

# Law, Politics, and the *Graphe Paranomon* in Fourth-Century Athens

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**I**N FOURTH-CENTURY Athens, when a *dikasterion* was convened to hear a *graphe paranomon*, the jurors naturally heard the prosecutor argue that the defendant's decree (*ψήφισμα*) was *παράνομον* or *παρὰ τοὺς νόμους*, that is, in conflict with some one or more statutes (*νόμοι*) of the inscribed law code.<sup>1</sup> The jurors were also likely to hear the plea that the decree under indictment was inexpedient (*ἀσύμφορον*) for the Athenian people, and the defendant ought to be convicted for that reason too, in addition to the conflict with statute law. If the decree under indictment was a grant of honors or citizenship, the jurors were likely to hear the further plea that the person named in the decree as the beneficiary of the grant was unworthy (*ἀνάξιος*) of the honors or citizenship. This plea too would be advanced as reason to convict the original mover of the decree. For the sake of convenience, I will call the plea of *paranomon* the 'legal plea', and the latter two pleas, concerning inexpediency and unworthiness, 'political pleas'. In this paper I wish to consider the status of these two types of pleas. Are the political pleas to be counted among those numerous irrelevant arguments and considerations, such as the opponent's family background, that Athenian orators commonly introduced in an attempt to prejudice the jurors against the opponent? Or were the political pleas, as well as the legal plea, viewed by Athenian pleaders and jurors as

<sup>1</sup> Throughout this paper the word 'decree' will be used to translate *ψήφισμα*, and the word 'statute' to translate *νόμος*, in the senses these words bear in the statutes passed in 403/2 following the decree of Tisamenus (Andoc. 1.87): ἀγράφω δὲ νόμῳ τὰς ἀρχὰς μὴ χρῆσθαι μηδὲ περὶ ἐνός. ψήφισμα δὲ μηδὲν μήτε βουλῆς μήτε δήμου νόμου κυριώτερον εἶναι. Cf. J. Triantaphyllopoulos, "Rechtsphilosophie und positives Recht in Griechenland," in H. J. Wolff, ed., *Symposion 1971: Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Cologne 1975) 23–65, esp. 34f; M. H. Hansen, "Nomos and Psephisma in Fourth-Century Athens," *GRBS* 19 (1978) 315–30; F. Quass, *Nomos und Psephisma* (=Zetemata 55 [Munich 1971]), esp. 40–44. The following works will be cited by author's name: H. J. WOLFF, 'Normenkontrolle' und Gesetzesbegriff in der attischen Demokratie (Heidelberg 1970); M. H. HANSEN, *The Sovereignty of the People's Court in Athens in the Fourth Century B.C.* (Odense 1974; catalogue of *graphai paranomon* indicated by Cat. and number), *The Athenian Assembly in the Age of Demosthenes* (Oxford 1987), and "Graphe Paranomon against psephismata not yet passed by the ekklesia," *ClMed* 38 (1987) 63–73.

relevant to the case in a *graphe paranomon*? If they were seen as relevant, what was the relation between the legal plea and the political pleas?

## I

First, some preliminary considerations. The questions just posed are not the product of modern distinctions that would amount to nonsense from the perspective of a fourth-century Athenian. There is no doubt that Athenian jurors were capable of distinguishing relevant arguments from irrelevant ones.<sup>2</sup> Nor should we be misled by the theatrics of the court orators to underestimate the seriousness with which the jurors attended to their task under the terms of the heliastic oath.<sup>3</sup>

Furthermore, to investigate the questions set out above, there would be no point in seeking out the injunctions of positive law. No statute governing the *graphe paranomon* has survived. There may never have been such a statute.<sup>4</sup> If one such existed, it is most unlikely that it included a definition of the criteria for condemning an indicted decree. Unlike Roman or modern Western law, neither the Athenian law code as a whole nor the individual statutes provided basic interpretation of the law; that is, among other things, the law did not provide any definition of what constituted a particular offense.<sup>5</sup> On

<sup>2</sup> *E.g.* Antiph. 6.10; Aeschin. 1.175f, 3.205f; [Dem.] 59.5; Lycurg. *Leoc.* 11–13; Pl. *Ap.* 17B6–C5.

<sup>3</sup> H. Meyer-Laurin, *Gesetz und Billigkeit im attischen Prozess* (Weimar 1965); J. Meinecke, “Gesetzinterpretation und Gesetzanwendung im attischen Zivilprozess,” *RIDA SER.* III 18 (1971) 275–360.

<sup>4</sup> There is no reference to such legislation in the ancient literature. The statute of 403/2 recorded by Andoc. 1.87 (quoted *supra* n.1) and frequently repeated by the orators (*e.g.* Dem. 23.87, 218; Hyp. *Athen.* 22) merely subordinates (μη κυριώτερον) the authority of decrees to that of statutes, but does not provide for cancelling (*e.g.* rendering ἄκυρον) decrees found to be in conflict with a statute. Normally, only the decision of a jury could cancel a decree; *cf.* Dem. 23.96, 24.30, [Dem.] 47.34, and Wolff 74–76. On the basis of Dem. 20.44 and the final clause of an inscribed statute of 375/4 (R. S. Stroud, “An Athenian Law on Silver Coinage,” *Hesperia* 43 [1974] 159, lines 55f), Hansen, “*Nomos*” (*supra* n.1: 324f), argued that “a *psephisma* was automatically repealed if it was in conflict with a new *nomos*.” Wolff’s discussion is still to be preferred; neither of Hansen’s pieces of evidence implies the general principle he infers. In Dem. 20.44 Demosthenes is exaggerating and probably implying the use of the *graphe paranomon* to render the decrees ἄκυρα. In the inscribed statute, it was by means of a special provision of this particular statute that the *grammateus* was instructed to delete those decrees that were in conflict with this new statute.

<sup>5</sup> Triantaphyllopoulos (*supra* n.1) 55–59. *Cf.* E. Ruschenbusch, “ΔΙΚΑΕΣΤΗΡΙΟΝ ΠΑΝΤΩΝ ΚΥΡΙΩΝ,” *Historia* 6 (1957) 257–74, esp. 261ff, 266f. A good example of this lack of definition may be observed in the law of *hybris* (Dem. 21.47). With

this basis David Cohen has argued that “Athenian theft statutes are formulated in such a way that they do not expressly define the relevant concept (*e.g.* theft, *hierosylia*), but rather presuppose a definition and a conception of the law that, given the nature of the legal system, cannot reside anywhere else but in the collective consciousness of the judges who happen to be sitting in court on a particular day.”<sup>6</sup> The situation is analogous for the offense of *παράνομα λέγειν*: I am attempting to ascertain as clearly as the evidence permits what the jurors in a court of the fourth-century Athenian democracy understood to be at issue when they sat in judgment of a *graphe paranomon*.

The present investigation is pertinent to an important, basic problem concerning the rôle of the *dikasteria* in the constitution of fourth-century Athens. The *graphe paranomon* has been cited as positive evidence by proponents of opposing views: that the *dikasteria* functioned essentially as a political body, empowered and expected to render judgment by consulting momentary political considerations rather than the demands of the law,<sup>7</sup> and, on the other hand, that the *dikasteria* functioned essentially as a judiciary which, for all its amateurism, gave meaning to the Athenian slogan proclaiming the ‘rule of law’.<sup>8</sup>

It is beyond the scope of this paper to discuss the constitutional rôle of the *dikasteria*. I will argue below that the political pleas were relevant, and in fact even necessary, for the jurors’ decision in a *graphe paranomon*. Yet I stop short of the extreme position that the political pleas would alone be sufficient to convince the jurors to condemn an indicted decree; the legal plea was also necessary.<sup>9</sup> Hence

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respect to the *graphe paranomon*, compare the undefined terms *ἐναντίος* and *ἐπιτήδειος* in the statute authorizing the similar *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι*, Dem. 24.33.

<sup>6</sup> D. Cohen, *Theft in Athenian Law* (Munich 1983) 6.

