

I INTRODUCTION



WHAT ROLE DID THE LAW COURTS PLAY IN THE WORLD'S FIRST WELL-DOCUMENTED democracy?¹ Ancient Athens is celebrated for its democratic political institutions, but its law courts have been largely ignored by lawyers and legal historians. This neglect is not mysterious. Athenian law has failed to attract the interest of legal historians because it was run by amateurs and did not generate jurisprudential texts. It has not helped that the best-known example of Athenian justice is an outrage: the trial and execution of Socrates.

Classicists have begun to remedy this neglect, but much of their work has emphasized the arbitrariness and anti-legal aspects of Athenian litigation. Most of what we know of Athenian law comes from court speeches, and these scholars have focused on the fact that these speeches contain information – boasts of their family's public services, character attacks, appeals to pity – that would be considered irrelevant or inadmissible in a modern courtroom. On this basis, they argue that the aims and ideals of the Athenian courts were radically different from those of modern courts. On this view, the Athenian 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.² According to this approach, litigation was not aimed chiefly at the final resolution of the dispute or the discovery of truth; rather, 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.³ The law under which the suit was brought mattered little to either the litigants or the jurors; the statute was merely a procedural mechanism for moving the feud or competition onto a public stage.⁴ Extra-legal

¹ Robinson (1997:16–25) discusses possible examples of early democracies outside of Athens, some of which predate the Athenian democracy. Our sources for these possible early democracies are too thin to permit meaningful analysis of these political systems.

² D. Cohen 1995:87–88; Osborne 1985a:52.

³ D. Cohen 1995:87–88. Cohen argues that Athenian judges and litigants acknowledged that litigation was primarily a form of feuding behavior.

⁴ D. Cohen 1995:90. However, 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 (Osborne 1985a:52–53).

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considerations trumped law in a process that bore little relation to the functioning of modern court systems – or so the argument goes.

This approach to the Athenian legal system has been challenged by two different academic camps, both of which credit Athens with attempting to implement a rule of law. First, institutional historians argue that reforms in the late fifth and early fourth century curtailed the lawmaking powers of the popular Assembly, and created a moderate democracy committed to a rule of law.⁵ Second, other scholars analyze the surviving court speeches and argue that “legal” reasoning – citations to, and exegesis of, the applicable statutes – played a much greater role in Athenian litigation than is commonly thought.⁶ They tend to dismiss the extra-legal arguments in the surviving speeches as stray comments reflecting only the amateurism and informality of the system.⁷

This book offers a different account of the aims and ideals of the Athenian courts. Rather than approaching Athenian courts as a homogeneous entity (as most historians have to date), this book focuses on the differences between ordinary cases tried in the Athenian popular courts, on the one hand, and the homicide and maritime cases that were tried in special courts with their own procedures, on the other. The Athenians handled these cases quite differently, and the juxtaposition illuminates a key feature of the Athenian concept of law. Most interestingly, the Athenians understood the desirability of a regular application of abstract principles to particular cases, but made this the dominant ideal only in the homicide and maritime cases.

Popular courts tried the vast majority of trials in the Athenian court system, and they are the focus of modern scholarship on the nature of Athenian litigation. In these cases, litigants regularly discuss matters that are extraneous to the application of the relevant statute to the event in question. For example, popular court litigants

⁵ Ostwald 1986:497–524; Sealey 1987:146–148. In the fourth century, the Athenians distinguished between general laws passed by a Board of Lawgivers and short-term decrees of the popular Assembly that could not contradict existing laws (Hansen 1999:161–177).

⁶ Meyer-Laurin 1965; E. Harris 2000; Meineke 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. E. Harris (2000:78 & n. 85), 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.”

⁷ E. Harris 1994a:137.

Cambridge University Press

0521857597 - Law and Justice in the Courts of Classical Athens

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make arguments based on 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. I argue that these extra-legal arguments were vital to 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.⁸ Even the relative importance of legal and contextual information in any individual case was open to dispute by the litigants.⁹

Homicide and maritime cases, by contrast, followed a perceptibly more formal, legal approach. The homicide courts employed a rule prohibiting statements "outside the issue." A written contract was required to bring a maritime suit, and speeches in this type of case tend to focus more narrowly on the terms of the contract and less on arguments from fairness and the broader context of the dispute than comparable non-maritime commercial cases.

Do the homicide and maritime procedures suggest that Athens was gradually discovering the rule of law, and would have eventually insisted that popular courts resolve disputes based exclusively on the application of set legal principles? The short answer is no. Although maritime procedures were introduced toward the end of the classical period, the more formal homicide procedures were developed sometime *before* the popular courts came into being. The jarring differences in the level of formality between the homicide courts and the popular courts were therefore the product not of progress but of ambivalence. In the spectrum of

⁸ Of course, some litigants were undoubtedly motivated by a desire to gain honor or to pursue 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.

