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THE SHAPE OF ATHENIAN LAWS

The title is unashamedly plagiarized from Stephen Todd's excellent book, *The Shape of Athenian Law*.[1] The plagiarism is slightly misleading, however, since my interest is in law as enactment (*Gesetz*) while Todd's title expresses his interest in law as system (*Recht*). The issue I wish to address is the formulation of written laws in Athens during the late archaic and classical period, specifically the balance between procedural and substantive law. Substantive law deals with rights, obligations, offences, etc. Its role is to define behaviour which is required, allowed, or prohibited. These are what Hart terms 'primary rules'. Procedural law, on the other hand, deals, as the name suggests, with the administration of justice, that is with jurisdiction, process, etc. Hart's term for these is 'secondary rules'.[2] The two cannot be separated quite as neatly as I have suggested, of course. A procedural law can scarcely avoid mentioning the offences or rights whose punishment or protection it regulates, while a substantive law may need to address issues such as jurisdiction. This is therefore an issue of orientation, not a simple binary division. However, as a broad basis for classification it is of value.

There appears to be a consensus hardening around the view that Athenian law was essentially procedural in its orientation.[3] Mogens Hansen in his important discussion of *eisangelia* ascribes a preference for formulation in procedural terms to the Athenians. He observes: 'our sources show that the Athenians took much more interest in procedural than in substantive law. In the forensic speeches we hear of innumerable procedures and types of process whereas the substantive rules concerning offences, obligations, property etc. are vague and often obscure.'[4] More recently, Stephen Todd has emphasized the procedural orientation of the Athenian laws.[5] Cohen stresses the lack of interest in definition in Athenian legislation,[6] and notes that this is a characteristic shared with the biblical, Roman and Assyrian codes, 'and indeed', he adds, 'most legal systems before the 20th century'.[7] This approach goes

[1] S. C. Todd, *The Shape of Athenian Law* (Oxford, 1993).

[2] For 'primary' and 'secondary' rules see H. L. A. Hart, *The Concept of Law* (Oxford, 1961), pp. 89ff.

[3] M. Gagarin, *Early Greek Law* (Berkeley and Los Angeles, 1986), has argued more generally for the chronological priority of procedural rules in the evolution of lawcodes. He offers (pp. 8f.) a model for the evolution of early legal systems. His first stage ('pre-legal') is where a society has no formal procedures for the resolution of disputes. The second stage ('proto-legal') is where a society has procedures for dispute resolution but 'no recognized legal rules'. In the third stage of development a society has both procedures and rules; for this a knowledge of writing is required. Though there are merits in this model (the rejection of the terms 'primary' and 'secondary', with their implications of priority both in chronological terms and in significance), I have problems with a number of Gagarin's assumptions. The role of writing in the evolution of a legal system, though important, is probably less significant for the creation of substantive rules than Gagarin suggests. I also find his Stage 2 society (a society with procedural protection but no recognized rules) decidedly implausible, at least for preliterate Greece. S. Todd and P. Millett, 'Law, society and Athens', in P. Cartledge *et al.* (edd.), *Nomos: Essays in Athenian Law, Politics and Society* (Cambridge, 1990), p. 5 likewise affirm 'a chronological and a logical priority' for procedural law.

[4] M. H. Hansen, *Eisangelia: The Sovereignty of the People's Court in Athens in the Fourth Century B.C., and the Impeachment of Generals and Politicians* (Odense, 1975), p. 10. Cf. pp. 14, 21.

[5] Todd (cited above n. 1), pp. 64ff.; so already in Todd and Millett (cited above n. 3).

[6] D. Cohen, *Law, Violence and Community in Classical Athens* (Cambridge, 1995), p. 190.

[7] Ibid., p. 152.

back to the great English nineteenth-century authority on early law, Maine, who argues that the emphasis on procedure is typical of early legal systems.[8] This view has also been accepted by the present writer.[9] The procedural emphasis has not gone unchallenged; Rhodes in passing has criticized Hansen's emphasis on procedure, drawing attention to the fact that Athenian laws always begin with the offence, not with the procedure.[10] But otherwise there appears to be broad agreement. The writers who assert the preponderance of procedural law in the Athenian context do not deny the existence of substantive law. However, blanket assertions about the Athenian laws collectively obscure some important distinctions within the legal system. My aim here is not to assert the priority of substantive over procedural law in terms either of status or chronology, but to suggest that the volume of law with a substantive orientation may have been understated by recent writers, and to offer some observations on the possible distribution of such law within the system as a whole.

It is worthwhile examining some of the evidence in support of the current consensus. I shall survey just a few laws in order to indicate the range of activities covered by laws with a procedural orientation.[11] I begin with violence against the person, mainly because this is an area where different procedures are clearly present, and therefore is a useful testing ground for possible discriminators governing the nature of individual laws. Sexual assault could be pursued by public action, the *graphe hybreos*, or by private action, the *dike biaion*.[12] For our purposes what matters is that the formulation of the law is the same in both cases:

ἐάν τις ὑβρίζῃ εἴς τινα ἢ παῖδα ἢ γυναῖκα ἢ ἄνδρα, τῶν ἐλευθέρων ἢ τῶν δούλων, ἢ παράνομόν τι ποιήσῃ εἰς τούτων τινα, γραφέσθω πρὸς τοὺς θεσμοθέτας ὁ βουλόμενος Ἀθηναίων οἷς ἔξεστι, οἱ δὲ θεσμοθέται εἰσαγόντων εἰς τὴν ἡλιαίαν τριάκοντα ἡμερῶν ἀφ' ἧς ἂν γραφῇ, ἐὰν μή τι δημόσιον κωλύῃ, εἰ δὲ μή, ὅταν ἧι πρῶτον οἷόν τε. ὅτου δ' ἂν καταγνῶι ἡ ἡλιαία, τιμάτω περὶ αὐτοῦ ὅτου ἂν δοκῆι ἄξιος εἶναι παθεῖν ἢ ἀποτεῖσαι. ὅσοι δ' ἂν γράφωνται [γραφὰς ἰδίας] κατὰ τὸν νόμον, ἐάν τις μὴ ἐπεξέλθῃι ἢ ἐπεξίων μὴ μεταλάβῃι τὸ πεμπτὸν μέρος τῶν ψήφων, ἀποτεισάτω χιλίας δραχμὰς τῶι δημοσίωι. ἐὰν

[8] H. S. Maine, *Dissertation on Early Law and Custom* (London, 1883), p. 389.

[9] C. Carey, 'Legal space in Classical Athens', *G&R* 41 (1994), 172–86, p. 179; '*Nomos* in Attic rhetoric and oratory', *JHS* 106 (1996), 33–46, p. 41

[10] P. Rhodes, '*ΕΙΣΑΓΓΕΛΙΑ* in Athens', *JHS* 99 (1979), 106.

[11] There is a methodological issue raised by the laws whose texts survive. Most of the (allegedly) verbatim quotations come from the orators. Where these quotations occur in the text of a speech, we can be sure that the citation corresponds at least broadly to the inscribed law, even if the details have been distorted by errors of transcription (the lack of concern for absolute precision in such matters on the part of litigants is attested by the variations in the wording of the law limiting *νόμοι ἐπ' ἀνδρί* at Dem.23.86, 24.59, 46.12 and Andok. 1.87) or deliberate distortion through selective citation or reordering of clauses, since it is not in a litigant's interest to indulge in gratuitous and blatant misrepresentation. Where the text is offered by the manuscripts as the document cited in court by the clerk, we cannot rule out the possibility that we are dealing with later forgeries. For the principles tacitly assumed here in accepting specific texts as genuine, see C. Carey, *Apollodoros Against Neaira: [Demosthenes] 59* (Warminster 1992), p. 20. The fullest discussion of this complex issue is still that of E. Drerup, *Über die bei den attischen Rednern eingelegten Urkunden* (Leipzig, 1898). In accepting such documents as genuine we do not need to suppose that the law in question has been cited in its entirety or that we are being offered a meticulous copy of the law; it is enough for my present purposes if the essence and the form of the law have been preserved.

[12] For the *graphe hybreos* and rape see E. M. Harris, 'Did the Athenians consider seduction a worse crime than rape?', *CQ* 40 (1990) 370–7, p. 373. For the *dike biaion* and rape see e.g. Todd (cited above n. 1), p.102; D. M. MacDowell, *The Law in Classical Athens* (London, 1978), p. 126. It is far from certain that the law cited at Lys. 1.32 does in fact deal with the *dike biaion*. What we can state with certainty on the basis of Lysias' text is that a private action was available to victims of rape or (in the case of women and children) the *kyrios*.