<sup>7</sup> Ruschenbusch (*supra* n.5) 257–61; Hansen, *Sov.* 62–65; D. P. Maio, “*Politeia* and Adjudication in Fourth-Century B.C. Athens,” *American Journal of Jurisprudence* 28 (1983) 16–45. Without citing the *graphe paranomon*, but referring to the Athenian jurors of the fourth century, L. Gernet, *Droit et société dans la Grèce ancienne* (Paris 1955) 67, remarks that “il n’y a pas une distinction absolue entre le législatif et le judiciaire”; *cf.* among Gernet’s citations especially Isoc. 21.18, Lycurg. *Leoc.* 9.

<sup>8</sup> *Cf.* M. Ostwald, *From Popular Sovereignty to the Sovereignty of Law* (Berkeley 1986) 125ff, 135f, 523f; R. Sealey, *The Athenian Republic: Democracy or the Rule of Law?* (University Park [Pa.] 1987) 49f, 97f, 139f, 146f. *Cf.* also Wolff 11f, 26. For further discussion of the literature on this question of the Athenian *Gerichtspraxis*, see J. Bleicken, *Die athenische Demokratie* (Paderborn 1985) 354ff. For *οἱ νόμοι κύριοι* see Hansen, *Ath. As.* 106, 180 n.681.

<sup>9</sup> In his numerous publications on the *graphe paranomon* and the constitution of fourth-century Athens, M. H. Hansen has on several occasions briefly expressed the view that both legal and political considerations were usually relevant, but that legal considerations were sometimes irrelevant and could therefore be omitted: *Ath. As.* 99,

the conclusions reached here support a view of the *dikasteria* midway between the two extremes just mentioned. On this middle view, the jurors were thoroughly responsive to the political issues that the leading politicians constantly debated before them in the course of prosecuting or defending a *graphe paranomon*. Yet the jurors were loyal to the laws of the democracy, their democracy. They would not seriously attend to a politician who, while prosecuting a *graphe paranomon*, did not speak as the defender of the law, or at least recognize the authority of the law, by explicitly presenting a case that the statutes of the people's law code had been broken.<sup>10</sup> Thus by means of the *graphe paranomon*, law and politics were indeed mingled, but not so as to create chaos. Law and politics were viewed as the two complementary standards to be consulted by the jurors when they cast their ballot: ὑμεῖς . . . αὐτοὶ τὰ δίκαια καὶ τὰ συμφέροντα ὑπὲρ τῆς πόλεως ψηφίσασθε.<sup>11</sup>

## II

In this section I argue that, to obtain a conviction, the prosecutor necessarily had to present a legal plea, and that the political pleas would not by themselves make a sufficient case. The prosecutor's legal plea usually urged that the substance of the decree was in conflict with one or more statutes. In some cases a formal deficiency was also urged as the legal plea, *viz.* that the decree was ἀπροβούλευτον.<sup>12</sup>

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175 n.639; *Sov.* 52, 65; *ClMed* 71f; "Demos, Ecclesia and Dicasterion in Classical Athens," *GRBS* 19 (1978) 145 n.40. I differ from his view in claiming that the legal plea was never irrelevant and was always a necessary consideration for the jurors. Furthermore, this paper investigates a problem suggested by Hansen's work, but which he has not considered in print, *viz.* how the various pleas stood in relation to one another and contributed to the jurors' decision. My frequent citation of Hansen's work will indicate the extent of my debt to him.

<sup>10</sup> Prosecutors in *graphai paranomon* traditionally assumed the rôle of the defender of the democracy; see Hansen, *Sov.* 55–61, and, for a conspicuous example, Aeschin. 3.1–8, 190–202.

<sup>11</sup> Aeschin. 3.260, the final sentence of the speech; *cf.* the very similar final sentence of Hyp. *Phil.* (both are speeches in prosecution of a *graphe paranomon*). On the juncture τὰ δίκαια καὶ τὰ συμφέροντα, *cf.* n.29 *infra*. Bleicken (*supra* n.8: 138–45, 246–53) considers a wide range of evidence and presents an account of the Athenian *dikasteria* that the conclusions reached here would support.

<sup>12</sup> See [Arist.] *Ath.Pol.* 45.4. Four cases are known in which the plea of ἀπροβούλευτον was advanced. Hansen, *Cat.* #4: [Plut.] *X Orat. (Mor.)* 835F, *P.Oxy.* XV 1800 fr.6f, Σ *Laur. ad Aeschin.* 3.195, Max. Plan. *ap. Walz, Rhet. Gr.* V 343 (Σ *ad Hermog. Stat.*); #12: Dem. 22.5–7; #29: [Dem.] 25. hypoth. 1; #35: Hyp. *Eux.* 15, *cf.* Hesych. *s.v.* αὐτοτελὲς ψήφισμα. *Pace* Hansen, *Ath. As.* 175 n.638, I do not believe that a prosecutor's accusation that the defendant had been debarred through *atimia* from the right to move proposals was put forward as a serious legal plea. We know

In his fundamental study of the *graphe paranomon* H. J. Wolff established the following points. The orators clearly recognized and presented the legal question as a distinct issue, demanding treatment independent of all other issues.<sup>13</sup> Although the political pleas are elaborated at great length, in speeches for the prosecution they always follow the carefully arranged legal plea.<sup>14</sup> Among the cases for which we have sufficient evidence to judge, only once did the jurors fail to convict a defendant when the prosecutor's legal plea was patently incontrovertible, *viz.* in Aeschines' prosecution of Ctesiphon in 330 for a decree honoring Demosthenes.<sup>15</sup> One may add to Wolff's analysis of the sophisticated legal argument in Dem. 23.22–99<sup>16</sup> that in unspectacular, ordinary prosecutions of *paranomon*, the prosecutor would carefully avail himself of the customary, simple procedure of *παράγραφεισθαι*.<sup>17</sup> In this procedure, the prosecutor has a written copy of a statute from the official, inscribed law code displayed side by side with a copy of the decree under indictment.<sup>18</sup> By means of this comparison, a direct conflict between the decree of lower authority and the statute of higher authority is made strikingly evident, the crime of *παράνομα λέγειν* is clearly established, and the prosecutor's case is, in theory, complete.<sup>19</sup>

All these considerations imply that the legal plea was an essential

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that such an accusation was advanced in two cases, Hansen, Cat. #12 (Dem. 22.21–34) and #18 ([Dem.] 59.5). In the latter, the crucial clause, *ὡς ὄφλε τῷ δημοσίῳ*, has been transposed from another context ([Dem.] 59.9). All modern editors, however, accept this emendation; *cf.* G. L. Cawkwell, "Eubulus," *JHS* 83 (1963) 58f with n.71. In both cases the motive and effect of this accusation seem to have been pure character-assassination. In both cases there were also proper legal pleas advanced: Dem. 22.5–11; implied in [Dem.] 59.4.

<sup>13</sup> *E.g.* Dem. 18.110: *τοὺς περὶ αὐτοῦ τοῦ παρανόμου λόγους ἀποδοῦναί με δεῖν*. Demosthenes then immediately presents his defense against the prosecutor's legal plea (110–25).

<sup>14</sup> Wolff 27f. However, as will be discussed below, I do not accept Wolff's characterization of the political pleas as "immer nur als Ergänzung" (27).

<sup>15</sup> Wolff 13, 46f, 61.

<sup>16</sup> Wolff 50–54, 64.

<sup>17</sup> *Cf.* J. H. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig 1905–15) 392f.

<sup>18</sup> *Cf.* Aeschin. 3.192, 200f; Dem. 18.111, 22.34, 23.51, 63, 215–18; [Dem.] 58.46. For a similar procedure in a *γραφή νόμον μὴ ἐπιτήδειον θείναι*, regarding the conflict between a newly proposed statute and existing statutes, *cf.* Dem. 24.38–66.

