EISANGELIA IN ATHENS: A REPLY

In *JHS* xcix (1979) 103–14 Dr Rhodes published an article, '*Eisangelia* in Athens', which is primarily a detailed and profound criticism of some conclusions in my *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). His objections have forced me to reconsider the subject. In '*Demos, Ecclesia* and *Dicasterion* in Classical Athens', *GRBS* xix (1978) 127–46, I have already dealt with the part of Rhodes' article based on the assumption that the Solonian Heliaia was a judicial session of the *ekklesia*. Here I discuss the *eisangelia* itself.[1]

(i) *Eisangelia as a technical term*

Rhodes warns me (103) against producing an analysis more precise and tidy than the procedure analysed (*eisangelia*). In support he adduces two examples of *eisangelia* used in a legal context but not in its technical sense: (a) In Lys. x 1 the verb εἰσαγγέλλειν is applied to a charge of a military offence, τὸ ἀποβεβληκέναι τὴν ἀσπίδα;[2] (b) in Isai. xi a charge of maltreating an orphan is described both as an *eisangelia* and as a *graphe*. There can be no doubt that *eisangelia* is a technical term denoting different (but related) procedures. However, I still doubt that *eisangelia* in a legal context can be used as a non-technical term denoting any procedure introduced by a denunciation.[3]

(a) In Lys. x 1 we may follow Gernet/Bizos in emending εἰσήγγελλε to ἐπήγγελλε (which I prefer, cf. *Eisangelia* 67 n. 8). Or we may retain εἰσήγγελλε; but in that case we probably have an example of *eisangelia* in the technical sense referring to a specific type of public action, presumably the *eisangelia* to the council. In support of this assumption I can refer to two other possible instances of *eisangelia* to the council for a military offence.

From Lys. xiii 12 and xxx 10–13 we learn that Kleophon was put on trial for a military offence (either ἀστρατεία or λιποτάξιον) and sentenced to death. Now a γραφὴ ἀστρατείας or λιποταξίου entailed *atimia* (and sometimes confiscation of property as well) but never capital punishment.[4] So the type of public action brought against Kleophon cannot have been a *graphe*, and since it was opened in the *boule* it may have been an *eisangelia* to the council (*Eisangelia* cat. no. 139).

From Dem. li 8–9 we learn that some trierarchs were charged with treason and with λιποτάξιον. The type of action was probably an *eisangelia* to the council and the prosecutor proposed capital punishment (*Eisangelia* cat. no. 142).

If we retain εἰσήγγελλε in Lys. x 1, comparison with Lys. xiii, xxx and Dem. li indicates that an *eisangelia* (to the council) might be brought against a person charged with a military offence,

[1] Minor points of disagreement I pass over in silence, such as whether the *eisangelia* for major public offences usually received its first airing in the *ekklesia* and only occasionally in the *boule* (for my opinion see *Eisangelia* 25–6), or was usually initiated in the *boule* and only exceptionally in the *ekklesia* (as Rhodes 108–10). I should like to thank Dr Rhodes for discussion about this topic, for sending me his article in typescript and for his comments on this article.

[2] Or rather to a charge of addressing the assembly while guilty of a military offence: ὅτε Λυσίθεος Θεόμνηστον εἰσήγγελλε τὰ ὅπλα ἀποβεβληκότα, οὐκ ἐξὸν αὐτῷ, δημηγορεῖν. If the emphasis was on the military offence itself (*cf.* Lys. x 9, 12, 21–5) the proper type of public action would be a γραφὴ τοῦ ἀποβεβληκέναι τὴν ἀσπίδα (And. i 74, *cf.* M. H. Hansen, *Atimistraffen i Athen i Klassisk Tid* [Odense 1973] 81–5). On the other hand, if the emphasis was on the infringement of the *atimia* incurred for the military offence the regular procedure to be adopted would be an *epangelia* followed by a *dokimasia ton rhetoron* (Aischin. i 28–32, *cf.* Hansen *op. cit.* 134–7). *Endeixis/apagoge* is ruled out, since that procedure presupposed a conviction in a γραφὴ τοῦ ἀποβεβληκέναι τὴν ἀσπίδα (Dem. xxiv 103–5, *cf.* M. H. Hansen, *Apagoge, Endeixis and Ephegesis* [Odense 1976] 66–7, 90–1) and it is apparent from Lys. x 24–5 that Theomnestos had not been sentenced for the military offence with which he was charged.