δὲ ἀργυρίου τιμηθῆι τῆς ὕβρεως, δεδέσθω, ἐὰν ἐλεύθερον ὑβρίσηι, μέχρι ἂν ἐκτείσηι. (Dem. 21.47)

If anyone treats with hybris any person, either child or woman or man, free or slave, or does anything unlawful against any of these, let anyone who wishes, of those Athenians who are entitled, submit a graphe to the thesmothetai. Let the thesmothetai bring the case to the Eliaia within thirty days of the submission of the graphe, if no public business prevents it, or otherwise as soon as possible. Whoever the Eliaia finds guilty, let it immediately assess whatever penalty it thinks right for him to suffer or pay. Of those who submit graphai according to the law, if anyone does not proceed, or when proceeding does not get one-fifth of the votes, let him pay one thousand drachmas to the public treasury. If he is assessed to pay money for his hybris, let him be imprisoned, if the hybris is against a free person, until he pays it. [trans. MacDowell]

ἀκούετε, ὦ ἄνδρες, ὅτι κελεύει, ἐάν τις ἄνθρωπον ἐλεύθερον ἢ παῖδα αἰσχύνηι βίαι, διπλῆν τὴν βλάβην ὀφείλειν· ἐὰν δὲ γυναῖκα, ἐφ' αἷσπερ ἀποκτείνειν ἔξεστιν, ἐν τοῖς αὐτοῖς ἐνέχεσθαι. (Lys. 1.32)

You hear, gentlemen that [the law] orders, that if someone shames by force a free man or boy, he is liable for double the damage; if a woman, in the case of those where it is allowable to kill, he is liable to the same punishment.

In each case, it seems, we begin with a protasis which lays down the conditions under which a certain legal consequence follows. The precondition is identified only, not defined. There is no attempt in the law cited in Lys. 1 to define specific sexual acts which might fall under the general heading of 'shame by force' any more than the *hybris* law specifies precisely the behaviour which constitutes *hybris*. In the one case prosecution is open to ὁ βουλόμενος and the penalties can include not only fines but also punishment inflicted on the person (παθεῖν ἢ ἀποτεῖσαι); it was open to the prosecutor to propose the death penalty. In the other case prosecution is open to the victim (or, in the case of a woman or boy, the *kyrios*) and the penalty consists of damages whose scale relates to the status of the victim. Clearly neither procedure nor penalty affects either the structure or the emphasis of the law, in this area at least. Nor for that matter does the seriousness of the offence. The diffidence of the speaker in opening his case for *kakegoria* at the beginning of Lys. 10 and the presentation of *kakegoria* as the lowest rung in a list of actions of ascending seriousness in Dem. 54.17f. suggest that (not surprisingly) verbal insult would normally be regarded as less serious than physical assault. Yet the law on slander seems to follow a similar formulation:

ἡδέως γὰρ ἄν σου πυθοίμην (περὶ τοῦτο γὰρ δεινὸς εἶ καὶ μεμελέτηκας καὶ ποιεῖν καὶ λέγειν)· εἴ τίς σε εἴποι ῥῖψαι τὴν ἀσπίδα (ἐν δὲ τῶι νόμωι εἴρηται 'ἐάν τις φάσκηι ἀποβεβληκέναι, ὑποδίκον εἶναι'), οὐκ ἂν ἐδικάζου αὐτῶι, ἀλλ' ἐξήρκει ἄν σοι ἐρριφέναι τὴν ἀσπίδα, λέγοντι οὐδέν σοι μέλειν; οὐδὲ γὰρ τὸ αὐτό ἐστι ῥῖψαι καὶ ἀποβεβληκέναι. (Lys. 10.9)

I should be pleased if you would tell me,—for you are an expert in this area and you are well versed both in practice and in speech—if someone said you had cast off your shield (and the law says: 'if someone says that a man has thrown it away, he is liable to action'), would you have refrained from suing him and been content with the term 'cast away the shield', claiming to be unconcerned, on the ground that 'cast away' and 'throw away' are not the same thing?

The formulation identified here ('If someone does A, then B is to result') is typical of the Athenian system. It has been argued by legal theorists who define law essentially (in Hart's words) as 'orders backed by threats' that this is the true form of law.[13]

[13] Hart (cited above n. 2), pp. 35f. For a critique of the 'orders backed by threats' model see Hart, pp. 20ff. For the 'If anyone . . .' structure as typical of Athenian laws see e.g. Rhodes (cited above n. 10).

This procedural orientation is likewise found in the laws we meet which restrict the marriage of Athenian citizens:

Ἐὰν δὲ ξένος ἀστῆι συνοικῆι τέχνηι ἢ μηχανῆι ἡιτινιοῦν, γραφέσθω πρὸς τοὺς θεσμοθέτας Ἀθηναίων ὁ βουλόμενος οἷς ἔξεστιν. ἐὰν δὲ ἁλῶι, πεπράσθω καὶ αὐτὸς καὶ ἡ οὐσία αὐτοῦ, καὶ τὸ τρίτον μέρος ἔστω τοῦ ἑλόντος. ἔστω δὲ καὶ ἐὰν ἡ ξένη τῶι ἀστῶι συνοικῆι κατὰ ταὐτά, καὶ ὁ συνοικῶν τῆι ξένηι τῆι ἁλούσηι ὀφειλέτω χιλίας δραχμάς. ([Dem.] 59.16)

If an alien lives in marriage with an Athenian woman by any manner or means, any Athenian at all who possesses the right may indict him before the Thesmothetai. If he is convicted, both he and his property are to be sold, and one third is to go to the successful prosecutor. The same is to apply if an alien woman lives in marriage with an Athenian man, and the man who lives with the alien woman so convicted is to be fined one thousand drachmas.

Ἐὰν δέ τις ἐκδῶι ξένην γυναῖκα ἀνδρὶ Ἀθηναίωι ὡς ἑαυτῶι προσήκουσαν, ἄτιμος ἔστω, καὶ ἡ οὐσία αὐτοῦ δημοσία ἔστω, καὶ τοῦ ἑλόντος τὸ τρίτον μέρος. γραφέσθων δὲ πρὸς τοὺς θεσμοθέτας οἷς ἔξεστιν, καθάπερ τῆς ξενίας. ([Dem.] 59.52)

If anyone gives an alien woman in marriage to an Athenian man, representing her as related to him, he is to be disfranchised, his property is to be confiscated, and one third is to go to the successful prosecutor. Those who possess the right may bring an indictment before the thesmothetai, as for masquerading as a citizen.

Again the law is interested in the legal action to be taken by the volunteer prosecutor rather than in the features which classify an act as subject to the law and the procedures in question. The interest in procedure is also visible in the legal action which forms the basis of Hansen's generalizations about the nature of Athenian law, the *eisangelia*. Here we are in the political domain. The *nomos eisangeltikos* as reconstructed by Hansen lists the acts which render an individual subject to the legal process in question but (at least as far as we can see) does not define those actions.[14]

Thus far I have been operating with a limited notion of procedure, that is with recourse to the *dikasteria*. But an orientation toward procedure is equally visible in some areas which are subject to automatic penalties and extra-judicial remedies. This is true, for instance, of the enactment dealing with women who are taken in adultery:

Ἐπειδὰν δὲ ἕληι τὸν μοιχόν, μὴ ἐξέστω τῶι ἑλόντι συνοικεῖν τῆι γυναικί· ἐὰν δὲ συνοικῆι, ἄτιμος ἔστω. μηδὲ τῆι γυναικὶ ἐξέστω εἰσιέναι εἰς τὰ ἱερὰ τὰ δημοτελῆ, ἐφ' ἧι ἂν μοιχὸς ἁλῶι· ἐὰν δ' εἰσίηι, νηποινεὶ πασχέτω ὅ τι ἂν πάσχηι, πλὴν θανάτου. ([Dem.] 59.87)

And when he has caught the adulterer, the person who has so caught him may not live in marriage with his wife; if he continues to live with her, he is to be disfranchised. And the woman who is caught with an adulterer may not enter any of the public temples; if she does so enter she is to suffer any mistreatment with impunity, short of death.

The clause in question, which evidently follows an account of action to be taken against the *moichos*, details the (non-judicial) action to be taken in relation to the wife and with the penalties which fall automatically on the guilty woman, for which no judicial ratification is required. This would also appear to be true of the enactment which allowed the aggrieved male to do as he pleased with a *moichos* caught in the act (and which may be part of the same law, though this cannot be proved), if we have in Lysias' passing reference to this law in his speech for Euphiletos an echo of the law itself:

κελεύουσι μέν, ἐάν τις μοιχὸν λάβηι, ὅ τι ἂν οὖν βούληται χρῆσθαι. (Lys. 1.49)

[14] Hansen (cited above n. 4), pp.12ff.

[The laws] instruct that if someone catches a moichos, he may treat him as he chooses.

