's experience to a limited set of facts that correspond to claims and arguments recognized by the applicable law.[69] Athenian litigants, by contrast, provided a "wide-angle"[70] view of the

64. *Compare, e.g.*, 1 DEMOSTHENES, *supra* note 8, at 221-22 [Dem. 36.55] *with* 3 DEMOSTHENES, *supra* note 8, at 71-72 [Dem. 52.1].

65. *See, e.g.*, HYPERIDES, *supra* note 63, at 4.32 [Hyp. 4.32]; 3 ISOCRATES, OPERA 176 (Basilius G. Mandilaras ed., Teubner 2003) [Isoc. 18.34-5].

66. *See infra* Section III.E.

67. Robert Burns, for example, argues that the American rules of evidence are flexible enough to permit an attorney to argue for a verdict based on extra-legal norms, and that in practice the trial jury's task is to decide between a variety of competing norms—legal, economic, moral, political, professional. *See* ROBERT P. BURNS, A THEORY OF THE TRIAL 29-30, 36, 201 (1999).

68. *See id.* at 36 (recognizing that in modern courts extralegal norms can only trump legal ones surreptitiously).

69. For a discussion of the process of translating lived experience into a legal discourse, see, for example, JAMES BOYD WHITE, JUSTICE AS TRANSLATION 179-201, 257-69 (1990).

70. Kim Scheppele, *Telling Stories*, 87 MICH. L. REV. 2096 (1989).

case, one that included not only a complete account of the event in question, but also information regarding the social context of the dispute, including discussion of the long-term relationship and interactions of the parties. In cases that were part of a series of suits between the parties, for example, speakers did not confine their argument to the immediate issue in question but rather recounted the past litigation in some detail.[71] This practice is particularly prominent in speeches for suits charging false testimony, which generally included an attempt to re-argue the previous case as well as evidence that a statement made by one of the opponent's witnesses was false. For instance, one speaker stated, "I now present to you a just request, that you both determine whether the testimony is false or true, and, at the same time, examine the entire matter from the beginning."[72]

Litigants also commonly discussed the manner in which each of the parties has conducted themselves in the course of litigation. They emphasized their own reasonableness and willingness to settle or arbitrate the claim, and portrayed their opponents as querulous, dishonest, and even violent.[73] To cite one example, the speaker in Demosthenes 44 states, "I think it is necessary to speak also of the things they have done in the time since the case regarding the estate was brought, and the way they have dealt with us, for I think that no one else has been as unlawfully treated in connection with an inheritance lawsuit as we have been."[74]

When relatives or friends faced each other in court, speakers described the long-term relationship and interaction of the parties and sought to represent themselves as honoring the obligations traditionally associated with bonds of *philia* ("friendship"), and to portray their opponents as having violated these norms.[75] Lawcourt speakers did not discuss why information about the relationship between the parties was considered relevant to the jury's decision, but it was common sense that such relationships were relevant to a moral assessment of the situation. The Athenians recognized this. In the *Nichomachean Ethics*[76] Aristotle

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71. *E.g.*, ANDOCIDES, ON THE MYSTERIES 54 (Douglas M. MacDowell ed., Oxford Univ. Press 1962) [And. 1.117ff]; 1 DEMOSTHENES, *supra* note 8, at 74, 79 [Dem. 29.9, 27]; 2 DEMOSTHENES, *supra* note 8, at 96, 155, 215 [Dem. 43.1-2; 45.102; 47.46]; ISAEUS, *supra* note 37, at 28-30, 68 [Is. 2.27-37; 5.5ff].

72. 2 DEMOSTHENES, *supra* note 8, at 215 [Dem. 47.46]; *see also* ROBERT J. BONNER, EVIDENCE IN ATHENIAN COURTS 18 (1905) (discussing the practice of raising issues from the previous suit in false testimony cases).

73. *E.g.*, DEMOSTHENES, AGAINST MEIDIAS 135ff (Douglas M. MacDowell ed., Oxford Univ. Press 1990) [Dem. 21.78ff]; 1 DEMOSTHENES, *supra* note 8, at 32, 87 [Dem. 27.1; 29.58]; 2 DEMOSTHENES, *supra* note 8, at 225-26 [Dem. 47.81]; *see also* HUNTER, *supra* note 10, at 57.

74. 2 DEMOSTHENES, *supra* note 8, at 140 [Dem. 44.31-2].

75. *See* CHRIST, *supra* note 10, at 167-80 (discussing the emphasis on the breach of *philia* in cases involving relatives, friends, neighbors, and demesmen).

76. Aristotle's theoretical works must be used with great care as a source for the ideals or practice of the Athenian lawcourts. *See* Christopher Carey, *Nomos in Attic Rhetoric and Oratory*, 116 J.

explains that just as the duties and obligations one owes to family, friends, fellow-citizens, and other types of relations differ, "Wrongs are also of a different quality in the case of each of these [relationships], and are more serious the more intimate the friendship." He continues, "For example, it is more serious to defraud a comrade than a fellow-citizen, and to refuse help to a brother than to a stranger, and to strike your father than anybody else."[77] Information about the relationship between the parties helped the jury evaluate the severity of the allegations and the extent of moral blame borne by each side.

In addition to presenting evidence about relationships and interactions prior to and after the event at issue, litigants at times provided a highly contextualized account of the dispute itself, often including arguments that are not explicitly recognized by law but that contribute to the jury's overall sense of the fair result of the dispute. For example, speakers at times discuss the extenuating (and, less commonly, aggravating) circumstances surrounding the incident, such as the absence of intent, the offender's youth, or his intoxication, even though the laws enforced by the popular courts did not formally recognize such defenses and did not provide for degrees of offenses based on their severity.[78]

Discussion of the circumstances and context of the contested event is most prominent in suits involving a challenge to a will.[79] Litigants often appeal to a variety of arguments rooted in notions of fairness and justice unrelated to the issue of the formal validity of the will. Speakers compare their relationship to the deceased with that of their opponents in an effort to argue that they have the better claim to the estate: they present evidence that they were closer in affection to the deceased, performed his burial rites, or nursed him when he was ill, and suggest that their opponents were detested by the dead man and took no interest in his affairs until it was

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HELLENIC STUD. 42 (1996) (noting that the advice given to litigants in Aristotle's *Rhetoric* bears little relation to the practice of the Athenian courts). However, the *Ethics* does seem to be a reliable source of Athenian popular values; Aristotle sets out to examine beliefs that are "prevalent and have some basis" ARISTOTLE, NICHOMACHEAN ETHICS 4 (I. Bywater ed., Oxford Univ. Press 1962) [Ar. *NE* 1095a28]; *see* PAUL MILLETT, LENDING AND BORROWING IN CLASSICAL ATHENS 112 (1991).

77. ARISTOTLE, *supra* note 76, at 168 [Ar. *NE* 1160a3ff].

78. These *topoi* have been catalogued and discussed in detail in TREVOR SAUNDERS, PLATO'S PENAL CODE 109-18 (1991); SCAFURO, *supra* note 10, at 246-50; and A.P. Dorjahn, *Extenuating Circumstances in Athenian Courts*, 25 CLASSICAL PHILOLOGY 162-72 (1930). This practice did not go entirely unchallenged. *See* AESCHINES, *supra* note 46, at 290 [Aesch. 3.198]; DEMOSTHENES, SELECTED PRIVATE SPEECHES 28 (C. Carey & R.A. Reid eds., Cambridge Univ. Press 1992) [Dem. 54.21-22].

79. Other recent discussions of the use of arguments from "fairness" or "equity" include CHRIST, *supra* note 10, at 194; SCAFURO, *supra* note 10, at 50-66; Arnaldo Biscardi, *La 'gnome dikaotate' et l'interprétation des lois dans la Grèce ancienne*, 17 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ 219 (1970). *Cf.* Harris, *supra* note 15, at 32-34 (arguing that jurors did feel bound to follow the letter of the law, and that what appear to be extra-legal arguments from equity are in fact legal arguments exploiting the open texture of Athenian statutes).

time to claim his estate.[80] One such litigant concludes with a summary of his arguments that places equitable considerations on an equal footing with the will and the law: "First, my friendship with the men who have bequeathed the estate . . . then the many good deeds I did for them when they were down on their luck . . . in addition the will, . . . further, the law. . . ."[81]

The frequency and centrality of discussion of the background and interaction of the parties in our surviving popular court speeches indicate that this type of information was considered relevant to the jury's decision. It has been suggested that the prevalence of such extra-legal arguments indicates that Athenian litigants and jurors regarded the court process as serving primarily a social role—the assertion of competitive advantage in a narrow stratum of society. One scholar, for example, explains the tendency to discuss the broader conflict between the parties as evidence that litigants were engaged in a competition for prestige unrelated to the "ostensible subject of the dispute": "rather than thinking in terms of a 'just resolution' of the dispute one should think instead of how the game of honor is being played."[82]

There may be a simpler explanation, however, one rooted in the pervasive amateurism of the Athenian courts. Human beings naturally tend to think about social interaction in story form.[83] The restrictive evidence regimes of contemporary jury-based legal systems are from a layperson's perspective counterintuitive. Amateurs left to their own devices in contemporary small claims courts, for example, often set their dispute in a broader context and use a variety of everyday storytelling techniques forbidden in formal court settings.[84] It is perhaps not surprising that amateur Athenian litigants would consider evidence concerning the background of the dispute, the parties' conduct in the course of litigation, and arguments from fairness relevant in reaching a just outcome in the issue at hand. There is no need to resort to a theory of the Athenian court system as a forum primarily concerned with social competition to explain

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80. *See, e.g.*, ISAEUS, *supra* note 37, at 7, 11, 14-17, 62, 78-79, 80, 95, 98, 103-04, 110-11, 131, 138-40 [Is. 1.4, 17, 19, 20, 30, 33, 37, 42; 4.19; 5.36-38, 41-43; 6.51, 60-61; 7.8,11,12,33-37; 9.4, 27-32]; *see also* SIMA AVRAMOVIĆ, ISEO E IL DIRITTO ATTICO 54-58 (1997); M. Hardcastle, *Some Non-legal Arguments in Athenian Inheritance Cases*, 12 PRUDENTIA 11 (1980). Lawless has argued that equity argumentation in Isaeus is a response to obscurities and gaps in the inheritance laws rather than an attempt to appeal to fairness. *See* J.M. Lawless, Legal Argument, Equity, and the Speeches of Isaeus 110-35 (1991) (unpublished Ph.D. Dissertation, Brown University).

81. 3 ISOCRATES, *supra* note 65, at 194 [Isoc. 19.50].