[3] The only occurrence of the verb εἰσαγγέλλειν in a sense which is not strictly technical is Lys. xiii 50: ἔδοξε τἀληθῆ εἰσαγγεῖλαι (*sc.* Agoratos; *cf.* 56). Although the trial is probably an *eisangelia* to the assembly, Agoratos cannot technically be described as ὁ εἰσαγγέλλων (cf. *Eisangelia* cat. no. 67 n. 6). Rhodes is probably right in his assumption (110 n. 67) that 'Agoratos and Menestratos were in retrospect treated as οἱ εἰσαγγείλαντες'.

[4] And. i 74; Lys. xiv 9; Isok. viii 143; Dem. xv 32, xxi 58–9, xxiv 103–5, lix 26–7; Aischin. i 29, iii 175–6. The trial of Kleophon, however, was in an atmosphere moving rapidly towards lynch-law, and it is possible that a *graphe* in 404 may have resulted in an unconstitutional sentence of death; but in his criticism of the trial Lysias does not point out that the punishment was in conflict with the type of public action brought against Kleophon.

and so Lys. x 1 is no clear illustration of the statement made by Rhodes that *eisangelia* can be used in a non-technical sense of the word.

(b) Isai. xi is a public action for maltreatment of orphans. As Rhodes points out it is described both as an *eisangelia* and as a *graphe*. But in this case it is probably *graphe* and not *eisangelia* which is used in a non-technical sense. In most public actions a prosecutor incurred a fine of 1,000 drs if he obtained less than one-fifth of the votes of the jurors. This rule applied to all types of *graphe*, whereas all types of *eisangelia* were ἀζήμιοι for the prosecutor even if he did not obtain one single vote (*Eisangelia* 29–30). We know that the *eisangelia* for maltreating an orphan was ἀζήμιος (Isai. iii 47, Dem. xxxvii 46), and this is a very strong indication that it was technically an *eisangelia*. On the other hand, any written accusation might be called a *graphe*, even a bill of indictment in a *dike* (Ant. i 2; *cf.* Isok. xviii 12, Ar. *Clouds* 759, 770). The conclusion seems to be that in Isai. xi it is *eisangelia* and not *graphe* which is the technical term.

Rhodes mentions the suggestion of Ruschenbusch that '*εἰσαγγέλλειν* was the original term for any verbal denunciation to the authorities, and tended to survive for all charges older than the rule that denunciations must be submitted in writing'.[5] Against this view I have two objections.

(1) Ruschenbusch can only present us with such a precise and tidy analysis because he has omitted Dem. xxiii 51: *NOMOΣ φόνου δὲ δίκας μὴ εἶναι μηδαμοῦ κατὰ τῶν τοὺς φεύγοντας ἐνδεικνύντων, ἐάν τις κατίῃ ὅποι μὴ ἔξεστιν.* This law is our principal source for *endeixis* against exiled homicides. In his discussion of the law Demosthenes emphasizes that it is Drakon's law he is quoting; so the conclusion seems to be, *pace* Ruschenbusch, that *endeixis* was an archaic procedure and probably older than *eisangelia*.[6] Even the few sources preserved indicate that a plurality of procedures existed as early as the sixth century B.C. and that the Athenians had at least two different forms of denunciation, *endeixis* (mentioned in Drakon's law) and *eisangelia* (introduced in 507? cf. *infra* p. 91). The statement that any denunciation in the archaic and early classical period was an *eisangelia* can only be upheld if Dem. xxiii 51 is rejected as a late addition to the homicide law.

(2) In the sources there is no support for the statement that the term *eisangelia* 'tended to survive for all charges older than the rule that denunciations must be submitted in writing'. Rhodes is undoubtedly right (103 n. 4) when he, following Calhoun, dates the introduction of obligatory written complaints to the 370s. But, in the speeches written by Antiphon, Andokides, Lysias and Isokrates before 380, all the different types of public actions are described with their specific technical terms—e.g. *γράφεσθαι, ἀπάγειν, ἐνδεικνύναι, φαίνειν, εἰσαγγέλλειν*—and there is no evidence that the term *eisangelia* could be used in a non-technical sense denoting any of the other procedures, *viz graphe, apagoge, endeixis, phasis*.[7]

(ii) *Was the Nomos Eisangeltikos Solonian?*

I agree with Rhodes (104) that the Athenians throughout the classical and most of the Hellenistic period had direct access to the original laws of Solon (as Ruschenbusch argues convincingly in *Solonos Nomoi*). But, as Rhodes is well aware, this does not mean that all legal reforms ascribed to Solon are in fact Solonian. According to the forensic speeches Solon was the author of *nomothesia* by *nomothetai* (Dem. xx 90 ff.), the *γραφὴ νόμον μὴ ἐπιτηδειον θεῖναι* (Dem.

[5] By letter Rhodes has informed me that he does not commit himself to accepting Ruschenbusch's suggestion.