Perhaps the most interesting area for this discussion is homicide. The processing and punishment of cases of homicide varied according to a number of factors relating to the alleged crime and the persons who were party to the legal process. Some of these factors were objective (e.g. the status of the victim); some were subjective, specifically the issue of intent, and it is interesting that Cohen exempts homicide from the procedural orientation he detects in the system as a whole because of its recognition of differing mental states.[15] However, a glance at the clause dealing with unintentional killing shows that homicide behaves exactly like rape in its lack of concern with definition: the law appears to take for granted one of the fundamental distinctions between categories of homicide (intentional versus unintentional) and concentrates instead on the minutiae of procedure for dealing with the offence:

καὶ ἐὰμ μὲ 'κ [π]ρονοί[α]ς [κ]τ[ένει τίς τινα, φεύγ]ε[ν, δ]ικάζεν δὲ τὸς βασιλέας αἴτιο[ν] φόν[ο] ἒ [...] ἒ [β]ολεύσαντα· τὸς δὲ ἐφέτας διαγν[ο]ν[α]ι. [αἰδέσασθαι δ' ἐὰμ μὲν πατέ]ρ εἶ ἒ ἀδελφὸ[ς] ἒ hυές, hάπαντ[α]ς, ἒ τὸν κο[λύοντα κρατῆν. (IG i^3 104.10ff.)

Even if someone [kills] another without intent, he is to be exiled; the basileis are to try him as guilty of homicide either . . . or by contriving, and the ephetai are to decide the case. . . . Pardon is to be given, if there is a father or brother or sons, by all of these, or the one who opposes is to prevail.

The Athenians ascribed their homicide laws to Drakon, not to Solon, and tradition had it that Solon replaced all of Drakon's laws apart from those dealing with homicide. Antiphon in the classical period stresses the antiquity of the homicide laws.[16] We do not have to believe that no change ever occurred in the homicide laws. But the Greek conservatism which obtained in matters of religion, combined with the ritual dimension of homicide, means that Antiphon is likely to be broadly correct. The point here is that the homicide laws probably *are* very old, and they already show the procedural orientation found in other important areas of Athenian legislation.

It is worth pausing to consider the implications of this situation. It might be expected that a tendency to phrase laws in terms of sanctions would lead to a corresponding emphasis both on law as a means of pursuing satisfaction and on laws as prohibitions backed by threats. It is not hard to find passages in which the law is presented as a source of fear, as in Lys. 14.14–15:

ἐνθυμεῖσθε δ', ὦ ἄνδρες δικασταί, ὅτι τῶν στρατιωτῶν οἱ μὲν κάμνοντες ἐτύγχανον, οἱ δ' ἐνδεεῖς ὄντες τῶν ἐπιτηδείων, καὶ ἡδέως ἂν οἱ μὲν ἐν ταῖς πόλεσι καταμείναντες ἐθεραπεύοντο, οἱ δὲ οἰκάδ' ἀπελθόντες τῶν οἰκείων ἐπεμέλοντο, οἱ δὲ ψιλοὶ ἐστρατεύοντο, οἱ δ' ἐν τοῖς ἱππεῦσιν ἐκινδύνευον· ἀλλ' ὅμως οὐκ ἐτολμᾶτε ἀπολιπεῖν τὰς τάξεις οὐδὲ τἀρεστὰ ὑμῖν αὐτοῖς αἱρεῖσθαι, ἀλλὰ πολὺ μᾶλλον ἐφοβεῖσθε τοὺς τῆς πόλεως νόμους ἢ τὸν πρὸς τοὺς πολεμίους κίνδυνον. (Lys. 14.14–15)

Bear in mind, judges, that some of the soldiers were actually ill, while others were in great need, and they would have been glad in some cases to stay in their cities and be treated, in others to go off and look after their own affairs, in others to serve as lightarmed troops, in others to take their chances in the cavalry. But still you could not bring yourself to abandon your posts or to choose what you preferred to do; no, you were much more afraid of the city's laws than the danger from the enemy.

The same view is taken in Perikles' funeral oration in Thucydides:

[15] Cohen (cited above n. 6), p.152, n. 25.
[16] Antiphon 5.14, 6.2.

ἀνεπαχθῶς δὲ τὰ ἴδια προσομιλοῦντες τὰ δημόσια διὰ δέος μάλιστα οὐ παρανομοῦμεν, τῶν τε αἰεὶ ἐν ἀρχῇι ὄντων ἀκροάσει καὶ τῶν νόμων . . . (Thuc. 2.37.3)

We consort without rancour in our private lives and in our public lives we particularly avoid lawbreaking because of fear, in obedience both to those who are in authority at any time and to the laws . . .

But the laws are as often conceptualized as positive recommendations rather than as threats. A good example is the statement of Euphiletos to Eratosthenes in Lysias 1 immediately before killing him:

ἐγὼ δ' εἶπον ὅτι οὐκ ἐγώ σε ἀποκτενῶ ἀλλ' ὁ τῆς πόλεως νόμος, ὃν σὺ παραβαίνων περὶ ἐλάττονος τῶν ἡδονῶν ἐποίησω, καὶ μᾶλλον εἶλου τοιοῦτον ἁμάρτημα ἐξαμαρτάνειν εἰς τὴν γυναῖκα τὴν ἐμὴν καὶ εἰς τοὺς παῖδας τοὺς ἐμοὺς ἢ τοῖς νόμοις πείθεσθαι καὶ κόσμιος εἶναι. (Lys. 1.26)

For my part I answered: 'It is not I who shall kill you but the city's law, which you broke, because you considered it less important than your pleasures. You preferred to commit a crime such as this against my wife and my children rather than obey the laws and behave decently.'

The laws here are seen as positively enjoining a proper mode of action rather than negatively forbidding an improper one. Likewise, Anaximenes in his attempt to define law sees it as having a message which is both substantive and positive:

νόμος δ' ἐστὶν ὁμολόγημα πόλεως κοινόν, διὰ γραμμάτων προστάττον πῶς χρὴ ποιεῖν ἕκαστα. (*Rhetorica ad Alexandrum* 1422a2f.)

Law is a common agreement of the state prescribing in writing how people should act in various matters.

This substantive dimension in the perception of law by the Athenians needs to be emphasized. Substance may in many cases (to use Maine's memorable formulation, quoted by Todd)[17] be secreted in the interstices of procedural law, may be formulated between the lines. But in envisaging law the Greek tends to read between the lines. This is perhaps no more than the recognized (and for the modern often disconcerting) tendency of the Athenians to rely on common sense in the interpretation of law. None the less it is clear that the Greeks tend to perceive the substantive element as vividly as the procedural, irrespective of the actual wording of the laws. For the purposes of the present exercise, this means that caution is needed when dealing with reports of laws which are offered as summary or paraphrase, since a law which concentrates on remedies for a dereliction may be presented as enjoining a positive action, and as a result not only the form but the emphasis of a law may be distorted.

Another implication of the orientation of Athenian laws is that Athenian law has (to use Hart's phrase) 'open texture'.[18] Osborne has recently used this phrase of the procedural flexibility of Athenian litigation in the context of a model which has recently been accepted by Todd (and was already prefigured by Hansen).[19] This view

[17] Maine (cited above n. 8), Todd (cited above n. 1), p. 65.

[18] On the open texture of law see Hart (cited above n. 2), pp. 119f., 121ff.

[19] R. Osborne 'Law in action in Classical Athens', *JHS* 105 (1985), 40–58, p. 44. Cf. Todd (cited above n. 1), pp. 160ff. So already M. H. Hansen, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense, 1976), p. 120. Osborne's use of Hart's terminology is criticized by E. M. Harris, 'Law and oratory', in I. Worthington (ed.), *Persuasion: Greek Rhetoric in Action* (London and New York, 1994), pp. 130–50, see p. 150, n.16. The 'flexibility' model is broadly correct, but it cannot be applied without differentiation to the system as a whole. Some delicts were susceptible only to one action or category (public/private) of actions, and in other cases (as for instance the range of remedies against the *moichos*) the range of actions available depended on the circumstances of transgression or detection.

of Athenian law, based on the range of procedures available in Athens, assumes that the severity of the punishment in Athens is conditioned not so much by the intrinsic nature of the offence as by the prosecutor's choice between a number of alternative procedures, and the latter in turn is governed by a range of socio-economic and psychological factors. Hart, however, had in mind verbal formulation, and that is what I mean by the phrase 'open texture' here. All law is to some degree open in texture, in that it is impossible to cover all possible applications, however a law is created or formulated. In classical Athens, however, this openness was very pronounced, in that the absence of formal definition in the text of the law in many cases meant that the definition of offences was left to the jury panels. The most commonly cited example is the law on *hybris*. But equally striking is the marriage law cited in [Dem.] 59, where the state of marriage is referred to by the verb *συνοικεῖν*. It is the prosecutor later on in the speech, not the law, who defines marriage:

τὸ γὰρ συνοικεῖν τοῦτ' ἔστιν, ὃς ἂν παιδοποιῆται καὶ εἰσάγηι εἴς τε τοὺς φράτερας καὶ δημότας τοὺς υἱεῖς, καὶ τὰς θυγατέρας ἐκδιδῶι ὡς αὑτοῦ οὔσας τοῖς ἀνδράσιν. ([Dem.] 59.122)

For this is what living in marriage means: when a man sires children and introduces the sons to phratry and deme and gives the daughters to their husbands as his own.

