

The Homicide Courts and the *Dikasteria*: A Paradigm not Followed

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THE AIMS AND IDEALS of the Athenian law courts, according to much recent scholarship, were radically different from those of modern courts. Drawing on the notion of social drama introduced by the anthropologist Victor Turner to describe law in primitive societies,¹ these scholars argue that the courts did not attempt to resolve disputes according to established rules and principles equally and impartially applied, but rather performed a variety of other social roles. The Athenian legal system has been alternately described as an arena for socially constructive feuding behavior,² a public stage on which the elite competed for prestige,³ and a forum for ongoing communication and negotiation between elite litigants and mass jurors “in a context that made explicit the power of the masses to judge the actions and behavior of elite individuals.”⁴ This view of the courts as social drama has been challenged by scholars who emphasize that lawcourt speakers often praise the laws and remind the jurors of their oath to vote according to the laws, and who argue that legal reasoning played a far greater role in Athenian courts than is acknowledged by today’s *com-*

¹V. W. Turner, *Schism and Continuity in an African Society* (Manchester 1957) 91–93, 230–232.

²D. Cohen, *Law, Violence, and Community in Classical Athens* (Cambridge 1995) 87–115.

³R. G. Osborne, “Law in Action in Classical Athens,” *JHS* 105 (1985) 40, 52.

⁴J. Ober, *Mass and Elite in Democratic Athens: Rhetoric, Ideology, and the Power of the People* (Princeton 1989) 145.

munis opinio.⁵ Crucial to both schools of thought is the relative importance of legal argumentation *stricto sensu*, and the assessment of material presented by litigants, such as references to character, that does not bear directly on the issues in dispute.

The scholarship addressing the role of the courts in Athenian society has focused on speeches delivered in the popular courts (*dikasteria*). Homicide and a few other serious offenses were tried not in these popular courts but in five special homicide courts, the most celebrated of which was the Areopagus. The unusual composition and procedures of the homicide courts,⁶ particularly the rule prohibiting irrelevant statements, made these courts (at least in theory) far more congenial to legal argument and less vulnerable to influences based on emotional appeals and the social standing of the litigants than the *dikasteria*. As a result, the Areopagus (and, by association, the other homicide courts) were universally lauded as the city's finest tribunals.⁷

In this article I examine the distinctive features of the homicide courts, as much in reputation as in fact, for the light I believe they can shed on the aims and ideals of the popular courts, and, more broadly, on the Athenian conception of judicial process. The focus is less on the workings of the homicide courts themselves than on their role in the Athenian

⁵E. M. Harris, "Open Texture in Athenian Law," *Dike* 3 (2000) 33, 78–79; cf. C. Carey, "Legal Space in Classical Athens" *G&R* 41 (1994) 181–183.

⁶When discussing the procedures of the homicide courts in this paper I focus on the Areopagus, Palladium, and Delphinium, and do not address the Prytaneum or the court at Phreatto, about which we know very little.

⁷There are surprisingly few references to the Palladium and Delphinium, though it seems highly probable that praise of the Areopagus must often refer to these courts as well. Demosthenes 23 treats these three courts as a group, linking the Palladium and the Areopagus as "two tribunals of great antiquity and high character" and describing the Delphinium as "a third aside from these two courts whose usages are still more sacred and awe-inspiring" (Dem. 23.73–74). The Areopagus evidently came to serve *pars pro toto* as a symbol of the other homicide courts. Translations of Aeschines, Antiphon, Isocrates, Lycurgus, and Lysias are drawn from M. Gagarin, ed., *The Oratory of Classical Greece* I– (Austin 1998–); the rest are from the Loeb Classical Library.

imagination. My aim in discussing the unusual procedures of the homicide courts is not to explain their origins in archaic times, but to explore the social meanings these procedural differences may have had in the classical period.⁸ It may even be possible that the homicide courts existed primarily in the imagination in the classical period: in contrast to the hundreds of popular court cases mentioned in our sources, there are only fifteen confirmed or possible cases of homicide in the period 507–322 B.C.⁹ If the homicide courts rarely sat in judgment, that probably only enhanced their reputation. I argue that the idealization of the Areopagus and the other homicide tribunals reflects Athenian ambivalence about the decision-making process of its mass juries.