[6] *ἐνδεικνύντων* in the law quoted in Dem. xxiii 51 is connected with *ἀπάγειν* in the law quoted in Dem. xxiii 28 (*cf.* Hansen, *Apagoge, Endeixis and Ephegesis* 115), and the first line of this law (including *ἀπάγειν*) has convincingly been restored in *IG* i² 115. 30–1 by most editors: *cf.* R. S. Stroud, *Drakon's Law on Homicide* (Berkeley/Los Angeles 1968) 54. In a discussion during the *III^e Colloque internationale d'histoire du droit grec et hellénistique* (Chantilly 1977) Ruschenbusch informed me that, in *Untersuchungen*, he omitted the law in Dem. xxiii 51 because in his opinion it is not archaic but a late addition to the homicide law.

[7] In the forensic speeches the term *εἰσαγγέλλειν/εἰσαγγελία* is applied to the political *eisangelia* (to the assembly or to the council) in Ant. vi 12, 35, 36; And. i 14, 27, 37, 43; Lys. xii 48; xiii 50, 56; xxx 22; Isok. viii 130; xv 314; xvi 6; Dem. viii 28–29; xiii 5; xviii 13, 249–50; xix 103, 116, 209; xx 79; xxxiv 50, xlvii 42, 80; xlix 67; Aischin. ii 139; iii 3, 52, 79, 171, 223, 252; Lyk. i 1, 5, 29, 30, 34, 55, 137; Hyp. ii *fr.* iv 47; 3, 4, 12; iii 1–5, 7–9, 27, 29–31, 38–40; Dein. i 52, 94, 100–1. The term probably denotes the political *eisangelia* in Lys. xvi 12; Dem. xxv 47, 94. On Lys. x 1 *cf.* above. The term denotes the *eisangelia* to the archon in Isai. iii 46–52, 62; xi 6, 15; Dem. xxxvii 46. There is no evidence of any other use of *eisangelia* as a legal term. In a few passages the meaning is simply 'report' without any connection with the administration of justice e.g. in And. ii 3, 21; Dem. l 4, 17.

xxiv 212–14) and the rigid distinction between *nomoi* and *psephismata* (Hyp. v 22). These statements only reflect the fourth-century controversy over Solon. Which status has the *νόμος εἰσαγγελίας* ascribed to Solon by Aristotle in *Ath. Pol.* 8.4? *καὶ τοὺς ἐπὶ καταλύσει τοῦ δήμου συνισταμένους ἔκρινεν* (the Council of the Areopagos), *Σόλωνος θέντος νόμον εἰσαγγελίας περὶ αὐτῶν*.

Rhodes admits that Aristotle's account is in part anachronistic. It is unbelievable that a person at the beginning of the sixth century could be charged with *κατάλυσις τοῦ δήμου*. What we expect is something like *ἐπανίστασθαι ἐπὶ τυραννίδι*. But this is a strong indication that the term *eisangelia* is anachronistic as well. From Aristotle's account we can at most infer that the Areopagos may have heard political trials, but not that Solon introduced a *nomos eisangeltikos* for *κατάλυσις τοῦ δήμου*. And I find it dangerous to reject the first half of Aristotle's statement as terminologically inexact and then to accept the other half as terminologically precise. Moreover, on p. 104 (near bottom) and 105 (last section) Rhodes confidently speaks of Solon's law on *eisangelia*, but in the first section of 104 he finds that it is a less important question whether the terms *εἰσαγγελία* and *εἰσαγγέλλειν* were used in Solon's laws. So Rhodes is prepared to admit that, in *Ath. Pol.* 8.4, not only the name of the offence (*κατάλυσις δήμου*) but also the name of the procedure (*εἰσαγγελία*) might be an anachronism.

(iii) *Eisangelia to the Areopagos*

Our only evidence for the administration of justice in political trials before Ephialtes consists of references to six cases from 493 to 463 (Rhodes 105); the trials of (a) Phrynichos (Hdt. vi 21.2); (b) Miltiades in 493 (my catalogue no. 1); (c) Miltiades in 489 (cat. no. 2); (d) Hipparchos 480–60 (cat. no. 3); (e) Themistokles 467(?) (cat. no. 4); and (f) Kimon 463/2 (cat. no. 5).

I omitted the trial of Phrynichos from my catalogue of *eisangeliai* because we have no evidence about the procedure applied or the court hearing the case. Of the remaining five cases it is expressly stated in reliable sources that the second trial of Miltiades (Hdt. vi 136.1) and the trial of Hipparchos (Lyk. i 117) were heard by the *demos*. The indictment of Themistokles is described by Krateros (*fr.* 11) as an *eisangelia* and included in his *synagoge psephismaton*, and Plutarch states (*Per.* 10.6) that Kimon's prosecutor, Perikles, was elected by the assembly. In my opinion this evidence points to the conclusion that *eisangelia* to the assembly existed before Ephialtes.