82. COHEN, *supra* note 10, at 90.

83. *See, e.g.*, W.L. BENNET & M.S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM 7 (1981); RICHARD HASTIE ET AL., INSIDE THE JURY 22-23 (1983); Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559 (1991); G.P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 3 (1984).

84. *See* W.M. O'Barr & J.M.Conley, *Litigant Satisfaction vs. Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC. REV. 661 (1985).

this contextual information included in our surviving popular court speeches. This explanation for the prevalence of extra-legal material becomes even more attractive when we consider that Athenian lawcourt speeches generally include evidence and argument based on the statute at issue, as well as such extra-legal argumentation.

B. Defense appeals based on the consequences of conviction

The second major category of extra-legal argumentation in the popular courts is the appeal for the jurors' pity based on the misfortune that will befall the defendant and his family if he is found guilty.[85] From a modern perspective, this information is relevant, if at all, to sentencing rather than the determination of guilt. Unlike modern jurors in non-capital cases, Athenian jurors were often aware of the range of penalties faced by the defendant through the public indictment or the arguments of the litigants during the guilt phase.[86] The frequency of arguments to acquit to spare the defendant a harsh penalty[87] in Athenian defense speeches and its anticipation by prosecutors suggests that appeals to pity were, for the most part, considered appropriate in the popular courts.[88] Indeed, prosecutors were more likely to argue that their particular opponent's character or actions had rendered him undeserving of pity rather than to challenge the legitimacy of the practice itself.[89]

Appeals to pity in the Athenian popular courts were firmly rooted in the defendant's particular circumstances; litigants generally did not criticize the penalty itself as disproportionate to the charges, but rather bemoaned the baleful effects that penalty would have on them given their specific

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85. *See* JOHNSTONE, *supra* note 10, at 109-25 (discussing appeals to pity in Athenian law); David Konstan, *Pity and the Law in Greek Theory and Practice*, 3 DIKE 125 (2000).

86. *E.g.*, ARISTOPHANES, *supra* note 7, at 897 [Ar. *Wasps* 897]; 1 DEMOSTHENES, *supra* note 8, at 51-52 [Dem. 27.67]; 2 DEMOSTHENES, *supra* note 8, at 168 [Dem. 45.46]; 4 DEMOSTHENES, *supra* note 8, at 48 [Dem. 58.19]; DEMOSTHENES, *supra* note 78, at 65 [Dem. 56.43].

87. As a practical matter, Athenian jurors had little control over the specific penalty imposed after a conviction. For some offenses, the penalty was fixed by statute. For others, the jury chose between the penalties proposed by the opposing parties during a second round of speeches. *See supra* note 49 and accompanying text. A juror who believed that the defendant was guilty of the charge but did not deserve to suffer the fixed or probable penalty was more likely to vote to acquit than (in the cases where the penalty was not fixed) to assume in the absence of deliberation that his fellow jurors shared his desire for a lenient sentence and that the defendant would propose a more acceptable penalty. Some scholars have argued that modern jurors should be informed of the sentencing consequences of finding a defendant guilty where the sentence is largely determined at the trial stage, such as in the case of mandatory minimum penalties. *See* M. Heumann & L. Cassack, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 AM. CRIM. L. REV. 343 (1983); Kristen Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232 (1995).

88. *See, e.g.*, 1 DEMOSTHENES, *supra* note 8, at 51-52 [Dem. 27.66-69]; 2 DEMOSTHENES, *supra* note 8, at 178 [Dem. 45.85]; HYPERIDES, *supra* note 63, at 1.19 [Hyp. 1.19]; 3 ISOCRATES, *supra* note 65, at 163 [Isoc. 16.47]; LYSIAS, *supra* note 37, at 116, 151, 153-54, 156, 161, 163 [Lys. 9.22; 18.27; 19.33, 53; 20.34; 21.25]. Johnstone shows that nearly half of defense speeches include a verbal appeal to the jurors' pity. *See* JOHNSTONE, *supra* note 10, at 111.

89. JOHNSTONE, *supra* note 10, at 113.

situation. Particularly common were appeals that an adverse verdict would leave the defendant's family without support or the means to dower its unmarried women,[90] and that failure to pay the penalty would lead to the defendant's loss of citizen rights.[91] Alcibiades the Younger, for example, explains that the five-talent penalty carries more serious consequences for him than for other defendants: "For even though the same legal punishments apply to all, the risk is not the same for everyone: rather, those who have money suffer a fine, but those who are impoverished, as I am, are in danger of losing their civic rights. . . . Therefore I beg you to help me . . . ."[92] Athenian notions of relevance in the popular courts thus extended to information regarding the concrete effects that laws and legal decisions had on the lives of individuals. Unlike modern jurors and judges, Athenian jurors were constantly made aware of the violence inherent in their judicial decisions.[93] Discussion of the effects of an adverse verdict thus served to assist the jury in determining whether a conviction was a just result given all of the circumstances, including the severity and effects of the likely penalty.

C. Arguments Concerning the Character of the Litigants

The third and most common type of extra-legal argumentation in our surviving popular court speeches is the liberal use of character evidence, which occurs in 70 out of 87 cases.[94] Litigants present themselves as upstanding citizens by describing their pubic services, participation in the army, and familial piety, and they criticize their opponents for everything from failing to pay taxes and having a prior record to low birth and sexual deviance.[95] In several cases, litigants preface their character evidence with an explicit explanation of why it is relevant to the jury's decision. These passages, along with other aspects of the way in which character evidence is used in our surviving speeches, suggest that discussion of character was considered relevant both to discovering the truth and to determining whether the defendant deserved the prescribed or likely penalty. Of course, it is difficult to pinpoint the intended effect of any particular piece of evidence; discussions of character likely operated on more than one

90. 1 DEMOSTHENES, *supra* note 8, at 61 [Dem. 28.19]; LYSIAS, *supra* note 37, at 153-54, 163 [Lys. 19.33; 21.24-25].

91. 3 ISOCRATES, *supra* note 65, at 153 [Isoc. 45-46]; LYSIAS, *supra* note 37, at 148, 115-16, 161 [Lys. 18.1; 9.21; 20.34].

92. 3 ISOCRATES, *supra* note 65, at 153 [Isoc. 16.47].

93. *Cf.* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (discussing how the process of modern legal interpretation tends to push the reality of law's violence into the background of legal officials' minds.).

94. Speeches in maritime suits and homicide cases are not included in this calculation.

95. *See* Christopher Carey, *Rhetorical Means of Persuasion*, *in* PERSUASION, *supra* note 16, at 26, 31-32 (listing examples).

level of meaning.[96] Nevertheless, the liberal use of character evidence in our surviving speeches is more plausibly explained as part of the attempt to reach a just resolution of the case, rather than as part of a competition for elite prestige and honor in which the jury aimed to pick a favorite.

The first justification for character evidence we meet in the speeches is that it assists the jury in finding facts through an argument from *eikos*, or probability.[97] Since the Athenians tended to view character as stable and unchanging,[98] evidence that a defendant had committed crimes in the past or otherwise exhibited bad morals was considered highly probative of whether he was guilty of the offense charged and whether he was telling the truth in the present speech.[99] Thus, for example, one speaker states: "If you knew the shamelessness of Diocles and what sort of man he was in relation to other matters, you would not doubt any of the things I have said."[100] In a world without modern techniques of forensic investigation and evidence-gathering, character was all the more relevant to factfinding; in the absence of hard evidence, character was a proxy for guilt or innocence. Another speaker cites his clean record and meritorious service to the city before arguing, "You ought to take these things as proof for the purpose of this case that the charges against me are false."[101]

The second reason given for the citation of character evidence is that it is relevant to the jury's assessment of whether the defendant deserves the penalty for the charge or should be given pardon.[102] To cite just one example, a prosecutor engages in an extended character attack on Aristogeiton, noting that he failed to support or properly bury his father, had been convicted on several charges in the past, and was even so base that his fellow criminals in prison voted to shun him. He then asserts that Aritogeiton has forfeited any right to a lenient penalty: "Do you still wish to hear arguments from us about the punishment for Aristogeiton, when you know well on the basis of both his whole life and the things that he has done now he would justly suffer the extreme sanction?"[103]

It has been pointed out that character evidence focuses most commonly

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96. Carey, *supra* note 76, at 42-43.

97. *See* JOHNSTONE, *supra* note 10, at 96; SAUNDERS, *supra* note 78, at 113.

98. *See* KENNETH J. DOVER, GREEK POPULAR MORALITY 88-95 (1974).

99. *E.g.*, DEMOSTHENES, ORATIONES 20.141-42 (S.H. Butcher ed., Oxford Univ. Press 1966) [Dem. 20.141-2]; 1 DEMOSTHENES, *supra* note 8, at 48 [36.55]; 4 DEMOSTHENES, *supra* note 8, at 51 [Dem. 58.28]; HYPERIDES, *supra* note 63, at 1.14-5 [Hyp. 1.14-15]; ISAEUS, *supra* note 37, at 127 [Is. 8.40].

100. ISAEUS, *supra* note 37, at 127. [Is. 8.40].

101. HYPERIDES, *supra* note 63, at 1.18 [Hyp. 1.18].

102. *See* SAUNDERS, *supra* note 78, at 113-18 (discussing litigants' use of the defendant's record to assess whether he deserves the penalty).

103. 2 DEMOSTHENES, *supra* note 8, at 172-73 [Dem. 45.63]; DINARCHUS, ORATIONES CUM FRAGMENTIS 58, 66 (N.C. Conomis ed., Teubner 1975) [Din. 2. 11; 3.5]; 3 ISOCRATES, *supra* note 65, at 178, 197 [Isoc. 18.47; 20.13]; LYSIAS, *supra* note 37, at 161, 183 [Lys. 20.34; 30.6].

on the defendant rather than the prosecutor.[104] The emphasis on the defendant alone, as opposed to both the defendant and the prosecutor, supports the view that the frequent citations to character are designed to assist the jury in reaching their verdict, rather than used as ammunition in a contest for honor: the defendant's reputation and record is part of the contextual information considered by the jury in determining whether a conviction is warranted.[105] Although there are a handful of passages that suggest an extra-legal purpose for the citation of character evidence—most notably, statements that the jury should acquit a defendant because he has performed expensive public services in the past and, if victorious, will continue to do so in the future[106]—the bulk of the evidence suggests that the liberal use of arguments from character reflect the Athenian popular court's highly individualized and discretionary mode of decisionmaking. In sum, the prevalence of extra-legal argumentation, such as information regarding the background of the dispute, appeals to pity, and character evidence, indicates not that the courts functioned primarily as a form of social drama, but that the Athenians had an extremely broad notion of relevance in the popular courts.

