Law and Politics in the Fourth Century: the Evolution of Public [Criminal] Justice

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It is generally posited that the 'criminal law' of Athens had reached maturity by the middle of the fifth century: e.g., the *graphē* had been instituted, allowing *ho boulomenos* to prosecute offences on behalf of the community or a single victim; extraordinary procedures such as trials by decree (*eisangeliai*, *euthynai* of generals, *probolē)* had begun to take shape; innovations or revived innovations such as the institution of 'circuit judges' promoted the system's efficiency by relieving a large quantity of private disputes from the courts of the *thesmothetai*; above all, the people manned the courts. Important changes took place during the last decade of the fifth century and further changes, mostly lesser in scale but not always so, would follow in the next. The role of democracy in this evolution has been much studied and theorized down toward the end of the fifth century, but throughout much of the fourth century (and to some extent the last decade of the fifth), the study of rhetoric has often trumped that of the influence of democracy, as, e.g., in Ober's important work published in 1990, *Mass and Elite in Democratic Athens*.[1] However, if Athenian democratic ideology can be said to be one that embraced 'not only the rule of law, but also justice and the public interest',[2] then many of the 'lesser and bigger changes' in the fourth century might be viewed as ensuring and enhancing the maintenance of that triad (the rule of law, justice, and the public interest) on a democratic axis--especially in moments of crisis. This, indeed, is what I hope to demonstrate in the course of this presentation. Moreover, some consequences of the changes in the administration of criminal justice can be seen to reflect the same democratic fabric as the 'awards system': as citizens on the lower end of the status scale become more eligible for honors awarded by the *polis*, so too do the doers of 'high crimes and misdemeanors' become less attested for the elite crowd. This afternoon, I shall only have time to discuss two of the changes in any detail; and probably I can only briefly mention the symbiotic relationship between the penal and award systems.

Before proceeding with this self-proclaimed trajectory and moving on to moments of change amidst crisis, that is, the lesser and bigger changes, as well as the status of their agents and victims, I would like to pause and briefly consider in my introductory remarks three issues that have been of great concern, and in some cases still are, to legal historians of ancient Athens: first, the changing relationship between the sovereignty of the people and the sovereignty of law, second, the boundaries between public and private law in ancient Athens; and third, the relationship between political historians and legal historians.

[1] There are exceptions, of course, e.g., Hansen's *Democracy in the Age of Demosthenes*, first published in 1990; but legal historians of fourth century Athens usually focus on the Attic Orators and a limited number of inscribed laws without much attention to democracy and the larger historical period, except in regard to the Harpalos Affair and Philips' impact on the careers of Demosthenes and Aeschines.

[2] The triad is introduced by Michael Gagarin in a forthcoming work called *Democratic law in Classical Athens*.

As to the first issue, the changing relationship between the sovereignty of the people and the sovereignty of law, scholars have for decades debated the question: which was more important in Athens, the rule of law, or the rule of the people, the *dikastēria* or *dēmokrateia*? This has been a fruitful debate [but rather a tired one at present] and one that is still ongoing. Probably most scholars at this point would see the rule of law as sovereign in Athens in the fourth century and this will not be an issue here.[3] It's time to move on, though fragments of this debate will be evident here.

As to the second issue, the boundaries between public and private law in ancient Athens: I shall begin, perhaps not surprisingly, by referring to the influence of Roman legal studies on Greek legal studies. Here, I simply point out that ancient and modern Roman jurists have always given priority to private law. The ancient jurists bestowed little attention on criminal law; it was not quite so interesting to them as were all the problems and intricacies of private law; modern Roman lawyers have followed suit and bestowed lavish attention on all aspects of private law: on obligations, especially contracts, and on property (e.g., inheritance).[4] If we take Justinian's *Digest* as example, only book 48 is dedicated to criminal law, though there may be some patches elsewhere amongst the fifty books that make up the work. I should note however, that the English phrase 'criminal procedure' translates the Latin phrase *publicae iudiciae*. (Incidentally, the published version of this paper will not use the term 'criminal' in its title!) The Roman preponderance of the study of private law may have had some effect on early textbooks of Greek law; perhaps the most extreme case is that of the French legal historian Ludovic Beauchet who restricted his four volume study of 1897 to the private law of Athens.[5] What do more contemporary Greek legal historians do with what we might call, 'criminal law'?[6] Some have tucked 'criminal law' inside of chapters dealing with procedures, and sometimes in chapters dealing with substantive offences. The *dikē phonou* exemplifies an underlying feature of this predicament: prosecution for homicide in Athens is a matter of private law, even, we might say, of family law--or at least the actors in the legal process, are in the first instance, family members.

As is widely recognized, a split between public and private spheres of life in Athens does not map onto a division between public or 'criminal' offences on the one hand, and private offences on the other. For many scholars, the easy way to distinguish public and private offences is to keep in mind that public offences are thought of as wrongs committed against the community and private offences as those committed against the individual. Recently, Alberto Maffi has discussed this important distinction