Rhodes, however, is not persuaded. The trial of Phrynichos and the two trials of Miltiades may have been cases which had gone on appeal from one of the archons to the Heliaia (on the assumption that the Heliaia was a judicial session of the *ekklesia*), Hipparchos may have been condemned by some *ad hoc* procedure, and the trials of Themistokles and Kimon are classified as respectively *eisangelia* and *euthynai* to the Areopagos.

Now in '*Demos, Ecclesia* and *Dicasterion* in Classical Athens' 141–3 I argued that the Heliaia, even before Ephialtes, was a *dikasterion* not to be identified with the *ekklesia*, and that *demos* invariably denotes the *ekklesia* and never the *dikasterion*. The inference is that the second trial of Miltiades, which was heard by the *demos*, cannot have been an appeal to the Heliaia. It was rather a case heard in the first instance by the *ekklesia* and probably an *eisangelia* to the assembly. If so, there is no reason to assume some *ad hoc* procedure in the trial of Hipparchos. It may have been a regular *eisangelia* to the assembly, and the indictment of Themistokles is our first known example of the obligatory *psephisma* which the *demos* had to pass in an *eisangelia*. The only evidence that the trials of Themistokles and Kimon were heard by the Areopagos is the story about Themistokles and Ephialtes in *Ath. Pol.* 25, which Rhodes discards himself (105) as 'almost certainly false'. Summing up: apart from Arist. *Ath. Pol.* 8.4 which is probably an anchronism (*Eisangelia* 18–19), there is no reliable evidence that *eisangeliai* were brought before the council of the Areopagos. On the other hand, several reliable sources indicate that the *eisangelia* to the assembly was introduced before Ephialtes, and so presumably by Kleisthenes in 507.

(iv) *Did the Nomos Eisangeltikos include a section on* ΚΑΙΝΑ ΚΑΙ ΑΓΡΑΦΑ ΑΔΙΚΗΜΑΤΑ?

In his speech for Euxenippos Hypereides quotes the *nomos eisangeltikos* and states that an *eisangelia* could be brought for *κατάλυσις τοῦ δήμου*, for *προδοσία* and for *τὸ μὴ τὰ ἄριστα λέγειν*

χρήματα λαμβάνοντα (Hyp. iii 7–8). But did Hypereides quote all sections of the law? His comments on the law convey the impression that he did; but his account is biassed and Euxenippos was in fact charged with having infringed the third section of the law quoted by Hypereides (Hyp. iii 39). If a fourth section dealing with καινὰ καὶ ἄγραφα ἀδικήματα existed, it would not be central to the case, and it might be omitted without any serious distortion of the law. Furthermore, I have myself demonstrated (*Eisangelia* 12 ff.) that Hypereides does not quote the full text of the three sections he does discuss. So I admit that Hypereides' speech for Euxenippos, in itself, is insufficient proof that no further section existed. But the *nomos eisangeltikos*, as quoted by Hypereides, is in perfect agreement with Theophrastos' account of the law. It is apparent both from the *Lex. Cant.* s.v. '*eisangelia*' and from Poll. viii 52 that the political *eisangelia* according to Theophrastos could be brought for three different offences, κατάλυσις τοῦ δήμου, τὸ μὴ τὰ ἄριστα συμβουλεύειν χρήματα λαμβάνοντα and προδοσία. Moreover in *Lex. Cant.* Theophrastos' account of *eisangelia* is opposed to that found in Kaikilios, according to which *eisangelia* was allowed against καινὰ καὶ ἄγραφα ἀδικήματα. The inference is that Theophrastos did not mention the καινὰ καὶ ἄγραφα ἀδικήματα, but only the three offences referred to above. Now Theophrastos' account cannot be suspected of bias and it is most unlikely that he quoted the law from Hypereides' speech *For Euxenippos*. The agreement between Theophrastos and Hypereides is a very strong indication that Kaikilios was wrong and that no fourth section existed.

Rhodes objects that 'Caecilius may have been mistaken, but he should have had some foundation for his view' (108). He had indeed and his source is mentioned both in the *Lex. Cant.* and in Schol. Plat. *Rep.* 565c.