D. The use of law in popular court speeches

The Athenians' broad view of relevance in the popular courts extended beyond the inclusion of extra-legal argumentation to the discussion of law. Rather than focus on the elements of the particular charge at issue and apply them to the facts of the case, Athenian litigants at times cite an array of laws that do not govern the charges in the case,[107] and at other times do not deem it relevant to discuss—or even mention—the law under which the suit was brought.[108] A brief examination of the peculiar treatment of statutes in the popular courts suggests that statutes and legal argument served to assist the jury in obtaining a broad view of the individual case before it, rather than focusing the dispute on one or a few points of

104. *See* JOHNSTONE, *supra note* 10, at 94; RUBINSTEIN, *supra* note 10, at 195.

105. In fact, the instances where prosecutors do cite their public services tend to be cases involving inheritance and cases where the prosecutor argues that his honor has been violated, for example assault prosecutions. JOHNSTONE, *supra* note 10, at 98-100. The prosecutor's character is relevant to the resolution of the dispute in these types of suit, because in inheritance cases it is pertinent to whether the prosecutor deserves to own the property under the circumstances, and in assault cases it is relevant to the seriousness of the crime.

106. 1 DEMOSTHENES, *supra* note 8, at 61-62 [Dem. 28.24]; ISAEUS, *supra* note 37, at 98, 111 [Is. 6.61; 7.38-42]; LYSIAS, *supra* note 37, at 151, 157, 163 [Lys.18.20-21; 19.61; 21.25].

107. For example, speakers sometimes cite laws to bolster their portrayal of the character of the parties, M. DeBrauw, *Listen to the Laws Themselves: Citations of Laws and the Portrayal of Character in Attic Oratory*, CLASSICAL J. 161-76 (2001-2), or to create the general impression that their position is supported by the laws, *see* Carey, *supra* note 76, at 44-45; Andrew Ford, *Reading Homer from the Rostrum: Poems and Laws in Aeschines' Against Timarchus*, *in* PERFORMANCE CULTURE AND ATHENIAN DEMOCRACY 231 (Simon Goldhill et al., eds. 1999).

108. *E.g.*, HYPERIDES, *supra* note 63 [Hyp. 3]; LYSIAS, *supra* note 37 [Lys. 30].

disagreement concerning the relevant law.

The speech in Demosthenes 42, *Against Phaenippus*, illustrates popular court litigants' lax approach to the statute under which a suit is brought. This case involved an *antidosis* ("exchange"), one of the more peculiar procedures in Athenian law. In the absence of universal taxation, wealthy Athenians were appointed to perform expensive public services, such as outfitting a warship or paying for a dramatic festival. Under the *antidosis* procedure, a man could seek to avoid an assigned liturgy by proposing a richer man to perform the service in his stead.[109] By doing so, he challenged the allegedly wealthier man to choose between carrying out the liturgy or exchanging all of his property with the challenger. If he chose to make the exchange, the parties were required by law to produce an inventory of their property within three days, and each was permitted to inspect the other's estate and seal the doors of storage rooms and the like to prevent his opponent from concealing or removing any of his property. It seems unlikely that exchanges took place very often, if at all; more commonly, the second man would refuse both options and the case would be brought before a jury to determine which party should perform the liturgy. If a challenge to an exchange was accepted, but the challenger believed that the exchange was not being properly or honestly carried out, he had the right to abandon the exchange and demand a trial. In such a case, the jury was to decide simply which party was required to perform the public service; by bringing the suit to trial the parties had terminated the agreement to exchange property, and any violations of the *antidosis* procedure were not formally before the court.[110]

The speaker in Demosthenes 42 initiates such a suit after his opponent Phaenippus initially agreed to an exchange but failed to produce the required inventory on time and allegedly attempted to conceal the true value of his property by removing grain, timber, and wine from his estate and claiming various debts on the farm that did not exist. Although the relevant law calls for the jury simply to determine which party is wealthier and therefore liable to perform the liturgy, the speaker focuses on his opponent's violation of the law requiring the presentation of an inventory within three days: his opening suggests that it is the violation of this law that is the basis for his suit; he has the statute read out in the course of his speech; and he expects the jurors to consider this violation along with the relative wealth of the parties in reaching their decision:

> I beg all of you, gentlemen of the jury, that if I demonstrate that this man here, Phaenippus, has both violated the just regulations in the

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109. *See, e.g.*, 2 A.R.W. HARRISON, THE LAW OF ATHENS 236-38 (1971) (discussing the *antidosis* procedure); MACDOWELL, *supra* note 25, at 161-64 (same).

110. 1 DEMOSTHENES, *supra* note 8, at 60 [Dem. 28.17]; 3 ISOCRATES, *supra* note 65, at 95 [Isoc. 15.51]; *see also* MACDOWELL, *supra* note 25, at 163-64.

> law [requiring the production of the inventory] and is richer than I am, to help me and put this man instead of me on the list of Three Hundred [liable to liturgies].[111]

The loose approach of the speaker in Demosthenes 42 to the formal charge is in keeping with the general Athenian reluctance to rely on arguments that might be perceived as based on procedural or legal technicalities. For example, litigants note when their opponent has violated the relevant statute of limitations, but do not argue that the case should be decided on these grounds.[112]

Even discussions of the specific charge at issue left much to the discretion of the jury because Athenian laws were vague. Generally, as is often pointed out, Athenian laws simply state the name of the offense, the procedure for bringing suit under the law, and in some cases the prescribed penalty; our surviving laws and decrees do not define the crime or describe the essential characteristics of behavior governed by the law. The decree of Cannonus is characteristically vague about the definition of the offense even though it provides detailed instructions for the method of trial and penalty: "If anyone wrongs the people of Athens, then that man, while chained up, is to be tried before the people, and if he is found guilty, he is to be killed by being thrown into a pit and his money confiscated and a tithe given to the goddess."[113]

There is evidence that some viewed the vagueness of the laws as a merit: The *Athenaion Politeia* reports that "some men think that [Solon] deliberately made the laws unclear in order that the demos would have power over the verdict."[114] The absence of carefully defined laws specifying the required elements of each charge invited litigants to bring a wide range of arguments to bear on the case. In many cases, the primary purpose of the relevant law may have been to set out a procedure for obtaining redress for a broad class of offenses; once the case came to court, the jury attempted to arrive at a just verdict by looking at the individual case as a whole, without focusing exclusively on determining whether the defendant's behavior satisfied the formal criteria of the specific charge at hand.

This is not to say that Athenian litigants could not, or did not, use legal reasoning to argue for a particular interpretation of a vague or ambiguous

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111. 2 DEMOSTHENES, *supra* note 8, at 79-80 [Dem. 42.4].

112. 1 DEMOSTHENES, *supra* note 8, at 143 [Dem. 33.27; 38.17]; *see also* P.C. Millett, *Sale, Credit, and Exchange, in* NOMOS, *supra* note 11, at 14. *See generally* J.F. Charles, Statutes of Limitations at Athens (1938) (unpublished Ph.D. dissertation, Harvard University).

113. XENOPHON, HELLENICA 1.7 (E.C. Marchant ed., Oxford Univ. Press 1961) [Xen. *Hell.* 1.7.20]; *see also* DEMOSTHENES, *supra* note 73, at 116 [Dem. 21.47] (quoting the law against *hubris*, which begins simply: "If anyone commits *hubris* . . . ."); DAVID COHEN, THEFT IN ATHENIAN LAW 6-7 (1983) (discussing the lack of definition in Athenian laws).

114. ARISTOTLE, *supra* note 38, at 7 [*Ath.Pol.* 9.2].

law.[115] A common strategy was to rely on the legal fiction that the laws were created by a single lawgiver and thus formed a coherent whole, making it possible to use principles from unrelated laws to interpret a particular law.[116] For example, Isaeus' speech, *On the Estate of Ciron*, includes an argument that attempts to resolve a gap in the law that states that in the absence of a male heir a female child can inherit as an *epikleros* ("heiress") ahead of collateral relatives such as the deceased's brother or nephew, but does not specify whether such a woman's child may also inherit ahead of a collateral.[117] The speaker attempts to establish that a daughter's son takes precedence over a brother's son by presenting two related laws and arguing from the apparent logic of the inheritance system as a whole. The speaker argues first that since a daughter inherits before a brother, a daughter's child therefore should inherit before a brother's child.[118] He bolsters his argument by quoting the law under which descendants are obliged to support their indigent and infirm parents and grandparents, while collaterals have no such obligation.[119] By arguing that if a man is legally bound to support his grandfather, he therefore has a corresponding right to inherit his estate, the speaker presupposes a coherent system underlying the inheritance laws that can be used to interpret an ambiguous law.[120]

As ingenious and potentially persuasive as these types of arguments are, it is striking that legal reasoning was not considered an authoritative guide to a verdict; interpretation and application of the law at issue was certainly considered relevant to the jury's decision, but there is no indication that a litigant was expected to limit himself to, or even focus on, such questions.[121] In fact, discussion of the relevant laws was only one weapon in an Athenian litigant's arsenal. The speaker in *On the Estate of Ciron* follows his legal argument that descendants take precedence over collaterals with an extended character attack on his opponent Diocles:[122]

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115. Several scholars have studied legal argumentation in the speeches. *See, e.g.*, MICHAEL HILLGRUBER, DIE ZEHNTE REDE DES LYSIAS 105-20 (1988); JOHNSTONE, *supra* note 10, at 20-45; Harris, *supra* note 15, *passim*.

116. *See* JOHNSTONE, *supra* note 10, at 25-33.

117. The law is quoted in 2 DEMOSTHENES, *supra* note 8, at 112 [Dem. 43.51].

118. ISAEUS, *supra* note 37, at 123 [Is. 8.31].

119. *Id.* at 125 [Is. 8.34].

120. Another example occurs in Hyperides 3. The speaker bought two slaves and was fooled into signing a sales contract that made him responsible for the (quite substantial) debts previously incurred by the slaves. The law of contract stated simply that agreements are binding, and the speaker attempts to read into law a provision voiding unjust contracts by citing a variety of laws that cast doubt on the validity of contracts in other contexts: he cites a statute permitting a man who unknowingly buys a slave with physical disabilities to return him, a law invalidating wills made under the influence of old age, insanity, or coercion, a statute prohibiting telling lies in the agora, and a law stating that children are only legitimate if the marriage was lawful. HYPERIDES, *supra* note 63, at 3.15-16 [Hyp. 3.15-18].

121. *See* TODD, *supra* note 10, at 59-60 (noting the persuasive but nonbinding nature of statutory law in Athens).

