Erotesis: Interrogation in the Courts of Fourth-Century Athens

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ὤν ἀντιδικοὶ ἐπάναγκες εἶναι ἀποκρίνασθαι ἄλλήλους τὸ ἐρωτώμενον (Dem. 46.10): ἐρωτήσις, interrogation of the adversary as Aristotle describes in the Rhetoric (1419a), has been regarded by authorities on Athenian law and judicial oratory as merely ‘rhetorical questions’ in the fourth century. The formalization of legal procedure under the restored democracy and the development of artistic argumentation in written speeches seem to have left little opportunity for question-and-answer. It has been assumed that the speech writers who provided their clients with prepared texts of their arguments effectively put an end to extemporaneous debate in the courts; and it has been concluded that the statute requiring an answer to the speaker’s questions (Dem. 46.10) had become a dead letter of the law. Recent work on Athenian law has given us a clearer understanding of the legal principles in such important procedures as ὑπαγωγή, ἀπαγωγή, ἀπαγωγή, and ἐνδείξεις, but it still remains unclear in some cases how these proceedings were initiated and what questions were left for the court to decide. The

1 This is the view of Ernst Leisi, Der Zeuge im attischen Recht (Frauenfeld 1907) 40–41; J. H. Lipsius, Das attische Recht und Rechtsverfahren III (Leipzig 1915) 876–77; and among commentators on the orators, W. Wyse, The Speeches of Isaeus (Cambridge 1904) 682. This view has been followed without question in later studies, with the result that D. M. MacDowell in his recent handbook, The Law in Classical Athens (London 1978) 241–50, discusses erotesis only in regard to the anakrisis.


3 Cf. Pl. Ap. 25D, καὶ γὰρ ὁ νόμος κελεύει ἀποκρίνεσθαι. On the authenticity of the law in Dem. 46.10 see n.7 infra. Kurt Latte, Heiliges Recht (Tübingen 1920) 16 n.27, regards the requirement to answer the adversary’s questions as an obsolete relic of archaic procedure: the orators of the fourth century no longer understood the principle of these interrogatories to decide the issue, but continued to follow the form for “theatrical effect.”

4 The principle of the sovereignty of the people’s court has been the focus of studies on the γραφή παρανόμων. H. J. Wolff, “Normenkontrolle” und Gesetzesbegriff in der attischen Demokratie (SitzHeidelberg 1970); M. H. Hansen, The Sovereignty of the Peo-
erotesis in the extant speeches, however, often indicate what positions the adversaries had taken at the anákρισις and what were the central issues at the trial. Those who have regarded erotesis as rhetorical ornamentation have ignored a key to the procedure and the argument.

Interrogation and debate were essential features of the earliest forms of legal process in Hellas: on the Homeric 'Shield of Achilles' (II. 18.506) both sides argue the case in turn, ἀμοιβηδεῖς δὲ δίκαιον; the trial of Orestes in Aeschylus' Eumenides (585–610) suggests that erotesis was regarded as an ancient procedure; and in Aristophanes' Acharnians (687) the chorus protest against current abuses of this tactic by young prosecutors who harass their elders in cross-examination. The chapters on erotesis in Aristotle's Rhetoric and in the Rhetoric attributed to Anaximenes (1444b) suggest that interrogatories were still an effective tactic in judicial debate in the later fourth century. The democratization of legal process had led to greater reliance on prepared speeches, written out verbatim or in part, and although written speeches were meant to imitate extempore speech, the authors have left us few indications of the extempore techniques that were actually used. There are, however, more than a dozen examples of erotesis in the extant speeches, and these passages in themselves are evidence that the most decisive issues were debated at the trial. In chronological sequence these passages fall into three groups that seem to coincide with changes in procedure: 403 to 378/7, from
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the restoration through a period of reform when written depositions replaced oral evidence; 376 to the late 340's, during which the παραγραφή became an important procedure; late 340's to 324, in which the few extant examples are in speeches concerning the prosecution of rhetores. In each of the examples it will be necessary to determine the sequence of the argument from the preliminaries to the trial.

The law requiring answers in cross-examination applied at the anakrisis as well as at the trial: at the anakrisis questions were directed by the archon to each of the antidikoi, and by each of the antidikoi to his adversary; the archon had the responsibility to define the questions at issue and determine the legality of the charges, and the archon had the authority to demand that both parties “answer according to the law”. Isaeus 6.12, δε γαρ αι ἄνακρισεις ἤσαν ... ἐρωτώμενοι ψ' ἡμὼν ... οὐκ εἶχον ἀποδείξαι ... καὶ τοῦ ἄρχοντος κελεύντως ἀποκρίνασθαι κατὰ τὸν νόμον ... It is generally agreed that the archon’s chief concern at the anakrisis was to determine whether the action was or was not admissible (eisagogimos), but it is

7 In the second speech Against Stephanus in the Demosthenic corpus we are told that the law requiring that the adversaries answer applied in all graphai, dikai, and euthynai (46.9). The same statute carries the restriction against testimony in one’s own behalf (10): τοιν ἀντιδικοῦ ἐπαναγκής εἶναι ἀποκρίνασθαι ἀλλήλως τὸ ἐρωτώμενον, μαρτυρεῖν δὲ μη. We have every reason to believe that the law is genuine and the statute was well known to the dikastai. The speaker’s purpose in citing the law is not to justify cross-examination—which seems to need no argument—but to show the illegality of Stephanus’ testimony: he argues that Stephanus’ martyria in the earlier action against Phormio was ‘hearsay’, on the word of Phormio himself, and thus amounts to testimony by the defendant in his own behalf. Since the clause concerning cross-examination is cited incidentally and is not relevant to the speaker’s argument, we have all the more reason to accept its authenticity.