> *Lex. Cant.* s.v. '*eisangelia*': Καικίλιος δὲ οὕτως ὡρίσατο· εἰσαγγελία ἐστὶν ὅ περὶ καινῶν ἀδικημάτων δεδώκασιν ἀπενεγκεῖν οἱ νόμοι. ἔστι δὲ τὸ μελετώμενον ἐν ταῖς τῶν σοφιστῶν διατριβαῖς (ed. Houtsma).
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> Schol. Plat. *Rep.* 565c: εἰσαγγελία ἐστὶ κυρίως ἡ περὶ καινῶν καὶ δημοσίων ἀδικημάτων εἰσαγομένη δίκη ὑπὸ τῶν πρυτάνεων, περὶ ὧν διαρρήδην μὲν οὐδὲν λέγουσιν οἱ νόμοι, συγχωροῦσι δὲ κρίσεις γίγνεσθαι. καὶ τοῦτό ἐστιν οἷον τὸ ἐν ταῖς τῶν σοφιστῶν διατριβαῖς μελετώμενον, τὸ τῶν ἀγράφων ἀδικημάτων (ed. Greene).

So the ultimate source for the view that *eisangelia* could be brought for new and unknown offences is only the Sophists' *diatribai*, and they are too weak a foundation for any statement about the law of Athens in the fourth century.[8] Against Kaikilios' information (based on the sophistic *diatribai*) I can adduce not only Theophrastos' account in his *Peri Nomon*, but also the complete silence of the orators. Admittedly, Rhodes is right in emphasizing that the absence of any reference to the καινὰ καὶ ἄγραφα ἀδικήματα in speeches for the defence (Hyp. ii, iii) can be explained and is insufficient proof that no such clause existed in the *nomos eisangeltikos*; but we have also speeches for the prosecution in which a fourth section of the *nomos eisangeltikos* is (surprisingly) left unmentioned. In this case Rhodes suggests that 'we should expect a prosecutor to subsume his case under one of the specific clauses whenever he could do so (it would be easier to argue for the defendant's guilt by citing a law which he was alleged to have broken than by admitting that what the defendant had done was not contrary to the existing law)' (107–08). In the speech *Against Leokrates*, however, the prosecutor, Lykourgos, does the opposite of what Rhodes expects: he expressly admits that Leokrates has committed a new crime not described in any law, but nevertheless bases his *eisangelia* against Leokrates on a charge of *prodosia*, although he knows that this will result in a protest from Leokrates against the type of action employed (cf. *Eisangelia* cat. no. 121). The central passage is Lyk. i 8: οὕτω γάρ ἐστιν δεινὸν τὸ γεγενημένον ἀδίκημα καὶ τηλικοῦτον ἔχει τὸ μέγεθος, ὥστε μήτε κατηγορίαν μήτε τιμωρίαν ἐνδέχεσθαι εὑρεῖν ἀξίαν, μηδ' ἐν τοῖς νόμοις ὡρίσθαι τιμωρίαν ἀξίαν τῶν ἁμαρτημάτων. If the *nomos eisangeltikos* included a section on new and unknown offences Lykourgos would have had no difficulty in formulating a *kategoria* and in quoting a law warranting capital punishment for such an offence.

[8] One of the most popular rhetorical exercises in the Hellenistic period was speaking for or against a law. Sometimes an old law was attacked or defended with 'sophistic' arguments, sometimes it was a fictitious law. Another possible source for the information about *eisangelia* is a fictitious forensic speech in which the prosecutor pleads (κατὰ ῥητὸν καὶ ὑπεξαίρεσιν) that the intent of the lawgiver was different from the strict letter of the law. *Cf.* G. Kennedy, *The Art of Persuasion in Greece* (London 1963) and J. A. Goldstein, *The Letters of Demosthenes* (New York 1968) with further references.

Probably no such clause existed and therefore Lykourgos was forced to do what he did: to base his *eisangelia* on the second section of the *nomos eisangeltikos* dealing with *prodosia*.

(v) *Eisangelia to the Ekklesia and to the Boule*

In the second chapter of *Eisangelia* (21–8) I distinguished between *eisangeliai* heard by the *ekklesia* (or referred to a *dikasterion*) and *eisangeliai* heard by the *boule* (or referred to a *dikasterion*). In the first type the *ekklesia* was always involved (either in the first instance or via the *boule*), in the second the *ekklesia* was not involved at all. Rhodes objects (106 ff.) that the analysis is based on a (wrong) interpretation of Harp. s.v. '*eisangelia*'. This is not how my argument really goes. I begin by discussing this entry (21) but the distinction is based on fourth-century evidence (22 ff.). Harpokration distinguishes between three forms of *eisangelia* (*τρία εἴδη*): (a) political *eisangelia*, (b) *eisangelia* to the archon for maltreatment, (c) *eisangelia* to the board of arbitrators. On the basis of the fourth-century sources I argued that the Athenians distinguished between two forms of political *eisangelia*, one against major public offences and one against magistrates for misconduct in office. The first form involved the *ekklesia*, the second only the *boule*, and I found support for this view in Harpokration's phrase: *ἀλλὰ πρὸς τὴν βουλὴν ἢ τὸν δῆμον ἡ πρώτη κατάστασις γίνεται*. Rhodes accepts my argument in so far as he acknowledges that two different forms of political *eisangelia* existed: one for major public offences and one against magistrates for misconduct (106–7). But he holds that Harpokration's first section on the political *eisangelia* only covers *eisangelia* for major public offences, and he interprets the phrase *πρὸς τὴν βουλὴν ἢ τὸν δῆμον ἡ πρώτη κατάστασις γίνεται* as a reference to the minor procedural detail that an *eisangelia* for a major public offence could be brought before the *ekklesia* either directly or via the *boule* (106).

