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NOMOS IN ATTIC RHETORIC AND ORATORY

FORENSIC oratory must of necessity deal with the subject of law, and rhetoric which aspires to be of use in the courts must offer the potential litigant or logographer guidance on the way to deal with questions of law. Accordingly, Aristotle devotes some space to this issue in the *Rhetoric*. Although the morality of Aristotle's advice has been debated, little attention has been paid to the more basic question of the soundness of his advice.[1] The aim of this paper is to examine Aristotle's presentation of the rhetoric of law in the *Rhetoric* in comparison with actual practice in surviving forensic speeches. The fourth century *Rhetorica ad Alexandrum*, commonly ascribed to Anaximenes of Lampsakos, also offers advice on the manipulation of argument from law, and the general similarity of that advice to Aristotle's suggests either direct influence or a common source. Anaximenes' discussion of the use of law in forensic oratory is both more brief and less systematic, and will be given more cursory treatment.

I

Aristotle begins his discussion of the law in the *Rhetoric* with what to the modern reader at least is a paradox, a paradox which has profound implications for his treatment of law in oratory. For he lists laws among the *atechnoi pisteis*. Aristotle divides the means of persuasion into two groups, *entechnoi pisteis* or 'artful proofs', those means of persuasion which are the province of rhetoric,[2] and *atechnoi pisteis* or 'artless proofs' which 'have not been provided through us but were already in existence'. He lists as examples witnesses, tortures and contracts. When he returns to the subject of artless proofs in 1375a22 ff. he adds two more items, oaths and laws. For Aristotle therefore law is, at least in forensic contexts, a means of persuasion.[3] Formally, at least, his inclusion of law among the artless means of persuasion reflects current practice. There were no lawbooks, and there was no text of relevant laws available to the jurors. It was up to the individual litigant to provide his own excerpts from the laws in order to prove his case. So laws are introduced in court exactly like other documents pertaining to the case. In the late fifth and early fourth century the formulae for introducing laws differ significantly from those used for introducing witnesses;[4] but this merely reflects the fact that witnesses were required to depose in person at this period, while laws were read out by the clerk of the court. Once the procedure for witness testimony was altered in the 380s, so that witness depositions were read out by the clerk, the formulae tended to coalesce,[5] with the result that there was no perceptible difference in the lawcourts between the law and depositions, contracts, tortures and oaths. The procedures for the citation of laws inevitably mean that the use of laws by litigants

[1] See W.K.C. Guthrie, *The sophists* (Cambridge 1971) 125 f., W.M.A. Grimaldi S.J., *Aristotle Rhetoric I, a commentary* (New York 1980) 317 f., for the ethical question. Problems of application are noted in passing by D.C. Mirhady, 'Aristotle on the rhetoric of law', *GRBS* 31 (1990) 397, E.M. Harris 'Law and oratory', in *Persuasion* ed. I. Worthington (London 1994) 130-150, 140.

[2] Arist. *Rhet.* 1355b35 ff.

[3] Although Anaximenes recognizes a similar category of proof (*Rhet. Alex.* 1428a16 ff.), it is interesting to note that his four types of 'supplementary proof' do not include law. D. Mirhady, 'Non-technical *pisteis* in Aristotle and Anaximenes', *AJP* 112 (1991) 5-28, 10 f. suggests that Aristotle's item 'law' corresponds to Anaximenes' item 'opinions of the speaker' and that both reflect an original item *enklema*, 'the statement of accusation' in their shared source. However, since nothing is said by Anaximenes in any of his references to this *pistis* to indicate that it is to be confined to any one or other aspect of the factual or other issues dealt with in oratory, forensic or otherwise, I find it difficult to accept the identification. It is easier to suppose that the two authors have independently expanded a simpler schema which they have inherited.

[4] Witnesses, e.g. Lys. 13.64 καί μοι ἀνάβητε μάρτυρες: laws, e.g. Lys. 14.5 ἀνάγνωθί μοι τὸν νόμον.