I

The Areopagus had jurisdiction over cases of intentional homicide, wounding, arson, poisoning, and some religious offences.¹⁰ In the fifth century at least, and perhaps throughout the classical period, other types of homicide were tried in special courts before the 51 *ephetai*.¹¹ We do not know for certain how the

⁸The historical reconstruction of the homicide courts has been a source of constant scholarly dispute. For a recent summary of views and a new proposal see E. Carawan, *Rhetoric and the Law of Draco* (Oxford 1998) 7ff.

⁹G. Herman, "How Violent was Athenian Society?" in R. Osborne and S. Hornblower, edd., *Ritual, Finance, Politics: Athenian Democratic Accounts Presented to David Lewis* (Oxford 1994) 101. In fact, it is possible that the *dike phonou* was largely superseded by the less rigid *apagoge* procedure in the fourth century: Carawan (*supra* n.8) 167.

¹⁰For an overview of the evidence for the jurisdiction, membership, procedures, and reputation of this court, see R. W. Wallace, *The Areopagos Council to 307 B.C.* (Baltimore 1989).

¹¹*IG I³* 104; *Dem.* 43.57; 23.37–38; *And.* 1.78; *Arist. Ath. Pol.* 57.4. The use of *ephetai* in the homicide courts has been much debated. Smith and Sealey argue that by the fourth century the homicide courts were manned by ordinary jurors, while Carawan, MacDowell, and Harrison argue that the *ephetai* continued to judge cases in the Palladium, Delphinium, and court in Phreatto. Carawan (*supra* n.8) 155–160; D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester 1963) 52–57; A. R. W. Harrison *The Law of Athens II Procedure* (Oxford 1971) 40–42; G. Smith, "Dicasts in the Ephetetic

ephetai were chosen, but it seems likely that they were selected by lot from the Areopagites.¹² The evidence for the identity of the *ephetai* is inconclusive, but what is more important for our purposes is that the procedures used in these homicide courts more closely resembled those of the Areopagus than those of the popular courts and that the Athenians considered the Areopagus and the *ephetic* courts special, related tribunals distinct from the popular courts.¹³

The composition of the Areopagus differed from the mass juries of the *dikasteria* in important respects: membership was limited to ex-archons, and Areopagites served for life. Demographic models suggest that the council probably comprised between 145 and 175 men with a median age between 52 and 57.¹⁴ It is not difficult to imagine how the composition of the Areopagus might affect (or, more importantly, might be perceived to affect) the decision-making process of the homicide courts. A somewhat smaller body of older men, all with considerable legal experience, both through their work on the Areopagus itself and through their service presiding at sessions of a popular lawcourt during their archon year, might be less likely to be swayed by rhetoric or emotion or to be misled on matters of law than the mass juries in the *dikasteria*.¹⁵

The impression that the Areopagus dispensed a different brand of justice was fueled by the Council's strict requirements

Courts," *CP* 19 (1924) 353; R. Sealey, "The Athenian Courts for Homicide," *CP* 78 (1983) 275.

¹²Carawan (*supra* n.8) 162; MacDowell (*supra* n.11) 51–52.

¹³For example, the speaker in Antiphon 6.6 discusses the unique procedures of the homicide courts and the speaker in Demosthenes 23.73–74 emphasizes the similarity between the Areopagus and other homicide courts.

¹⁴M. H. Hansen and L. Pederson, "The Size of the Council of the Areopagos and its Social Composition in the Fourth Century B.C." *ClMed* 41 (1991) 73. This age distribution fits the parallel Isocrates draws between the Areopagus and the Spartan *gerousia* (12.154).

¹⁵The Areopagites' legal knowledge was of course practical rather than theoretical—there is no evidence that the Areopagus developed a collective sense of jurisprudence over time.

regarding behavior and decorum. The Areopagites were expected to be particularly upright and respectable citizens.¹⁶ Throughout the classical period, the Areopagus had a reputation as the finest lawcourt in Athens.¹⁷ Litigants in the popular courts express anxiety about the ability of their judges (see below); contrast the faith in the Areopagus professed by the speaker in Lysias 3:

If anybody else were going to decide my case, I would be very worried about the danger. I know that carefully prepared tricks or mere chance can sometimes produce wholly unexpected outcomes for those on trial, but because I am appearing before you [the Areopagus], I remain confident that I shall receive justice (Lys. 3.2).