Rhodes may be right in his interpretation of Harpokration, but if so, we must both admit that Harpokration's account of the political *eisangelia* is defective in so far as he has omitted the *eisangelia* against magistrates for misconduct in office, which is a fourth form of *eisangelia*, different from (a) *eisangelia* for major public offences, (b) *eisangelia* to the archon and (c) *eisangelia* to the board of arbitrators.

Emphasizing the importance of procedural law I divided the political *eisangeliai* into *eisangeliai* to the assembly (for major public offences) and *eisangeliai* to the council (against magistrates for misconduct in office); and this distinction is based not on Harp. but on fourth-century sources. (i) In the *Ath. Pol.* Aristotle mentions *eisangeliai* to the assembly (43.4 and 59.2) and *eisangeliai* to the council in which the assembly is not involved (45.2). (ii) In the amendment of the *eisangeltikos nomos* proposed and carried by Timokrates (Dem. xxiv 63) an *eisangelia* to the council results in a *katagnosis* passed by the *boule*. In Arist. *Ath. Pol.* 59.4 the *katagnoseis* passed by the *boule* are distinguished from *eisangeliai* to the assembly (59.2), and in all cases heard by the *ekklesia* or referred by the *ekklesia* to a *dikasterion* there is no mention of any *katagnosis* on the part of the *boule*. (iii) A very detailed account of *eisangelia* to the council is given in Dem. xlvii 42–3: *γενομένης τοίνυν τῆς κρίσεως τῷ Θεοφήμῳ ἐν τῇ βουλῇ κατὰ τὴν εἰσαγγελίαν ἣν ἐγὼ εἰσήγγειλα, καὶ ἀποδοθέντος λόγου ἑκατέρῳ, καὶ κρύβδην διαψηφισαμένων τῶν βουλευτῶν, ἑάλω ἐν τῷ βουλευτηρίῳ καὶ ἔδοξεν ἀδικεῖν. καὶ ἐπειδὴ ἐν τῷ διαχειροτονεῖν ἦν ἡ βουλὴ πότερα δικαστηρίῳ παραδοίη ἢ ζημιώσειε ταῖς πεντακοσίαις, ὅσου ἦν κυρία κατὰ τὸν νόμον, . . . συνεχώρησα ὥστε τῷ Θεοφήμῳ πέντε καὶ εἴκοσι δραχμῶν προστιμηθῆναι*. This account reveals the following differences from the well-known *eisangelia* to the assembly. (1) The *eisangelia* is brought before the *boule* only and never referred to the *ekklesia*. (2) The case is heard by the *boule*. (3) The *boule* passes a preliminary verdict. (4) After a verdict of guilty the *boule* is empowered to settle the case if the penalty does not exceed a fine of 500 drs (and if neither party appeals against the decision; *cf.* Arist. *Ath. Pol.* 45.2 and *Eisangelia* 24–5). (5) The offence committed is neither one of the three major public offences mentioned by Hyp. and Theoph. nor a new and unknown offence, but simply a refusal to hand over some trierarchic equipment. The differences between this form of *eisangelia* and the *eisangelia* to the assembly for major public offences are so important that they cannot be brushed away as minor procedural variations from the standard procedure.[9] So, following

[9] The law on Athenian silver coinage, recently discovered during the Agora Excavations, has provided important information about the *εἰσαγγελία εἰς τὴν βουλήν* against magistrates. Lines 32–6 contain the following provision: *ἐὰν δέ τις [τῶ]ν ἀ[ρχόντ]ων μὴ ποιῆι κατὰ τὰ γεγραμμένα, εἰσαγ[γελλέτω μέ]ν ἐς τὴμ βολὴν 'Αθηναίων*

Lipsius against Harrison and Rhodes, I maintain that *eisangelia* to the *boule* was a distinct type of *eisangelia*.

Rhodes suggests that the offence and not the procedure was the guiding principle (106, 109, 113–14) and in support of this he points out that, in a law dealing with an offence, the offence is usually mentioned in the beginning and the procedure at the end. Consequently he divides the political *eisangelia* into *eisangeliai* for major public offences and *eisangeliai* against magistrates for misconduct in office.