Thus far I have accepted that there is a striking procedural orientation in Athenian law. The tendency to frame laws in the form 'If someone . . .' is in itself one which lends itself readily to a procedural emphasis, although, as has been pointed out to me, the formulation is in essence casuistic rather than specifically procedural.[20] That is, it expresses general rules through the medium of hypothetical cases. But the question must still be asked: how far can the procedural model be pressed in one's attempt to make sense of the system as a whole? The question is not usually asked. But when one asks it one finds that the procedural model will not account for the system as a whole.[21]

Firstly, it is worth noting that the 'If anyone . . .' template for Athenian laws, which appears so often in laws with a procedural formulation, is itself very flexible. One way in which it can be adjusted is by adding exemption clauses which modify the precondition for procedural intervention. An example of this can be seen in the law (cited in Dem. 43) dealing with the treatment of secular olive trees standing on private property:

Ἐάν τις ἐλάαν Ἀθήνησιν ἐξορύττηι, εἰ μὴ εἰς ἱερὸν Ἀθηναίων δημόσιον ἢ δημοτικόν, ἢ ἑαυτῶι χρῆσθαι μέχρι δυοῖν ἐλάαιν τοῦ ἐνιαυτοῦ ἑκάστου, ἢ ἐπὶ ἀποθανόντα δέηι χρήσασθαι, ὀφείλειν ἑκατὸν δραχμὰς τῶι δημοσίωι τῆς ἐλάας ἑκάστης, τὸ δὲ ἐπιδέκατον τούτου τῆς θεοῦ εἶναι. ὀφείλετω δὲ καὶ τῶι ἰδιώτηι τῶι ἐπεξιόντι ἑκατὸν δραχμὰς καθ' ἑκάστην ἐλάαν. τὰς δὲ δίκας εἶναι περὶ τούτων πρὸς τοὺς ἄρχοντας, ὧν ἕκασται δίκαι εἰσί. πρυτανεῖα δὲ τιθέτω ὁ διώκων τοῦ αὐτοῦ μέρους. ὅτου δ' ἂν καταγνωσθῆι,

[20] This point was made forcefully to me by Lene Rubinstein and Philip de Souza. See also R. Sealey, *The Justice of the Greeks* (Ann Arbor, 1994), p. 43. Sealey notes the similarity in this respect between the codes of Gortyn and Athens.

[21] In what follows I shall again be sampling from the surviving texts. For a comprehensive demonstration of the picture presented by the surviving evidence it would be necessary to provide all texts which purport to give the wording or the substance of an Athenian law. Even then our picture of the lawcode as a whole would be hopelessly incomplete and (dependent as we are on the accident of survival) we could not be sure that it accurately represented the balance of formulation in laws in existence in the classical period. The only work which attempts to provide a text of all surviving laws is I. B. Telfy, *Synagoge ton attikon nomon, corpus iuris attici* (Leipzig, 1868). A new version is highly desirable.

ἐγγραφόντων οἱ ἄρχοντες, πρὸς οὓς ἂν ᾖι ἡ δίκη, τοῖς πράκτορσιν, ὃ τῶι δημοσίωι γίγνεται· <ὃ δὲ τῶι θεῶι γίγνεται>, τοῖς ταμίαις τῶν τῆς θεοῦ. ἐὰν δὲ μὴ ἐγγράφωσιν, αὐτοὶ ὀφειλόντων. ([Dem.] 43.71)

If anyone in Athens digs up an olive, except for a public or deme sanctuary, or for his own use up to two olives in any one year, or if he needs to use it for a dead man, he is to owe 100 drachmas to the treasury for each olive, and a tithe of this is to belong to the goddess. Let him also owe 100 drachmas for each olive to the individual who prosecuted him. The suits for these matters are to be brought before the archons according to their separate jurisdiction. The prosecutor is to pay court fees for his share. In the case of anyone who is convicted, the archons before whom the case is brought are to record the amount due to the treasury for the collectors, and the amount due to the goddess for the treasurers of the goddess's property. If they do not record it, they are themselves to be liable for the debt.

Here we have an enactment preventing the felling of olive trees, and the framing of the law is primarily concerned with the consequences of the proscribed conduct. But the subordinate clauses which modify the reference to the prohibited behaviour have the effect of conveying a right to destroy trees in certain circumstances and up to a certain number; in so doing they narrow the definition of actionable conduct in the area in question and significantly adjust the orientation of the law. There are, then, within procedurally formulated laws differing shades of emphasis; the picture is not simple. To return to Maine's formulation, the substantive regulations are not always secreted in the interstices; sometimes they are highly visible. The same may be said of the law dealing with slander, since the extension of the protasis by the addition of items of *ἀπόρρητα* in effect acts as a definition of *κακηγορία*, slander, even if the definition remained sufficiently imprecise to generate conflicting interpretations in the case represented by Lys. 10. We do not of course have the text of the law mentioned in Lys. 10, but it seems reasonably certain (from Lys. 10.9 quoted above) that it did extend the 'If anyone . . .' clause in this way. However, the 'If anyone . . .' formula is capable of still further extension, as in the law which dealt with damage to a neighbour's property:

ἐάν τις αἰμασίαν παρ' ἀλλοτρίωι χωρίωι <οἰκοδομῆι ἢ> ὀφρύγην, τὸν ὅρον μὴ παραβαίνειν, ἐὰν τείχιον, πόδα ἀπολείπειν, ἐὰν δὲ οἴκημα, δύο πόδας, ἐὰν δὲ τάφρον ἢ βόθυνον ὀρύττηι, ὅσον <ἂν> τὸ βάθος ᾖ, τοσοῦτον ἀπολείπειν· ἐὰν δὲ φρέαρ, ὀργυάν· ἐλάαν δὲ καὶ συκῆν ἐννέα πόδας ἀπὸ τοῦ ἀλλοτρίου φυτεύειν, τὰ δὲ ἄλλα δένδρη πέντε πόδας. (Dig. 10.1.13)

If anyone builds a dyke next to another's property or an embankment, he is not to trespass over the boundary; if he builds a wall, he is to leave a foot, if a building he is to leave two feet. If he digs a trench or a pit, he is to leave a distance equal to the depth, if a well, a fathom. He is to sow olive or fig nine feet from the other's land, other trees five feet.

Here what we have is not a simple indication of behaviour which is actionable but a set of detailed prescriptions dealing with construction and agricultural work taking place near the boundary between properties. The passage extends the common legislative formula further, since there is in the section of the law which survives no apodosis expressing the procedure to be adopted or the penalty to which the delinquent neighbour is liable; instead the apodosis expresses obligations. Clearly breaches of these prescriptions are actionable, and one may guess that the law went on to designate the action to be taken. But the emphasis is clearly on the prescription of obligation rather than procedural protection in cases of non-compliance. This law offers two important insights. Firstly, it illustrates the flexibility of the 'If anyone . . .' formula, which is capable of modification to produce structures and strictures quite divergent from the most obvious pattern. Secondly, it shows the persistence of the

formula, which seems to come automatically to mind when laws are being formulated. It would be easy to recast this law as a simple command or prohibition ('nobody may build a wall within two feet, etc.'). But that is not, in Athens, the most natural way to formulate a law. The reflex nature of the use of this formula confirms (if confirmation were needed) its favoured status.

A further extension of the formula can be seen in the law in [Dem.] 46 which lays down the conditions for legitimacy:

ἢν ἂν ἐγγυήσηι ἐπὶ δικαίοις δάμαρτα εἶναι ἢ πατὴρ ἢ ἀδελφὸς ὁμοπάτωρ ἢ πάππος ὁ πρὸς πατρός, ἐκ ταύτης εἶναι παῖδας γνησίους. ἐὰν δὲ μηδεὶς ἦι τούτων, ἐὰν μὲν ἐπίκληρός τις ἦι, τὸν κύριον ἔχειν, ἐὰν δὲ μὴ ἦι, ὅτωι ἂν ἐπιτρέψηι, τοῦτον κύριον εἶναι. ([Dem.] 46.18)

Children of any woman who is fairly betrothed by father or brother by the same father or paternal grandfather are to be legitimate. If there is none of these, her kyrios is to have her if she is an epikleros, if she is not, then the man to whom he entrusts her is to be her kyrios.