Lycurgus calls the Areopagus the “finest model of Greece,” going so far as to make the incredible statement: “this court is so superior to all other courts that even the men convicted by it agree that its verdicts are just” (Lyc. 1.12). In accordance with Ephialtes’ reforms, the functions of the Areopagus had been reduced primarily to trying murder cases, but in the middle of the fourth century the powers of the council were expanded and the Areopagus once again became a political force. One might at first be tempted to dismiss the praise of the Areopagus’ competence as a lawcourt as a reflection of its enhanced political powers at the time, but even earlier writers like Lysias and Antiphon refer to the Areopagus as “the most sacred and

¹⁶Din. 1.55–6; Aeschin. 1.81–5; Plut. *Mor.* 348B; Ath. 566–568. In the *Areopagiticus* Isocrates describes the moral transformation that accompanies admission to the Areopagus: “we can see those who are insufferable in other matters hesitate to show their true nature when they enter the Areopagus and abide by its laws rather than by their own wickedness, so great was the fear our ancestors aroused in the wicked, and such was the memorial to their own virtue and moderation that they left in this place” (7.21).

¹⁷E.g. Xen. *Mem.* 3.5.20. The speaker in Demosthenes 23.66 speaks of the Areopagus as uniquely immune from extreme political swings.

just of courts" (Lys. 6.14) and to its members as "the most righteous and just jurors in Greece" (Ant. 6.51).¹⁸

Although the Areopagus was not a particularly selective institution in the classical period—after 457 archons were chosen by lot from all but the lowest class of citizens and by the mid-fourth century all citizens were eligible—it is clear that the aura surrounding its members and presumably their judicial decisions was very different from the Athenians' attitude toward the popular *dikasteria*.

II

The Areopagus and homicide courts also had their own special procedures; as the speaker in Antiphon 6 states:

For these reasons the laws, the oaths, sacrifices, proclamations, and aspects of procedure in homicide cases are very different from other cases, because it is of the highest importance to determine the facts (*αὐτὰ τὰ πράγματα*) correctly when so much is at stake (Ant. 6.6).

This passage and others like it suggest that the rules of this court encourage the Areopagites to base their decisions primarily on the factual and legal issues of the case and minimize some of the characteristics of the popular lawcourts that the Athenians found troubling, such as the injection of irrelevant material.

Even in speeches written for delivery before a popular court, litigants openly denounce the tendency of jurors to ignore the legal issues of the case. The friends of the speaker in Isocrates 18 urged him, he claims, not to bring his case even though he was in the right, arguing that "many things come out contrary to

¹⁸The extraordinary reputation of the Areopagus extended into the Roman period; in a letter of A.D. 165 Marcus Aurelius calls it "the most respected court," and a decade later laments that the Areopagus no longer requires the *trigonia* of its members. See J. H. Oliver, *Greek Constitutions* nos. 173, 184. On the Areopagus in the Roman period see J. H. Oliver, *The Civic Tradition and Roman Athens* (Baltimore 1983) 53–55.

expectation in the [popular] courts and that your verdicts were more a matter of luck than justice" (18.9–10). In a similar vein Lysias remarks that Eratosthenes is employing a common defense strategy that consists of evading the specific charge and dwelling on supposed services to the city:

Nor can he even do what has become the custom in this city, whereby defendants make no defense against the charges, but sometimes deceive you with irrelevant statements about themselves, showing you that they are fine soldiers, or have captured many enemy ships while serving as trierarchs, or have made hostile cities into friendly ones (Lys. 12.38).

The most striking difference between the Areopagus and the popular courts is that the Areopagus had a rule forbidding irrelevant statements.¹⁹ A similar rule appears to have applied in the other homicide courts as well: the speaker in Antiphon 6, a case before the court at the Palladium, implies that the rule applies to all homicide prosecutions: "in this trial, when they are prosecuting me for homicide and the law requires them to stick to the crime itself" (ἐν δὲ τούτῳ τῷ ἀγῶνι, φόνου διώκοντες καὶ τοῦ νόμου οὕτως ἔχοντος, εἰς αὐτὸ τὸ πρᾶγμα κατηγορεῖν) (Ant. 6.9). None of our sources gives an exhaustive list of items that were considered "legally irrelevant" (ἔξω τοῦ πρᾶγματος), but the context of Lysias 3.46, Lycurgus 1.11–13, and Antiphon 5.11 makes it clear that lists of services and attacks on an opponent's character were forbidden. Pollux adds that litigants before the Areopagus were not permitted to include a *proem* or emotional appeals in their speeches.²⁰ We do not know for certain how, or how strictly, this rule was enforced, but an (admittedly very late) source suggests that the herald would squelch litigants who strayed from the subject:

¹⁹Lys. 3.46; Lycurg. 1.11–13; Poll. 8.117.