[3] Hansen, Rhodes, Ostwald, Harris. (Harris 2016: 75 conclusion is basically the same as Rhodes' 1992, 303).
[4] From the summary to A.M. Riggsby's article, 'criminal law, Roman' in the *Oxford Classical Dictionary*, online: 'Roman criminal law had a deeper and more complicated relationship to politics than did the private, civil law. This is true both in the sense that the jurists were relatively uninterested in the criminal law, especially before the late 2nd century CE, and that known trials in the criminal courts seem to have been little governed by niceties of the law. Common-sense notions of guilt and innocence were relevant, but not legal technicalities. Cf. S.C. Todd, *Shape of Athenian Law*, 1993, 263.
[5] *Histoire du droit privé de la République athénienne*, Paris, Chevalier-Marescq.
[6] Cf. S.C. Todd, *Shape of Athenian Law*, 1993, 263.
[6] *Histoire du droit privé de la République athénienne*, Paris, Chevalier

slightly differently, and takes as his starting point 'constitutional law'. Maffi calls upon us to rethink the way we divide public and private domains of law, so that 'the public sphere goes beyond the strictly constitutional fields, which comprise the competences of constitutional bodies and the relations between them. *Ta koina* or *ta dēmosia* covers the whole sphere of public interest from the perspective of the modern jurist and would encompass not only constitutional law but also administrative law'.[7] Maffi is primarily interested in people 'who act in the public interest' and who are not magistrates and he asks whether they are subject to 'rules'; as a route to follow, he suggests paying more attention to public administration in Athens and the part played by individuals. This articulation is important to keep in mind—and indeed, my attention in the main body of this presentation will be on public administration and bureaucracy, that is, on the paper trail that legal processes and secretaries leave behind.

The third issue of my introductory remarks concerns the difference between political and legal historians. Political historians have always had a great time with criminal processes: the trials arising from the profanation of the Mysteries and the mutilation of the Herms; the non-trial of the generals after their victory at Arginousai; Socrates' trial for impiety; Demosthenes' crown trial and the Harpalos scandal in the next century. These are lightning rods for political narrative of the evolution of justice and democratic principles, less so for the tawdry Harpalos Affair, but extremely so for the grand trials at the end of the fifth century and perhaps only a little less so for 'Demosthenes' trial' in 330, especially when we see it, momentarily, through the lens of its procedure—namely, through the lens of his vicarious self, Ctesiphon, the politician who proposed the decree to crown Demosthenes and who was indicted for the public offense of proposing an unlawful decree; the award system, we see, is intimately entwined with its nemesis, the *graphē paranomōn*.[8] But to leave the crown aside here, and to reflect on the political historians dealing with trials at the end of the fifth century, we easily see, especially in the grand work of Martin Ostwald, that the evolution of the rule of law seems to have found its *telos* at the close of the fifth century. It has not been of so much interest to trace its evolution in the political and historical narrative of the fourth century. . . but perhaps some inroads can be made—and perhaps they can start today.

Claudia Tiersch, in a Berlin colloquium hosted by her in 2012, asked fellow participants to think about Athens of the fourth century as a period 'zwischen Modernisierung und Tradition'. John Davies, in his typically elegant end-of-conference review of the papers that had been presented there,

[7] A. Maffi, 'Toward a New Shape of the Relationship between Public and Private Law in Ancient Greece', 73 with n. 10, in P. Perlman (ed), *Ancient Greek Law in the 21st century*, Austin, 1918, 70-84.
[8] Indeed, M. Osborne 198, associating *dokimasia* (of foreigners upon whom citizenship was being conferred) with democratic periods of Athens, even hypothesizes that it became regular only in 229—and replaced the *graphe paranomōn*. N. Papazarkados, who points this out in an unpublished essay, concludes, 'If so, far from being a decorative element, Athenian Hellenistic lawcourts suddenly turn out to be an important component of political life.'

called attention to critical moments that made modernization impossible.[9] I am following Davies' broad hint here by giving attention to moments of crisis. It seems to me that the Athenians *did* modernize, and *did* bureaucratize, and did so in a democratic way, especially when those moments of crisis arrived.

Critical moments and changes

Three fourth century changes in the administration of the public procedure of political *eisangeliai* are my focus here.[10] It will be best, however, to begin with a definition: *eisangelia*, usually translated in English as 'impeachment' or 'denunciation', in the late fifth and fourth centuries can refer, on the one hand, to a specific type of prosecution or trial, or, on the other hand, to the initiation of that trial before the assembly or the boulē (that is, the Council of Five Hundred), by a member who *eisangellein*: i.e., he makes an impeachment or denounces someone for committing a major public offence.[11] The three major offences are (1) attempting to overthrow the democracy; (2) treason; and (3) being a rhētor and taking bribes to speak otherwise than in the best interests of the people. There is additionally another category of political *eisangelia*—this is *eisangelia* to the *boulē* against magistrates who do not use the laws. *Eisangelia* may be set in motion in a number of ways, but it is essential that, at some point in the initial stage, one person will propose a decree to impeach a particular person. If that decree is enacted—and if it is not successfully subjected to *a graphē paranomōn,* then eventually, perhaps within thirty days, a trial will take place either in the *boulē* or assembly; either body, however, can decide to remit the case to a *dikastērion*. The *boulē* will almost always do this if the penalty is more than 500 drachmas. Accordingly, it is possible for a 'final' or a 'complete' hearing to take place in the boulē, or in the assembly, or in the *dikastērio*n.

Now for some of the changes in the procedure during the fourth century: The first change is a restriction upon the forum for the final hearing of an *eisangelia* for major public offences against the state: previously these trials could be held in the assembly*, boulē*, or a *dikastērion*, but after 362, the assembly is no longer attested as the trier. The second change is another transfer of jurisdiction: the *boulē* must transfer hearings to the Eleven, in cases where a *katagnōsis* had not been given after thirty days. The third change is the risk factor for the prosecutors of such cases: earlier in its deployment, prosecutors who proposed and brought *eisangeliai* did so free of risk--that is, a penalty of 1,000 drachmas would not be imposed if they lost the case overwhelmingly and did not garner even a fifth of the votes; but at some point in the fourth century, probably between 333 and 330, such prosecutions

[9] J.K. Davies, 'Athens after 404: A Battleground of Contradictory Visions', 388, in Claudia Tiersch (ed.), *Die Athenische Demokratie im 4. Jahrhundert: zwischen Modernisierung und Tradition***.** Stuttgart, 2016, pp. 385-394.