Syntactically this law extends the basic structure still further, since the conditional clause is replaced by a conditional relative. More significantly, there appears to be no sanction laid down. This law does not fit the pattern of the other laws discussed so far, which fall within the definition of law as 'orders backed by threats'. It may be objected that there is a sanction implied here, the sanction of nullity, since a relationship which does not conform to the pattern laid down here is incapable of producing legitimate issue. It is, however, questionable whether nullity is really a punishment.[22] But even if one assimilates this law to those already discussed, there remain other laws which cannot be subsumed under the notion of 'orders backed by threats'. There is a substantial number of laws which are unambiguously substantive in formulation and which bear only a very limited structural resemblance to the laws discussed so far. The law dealing with funerals in [Dem.] 43 for the most part does not fit this model:

τὸν ἀποθανόντα προτίθεσθαι ἔνδον, ὅπως ἂν βούληται. ἐκφέρειν δὲ τὸν ἀποθανόντα τῆι ὑστεραίαι ἢι ἂν προθῶνται, πρὶν ἥλιον ἐξέχειν. βαδίζειν δὲ τοὺς ἄνδρας πρόσθεν, ὅταν ἐκφέρωνται, τὰς δὲ γυναῖκας ὄπισθεν. γυναῖκα δὲ μὴ ἐξεῖναι εἰσιέναι εἰς τὰ τοῦ ἀποθανόντος μηδ' ἀκολουθεῖν ἀποθανόντι, ὅταν εἰς τὰ σήματα ἄγηται, ἐντὸς ἐξήκοντ' ἐτῶν γεγονυῖαν, πλὴν ὅσαι ἐντὸς ἀνεψιαδῶν εἰσι· μηδ' εἰς τὰ τοῦ ἀποθανόντος εἰσιέναι, ἐπειδὰν ἐξενεχθῆι ὁ νέκυς, γυναῖκα μηδεμίαν πλὴν ὅσαι ἐντὸς ἀνεψιαδῶν εἰσιν. ([Dem.] 43.62)

Let him lay out the dead man indoors as he sees fit. The dead man is to be carried forth on the day after they lay him out, before the sun is up. When they are carrying forth the body, the men are to walk in front, the women behind. No woman below the age of sixty is permitted to enter the dead man's house or to accompany the body when it is taken to the tomb, except for those no more distant than first cousin's issue. Nor may any woman enter the dead man's house when the corpse is carried forth except for those no more distant than first cousin's issue.

Thus far we have seen that there is a range of formulations for Athenian law, even if we can discern a preferred model, and that, irrespective of the structure of the law, individual laws may occupy different positions on a scale between procedural and substantive orientation. It may be that the majority of Athenian legislation was procedural in emphasis, but even if we accept this assumption (and I am inclined to), we are left with a substantial number of laws which are substantive in orientation, and a question suggests itself: what sort of subject attracts legislation with a substantive orientation? To put it another way, how is substantive legislation distributed within the

[22] For a critique of the conception of nullity as sanction see Hart (cited above n. 2), pp. 33ff.

Athenian system? It is perhaps unwise to look for hard and fast rules. But it may be that some rough rules of thumb can be devised.

My first category concerns the conferment of rights. The procedural school ultimately looks to the 'orders backed by threats' model of law. But in fact, as Hart observes, some legislation has as its object empowerment rather than prohibition.[23] An example of such legislation is that which deals with the making of wills, which defines the category of person who may make a legally valid will:

ὅσοι μὴ ἐπεποίηντο, ὥστε μήτε ἀπειπεῖν μήτ' ἐπιδικάσασθαι ὅτε Σόλων εἰσήιει εἰς τὴν ἀρχήν, τὰ ἑαυτοῦ διαθέσθαι ὅπως ἂν ἐθέλῃ, ἂν μὴ παῖδες ὦσι γνήσιοι ἄρρενες, ἂν μὴ μανιῶν ἢ φαρμάκων ἢ νόσου ἕνεκα ἢ γυναικὶ πειθόμενος ὑπὸ τούτων του παρανοῶν ἢ ὑπ' ἀνάγκης ἢ ὑπὸ δεσμοῦ καταληφθείς. ([Dem.] 46.14)

Any of those who had not been adopted, so as neither to renounce nor to claim [an inheritance] at the time when Solon entered office, may make testamentary provision for his own property as he wishes, if there are no legitimate children, if he is not out of his wits from madness or age or drugs or illness or under the influence of a woman, or the victim of constraint or confinement.

The law dealing with legitimacy ([Dem.] 46.18, quoted above) also falls into this category. The purpose of this law, which concerns inheritance and membership of the *oikos*, is to define legitimate issue as a category with reference to the formalities of marriage. Another example from what we would call family law illustrates the definition of rights:

ὅστις ἂν μὴ διαθέμενος ἀποθάνηι, ἐὰν μὲν παῖδας καταλίπηι θηλείας, σὺν ταύτηισι, ἐὰν δὲ μή, τούσδε κυρίους εἶναι τῶν χρημάτων. ἐὰν μὲν ἀδελφοὶ ὦσιν ὁμοπάτορες· καὶ ἐὰν παῖδες ἐξ ἀδελφῶν γνήσιοι, τὴν τοῦ πατρὸς μοῖραν λαγχάνειν· ἐὰν δὲ μὴ ἀδελφοὶ ὦσιν ἢ ἀδελφῶν παῖδες, . . . ἐξ αὐτῶν κατὰ ταὐτὰ λαγχάνειν· κρατεῖν δὲ τοὺς ἄρρενας καὶ τοὺς ἐκ τῶν ἀρρένων, ἐὰν ἐκ τῶν αὐτῶν ὦσι, καὶ ἐὰν γένει ἀπωτέρω. ἐὰν δὲ μὴ ὦσι πρὸς πατρὸς μέχρι ἀνεψιῶν παίδων, τοὺς πρὸς μητρὸς τοῦ ἀνδρὸς κατὰ ταὐτὰ κυρίους εἶναι. ἐὰν δὲ μηδετέρωθεν ἦι ἐντὸς τούτων, τὸν πρὸς πατρὸς ἐγγύτατα κύριον εἶναι. νόθωι δὲ μηδὲ νόθηι μὴ εἶναι ἀγχιστείαν μήθ' ἱερῶν μήθ' ὁσίων ἀπ' Εὐκλείδου ἄρχοντος. ([Dem.] 43.51)

Whenever a man dies without making a will, if he leaves female children, [the property goes] with them, if not, the following have control over the money. Any brothers by the same father; and any legitimate sons of brothers are to obtain their father's share. If there are no brothers or brothers' sons, . . . the issue of the latter are to obtain their share in the same way. The males and children of the males are to have preference, if they are of the same parents, even if they are more distantly related. If there are no relatives on the father's side as far as second cousins, the relatives by the man's mother are to control the property in the same sequence. If there is nobody on either side within these limits, the nearest relative on the father's side is to control. Neither male nor female bastard is to have right of proximity from the archonship of Eukleides.

Here what is at issue is the order of priority in intestate succession. The text is lacunose, but it clearly represents an attempt to create a set of rules for determining the relative validity of claims to a property.

The law also defines the conditions for a legally binding contract:

[τὸν νόμον] τὸν κελεύοντα κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας, ἃς ἂν ἐναντίον ποιήσωνται μαρτύρων. ([Dem.] 42.12)

. . . the law which instructs that agreements between individuals are valid which are made in front of witnesses.

ἐρεῖ δὲ πρὸς ὑμᾶς αὐτίκα μάλα Ἀθηνογένης ὡς ὁ νόμος λέγει, ὅσα ἂν ἕτερος ἑτέρωι ὁμολογήσηι κύρια εἶναι. τά γε δίκαια, ὦ βέλτιστε. (Hyp. *Athen.* 3.13)

[23] For rules conferring powers see Hart (cited above n. 2), p. 28.

Athenogenes will shortly tell you that the law instructs that all agreements made by one man with another are to be binding. Yes, just agreements, mister.

The close verbal agreement between these passages suggests that they give the essence of the legal text; though evidently neither speaker gives the full set of criteria for validity, we can conclude with some confidence that we have the form of the law. It would seem that the legal definition of a valid contract is spare in the extreme. But this is still enabling, not procedural, legislation; it confers rights rather than providing for their protection. Likewise, the law explicitly permitted anyone lending money to set a level of interest which he saw fit:

τὸ ἀργύριον στάσιμον θεῖναι, ἐφ' ὁπόσωι ἂν βούληται ὁ δανείζων. (Lys. 10.18)

He is/they are to set the interest at whatever level the lender wishes.