<sup>19</sup> *Cf.* Wolff 69: "Wir sahen . . . wie es bei allem Geschick und aller Neigung der Rhetoren, Vorlagen wegen wirklichen oder behaupteten Konflikts mit allgemeinen in den Gesetzen verwirklichten, wenn auch nicht notwendig direkt ausgesprochenen, Grundsätzen zu bekämpfen, letzten Endes doch immer der *positive Einzelnomos* war, auf den sie ihren Angriff stützten, wie sie eben auch die verletzten Prinzipien selbst aus ihm herleiteten." For the theoretical completion of the prosecutor's case, *cf.* Dem. 23.87 and the colorful fiction of the good old days presented (not as fiction) by Aeschin. 3.192.

part of the prosecution of a *graphe paranomon*. For this reason it always demanded and received the utmost attention from the pleaders and jurors. Although the *graphe paranomon* was frequently and properly employed in the service of partisan political ends, it was never so totally debased as to be argued without the prosecutor explicitly urging a legal plea. For all their often amateurish administration of the law, the Athenians always expected a legal plea in *graphai paranomon*, although, as will be discussed below, they also expected other pleas. The legal plea could at most be abused, never utterly dispensed with. Two passages, however, might at first seem to indicate that a legal plea, at least in certain circumstances, was superfluous. Close examination proves otherwise.

From a passage describing the procedure for granting citizenship to an alien ([Dem.] 59.88–91), Hansen has inferred that “a decree could be attacked [*sc.* in a *graphe paranomon*] on the sole ground that it was detrimental to the interests of the Athenians.”<sup>20</sup> This inference is not justified.

Apollodorus, the speaker of this part of [Dem.] 59, introduces the passage by saying that the Athenian people considered the grant of citizenship so honorable and sacred that it imposed statutes on itself through which a foreigner could become a citizen (88). After a bit of editorializing, there follows a paraphrase of the statute that governs the procedure for ensuring that the granting decree is valid (89f). One clause in the paraphrase asserts *μη̄ ἐξείναι ποιήσασθαι Ἀθηναίων, ὃν ἂν μη̄ δι’ ἀνδραγαθίαν εἰς τὸν δῆμον τὸν Ἀθηναίων ἄξιον ἦ γενέσθαι πολίτην* (89). After further details of the procedure enjoined by the statute, Apollodorus continues thus (90):

ἔπειτα μετὰ ταῦτα [*i.e.*, the fairly complex procedure for making a valid grant] *παρὰ νόμων γραφήν ἐποίησε κατ’ αὐτοῦ τῷ βουλομένῳ Ἀθηναίων, καὶ ἔστιν εἰσελθόντα εἰς τὸ δικαστήριον ἐξελέγξαι ὡς οὐκ ἄξιός ἐστι τῆς δωρεᾶς, ἀλλὰ παρὰ τοὺς νόμους Ἀθηναίους γέγονεν.*

Finally, Apollodorus asserts that in several instances citizenship decrees have been indicted for *paranomon*, the prosecutor has urged that the beneficiary was not worthy of the grant, and the court revoked it (91).

First of all, it is not inexpediency that the prosecutor pleads, as Hansen asserted in the quotation above, but unworthiness.<sup>21</sup> Apollo-

<sup>20</sup> *Ath. As.* 175 n.639. Hansen adds a reference to Aeschin. 3.50; but I do not see the relevance of this passage to his inference, and will discuss its bearing on a related point in section III below.

<sup>21</sup> Hansen is correct on the point of unworthiness elsewhere, though he retains the claim, under challenge here, that it could form the “sole ground” for revoking a citizenship grant (*CIMed* 72).

dorus clearly implies that unworthiness is well recognized as a relevant factor when a court decides to annul a citizenship decree, and I do not wish to challenge this implication. It is confirmed by much evidence that I shall present below (III). But does the passage imply that the nominee's unworthiness could furnish the *sole ground* for indicting or convicting a citizenship decree? It must be appreciated that Apollodorus' aim in this passage is to vilify the status of aliens who are unworthy of Athenian citizenship and have usurped the sacred prerogatives of citizenship under false pretenses. For this is what Apollodorus is alleging against Neaera, his opponent in this case, and her daughter Phano in the larger section of the speech from which this passage comes (74–115). To promote that aim Apollodorus indulges in what amounts to an insinuation that misleadingly distorts the issue of worthiness in *graphai paranomon* of citizenship decrees.

Apollodorus studiously avoids legal precision in his account of naturalization. He gives a paraphrase of the statute where a quotation was possible though evidently not wanted. After the paraphrase, in the sentence that raises the notion of the *graphe paranomon* (90, quoted above), the subject of the verb *ἐποίησε* is not explicit. *ὁ νόμος*, the subject in the paraphrase of the statute (89f), is not the subject of *ἐποίησε*. Wherever *ὁ νόμος* is the subject in the paraphrase, the verbs are always in the present tense.<sup>22</sup> The implicit subject of *ἐποίησε* must be *ὁ δῆμος ὁ Ἀθηναίων* from earlier in the account (88).<sup>23</sup> So Apollodorus is not implying that the naturalization statute specifically authorizes a *graphe paranomon* against a citizenship decree on the grounds of unworthiness.<sup>24</sup> Nor when citing examples of citizenship decrees that have been convicted in *graphai paranomon* (91) does he imply that unworthiness was the only plea presented by the prosecutor. Finally, a proper *graphe paranomon* would be formally directed against the man who moved the citizenship decree, not the proposed new citizen.<sup>25</sup> Thus when Apollodorus speaks of the indictment *κατ' αὐτοῦ* (90), referring to the proposed new citizen, he is being informal

<sup>22</sup> In 89f: *ἐστὶ κείμενος, ἐᾶ, κελεύει*.

<sup>23</sup> In 88 it was said that the Athenian people restricted its freedom to confer citizenship by creating the statute governing proper procedure; the verb parallel to *ἐποίησε* is *ἔθετο*, the technical term for *νόμοι*. It is asserted in 90 that the *graphe paranomon*, like the statute, is another such restriction created by the people.

<sup>24</sup> In his analysis of the law and procedure of naturalization, M. J. Osborne, *Naturalization in Athens* IV (Brussels 1983) 155–68, does not consider the use of the *graphe paranomon* to challenge a grant as an intrinsic part of the procedure. Osborne contrasts the statutory judicial scrutiny, which was added to the naturalization procedure sometime after Apollodorus, as probably “a replacement for the *graphe paranomon*, making statutory what in the past had been irregular and dependent upon private initiative” (167).

<sup>25</sup> Cf., in the analogous case of honors, *κατὰ Κτησιφώντος*, not *κατὰ Δημοσθένους*.

and not reproducing precise legal terminology. And this, of course, is in accord with his purpose, to concentrate on the unworthy, false citizen, not the mover of the original decree.

The disingenuous turn of Apollodorus' account is apparent in his assertion that the prosecutor in these cases proves "that the nominee is not worthy of the grant, but was made an Athenian contrary to the statutes" (90, quoted *supra*)—as if the legal plea (*παρὰ τοὺς νόμους*) consisted in the plea of unworthiness (*οὐκ ἄξιος*). This is the misleading insinuation that is convenient for his case. The misrepresentation is exposed by the evidence from actual cases, in which the legal plea is always clearly separated from the plea of unworthiness, is based strictly on legal arguments in which the indicted decree is compared to statute law, and is never based on political arguments that the nominee was unworthy of the grant.<sup>26</sup> Only by ignoring the legal precision that could not be avoided before a court involved in such a case does he even gain the chance to make the insinuation. The insinuation is therefore inaccurate and must be rejected.