⁹ 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 (1998b:195–196); Scafuro (1997:50–66), and Humphreys (1983:248). These scholars do not distinguish between approaches taken in different types of suit.

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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 in the particular case that has haunted the law ever since.

The varied approach to the legal process stems from a deep tension in the Athenian system between a desire for flexibility and wide-ranging jury discretion on the one hand, and consistency and predictability on the other. 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 abstract rules were applied without reference to the social context of the dispute, but 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 maximizing the discretion wielded by popular juries. In other cases, however, such as commercial suits, where the practical importance of predictable verdicts was high, the Athenians employed rules of admissibility and relevance that limited jury discretion. 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 managed to do so in a way that did not destroy predictability and legal certainty in the parts of the system where it was most needed.

SOURCES AND METHOD

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 – 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.¹⁰ But whatever their hodge-podge origins, the practices

¹⁰ It is not my contention that every, or even most, aspects of Athenian law fit into a coherent and logical system. As Christ (1994) points out, viewing Athenian law as a system with a “latent logic” may lead one to underestimate the impact of piecemeal legislation and to overlook the eclecticism of Athenian law.

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of the courts constituted an Athenian tradition that reflected a shared understanding of how justice was and should be done. The Athenian courts can 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. I am seeking to uncover the values and concerns that seem to underlie the practices and procedures of the Athenian courts – values and concerns that the various individual participants in the legal system may have been more or less consciously aware of at any given time.

The Athenian law courts are remarkably well attested, at least by the standards of ancient history: roughly 100 forensic speeches survive from the period between 430 and 323 B.C.E. 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.¹¹ Only speeches that were attributed to one of the ten Attic orators later formed into a canon were preserved.¹² The ten Attic orators are: Aeschines (ca. 395–ca. 322); Andocides (ca. 440–ca. 390); Antiphon (ca. 480–411); Demosthenes (384–322); Dinarchus (ca. 360–ca. 290); Hyperides (390–322); Isaeus (ca. 415–ca. 340); Isocrates (436–338); Lycurgus (ca. 390–ca. 324); and Lysias (ca. 445–ca. 380).¹³ The speeches in the corpus run the gamut, and are from politically charged treason

Indeed, as we will see, the association of the homicide courts with a more formal, legal approach stems as much from historical accident followed by path dependency as from any “latent logic” related to the nature of the crime of homicide. Nevertheless, the differences between procedures can tell us something about the goals of the Athenian courts.

¹¹ Demosthenes and Aeschines, for example, both revised their published speeches in the case over the Crown in response to each other’s courtroom presentations (Yunis 2001:26–7). On revision for publication more generally, see, e.g., Trevett 1996; Worthington 1991.

¹² See, e.g., Smith 1995; Worthington 1994b:244.

¹³ Not all of the “Attic” orators were Athenian citizens; some were resident aliens. For a very brief summary of the life and work of each of the orators, see Gagarin 1998b:xii–xv. It is suspected that several of the speeches in the corpus were written by other, lesser-known classical logographers and falsely attributed to a member of the canon, perhaps by ancient publishers hoping to sell more books. Most scholars agree, for example, that seven of the speeches in the Demosthenic corpus were in fact written by Apollodorus. For discussion of Apollodorus’ career and speeches, see Trevett 1992. Since the issues I explore in this book are not affected by the authorship of any individual speech, I use the traditional citation system for the Attic orations and do not mark speeches that I believe are spurious with square brackets.

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trials and violent crime trials to inheritance cases and property disputes between neighbors.

Despite their copiousness, these sources are not without their problems. The surviving cases are those in which at least one litigant was wealthy enough to hire a famous logographer, and as a result involve primarily members of the elite.¹⁴ The Attic orations were preserved not as legal documents but as tools for teaching boys and young men the art of rhetoric in the Hellenistic and Roman periods. As a result, the information a legal historian would most like to know about any particular case is generally lost. We almost never have speeches from both sides of a legal contest;¹⁵ we rarely know the outcome of the case. Citations of laws and witness testimony are often omitted or regarded as inauthentic later additions. Most important, any statement we meet in the speeches regarding the law or legal procedures may be a misleading characterization designed to help the litigant's case.¹⁶ As is often pointed out, however, a litigant who wished to be successful would presumably limit himself to statements and arguments that were likely to be accepted by a jury; speakers may at times give us a self-serving account of the law, but their arguments generally remain within the realm of plausible interpretations of the legal situation in question.¹⁷

In addition to court speeches, the sources for the Athenian legal system include the *Constitution of the Athenians*, a partial history and description of Athenian political and legal institutions probably written by Aristotle or his students. The comic plays of Aristophanes include several references to the law courts; the central character of the comedy *The Wasps* is an elderly Athenian juror. Some laws, most notably Draco's law on homicide, survive in the form of stone inscriptions, but they represent only a tiny percentage of the body of Athenian statutes. The nature of our sources presents not only challenges but also opportunities: from the beginning, the study of Athenian law has been of necessity a study not of law on the books but of law in action.