[10] I do not include here the like-named but much different procedures against arbitratiors (see D.M. MacDowell) and against guardians and others for mistreatment of orphans, epiklēroi and parents (see A.R.W. Harrison I 117-19 with nn. for ancient refs.).

[11] This concise definition conceals the decades-old controversy between Rhodes and Hansen, etc. The difference between the views espoused by each is summarily presented in the discussion of the law cited below at Dem. 24.63; see the text below at nn. 26-28.

lost that comfortable status. As I look at these changes (or at least the first two—indeed, I have time here for only the first two), my question is not only, is it a change that favors democratic rule; it is also, what impels the change? In each instance, there appears to be a crisis for which relief is being sought.

i. Change of forum: from assembly to *dikastērion*

The first change cannot be precisely dated. Nonetheless, statistics for the place of hearing (boulē, assembly, or dikastērion) will make obvious that change did indeed occur. Of the 12 attested eisangeltic trials from the start of the fourth century down to 363/2 for which we know the forum of the final hearing,[12] four occur in a *dikastērion*;[13] and eight have their final hearing in the assembly.[14] Of the 27 trials from 361 until 324 which went ahead to a hearing and for which that venue is known,[15] all were heard by *dikastēria*;[16] there is no attestation that any *eisangelia* after 362 was heard by the assembly. As earlier scholars have noted, it is clear that a significant change in judiciary administration had taken place. Different motives have been suggested for the change of place: Hansen (1990/1991, 158-9) thought both constitutional and economic considerations may have played a part: as for the latter, it was cheaper to pay a *dikastērion* to hear a case than to pay the assembly to do so; and as for constitutional matters, the transfer to the *dikastēria* made the democracy more moderate by reducing the power of the assembly;[17] Hansen dated the change as occurring in conjunction with Athens' fiscal and political crisis in 355, at the end of the Social War. Rhodes disagreed about Hansen's second motive (2016, 311 and 314): while the economic impulse is credible, an impulse to moderate the democracy by reducing the assembly's powers is not; in fact, the assembly's importance increased as it is 'the body which sometimes commissions and always receives the Areopagus' ἀποφάσεις.'

The change of forum, from the assembly to the dikastēria, is certain; the impulse for the change, however, might be further explored. IG II^2 111 (=R&O 39), a well-known polis decree of 363/2, might shed some light. The decree reports the aftermath of an uprising in Ioulis on the island of Keos; *inter alia*, in ll. 41-45, it orders the exile of those who revolted and the confiscation of their property; in ll. 45-49, it also sets up a method of trial for those who dispute their inclusion among the named rebels; more significantly for our purposes, as the background for these instructions, in ll. 27-41, it briefly

[12] I use numbers from Hansen' 1975 catalogue for 'eisangelia to the assembly'. His figures are cited on p. 53. There are 19 eisangeltic trials during this period (which according to Hansen 'go to the Assembly'—i.e., they are initiated there); 7 lack attestation of the place where they were heard: Hansen 1975 cat. nos. 68 (393/2) Konon against the general Adeimantos; nos. 69-72 (392/1); no. 74; no. 79.
[13] Hansen 1975 cat. nos. 77-78, AA against two anonymous generals ((379/8); 83; 84.
[14] Hansen 1975 cat. nos. 73, 75, 76, 80, 81, 82, 85, 86. All eight cases before the Assembly are prosecutions of generals and so too are three of the four cases before the dikastēria.
[15] Of the 44 trials from 361 until 324, I exclude Hansen 1975 nos. 120 and 128 on the grounds that the source, [Dem.] 25, is not genuine; two others were withdrawn (Hansen nos. 110, 128, 129); two may not have taken place (nos. 99 and 114); and the venue for eleven is uncertain (nos. 90, 92, 93, 95, 98, 111, 112, 122-23, 130). This leaves 27 trials.
[16] Hansen 1975 cat. nos. 87, 88, 89, 91, 94, 96, 97, 100, 101, 102, 103-108, 109, 113, 115, 117, 118, 119, 121, 124, 125, 126, 127.
[17] Note that the critique of change, at least in Hansen, is framed in the 'old paradigm' as a change in the measure of the balance of powers.

alludes to the trials of the rebels in Athens and specifically mentions the council's prosecution and death sentence upon a man named Antipater who had killed the Athenian *proxenos*.[18] The decree was proposed by Aristophon of Azenia; the latter had himself served as general and had led an expedition to Keos.[19] Revolts of allies such as that in Keos in the late 360s may have created an environment in which problems may have become too complex or even too provocative for hearings before the assembly—indeed, problems that may have arisen in the new confederacy may have presented so many issues and impelled so much debate in the assembly, that it could no longer serve as the trier of these cases.[20]

Further reflection on Aristophon's career will lead to another phenomenon that may have impelled the change of court venue. Aristophon not only proposed decrees and served as a general, he was also a well-known prosecutor; he is known to have impeached four generals and also some trierarchs (Dem. 51.8-9); all the trials were heard in lawcourts between 362/1 and 356/5—except perhaps for the trial against the trierarchs which can be dated to 362/1 and was probably heard in the assembly.[21] For none of these trials do we have the speeches of the prosecutors or defendants; we only have attestations of these trials in other orations or literary works. Thus the speaker of Dem. 51 mentions the trial of the trierarchs when he is addressing the boulē in a different kind of trial, probably a diadikasia, in which the speaker claims that he deserves a crown for his service as trierarch:

> δεῖ τοίνυν ὑμᾶς, ὦ ἄνδρες Ἀθηναῖοι, μὴ μόνον ἐκ τούτων σκοπεῖν τὸ δίκαιον, ἀλλὰ καὶ ἐξ ὧν αὐτοὶ πρότερον πεποιήκατε ταὐτὰ τινῶν διαπραξαμένων τούτοις. ὅτε γὰρ τῇ ναυμαχίᾳ τῇ πρὸς Ἀλέξανδρον ἐνικήθητε, τότε τῶν τριηράρχων τοὺς μεμισθωκότας τὰς τριηραρχίας αἰτιωτάτους τοῦ γεγενημένου νομίζοντες, παρεδώκατ᾽ εἰς τὸ δεσμωτήριον, καταχειροτονήσαντες προδεδωκέναι τὰς ναῦς καὶ λελοιπέναι τὴν τάξιν. καὶ κατηγόρει μὲν Ἀριστοφῶν, ἐδικάζετε δ᾽ ὑμεῖς· εἰ δὲ μὴ μετριωτέραν ἔσχετε τὴν ὀργὴν τῆς ἐκείνων πονηρίας, οὐδὲν ἂν αὐτοὺς ἐκώλυεν τεθνάναι.

[18] Cf. IG II^2 404, another decree concerning relations with the Keans, dated to the period 338/7-319/8, but redated by Dreher, *Symposium 1985*, 263-281 to 363/2 (SEG 39.73).

[19] Aristophon's generalship is only known from schol. Aeschin. 1.64 = 145 Dilts; see Hansen 1974, 31 no. 10. Whitehead 1986, 314 and n. 11 cites the scholiast along with IG II^2 111 to confirm 363/2 as the date of Aristophon's generalship, but I am not sure the inference can be made. Aristophon was himself the prosecutor of four generals and also some trierarchs (Dem. 51.8-9); all the trials were heard in a lawcourt, that of the first general and the trierarchs in 361, and the other generals in 356/5. Hansen 1975 nos. 88, 100, 101, 102, and 142; he was himself impeached by Hyperides at some point between 361-343, Hansen 1975 no. 97.

[20] I am grateful for to discussants at the conference for bringing out this final point about the assembly's workload!

[21] Aristophon was himself the prosecutor of four generals and also some trierarchs (Dem. 51.8-9); all the trials were heard in a lawcourt, that of the first general and the trierarchs in 361, and the other generals in 356/5. Hansen 1975 nos. 88, 100, 101, 102, and 142; he was himself impeached by Hyperides at some point between 361-343, Hansen 1975 no. 97. The trial of the trierarchs (Hansen 1975 cat. no. 142) may be dated by connecting it with Leosthenes' generalship during the battle of Peparethos against Alexander of Pherai. Hansen argues that the case was heard by the *boulē*.

> ‘You ought, men of Athens, to seek a just course, not only in the light of these considerations, but also in the light of your own previous actions in the case of others who have acted as these men have done. For, when you were worsted in the sea-fight against Alexander [sc., of Pherae], you thought that the trierarchs who had let out their trierarchies were chiefly responsible for what had happened, and you gave them over for imprisonment, having decided by show of hands that they had betrayed their ships and deserted their post. The accusation was made by Aristophon, and you were the judges; and, if the anger you felt had been equal to their crime, nothing could have prevented their being put to death.’ (Trans. Bers)

The text is fraught with problems that cannot be taken up here; nonetheless, it is suggestive of problems in the trierarchy that may have led to re-thinking the forum of final hearings for *eisangeliai* before the assembly—Gabrielsen’s paper should be recalled here. Apollodoros, the speaker of Demosthenes 50 and probably the author of that speech (*Against Polycles*), mentions another trierarch, Kallippos of Aixone, whom he prosecuted in 360 (Hansen 1975, cat. no. 92); apparently, he had conveyed an exiled politician from Methone to Thasos, on the order of his general Timomachos; he had accomplished this by hiring a ship from another trierarch and serving in his stead ([Dem.] 50.46-52). The problems created by multiple trierarchs such as Kallipos and others who hired out their service and then failed miserably as in Dem. 51.8-9 may have become too unwieldy for the assembly to handle. These problems will not have started only in 362; they will have been persistent and pressing, and will have continued. My conclusion regarding this first change is that its motive may have been more than economically driven; there may have additionally been other public interests involved: e.g., a push for greater efficiency in dealing with problems stemming from Athens’ position in the Second Athenian League which would explode in the years 357-355 in the Social War. The assembly was simply too busy with its military affairs, financial strategies, and foreign policies to continue acting as an enormous courtroom.

ii. Timokrates law: Dem. 24.63

Timokrates’ law, inserted into Dem. 24 at chapter 63, is generally considered genuine,[22] concerns *eisangeliai* that have not received a *katagnōsis* within a set period of time.[23] The meaning of the term *katagnōsis* is controversial:

[22] Canevaro 2013, 151-157, argues persuasively that even though ‘[i]t is impossible to calculate on the basis of the stichometry whether this document was part of the Urexemplar of the speech or not’ (p. 151), it should be considered authentic.

[23] The meaning of *katagnōsis* is controversial: either it is a preliminary verdict of condemnation by the boulē (Hansen 1975, 22 and 50; 1980:93; Rhodes 1981, 662 on *AP* 59.4; and Lipsius 1905, 202-03) or it can mean, additionally, the boulē’s decision to transmit the case to another venue (Harrison 1971, 56). I argue elsewhere, in agreement with Harrison, that *katagnōsis* can have either meaning.