The second passage that might be adduced against the absolute necessity of a legal plea is more quickly dispatched. In [Dem.] 58.31 a certain Epichares asserts that although his father had been indicted, convicted, and fined ten talents (!) in a *graphe paranomon*, nevertheless the jurors thought (*νομισάντων*) that the father's decree and its provisions for a benefaction were *κατὰ τοὺς νόμους*. Epichares' assertion is hardly short of preposterous. It is unclear how the jurors, as a body, could have made known the peculiar position Epichares attributes to them; all they do is vote. In any event, the severe penalty that threatens both father and son with *atimia* (58.2, 33) implies that the case is unlikely to have been as subtle as Epichares maintains. The context from which this assertion comes is a prosecution by Epichares in an *endeixis* against his father's prosecutor (the sycophant Theocrines). Hence, Epichares is seeking to minimize both his father's culpability and the justice of Theocrines' successful prosecution in the original *graphe paranomon*.

### III

We ought to stop short of embracing Wolff's ultimate conclusion, that the proper function of the *graphe paranomon* was to serve as a sort of legal review process ("Normenkontrolle"), and that insofar as

<sup>26</sup> Some of this evidence was presented above in the discussion of the legal plea. The rest is discussed below (III).



political issues were injected into the proceedings, it was abused.<sup>27</sup> It was Wolff's purpose to determine what substantial legal concepts stood behind the enduring idea of *paranomon*, in contrast to whatever momentary political purposes gave rise to a particular *graphe paranomon*.<sup>28</sup> To that end, he separated "das politische und das juristische Element" and ignored the former as irrelevant to his purpose (26f). In contrast, the political element is central to the purpose undertaken in this paper.

I do not wish to reassert, in response to Wolff's position, the self-evident fact that each *graphe paranomon* involved a particular set of political issues. Rather, I wish to argue for two claims. First, the notions of inexpediency and unworthiness functioned in the political pleas in a manner parallel to the notion of *paranomon* in the legal plea. Hence, whenever a *graphe paranomon* came before a court, just as the particular legal issues of the case were measured against the communal law code, so the particular political issues were measured against the community's best interests and its standards for granting honors and citizenship. The only difference, not an insignificant one in practice, was that the law code was objectively discernible, whereas the community's best interests and standards for grants were not so clear. Nevertheless, the orators treated expediency and worthiness *in principle* as essential and objectively discernible standards against which the decree was to be measured in just the same way that the statutes of the law code constituted a standard for the legal status of the decree. Beyond the personal abuse that political enemies such as Aeschines and Demosthenes flung at each other while arguing their sides in a *graphe paranomon*, the political pleas stand out, just as clearly as does the legal plea, as attempts to persuade the jurors on the basis of rational, objective, pertinent arguments. The *graphe paranomon* was legal and political review at once.<sup>29</sup>

The second claim is a simpler matter, and practically follows from the first. The political pleas were viewed as not only relevant, but in fact necessary in order for a prosecutor to secure a conviction.<sup>30</sup> Thus

<sup>27</sup> Wolff 15, 60–64.

<sup>28</sup> Wolff 11f ("der Begriff des παράνομον"), 47 ("Unser Anliegen ist die Ermittlung objektiver Grundvorstellungen vom Wesen des παράνομον").

<sup>29</sup> In the terms of Aristotle's division of speeches into three types (deliberative, forensic, epideictic: *Rh.* 1358a36–b8), speeches in prosecution of *graphai paranomon*, as will be made evident below, were always composed of at least two parts, the forensic (δικανικόν) and the deliberative (συμβουλευτικόν), corresponding to the legal review and the political review. The former is concerned with τὸ δίκαιον, the latter with τὸ συμφέρον (*Rh.* 1353b20–27); cf. the text quoted *supra* n.11. The epideictic type of speech is not strictly relevant here.

<sup>30</sup> This second claim was already made by Hansen, and my argument here is an

the legal plea, although necessary, was not by itself sufficient to convince the jurors to condemn an indicted decree.

Indictments of decrees granting honors or citizenship constitute that sub-genre of *graphai paranomon* about which we are best informed.<sup>31</sup> Amid the considerable variety of authors and occasions for which there are preserved either fragments or whole speeches in this sub-genre, the political pleas are regularly utilized in the manner claimed just above. Thus, the use of the political plea in a manner parallel and equal to the legal plea is not the habit of any one orator or the consequence of any one political situation.

Demosthenes wrote the speech numbered 23 in his corpus for a certain Euthycles, who in 352/1 indicted Aristocrates for moving a decree honoring Charidemus, the Euboean mercenary commander recently granted Athenian citizenship (Hansen, Cat. #14). This speech exhibits the tripartite argument clearly and explicitly. Towards the end of the exordium, Demosthenes outlines the arrangement of the entire speech (23.18):

ἔμ' ὑπεσχημένον τρί' ἐπιδείξειν, ἐν μὲν ὡς παρὰ τοὺς νόμους τὸ ψήφισμ' εἴρηται, δεύτερον δ' ὡς ἀσύμφορόν ἐστι τῇ πόλει, τρίτον δ' ὡς ἀνάξιον τυχεῖν ᾧ γέγραπται.

The rest of the speech follows true to this plan. In the first section (22–99) Demosthenes examines a number of statutes, all of which are purportedly contravened by the decree. This is the legal plea. The arguments contained in this section of the speech and in the parallel sections of the speeches discussed below make up the sort of legal plea that Apollodorus suppressed in his account of *graphai paranomon* of citizenship decrees. After the legal plea follow the two political pleas. The second section (100–43), concerning inexpediency, features a review of historical precedent in order to show that the Athenians would be harming their own interests by honoring Charidemus. In the

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elaboration of a position first staked out by him. For references on this point, see *supra* n.9.

<sup>31</sup> Decrees of this sort were among the most common types; likewise they figure prominently among the known *graphai paranomon*, making up about fifty per cent of the total. Cf. Hansen, *Sov.* 62, *Ath. As.* 114, 186 nn.725–27. In the fourth century, citizenship grants were essentially honorific; see Osborne (*supra* n.24) 145–50. Hence the necessity of treating citizenship decrees and other honorary decrees together. The indictment of this type of decree was far from an insignificant matter. The decision of the jurors in a *graphe paranomon* of an honorary decree was taken as a formal decision of policy: Aeschin. 3.254, Dem. 18.222, 226, 228–31; cf. S. Perlman, “The Politicians in the Athenian Democracy of the Fourth Century,” *Athenaeum* n.s. 41 (1963) 327–55, esp. 342f, 346.

third section (144–214), pleading the honorand's unworthiness, Demosthenes reviews Charidemus' rôle in recent history to conclude that he has actually hurt Athens rather than helped it, and deserves punishment rather than reward.

In Aeschines' prosecution of Ctesiphon in 330 for a decree honoring Demosthenes with a crown (Aeschin. 3; Cat. #30), the same tripartite argument is outlined near the end of the exordium. There is, however, an interesting difference in the way the plea of unworthiness is presented (3.8): ἐξελέγξω Κτησιφῶντα καὶ παράνομα γεγραφότα καὶ ψευδῆ καὶ ἀσύμφορα τῇ πόλει. The first and third points are clear: the legal plea (executed in 9–48, recalled in 203f) displays the statutes contravened by Ctesiphon's decree, and the plea of inexpediency (executed in 177–202, 245–54) argues that to crown Demosthenes is contrary to the interests of the Athenians.

The second point, that Ctesiphon has moved a 'false' decree, is fulfilled in 49–176. After reading from the decree several clauses that praise Demosthenes, Aeschines claims he will show that οἱ κατὰ Δημοσθένους ἔπαινοι ψευδεῖς (50). To claim as false the meritorious services attributed in the decree to Demosthenes and cited therein to justify the honors, is to say that Demosthenes is unworthy of the honors. Aeschines admits as much. He introduces this argument by emphasizing ἡ πρόφασις [=τὰ ψευδῆ] δι' ἣν αὐτὸν ἀξιοῖ στεφανοῦσθαι (49). Twice later in the speech this plea is taken as having established that Demosthenes is ἀνάξιος (188, 205).