8 The procedure for questioning by the archon or the diaires at the preliminary hearing is suggested by Isae. 5.32, ἄνακριναντες δε ἡμᾶς πολλάκις καὶ πιθομένοι τὰ πραχθέντα οἱ δικαιται, and in Dem. 48.31, ὁ ἄρχων ἀνέκρινε πάσαν ἡμῶν τοῦ ἀμφοτεροῦσι καὶ ἄνακρινας εἰσήγαγεν εἰς τὸ δικαστήριον. Questioning by the antidikoi is evident in Isae. 6.12 (quoted infra).

9 For the magistrate’s authority to clarify the wording of the charges and of the counterpleas see Isae. 10.2, and cf. the discussion in Harrison (supra n.5) 95–96. In cases other than inheritance disputes we have little evidence for the magistrate’s questions. Bonner and Smith (supra n.2) I 289 suggest the following line of inquiry: “Was the plaintiff eligible to appear in court? Was the defendant qualified to answer the charge or the claim? If the defendant failed to appear, had he been duly summoned? Were the documents—plaint or indictment—properly drawn? Was the matter at issue actionable? Was the proper form of action chosen? Did the magistrate have jurisdiction in the case?” Cf. Leisi (supra n.1) 83–84.

10 In Athens under the radical democracy, anakriseis before the archons were the only vestige of the pre-Solonian magisterial trial. Such hearings had parallels in Laconian and Roman procedures. On Spartan anakriseis see Thuc. 1.95, 132; Arist. Rh. 1419a31–36; Plut. Mor. 217a–b; cf. J. Keaney, “Theophrastus on Judicial Procedure,” TAPA 104 (1974) 179–94. At Rome preliminary hearings before the praetor in iure corresponded to anakriseis at Athens, and similarly represent a survival of the archaic
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often assumed that all important legal issues, the evidence, and the facts of the case were decided at the anakrisis and that there were no new questions to answer at the trial;\textsuperscript{11} the speeches at the trial were thus exercises in argumentation. The courts of the people, however, had become the supreme authority in the democratic judiciary.\textsuperscript{12} In most cases the pre-judicial authorities who held the preliminary hearings—the archons, the thesmothetai, the Eleven, and the council—were reluctant to condemn or acquit on their own authority,\textsuperscript{13} and thus in many cases the most convincing arguments may have been held in reserve for the trial.

It has been argued, however, that the procedure in ‘denunciation’ and ‘summary arrest’, endeixis and apagoge, was an exception to the principle of the sovereignty of the court: M. H. Hansen has suggested that the magistrates in charge—the Eleven, the thesmothetai, or the council, annual officials appointed by lot with no special qualifications—routinely disposed of such cases by execution without trial (τὸ ἀκριτὸν ἀποκτεῖναι).\textsuperscript{14} This admittedly “pessimistic account” has provoked a great deal of discussion, but no one has disputed the

\textsuperscript{11} F. Lämmli, \textit{Das attische Prozessverfahren} (Paderborn 1938) 84, suggested that the requirement to answer allowed for investigation of the adversary’s line of argument, and this view is often accepted.


\textsuperscript{13} Cf. Harriso\textit{n (supra n.5) 91. “We can only suppose that the threat of proceedings by way of euthyna or epikheirion had the effect of making magistrates lean heavily in the direction of allowing suit.” Hereafter it will be convenient to use the general term ‘archon’ of all those who administer an arche and thus conduct preliminary hearings within that jurisdiction, as opposed to the specific offices of e.g. the Eleven, the thesmothetai, or the archon eponymos; for the classification of the boule as an arche, see P. J. Rhodes, \textit{The Athenian Boule} (Oxford 1972) 13–14, and Hansen (\textit{supra} n.12) 347–60.

\textsuperscript{14} Hansen, Apagoge 119 \textit{et passim}, and (\textit{supra} n.12) 354. His argument on this point may be summarized as follows. (1) Endeixis and apagoge are two stages of the same procedure; the offender can be arrested in flagrante delicto (apagoge), or the prosecutor can make his denunciation (endeixis) before the archon, who in effect gives warrant for the arrest. But (2) even in endeixis it is the prosecutor who makes the arrest (not the Eleven or the thesmotheitai as had been assumed). (3) In the endeixis of atimoi the prosecutor may leave the accused at liberty (as in the proceedings against Andocides), but in the arrest of felons or exiles for execution the prosecutor is safeguarded from dike phonou if he has made the denunciation to the archon. (4) Although a hearing before the people was guaranteed in the endeixis of atimoi, apagoge and endeixis of kakourgoi and pheugontes often led to execution without trial.
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claim that “penalties were often inflicted without any hearing of the case.” If it is true, however, that these officials often exercised the power of life and death in apagoge and related procedures, we need to ask how the questions at issue were answered and the verdict determined at the anakrisis. If in similar cases erotesis and extempore debate were used to decide such questions at the trial, it is unlikely that the archons would have been willing to condemn the accused on their own authority.