Not all substantive legislation is permissive, however. Some legislation which falls into this category provides detailed instruction on how to undertake certain acts or defines certain obligations. Structurally such legislation resembles procedural law, but it is ultimately different in that it is about the exercise of rights or fulfilment of obligations rather than the protection of rights. Another example from the area of what we would call family law will illustrate this. The law governing the marriage of heiresses imposes clear obligations on the nearest relative of the *epikleros* if she falls into the thetic class and therefore has no estate to encourage relatives to claim her in marriage:

τῶν ἐπικλήρων ὅσαι θητικὸν τελοῦσιν, ἐὰν μὴ βούληται ἔχειν ὁ ἐγγύτατα γένους, ἐκδιδότω ἐπιδοὺς ὁ μὲν πεντακοσιομέδιμνος πεντακοσίας δραχμάς, ὁ δ' ἱππεὺς τριακοσίας, ὁ δὲ ζευγίτης ἑκατὸν πεντήκοντα πρὸς τοῖς αὐτῆς. ἐὰν δὲ πλείους ὦσιν ἐν τῶι αὐτῶι γένει, τῆι ἐπικλήρωι πρὸς μέρος ἐπιδιδόναι ἕκαστον. ἐὰν δ' αἱ γυναῖκες πλείους ὦσι, μὴ ἐπάναγκες εἶναι πλέον ἢ μίαν ἐκδοῦναι τῶι ἑνί, ἀλλὰ τὸν ἐγγύτατα ἀεὶ ἐκδιδόναι ἢ αὐτὸν ἔχειν. ἐὰν δὲ μὴ ἔχηι ὁ ἐγγύτατα γένους ἢ μὴ ἐκδῶι, ὁ ἄρχων ἐπαναγκαζέτω ἢ αὐτὸν ἔχειν ἢ ἐκδοῦναι. ἐὰν δὲ μὴ ἐπαναγκάσηι ὁ ἄρχων, ὀφειλέτω χιλίας δραχμὰς ἱερὰς τῆι Ἥραι. ἀπογραφέτω δὲ τὸν μὴ ποιοῦντα ταῦτα ὁ βουλόμενος πρὸς τὸς ἄρχοντα. ([Dem.] 43.54)

In the case of epikleroi belonging to the thetic class, if the nearest relative does not wish to have her as wife, let him give her in marriage with a dowry of five hundred drachmas if he is a pentakosiomedimnos, three hundred if he is a hippeus, one hundred and fifty if he is a zeugites, in addition to her own property. If there are more in the same degree of kinship, each is to share in the dowering of the epikleros. If there are more women, no single man is to be obliged to give more than one in marriage; rather the nearest relative in each case is to give her in marriage or to have her himself. If the nearest relative does not either have her as wife or give her in marriage, let the Archon compel him either to have her or give her in marriage. If the Archon does not compel him, he is to be fined a thousand drachmas to be dedicated to Hera. Anyone who wishes is to indict before the Archon the man who fails to do this.

Duties with reference to the *epikleros* were equally specific after marriage. Plutarch tells us that the husband was required to have sex with her at least three times a month:

τρὶς ἑκάστου μηνὸς ἐντυγχάνειν πάντως τῆι ἐπικλήρωι τὸν λαβόντα. (Plut. *Sol.* 4)

The man who receives the epikleros is absolutely to have intercourse with her three times each month.

We cannot be sure that Plutarch is quoting or paraphrasing rather than summarizing the law in question (especially since he uses a slightly different wording with a deliberately distorted version of the same law at *Mor.* 769a). Caution is therefore needed in drawing conclusions about the form of the law. But the provision for the

remarriage of the heiress in the event of failure of the husband to perform his sexual duties supports the assumption that the law was substantive in form:

ἂν ὁ κρατῶν καὶ κύριος γεγονὼς κατὰ τὸν νόμον αὐτὸς μὴ δύνατος ἦι πλησιάζειν, ὑπὸ τῶν ἐγγιστα τοῦ ἀνδρὸς ὀπύεσθαι. (Plut. *Sol.* 20.2)

If the one who possesses the epikleros and has become her kyrios under the law is unable himself to have intercourse with her, she is to be married to the nearest kin of the dead man.

There is less uncertainty in the case of the rights and obligations of the male issue of the *epikleros*:

καὶ ἐὰν ἐξ ἐπικλήρου τις γένηται καὶ ἅμα ἡβήσηι ἐπὶ δίετες, κρατεῖν τῶν χρημάτων, τὸν δὲ σῖτον μετρεῖν τῆι μητρί. [Dem.] 46.20)

And if there is any issue of the epikleros and he passes the second year after puberty, he is to have control of the property and to allocate food to his mother.

Another broadly related area in which we find detailed guidance is in the transfer of property. We know from Theophrastos that there were legal requirements in place to legitimize the transfer of property by purchase:

οἱ μὲν οὖν ὑπὸ κήρυκος κελεύουσι πωλεῖν καὶ προκηρύττειν ἐκ πλειόνων ἡμερῶν, οἱ δὲ παρ' ἀρχῆι τινί, καθάπερ καὶ Πιττακὸς παρὰ βασιλεῦσι καὶ πρυτανεῖ. ἔνιοι δὲ προγράφειν παρὰ τῆι ἀρχῆι πρὸ ἡμερῶν μὴ ἔλαττον ἢ ἑξήκοντα, καθάπερ Ἀθήνησι, καὶ τὸν πριάμενον ἑκατοστὴν τιθέναι τῆς τιμῆς . . . (Theophrastos fr. 650 Fortenbaugh *et al.*)

Some require that sales must be made through a herald and announced several days in advance, others that it be made before a public official, as with Pittakos before the basileis and the prytanis. Some say that the sale should be preregistered with the official no fewer than sixty days in advance, as at Athens, and that the buyer deposit one per cent of the value . . .

Theophrastos' account suggests that we have here a specific instruction in positive form. We cannot exclude the possibility, here as elsewhere when dealing with paraphrase or summary, that the form, as distinct from the tenor, of the law has been recast. It could, for instance, have read: 'If anyone in making a sale does not . . . then . . .' But at the very least we should have a law which defined the circumstances which made a transaction invalid. However, Theophrastos' formulation of the law as positive instruction is in harmony with what we learn of the rules governing the sale of a slave. The law imposed on the vendor the obligation to declare any disability to which the slave was subject, and failure to declare rendered the sale nul and void:

μετὰ δὲ ταῦτα ἕτερος νόμος ἐστὶ περὶ ὧν ὁμολογοῦντες ἀλλήλοις συμβάλλουσι, ὅταν τις πωλῆι ἀνδράποδον προλέγειν ἐὰν τι ἔχει ἀρρώστημα, εἰ δὲ μή, ἀναγωγὴ τούτου ἐστίν. (Hypereides 3.15)

Then there's another law dealing with agreements which people make with each other, that when someone is selling a slave they must state in advance any physical disability the slave has, or else there is a right to bring it back.

The law offered only limited protection, as the speaker of Hypereides' *Against Athenogenes* discovered to his cost when he was sold a slave who was physically fit but came with crippling debts; he is therefore compelled to argue a rhetorically impressive but legally weak case based on analogy. As with the law governing contracts the text of the law was brief and to the point. But despite the limitations of the legal provision this is an attempt to ensure protection of a sort; the law lays down rules for the validity of the sale and (at least as presented) it is substantive in emphasis. The law also lays down rules for the transfer of property under the

procedure called *antidosis* which could be invoked when an individual felt that he had been unfairly selected for the performance of a liturgy. Here, since the speaker is quoting from the law, there is no doubt that it is substantive:

διαρρήδην οὕτω λέγει· 'τοὺς δ' ἀντιδιδόντας ἀλλήλοις, ὅταν ὁμόσαντες ἀποφαίνωσι τὴν οὐσίαν, προσομνύειν τόνδε τὸν ὅρκον· "ἀποφαίνω τὴν οὐσίαν τὴν ἐμαυτοῦ ὀρθῶς καὶ δίκαιως, πλὴν τῶν ἐν τοῖς ἀργυρείοις ὅσα οἱ νόμοι ἀτελῆ πεποιήκασι."' ([Dem.] 42.18)

[The law] states the following verbatim: 'People who are exchanging property [i.e. through the antidosis] with each other, when after taking the oath they are declaring their property, are to add this oath: "I declare my property accurately and fairly, except for such properties in the silver workings which the laws have rendered exempt."'