> Τιμοκράτης εἶπεν· ὁπόσοι Ἀθηναίων κατ᾽ εἰσαγγελίαν ἐκ τῆς βουλῆς ἢ νῦν εἰσιν ἐν τῷ δεσμωτηρίῳ ἢ τὸ λοιπὸν κατατεθῶσι, καὶ μὴ παραδοθῇ **ἡ κατάγνωσις** αὐτῶν τοῖς θεσμοθέταις ὑπὸ τοῦ γραμματέως τοῦ κατὰ πρυτανείαν κατὰ τὸν εἰσαγγελτικὸν νόμον, δεδόχθαι εἰσάγειν τοὺς ἕνδεκα εἰς τὸ δικαστήριον τριάκονθ᾽ ἡμερῶν ἀφ᾽ ἧς ἂν παραλάβωσιν, ἐὰν μή τι δημοσίᾳ κωλύῃ, ἐὰν δὲ μή, ὅταν πρῶτον οἷόν τ᾽ ᾖ. κατηγορεῖν δ᾽ Ἀθηναίων τὸν βουλόμενον οἷς ἔξεστιν. ἐὰν δ᾽ ἁλῷ, τιμάτω ἡ ἡλιαία περὶ αὐτοῦ ὅ τι ἂν δοκῇ ἄξιος εἶναι παθεῖν ἢ ἀποτεῖσαι. ἐὰν δ᾽ ἀργυρίου τιμηθῇ, δεδέσθω ἕως ἂν ἐκτείσῃ ὅ τι ἂν αὐτοῦ καταγνωσθῇ.
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> Timokrates made the proposal: all Athenians who are now in custody or who will be put there in the future because of an *eisangelia* emanating from the Council and for whom a *katagnōsis* was not delivered to the thesmothetai by the secretary of the prytany in accordance with the eisangeltic law: all these Athenians the Eleven are to bring into the lawcourt within thirty days from that on which they took them over unless public business obtrudes, and if not [within thirty days because of public business] as soon as it is possible. Any qualified Athenian volunteering to accuse may do so and if [the accused] is convicted the Heliaia is to determine whatever is to happen to him or whatever monetary fine he is to pay. And if he is penalized with a fine, he is to be imprisoned until he pay whatever sum shall have been decided for him.

The law permits the inference that *katagnōseis* were expected to be passed on to the thesmothetai (presumably to be scheduled for a final decision on punishment before a dikasterion) but that sometimes they were not. The motivation for the law is usually extrapolated as the delinquency of the Councillors: they have shirked their duty and so now the festering cases are to be handed over post-haste to the Eleven.[24] It seems to me, however, highly unlikely that nomosthetic machinery would have been set in motion to correct a problem that could have been amended by creating penalties for the Councillors (or for the prytaneis or secretary of the prytany) if it were their fault for failing to deliver a *katagnōsis* in timely fashion. Change of jurisdiction and court suggests either a deeper problem in the administration of the court system--or more significant innovation. Demosthenes' speech was composed ca. 353 B.C.; and there is good reason to date Timokrates' law to some point within the years 363-54: the γραμματεὺς κατὰ πρυτανείον is not attested before 363.[25]

[24] Hansen 1975, 50.

[25] Busolt/Swoboda 1039f.; sources cited by Hansen 1975: 15. Important changes both in jurisdiction and in the building of court structures have been posited for this period. Many were pointed out by Rhodes in his 2016 essay. Jurisdiction over *dikai* underwent changes: certain *dikai* which are 'confirmed' for official arbitration in the middle of the fourth century (and so belong to the jurisdiction of the Forty) appear as *emmenoi* and under the jurisdiction of the *eisagogeis* in *AP* 52.2, e.g., *dikai proikos* and *aikeias*, and possibly *aphormes* and *trapezetikai*; see Rhodes 1981: ad loc. The date for the change cannot be determined, but most scholars have accepted Gernet's arguments that *dikai emmenoi* did not exist during the first half of the fourth century; and *dikai emporikai* (a subset of *dikai emmenoi*) seem to have come into

How might one explain the impetus for this law? That is, what could have strained the council to such a degree that alleged offenders were left in fetters for weeks on end? One might reasonably hypothesize, I think, that the culprits may have been, once again, the offending trierarchs (consider Gabrielsen's paper once again); one might even suggest that under certain circumstances, and not infrequently, the offences of trierarchs may have been considered treasonable (e.g. Dem. 51.8-9).[26] Moreover, our sources indicate that a significant number of generals were denounced and brought to trial via *eisangeliai* or deposed and then brought to trial via the so-called *euthynai* of deposed generals—i.e., a trial eisangeltic in form; our sources also indicate that the Athenians had a penchant for blaming their generals for their failures and deeming those failures treasonable.[27] Surely it is here that we can hypothesize an overflow of cases involving the incarcerated men whom Timokrates' law assists to a trial within thirty days. Such an explanation would require that serious public offences could be brought to the council and not simply to the assembly. However, according to Hansen's general interpretation of political *eisangelia* (viz., that there are two kinds, one to the Council against magistrates and one to the Assembly for major public offences), only cases that are brought before the Council are given a *katagnosis*. Timokrates' law has only to do with the latter category. On the basis of Hansen's catalogue of '*eisangeliai* to the Council', there are fifteen attested cases in the sixty years between 419 and 357/6, five of which cannot be identified with much confidence.[28] More significantly, probably less than a handful of the accused were probably remanded into custody.[29] Can there have been so many unattested cases of '*eisangeliai* to the Council' as Hansen defines them in which magistrates who did not use the laws were remanded to custody before trial so as to warrant the change of jurisdiction? Hardly likely!