The only clear case of apagoge leading to execution without trial occurred in the first year of the restoration: an unknown democrat was arrested by Archinos and brought before the boule for violation of the amnesty, and in that hearing he was condemned to death. Our only source for this incident is Aristotle’s Ath. Pol. 40.2, so that we have no indication what procedures were followed to decide the case in the anakrisis. We may assume that the accused was forced to confess to the facts of the case, that he had acted against members of the other party, but it is unclear whether it was necessary for him to confess to the crime, that he had acted in violation of the amnesty. Aristotle tells us only that the verdict was a very effective deterrent: ἀποθανόντος γὰρ οὐδεὶς πῶπτε ὦστερον ἐμνησιακῆσεν. We know of only two motions for summary execution in the latter half of the fourth century, both of which were dismissed as unconstitutional. In the years immediately following Archinos’ apagoge there were three cases of endeixis or apagoge for which the extant speeches indicate erotesis at the trial; these passages together with the eroteseis from similar cases of the same period suggest that the council and other pre-judicial authorities were reluctant to condemn without trial, if

15 Hansen, Apagoge 118–19. D. M. MacDowell, CR 92 (1978) 175, accepts Hansen’s argument on the prosecutor’s arrest in endeixis, but disputes his interpretation of the term ἐπὶ αὐτοφώρῳ with regard to the prosecution of kakourgoi; G. Lalonde, AJP 99 (1978) 132–33, finds the argument that the prosecutor must make the arrest in endeixis “plausible at best”; M. Gagarin, “The Prosecution of Homicide in Athens,” GRBS 20 (1979) 318–22, argues against Hansen’s explanation of apagoge in the prosecution of homicide, with regard to the case against Agoratus (Lys. 13); see Hansen’s answer in GRBS 22 (1981), esp. 28–29; and the discussion of Lys. 13 infra (217f).

16 The only other reference is found in Dem. 23.31: οἱ θεσμοθέται τούτοις ἐπὶ φόνῳ φθεγόνται κύριοι θανάτῳ ἵπτωσι, καὶ τὸν ἑκείνης ἐκκλησίας πέρῳ πάντες ἐφιεσαμένοι ὑπ’ ἑκείνης ἀπακθήσεται. Cf. Hansen, Apagoge 134. The incident is mentioned among many procedures against which Charedemus would have had immunity under Aristocrates’ proposal; if such summary executions were commonplace we should expect the speaker to attach greater importance to this procedure.

17 Meidias proposed arrest and execution of Aristarchus (348), but the proposal was rejected by the council; Hansen argues ex silentio (Apagoge 135–36) that the proposal is not unconstitutional. The proposal of Pythangelos for the execution of Hierocles (332/1) is discussed infra 219.
indeed they retained the power to do so. In each case the erotesis reveals what questions had been answered at the anakrisis and what questions were left for the court to decide.

The earliest erotesis in the extant speeches is found in Lysias 12 Against Eratosthenes, from the same year as Archinos’ apagoge. By provisions of the amnesty the former oligarch came to trial in a special accounting before a jury of qualified Athenians after a preliminary hearing before a committee of the council (logistai). In principle the problem of pre-judicial authority is the same as in Archinos’ apagoge; the facts of the case are not in question, but in this case the nature of the proceedings may have guaranteed a hearing before the special court. In the received text of Lysias 12, Eratosthenes’ answers are recorded verbatim, and this is a probable sign that the issues had been clearly defined at the preliminary hearing. Although the extant speech may represent a version revised for publication, it is unlikely that Lysias would have misrepresented the actual proceedings.

Eratosthenes has admitted the fact of the crime and the ‘wrong’ but denies the responsibility. Lysias must have been sure of the plea for he does not call witnesses of the events in question, but he later calls witnesses to verify Eratosthenes’ rank in the oligarchic régime in order to refute his plea of intimidation. The preliminary hearing had established the basis for the cross-examination at the trial and enabled Lysias to anticipate his adversary’s response.

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18 The legal status of Lysias, a privileged alien (isoteles), as prosecutor at the accounting of Eratosthenes has been the subject of some controversy. Friedrich Blass, Die attische Beredsamkeit I (Leipzig 1887) 540–42, suggested that under a special procedure for indictments against the Thirty, privileged aliens had the right to bring charges. Wilamowitz, Aristoteles und Athen II (Berlin 1893) 218–21, with reference to Ath.Pol. 39.6, followed the same line of reasoning. Dover (supra n.6) 8 n.9 accepts this explanation. The story of a special grant of citizenship (Plut. Mor. 835) is seldom given consideration.

19 See Lavency (supra n.6) and Dover (supra n.6).
The *endeixis asebeias* against Andocides late in the year 400 is another instance of proceedings initiated before the *boule* that led to cross-examination at trial before the people. Once again the procedure is irregular, but it is a crucial piece of evidence in Hansen’s analysis of *endeixis*; the sequence of events, however, tends to discredit the notion that the pre-judicial authority often exercised the power of execution without trial. Kephisios had made every effort to convict Andocides in the preliminaries, alleging that Andocides confessed his guilt in his information against those who took part in the mutilation of the Hermae and the profanation of the Mysteries (Lys. 6.15, 51). Andocides’ strongest arguments rely on the amnesty of 403/2 and Patrocleides’ decree of 405 that restored civil rights to *atimoi*. Fully acquainted with the facts of the case, the council was unwilling either to interpret Andocides’ admissions as a confession of guilt or to acquit him on their own authority, and Andocides was left at liberty until the trial. To judge from the extant speech the arguments at the *anakrisis* formed the basis of cross-examination at the trial. With reference to the laws rendered invalid by the amnesty, Andocides addresses Epi-chares, πότερον ... κύριος ὁ νόμος δοθεὶς ἦν οὔ κύριος; (1.99). Recounting the questions that had been posed to him by the prosecution, Andocides asks his audience to recall how much like the inquisitions of the Thirty his accusers’ questions have been:

> When he made his charges against me it seemed just as though I had been arrested and put on trial by the Thirty ... Who else but Charicles would have conducted the interrogation, asking, “Tell me, did you go to Decelea and build there a bastion against your own homeland? ... Did you lay waste the land or rob your own countrymen on land or on sea?”

Evidently Charicles had continued the interrogation at the trial along the same lines laid out at the *anakrisis*. This passage seems to be an

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20 The proceedings against Andocides are the clearest case of the accused at liberty until the trial in *endeixis*: the *endeixis* was brought by Kephisios to the *thesmothetai*; after the traditional report of the *basileus* to the council, the *pytaneis* summoned the *antidikoi* to a preliminary hearing before the council; there was some debate (And. 1.111–16), but Andocides was released without bail. See Hansen’s discussion, *Apagoge* 20–28, 128–30.