²⁰Poll. 8.117. If taken literally, this rule would require the judges or the herald to perform a quick feat of literary analysis during every speech.

If anyone prefaces his speech with an introduction (φοίμιον) in order to make the court more favorable, or brings emotion or exaggeration into the case—tricks that are often devised by the disciples of rhetoric to influence judges—then the herald appears and silences them at once, preventing them from talking nonsense to the court and from disguising the issue with words, in order that the Areopagites may see the facts bare.²¹

Regardless whether a formal mechanism for enforcing the relevancy rule existed, or whether the experienced Areopagites 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 irrelevant material had no place in the court of the Areopagus. In the opening of the *Rhetoric*, Aristotle suggests that the Areopagus' relevancy law places the discussion in that court outside the realm of rhetoric and adds that if all trials observed this rule there would be nothing left for a rhetorician to say (*Rh.* 1354a). Aeschines suggests that the Areopagus often succeeded in ignoring irrelevant issues such as the character and speaking ability of the litigants when making its decisions:

Now take as an example the Council of the Areopagus, the most exact body in the city. I have often at meetings of that council seen men who spoke well and provided witnesses convicted; and before now I know of some men who spoke very badly and had no witnesses for their case but succeeded.²²

Finally, Lucian's statement (*Hermot.* 64.13) that the Areopagus

²¹ Lucian *Anach.* 19. Plato suggested a similar mechanism in the *Laws*: "And in general, during a trial, the presidents of the court shall not permit a man to speak under oath for the sake of gaining credence, or to imprecate curses upon himself and his family, or to make use of unseemly supplications and womanish sobbings, but only and always to state what is just in proper language; otherwise the magistrate shall check him for digressing from the point, and shall call him back to deal with the matter at hand" (*Leg.* 949B).

²² Aeschin. 1.92. Aeschines suggests that the Areopagites reach the correct result without regard to the quality of the speakers or their witnesses in part because they base their decisions on their own knowledge and investigations as well as the proceedings in court. Cf. *Lys.* 7.25 for the Areopagus' monthly supervision of the sacred olives protected by law.

judged at night in the dark, “so that it would have no regard for who was speaking but only for what is said,” is not likely to be literally true, but does suggest a strong and remarkably persistent belief that the Areopagus judged in an entirely different manner from the popular courts.

One problematic text runs counter to the rest of our evidence. According to the *Ath. Pol.*, in private cases heard by the popular courts litigants took an oath to speak to the point (κ[α]ὶ δ[ι]ομνύ[ουσι]ν οἱ ἀντίδικοι εἰς αὐτὸ τὸ πρῶμ[α] ἐρεῖν).²³ Even if this report is accurate, the required oath has left no trace in our surviving private speeches. Whereas speeches made before the homicide courts or referring to them make frequent mention of the relevancy rule,²⁴ those delivered in the *dikasteria* never mention such a legal requirement. In the very few allusions to speaking to the issue, most of which are found in a single speech, Demosthenes 57 *Against Eubulides*, nothing in the phraseology suggests a duty imposed by law to avoid straying from the issue at hand.²⁵ At Dem. 57.59 the speaker begs the jury not to be irritated (“in the name of Zeus and the Gods let no one be offended,” καὶ μοι πρὸς Διὸς καὶ θεῶν μηδεὶς ὑπολάβῃ δυσκόλως) if he seeks to demonstrate that his opponents are villains, as their villainy truly does pertain to the event that befell him. The speaker in Lys. 9.1 complains that his opponents are evading the point at issue by condemning his character: “What on earth did my opponents have in mind when they ignored the point at issue and sought to defame my character?

²³ *Ath. Pol.* 67.1. For varying interpretations of this problematic text see P. J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford 1993) 718–719; J. H. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig 1915) 918–919; Harrison (*supra* n.11) 163.

²⁴ E.g. Ant. 6.9, Lys. 3.46.

²⁵ Dem. 57.7, 33, 59, 60, 63, 66; Lys. 9.1–3. Since admonitions to the jurors to be faithful to the dikastic oath are common, the complete absence from our texts of this alleged litigants’ oath is striking. For a discussion of the dikastic oath see S. Johnstone, *Disputes and Democracy: The Consequences of Litigation in Athens* (Austin 1999) 33–42.