122. Although Diocles was not a litigant in this suit, the speaker presents him as his true opponent

he details his past plots to defraud, deprive of citizen rights, and even murder various family members, and in a surprising crescendo, he ends his speech with a deposition attesting that Diocles was caught as an adulterer.[123]

In modern legal systems, one of the primary functions of law is to provide a means to focus a dispute on one or a few aspects of disagreement recognized by the relevant law. As White notes, law "compel[s] those who disagree about one thing to speak a language that expresses their actual or pretended agreement about everything else."[124] In Athens, law served no such purpose; the legal charge provided a means to get a dispute before a jury and served as an important source for litigants' arguments, but did not serve to narrow the range of information and argument that was considered relevant to the jury's decision.

E. The jury's evaluation of extra-legal and legal argumentation

We have seen that both extra-legal and legal argumentation were considered relevant in the popular courts. Although modern accounts of the Athenian legal system tend to emphasize one or the other of these types of material, neither is dominant in the surviving sources, and most orations include a mixture of contextual and legal argumentation.[125] Isaeus' *On the Estate of Ciron* (discussed above) illustrates the balance of legal and extra-legal argumentation found in many popular court speeches. The speaker devotes roughly the same amount of effort to explaining that the law favors descendants over collaterals as he does to arguing that his opponent Diocles does not deserve to enjoy the fruits of the estate.[126]

How did an Athenian jury go about evaluating the mass of information and argument, both contextual and legal, presented in a popular court case? Athenian juries offered no reasons for their verdicts, and we rarely know the outcome of the cases for which speeches are preserved. One clue is an enigmatic and controversial phrase in the oath which was sworn each year by the panel of potential jurors. According to the standard reconstruction, the oath stated in part: "I shall vote according to the laws

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in the dispute.

123. ISAEUS, *supra* note 37, at 125-28 [Is. 8.36-44].

124. WHITE, *supra* note 69, at 179.

125. There is some variation in the distribution of contextual and legal material in various types of speech. Most notably, defendants focus more on extra-legal information and argumentation than prosecutors, who tend to rely more heavily on the law in constructing their arguments. *See* JOHNSTONE, *supra* note 10, at 49-60. Of course, Athenian prosecutors did regularly use contextual information. *E.g.*, DEMOSTHENES, *supra* note 78, at 23-33 [Dem. 54]; DINARCHUS, *supra* note 103, at 11-72 [Din. 1; 2; 3]; LYSIAS, *supra* note 8, at 38-46 [Lys. 14]. Both ancient and modern writers have also noted that extra-legal argumentation was particularly prevalent in inheritance disputes. ARISTOTLE, PROBLEMS 139 (W.S. Hett ed., Harvard Univ. Press 1937) [Ar. *Pr.* 29.3]; *see also* COHEN, *supra* note 10, at 163-81.

126. The speaker also includes a brief discussion of the effects an adverse verdict would have on him. ISAEUS, *supra* note 37, at 128 [Is. 8.43-45].

and decrees of the Athenian people and the Council of the Five Hundred, but concerning things about which there are no laws, I shall decide to the best of my judgment, neither with favor nor enmity."[127] Although some scholars have viewed the jurors' oath as evidence that the jury was limited to strictly applying the laws in all but the unusual case where there was no controlling statute, others have argued convincingly that the jurors' "best judgment" (*dikaiotate gnome*) necessarily played a much greater role in legal verdicts, noting particularly the broad discretion given to juries to interpret and apply laws that were often vague and ambiguous.[128]

We cannot know for certain how the average Athenian juror conceived of his task, but surviving speeches suggest that even the relative importance of legal and contextual evidence in any individual case was open to dispute. Some speakers attempt to focus the jury's attention on their legal arguments by reminding them of their oath to vote according to the laws,[129] or by arguing that the jury should not be affected by the social standing of the litigants.[130] We have seen that others insist on the relevance of contextual information, such as the defendant's behavior throughout his life[131] and the parties' conduct in the course of the litigation.[132] As has often been pointed out, the treatment of legal and extra-legal arguments was not, however, entirely symmetrical. Lawcourt speakers do not explicitly urge jurors to ignore the law in favor of fairness and other extra-legal considerations; rather, they typically argue that both law and justice support their claim.[133] This is hardly surprising. The general notion of the supremacy of law was central to Athenian democratic ideology, which held that adherence to law was one of the distinctions, perhaps the most important, that separated democracy from tyranny.[134] To suggest explicitly that the law was in some way inadequate would, at worst, raise suspicion of antidemocratic sentiment, and, at best, result in a serious self-inflicted wound. Even though litigants do not urge the jurors to disregard the law, the explicit insistence on the relevance and importance of extra-legal argumentation in many of our speeches suggests

127. SCAFURO, *supra* note 10, at 50; *see also* JOHNSTONE, *supra* note 10, at 41 & nn.101-103 (discussing the reconstruction of the oath); Biscardi, *supra* note 79, at 222 n.20 (same).

128. *See, e.g.*, SCAFURO, *supra* note 10, at 50-51 (providing a recent account of the scholarly controversy over the meaning of the *dikastic* oath).

129. *See, e.g.*, JOHNSTONE, *supra* note 10, at 35-42 (discussing litigants' references to the *dikastic* oath in Athenian court speeches).

130. 3 DEMOSTHENES, *supra* note 8, at 71 [Dem. 52.1-2]; 3 ISOCRATES, *supra* note 65, at 176, 203 [Isoc. 18.34-35; 20.19].

131. *See supra* Section III.B.

132. *See supra* Section III.A.

133. *See, e.g.*, CHRIST, *supra* note 10, at 195; Carey, *supra* note 76, at 41.

134. Aeschines' remark is typical: "It is agreed that there are three types of government among all men: tyranny, oligarchy, and democracy. Tyrannies and oligarchies are run according to the character of their leaders, while democratic cities according to the established laws." AESCHINES, *supra* note 46, at 2-3 [Aesch. 1.4].

that it was accepted that extra-legal arguments could take precedence over the dictates of the written law.

Even when the litigants in a particular case did not explicitly argue about the relative importance of legal and contextual evidence, they could make very different choices about what types of evidence to include and emphasize in their speeches. The dispute over the honorary crown awarded to Demosthenes, one of the few cases in which the speeches of both speakers survive, illustrates the lack of consensus on the relative importance of legal and extra-legal argumentation. Aeschines, who failed to win even one-fifth of the jurors' votes, opens his speech with a long discussion of the relevant laws,[135] while Demosthenes responds to these legal arguments in a mere nine sections, and does so an inconspicuous part of his speech.[136] Such a situation, in which the jurors are presented with two contrasting views of "the case," each of which employs a radically different balance between legal and extra-legal argumentation, suggests that neither form of argumentation was considered decisive or even superior to the other.

In sum, there was no authoritative rule of decision in Athenian popular courts; the jury panel was typically presented with a highly particularized and contextualized account of the facts and law relating to a dispute, and left to its own devices to arrive at a just resolution to the individual case. However, the Athenians did not employ this flexible approach to justice in all legal contexts. In the remainder of this article, I describe the special procedures used for homicide and maritime cases and attempt to explain these variations.

IV. THE HOMICIDE COURTS

The scholarly debate over Athenian notions of law and the role of the courts in Athenian society has so far focused on speeches delivered in the popular courts.[137] As we have seen, in the popular courts the laws were largely undefined, and the litigants observed no rule of relevance. But there were also special homicide courts—highly respected, seldom used, and largely omitted from modern discussions of lawcourts' aims. These courts—which almost certainly developed earlier than the popular courts—reportedly employed a rule prohibiting statements "outside the issue." Additionally, they applied laws that exhibited greater legal

135. *Id.* at 189-211 [Aesch. 3.8-48].

136. DEMOSTHENES, ON THE CROWN 59-61 (Harvey Yunis ed., Cambridge Univ. Press 2001) [Dem. 18.111-120]. For discussion of which orator had the better legal case, compare William Gwatkin, *Legal Argument in Aeschines' Against Ktesiphon and Demosthenes' On the Crown*, 26 HESPERIA 129 (1957) with Harris, *supra* note 16, at 141.

137. *See supra* note 17; *see also supra* notes 11-16 and accompanying text (describing the current debate over the nature of litigation in Athens).

definition and substantive content than those used in the popular courts. The unusual procedures of the homicide courts made these courts (at least in theory) far more congenial than popular courts to arguments directly related to the charge, and less receptive to extra-legal argumentation. Largely for this reason, the Areopagus (the most prominent of the homicide courts) was widely praised as Athens' finest court.

The formalism of the homicide courts arose for historical reasons largely unrelated to conventional rule-of-law justifications. Once in place, however, these courts served as an example of a more uniform, certain, and predictable approach, in contrast to which the Athenians defined and debated the flexible and discretionary system of the popular courts. The distinctive features of the homicide courts reveal that the Athenians could conceive of—and, to a lesser extent, put into practice—a system that encouraged the regular application of abstract rules without regard for the broader social context of the dispute. Yet they rejected this model in favor of a more discretionary approach in their popular courts. This decision reflects both a normative belief in the importance of contextual information in reaching a just decision and a desire to give juries unfettered discretion in the new democracy. Nevertheless, the homicide courts remained more highly esteemed. The idealization of the homicide courts, and particularly the relevancy rule, reveals a deep tension at the heart of the Athenian legal system.

A. Relevance in the homicide courts

We have seen that Athenian laws typically do not define the elements of offense, and that in the popular courts the charge under which the case was brought was not considered the authoritative guide to the verdict.[138] The homicide statutes are unusual in that they include significant substantive content. The lawful homicide statute, for example, lists specific situations in which homicide is not punishable, such as self-defense in a robbery, accidentally killing a comrade in war or a fellow athlete during an athletic competition, or killing an adulterer caught in the act.[139] There was no general provision exempting just or morally defensible killings from punishment, and it appears that defendants pleading lawful homicide were obliged to argue that their case was covered by an existing statute.[140]

Homicide and wounding[141]—both charges within the purview of the

138. *See supra* notes 113, 121-23 and accompanying text.

139. DEMOSTHENES, *supra* note 99, at 23.53 [Dem. 23.53]. This list is not exclusive; there were other laws that provided for further types of lawful homicide, but in each case the law describes the specific form of killing that is permitted. *See, e.g., id.* at 23.28, 60; 24.113 [Dem. 23. 28, 60; 24.113].

140. *See* CARAWAN, *supra* note 10, at 282 n.1.