21 1.101: οὔδεν ἀλλο ἦν ὑπὸ τῶν τριάκοντα συνειδημένως ἐδοξα κρίνεσθαι; εἰ γὰρ τότε ἡγομόνειν, τις ἄν μοι κατηγορεῖ; οὐχ οὗτοι ὑπηρέτησαν, εἰ μὴ ἐδόθην ἀργύρων; καὶ γὰρ νῦν ἀνέκρινε δὲ ἄν με τις ἄλλος ἡ Χαρυκλῆς, ἑρωτάω. Εἰπε μοι, ὡς Ἀνδοκίδης, ἢλλ᾽ εἰς δεκέλεαν, καὶ ἐπέτειχας τῇ πατρίδῃ τῇ σεαυτοῦ; οὐκ ἔγογγα. Τί δε; ἔτεμες τὴν χωρὰν, καὶ ἐλήμεν ἡ κατὰ γῆν ἡ κατὰ θαλάσσα τούτοις πολίταις τοὺς σεαυτοῦ; Οὐ δήτα. Οὐδὲ ἐνυπαίχθας ἑναιντὰ τῇ πόλει, οὔδε συγκατάσκεψας τὰ τείχη, οὔδε συγκατέστατος τοῦ δήμου, οὔδε βακκηθῆς εἰς τὴν πόλιν; Οὔδε τούτων πεποίηκα οὔδεν. Δοκεῖς οὗν χαριστέσθαι καὶ οὐκ ἀποθανείσθαι, ὡς ἔτεροι πολλοὶ;
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elaboration of extempore debate in the published version of the actual proceedings, and in many other instances, in legal actions involving political issues and party rivalry, what appear to be rhetorical questions in speeches for publication may represent eroteseis in the actual delivery.22

In the graphe asebeias against Socrates, the two surviving accounts, of Plato, who was present at the trial, and of Xenophon, who drew on the account of Hermogenes, although they agree on very little else, confirm that Socrates made extensive use of interrogatories; and his handling of the procedure was in accordance with accepted practice in most regards. Plato’s version shows Socrates adapting his own characteristic method of argument, ἐν τῷ εἰσαθήτα τρόπῳ, to the conventions of the courts where the law required an answer, and for the most part the questioning is based on the wording of the indictment recorded at the anakrisis. The prosecution by graphe in a case of impiety may have seemed unusual; endeixis or eisangelia could have provided for the arrest and imprisonment of the accused as an urgent threat to the community; the eisangelia against Anaxagoras was the most notorious case of its kind.23 In the graphe, however, the defendant was summoned to appear before the basileus and an anakrisis was held; afterward Socrates was at liberty until the trial. It appears to be an authentic feature in Plato’s account that Socrates’ interrogation is directed to the wording of the charges, to refute the accusations of corruption of the youth (24D–26A) and impiety towards the gods of the state (26B–27A). Aristotle, in fact, without citing Plato’s version, gives Socrates’ interrogatory argument—that he who believes in daimonia must believe in the gods (27c)—as an example of the second method of erotesis, “when one premise is self-evident and it is clear that the opponent will grant the other” (1419a5–12). This kind of cross-examination based on the arguments put forward at the anakrisis seems to be typical of erotesis in the extant speeches.

The speech of Lysias Against Agoratus (13) provides another example of erotesis at the trial, in the same year as or soon after the suits

22 Lipsius (supra n.1) 917 n.60 cites this passage along with Pl. Ap. 24D–27E and Din. 1.83 as examples of the rhetorical elaboration of interrogatories.

23 On the eisangelia against Anaxagoras (437/6) and the decree of Diopeithes cf. E. Derenne, Les Procès d’impiété (Liège 1930) 24–30; J. Mansfeld, “The Chronology of Anaxagoras’ Athenian Period and the Date of His Trial,” Mnemosyne IV.32 (1979) 54–55 and n.53; 33 (1980) 80–84. Pericles spoke as synegoros, and his speech for the defense seems the most likely source for the erotesin attributed to Pericles in Arist. Rh. 1419a2–5. Cf. Diog. Laert. 2.12, Σωτήρ μὲν γὰρ δήσας ἐν τῇ διαδοχῇ τῶν φιλοσόφων ὑπὸ Κλέωνος αὐτὸν ἀπεβίακας κραθήναι ... ἀπολογηθαμένοι δὲ ὑπὸ αὐτοῦ Περικλέους τοῦ μαθητοῦ ...
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for impiety against Socrates and Andocides. The extant speech is of special interest as a testimony to the use of erotesis in logographic speeches; it is, moreover, a crucial case for the procedure in the prosecution of homicides by apagoge. In this case the proceedings were initiated by apagoge to the Eleven. We can be sure (pace Hansen) that the prosecutors would have made every effort to have Agoratus condemned at the anakrisis, but it seems evident that only the fundamental legal questions were decided; we are told that the magistrates insisted that the phrase ἐπ’ αὐτοφόρῳ be included in the indictment (13.6). It is clear from the context that Agoratus was compelled to make some very damaging admissions, but the possibility of evasive tactics, denying wrongdoing or claiming justifiable cause (such as Arist. Rh. 1419a20–30 and the Rh. Al. 1444b describe) is clearly foreseen by the speaker, who claims to have evidence and arguments to refute any evasion: ὡς δὲ ἀπεγραψε τὰ ὀνόματα, οἶμαι μὲν καὶ αὐτὸν ὀμολογήσεως· έι δὲ μὴ, ἐπ’ αὐτοφόρῳ ἔγὼ αὐτὸν ἐξελέξω ἀπόκριναι δὴ μοι . . . (30). The exact wording of the interrogatories is not recorded and in only one manuscript do we find the lemma ἙΡΩΤΗΣΙΣ, but it is clear from the context that some questioning was planned and that the logographer had provided his client with a preconceived strategy of argumentation. The speaker allows for extemporaneous rebuttal if Agoratus denies the fact of the crime, and goes on to introduce the decree against the men named in Agoratus’ menis: καί μοι ἀπόκριναι, ὡς Ἀγόρατε· οὖν γὰρ οἴμαι σε ἕχαρνον γενήσεσθαι ἄνοιαν Ἀθηναίων ἀπάντων ἐποίησας. ἙΡΩΤΗΣΙΣ (32). Evidently Agoratus had based his defense solely on the interpretation of the phrase ἐπ’ αὐτοφόρῳ, the Eleven had been unwilling to condemn the accused, and there had been no decision even on considerable evidence. In the epilogue the speaker returns to this issue with some reference to the positions taken at the anakrisis.