Are they unaware that their business is to speak to the point?" (πότερον ἀγνοοῦντες ὅτι περὶ τοῦ πράγματος προσήκει λέγειν;). By contrast, the speaker before the Areopagus in *Lys.* 3.46 asserts that "it is unlawful to mention irrelevant material in your court" (παρ' ὑμῖν οὐ νόμιμόν ἐστιν ἔξω τοῦ πράγματος λέγειν)," and the speaker in *Antiphon* 5.11 speaks of an obligatory oath, applicable in homicide trials, to bring no charge other than the homicide itself. And we have seen that a number of texts praise the Areopagus for its distinctive prohibition of irrelevant matter.²⁶ It is most likely, then, that the homicide courts had a unique procedural stricture, some provision different from the putative oath for *antidikoi* mentioned in the *Ath. Pol.*, forbidding the introduction of any matter not germane to the charge.

Examination of the four surviving speeches written for delivery in the Areopagus (*Ant.* 1, *Lys.* 3, 4, 7) and the two written for the other homicide courts (*Ant.* 6, *Lys.* 1) gives some indication of the extent to which the rules and procedures of these special courts would have affected litigants' use of material ἔξω τοῦ πράγματος.²⁷ Speakers in the homicide courts are more skittish about citing their services to the state or slandering their opponents than popular court speakers, but irrelevancy was by no means absent from litigation in these courts. Although the relevancy rule was not adhered to in all respects, there are significant differences between the surviving homicide and popular court speeches, and litigants seem to be aware that the homicide courts enjoyed a reputation for having different expectations from those of the popular courts.

Litigants before the homicide courts were reluctant to adduce evidence of their good deeds or to criticize their opponent's character. Although such references occur frequently in the

²⁶*Lyc.* 1.11–13; *Ant.* 5.11; *Arist. Rh.* 1354a.

²⁷I hope to address elsewhere the broader question of whether there is a significant difference in the nature of legal argumentation used in homicide and popular court speeches.

dikasteria,²⁸ litigants in our surviving six homicide speeches employ this strategy in only three passages. In two of the three²⁹ 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 ability as a soldier but stops short with a *praeteritio*: "I could tell you many other things about [my opponent], but it is unlawful to mention irrelevant material in your court" (3.46; later in this same passage the speaker states that he performed many public services). Lysias 7 includes a similar formulation: the speaker boasts that he has fought in many battles and has been a model citizen, before calling himself to order, as it were: "I have fought many battles on land and at sea [for Athens], and have behaved well under both the democracy and oligarchy. But I do not know, members of the Council, why I need to mention these matters in your court" (7.41–42). 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.³⁰ 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.

In addition to the rare and reluctant use of character evidence in the speeches themselves, in one case, Antiphon 6, the

²⁸E.g., Lys. 18.47, 20.30, 25.24–25, 30.2; Is. 4.27, 5.45, 6.35–38; Dem. 18.129–130, 21.154, 36.45, 54.44; Aeschin. 1.101. For discussion see C. Carey, "Rhetorical Means of Persuasion" in I. Worthington, ed., *Persuasion: Greek Rhetoric in Action* (London 1994) 26–46.

²⁹Lys. 3.44–46, 7.41; the exception is 7.31.

³⁰Johnstone (*supra* n.25) 93–100. He shows that in private cases 50% of defendants cite their liturgies, but 23% of prosecutors.

speaker, a *choregus*, accuses his opponent of violating the relevancy rule by slandering him rather than restricting his prosecution to the homicide charge (6.7–10). On closer inspection, however, the *choregus*' complaint appears to be unfounded. He indicates that the allegedly irrelevant material introduced by his opponent chiefly concerns his conduct in training the chorus:

If I had done any wrong to the city in training the chorus or in anything else, they had the opportunity to make this known and prove it, punishing one of their own enemies and helping the city at the same time, but none of them was ever able to prove that I had committed any crime, large or small, against you, the people; on the other hand, in this trial, when they are prosecuting me for homicide and the law requires them to stick to the crime itself (φόνου διώκοντες καὶ τοῦ νόμου οὕτως ἔχοντος, εἰς αὐτὸ τὸ πρῶγμα κατηγορεῖν), they are conspiring against me by inventing falsehoods and slandering me for my public activities (Ant. 6.9).