[5] See e.g. Isai. 2.16 καί μοι τὰς μαρτυρίας ἀνάγνωθι ταύτας καὶ τὸν νόμον.

approximates them in some respects to the status of depositions etc. For although considerable space is given to laws relating unambiguously to the main issue in order to demonstrate substantive points, that is to prove that the speaker's conduct in the matter under dispute has been, or the opponent's has not been, in accordance with the law, we also find speakers using laws to support tangential issues, for instance to demonstrate allegations of the sort classified by rhetoricians under the heading *diabole* (that is, intended to create hostility toward the opponent) or to overwhelm the jury with a seemingly compelling array of legal support.[6] Laws, like depositions, tortures etc., form part of the speaker's strategy. It is important however to distinguish between the formal presentation of laws and the role of law in the courts. Firstly, laws were protected procedurally in a way which distinguished them from other *atechnoi pisteis*. We are told that the penalty for introducing a non-existent law was death.[7] Procedures were in place to prevent abuse in relation to other *atechnoi pisteis*. For false witness there was the *dike pseudomartyrion*; this action would also prevent abuse in cases of torture, since both the challenge to torture and the torture session itself would be witnessed, and also in cases of contracts for similar reasons. But the penalty in such cases consisted of damages to the prosecutor. Law is privileged in its protection by the death penalty. It is also privileged in the decision-making process, since the jurors swore to vote according to the laws and decrees of the Athenian assembly and Boule.[8] Law is thus treated in an ambiguous way. Formally it is treated as a means of proof; but it is given a status quite distinct from other means of persuasion.

Aristotle subdivides law in the *Rhetoric* into different types, though not with complete consistency. He defines law at *Rhet.* 1368b5 ff. as follows:

> ἔστω δὴ τὸ ἀδικεῖν τὸ βλάπτειν ἑκόντα παρὰ τὸν νόμον. νόμος δ' ἐστὶν ὁ μὲν ἴδιος, ὁ δὲ κοινός· λέγω δὲ ἴδιον μὲν καθ' ὃν γεγραμμένον πολιτεύονται, κοινὸν δὲ ὅσα ἄγραφα παρὰ πᾶσιν ὁμολογεῖσθαι δοκεῖ.
>
> Let unjust action be defined as doing harm voluntarily contrary to the law. There are two types of law, individual and common. By individual I mean the written law which forms the basis of the constitution, by common all the unwritten laws which seem to be universally agreed.

At 1374a25 *idios nomos* and *gegrammenos nomos* are again identical. However, at 1373b he says:

> λέγω δὲ νόμον τὸν μὲν ἴδιον, τὸν δὲ κοινόν, ἴδιον μὲν τὸν ἑκάστοις ὡρισμένον πρὸς αὐτούς, καὶ τοῦτον τὸν μὲν ἄγραφον, τὸν δὲ γεγραμμένον, κοινὸν δὲ τὸν κατὰ φύσιν.

[6] I discuss this issue in 'Artless proofs in Aristotle and the orators', *BICS* xxxix (1994) 95-106.

[7] [Dem.] 26.24 καὶ θάνατον μὲν ὡρικέναι τὴν ζημίαν, ἐάν τις οὐκ ὄντα νόμον παράσχηται, τοὺς δὲ τοὺς ὄντας εἰς τὴν τῶν οὐκ ὄντων νόμων τάξιν ἄγοντας, τούτους ἀτιμωρήτους περιορᾶν. As with so much else in the Athenian system, enforcement (by legal action) was presumably left to the volunteer, either the opponent or *ho boulomenos*.

[8] For this and other clauses in the dikast's oath see A.R.W. Harrison, *The law of Athens* II (Oxford 1971) 48, R.J. Bonner and G. Smith, *The administration of justice from Homer to Aristotle* II (Chicago 1938) 152 ff. S.C. Todd, *The shape of Athenian law* (Oxford 1993) 60 underrates the force of law when he attributes to it only a persuasive power. It is of course true that the litigant in citing a law seeks to persuade the jurors of its applicability to his own or his opponent's conduct, and, where conflicting laws are cited, of the greater applicability in context of one law rather than another. Thus the law forms part of the process of persuasion. But this does not mean that the jurors, once convinced of the relevance of a law to the subject at issue, feel that its authority in court is merely to suggest a response. The juror's oath, and the strenuous efforts of Athenian litigants to prove that the law supports their stance on the subject at issue, indicate that the jurors did feel bound by the law and that for the most part they consciously sought to make their decisions conform to the law. That the jurors might allow other factors to outweigh the law indicates only that its authority was not absolute, not that it did not take priority over other considerations. Here I am in general agreement with Harris (n. 1), though I do not share his belief (p.137) that we can dismiss occasions on which emotional appeal obfuscated legal considerations as rare aberrations.

> I term one type of law individual, another common, individual being that which is defined by a group with reference to themselves, consisting of two categories, unwritten and written, common being that which accords with nature.