24 Agoratus is charged with complicity in the proscriptions of the Thirty. Because the defense objects that the action is time-barred (13.83), Hansen (Apagoge 132), assuming a statutory limitation of five years, argues that the case may have been tried sometime after 399, the date usually given.

25 The precise classification of these proceedings is subject to dispute: Hansen, Apagoge 52, argues that Agoratus is tried as a kakourgos and the kakourgema is the homicide itself, as in the case against Euxitheos (Antiph. 5.10); Gagarin (supra n.15) 317–20 argues that the violation is the trespass of areas prohibited to homicides; Hansen (supra n.15) 28–29 insists that the phrase ἐπ’ αὐτοφόρῳ in the indictment shows that the procedure is apagoge kakourgon.

26 The first direct questioning is found at 26–27 and has to do with the plea and the question of guilt: καίτω, ὡς Ἀγόρατε, εἰ μὴ τί σοι ἦν παρεγκενεμένον . . . πῶς οὐκ ἂν ἄγων . . . ; The speaker proceeds to refute the defendant’s plea that he had acted unwillingly, μὴν δὲ ἂκος μὲν προσποιεί . . . (28).
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ākoīnō δ' αὐτόν καὶ <τούτω> δισχυρίζεσθαι, ὅτι "ἐπ' αὐτοφώρῳ τῇ ἀπαγωγῇ επιγέγραπται . . . (85), and interrogates his adversary to suggest that Agoratus has convicted himself in his own words:

οὐ γὰρ δῆπον τούτῳ μόνον ὁδεῖ τὸ ἐπ' αὐτοφώρῳ ἐπεὶ ἐκ τοῦ σοῦ λόγου οὐδεὶς φανερεῖται ἀποκτείνας τοὺς ἄνδρας οὓς σὺ ἀπέγραψας . . . οὐκ οὖν αὕτως τοῦ βανάτου, οὕτως ἐπ' αὐτοφώρῳ ἐστὶ; τίς οὖν ἄλλος αὐτίκος ἰ σὺ ἀπογράφας; ἠστε, πῶς οὐκ ἐπ' αὐτοφώρῳ σὺ εἶ ο ἀποκτείνας; (87)

The term ἐπ' αὐτοφώρῳ in the indictment should apply to the arrest rather than the crime,27 and the prosecutor must go to some length to justify his charges. To debate the fundamental questions of guilt and legality by interrogation in this way suggests that there had been no decisive debate on these questions at the anakrisis before the Eleven.

The next example of erotesis in the extant speeches is found in Lysias 22 Against the Graindealers, dating from the last years of the Corinthian War (ca 386). The argumentative purpose is best understood in the light of what we know about the preliminaries. It is uncertain whether the procedure is apagoge to the council or eisangelia, but given the status of the defendants and the nature of the charges, apagoge seems more likely.28 The speaker says that the metic sitopoleis were taken into custody and questioned in the council by members acting ex officio. Some among the bouleutai had moved for execution without trial; the speaker had moved for trial before the people’s court to avert a dangerous precedent (22.2–4). It is clear from the speaker’s own comments that the sitopoleis had made their plea—that they had acted under order from the authorities—at the hearing before the council: we are told that the archons had been called and questioned on this point, ἐπειδὴ γὰρ οὗτοι τὴν αἰτίαν εἰς ἐκεῖνος ἀνέφερον, παρακαλέσαντες τοὺς ἀρχοντας ἡρωτώμεν (8). It seems evident, too, that the interrogatories here cover the same ground covered at the anakrisis: ἢσως δ' ἐροῦσιν ὡσπερ καὶ ἐν τῇ βουλῇ κτλ. (11). Nonetheless, although there had been some preliminary investigation, it seems necessary to establish what arguments will be used for the defense. The speaker must determine (1) the legal status of the defendants, (2) the facts of the crime, and (3) responsibility.

27 Hansen insists (Apagoge 48–52) that ἐπ' αὐτοφώρῳ refers to the discovery or apprehension by the accuser himself of the criminal ‘with the goods on him’, i.e., in incriminating circumstances, and not necessarily ‘caught in the act’ as it is often interpreted. Strictly speaking “a phrase like ἐπ' αὐτοφώρῳ ἀποκτείνειν is a solecism”: Hansen (supra n.15) 29.
28 Harrison (supra n.5) 50 n.2; cf. Hansen, Eisangelia 41, 114, and Apagoge 31.
From these examples of *apagoge* and related procedures it appears that the initial hearing did not allow for preliminary debate beyond the question of legality and the plea. Instead, in most cases the magistrate would have been reluctant to condemn on his own authority.