¹⁴ Lysias 24 *For the Invalid* is a notable exception, though some scholars have argued that this speech is merely a rhetorical exercise for a fictional case. It is unclear whether Athenian litigation was dominated by the wealthy, or whether the widespread participation of ordinary Athenians is simply not reflected in the historical record. For a discussion of who litigated in Athens, see Chapter 2.

¹⁵ Only two pairs of speeches survive: Demosthenes 19 and Aeschines 2 (*On the Embassy*); Aeschines 3 and Demosthenes 18 (*On the Crown*). In two other instances we have imperfectly matched speeches on both sides of a particular issue: Lysias 6 and Andocides 1; Demosthenes 43 and Isaeus 11.

¹⁶ On how to deal with apparent outliers in our sources, see Bers 2002.

¹⁷ Dover 1974:8–14.

Cambridge University Press

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My approach is, for the most part, synchronic. This approach is dictated by the distribution of our surviving speeches. There is little evidence for the early development of the legal system; the classical court system was fully formed by the time of our earliest preserved orations. With a few important exceptions,¹⁸ the practices and procedures of the courts remained largely unchanged throughout the classical period. It therefore makes sense to treat the popular court system from 430–323 B.C.E. as a single unit for analytical purposes. A synchronic organization also highlights the dynamic tension between different notions of legal process present throughout the classical period.

RELEVANCE AND DISCRETION

In exploring the aims and ideals of the courts, a key focus will be on relevance – that is, notions of what types of information and arguments should be presented to a jury and given weight in reaching a verdict. I refer to information and argumentation in the court speeches that do not bear on the application of the formal charge to the facts of the case as “extra-legal.”

In categorizing some types of argumentation as “legal” or “extra-legal” and choosing relevance as my primary focus, I am not using a modern metric foreign to the Athenian mindset. The Athenians were themselves concerned with what sort of information was considered on or off the point (ἐἰς τὸ πρῶγμα/ ἔξω τοῦ πρῶματος), and employed a relevancy rule prohibiting statements “outside the issue” in the homicide courts. Chapters 3, 4, and 6 explore the distinctive notions of relevance employed in, respectively, the popular courts, homicide courts, and maritime cases. Although I am primarily interested in comparing the approaches to relevance taken by various Athenian courts to each other rather than to modern courts, a brief discussion of modern notions of relevance and admissibility may help to clarify what is at stake in how a society decides to approach this issue.

In contemporary American courts, statutes and/or case law provide for a list of criteria (often called “elements”) that must be met for a prosecutor or

¹⁸ The two most important changes were the transition from oral to written indictments and witness evidence in the early fourth century and the revision of the laws and law-making process at the end of the fifth century. The Athenians repeatedly tinkered with the system during the fourth century by adding new actions, changing the process of jury selection, etc., but the basic structure and procedures of the popular courts remained unchanged.

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plaintiff to prevail under a particular criminal charge or civil cause of action. Any information that tends to make it more likely than not that any of these legal elements are (or are not) present is “relevant” to the case,¹⁹ though some classes of relevant information may be inadmissible because, for example, it is deemed to be overly time consuming or prejudicial.²⁰ I discuss Athenian notions of evidence that should be presented to a jury as “relevant” rather than “admissible” 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, much of this extra-legal argumentation is considered relevant but inadmissible.

Of course, determining which information is relevant is not as straightforward as it sounds. How one frames the legal case – how the rich context of lived experience is translated and trimmed to fit into fixed, abstract legal categories – is often crucial to the outcome.²¹ In many trials, each party attempts to broaden or narrow the scope of the story the jury is to hear. A battered woman charged with murdering her husband will argue for a “wide-angle”²² perspective, one that takes in the history of the couple’s relationship, while the state will focus on the killing itself.²³ Where the rules of evidence impose restrictions on what is relevant and how a party frames the case, for instance, the federal rule excluding evidence of a rape victim’s sexual history,²⁴ these rules encapsulate more or less explicit value judgments.²⁵ Beyond this, there is information that lacks even a theoretical connection to factual guilt – such as the charitable activities of a defendant’s

¹⁹ As is evidence that tends to disprove the opponent’s case, as, for example, evidence impeaching the reliability of an opponent’s witness.

²⁰ Rule 403 of the Federal Rules of Evidence, for example, provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” For a summary of the legal doctrine of relevance and its relation to the “received view” of the modern trial as “the institutional device for the actualization of the Rule of Law,” see Burns 1999:21–23.