Aeschines casts the plea of unworthiness in this form in order to indulge in a legal fiction (50): ἅπαντες γὰρ ἀπαγορεύουσιν οἱ νόμοι μηδένα ψευδῆ γράμματα ἐγγράφειν ἐν τοῖς δημοσίοις ψηφίσμασι. If all the statutes forbid ψευδῆ γράμματα in decrees, clearly no law forbids it in so many words. If one did, we may be sure that Aeschines would have cited it. If there had been such a statute, and Aeschines had cited it, that would have had the effect of turning the falsehood-unworthiness plea into a legal plea, *i.e.*, it would be another statute that the decree contravened. As it is, the falsehood-unworthiness plea does not rest on a conflict with any particular statute, is kept separate from the legal plea, and remains a political plea. It consists of an Aeschinean version of Demosthenes' rôle in recent history. In response to this argument, Demosthenes aims to establish on the basis of (his version of) the public record that Ctesiphon has described his conduct truthfully in the decree and that he deserves the crown.<sup>32</sup> This accords with all

<sup>32</sup> Dem. 18.53–59 (57, εἴτ' ἀληθῆ περὶ ἐμοῦ γέγραφε Κτησιφῶν . . . εἴτε καὶ ψευδῆ; 58, εἴτ' ἀξίός εἰμι τοῦ στεφάνου . . . εἴτε καὶ μή).

other cases of a *graphe paranomon* of an honorary decree; the plea of unworthiness is always based on political, not legal, arguments.<sup>33</sup>

One sentence from a speech by Lycurgus in prosecution of a *graphe paranomon* of an honorary decree has been preserved with no external indication of its original context (Hansen, Cat. #36). Yet this sentence is instructive. It outlines an argument on precisely the same three grounds as the argument outlined in Dem. 23.18 (quoted above). This sentence must come from the exordium of Lycurgus' speech: *καὶ παράνομον τὸ ψήφισμα ἐπιδείξω καὶ ἀσύμφορον καὶ ἀνάξιον τὸν ἄνδρα δωρεᾶς*.<sup>34</sup> In the remaining two cases, the same tripartite argument can be observed. In Dem. 22 (Cat. #12), not nearly as polished as work as Dem. 23 or Aeschin. 3, the legal plea is advanced first (22.5–11); this is followed by the plea of unworthiness (12–18), which is followed in turn by the plea of inexpediency (19f). The remainder of the speech (21–78) essentially descends to character-assassination of the defendant Androtion.<sup>35</sup> The substantial fragment that survives from Hyperides' speech in prosecution of Philippides for an honorary decree belongs to the very end of the speech (Hyp.

<sup>33</sup> This understanding of Aeschines' procedure is sufficient reason for rejecting as an interpolation the indictment recorded in Dem. 18.54f; cf. H. Wankel, *Demosthenes: Rede für Ktesiphon über den Kranz I* (Heidelberg 1976) 17f, 359f. Aeschines' treatment of the unworthiness plea is paralleled in Hyperides' speech in prosecution of Demades for a decree honoring Euthykrates of Olynthus with *proxenia* (Hyp. fr.76 Jensen; Hansen, Cat. #28). This plea is broached by ostensibly questioning whether Euthykrates' services listed in the decree provide *τὰς ἀληθεῖς αἰτίας τῆς προξενίας*. (A second version reports: *εἰ τὰ ληθῆ Δημάδης ἐβούλετο περὶ Εὐθυκράτους εἰπεῖν*). But the issue is in fact whether Euthykrates deserves the grant from the Athenians. Hyperides argues that he does not by sarcastically reading a mock decree listing the honorand's considerable services in behalf of Philip. A true decree, we are meant to understand, would clearly imply that the nominee is worthy of punishment, not reward.

<sup>34</sup> Lycurg. fr.91 Sauppe=57 Blass=viii.1 Durrbach. This fragment is preserved in the anonymous treatise *τέχ. ῥητ.* 167 *ap.* Hammer, *Rhet. Gr.* 381. It is incorrectly transcribed in Conomis' edition of Lycurgus (Leipzig 1970), where it appears as fr.ix.1. This sentence could have come from any prosecution by Lycurgus of an honorary decree. However, it is a reasonable guess that the sentence comes from Lycurgus' prosecution of Cephisodotus for a decree honoring Demades; so N. C. Conomis, "Notes on the Fragments of Lycurgus," *Klio* 39 (1961) 72–152, esp. 126ff. Lycurg. fr. ix.2–4 Conomis and Polyuctus fr.1f Sauppe certainly come from the speeches written in prosecution of Cephisodotus (Cat. #31). In these fragments both Lycurgus and Polyuctus argue that the honorand is unworthy. Polyuctus stresses that Demades has continually acted to help Philip and harm the Athenians.

<sup>35</sup> Part of this attack, however, is presented in the guise of a legal plea, *viz.* that as a male prostitute (21–32) and as a debtor to the state (33f), Androtion was debarred from moving the original decree; cf. *supra* n.12. The loose structure of this speech might be attributed to its rôle as a deuterology. L. Pearson, "The Development of Demosthenes as a Political Orator," *Phoenix* 18 (1964) 95–109, esp. 106ff, detected other formal characteristics of this speech that indicate its relatively immature stage in Demosthenes' development.

*Phil.*; Cat. #32). It seems clear that the three pleas were employed. There was a legal plea in which certain statutes were read aloud in court (4). As in Aeschines' prosecution of Ctesiphon, the plea of unworthiness formally urged that the praises of the honorands recorded in the decree were false.<sup>36</sup> The speech ends with the plea that the indicted decree is only the most recent occasion in which Philipides has undertaken to harm the Athenians (8–12).

That exhausts our first-hand knowledge of the arguments used by prosecutors in *graphai paranomon* of honorary decrees. However, it is worth making a conjecture about one more case. In the aftermath of the return of the democrats in 403, Thrasybulus proposed a decree granting citizenship to those non-citizens who returned with him to Athens from the Piraeus. Archinus indicted Thrasybulus for this decree (Cat. #4). Several sources indicate that there was a legal plea based on the fact that the decree was ἀπροβούλευτον.<sup>37</sup> But along with such deserving metics as Lysias, some of those included in the grant were slaves ([Arist.] *Ath. Pol.* 40.2). Archinus must have argued that the slaves, at least, were unworthy of the grant. Furthermore, in the charged political atmosphere of the time, Archinus must have argued that so generous and indiscriminate a grant was inexpedient for the still fragile, newly-restored democracy.<sup>38</sup>

There is no first-hand evidence to indicate how prosecutors arranged their pleas in *graphai paranomon* of decrees that were not grants of honors or citizenship.<sup>39</sup> Where no grant was at stake, there could, of course, be no plea of unworthiness. But the plea of inexpediency was always appropriate and relevant. In view of the practice observed in *graphai paranomon* of honorary decrees, I would assert that it is *a fortiori* likely that orators presented the political issues

<sup>36</sup> The honorands are certain *proedroi* who had allowed a decree honoring some Macedonians to go forward: ἔγραψεν γὰρ ὧν ἕνεκα ἔστεφάνωσεν τοὺς προέδρους, δικαιοσύνης τε τῆς εἰς τὸν δῆμον τὸν Ἀθηναίων, καὶ διότι κατὰ τοὺς νόμους προηδρεύκασιν. ἐπὶ δ[ὲ] ταῦτ' ἄγετ' αὐτὸν ἀπολογησόμενον, καὶ σύ, ὦ Φ[ιλι]ππίδη, δείξας ἀληθῆ εἶναι τὰ περὶ τῶν προέδρων, ἃ ὑπέθου ἐν τῷ ψηφίσματι, ἀπόφενγε (6). Cf. also the supplement conjectured in fr.10 of this speech: [*sc.* the *proedroi*] πολὺ μᾶλλον ἄξιοί εἰσιν [μ]ισεῖσθ[αι].

<sup>37</sup> [Plut.] *X Orat.* (*Mor.*) 835F, *P.Oxy.* XV 1800 fr.6f, Σ Laur. *ad Aeschin.* 3.195, Max. Plan. *ap. Walz, Rhet. Gr.* V 343 (Σ *ad Hermog. Stat.*). This formal deficiency resulted from the fact that the decree was passed during the period of *anarchia* before Euclides took office (*X Orat.*) and the democratic *boule* had been reconstituted (Σ *Aeschin.*, Max. Plan.).