Another area in which we can detect a readiness to express obligations as positive instructions is religion. This is hardly surprising. Dealings with the gods are yet more fraught than commercial or testamentary dealings between human beings. This may at any rate explain the precise arrangements set out for dealing with the dead at deme level in the law quoted in Dem. 43:

τοὺς δ' ἀπογιγνομένους ἐν τοῖς δήμοις, οὓς ἂν μηδεὶς ἀναιρῆται, ἐπαγγελλέτω ὁ δήμαρχος τοῖς προσήκουσιν ἀναιρεῖν καὶ θάπτειν καὶ καθαιρεῖν τὸν δῆμον, τῆι ἡμέραι ἧι ἂν ἀπογένηται ἕκαστος αὐτῶν. ἐπαγγέλλειν δὲ περὶ τῶν δούλων τῶι δεσπότηι, περὶ δὲ τῶν ἐλευθέρων τοῖς τὰ χρήματ' ἔχουσιν· ἐὰν δὲ μὴ ἧι χρήματα τῶι ἀποθανόντι, τοῖς προσήκουσι τοῦ ἀποθανόντος ἐπαγγέλλειν. ἐὰν δὲ τοῦ δημάρχου ἐπαγγείλαντος μὴ ἀναιρῶνται οἱ προσήκοντες, ὁ μὲν δήμαρχος ἀπομισθωσάτω ἀνελεῖν καὶ καταθάψαι καὶ καθῆραι τὸν δῆμον αὐθημερόν, ὅπως ἂν δύνηται ὀλιγίστου· ἐὰν δὲ μὴ ἀπομισθώσηι, ὀφειλέτω χιλίας δραχμὰς τῶι δημοσίωι. ὅ τι δ' ἄν ἀναλώσηι, διπλάσιον πραξάσθω παρὰ τῶν ὀφειλόντων· ἐὰν δὲ μὴ πράξηι, αὐτὸς ὀφειλέτω τοῖς δημόταις. ([Dem.] 43.57–8)

In the case of people dying in the demes whom nobody takes up, let the demarchos make an announcement for the relatives to take up and bury them and purify the deme on the day on which each of them dies. He is to make an announcement for the master in the case of a slave and for those in possession of the property in the case of free individuals. If the deceased has no property he is to make an announcement for the relatives of the deceased. If the relatives do not take up the body in response to the demarchos' announcement, let the demarchos contract for the collection of the body on the same day after as short an interval as possible. If he does not so contract, let him pay a fine of one thousand drachmas to the treasury. Whatever sum he pays, let him exact twice the amount from those who owe it. If he does not so exact, he is to owe it in person to the deme.

The presence of the dead is a source of pollution, and arrangements have to be made to remove and bury the corpse and to purify the area. In most cases the family can be expected to deal with the corpse as a matter of course; but not everyone has living relatives, or (in an age when deme membership may not coincide with domicile) living relatives near at hand, and the law has to ensure that appropriate arrangements are made even in these cases. Under the broad heading of religion we can perhaps place the law dealing with the assembly meetings following religious festivals quoted in Dem. 21:

τοὺς πρυτάνεις ποιεῖν ἐκκλησίαν ἐν Διονύσου τῆι ὑστεραίαι τῶν Πανδίων, ἐν δὲ ταύτηι χρηματίζειν πρῶτον μὲν περὶ ἱερῶν, ἔπειτα τὰς προβολὰς παραδιδότωσαν τὰς γεγενημένας ἕνεκα τῆς πομπῆς ἢ τῶν ἀγώνων τῶν ἐν Διονυσίοις, ὅσαι μὴ ἐκτετεισμέναι ὦσιν. (Dem. 21.8)

The prytaneis are to convene a meeting of the Ekklesia in the precinct of Dionysos on the day after the Pandia. At this meeting they are to deal first with sacred matters; next let them bring forward the probolai which have been made in connection with the procession or the contests at the Dionysia, all that have not been paid for. (trans MacDowell)

The same presumably applies to the law on the organization of burials cited in Dem. 43.62 (quoted above). The speaker claims that the law is Solonian. Taken by itself, this claim is of limited authority, since there is a tendency in the historical period to ascribe laws to Solon irrespective of the date of enactment. However, there is supporting evidence for the speaker's attribution of the law.[24] The law in question is a sumptuary enactment. My concern, however, is not with the legislator's intention but with the form of the law, and this may be governed more by the sphere of activity covered than by the political purpose of the legislation.

Two of the laws blandly categorized above as religious share another feature, however. The instructions on the burial of the dead in the demes and on the conduct of the assembly with reference to the festivals overlap with what we would call constitutional law. Such laws would naturally be substantive, since the duties of public officials need to be laid out clearly and public business needs to be conducted in an orderly and predictable way. The two laws discussed may owe their form to the presence not only of a religious but also of a constitutional dimension. Similarly the laws governing the legislative process itself, at least as we meet them in the fourth century, lay down detailed instructions for the conduct of business with reference both to laws and to decrees:[25]

ἐπὶ δὲ τῆς τρίτης πρυτανείας τῆι ἑνδεκάτηι ἐν τῶι δήμωι, ἐπείδαν εὔξηται ὁ κῆρυξ, ἐπιχειροτονίαν ποιεῖν τῶν νόμων, πρῶτον μὲν περὶ τῶν βουλευτικῶν, δεύτερον δὲ τῶν κοινῶν, εἶτα οἳ κεῖνται τοῖς ἐννέα ἄρχουσιν, εἶτα τῶν ἄλλων ἀρχῶν. ἡ δὲ χειροτονία ἔστω ἡ προτέρα, ὅτωι δοκοῦσιν ἀρκεῖν οἱ νόμοι οἱ βουλευτικοί, ἡ δ' ὑστέρα, ὅτωι μὴ δοκοῦσιν· εἶτα τῶν κοινῶν κατὰ ταὐτά. τὴν δ' ἐπιχειροτονίαν εἶναι τῶν νόμων κατὰ τοὺς νόμους τοὺς κειμένους. ἐὰν δέ τινες τῶν νόμων των κειμένων ἀποχειροτονηθῶσι, τοὺς πρυτανεῖς, ἐφ' ὅτων ἂν ἡ ἐπιχειροτονία γένηται, ποιεῖν περὶ τῶν ἀποχειροτονηθέντων τὴν τελευταίαν τῶν τριῶν ἐκκλησιῶν· τοὺς δὲ προέδρους, οἳ ἂν τυγχάνωσι προεδρεύοντες ἐν ταύτηι τῆι ἐκκλησίαι, χρηματίζειν ἐπάναγκες πρῶτον μετὰ τὰ ἱερὰ περὶ τῶν νομοθετῶν, καθ' ὅ τι καθεδοῦνται, καὶ περὶ τοῦ ἀργυρίου, ὁπόθεν τοῖς νομοθέταις ἔσται· τοὺς δὲ νομοθέτας εἶναι ἐκ τῶν ὀμωμοκότων τὸν ἡλιαστικὸν ὅρκον. ἐὰν δ' οἱ πρυτανεῖς μὴ ποιήσωσι κατὰ τὰ γεγραμμένα τὴν ἐκκλησίαν ἢ οἱ πρόεδροι μὴ χρηματίσωσι, ὀφείλειν τῶν μὲν πρυτανέων ἕκαστον χιλίας δραχμὰς ἱερὰς τῆι Ἀθηνᾶι, τῶν δὲ προέδρων ἕκαστος ὀφειλέτω τετταράκοντα δραχμὰς ἱερὰς τῆι Ἀθηνᾶι . . . (Dem. 24.20ff.)

On the eleventh day of the third prytany, in the Assembly, after the herald has uttered the prayer, a vote by show of hands is to be held on the laws, firstly those connected with the Boule, secondly the general laws then those which are laid down for the nine archons, then the other offices. The first vote is to be those who think the laws connected with the Boule satisfactory, the second those who think them unsatisfactory, and then the general laws in the same way. The vote on the laws is to take place according to the established laws. If any of the established laws are rejected by show of hands, the prytaneis in whose term the vote takes place are to devote the the last of the three Assemblies to the rejected laws; the presidents who happen to be presiding at this Assembly must make the first business after the sacrifice the terms on which the legislators are to convene, and the source of money for the legislators; the legislators are to be drawn from those who have sworn the judicial oath. If the prytaneis do not convene the Assembly according to the written terms or the presidents do not conduct the business, each of the prytaneis is to be fined a thousand drachmas devoted to Athene, and let each of the presidents be fined forty drachmas devoted to Athene.

τῶν δὲ κειμένων νόμων μὴ ἐξεῖναι λῦσαι μηδένα, ἐὰν μὴ ἐν νομοθέταις. τότε δὲ ἐξεῖναι τῶι βουλομένωι Ἀθηναίων λύειν, ἕτερον τιθέντι ἀνθ' ὅτου ἂν λύηι. διαχειροτονίαν δὲ ποιεῖν τοὺς προέδρους περὶ τούτων τῶν νόμων, πρῶτον μὲν περὶ τοῦ κειμένου, εἰ δοκεῖ ἐπιτήδειος εἶναι τῶι δήμωι τῶι Ἀθηναίων ἢ οὔ, ἔπειτα περὶ τοῦ τιθεμένου . . . (Dem. 24.33)

[24] See E. Ruschenbusch, *ΣΟΛΩΝΟΣ NOMOI: die Fragmente des solonischen Gesetzwerkes mit einer Text- und Überlieferungsgeschichte*, *Historia Einzelschrift* 9 (Wiesbaden, 1966), pp. 95ff.

It shall not be permitted for anyone to abolish an established law except through legislators. In that case any Athenian who wishes is to be permitted to abolish, if he proposes another to replace the one he abolishes. The presidents are to hold a vote by show of hands firstly on the established law to determine whether it is believed to be advantageous to the Athenian people or not, and then on the law which is being proposed.