In regard to the summary nature of the procedure in *apagoge*, in cases initiated before the council or the assembly, we should compare the action of Pythangelos against Hierocles (ὧς ἱερόσυλον: 332/1). The arrest was made to the *prytaneis*, who brought the case before the *ecclesia*. Aristogeiton proposed that the accused stand convicted and be condemned to death if he admitted having taken the sacred garments as charged, without allowing the plea that he had acted on order from the priest. Aristogeiton’s proposal was indicted for illegality. By law, if the accused denies the charges he has the right of trial before the people’s court, but in this instance it is proposed that the pre-judicial authority, the *ecclesia* acting in the rôle of the archon, interpret admission of the fact as admission of guilt. It is significant for our purposes that in this case, just as in the case against the *sitopoleis*, the proposal for summary execution without trial is rejected as unconstitutional without a *probouleuma* (πρῶτον μὲν ἄπροβολευ­τον), and because of the severity of the sentencing without due process, ἐπείτα δεινότατον κελεύον (Dem. 25 hyp. 1). Aristogeiton’s proposal to the council may seem to suggest that the Eleven and other legal officials had similar authority to interpret the statements of the accused as admission of guilt; however, we have no single instance of summary execution in such cases. Instead, it seems more likely that the rôles of the *boule* and the *ecclesia*, in the cases against the *sitopoleis* and against Hierocles as in Archinos’ *apagoge*, were exceptional owing to religious and political implications; in both cases the proposal was condemned as contrary to the principles of the democratic judiciary.

In the first five examples of *erotesis* in the extant speeches, every case involved some sort of preliminary hearing, although from the argument it appears that the hearing left undecided many questions at issue. In the case against Agoratus it is evident, both from the nature of the procedure and from the questioning indicated in the text, that in the preliminary investigation the Eleven were concerned only with
the question of legality and the defendant’s plea. In all five examples the same principle seems to apply: debate on the questions at issue is reserved for trial before the people. In the next four examples, from the period after the formalization of procedures in 378/7, this principle of the people’s sovereignty is all the more evident.

It is generally agreed that written depositions were required in all legal action after 378, although the exact date of the requirement cannot be determined; it is often assumed that no new evidence was submitted at the trial. The latter assumption is based on the belief that the same principle applies in other procedures as in private suits on appeal from arbitration. It is now generally acknowledged, however, that in cases on appeal from arbitration the restriction against new evidence (Ath.Pol. 52.2–3) is a safeguard to ensure that the claimants negotiate in good faith. The same principle does not hold true for the archon’s decision at the anakrisis: he simply decides whether the action is or is not admissible. We might expect to find some limitations to the uses of erotesis at the trial when the facts of the case had been fully documented. In the following examples, however, special procedures were used to circumvent the new restrictions: the first example is found in Isaeus 11, in a private suit prosecuted by eisangelia to the archon; two of the remaining examples are found in speeches given at hearings for paragraphai in private suits; the fourth case is an appeal (ephesis) against expulsion (diapsephisis).

Speeches involving claims of kinship, rights of inheritance, and citizenship are numerous among the extant orations, and in many cases proof of identity and family ties depends in part upon interrogatories. The clearest example comes from Isaeus’ speech (11) for Theopompus On the Estate of Hagnias (ca 360), where the procedure followed is not dike but eisangelia kakoseos, and in fact the speaker protests against this form of ‘criminal’ prosecution in what is patently a private dispute (11.28). The prosecutor brought his report

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30 G. M. Calhoun, TAPA 50 (1919) 177–88, observed that judicial speeches before 378/7 make no clear reference to written pleas. Thus the rule for written statements at the anakrisis is thought to coincide with other changes in procedure of that time. Cf. Harrison (supra n.5) 98–99.

31 For the view that no new evidence was submitted at the trial, see Lipsius (supra n.1) 829; Leisi (supra n.1) 85; Bonner and Smith (supra n.2) 1 283–84; for the argument followed here, see Harrison (supra n.5) 97 and n.2, 102.

32 On the lengthy dispute on the estate of Hagnias, and the date of Isaeus’ speech written for Theopompus, see the discussion in Wyse’s commentary (supra n.1) 671–78; cf. W. Thompson, De Hagniae Hereditate: An Athenian Inheritance Case (Mnemosyne Suppl. 44 [1976]).
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(eisangelia) before the archon epomnos as the competent magistrate in property disputes. It is clear that the archon’s hearing was not intended to decide the issue without trial but to prepare the case for speedy trial before the people’s court. Thus, at 5, the erotesis is used to establish fundamental facts of the case that might ordinarily be answered at the anakrisis:

Is the child a brother or nephew, either brother’s son or sister’s son, cousin or cousin’s son . . . ? Which of these connections [can he claim], which the law requires to determine ‘next of kin’? . . . You must explain, then, the claim of kinship, what relation this boy is to Hagnias. Tell them! You see that he cannot explain their kinship and answers anything but what you need to know.33

The uses of erotesis in Isaeus 11, and in Lysias 13, are especially significant as examples of cross-examination in logographic speeches in proceedings where the questions at issue had not been debated in preliminaries. The next three examples are also found in logographic speeches in cases where important questions at issue seem to be first debated at the trial. The first two are in speeches for the paragraphe hearing in private suits of about the same period, speeches 35 and 36 in the Demosthenic corpus.34 In these two the erōteis are directed to the question of legality.

The synegoros for Phormio (Dem. 36) against Apollodorus makes extensive use of direct questioning against the legal basis of his adversary’s claim. After a brief diegesis the speaker addresses the two questions upon which the legality of the charges must be decided: in eighteen years Apollodorus had not contested the settlement of his father’s estate; the plaintiff has not been able to produce any documents to support his claim.