<sup>38</sup> This would explain why *Ath. Pol.* 40.2 and *Aeschin.* 3.194f record this action by Archinus as a considerable benefit to the state.

<sup>39</sup> The only fragments that survive from speeches in such cases are those from Lysias' speech written in prosecution of Theozotides, and they are inconclusive in this matter (Lys. fr.vi Gernet-Bizos; Cat. #5).

raised by any indicted decree in the form of a plea of inexpediency. There would also be a legal plea. One example will be considered.

At the time of Philip's hostilities directed against Olynthus (349/8), Apollodorus moved a decree that was clearly intended to enable the state's surplus revenue (τὰ περιόντα χρήματα τῆς διοικήσεως) to be devoted to the military fund (τὰ στρατιωτικά) as opposed to the theoric fund (τὰ θεωρικά). After the decree was passed and the surplus revenue assigned by vote to the military fund, Stephanus indicted Apollodorus for *paranomon* and won the case ([Dem.] 59.3–8; Cat. #18). We know from [Dem.] 59 that Stephanus and Apollodorus were bitter enemies, and we have only a meager and very partial account of the trial. It is hardly inconceivable that Stephanus prosecuted Apollodorus in pursuit of a private quarrel, just as Theomnestus and Apollodorus openly admit they are using the *graphe xenias* against Stephanus' girlfriend Neaera to seek redress in this private quarrel (*cf.*, *e.g.*, [Dem.] 59.1, 8f, 14, 16, 43).

We also know, however, that Apollodorus' decree raised formidable legal and political issues. The legal issue involved the relationship between the decree and one or more statutes that regulated the disposition of the three funds named above. The legal issue inevitably surpassed the personal enmity that may have given rise to the trial. Apollodorus must have framed his decree in such a manner as to seem to avoid breaking at least the letter of the statutes, and Stephanus must have displayed these statutes in court and argued that they were broken.<sup>40</sup> Thus Stephanus must have presented a formal legal plea.

The political issue was even greater than the legal one: whether or not to aid the Olynthians against Philip, and if so, how. Here we can cite Demosthenes' *Third Olynthiac*, delivered before the assembly at just about the time of Stephanus' indictment of Apollodorus. Much of this speech is devoted to advocating the repeal of certain statutes regulating the various funds, and spending these resources on war against Philip (*cf.* esp. 3.10–13, 18–20, 33–35). Apollodorus' decree was intended to advance the same foreign policy advocated by Demosthenes in the *Third Olynthiac* without, however, going through the tedious process of repealing the statutes. Thus, in view of the momentous political decisions to be made, Stephanus must also have

<sup>40</sup> *Cf.* [Dem.] 59.4, κελυόντων μὲν τῶν νόμων, but we cannot trust Theomnestus' brief paraphrase of what the statutes enjoin. On the complex legal situation, including the report of Σ *ad* Dem. 1.1, see Cawkwell (*supra* n.12) 58–61, and M. H. Hansen, "The Theoric Fund and the *graphe paranomon* against Apollodorus," *GRBS* 17 (1976) 235–46. *Cf.* also Demosthenes' reticence even to seem to be moving a proposal regarding these funds: Dem. 1.19f.

presented a formal plea of inexpediency, arguing against opposing Philip at Olynthus, or using the funds in the manner intended by Apollodorus' decree, or, most likely, both. We can be sure that Stephanus liberally sprinkled personal abuse throughout his speech, much as we can see Demosthenes and Aeschines do when they prosecute *graphai paranomon*. This manner of speaking would not have diminished the importance and indeed necessity of both the legal and the political plea in constructing an effective case.

#### IV

The prosecutor in a *graphe paranomon* presented both the legal plea and the political pleas with the common aim of convincing the jurors to cancel the proposal or decree and punish the proposer. Yet despite the prosecutor's best effort to make things appear so, there is no reason why the legal and political considerations should inevitably converge and recommend to the jurors the same decision. It might well happen that a decree that was in conflict with the statutes nevertheless tended to promote the best interests of the Athenians. It was, of course, always open to the defendant who found himself in a weak legal position to argue on this basis, and some did.

As he opened the political plea in the prosecution of Aristocrates, Demosthenes warned the jurors of what he claims is a common tactic: the defendant will hardly contest the prosecutor's legal plea, since it is incontrovertible, but will base his entire defense on a political plea (Dem. 23.100). Because this statement is obviously self-serving (for it implies that the defendant has no legal plea worth making), we ought not to accept it as literally true. Yet we can detect in some cases a real tension between the legal and political pleas. On another occasion, speaking for the defense, Demosthenes demonstrated the tactic himself.

In his prosecution of Ctesiphon, Aeschines had presented a clear, fairly dispassionate, carefully argued legal plea (Aeschin. 3.9–48).<sup>41</sup> In reply, Demosthenes acknowledged that he was obliged to respond to this legal plea (18.110), and certainly did not venture to omit a legal plea entirely; but the few paragraphs he devotes to this response contain more bluster than argument (110–25). The vast bulk of the speech and the entire thrust of the defense consist in a defense of his

<sup>41</sup> Essentially, Ctesiphon's decree was in conflict with statutes that forbade the honorand from receiving a crown while still *ἀντιπρόεδρος* (9–31) and from being proclaimed in the theater of Dionysus (32–48). Wolff categorically asserted that, with respect to the legal plea, Demosthenes did not have a leg to stand on; cf. *supra* n.15.

record in order to prove that he was worthy of the honors.<sup>42</sup> At one point Demosthenes claims that the jurors' proper task is merely an *ἐξέτασις τῶν πεπολιτευμένων* and they are to issue a *κρίσις τοῦ τῇ πόλει συμφέροντος* (226). This was evidently sufficient for the jurors on this occasion.

There is only one other instance in which we can detect how a defendant in a *graphe paranomon* arranged his arguments, and the same tactic was employed with greater boldness and the same success.<sup>43</sup> In the aftermath of the battle of Chaeronea, Hyperides moved and secured passage of a decree mandating extreme measures to meet the emergency. These measures included the restoration of rights to the disenfranchised, the recall of exiles, and the liberation of slaves. The decree was prosecuted for *paranomon* by Aristogeiton (Cat. #27). In his defense Hyperides repeated several of the prosecutor's main contentions and answered them in turn.<sup>44</sup> The prosecutor's legal plea, put last in the list of the prosecutor's contentions, was clearly intended to be the most damning. Regarding the statutes with which the extreme measures of the decree allegedly conflicted, Aristogeiton had asked Hyperides (more or less): *leges igitur, quae prohibebant haec, nonne legebas?* Hyperides responded: *non poteram; propterea quod literis earum arma Macedonum opposita officiebant.*<sup>45</sup> In defense against the charge of *paranomon*, Hyperides essentially conceded that the decree was in conflict with the statutes, or at least that the point was not worth arguing. He claimed, rather, that the state of emergency required the extreme measures, even if some statutes were thereby broken. Expediency won out over the law, but Hyperides' argument gained strength from the palpable emergency. So blatant a disregard of the law would not have been acceptable under normal conditions.

Although Hyperides' defense against Aristogeiton is an extreme

<sup>42</sup> This argument is essentially presented in 9–109, 160–251, 285–323. In most of the rest of the speech Demosthenes impugns Aeschines, esp. 126–59, 252–75.

<sup>43</sup> The fragment from Lysias' speech in defense of Phantias against Cinesias, which merely attacks the prosecutor's reputation (Lys. fr.v G.-B.; Cat. #6), is useless for the present purpose.