The definitions at 1368b and 1373b are not entirely compatible as formulated.[9] In the first, unwritten law is identical with common/shared law, as distinct from individual law; in the second, unwritten law is a species of individual law. For our present purposes it is the first formulation which matters, for this is the definition which forms the basis of Aristotle's guidance on appropriate use of the law in oratory. The unwritten local law is of no further significance for the treatise. What Aristotle meant by unwritten or common law is never fully clarified, since the distinction between written and unwritten law does not play a major role in the *Rhetoric*; as with the other *atechnoi pisteis*, once he has dealt with law he abandons it. In 1373b7 ff. and 1375a33 ff. he exemplifies common law with reference to the famous speech of Antigone justifying her decision to bury Polyneikes in contravention of Kreon's decree.[10] This would appear to identify common law with rules of conduct, as does 1374a23 ff.,[11] where he lists gratitude for a good turn, requital of benefactions, helping friends. This agrees with Perikles' famous formulation of unwritten laws in Thucydides as rules whose breach results in informal rather than formal sanctions, and with the (possibly) dependent passage in Lysias 6, which quotes Perikles to the effect that one should obey the unwritten as well as the written laws.[12] But Aristotle also cites Alkidamas' maxim that nature made no man a slave.[13] Evidently therefore he has in mind something broader than non-statutory imperatives.

II

Since Aristotle has characterized law as a species of artless proof, he proceeds to analyse the treatment of law in the context of the lawcourts according to a simple schema for dealing with such proofs. Aristotle is not, of course, particularly interested in the artless proofs themselves, for they are not in his opinion the real business of rhetoric.[14] The orator's role is to use rhetorical proof (specifically argument) to maximize the impact of his own artless proofs and to minimize the impact of his opponent's. This means undermining the general validity of such

[9] See in general M. Ostwald, 'Was there a concept of ἄγραφος νόμος in classical Greece' in *Exegesis and argument: studies in Greek philosophy presented to Gregory Vlastos*, ed. E.N. Lee, A.P.D. Mourelatos, R.M. Rorty, 70-104, 71f., Grimaldi (n. 1) 287.

[10] *Rhet.* 1375a34-b2 τὸ μὲν ἐπιεικὲς ἀεὶ μένει καὶ οὐδέποτε μεταβάλλει, οὐδ' ὁ κοινός (κατὰ φύσιν γάρ ἐστιν), οἱ δὲ γεγραμμένοι πολλάκις, ὅθεν εἴρηται τὰ ἐν τῇι Σοφοκλέους Ἀντιγόνηι· ἀπολογεῖται γὰρ ὅτι ἔθαψε παρὰ τὸν τοῦ Κρέοντος νόμον ἀλλ' οὐ παρὰ τὸν ἄγραφον,

οὐ γάρ τι νῦν γε κἀχθές, ἀλλ' ἀεί ποτε...

[11] *Rhet.* 1374a18 ff. ἐπεὶ δὲ τῶν δικαίων καὶ τῶν ἀδίκων ἦν δύο εἴδη (τὰ μὲν γὰρ γεγραμμένα τὰ δ' ἄγραφα), περὶ ὧν μὲν οἱ νόμοι ἀγορεύουσιν εἴρηται, τῶν δ' ἀγράφων δύο ἐστιν εἴδη· ταῦτα δ' ἐστὶν τὰ μὲν καθ' ὑπερβολὴν ἀρετῆς καὶ κακίας, ἐφ' οἷς ὀνείδη καὶ ἔπαινοι καὶ ἀτιμίαι, καὶ τιμαὶ καὶ δωρεαί (οἷον τὸ χάριν ἔχειν τῷ ποιήσαντι εὖ καὶ ἀντευποιεῖν τὸν εὖ ποιήσαντα καὶ βοηθητικὸν εἶναι τοῖς φίλοις καὶ ὅσα ἄλλα τοιαῦτα), τὰ δὲ τοῦ ἰδίου νόμου καὶ γεγραμμένου ἔλλειμμα.

[12] Thuc. 2.37.3 ἀνεπαχθῶς δὲ τὰ ἴδια προσομιλοῦντες τὰ δημόσια διὰ δέος μάλιστα οὐ παρανομοῦμεν, τῶν τε αἰεὶ ἐν ἀρχῆι ὄντων ἀκροάσει καὶ τῶν νόμων, καὶ μάλιστα αὐτῶν ὅσοι τε ἐπ' ὠφελίᾳ τῶν ἀδικουμένων κεῖνται καὶ ὅσοι ἄγραφοι ὄντες αἰσχύνην ὁμολογουμένην φέρουσιν. Lys. 6.10 καίτοι Περικλέα ποτέ φασι παραινέσαι ὑμῖν περὶ τῶν ἀσεβούντων μὴ μόνον χρῆσθαι τοῖς γεγραμμένοις νόμοις περὶ αὐτῶν ἀλλὰ καὶ τοῖς ἀγράφοις καθ' οὓς Εὐμολπίδαι ἐξηγοῦνται.