However, the issue in this unusual case of *bouleusis* of involuntary homicide is whether the *choregus* is responsible for actions taken by his subordinates and therefore may be held liable for accidents that occur in connection with his training of the chorus, or whether “planning” requires a more direct connection to the giving of the poison.³¹ It was therefore natural for the prosecution to argue that the defendant was negligent in his handling of the liturgy, and indeed the *choregus* begins his own defense by stating that he discharged the office efficiently and scrupulously (6.11). The purported irrelevant slanders in the prosecution speech were thus more probably criticisms of the *choregus*' supervision over the choral training, a question directly relevant to the charge at issue.³²

³¹ For discussion of the legal issues in this case, see M. Gagarin, *Antiphon the Athenian: Oratory, Law, and Justice in the Age of the Sophists* (forthcoming), and *Antiphon and Andocides* (Austin 1998) 74; Carawan (*supra* n.8) 251–281.

³² The speaker also devotes several sections of this speech to the argument that the prosecutor was bribed by his enemies to bring the case and thereby prevent the speaker from proceeding against them in court on unrelated charges

The unusual approach to relevance in the homicide courts can be seen clearly by comparing our surviving homicide court speeches with three popular court speeches involving similar charges: Antiphon 5, Lysias 12, and Lysias 13. Antiphon 5 and Lysias 13 are both homicide cases argued in a popular court via the *apagoge* procedure.³³ The speaker in Antiphon 5, a young Mytilenean defending himself on a charge of homicide, feels the need to give an explanation of his father's conduct when Mytilene revolted from Athens a decade earlier, and notes that his father has served Athens by sponsoring choruses and paying his taxes (Ant. 5.74–79). The prosecutor in Lysias 13 devotes six sections and witness testimony to an attack on the character of Agoratus and that of his family. He is, according to the speaker, a slave and the descendant of slaves, a convicted sycophant, and an adulterer who corrupts the wives of citizens (Lys. 13.18–19, 64–67). The speaker also recounts the crimes of each of Agoratus' three brothers: one was executed for treason during the Sicilian expedition, one was imprisoned as a slave smuggler, and one was executed as a clothes-stealer (13.67–68). In speech 12, Lysias accuses Eratosthenes, a member of the Thirty, of the killing of his brother Polemarchus during the Thirty's short-lived reign of terror. The legal context of this speech is not entirely clear from the text, but it appears to have been delivered before a popular court at Eratosthenes' *euthunai*

(6.33–50). Although some scholars have viewed this argument as irrelevant material, there is no reason to believe that the Athenians considered specific evidence that the prosecutor was bribed to bring a false charge ἔξω τοῦ πράγματος. Indeed, even in the restrictive evidence system of the modern United States, evidence suggesting that a witness has ulterior motives for his testimony is considered relevant. Because the prosecutor in an Athenian homicide case was required to swear that the accusation was true and that the accused had committed the homicide, such litigants were akin to witnesses in some ways.

³³The details of the types of *apagoge* have been vigorously debated. For discussion see M. H. Hansen, *Apagoge, Endeixis, and Ephegesis against Kakourgoi, Atimoi, and Pheugontes* (Odense 1976); M. Gagarin, "The Prosecution of Homicide in Athens," *GRBS* 20 (1979) 301–323; Hansen, "The Prosecution of Homicide in Athens: A Reply," *GRBS* 22 (1981) 11–30; H. D. Evjen, "'Apagoge' and Athenian Homicide Procedure," *RHD* 38 (1970) 402–415; E. Volonaki, "'Apagoge' in Homicide Cases," *Dike* 3 (2000) 147–176.

in 403/2.³⁴ Less than half of the speech concerns the murder of Polemarchus: Lysias details Eratosthenes' other evil deeds, beginning with his involvement with the Four Hundred in 411 B.C. (12.42–52), and engages in an extended attack on Theramenes (62–78). We must be careful about drawing conclusions from the argumentation in this unique case.³⁵ Nevertheless, the unabashed use of irrelevant references to character in Antiphon 5 and Lysias 13, as well as Lysias 12, supports the conclusion that speakers were more likely to stick to the issue under dispute in cases heard by the homicide courts than in similar popular court cases.

The one consistent exception to the relevancy rule we find in these speeches is the appeal for sympathy from the Areopagites.³⁶ It is possible that under the stress of such a serious charge litigants could not maintain composure³⁷ and refrain from appeals for pity, and that such appeals were not considered as offensive as lists of services or attacks on the opponent's character, and were for that reason allowed a degree of forbearance. In sum, although our sources overstate the differences between the rules and procedures of the Areopagus and the popular courts and exaggerate the effects of

³⁴It may have been written for circulation rather than delivery in a court. Less likely is a prosecution via *dike phonou*. For discussion see e.g. Carawan (*supra* n.8) 376–377.