<sup>44</sup> See Hyp. fr.27f Jensen=fr.32 Sauppe for the Greek and Latin sources of this fragment. The Latin translation by Rutil. Lup. 1.19 provides all the information in one continuous fragment; hence it is used here. Aristogeiton fr.5 Sauppe, from his speech in prosecution, implies that Hyperides accurately summarized Aristogeiton's legal plea. See Lycurg. *Leoc.* 36–41 for a vivid description of the state of emergency in which Hyperides moved the proposal. Cf. also [Dem.] 26.11–14, from a speech against Aristogeiton, for a partisan recollection of this trial. Hyperides' acquittal is noted in [Plut.] *X Orat. (Mor.)* 849A.

<sup>45</sup> The original version of the end of this response is preserved: *ἐπεσκότει μοι τὰ Μακεδόνων ὄπλα.* Cf. the further point found only in the original: *οὐκ ἐγὼ τὸ ψήφισμα ἔγραψα, ἢ δ' ἐν Χαιρωνείᾳ μάχῃ* ([Plut.] *Mor.*) 849A.



example, there is some other evidence indicating that the Athenians sometimes viewed expediency as the chief issue in a *graphe paranomon*. Lycurgus asserts this outright in comparing the *graphe paranomon* to *eisangelia* (Lycurg. *Leoc.* 7):

ὅταν μὲν γὰρ τὰς τῶν παρανόμων γραφὰς δικάζητε, τοῦτο μόνον ἐπανορθοῦτε καὶ ταύτην τὴν πράξιν κωλύετε, καθ' ὅσον ἂν τὸ ψήφισμα μέλλη βλάπτειν τὴν πόλιν.

On another occasion, Epichares is attempting to strengthen his accusation of sycophancy against Theocrines ([Dem.] 58.36f). Speaking from the posture of one who would be defending certain decrees indicted by Theocrines, Epichares claims that whether the courts ratify or annul the decrees, the Athenians are neither benefited nor harmed. That is, the political plea of the expediency or in expediency of these decrees is redundant. The jurors are meant to infer that the indictments brought by Theocrines are frivolous and therefore motivated solely by sycophancy. Epichares says and implies nothing about the status of the indicted decrees with regard to statute law. This passage makes sense only if the speaker and jurors share the tacit assumption that political expediency is the chief issue in *graphai paranomon*. Both Lycurgus and Epichares are speaking before a *dikasterion*, so they are counting on the jurors' implicit agreement. Neither passage comes from a *graphe paranomon*, so there is no question of special pleading.

There was, therefore, a certain degree of tension between the legal plea and the political pleas, between law and politics, that was always available to the defendant to exploit.<sup>46</sup> This tension arose from the dual rôle played by the *graphe paranomon* in the fourth-century democracy. As claimed above, the *graphe paranomon* was both legal review and political review at once. The task of legal review was fairly straightforward. The *graphe paranomon* should be viewed in the context of the nomothetic reforms instituted at the end of the fifth century and advanced during the fourth.<sup>47</sup> As a means of enforcing the higher authority of statute law over decrees of the assembly, the

<sup>46</sup> Cf. the comment of Triantaphyllopoulos (*supra* n.1) 48: "Zudem erlaubte das Konzept des ἐπιτήδειον und συμφέρον soziale Momente im Gesetz in Erwägung zu ziehen, die gewöhnlich in Gelegenheits- und Notlagengesetzen zu finden sind."

<sup>47</sup> On *nomothesia* in Athens, see A. R. W. Harrison, "Law-making at Athens at the End of the Fifth Century," *JHS* 75 (1955) 26–35; D. M. MacDowell, "Law-Making at Athens in the Fourth Century B.C.," *JHS* 95 (1975) 62–74; P. J. Rhodes, "*Nomothesia* in Fourth-century Athens," *CQ* n.s. 35 (1985) 55–60; M. H. Hansen, "Athenian *Nomothesia*," *GRBS* 26 (1985) 345–71; P. J. Rhodes, "*Nomothesia* in Classical Athens," in A. Giuliani and N. Picardi, edd., *L'educazione giuridica* V.2 (Perugia 1987) 5–26.

*graphe paranomon* helped prevent the assembly from enacting such fundamental, statutory measures as the reforms aimed to relegate to the more deliberate, orderly procedure of *nomothesia*.<sup>48</sup> Although the *graphe paranomon* predates the archonship of Euclides (403/2), only after the reforms of that year did the *graphe paranomon* acquire a well-defined legal rôle.<sup>49</sup>

The task of political review was not quite so straightforward, and can be understood properly only after a paradoxical but familiar feature of democracy is called to mind. Ideally, the political structure of the democracy was meant to enable political decisions to be expressions of the will of the *demos* as a whole. In fact, because a single individual, the demagogue (the term is used neutrally), could on occasion direct the will of the *demos* through sufficient persuasive power, the democracy sometimes became essentially a tyranny. This fact was noted by the three great political philosophers of classical Greece: Thucydides on Pericles, Plato in Book 8 of the *Republic*, and Aristotle on democracies where “decrees are authoritative (*κύρια*) and not the law.”<sup>50</sup> In their own way, the Athenians themselves recognized this fact: when a policy that had been approved by the assembly turned out badly, the politician who had proposed the policy was held responsible, often for having deceived (*ἐξαπατᾶν*) the people.<sup>51</sup>

The *graphe paranomon* directly addressed this problem. The threat of a *graphe paranomon* inevitably created a check on the power of the demagogues in the assembly.<sup>52</sup> By invoking the *graphe paranomon*,

<sup>48</sup> Cf. the exaggerated description of legislative confusion at Dem. 20.91f.

<sup>49</sup> The earliest *graphe paranomon* of certain date occurred in 415 when Leogoras, the father of Andocides, indicted Speusippus for a decree relating to some of those accused, Leogoras included, of profaning the Mysteries (Andoc. 1.17, 22; Cat. #1). See the Appendix *infra* for discussion of the legal plea in a pre-Euclidean case.

<sup>50</sup> Thuc. 2.65.8f; Pl. *Resp.* 8.562A–569C; Arist. *Pol.* 1292a4–37 (the quotation is from a6f). Cf. also Eur. *Supp.* 240–43, *Or.* 696–703, 902–16.

<sup>51</sup> E.g. Hdt. 6.136.1 (Miltiades); Thuc. 2.59.1f (Pericles), 3.36.4f (Mytilene), 8.1.1 (Sicily); Arist. *Pol.* 1304b10–15 (the Four Hundred); [Arist.] *Ath.Pol.* 34.1, Xen. *Hell.* 1.7.35 (the Arginusae affair); [Arist.] *Ath.Pol.* 34.1 (Cleophon); in the fourth century: Dem. 22.32, 23.18, 93, [Dem.] 59.91, Din. 1.47; general statements of this phenomenon: [Xen.] *Ath.Pol.* 2.17, [Arist.] *Ath.Pol.* 28.3, Dem. 23.97. The use of the procedure of *προβολή* for having deceived the people by making unfulfilled promises seems to have been infrequently employed, although Callixenus and (probably) Miltiades were attacked by this procedure. On the *προβολή*, see Lipsius (*supra* n.17) 211–19; A. R. W. Harrison, *The Law of Athens* II (Oxford 1971) 59–64.

<sup>52</sup> This was especially useful in the fourth century when the public speakers (*ρήτορες*) less often than previously held magistracies, especially the *strategia*, and therefore were less often subject to *euthyna*; cf. Arist. *Pol.* 1305a10–15, Isoc. 8.55, Plut. *Phoc.* 7.5, and Perlman (*supra* n.31) 347. The *graphe paranomon* was certainly not the only means available for attacking a politician; there were also the *δοκιμασία ῥητόρων* (Aeschin. 1.28–32), *εἰσαγγελία* (cf. Hyp. *Eux.* 8), and a number of other procedures suitable for particular circumstances. The advantages of the *graphe para-*

politicians, concerned citizens, and sycophants could hinder a demagogue in the assembly from turning his advice into official policy. When the proposal was reconsidered in court, the demagogue might still be able to exert his influence, and the jurors might, of course, ratify the decree.<sup>53</sup> But the setting in court was far less amenable to the demagogue than the assembly. The prosecutor had a captive audience and an allotted time to speak; he prosecuted in the name of the law; he could subject the decree to the legal and political scrutiny it may not have received in the assembly; the jurors rendered their decision by secret ballot; and the mere act of reconsideration might serve to dispel the demagogue's influence.<sup>54</sup> Furthermore, the proposer of a decree had to hedge his designs against the possibility of a heavy punishment in court.<sup>55</sup> A politician could avoid personal liability in the event of an indictment by paying someone to act as the formal proposer of his decree.<sup>56</sup> But from the standpoint of the *demos*, if not of the demagogue's personal enemies, it would have been irrelevant who actually moved the decree publicly advocated by the demagogue. In the event of an indictment, the *demos* was still saved from an impulsive decision.