Speech 35 defends the legality of the speaker’s suit against fraud; in the paragraphe Lacritus has objected that suits involving

33 11.4-6: Ἐπίσχες. ἐρωτήσομεν σε. ἀδελφός ἡ γένος γεγονὼς. ἦ ἀνθρώπος ἡ ἐξ ἀνθρώπων. πρὸς πρὸς πατέρων. τι πατερῶν ἡ ἀνέμβατος. γὰρ ὁ ἀνιψὸς τῆς ἀγαθίστειαν δίδωσι. . . . δὲ δὴ σὲ τῆς ἀγαθίστειας. τι τοῖς ἀνίψοις. ἢ ἄνεμβατος. τοῦ γενοῦς ἐπίτειν. διήρκει τόν τοῦτον. αἰσθήθησθε. ὅτι οὐκ ἔχει τῆς συντριβής ἐπίτειν. ἄλλʼ ἀποκρίνεται πάντα μᾶλλον. ἡ δὲ μαθεῖν ύμᾶς.

34 See Isager and Hansen (supra n.4) 123–29 on procedure in paragraphe; 169–70 and 177 on dating Dem. 35 and 36.
business dealings of this kind are inadmissible before the people’s courts. Thus the speaker demands (45–49):

For what reason, Lacritus, does this principle [of prosecution for fraud] hold good in your case but will not be valid for me? Are not the same written laws valid for us all, and the same principle of justice in commercial disputes? ... Where then is such a suit admissible? Just give a straight answer, according to the laws (διδάξον, ὃ Λάκριτος, μόνον δικαιόν τι λέγων καὶ κατὰ τὸν νόμον, 49).

In these arguments for the prosecution and in Dem. 36 for the defense we have two examples of debate at paragraphe hearings on questions of legality that might have been answered ordinarily at the anakrisis. The growing importance of the paragraphe points to a final phase in the decline of the archon’s judicial authority. Even on the fundamental question of legality erotesis and other decisive arguments were often reserved for debate before the dikastai.

From the same period we have a fourth instance of erotesis in the speech Against Euboulides (Dem. 57), in an appeal against expulsion (διωψώμενος τῶν δημότων). In this case, again, the accusers have taken advantage of a special procedure to prosecute a private dispute, without the usual safeguards and restrictions. From the diegesis it is clear that the questions at issue have not been decided before the trial. The speaker in his own defense challenges his adversary to debate the issues in the time allotted to the speaker. It has been acknowledged that such challenges indicate erotesis and extempore debate: ἐπὶ τοῦ ἐμοῦ ὑδάτος δότις βούλεται τούτων τὰναντία μαρτυρησάτω (61). Again, in the epilogue (76–78), the speaker himself responds to the customary questions in proof of identity, the same questions asked in the dokimasia of candidates for public office (cf. Ath.Pol 53.3), and, one may assume, a conventional procedure in such disputes involving rights of citizenship or inheritance.

These last four examples (Is. 11.5; Dem. 35.35–49, 36.19, 57.61), from the period after 378/7 to the 340’s, illustrate two aspects of the conservatism of Athenian court proceedings. All are found in logographic speeches in private suits in procedures where the usual opportunities for preliminary debate on the questions at issue had been circumvented. None of these speeches is likely to have been published in any revised form: the text we have is essentially the prepared text. Thus we have considerable evidence, first, that logography did not put an end to extempore tactics, second, that the re-

35 For the procedure in diassephesis see Bonner and Smith (supra n.2) 1 319.
36 Leisi (supra n.1) 40–41.
requirement for written depositions at the *anakrisis* did not restrict *erōtesis* at the trial. In most cases there was no restriction against new evidence, and in many cases even the most fundamental questions were debated first before the *dikastai*. Only the charges, the plea, and the question of legality were decided at the *anakrisis*, and even the question of legality could be deferred by *paragraphe*.

The next four examples, however, are all found in procedures where there was some preliminary debate and most of the questions at issue seem to be clearly defined. All occur in speeches in public suits of some notoriety in the prosecution of *rhetores*, and in each case it is likely that the received text is a version revised for publication. We cannot be sure how closely the extant speeches follow the speaker’s actual delivery, but it seems inherently unlikely that the published version would have included such provocative tactics as *erōtesis* if the speaker had not had the confidence to challenge his adversary in the actual proceedings.

The speech of Demosthenes (19) in the *graphe parapresbeias* against Aeschines provides the first of these examples. It is clear that the questions at issue and the essential arguments on both sides were defined at the hearing before the *euthynos*:


In the fragment of Hyperides’ speech reported in Rutilius Lupus (fr.32), the phrase *saepius his verbis . . . requiris* suggests that the issue
 had been debated in the assembly—unless we are to assume that this represents an editorial comment in the published version.

_Quid a me saepius his verbis de meo officio requiris?_ "Scripsisti ut servis libertas daretur?" _Scripsi, ne liberi servitatem experiretur._ "Scripsisti ut exules restituerentur?" _Scripsi, ne quis exitio afficeretur._ "Leges igitur quae prohibebant haec nonne legebas?" _Non poteram, propriae quod litteris earum arma Macedonum opposita officiebant._

In another report of these proceedings (Plut. _Mor._ 849a) the famous dictum οὐκ ἐγὼ τὸ ψῆφωσμα ἔγραφα, ἡ δὲ ἐν Χαρονείᾳ μάχη probably represents a response to erotesis; apparently Aristogeiton demanded ἔγραφας σὺ τοῦτο τὸ ψῆφωσμα; as Dinarchus (1.83) was later to interrogate Demosthenes.