141. The definition of wounding (*trauma*) is unclear, but is certainly more narrow than the modern notion of assault, which was regularly tried in the popular courts under the charge of *aikeia*

special homicide courts—are the only cases in which the Athenians distinguished between different mental states of the offender. A prosecutor could not bring multiple charges. He had to choose whether to prosecute the defendant for intentional homicide, a capital charge, or unintentional homicide, which was punishable by exile. If the prosecutor in an intentional homicide or wounding case failed to prove intent (*pronoia*), the defendant was to be acquitted.[142] One would expect that the requirement that the prosecutor prove intent to gain a conviction would have focused the litigants' arguments on the mental state of the offender and discouraged the sort of loose approach to the legal charge found in popular court speeches. Indeed, in the three surviving cases involving intentional homicide or wounding, speakers are markedly more focused on discussing the elements of the charge at issue, particularly the presence or absence of intent, than are popular court speakers.[143]

The most striking difference between the popular and homicide courts is that the homicide courts had a rule limiting the use of irrelevant statements.[144] None of our sources gives an exhaustive list of items which were considered "outside the issue" (*exo tou pragmatos*), but the context of Lysias 3, Lycurgus 1, and Antiphon 5 makes it clear that character evidence was forbidden. Two post-classical, and therefore less reliable, sources add that litigants were not permitted to include a *proem* or emotional appeal in their speeches.[145] However, speakers in homicide court cases do not shy away from appeals to pity, and it is difficult to say whether such appeals were in fact considered relevant in the homicide courts, or whether this stricture was simply not as carefully observed in practice as the limitation on character evidence.

We do not know for certain how, or how strictly, the relevancy rule was

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("assault"). It has been suggested, for example, that wounding was limited to assault with intent to kill, a sort of attempted homicide charge, or that it was akin to assault with a deadly weapon. *See* D.D. Phillips, Homicide, Wounding, and Battery in the Fourth Century Attic Orators 177 (2000) (unpublished Ph.D. dissertation, University of Michigan) (on file with the University of Michigan library).

142. ARISTOTLE, MAGNA MORALIA (G. Cyril Armstrong ed., Harvard Univ. Press 1975) [Ar. *Mag. Mor.* 1188b30-38]. *See generally* DOUGLAS M. MACDOWELL, ATHENIAN HOMICIDE LAW IN THE AGE OF THE ORATORS 39-48 (1963) (discussing the procedures in the Areopagus, the court that heard intentional homicide and wounding cases).

143. The speaker in Lysias 3 devotes nearly his entire proof section to the absence of the required element of *pronoia*. *See* LYSIAS, *supra* note 8, at 29-31 [Lys. 3.28-42]. The speaker in Lysias 4 similarly repeatedly emphasizes the absence of *pronoia* and twice refers to this as the crux of the case. *See* LYSIAS, *supra* note 37, at 101-02 [Lys. 4.6, 12, 18]. The prosecutor in Antiphon 1 states at the outset that he will prove that the defendant murdered his father intentionally and with premeditation, and emphatically repeats that the murder was intentional. *See* ANTIPHON, *supra* note 8, at 39, 43-44 [Ant. 1.3, 22, 25, 26, 27].

144. ANTIPHON, *supra* note 8, at 71, 92 [Ant. 5.11; 6.9]; LYCURGUS, *supra* note 61, at 36-37 [Lyc. 1.11-13]; LYSIAS, *supra* note 8, at 32 [Lys. 3.46]; POLLUX, ONOMASTICON 359 (Immanuel Bekker ed., Berolini, Friderici Nicolai 1846) [Poll. 8.117].

145. LUCIAN, OPERA 245-6 (M.D. MacLeod ed., Oxford Univ. Press 1974) [Lucian *Anach.* 19]; POLLUX, *supra* note 144 [Poll. 8.117].

enforced, but a post-classical source states that the herald would squelch litigants who strayed from the subject.[146] Regardless of whether a formal mechanism for enforcing the relevancy rule existed or whether those judging cases in the homicide courts would simply make their displeasure known to a litigant who strayed from the point, our sources reveal that it was widely believed that extra-legal material had no place in the court of the Areopagus and, by association, the other homicide courts.[147] Several passages praise the Areopagus for basing their decisions on the narrow factual and legal issues in the case and ignoring extra-legal considerations, particularly evidence relating to the character and social standing of the litigants.[148] One speaker in a popular court case, for example, bemoans the tendency of popular court speakers to "make accusations and slanders about all things except the subject matter of the vote on which you are about to cast," and urges the jurors to adopt the more narrow approach of the Areopagus:

> And you are the cause of this state of affairs, gentlemen, for you have given this authority to those who come before you here, even though you have in the Areopagus court the most noble example of the Greeks. . . . Looking to [the Areopagus] you should not allow them to speak outside the issue.[149]

Another states that if he had been prosecuted in a homicide court, the prosecutor would be limited to arguing only that he was guilty of the specific crime in the charge, "with the result that, if I had done many bad acts, I would not be convicted for any reason other than the charge itself, and, had I done many good deeds, I would not be saved because of this good conduct."[150] In the opening of the *Rhetoric*, Aristotle suggests that the Areopagus' relevancy rule places the discussion in that court outside the realm of rhetoric and states that if all trials observed this rule there would be nothing left for a rhetorician to say.[151] A statement by the post-

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146. LUCIAN, *supra* note 145 [Lucian *Anach.* 19]. Plato suggests a similar mechanism in his ideal legal system presented in the *Laws*. *See* PLATO, LAWS (John Burnet ed., Oxford Univ. Press 1962) [Pl., *Leg.* 948a8].

147. There are very few lone references to the other, less prominent, homicide courts, though our sources tend to treat these courts as a group. *See, e.g.*, DEMOSTHENES, *supra* note 99, at 23.73-74 [Dem. 23.73-4]. The Areopagus apparently came to serve *pars pro toto* as a symbol of the homicide courts as a whole.

148. *E.g.*, AESCHINES, *supra* note 46, at 47 [Aesch. 1.92]; ANTIPHON, *supra* note 8, at 71, 91 [Ant. 5.11; 6.6]; LYCURGUS, *supra* note 61, at 72 [Lyc. 1.113]. For general praise of the Areopagus as a court, see ANTIPHON, *supra* note 8, at 103 [Ant. 6.51]; DEMOSTHENES, *supra* note 99, at 23.65-66 [Dem. 23.65-6]; LYSIAS, *supra* note 37, at 104 [Lys. 6.14]; and XENOPHON, MEMORABILIA 3.5.20 (E.C. Marchant ed., Oxford Univ. Press 1971) [Xen. Mem. 3.5.20]. One speaker even makes the incredible claim that "even those who have been convicted [in the Areopagus] agree that the verdict is just." LYCURGUS, *supra* note 61, at 37 [Lyc. 1.12].

149. LYCURGUS, *supra* note 61, at 36-37 [Lyc. 1.11-13].

150. ANTIPHON, *supra* note 8, at 71 [Ant. 5.11].

151. *See* ARISTOTLE, ARS RHETORICA 1 (W.D. Ross ed., Oxford Univ. Press 1959) [Ar. Rhet. 1354a].

classical writer Lucian, though not likely to be literally true, suggests a strong and remarkably persistent belief that in the Areopagus the laws were regularly and impartially applied without reference to the social context of the dispute or even to the identity of the litigants: he states that the Areopagus judged at night in the dark "in order that it would not pay attention to the man who is speaking, but only to what is said."[152]

Although in practice the differences in the mode of argumentation in popular and homicide cases are not nearly as sharp as the Areopagus' reputation would suggest, speakers in the surviving homicide court speeches are more skittish about offering evidence of their good character or slandering their opponents than are popular court speakers. Although references to character evidence occur frequently in the popular courts, litigants in our surviving six homicide speeches employ this strategy in only three passages.[153] In two of the three instances, the speaker does not mention character without citing the relevancy rule and immediately checking himself, not unlike the modern trial lawyer who deliberately refers to inadmissible evidence in the hope that it will have an effect on the jurors despite the inevitable admonition from the bench that they disregard it. The speaker's unease is clear in Lysias 3, where he squeezes in a quick attack on his opponent's conduct as a soldier but stops short with a *praeteritio*. He begins by stating,

> I wish I were permitted to prove to you the baseness of this man with evidence of other things [i.e., acts or events outside the charge] . . . . I will exclude all the other evidence, but I will mention one thing which I think it is fitting that you hear about, and that will be a proof of this man's rashness and boldness.

After briefly recounting how he assaulted his military commander and was the only Athenian publicly censured for insubordination by the generals, he stops himself: "I could say many other things about this man, but since it is not lawful to speak outside the issue before your court. . . ."[154] Although our sources overstate the differences between the rules and procedures of the homicide and popular courts and exaggerate the effects of these differences, it seems that speakers would make significant

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152. LUCIAN, *supra* note 145, at 67-68 [Lucian, *Hermot.* 64.13].

153. LYSIAS, *supra* note 8, at 31-32, 36, 38 [Lys. 3.44-46; 7.31, 41]. In a survey of our entire corpus of court speeches, Johnstone has shown that defendants were much more likely than prosecutors to cite their liturgies and discuss issues of character. JOHNSTONE, *supra* note 10, at 93-100. The small number of references to character in the homicide courts becomes even more significant when we consider that all but one of our surviving homicide speeches were delivered by defendants. The unusual approach to relevance in the homicide courts can also be seen by comparing homicide speeches with two homicide cases brought in the popular courts through a special procedure known as *apagoge* (Antiphon 5 and Lysias 13). The speakers in these two cases make extensive use of extra-legal material, particularly character evidence.

154. LYSIAS, *supra* note 8, at 31-32 [Lys. 3.44-46]. *Id.* at 38 [Lys. 7.41] includes a similar formulation.

alterations in their arguments when appearing before a homicide court.

B. Explaining the differences between the homicide and popular courts

By the classical period the homicide courts were considered—and, to a lesser extent, were—distinctive in their approach to relevance and legal argumentation. When, how, and why did this process of differentiation occur? Or, stated differently, what is it about homicide that explains its unusual treatment? In my view, it is the peculiar development of homicide law in the archaic period, *not* a sense that homicide was more serious or in some way different from other charges, that accounts for the unusual character of the homicide courts in the classical period. Although the early history of the homicide courts is murky, the more formal, legal approach of these courts appears to reflect the concerns of a state just beginning to assert control over private violence in the seventh or early sixth century B.C. The popular court system as we know it in the classical period was introduced about a century later, as part of the creation of the democracy. In constructing the new popular court system, the Athenians consciously declined to adopt the strict approach of the existing homicide courts but permitted these courts to continue to decide cases involving homicide in the traditional manner.