Between the demagogue and the implementation of his advice stood the *graphe paranomon*—and that means, in concrete terms, the statutes of the people's inscribed law code, a trial in the people's court, and, above all, the sycophants, the Athenian version of the people's prosecutor. The sycophants stood ready to use the *graphe paranomon* against public speakers to make money for themselves and perform an essential public service. Sycophants could, of course, and did, avail themselves of any form of public prosecution; however, because they could pose as defenders of the democracy when prosecuting *graphai paranomon*, this indictment was especially attractive. For his numerous prosecutions of *graphai paranomon* Aristogeiton earned the nickname *κύων τοῦ δήμου*, 'watchdog of the democracy'

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*nomon* were that it could be invoked on the spot in the assembly with no prior cause or preparation, it was always available, and it could be used repeatedly.

<sup>53</sup> The demagogue could be considered to 'deceive' the jurors too; cf. Dem. 23.97, [Dem.] 59.5.

<sup>54</sup> For example, in Stephanus' indictment of Apollodorus (cited above), the jurors reversed what Theomnestus reports as a unanimous decision of the assembly to devote the state's surplus revenue to the military fund ([Dem.] 59.5). It is impossible to estimate how often such drastic reversals in court took place. Hansen (*Sov.* 50, 54) recognizes, but severely qualifies, the use of the *graphe paranomon* as a safeguard against demagogues.

<sup>55</sup> E.g. Apollodorus ([Dem.] 59.6–8) and Demades (Diod. 18.18.2, Plut. *Phoc.* 26.3) suffered severely after having been convicted in *graphai paranomon*.

<sup>56</sup> See Hansen, *Ath. As.* 59f, 68.

([Dem.] 25.40)! Theocrines is said to have publicly and frequently claimed that “he himself guards against those who move decrees in conflict with statute law, and that when *graphai paranomon* are abolished, the democracy is undone” ([Dem.] 58.34, *cf.* 22, 45, 63). Sycophants would indict for *paranomon* insignificant but wealthy citizens like Epichares’ father ([Dem.] 58.31), or prominent politicians like Demosthenes and Hyperides ([Dem.] 26.11–14, 58.35). Demosthenes, recalling the days of struggle with Philip, compared the ease of action available to Philip as absolute, despotic autocrat with the cumbersome administration of Athenian policy, belabored by sycophants and *graphai paranomon* (Dem. 18.235, 249f). Clearly the Athenians preferred their cumbersome democracy, sycophants and all.<sup>57</sup> For all the nuisance and shady dealings undertaken by the sycophants, in which wealthy citizens primarily suffered, sycophancy was, from the perspective of the *politeia* as a whole, a necessary evil if institutions such as the *graphe paranomon* were to increase stability amidst the internal conflict appropriate for democracy.<sup>58</sup>

Leading politicians frequently employed the *graphe paranomon* against one another. This too was meant to serve the public interest. In Dinarchus’ speech against Demosthenes, the *graphe paranomon* is mentioned as one of the chief weapons used by a “democratic politician” (*ρήτωρ δημοτικός*) to control harmful demagogues. Demosthenes is then censured for having failed to check the pernicious influence of Demades by indicting his decrees for *paranomon* (Din. 1.100f). Demosthenes used a similar argument to chide Aeschines (Dem. 18.222–24, *cf.* 251): if Aeschines is doing the *polis* a service by prosecuting Ctesiphon’s decree, why, Demosthenes asks, did he fail in his public duty to indict and prosecute a previous decree honoring Demosthenes? By enabling the *demos* to settle conflicts among the leading politicians in court, the *graphe paranomon* served as a more refined democratic tool than the fifth-century institution of ostracism.<sup>59</sup> To take an extreme example, as prosecutor against Ctesiphon

<sup>57</sup> It is worth recalling that the Roman Empire developed a precisely similar class, supported by virtually all emperors as vital to their survival.

<sup>58</sup> *Cf.* M. I. Finley, “Athenian Demagogues,” *Past & Present* 21 (1962) 3–24, esp. 19–22.

<sup>59</sup> I am not inclined to view it as mere chance that the first known *graphe paranomon* occurred in 415; see *supra* n.49. Hyperbolus is the last Athenian known to have been ostracized, probably in 416. On the sources and date of Hyperbolus’ ostracism, see Andrewes, *HCT* V 259ff *ad* Thuc. 8.73.3. Although it seems to have fallen into disuse after Hyperbolus, ostracism remained on the books through the fourth century ([Arist.] *Ath. Pol.* 43.5). We have no evidence concerning when the *graphe paranomon* was created; speculation prevails. I do not consider it credible that it was instituted

Aeschines failed to receive his minimum one-fifth of the jurors' votes, incurred a heavy fine which he could not or would not pay, and was thus forced into exile. At least the *demos* heard reasoned arguments in a regulated setting before casting their ballots, and the exile-to-be, having taken his chances, received a hearing before he had to pack his bags.

Under the terms of the *graphe paranomon*, rivals such as Demosthenes and Aeschines or a politician and a sycophant representing the people fought for the approval of the people in public and without violence. The democracy was bolstered by such verbal combat. The policies and personalities of the leaders of the *demos* were scrutinized and held to the standards of the communal law code and the community's best interests. It was up to that section of the fickle *demos* who were sitting as jurors that day both to decide public policy and to guard the authority of their laws. The record, of course, is mixed. Yet it is not to be expected that the tension between law and politics ought to have been dissolved or that law and politics ought to have been kept strictly separate. By means of the *graphe paranomon* law and politics were brought into the same arena in a regular manner. The tension between these two communal concerns was preserved, but mediated and controlled, taken notice of and directed into an orderly, reasoned, democratic forum. For these reasons, it was incumbent on the Athenian jurors to consider and take seriously both the legal and the political issues raised by the decree before they cast their votes.

### APPENDIX: The Legal Plea in a Pre-Euclidean Case

In the only pre-Euclidean case of which we have any substantial knowledge, the legal plea does not display the same clear reliance on statute law that is displayed in every other case, all from after the reforms of Euclides' year. In 406 Euryptolemus attempted to indict the decree of Callixenus directing the Arginusae generals to be judged en masse in the assembly (*Xen. Hell.* 1.7.9–35; Hansen, Cat. #3). Facing a threat of reprisal, Euryptolemus withdrew the indictment and the case never went to court. Nevertheless, Euryptolemus spoke before the assembly against the decree, and, as represented by Xenophon, delivered a speech that resembles what he is likely to have said if prosecuting the decree before a court (1.7.16–33). Euryptolemus does not cite any particular *nomos* contravened by the decree; perhaps no such statute existed at the time. When arguing that the assembly should dismiss Callixe-

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long before the first known instance. Thus, I am inclined to follow the speculation of Wolff 15–22, who prefers Nicias as the originator sometime between 427 and 415.

nus' decree and follow another legal procedure instead (20–29), Euryptolemus presents as proper legal alternatives both a *psephisma* (20f) and a *nomos* (22). By the standards observable in all fourth-century cases, Euryptolemus' legal plea would have to be judged utterly inept and especially confused in its failure to distinguish between statute and decree. In fact, Euryptolemus deserves no such censure because in all probability the standards adhered to by fourth-century pleaders had not yet been introduced.<sup>60</sup>

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