²¹ On the difficulties involved in framing a case, see Frier 1985:214–215; White 1990:179–201, 257–269.

²² Scheppele 1989:2096.

²³ Armour 1996.

²⁴ Federal Rules of Evidence, Rule 412.

²⁵ So Weyrauch (1978:706): “Many judicial references to relevance are substantive dispositions in the guise of rules of evidence”; Scheppele (1989:2097) “standards of legal relevance, appearing to limit the gathering of evidence neutrally to just ‘what happened’ at the time of ‘the trouble’ may have the effect of excluding the key materials of outsiders’ stories.”

parents, a common type of evidence in Athenian courts – that we unquestionably exclude as irrelevant to proving the elements of the legal charge.

In practice, modern trial lawyers are often able to impart to the jury some information that, strictly speaking, is not relevant to proving the charge. Witnesses, for example, are routinely asked at the beginning of their testimony to describe their occupation and home address, information that may improperly influence the jurors' perception of the testimony. In the presentation of evidence concerning the specific event in question, it is inevitable that a fair amount of extraneous material about the milieu of the parties will incidentally be heard by the jury as well. A botched drug deal that ended in violence may look very different to a jury if it involved gang members in an urban housing project rather than college kids meeting a dealer in a motel room. A skillful trial attorney will exploit the flexibility in the rules of evidence to his advantage, and may even be able to suggest surreptitiously in his opening and closing statements that the verdict should hinge on legally irrelevant factors – from the race or class of one of the parties to the relative importance of a money judgment to the family of a poor tort victim as opposed to a wealthy corporate defendant.²⁶ 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 certain and arguments based on extra-legal factors are always 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 legally relevant evidence presented at trial.²⁷

In the Athenian popular courts, there was effectively no rule of relevance limiting litigants to information and arguments related to the legal charge.²⁸ How "the case" should be framed was precisely what was at issue in many Athenian suits: litigants presented jurors with a wide variety of legal and extra-legal arguments,

²⁶ In a recent book, Burns (1999:29–30, 36–37, 201) makes a detailed case for what courtwatchers have long maintained, namely that in practice there is enough flexibility in the modern American rules of evidence to permit an attorney to argue for a verdict based on extra-legal norms. He argues that in many trials, the jury's task is to decide between a variety of conflicting norms – legal, economic, moral, political, and professional.

²⁷ Burns 1999:36–37.

²⁸ Cf. Arist. *Ath.Pol.* 67.1. For discussion, see Chapter 3. Abbreviations of classical texts follow the style of the *Oxford Classical Dictionary* (2d edition).

and it was up to the jury to decide which types of information were most important in reaching a just outcome to the particular case. The result was a highly flexible – but also highly unpredictable – ad hoc system that permitted litigants to describe the dispute in their own voice and on their own terms. Of course, litigants (and their speechwriters) were limited by the expectations of the jurors; we will see that even in the absence of a rule of relevance, several types of argument recur, indicating that speechwriters believed that jurors would find these arguments persuasive. It is therefore possible to speak of broad categories of evidence that were considered particularly relevant in the popular courts. Nevertheless, litigants could choose from a variety of legal and extra-legal arguments within these broad categories and had much more flexibility in telling their stories than modern litigants.

One example may help to illustrate how the Athenian conception of relevance in the popular courts altered the nature of the jurors' task. The Athenian popular courts drew no distinction between evidence relevant to guilt and evidence relevant to sentencing. Unlike the practice generally employed in American courts of withholding from the trial jury information about the likely penalty and arguments regarding the appropriate sentence, Athenian litigants at trial regularly discuss potential penalties and make what a modern would regard as sentencing arguments – from comments about the defendant's character and prior record to appeals for mercy and discussion of the disastrous financial consequences a conviction would have on the defendant's innocent family. The trial verdict thus encompassed much more than a decision as to factual guilt, as the jury considered, as part of their decision at the guilt stage, whether the likely penalty was justified in light of the circumstances of the offense, the character of the offender, and the effects of the penalty on the offender, his family, and society. Arguments relating to the application of the relevant statute were no more authoritative than information regarding the concrete effects a conviction would have on the offender, and the relative weight to be accorded to the various types of extra-legal or legal argument presented in each case was left to the discretion of the jury.

This unusual approach to relevance was not the only example of the Athenian system's extraordinary flexibility. In designing a legal system, all societies must address the inevitable tension between consistency and flexibility. A legal system's flexibility can be enhanced or limited by adjusting one of three elements: the precision of the rules; the definition of relevance; and the degree of discretion extended to the state prosecutor (where there is one), the judge, or jury (including the provision for appeal). We will see that in all three respects the Athenian popular