Classical sources state that the unusual homicide procedures are ancient in origin and have remained unchanged since the time of Draco (620 B.C.).[155] The relevancy rule of the homicide courts, which seems so "advanced" in comparison to the free-for-all approach to relevance in the popular courts, likely developed well before the creation of the popular courts and grew out of an urgent need to foster obedience to and respect for verdicts in a fledgling legal system that was just beginning to assert control over the private use of violence. The traditional response to homicide in pre-Draconian Athens was retaliatory murder carried out by the victim's family unless the family agreed to accept a blood price.[156] Draco's law sets limits on the family's power over a homicide: unintentional killers are to be permitted to flee the city unharmed; at least one type of justifiable homicide is proclaimed to be *nepoinei* (without penalty); and although the family retains the final decision on whether to accept compensation from an unintentional homicide to permit the killer to remain in the city, a finding that a killing was unintentional likely put pressure on the family to do so.[157] The process of convincing the relatives

155. *See, e.g.*, ANTIPHON, *supra* note 8, at 71, 90-91 [Ant. 5.14; 6.2]. The distinction between intentional and unintentional homicide is present already in Draco's homicide law of 621/0 B.C. A passage in Lucian describes the operation of the relevancy rule in the time of Solon (circa 590 B.C.), but this source is too far removed to offer secure evidence.

156. MICHAEL GAGARIN, EARLY GREEK LAW 5-18 (1986).

157. *See* MICHAEL GAGARIN, DRAKON AND EARLY ATHENIAN HOMICIDE LAW 30-65 (1981) (discussing the provisions of Draco's law).

of a man who had been killed to relinquish the traditional right of immediate retaliation and to abide by the findings of the homicide judges must have been a slow and difficult one.

A relevancy rule may have been thought to assist in this process in two ways. First, by limiting the judges' discretion and discouraging evidence about the litigants' social background, the relevancy rule may have fostered a belief in the impartiality of the judges and thereby encouraged families to appeal to and abide by the results of the official homicide procedures. Second, by forcing families to cast their arguments in terms of the narrow question of the individual homicide, the rule would promote the view that a homicide was an isolated event to be resolved rather than simply one part of an ongoing and escalating cycle of violence that reached beyond the individual killer and victim to encompass their families, as well.

It was only after the homicide courts had been operating for about a century that a popular court system resembling the classical courts in structure and function was most likely introduced as part of the creation and development of the democracy.[158] Thus, the legalism of the homicide courts was available as a potential model at the inception of the popular courts, but was rejected in favor of a more flexible approach. The chronological priority of the homicide court procedures therefore belies an evolutionary account of the development of law and legal thinking in Athens.

Thus, the legalism of the homicide courts grew out of the fledgling state's attempts to curb the violence and social disruption associated with this unique crime. Once the distinction between the two types of lawcourt was established, however, it seems likely that it was inertia and the tradition of legalism in the homicide courts, rather than a sense that homicide by its nature required different treatment, that led to the decision to maintain the homicide courts as islands of formalism in a sea of highly informal popular court cases. Factors such as the seriousness of the offense and a concern over pollution may also have played a role in the continued existence of the homicide courts' strict approach, but our evidence suggests that these characteristics of homicide were less important in the classical period than one might expect. It is not clear, for example, that the Athenians shared the modern view of homicide as the

158. We know very little of the early history of the popular courts, which may have been introduced anytime between the time of Solon (ca. 590 B.C.—i.e., prior to the democracy) and the legal reorganization of Ephialtes in the mid-fifth century. *See, e.g.*, Mogens Herman Hansen, *The Archaic Heliaia from Solon to Aristotle*, 33 CLASSICA ET MEDIAEVALIA 9, 9-20 (1981-2) (reviewing the evidence for the early *heliaia* and offering a new proposal). My own view is that a popular court system resembling that of the classical period, with selection of jurors by lot and a clear differentiation between the Assembly and the court, was most likely introduced sometime between the political reorganization of Cleisthenes in 508/7 B.C. and the reforms of Ephialtes and Pericles in the 460s and 450s B.C.

most serious possible crime. Homicide was a private rather than a public matter; it was only one of many crimes that could result in the death penalty; and, indeed, a man accused of intentional homicide could avoid death by voluntarily going into exile after the first of his two defense speeches. In addition, recent scholarship suggests that the relative importance of pollution in the treatment of homicide has been exaggerated, and that by the fourth century, concern over pollution in relation to homicide was in steep decline.[159] The view that the differentiation of the homicide and popular courts was not primarily linked to the nature of the crime of homicide is supported by the introduction near the end of the fifth century of an alternative procedure called *apagoge* for dealing with at least some types of homicide through the popular court system.[160] Further, we have seen that the praise of the homicide court procedures was not limited to their ability to resolve homicide cases alone.[161] Athenian attitudes toward relevance cannot be explained simply by a clear preference for different modes of decisionmaking when judging different types of offense.

C. The homicide courts and Athenian notions of law

The homicide courts' special procedures can tell us something about the Athenian conception of law and the aims of its popular courts. The existence of a rule forbidding irrelevant statements demonstrates that the Athenians were capable of imagining a legal process that entails the regular application of abstract principles to particular cases. There was a notion that at least in the homicide courts, judicial decisions were to be based on the narrow legal and factual issues of the case, detached from their social context and without regard for the social standing of the litigants.

The antiquity and conservatism of the homicide courts invested them with great prestige, even apart from any perception of the merits of their mode of decisionmaking. The fact that the Athenians did not introduce similar constraining procedural and evidentiary rules in the popular courts despite these older examples seems to indicate a conscious reluctance to embrace that mode of stricter legal argumentation. No ancient source discusses the motives behind the decision not to emulate the special procedures and apparent rigor of the homicide courts, most notably the relevancy rule, in the popular courts. It seems likely that this decision stems from countervailing values in Athenian political culture: namely,

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159. *See* CARAWAN, *supra* note 10, at 17-19; GAGARIN, *supra* note 157, at 164-67; MACDOWELL, *supra* note 142, at 144-46; ROBERT PARKER, MIASMA 104-43 (1983); I. Arnaoutoglou, *Pollution in Athenian Homicide Law*, 40 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ 109 (1993).

160. *See infra* note 164 and accompanying text.

161. *See supra* note 148 and accompanying text.

the widespread participation of ordinary men, and the broad discretion extended to juries to temper strict legality with equity. The broad view of relevance that is evident in the popular courts reflected not only a normative judgment about the value of contextualized justice but also a commitment to popular decisionmaking in the new democracy. It is one thing to hold that a wide range of extra-legal information and argumentation, such as the prior relationship and interaction of the parties and the effect an adverse verdict would have on a particular defendant, is potentially relevant to the resolution of a legal dispute. It is quite another to unleash a popular jury to determine, without being provided with any rule of decision, what types of legal and extra-legal information and argumentation should be credited in reaching a just decision in a particular case. Support for an open-ended system of relevance like that used in the popular courts cannot be separated from the critical question of who decides what is most relevant in a specific case. The discretionary approach of the popular courts was thus intimately linked to the creation of a participatory democracy in which, in Aristotle's words, the *demos* was *kurios* (supreme) in all things, including the popular courts.[162]

Why did the homicide courts not adopt the more lax procedures of the popular courts in the classical period? The sheer force of conservatism and a reluctance to alter the traditional procedures of the Areopagus must have played some role. It is possible that the fact that the homicide courts did take into account the most important type of contextual information relating to a homicide—the intent of the offender—made it seem less necessary to reform the homicide procedures. The most important factor may have been the rarity of traditional homicide procedures. Homicide appears to have been unusual in Athens.[163] The frequency of traditional homicide trials may have further declined in the fourth century because *apagoge*, an alternate procedure for bringing at least some types of homicide in the popular courts, was introduced near the end of the fifth century.[164] Although the homicide courts continued to hear cases throughout the classical period, the existence of this alternate homicide procedure, as well as the overall infrequency of homicide trials, may have weakened any inclination to change the traditional homicide procedures.

Even if the Areopagus and other homicide courts rarely heard cases in the classical period, the Areopagus remained prominent in the Athenian

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162. ARISTOTLE, *supra* note 38, at 36-37 [*Ath.Pol.* 41.2].

163. Our sources mention only fifteen cases of homicide between 507 and 322 B.C. *See* Gabriel Herman, *How Violent Was Athenian Society?*, *in* RITUAL, FINANCE, POLITICS 101, *supra* note 23.

164. The dating and types of *apagoge* used in homicide cases have been the subject of scholarly dispute for some time. *See, e.g.*, CARAWAN, *supra* note 10, at 164-67; Michael Gagarin, *The Prosecution of Homicide in Athens*, 20 GREEK, ROMAN, & BYZANTINE STUD. 301 (1979); Mogens Herman Hansen, *The Prosecution of Homicide in Athens: A Reply*, 22 GREEK, ROMAN, & BYZANTINE STUD 11 (1981); Eleni Volonaki, *"Apagoge" in Homicide Cases*, 3 DIKE 147 (2000).

legal imagination, serving as a notional antithesis to the contextualized approach of the popular courts. Indeed, if the homicide courts rarely sat in judgment, that probably only enhanced their reputation by promoting an idealized view of their operation undiminished by frequent or apparent departures from the ideal.[165] The idealization of the Areopagus and other homicide tribunals in the classical period may reflect Athenian anxieties about the decisionmaking process of its mass juries. We have seen that the praise of the Areopagus and the homicide courts was particularly focused on the judges' tendency to ignore the social standing and character of the litigants.[166] The use of character evidence in the popular courts was controversial, and praise of the Areopagus may reflect a widespread unease about the potential for misuse of this type of information, especially at the hands of a popular court jury.[167]

The Athenians were aware of, and uneasy about, the aspects of their legal system that discouraged strict legal argument divorced from the social context of the dispute. Theirs was a conscious choice to favor contextualized justice and broad jury discretion over the more formal, legal approach represented by the homicide courts. Nevertheless, there appears to have been a decided ambivalence about the decision not to follow the homicide courts' paradigm in the popular courts.

V. MARITIME CASES

As a result of Athens' defeat by Sparta in the Peloponnesian War in 404 B.C., Athens lost its fleet, the benefits of imperial tribute, and its status as the dominant commercial center of Greece. By the middle of the fourth century the city was near bankruptcy and in desperate need of insuring an adequate grain supply for its citizens.[168] It was in this context that the Athenians created a special procedure for maritime suits, the *dike emporike*.[169] *Dikai emporikai* were most likely heard in the ordinary popular courts, but were exceptional in three important respects: (1) foreigners, resident aliens (*metics*), and perhaps even slaves were given standing in these suits equal to Athenian citizens; (2) only disputes

165. On praise for the Areopagus' method of decisionmaking, see *supra* notes 148-52 and accompanying text.

166. *See id.*

167. Indeed, we have seen that litigants in the popular courts who use character evidence are careful to explain how this contextual information is relevant to reaching a just result rather than merely serving as an instrument to whip up prejudice and unprincipled emotion among the jurors. *See supra* Section III.C.