Viewed in this light, my argument is part of a more detailed argument against Hansen's view of *eisangelia*--but it is probably best not to go into that detail here; I simply jump to my conclusion. *Katagnosis*, in the context of Timokrates' law, cannot be restricted to the Council's preliminary verdict in cases involving magistrates for 'not using the laws' as Hansen and really, the *opinio communis*, has

existence sometime between 355 and 342. Gernet 1939. *Dikai emporikai* (a subset of *dikai emmenoi*) came into existence sometime between 355 and 342 (see MacDowell 1990 apud Dem. 21. 176); dates for other *dikai emmenoi* cannot be specified beyond saying that they were introduced at some point between the early 340's and the composition of the *AP* (see E. Cohen 1973: 186-91; Harrison 2. 21). Later changes: At some point in the late 340's, a new procedure, *apophasis,* appears on the juristic agenda. And also in the late 340's, two new courts (the 'First and Middle of the New Courts') were built in the northeast quadrant of the Agora—perhaps in response to the new draw on the lawcourts for empanelling large numbers of judges for hearing *apophaseis* and *eisangeliai*.

[26] Hansen 1975: cat. no. 142 (the case against the trierarchs) is problematic because of variant readings and the use of καταχειροτονεῖν. Without going into detail, my own eclectic solution to the problem is to add more flexibility to the meaning of the verb (similarly Rubinstein 2000: 112-13 with n. 87). The Assembly has voted to imprison the trierarchs and to pass the case on to a dikasterion; it is possible that the Council had asked the Assembly to investigate the matter and decide how to treat the trierarchs.

[27] Hansen 1975; Hamel; Scafuro 2019.

[28] Hansen gives an assessment of 'C' to nos. 138 and139; an assessment of 'D' to nos. 134, 141, and 143.

[29] Cat. nos. 135-37: Antiphon, Arkheptolemos, and Onomakles were ordered to be incarcerated before trial by Andron's decree; no. 139: Kleophon is ordered into pre-trial custody by Satyros's decree (the case not securely identified as an *eisangelia*); and no. 141: the corn dealers may have been remanded to custody (the case is not securely identified as an *eisangelia*).

it; Timokrates' law requires a bigger net and a larger catch than Hansen's category of *eisangelia* to the Council can provide, and so must include citizens and magistrates *for serious offences*. Following and expanding Rhodes' views, *eisangelia* for major public offences might be raised in either the Council or Assembly. The Council, however, may regularly have received notice of *eisangeliai* before the chief Assembly meeting of the prytany and it may have received notice on other extraordinary and even less extraordinary occasions as well; the *katagnosis* was its decision regarding the way the case was to be transmitted. Thus understood, Timokrates' law suggests that the Council was the clearinghouse for all *eisangeliai*.

Presumably the persons who have been denounced and are awaiting assignment to trial were arrested to the Eleven in the first place (e.g. Dem. 51. 8-9) and this helps explain why those magistrates are expected to know, in Timokrates' law, the first date of incarceration and so can calculate the thirty days from which they 'took them over' from the men who had seized them.[30] Accordingly, the Council (whether by its own decree or with a *probouleuma*) will have made a previous decision on a denunciation—i.e., at the very least, that the men were to be seized and imprisoned. It is the later decision (the *katagnōsis*), however, that is at issue in the law: either a *katagnōsis* has not been given at all, or else one has been given that looks for a greater penalty than the Council was permitted to impose and so the case must be sent to a *dikastērion*.[31] In either event (either no *katagnōsis* at all or no punishment voted yet by the *dikastērion*), the case has not been prosecuted to conclusion. But if there were numerous investigations scheduled (and these may have included investigations of allies), the Council may not have been able to complete them in a timely fashion and to send the *katagnōseis* on to the *thesmothetai*. I suggest that Timokrates' law was designed to remedy this situation.

The systemic problem that Timokrates' law sought to remedy might now be identified: the investigative process in the Council may have become bottlenecked, especially amidst what I have identified as a period in which generals and trierarchs are embattled; we might think of the larger context of the late 360s when so much military effort was aimed against Theban hegemony and 357-355, the period of the Social War; indeed, trials may also have been proposed for offenses committed in allied cities—as we have seen in IG II^2 111 a text of 363/2. Another text, IG II^3 1 399 (= IG II^2 125), a text of 348 or 343, also suggests troubles in the treatment of allies by Athenians and possibly others; this decree in lines 7-10 requests a *probouleuma* from the council to design a trial framework for the past offenders who had invaded the territory of the Eretrians; it also, in lines 10-16, specifies the penalties for similar offences in the future; it thereby creates the template for future decrees for trial.

To return to Timokrates' law now: the (what I take to be) new thirty day limit in the law may explain why *eisangeliai*, according to the *Athenaiōn Politeia,* were permitted only at the first meeting

[30] For the Eleven's supervision of the prison: Hunter; Allen.
[31] In some cases, however, the decree for pre-trial incarceration will have contained details about the trial—even including the designation of the prosecutors, as, for instance, Andron's decree against Antiphon, Arkheptolemos, and Onomakles does.

of the prytany (if this rule were in place at the time of Timokrates' law): the restriction may have served not only as a check on the number of denunciations made before the assembly but also as a means to moderate dispersement through the system and entrée to the schedule for hearings (whether by the Council or courts). Presumably 'seizures' (if required) could not all be successfully executed on the same day, and investigation into the cases might take up more time before charges could be precisely articulated; but the nature of eisangeltic offences and the procedure's reputation for speedy hearings suggest that arrests and investigations were at least attempted expeditiously. The impetus for the innovation of the 30-day time limit is efficiency in a time of crisis. It is possible that the change in law occurred near in time to the hypothesized law that transferred eisangeltic hearings from the assembly to the dikastēria; the law at Dem. 24.63 seems to be impelled by the same problems.