In Demosthenes’ oration _On the Crown_ the speaker makes persistent use of direct questioning to his adversary (18.63–71, 124, 196), and there is ample evidence that these questions represent eroteseis in the actual delivery. In his speech for the prosecution Aeschines claims that he has been threatened with cross-examination: ταύτα δὲ καταριθμητάμενος, ὡς άκούω, μέλλει μὲ παρακαλεῖν καὶ ἐπερωτάν... καὶ μὴ θέλω ἀποκρίνασθαι, ... ἐκκαλύψειν μὲ φησι προσελθόν καὶ ἄξειν ἐπὶ τὸ βήμα καὶ ἀναγκάσειν ἀποκρίνασθαι (3.55). Demosthenes’ challenge to Aeschines to reveal a better policy (18.63–71) suggests in itself that the issues had been debated publicly and the speaker was sure of his ground. Later commentators in antiquity seem to have assumed that such questions demanded some response.39

The last of the examples that can be dated is found in Dinarchus’ speech _Against Demosthenes_ (1). The prosecution was initiated by _apophasis_ , or report of the council of the Areopagus to the assembly. The council of the Areopagus undertook the preliminary investigation, and in this case, as in few other public suits, all the evidence was entered at the preliminary hearing: not a single authentic deposition is read in the four surviving speeches.40 We may assume that the evidence was cited in the _apophasis_ proper, the report of the Areopagus to the assembly. Thus the _dikastai_ were well acquainted with the evidence, and Dinarchus’ challenge is a safe strategy (1.83):

_ἔγραψας σὺ τοῦτο, Δημόσθενε; ἔγραψας: οὐκ ἐστιν ἀντειπέιν._
_ἔγένετο ἡ βουλή κυρία σοι προστάξαντος; ἔγένετο τεθνάσαι τῶν_ 39 See the essay Περὶ διαλημμάτων in _Hermog._ _Inv._ 4.6: διὸ ἐρωτήσεις ἐρωτώντες τῶν ἀντικειμένων πρὸς ἑκατέραν ὡμὲν εἰς λύσιν παρασκευαζόμενοι. δει δὲ τὰς ἐρωτήσεις ἐναίσθας ἀδίκημα εἶναι, κτλ.
40 Hansen, _Eisangelia_ 39–40.
Demosthenes himself had proposed the investigation that found him guilty; the purpose of the interrogation is to provoke any arguments against the legality of the proceedings. The speaker’s next questions are meant to refute Demosthenes’ defense that he had proven his integrity in handling public monies (89–90):

{oùtós on, ó áριστε, eîseí mou, φυλάξομεν, eîn sw múen eîkosí ták-

launtau laðbou èξèi . . . èteroi ð’’ ðôsa ðê potè àπòpèbássomènou eîsi;

. . . kai pòtera kàllìou èstì, pròs de dikaiòterou, àπànt’ èn tò
kouìv φυλάττεσθαι . . . ð’’ tòiùs ð’ìtòròs . . . dìhýrpakòtòs èξèu;}

These last four examples of èrôtesis from proceedings against rhe-
toìres resemble the examples from earlier periods in form and argu-
mentative function: the interrogatories are directed to the questions
of guilt and legality; they are not literary ornamentation, as some
commentators have supposed,41 but indicate a common practice in
the courts.

There are two further indications of èrôtesis in speeches that have
not been dated or identified with any certainty: Isaeus fr.2 and Hy-
perides fr.B55. These examples suggest some general trends in the
practice of judicial debate. The earlier of the two, from Isaeus, is cited
by Dionysius (Isae. 12). The speaker’s argument suggests that exam-
inational questions were a conventional if not obligatory part of the
rhetoric of accusation: the judges were accustomed to hearing the
issues clearly phrased in a few straightforward interrogatories.

èξèhì de àutôn, eì pèr tì díkaiou èfrónèi . . . kai èxètâxein èkàst-
tà tòw èn tò lògòw, tòutò tòw tròpòw pàr’ èmòu pînðànomènou.
eîsthòras logìsèi pòsaç; tòsaç. kàtà tòsou àrgyriou èiènènèg-
mènas; kàtà tòsou kai tòsou. kai pòià ùψè̂fîmata; tautì taîntas
eîlèpsèi tîñè; òðè. (kai taînta màrtaùromènou skèpíasthài . . . )

The second example, from the latter half of the fourth century,
shows how speakers in the courts may have departed from formal
èrôtesis to take full advantage of their position on the bema in direct
questioning to the adversary: àπòkòriνaì muì, ‘Èrmèiaì, òîpèÔer kàthì.

41 C. D. Adams, for example, ad Lys. 12.25–26, in Lysis, Selected Speeches (New
York 1905) 356, recognizes the interrogatory formula in the questions at 12.25, but re-
gards the follow-up questions at 26 as “rhetorical questions” for stylistic effect, with
reference to the písmatíkon schéma in Tiberius De figuris (Spengel Rh. Gr. III 64).
Thompson (supra n.32) ad Isae. 11.4–6 makes the suggestion that the questions in
Lys. 12.25–26 are simply rhetorical embellishment. On Din. 1.83 see Lipsius (supra
n.1) 917 n.60.
This fragment confirms many indications that the adversary was not always 'called to the stand' for cross-examination, but his answers or his silence were no less incriminating.

Thus, over the course of the fourth century, changes in practice and procedure, rather than restricting erotesis within set speeches, called for new tactics in debate at the trial. In such summary procedures as apagoge and endeixis only the defendant's plea and the legality of the charges were decided at the anakrisis; in many cases the major questions at issue were first debated in court. In ordinary procedures in most cases the rules for submitting evidence at the hearing were no obstacle to erotesis; in paragraphe the sovereign court assumed authority to judge even the question of legality. In the prosecution of rhetores by graphe paranomon and related procedures, in political disputes involving well-known policies and personalities, the requirement to answer the speaker's questions could still be invoked to discredit the opposition. In logographic speeches and in speeches for publication erotesis is not a stylistic ornament but a sign of common practices in the courts.

GASTONIA, NORTH CAROLINA

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