168. *See, e.g.*, SIGNE ISAGER & MOGENS HERMAN HANSEN, ASPECTS OF ATHENIAN SOCIETY IN THE FOURTH CENTURY 11-84 (1975) (providing an overview of Athenian foreign trade and economy in the early fourth century); CLAUDE MOSSÉ, ATHENS IN DECLINE, 404-86 B.C. 12-17, 32-49 (1973) (same); BARRY S. STRAUSS, ATHENS AFTER THE PELOPONNESIAN WAR 42-70 (1986) (same).

169. *Dike emporike* (pl. *dikai emporikai*) refers to both the special maritime procedure and to a maritime case brought under this procedure.

concerning written contracts could be heard through this procedure; and (3) the use of special rules providing for expedited procedures and strong measures to insure compliance with judgments.[170] Although no ancient source explicitly discusses the motivation behind the creation of the *dike emporike*, it is generally thought that these special procedures were designed to stimulate the city's flagging economy by encouraging foreign merchants to come to Athens.

In this Part, I argue that maritime suits, like Athenian homicide cases, exhibit a distinctive notion of relevance.[171] Speeches in *dikai emporikai* appear to be more focused on the terms of the written contract and less likely to appeal to extra-legal argumentation than ordinary popular court speeches. These differences stem from a need to facilitate trade and attract non-Athenian merchants by offering a predictable procedure that focused on the enforcement of contracts as written. In this special context, the contexualized approach of the popular courts became a liability rather than an asset.

A. Relevance in maritime suits

A written contract requirement such as that used in the maritime procedure was unprecedented in Athens; in ordinary popular court speeches, oral contracts and wills are commonly used even for complex arrangements.[172] It has been shown that even where written contracts were used, they seem primarily to have supplemented the speaker's witness evidence rather than to have served as decisive proof.[173]

One would expect that the special requirement of written proof in maritime cases would focus the dispute on the terms of the written agreement. Our surviving maritime cases bear out this prediction: one of the most distinctive features of these speeches is the importance of the contract terms to the speakers' arguments.[174] In the three maritime cases in which the speaker is not challenging the existence of a contract, the written contract is recited in full within the first ten sections of the speech.[175] Of the 113 references to written contracts in the entire

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170. There is some evidence that *dikai emporikai* were heard in separate courts before specialist judges, but most scholars reject this hypothesis. *Compare* COHEN, *supra* note 55, at 93-95 *with* TODD, *supra* note 10, at 336. For detailed discussion of the unusual features of the *dikai emporikai*, see COHEN, *supra* note 10; TODD, *supra* note 10, at 333-36; and Louis Gernet, *Sur les actions commerciales en droit athénien*, 51 REG 1 (1938).

171. As in the case of the homicide courts, space permits only a partial summary of the evidence for the differences in argumentation in maritime and ordinary popular court suits.

172. *See, e.g.*, 2 DEMOSTHENES, *supra* note 8, at 51-70 [Dem. 41].

173. *See* THOMAS *supra* note 40, at 40-45.

174. *See* CHRIST, *supra* note 10, at 220-21; DEMOSTHENES, *supra* note 78, at 200n.50 (1985).

175. 1 DEMOSTHENES, *supra* note 8, at 155, 183 [Dem. 34.7; 35.10]; DEMOSTHENES, *supra* note 78, at 57 [Dem. 56.6].

Demosthenic corpus, 100 occur in these three speeches alone.[176] Demosthenes' *Against Lacritus* is most striking in this regard: the speaker discusses the contract in painstaking detail, "addressing in turn each of the provisions of the written contract,"[177] and then has the entire agreement read out a second time.[178] The contract in Demothenes 56, *Against Dionysidorus*, did not address the precise issue in dispute. The contract provided that the lender bear the loss if the ship was lost at sea, and that the borrowers pay a penalty if they did not return with their cargo to Athens, but made no provision for another contingency rather than total loss of the ship, damage severe enough to preclude the return of the ship and require that her cargo therefore be sold outside Athens. This is what the defendant claimed to have happened, if we can trust the prosecution's account.[179] Although the contract is silent on the crucial question of the rights of the parties in this contingency, the speaker quotes from the written contract four times and repeatedly refers the jurors to the terms of the agreement as the proper guide to their decision.[180] It is not only speakers who are pressing their contractual claims who emphasize that the terms of the written contract are decisive in maritime suits. The speaker in Demosthenes 33, the defendant in the original contract action, refers to a written contract as "the exact agreement,"[181] and states that contract disputes are to be resolved by reference to the written document.[182]

In stark contrast to the importance of the contractual terms in maritime suits, speakers in other suits involving written contracts or wills rarely dwell on the specifics of the legal instrument or suggest that the jurors should look only within the four corners of the contract. Instead, speakers in non-maritime cases appeal to general notions of fair dealing and argue that one or other of the parties has a superior moral claim to the money or property at issue.

Demosthenes 48, *Against Olympiodorus*, illustrates the diminished importance of the written instrument in non-maritime contract cases.[183]

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176. *See* DEMOSTHENES, *supra* note 78, at 200 n.50.

177. 1 DEMOSTHENES, *supra* note 8, at 186 [Dem. 35.17].

178. *Id.* at 192 [Dem. 35.37].

179. DEMOSTHENES, *supra* note 78, at 64 [Dem. 56.37].

180. *Id.* at 57, 64 [Dem. 56.6, 36, 38].

181. 1 DEMOSTHENES, *supra* note 8, at 145 [Dem. 33. 36].

182. The speaker says:

> All men, whenever they make contracts with one another, after sealing the agreement they deposit it with those whom they trust, for this reason, that if they disagree about something, it would be possible for them to go to the written contract and from this obtain the means of resolving their disagreement.

Id.

183. Hyperides' *Against Athenogenes* is another notable example. In that case, which involved the purchase of a slave boy, the speaker alleges that his opponent misrepresented the extent of the slave's debt, and that the jury should therefore disregard the contract even though it clearly provided that the buyer was taking on all of the slave's liabilities. The speaker argues that the contract should be voided

The speaker is suing his partner in crime for breach of contract[184] for tricking him out of his share, and one would expect that the plaintiff would focus on the terms of the agreement in the absence of equitable sources of support for his claim. The speaker, Callistratus, and his brother-in-law, Olympiodorus, made a written contract to divide the estate belonging to Comon, a mutual relative, evenly between them and to exclude all other claimants. After the two managed to have the estate awarded to Olympiodorus by colluding in various misrepresentations to the court, Olympiodorus refused to give Callistratus half of the estate in accordance with their agreement. Predictably, Callistratus emphasizes that his opponent has breached their agreement. Callistratus does not rest his claim solely on the terms of the contract, however, but also includes a number of arguments rooted in fairness. He stresses that he offered Olympiodorus a fair settlement to avoid litigation but was rebuffed,[185] and he requests in the first instance not the enforcement of the contract as written but a compromise ruling.[186] He notes that he arranged for Comon's burial, a fact often cited by contestants in inheritance cases to show their personal connection to the deceased and right to a share of the estate.[187] Finally, Callistratus reports that Olympiodorus is unmarried and has been wasting all his money on his mistress, a former slave, while Callistratus has a wife and daughter to support.[188]

Thus, the speakers in non-maritime contract cases do not confine their arguments to the terms of the agreement or suggest, as speakers in *dikai emporikai* do, that the contract should be the sole guide to the jurors' decision.[189] The narrow focus on the written contract unique to maritime suits presumably would facilitate business deals by increasing the predictability of verdicts, but would also hamper the jury's ability to take into account a wide range of factors in reaching its decision.

One might expect that the presence of foreigners, metics, and perhaps even slaves in maritime litigation would lead to a plethora of arguments in which the litigant of more favored status exploits his superior social standing. With few exceptions, however, the social standing, character,

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as unjust, even though the Athenians appear to have had no written law voiding a contract that was unconscionable, fraudulent, or even illegal.

184. The suit was technically a *dike blabes*, "an action for damage." There appears to have been no distinctive procedure for a breach of contract action. *See* TODD, *supra* note 10, at 266.

185. 2 DEMOSTHENES, *supra* note 8, at 233 [Dem. 48.4].

186. *Id.* [Dem. 48.3].

187. *Id.* at 234 [Dem. 48.6].

188. *Id.* at 246-47 [Dem. 48.54-55].

189. Christ has pointed out a similar difference between cases involving banking transactions and the *dikai emporikai*: while litigants in banking suits present their cases in terms of a breach of *philia*, parties in maritime cases emphasize a breach of contract. *See* CHRIST, *supra* note 10, at 180-91. And, of course, we have seen that extra-legal argumentation played a central role in suits involving written wills. *See supra* notes 79-80 and accompanying text.

and public services of the litigants play no role in arguments in the maritime suits.[190] Indeed, in several cases we are unsure of the legal status of the individuals involved in the transaction. A narrowed sense of relevance is also suggested by the complete absence of appeals to the jurors' pity, which we have seen is a well-known *topos* in our non-maritime popular court cases. The only references to larger policy considerations in these speeches involve the importance of insuring Athens' grain supply and the necessity of enforcing contracts as written to facilitate trade.[191]

The distinctive mode of argumentation in maritime cases can be usefully compared to two non-maritime commercial cases that also date from sometime in the middle of the fourth century, Demosthenes 36 and 37. Although the subject matter of these two suits, the leasing arrangement of a banking business and a series of transactions involving mining property, is similar to that of maritime suits, these speeches reflect a much broader notion of relevance. Both speakers make extensive use of extra-legal arguments such as character evidence and appeals to pity.[192] Most striking is the use in these two speeches of witnesses to testify solely to the good character of the speaker or the villainy of his opponent.[193]

B. Why a different notion of relevance in maritime suits?

We have seen that speeches in *dikai emporikai* seem to be more focused on the contractual issue in dispute and less likely to appeal to evidence regarding the character and social standing of the litigants than similar non-maritime commercial cases, where a man's reputation for fair business practices and other issues beyond the specific terms of any written agreement, such as fairness and equity, become relevant to the jurors' decision. It seems likely that the specific aim of the *dike emporike*, which was to facilitate trade, especially trade in grain, by providing a predictable procedure and attracting foreign merchants, accounts for the distinctive mode of argumentation evinced in these suits. The formalism of the maritime procedures was most likely an accommodation to the specific needs of commercial suits, not an improvement on the popular

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190. The one notable exception is Demosthenes 35, in which the speaker, a citizen, reviles his opponents as Phaselites and sophists. However, even in this speech the bulk of the oration is devoted to a close reading of the contract, which is twice read out in full.