We have few if any attestations of the Eleven introducing such cases into court. The law may have proved ineffective—or served its purpose so efficiently that it never needed to be used. I rather think the former, that it was not effective and did not stem the tide. A better solution arrived with the creation of *apophasis* in the 340's; investigation of serious public offenders was absolutely necessary before a decision for trial; neither the assembly nor the members of the council of five hundred could undertake the burden entirely; the Areopagites took it over.

Are these changes democratic? If democratic ideology embraces the rule of law, justice, and the public interest—the triad introduced by Gagarin as mentioned earlier in this presentation, then of course these are democratic changes; but perhaps more importantly, the changes belong to the umbrella of protective care offered by bureaucracy and administration in times of crisis. And so democracy advances, and modernizes as circumstances urge efficiency.[32]

Consequences of change: the penal and award systems

It is well-known that generals were often subjected to impeachments: indeed, of the 66 impeachments catalogued by Hansen for the fourth century, 22 were impeachments of generals; the last impeachment against a general is attested in 338, Lycurgos' impeachment of Lysikles in 338/7 (for treason, and as being responsible for the defeat at Chaeronia). How do their honors stack up in comparison?

[32] If I may jump to a conclusion about the third change I did not have time to speak about: The prosecutors who proposed and brought *eisangeliai* did so free of risk--that is, a penalty of 1,000 drachmas would not be imposed if the case was lost overwhelmingly; prosecutors were thus (democratically) encouraged to bring cases against elite offenders (generals and successful but corrupt politicians); eventually the risk-free status would be erased; this, too, will have, paradoxically, democratized the procedure in its later development--lesser folks, at least apparently so, are now impeached. The system of awards will be seen to be the other side of the coin.

While there are attestations of honors (*megistai timai*) for some of the grand generals in the first half of the fourth century (Konon in 393; Chabrias in 376; Iphikrates in 371; Timotheos in 360),[33] only one inscribed honorary decree for a general may be extant, and that is a decree of Lycurgos (IG II^3 336), restored so as to honor Diotimos; that that particular general was honored by Lycurgos is reported in [Plut.] *Lives of the Ten Orators* 844a and assigned to the year 334/3.[34] On the other hand, we have five attestations of indictments for illegal proposals (*graphai paranomōn*) used against decrees that proposed honors for generals in the fourth century: indeed, the *graphē paranomōn* was another weapon against the general, though it would not entail any penalty for him--beyond the humiliation of rescinding the honorary proposal or the decree itself. Such contested decrees, however, were usually allowed to stand. In regard to the contested decrees proposed for (1) Chabrias in 376/5 (Hansen no. 7); (2) Timotheos in 375/4 (Hansen 1974 no. 8); (3) Iphikrates in 371 (Hansen 1974 no. 9); (4) Charidemos in 352/1 (Hansen 1974 no. 14; Dem. 23 *Aristokrates*); and (5) Phokion, (before 322, Hansen 1974 no. 39), the courts upheld four of the decrees—the outcome of the decree for Charidemos is unknown. All 'greatly honored' generals except Konon were subsequently subjected to *eisangeliai*; moreover, two of the generals themselves prosecuted other generals by *eisangelia*.[35] Lykourgos, who, as just mentioned, proposed honors for the general Diotimos in 334/3, also prosecuted a general (Lysikles) in 338/7.[36] No honors are attested for generals after the 330s, but neither do we have any specific attestation of a general being prosecuted by *eisangelia* after the 330s,[37] though Demosthenes would lead us to believe, in the 340s at least, that it was a common phenomenon--and indeed, there is attestation that two may have been prosecuted by *apophasis* (Proxenos in 347/ 6 and Philokles in 323, Hamels nos. 61 and 63). The takeaway here may be a balance between honoring and prosecuting generals that lasted well into the 330s. The penal system and award system were entwined: the men held to the highest accountability were also awarded the highest honors—and those honors were often subjected to a legal battle before enactment or full implementation.

The situation changes, however, in the middle of the century: as citizens without elite status become more eligible for honors awarded by the *polis* in the course of the fourth century (see Lambert's paper in this conference), so, too, the alleged doers of 'high crimes and misdemeanors' become less attested for the elite crowd.[38] The slackening off of the attested impeachments of generals by the 330s

[33] See G. Oliver, 2007, 'Space and the Visualization of Power in the Greek Polis: The Award of Portrait Statues in Decrees of Athens,' pp. 181-204 in P. Schultz and R. von den Hoff (eds.), *Early Hellenistic Portraiture. Image, Style, Context* (Cambridge).
[34] [Plut.] *Lycurgus* 844a reports that he proposed the honors for Diotimos in the archonship of Ktesikles (334/3); his generalship is mentioned in IG II^2 1623, 276-285 in the precding year.
[35] Iphikrates was also a prosecutor of eisangeliai (nos. 80 and 81 in 373); Konon also prosecuted a general in 393/2 (no. 68).
[36] Hansen no. 112: eisangelia or euthynai.
[37] See Hamel 1998, nos. 63-65.
[38] Note as changes in fifth to fourth century (from Hansen's review of Ober): (1) few politicians belong to the Elite; (2) during the period 415-350, Athens witnessed a separation of military leaders from political leaders—that is, 'by 350, the political elite tended to be split into rhetores (who dominated the ekklesia)

is matched by an increase in the attested number of smallfry who are now impeached: a *grammateus* (Hansen no. 114); men involved in the emporium (Hansen nos. 116; 121; 125); a hipparch (Hansen no. 119); a priest (? Hansen no. 124); and men whose offenses are presented as trifling: a public slave who is charged with bribing demesmen of Halimous to enroll him unlawfully (Hansen no. 115); for hiring out flute girls at a higher rate than permitted by law (Hansen nos. 122-3). All thesetrials appear to have taken place between 336 and 324.