If Rhodes were right we should expect the Athenian law code to have included e.g. a law about *κατάλυσις τοῦ δήμου* beginning with a description of the crime and proceeding to enumerate the various procedures through which a person guilty of *katalysis* might be brought to trial. The sources, however, show that *katalysis* was mentioned in several different laws each describing one procedure but often several offences. In Demophantos' law *katalysis* leads to instant execution without trial (And. i 96–8, still valid in 330: Lyk. i 127). Similarly in Eukrates' tyranny law from 337/6 (*SEG* xii 87). In the *nomos eisangeltikos* itself *katalysis*, of course, results in an *eisangelia*, and in the law quoted in Dem. xlvi 26 in a *graphe* (*καταλύσεως τοῦ δήμου*).

Our knowledge of the Athenian law code is indeed insufficient, but we do know that it contained a law about *euthynai* (Aischin. iii 18–22), a law about *probolai* (Dem. xxi 8–11), a law about *eisangelia* (Hyp. iii 7–8), a law about *dokimasia ton rhetoron* (Aischin. i 28–32), a law about *endeixis/apagoge* (Dem. xxiv 103–5, 146), a law about *paragraphe* (Isok. xviii 1–3), etc. All these laws combined a plurality of offences with one procedure. Second, we hear about a *nomos blabes* (Dem. xxi 35), a *nomos aikeias* (*ibid.*), a *nomos hybreos* (*ibid.*), a *nomos klopes* (Dem. xxiv 103–5), a *nomos doron* (Dem. xxi 107–8) and a *nomos ton kakourgon* (Ant. v 9). As far as the evidence goes, these laws combined one offence (or a group of related offences) with one procedure. On the other hand, we have no example of a law combining one offence with a plurality of procedures.[10] In conformity with this practice Aristotle's description in the *Ath. Pol.* of the Athenian judicial system is organized according to magistrates and procedures, but not according to substantive law. And in the speeches the emphasis on procedural law is so predominant that even scholars stressing the importance of substantive law are forced to base their account on procedural distinctions. All books dealing with Athenian law (including *The Athenian Boule*) have one chapter on *eisangelia* and one on *euthynai*, and I do not know of any historian who has ventured to rearrange the sources according to substantive law and to write one chapter on *katalysis tou demou*, one on *prodosia*, one on *klope* etc.

In spite of our disagreement about the relative importance of procedural and substantive law Rhodes' new analysis of the political *eisangelia* is not so far from my account. Leaving aside *eisangelia* to the archon for maltreatment and to the board of *diaitetai* for misconduct in office (108) he now accepts my basic division of political *eisangeliai* into two categories. Furthermore, he states on p. 112 'It was clearly not normal for charges of *μὴ χρῆσθαι τοῖς νόμοις* to be considered by the *ecclesia*'; and on 113 'As for what followed the presentation of the *εἰσαγγελία*, it may originally have been stated or assumed for charges of major public offences that the *boule* should make a *προβούλευμα* on how the defendants should be tried . . .' So Rhodes does in fact distinguish between *eisangeliai* for major public offences (usually brought before or referred to the *ekklesia*

ὁ βολόμενος οἷς [ἔξεστιν]. ἐὰν δὲ ἁλῶι, ὑπαρχέτω μὲν αὐτῶι πεπαῦσθ[αι ἄρχον]τι καὶ προστιμάτω αὐτῶ[ι] ἡ βολὴ μέχρι [⌜Η⌝δραχμῶν]. Ed. R. S. Stroud, 'An Athenian Law on Silver Coinage', *Hesp.* xliii (1974) 157–88. On the restoration *εἰσαγ[γελλέτω μὲ]ν* instead of *εἰσαγ[αγέτω αὐτὸ]ν* proposed by the editor cf. *Eisangelia* 28, *Additional Note*, and 'Sur une clause pénale de la loi athénienne relative à la monnaie d'argent' by Ph. Gauthier, who, independently, has proposed the same restoration for the same reasons but has based his conclusion on a much more detailed discussion of the sources (*Revue de phil. de litt. et d'histoire anciennes* lii (1978) 32–6.