³⁵It is possible that multiple offenses could be brought against a defendant in his *euthunai*, if indeed this speech was delivered as part of that procedure, in which case some of the material in the speech unrelated to the murder may have been regarded as germane to the charges. It is unclear what types of charges were suitable for prosecution through *euthunai*, but presumably they would be limited to wrongs allegedly committed by a magistrate in his official capacity against either individuals or the city (*Ath.Pol.* 48.4: εὐθύναν ... τ' ἰδίαν ... τε δημοσίαν). The *Ath.Pol.* here states that the man bringing a charge must write out the specific offense (τὸ ἀδίκημα) of which he accuses the magistrate. While we do not know what specific charges Lysias brought against Eratosthenes, it is improbable that they ranged as broadly as the accusations included in the speech.

³⁶Lys. 3.48, 4.20, 7.41; Ant. 1.3, 21, 25.

³⁷So V. Bers in a speech "Professional and Amateur Speech in the Athenian Courts," delivered at the annual meeting of the American Society for Legal History (Toronto 1999).

these differences, it seems that speakers might make some alterations in their arguments when appearing before a homicide court.

III

For our purposes, the Athenian belief that the homicide courts judged in an entirely different manner than the popular courts is far more important than any real differences in the decision-making processes of these tribunals. A brief examination of two speeches, one written by Antiphon sometime around 420 B.C., the other by Lycurgus in 330, indicates that the Areopagus was thought to arrive at decisions in a manner very different from that of the popular courts. In both cases, a speaker in a popular lawcourt expresses regret that the jury will not be following the rules and procedures of the Areopagus and the special homicide courts.

Although Antiphon 5 concerns a murder, the prosecutors used a special procedure, *apagoge*, to bring the defendant before an ordinary popular court rather than a homicide court. The defendant takes care at the beginning of his speech not to alienate the popular jury when he protests that his motivation is not to evade the popular court: "it's not that I would avoid trial before you, the people: even if you were not under any oath or subject to any law, I would entrust my life to your verdict" (Ant. 5.8). Nevertheless, much of his defense is devoted to arguing that it is illegal to deprive him of the special homicide procedures (5.8–14). He pines after the relevancy rule used in homicide cases, telling the prosecutor:

You ought to have sworn the greatest and strongest oath, calling down destruction on yourself, your family, and your entire household and swearing to confine your case to this murder alone. So, I would not be convicted for anything besides this act, even if I had committed many other crimes, and I would not be acquitted for my good deeds, no matter how many I had accomplished (5.11).

The defendant also expresses resentment at the disadvantage to which an inexperienced defendant is exposed: “thus someone with little experience in legal contests is forced to address himself to the prosecution’s words rather than the actual events and the truth of what happened” (5.3). The defendant’s anxiety that his inability to speak will prejudice the jury comports with his desire for his case to be heard in the homicide courts, which as we have seen were thought to place more emphasis on the dispute itself than on the social standing or speaking ability of the litigants. Finally, the speaker warns the jury of the dangers of allowing emotion to influence verdicts. He relates a story of a case in which a group of magistrates were wrongly accused and urges the jury to avoid making a similar mistake:

And then there were your Hellenotamiae, who were blamed for financial wrongdoing, although like me now they were not guilty. They were all put to death in anger without any deliberation, except for one. Later the facts became clear ... So don’t wait until later to decide that you executed me when I was innocent, but come to the right decision sooner and not in anger or prejudice; for there could not be worse advisors than these (5.69–72).

Thus, the speaker in Antiphon 5 objects to the characteristics of the popular courts which distract the jury from forming a judgment based solely on legal and factual issues that are εἰς τὸ πρᾶγμα, and pleads, remarkably enough, not to be acquitted permanently, but merely to be turned over to a proper homicide court (5.90).

There is no murder in Lycurgus’ speech *Against Leocrates*, but the speaker objects to the manner in which popular courts generally arrive at verdicts, and urges the jurors to be more like the Areopagites:

The charge I am about to bring is just and contains no lies or irrelevant material. Most of the men who come before you act in the strangest way: they either give you advice about public

business or make charges and accusations about everything except the issue about which you are to cast your vote ... You are the ones who are responsible for this situation. You have allowed those who come into court to do this, although you have in front of you the splendid example of the Areopagus Council ... It is their example you should follow and not give in to those who do not keep to the relevant issues (τοις ἔξω τοῦ πράγματος λέγουσιν) (Lyc. 1.11–13).