It is possible, however, that this attested 'trend' is only apparent—a trick of rhetoric in lawcourt speeches (e.g. Hyp. Eux. 3). I cannot pursue this question further now, but it deserves further thought. A passage from Dem. 51, however, may be a catalyst for future reflections:

> θαυμάζω δ᾽ ἔγωγε, τί δή ποτε τῶν μὲν ναυτῶν τοὺς ἀπολειπομένους, ὧν τριάκοντα δραχμὰς ἕκαστος ἔχει μόνας, δοῦσι καὶ κολάζουσιν οὗτοι· τῶν δὲ τριηράρχων τοὺς μὴ συμπλέοντας, ὧν τριάκοντα μνᾶς εἰς ἐπίπλουν εἴληφεν ἕκαστος, οὐ ταὐτὰ ποιεῖθ᾽ ὑμεῖς· **ἀλλ᾽ ἐὰν μὲν πένης ὤν τις δι᾽ ἔνδειαν ἁμάρτῃ, τοῖς ἐσχάτοις ἐπιτιμίοις ἐνέξεται, ἐὰν δὲ πλούσιος ὢν δι᾽ αἰσχροκέρδειαν ταὐτὰ ποιήσῃ, συγγνώμης τεύξεται; καὶ ποῦ τὸ πάντας ἔχειν ἴσον καὶ δημοκρατεῖσθαι φαίνεται, τοῦτον τὸν τρόπον ὑμῶν ταῦτα βραβευόντων;** ἔτι τοίνυν ἔμοιγε δοκεῖ κἀκεῖνο ἀλόγως ἔχειν, τὸν μὲν εἰπόντα τι μὴ κατὰ τοὺς νόμους, ἐὰν ἁλῷ, τὸ τρίτον μέρος ἠτιμῶσθαι τοῦ σώματος, τοὺς δὲ μὴ λόγον, ἀλλ᾽ ἔργον παράνομον πεποιηκότας μηδεμίαν δοῦναι δίκην.
>
> 'I for my part wonder why in the world these men should imprison and punish those of the sailors who desert their ships—men who receive only thirty drachmae apiece,—while you do not deal in the same manner with those of the trierarchs who do not sail with their ships yet receive thirty minae apiece for so doing; **if a poor man through stress of need commits a fault, is he to be liable to the severest penalties, while, if a rich man does the same thing through shameful love of gain, is he to win pardon? Where, then, is equality for all and popular government, if you decide matters in this way?** More than this, it seems to me to be absurd that, when a man says anything contrary to law, he should, if he is convicted, be deprived of one third of his personal rights,[a] while those guilty not of words but of acts that are illegal should pay no penalty. '

and strategoi (who led the armed forces but tended to stay away from the Pnyx). (3) the number of citizens dwindled: this would have an affect on the dikasteria: fewer men to attend meetings and man the panels, hence dikastic panels—participation had to be stimulated—ecclesiasticon and dikastikon. (4) migration from the countryside to the city and Peiraeus. Ober (followingWhitehead and Osborne): citizens active in polis do not seem to have been active in deme politics—that appears to have been left to those still living in demes.

The passage would seem to contradict the trend that I have been pursuing: that penalizing non-elites is a democratization, that is, the correlation between the conferral of honor and accountability that was so well attested for the elites at the beginning of the century may now be applied to non-elites; that might seem so—except for the fact that the speech was probably delivered ca. 359.[39] At this time, the speaker would persuade his listeners, that the lot of non-elites is extremely undemocratic; we might note that the speech pre-dates the change in the award system, proposed by Lambert (see his paper in this conference and AIO 9) for ordinary magistrates who are honored: it may have been only in 357, that the cost of dedications commemorating the award of honors to officials began to be funded by the state. The balance, then, begins to be redressed.

Conclusions

Taking as starting points some critical moments in that battle-torn century, e.g., after the battle of Mantinea and during the 360s with Theban and Thracian messiness and before the Social War, or the decade of Chaeronea, we can see the protections added to the system. As for change of venue (from assembly *to dikastēria* after 362): not only is the impulse for change economic, a savings for the Athenian treasury, but the impulse derives from the political situation and entails a bureaucratic solution for undertaking investigations and hearing cases in a timely fashion under pressing circumstances. Timokrates' law (*apud* Dem. 24.63) transferred from the Council to the Eleven certain eisangeltic cases that had not yet been given a *katagnōsis* (preliminary verdict that entailed transmission to a dikastērion for assessment of a more severe penalty than the boulē could lawfully impose); this certainly expedited the procedure and made it more fair (the accused had been in custody)--and it will have had something significant to do with military crisis and the conduct of trierarchs perhaps even more than that of generals. Although I have had to abridge this paper a great deal,[40] I hope to have argued persuasively that to understand changes in the law in the fourth century—as in the fifth and sixth—it makes sense, indeed, it is a prerequisite, to take account of the political and historical forces that may be impelling the change.

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[39] Bers 2003, 39-40
[40] See n. 32.