[10] One exception is *IG* ii² 1631. 350–403, a decision made by the council that Sopolis is allowed to avail himself of either the *γραφὴ βουλεύσεως* or the *εἰσαγγελία εἰς τὴν βουλήν* if the *ἐπιμεληταὶ τῶν νεωρίων* or the *γραμματεὺς τῶν ἕνδεκα*, on Sopolis' payment or delivery of oars, do not record the reduction of his debt to the state. In this case we have one offence combined with two different procedures, but the document in question is not a *nomos*, but a *psephisma tes boules* regulating an individual case—Drakon's law on homicide provides primarily for the *dike phonou*. In the law there are references to the *apagoge* (Dem. xxiii 28) and the *endeixis* (Dem. xxiii 51), but there is no evidence that the laws regulating these procedures were part of the homicide law. If we accept the magisterial order of the Athenian *nomoi*—as Rhodes, following Stroud (n. 6) 32 ff.—the inference is that the homicide law itself was one of the King's laws whereas the laws regulating *endeixis/apagoge* were included among the laws administered by the *thesmothetai* or the Eleven.

and heard either by the *ekklesia* or a *dikasterion*) and *eisangeliai* against magistrates for charges of *μὴ χρῆσθαι τοῖς νόμοις* (usually brought before the *boule* and either heard by the *boule* or referred to a *dikasterion*). It is well known that the political *eisangelia* was sometimes abused in the fourth century, and variations from this pattern may be due to sycophancy and not to any looseness in the Athenian judicial system.

One problem is left: what about a major public offence committed by a magistrate? Here again Rhodes and I agree that either type of *eisangelia* could be brought (113). Probably it was the prosecutor who decided for himself whether he would base his denunciation on that section of the eisangeltic law quoted in Hyp. iii 7–8, or on the section dealing with offences committed by magistrates and resulting in a trial before the *boule* and/or a *dikasterion* without being referred to the *ekklesia*.[11] It is sometimes impossible to decide to which of the two categories a particular trial belongs. The sources show that the *eisangelia* was usually brought before the *ekklesia* (either directly or via the *boule*), but the trial of Leosthenes' trierarchs in 361 is an example of a major public offence committed by magistrates (in the wide sense of the word) but referred to a *dikasterion* by the council without being brought before the *ekklesia* (cf. *Eisangelia* cat. no. 142).

(vi) *The fine of 500 drs in Eisangeliai to the Council*

The fine of max. 500 drs imposed by the *boule* is one more argument that a procedural distinction should be made between *eisangeliai* to the assembly (for major public offences) and *eisangeliai* to the council (against magistrates for misconduct in office). Rhodes opens his discussion of *eisangelia* for major public offences with the statement that 'in some cases . . . the *boule* could impose fines of up to 500 drachmae' (108). This statement is *a priori* unlikely and it is not supported by the evidence adduced by Rhodes.

(a) If the *eisangelia* for major public offences constituted a separate category (as both Rhodes and I believe) it is inconceivable that the law regulating this category contained the provision that a person found guilty could escape with a fine of max. 500 drs. Such a penalty is only appropriate for minor offences, and it would be very unlike the Athenians to provide for a fine of max. 500 drs in a law exclusively dealing with offences such as *katalysis tou demou* and *prodosia*.

(b) In support of his statement Rhodes adduces the *eisangelia* against Theophemos, who, in the *boule*, was fined 25 drs (108 n. 40, *cf.* 110, 112). But this trial should not be classified as *eisangelia* for a major public offence but as *eisangelia* against a magistrate. First, Theophemos was a magistrate in the wide sense of the word (here Rhodes and I agree). Second, Theophemos is not charged with a major public offence. In the subsequent *dike pseudomartyrion* the charge is described by Theophemos' opponent in the following words: . . . *τοὺς πρυτάνεις προγράφειν αὐτῷ τὴν κρίσιν ἐπὶ δύο ἡμέρας ὡς ἀδικοῦντι καὶ διακωλύοντι τὸν ἀπόστολον, διότι τὰ σκεύη οὐκ ἀπεδίδου καὶ τὰ ἐνέχυρα ἀφείλετο καὶ ἐμὲ συνέκοψεν τὸν εἰσπράττοντα καὶ ὑπηρετοῦντα τῇ πόλει.* (Dem. xlvii 42). Rhodes suspects that Theophemos was in fact accused of *prodosia* (110 n. 63), but his assumption is contradicted by the passage quoted above: it is unparalleled that a prosecutor, in his own account of a trial won against his opponent, should minimize the charge and tell the jurors that his opponent was convicted for 'having delayed the expedition by not handing over the equipment' when in fact he was found guilty of *prodosia*.

So the *eisangelia* against Theophemos must have been against a 'magistrate' for misconduct in office, and consequently there is no evidence for the view that *eisangelia* for a major public offence might be heard by the *boule*, without being referred to a *dikasterion*, and result in a fine of max. 500 drs. On the contrary, this fine constitutes one of the differences between *eisangelia* against magistrates heard by the *boule*, and *eisangelia* for major public offences referred by the *boule* to the *ekklesia* through a *probouleuma*.

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[11] That the choice of the type of action applied rested with the prosecutor is apparent from e.g. Dem. xxii 26 ff.; cf. *Apagoge* (n. 2) 120.