At the end of his speech Lycurgus claims that he at least has lived up to a higher standard, recognizable as that attributed to the Areopagus: “I have conducted this case in a fashion both just and correct, without attacking the rest of this man’s life or making irrelevant charges” (ἔξω τοῦ πράγματος οὐδὲν κατηγορήσας) (1.149).

IV

What do the special procedures of the homicide courts indicate about the Athenian notion of law and the aims of her popular courts? The existence of a rule forbidding irrelevant statements demonstrates that the Athenians were not so primitive as to be incapable of conceiving of, if not quite a “rule of law” in modern parlance,³⁸ at least a legal process that entails the regular application of abstract principles to particular cases. We have seen that the Athenian conception of what was ἔξω τοῦ πράγματος was not so different from our own. There was a notion that in the homicide courts, at least, 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 character or social standing of the litigants and the impression that their rhetoric made on the judges. If, as some have argued, the popular courts served primarily social ends, and if the trials can rightly be seen as enacting a “social drama” in which the services and character of the litigants mattered more

³⁸E.g., J. Rawls, *A Theory of Justice* (1971) 235–241.

than the charge at issue, these characteristics were not due to an inability to imagine a legal system in which abstract rules are consistently and impartially applied, or to a different conception of a “rule of law” in which the law is closely identified with the *demos* and its interests.³⁹

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 decision-making. The fact that the Athenians did not introduce similar constraining procedural and evidentiary rules in the popular courts despite these examples seems to indicate a conscious reluctance to embrace that mode of notably stricter legal argumentation. Opportunities for an assimilation to the perceived methods of the homicide courts were not lacking: there were several episodes of major and minor procedural reform, including the revision of the laws at the end of the fifth century, the transition from oral to written depositions, and the introduction of the *emmênōi dikai*. It is true that the enforcement of a relevancy rule might have presented more practical difficulties in the popular courts than in the homicide courts because the Areopagite judges were more experienced and presumably therefore more likely to express their displeasure when a speaker strayed from the issue at hand.⁴⁰ However, we should not underestimate the ordinary Athenian’s familiarity with legal procedures; it is not improbable that knowledgeable jurors and spectators would be able to enforce a relevancy rule by shouting down speakers who introduced evidence of their liturgies or engaged in character attacks on their

³⁹For the suggestion of a distinctive Athenian conception of the “rule of law” see Cohen (*supra* n.2) 192.

⁴⁰If there was some formal mechanism, such as an order from the herald, to enforce the relevancy rule in the homicide courts, the herald presumably took his cue from the reaction of the judges.

opponent.⁴¹ Even if a relevancy rule similar to that used in the homicide courts would be unenforceable in the popular courts, we would expect to see some mechanism which like the dikastic oath was in practical terms unenforceable, but which speakers nevertheless referred to often and milked for its rhetorical value.

It is possible that the Athenian decision not to emulate the special procedures and apparent rigor of the homicide courts, most notably the relevancy rule, in the *dikasteria* may be attributed to countervailing values in their political culture: the widespread participation of ordinary men, and the broad discretion extended to juries to temper strict legality with equity. It seems that in the popular courts the Athenians decided to forego some measure of consistency and predictability in favor of a more contextualized form of justice.⁴² At the same time, the idealization of the Areopagus and other homicide tribunals in the classical period may reflect Athenian anxieties about the decision-making process of its mass juries. The praise for the distinctive procedures of the homicide courts should be read against the background of Athenian discomfiture over the workings of their popular courts. Athenians were intensely aware of, and intensely uneasy about, the aspects of their legal system that discouraged strict legal argument divorced from the social context of the dispute. There appears to have been a decided ambivalence about the decision not to follow the Areopagus' paradigm of expertise and legal argumentation in the popular courts. In this respect the Athenian courts were both more and less removed from modern courts than scholars have believed: the popular courts did not, and perhaps did not

⁴¹On the possibility of knowledgeable bystanders heckling jurors, see A. Lanni, "Spectator Sport or Serious Politics? οἱ περιεστηκότες and the Athenian Lawcourts," *JHS* 117 (1997) 187–188.

⁴²One might ask why the homicide courts did not assimilate themselves to the *dikasteria*. The sheer force of conservatism and reluctance to alter the traditional procedures of the Areopagus must have played some role. It is also possible that the *dike phonou* was gradually eclipsed by *apagoge*; for this possibility see Carawan (*supra* n.8) 164–167.

aim, to achieve a rule of law, but the fundamental concerns of the Athenian legal system were by no means unique.⁴³

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