μηδὲ περὶ τῶν ἀτίμων, ὅπως χρὴ ἐπιτίμους αὐτοὺς εἶναι, μηδὲ περὶ τῶν ὀφειλόντων τοῖς θεοῖς ἢ τῶι δημοσίωι τῶι Ἀθηναίων περὶ ἀφέσεως τοῦ ὀφλήματος ἢ τάξεως, ἐὰν μὴ ψηφισαμένων Ἀθηναίων τὴν ἄδειαν πρῶτον μὴ ἔλαττον ἑξακισχιλίων, οἷς ἂν δόξηι κρύβδην ψηφιζομένοις. τότε δὲ ἐξεῖναι χρηματίζειν καθ' ὅ τι ἂν τῆι βουλῆι καὶ τῶι δήμωι δοκῆι. (Dem. 24.45)

Nor [is it to be permitted to make proposals] about those deprived of rights, to the effect that they should be granted rights, nor about debtors to the gods or to the Athenian treasury concerning release from the debt or composition, unless no fewer than six thousand Athenians first vote impunity, approving by secret ballot. In that case it is to be permitted to introduce business as the Boule and the Assembly see fit.

That the conduct of public business should be governed by substantive law, with procedures against those guilty of dereliction merely appended (as in Dem. 24.20ff.), may seem too obvious to be worth stating, particularly since it would be very difficult to frame laws of this degree of complexity in terms of a series of procedures and penalties for non-compliance. But constitutional law will inevitably have made up a substantial proportion of the lawcode and will have had a profound impact on the Athenians' own perception of their laws.

It may be unwise to insist too firmly on categories of law which have a substantive tendency on the basis of so cursory a survey. However, I think one can see a trend toward the definition of rights and obligations in specific areas: property law, especially the transfer of property, and family law, two areas which converge in the case of inheritance; religion; constitutional law. The areas in question are distinguished by at least one of two features. The first is a marked propensity to generate disputes about rights and/or duties, so that clear definitions are needed, as in the case of property law. The second is a need for clarity in the conduct of business. In the case of religion this reflects the need to avoid divine anger. In the case of the duties of officials it reflects the need to control public business, to control public servants and to have a means of evaluating their conduct precisely in the event of complaint or mishap. Accordingly it is not surprising that the procedural law dealing with the destruction of olives cited at [Dem.] 43.71 and the substantive laws dealing with the marriage of *epikleroi* cited at [Dem.] 43.54 or the repeal of laws cited at Dem. 24.20ff. lay down specific duties (with penalties) for the officials with jurisdiction or responsibility in the area in question. In this at least there appears to be a convergence between laws with a procedural and those with a substantive orientation.

A question suggests itself at this point. Gagarin argues for the chronological priority of procedural law. Todd associates legislation with a procedural emphasis with 'primitive' systems.[26] On the basis of an evolutionary model one could in theory explain the substantive laws discussed above as indicative of a progressive shift within the Athenian system from procedural to substantive law. A careful study of the dates of surviving laws would be needed before one could give a confident answer to this

[25] The relationship between the various laws on *nomothesia* in fourth-century Athens is contentious; see in general D. M. MacDowell, *JHS* 95 (1975), 62–74; P. J. Rhodes, *CQ* 35 (1985), 55–60; M. H. Hansen, *GRBS* 26 (1985), 345–71. For my present purposes all that matters is the formulation. Cf. also the law limiting *νόμοι ἐπ' ἀνδρί*, for which see n. 11 above.

[26] Gagarin (cited above n. 2), Todd (cited above n. 1).

question.[27] All one can do in this context is to try to gain a broad impression of the chronology of law. I noted earlier that the laws on homicide, ascribed by the Athenians to the period before Solon, are procedural in emphasis. This fact might serve as the basis for an evolutionary reconstruction of the formulation of Athenian law. It would, however, be difficult to lay down a hard and fast rule on this subject. At first sight the inheritance law cited at [Dem.] 43.51 seems to favour an evolutionary view. There we have detailed instructions on priority in inheritance cases, and the provisions are at the end specifically linked to the archonship of Eukleides, that is 403/2. The mention of Eukleides clearly reflects the revision of the laws which began in the last decade of the fifth century and was resumed after the fall of the Thirty and the restoration of the democracy in 403. However, the detailed definition of rights with reference to the transmission of property by inheritance preceded the restoration, as we can see from the law cited by Aristophanes in the *Birds*:

ἐρῶ δὲ δὴ καὶ τὸν Σόλωνός σοι νόμον·
νοθῳι δὲ μὴ εἶναι ἀγχιστείαν παίδων ὄντων γνησίων. ἐὰν δὲ παῖδες μὴ ὦσι γνήσιοι, τοῖς ἐγγύτατα γένους μετεῖναι τῶν χρημάτων. (Ar. *Av.* 1660)

I shall quote the law of Solon for you: There is to be no right of proximity for a bastard while there are legitimate children. If there are no legitimate children, the nearest relatives are to share the property.

We need not assume an accurate quotation of the law; its existence and the degree of overlap with the law in operation after Eukleides suffice. Even without Aristophanes' testimony the form of the feminine dative plural in the first (surviving) sentence, which indicates a date before 420, would enable us to push back this law by at least a couple of decades and to conclude that the law as reinscribed at the end of the fifth century either reproduced in its entirety or incorporated details from an earlier law.[28] If Aristophanes is correct, the law in question goes back to Solon. There is no obvious reason to doubt the ascription, but even if Solon is being used as a catch-all for old legislation, the attribution to Solon allows us to push the law back at least to the first half of the fifth century. The law governing the making of wills, which (unless we are dealing with an singularly felicitous forgery) appears to be Solonian, contains precise provision on the circumstances in which a will can be made, as well as indicating who may make a will. In a related sphere, parts at least of the legislation on the *epikleros*, which I concluded above was probably substantive, were old, as the use of the verb ὀπύεσθαι (non-current in Attic prose of the classical period) of marital sex indicates. Although Athenian laws had their own recurring syntax and even formulae, the vocabulary of the laws tends to reflect that of contemporary polite discourse; there is no tendency to use an archaizing vocabulary or morphology. Accordingly, archaisms embedded in laws in use in the classical period may reasonably be used as evidence for dating. Substantive law in this area therefore is not a late development. Again, the use of the word δάμαρ in the law determining legitimacy at [Dem.] 46.18 (quoted above), where Attic prose of the classical period would use the word γυνή, suggests that this (substantive) legislation goes back to the archaic period, and therefore in all probability to Solon. Likewise, the law governing the setting of interest (Lys. 10.18, quoted above) was old enough for the terminology

[27] Such an attempt is fraught with difficulties, especially where attribution of laws to Solon is at issue. For the general difficulties see Ruschebusch (cited above n. 24), pp. 53ff.

[28] Ruschenbusch, ibid., p. 87 reproduces the whole law as Solonian, marking out the reference to Eukleides as a later addition.

used to require explanation at the turn of the fourth century.[29] That the speaker of Lys. 10 is correct to ascribe this law to Solon is strongly suggested by its evident connection with a major aspect of Solonian legislation, the prohibition of loans on the security of the person. The law on burials quoted at Dem. 43.62 was also (it was argued above) of Solonian date. Equally interesting is the law on building and other works near a boundary, to which Solonian authorship is attributed in ancient sources. The use of the terms ὀφρύγη or ὀφρύη, which were not in use in Attic prose of the classical period, and possibly βόθυνος for the more common βόθρος support an early date. This law, which enjoins clear responsibilities, is unambiguously substantive. If—and this cannot be established with certainty—the law on *kakegoria* which forms the basis of debate in Lys. 10 is to be identified with the Solonian legislation on *kakegoria* discussed by Plutarch at *Sol.* 21.1, we have the essence of a Solonian law which is procedural in form, but which (as was noted above) in listing forbidden terms presents a marked substantive element. Thus not only fully substantive laws but also laws with a procedural cast and a significant substantive component (by which is meant a fuller definition beyond the act of naming the delict), are part of the legislative process from very early on.

This is, of course, very impressionistic. But the evidence suggests that the factor which determines the form of the law is not chronology so much as content. The evidence does not allow us to exclude the possibility of a change in the balance between procedural and substantive law between the archaic and the classical period; but we can state that from Solon onwards the Athenians were using laws with both a procedural and a substantive emphasis according to the nature of the issue subjected to legislation. The result was probably a majority of procedural law, but where a substantive formulation was needed it was used, from the very first. Probably also the statements above on the open texture of Athenian legislation require qualification. Because there is a tendency among modern scholars to concentrate on the 'if anyone' formulation and on laws as 'prohibitions backed by threats', and because laws like that on *hybris* readily present themselves as examples, scholars naturally note above all the indeterminacy of Athenian laws. The admixture of substantive law means that openness of texture is a relative and not an absolute attribute of Athenian laws and that the susceptibility to interpretation varied significantly from law to law. This is an area where generalization brings the risk of distortion.[30]

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[29] The speaker in Lys. 10 includes this law among a number of old laws whose vocabulary is archaic and therefore needs to be glossed.

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