191. Although in a few cases speakers charge their opponents with having violated Athens' grain laws, they do not argue that the jurors should vote in their favor for this reason. This evidence is presented as part of an argument for insuring the grain supply and encouraging trade by strictly enforcing written contracts. 1 DEMOSTHENES, *supra* note 8, at 168, 197 [Dem. 34.51; 35.54]; DEMOSTHENES, *supra* note 78, at 66 [Dem. 56.48].

192. 1 DEMOSTHENES, *supra* note 8, at 204, 206-07 [Dem. 36.42, 45, 52, 55-57, 59]; DEMOSTHENES, *supra* note 78, at 44-45 [Dem. 37.48, 52, 54].

193. 1 DEMOSTHENES, *supra* note 8, at 206 [Dem. 36.55-56]; DEMOSTHENES, *supra* note 78, at 45 [Dem. 37.54].

court procedures; though the *dikai emporikai* have more in common with modern courts, the Athenians may have viewed the more formal, "legal" approach in maritime cases as affording a judicial process inferior to the contextualized format of the popular courts, or at least inappropriate to the issues raised in the popular courts.

Because of the policy of encouraging lending and facilitating trade by offering a predictable procedure that focused on the enforcement of contracts as written, the wide-ranging discretion wielded by juries in non-maritime suits became counter-productive in maritime cases.[194] A focus on the terms of the written contract reduced the uncertainty associated with the ad hoc approach taken in the Athenian popular courts and gave lenders and traders confidence that they would be able to enforce their contracts in court if necessary. The speaker in Demosthenes 56 makes precisely this argument in urging the jurors to strictly enforce the maritime contract in his suit:

> For if you think that contracts and agreements made between men should be binding, and you will show no forbearance toward those who break them, then those men who lend their own money will do so more readily and as a result your market will flourish. For who will want to risk his money, when he sees written contracts having no effect, and arguments of this sort [i.e., contrary to the terms of the agreement] winning the day, and the accusations of criminals being placed before justice?[195]

This reassurance may have been particularly important in encouraging lenders and traders to do business with men outside their close-knit community, including foreigners whose reputation might not be well-known, who might not be repeat players, and who might not be easily influenced by the informal norms of the marketplace.[196] It is natural that the participants in deals with strangers would be less trustful, and therefore more likely to want well-defined commitments spelled out in written contracts and enforced in a more formal procedure. Strict enforcement of contracts is an easy way to reduce legal uncertainty in a society without precise legal rules or legal experts because it does not involve the creation of a complex substantive law but rather permits the contracting parties to create their own law for each deal.

The narrower notion of relevance employed in *dikai emporikai* was also vital to attracting foreign merchants to Athens. Foreigners would be at a

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194. *See* 1 DEMOSTHENES, *supra* note 8, at 168, 197 [Dem. 34.51; 35.54]; DEMOSTHENES, *supra* note 78, at 66 [Dem. 56.48] (speakers' statements regarding the importance of encouraging lending and facilitating trade by strictly enforcing written agreements).

195. DEMOSTHENES, *supra* note 78, at 66-67 [Dem. 56.48].

196. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 40-123 (1991) (noting that close-knit communities can order their affairs effectively "without law," by reliance on trust and informal control over anti-social behavior).

distinct disadvantage in the ordinary Athenian popular courts, where they would be subject to judgment based on unwritten Athenian norms and values that they might not fully understand, let alone share. Few transient foreign merchants would have ready access to the witnesses necessary to present a contextualized account of their character, reputation, and manner of doing business. Even those who could present such a case might not be sanguine about their chances of prevailing in an Athenian court against an Athenian citizen who could point to military service and other hallmarks of good character familiar to popular court juries. The *dike emporike* procedure, by focusing on the terms of the written contract and discouraging extra-legal information and argumentation, offered foreign merchants the chance to resolve their disputes on a truly equal footing with citizens based on a transparent, straightforward, and culturally neutral standard: the terms of the written contract agreed to by the parties.

If a more formal, predictable legal procedure facilitated business deals, one might ask why the Athenians employed this approach only in maritime cases and did not adopt it in other business contexts such as banking and ordinary contract cases. We have seen that Athenian jurors valued their ability to enforce informal social norms of fair dealing and good conduct in reaching their verdicts in the popular courts. The adoption of a narrow relevance regime in non-maritime cases would have detracted from the democratic juries' ability to wield their influence on Athenian life. In *dikai emporikai*, on the other hand, the common participation of foreigners may have isolated maritime business activity from the everyday social interactions in which the Athenian juror took great interest. Although citizens did play an active role in maritime trade, the port of the Piraeus was thought of as "a world apart" from city life, and commercial activity was always considered different and separate from more respected economic pursuits.[197] In this sphere, Athenian jurors probably saw less value in enforcing fair play and ensuring a just resolution that took into account the particular circumstances of the case. On the other side of the ledger were the considerable economic advantages associated with a more narrow, legal approach in maritime cases. In this one area of law, the costs associated with discretionary justice outweighed the benefits, and steps were taken to narrow the range of evidence considered relevant to the jury in an effort to enhance the predictability of verdicts and thereby facilitate trade.

CONCLUSION

We see in classical Athens the first sustained, well-documented

197. *See, e.g.*, RICHARD GARLAND, THE PIRAEUS 58-100 (1987); Sita von Reden, *The Piraeus—A World Apart*, 42 GREECE & ROME 24 (1995).

approach to a perennial problem faced by all organized societies in constructing a legal system: the tension between adherence to general rules and doing justice in specific cases. Under the democracy, the Athenians experimented with a variety of responses to this problem. Rather than impose a single mode on all cases that came before the courts, the Athenians adopted a mixed system, with pockets of legal formalism surrounded by popular courts that granted juries a wide degree of discretion. For the majority of cases, the Athenians chose what by modern standards is a remarkably flexible approach to legal decisionmaking.

In this study, then, I have argued that the Athenian approach to law was more varied and complex than has previously been recognized. A more fine-grained description of the Athenian legal system must take account of not only the practices of the popular courts, but also the more formal, legal approach used in homicide and maritime cases. The special homicide and maritime procedures suggest that the Athenians could conceptualize (and to a lesser extent implement) a system that excluded social context in favor of generalized rules. However, in the vast majority of cases Athenian jurors produced largely ad hoc decisions, as a wide variety of extra-legal material was considered relevant and important to reaching a just verdict tailored to the particular circumstances of the individual case. In this respect, the Athenian courts were both more and less removed from modern courts than is commonly believed: the legal system cannot be characterized as embodying a rule of law, but the participants nevertheless viewed the process as aiming at the resolution of the dispute rather than unrelated social ends. The Athenians' distinctive approach to relevance in the popular courts reflects a highly individualized and contextualized notion of justice.

Why was context so highly valued in Athens, in spite of its costs? Part of the answer must be that although the nature of the disadvantages associated with contextualized justice—the dangers of verdicts based purely on prejudice, and reduced legal certainty and predictability—were the same as they are today, the potential effects of these shortcomings were much less severe in a society that was ethnically and socially far more homogenous than most contemporary societies. Shared values and informal social norms must have gone a long way in regulating behavior and reducing the amount of legal uncertainty.

But the most important factor was Athens' political structure as a direct, participatory democracy. We have seen that laypersons tend to find the restriction of evidence demanded by formal legal reasoning counterintuitive.[198] It is not surprising that a system that entrusted legal decisions entirely to amateurs would embrace extra-legal argumentation as

198. *See supra* note 84 and accompanying text.

relevant and even vital to reaching a just verdict. The flexible approach also benefited the poor citizen males who formed the dominant political constituency of the democracy. The judicial system placed all litigants, the rich included, squarely in the power of the predominately poor jurors who enjoyed the right to reach verdicts by whatever reasoning they wished to apply. The informality of legal procedures also gave the poor relatively easy access to legal remedies and allowed room for uneducated men to "tell their story" in a more-or-less natural way. Indeed, although no direct expression of the poor man's point of view survives, one treatise written by a man with oligarchic sympathies suggests that the aspects of the democracy that he detests, including the judicial system, were rationally seen by the poor and the masses (*hoi penetes kai ho demos*) as serving their interests. [199] Finally, the Athenian democratic commitment to popular decisionmaking dictated that jurors be given maximum discretion in reaching their decisions. After all, it was not only through the Assembly but through the popular courts that the citizenry ruled Athens.

Athens' political culture helps to explain why what appears to us to be an extremely costly approach[200]—case-by-case decisionmaking carried out by juries numbering in the hundreds—was not perceived as such at the time. For the Athenians, popular court cases were valuable in themselves because they gave average citizens an opportunity to actively participate in the governing of their city.[201] Moreover, ex post jury decisionmaking may have been more efficient than detailed rulemaking in the popular Assembly, where any male citizen was permitted to propose a rule or give a speech regarding the proposal under discussion. Where enhanced certainty and predictability were needed to attract foreign traders in maritime suits, the Athenians avoided the costs of rulemaking entirely by strictly enforcing the terms agreed to by the parties rather than creating substantive contracting rules. The unusual balance between formality and certainty on the one hand and flexibility and fairness on the other was thus well-suited to the political and social context of classical Athens.

The Athenian case casts doubt on evolutionary accounts of legal history and makes us question our assumption that the rule of law is the judicial model of choice for all democracies. Athens demonstrates that a sophisticated legal culture may have reasons to favor equity and discretion

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199. XENOPHON, ATHENAION POLITEIA 221 (E.C. Marchant ed., Oxford Univ. Press 1966) [[Xen.] Ath.Pol. 1.1, 13].

200. Many modern evaluations of the choice between rules and standards include analysis of the relative costs of rulemaking and ex post discretionary decisions. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL'Y 101 (1997).

201. Indeed, Athenians were sometimes buried with their ticket for jury service (*pinakion*). *See* JOHN H. KROLL, ATHENIAN BRONZE ALLOTMENT PLATES (1972) (cataloguing and describing surviving *pinakia*).

over the neutral application of generalized rules in some circumstances, and that such a choice need not require surrender to wholesale legal uncertainty and its resulting burden on commercial transactions. For the Athenians, the "verdict most just"[202] was one reached by a jury empowered to consider not only the applicable legal rules, but also the broader context of the dispute and the particular circumstances of the case.

202. A phrase from the classical Athenian juror's oath, *dikaiotate gnome*. In the oath it is used as an instrumental dative and is generally translated "most just judgment," but the noun is often best translated "verdict."