[13] *Rhet.* 1373b18 f. καὶ ὡς ἐν τῷ Μεσσηνιακῷ λέγει Ἀλκιδάμας, 'ἐλευθέρους ἀφῆκε πάντας θεός, οὐδένα δοῦλον ἡ φύσις πεποίηκεν'. More precisely, the Mss. have a lacuna after Ἀλκιδάμας; the quotation is supplied by the scholiast.

[14] *Rhet.* 1354a11 ff. In 'Artless proofs in Aristotle and the orators' (n. 6) I argue that Aristotle exaggerates the distinction between artful and artless proofs.

proofs where they favour the opponent and stressing the validity of such proofs where they favour ourselves. The same approach is adopted by Anaximenes; though (as was noted above) he does not explicitly classify laws as proofs, his treatment of laws at 1443a11 ff. (where they figure in his advice on the anticipation of the opponent's case) is very similar to his treatment of depositions, tortures and oaths at 1431b20 ff., 1432a14 ff., 1432a33 ff. At first sight this looks like a promising approach. It reflects a strand in Greek rhetoric which was represented for instance in the teaching of Protagoras, who taught his pupils to argue the same case from diametrically opposing sides, and which in surviving works is represented by the *Dissoi Logoi* and the *Tetralogies* of Antiphon. But in fact the value of what Aristotle and Anaximenes have to say lies, in general, less in the direct applicability of the advice than in the insight it gives into some areas of ambiguity in the Athenian attitude to the law.

In advising on the use to be made of law in oratory, Aristotle begins with arguments to adopt when the law is against us.[15] Presumably he does not here mean 'when we are patently guilty' or 'when the person we are accusing is patently innocent'. Rather, he appears to have in mind a situation in which the law, interpreted strictly, supports our opponent. In such a context, it would appear to be in our interests to subvert the authority of law, and accordingly Aristotle proposes that we should utilize the *koinos nomos* and base our argument on *epieikeia*, equity, and justice.[16] When we attempt to exemplify Aristotle's advice from contemporary oratory, however, we encounter a problem. Inevitably, newly proposed laws are subjected to rigorous criticism through the *graphe nomon me epitedeion theinai*. But we do not find assaults on statute law as a category. Although Aristotle makes much of the distinction between the different types of *nomos*, the word *nomos* itself, applied to written law or customs and values, commanded enormous respect. To judge from surviving oratory, there appears to have been a fundamental inhibition against frontal assaults on the authority of law. Even when speakers misuse the laws, when they cite irrelevant laws or seek to distort their significance, they are still drawing on an enormous reservoir of respect for *nomos*. This attitude is not merely Athenian but more generally Greek. Subservience to impersonal laws, as distinct from the authority of a single figure, is one of the features which distinguish the Hellene from the barbarian. Although few Athenians would go as far as Sokrates in Plato's *Crito* in obedience to the laws,[17] the rhetorical force of the *Crito* as part of Plato's continuing apologia for Sokrates derives in no small part from the ideology of obedience to *nomos*, in any form, to which it appeals.

This is a rhetorical as well as a moral problem. Whatever logic may say, any theoretical gain in force of argument from an outright attack on the laws is immediately counteracted by a disproportionate loss in the area of *ethos*. It is important to remember that the speaker had only a limited amount of time available to present his case, and that he faces an opponent ready to exploit any vulnerable points in his case. In this context the speaker cannot afford to present an *ethos* of which disregard for *nomos* is a salient characteristic. It is standard practice to associate

[15] *Rhet.* 1375a27 ff. Grimaldi (n. 1) objects to the translation of ἐὰν μὲν ἐναντίος ᾖ ὁ γεγραμμένος νόμος τῷ πράγματι as 'when the written law is opposed to our case', but offers no argument. His alternative, to take πρᾶγμα as 'that which took place, the actual fact, the specific action at issue' gives an inferior sense. The question is not whether the law is relevant to the *subject under dispute* (for throughout his discussion of *nomos* Aristotle clearly envisages the citation of law by one side or the other) but which side the law favours.

[16] There is a textual problem at 1375a28 f. Mss. and editors are divided between τῷ κοινῷ χρηστέον καὶ τοῖς ἐπιεικεστέροις καὶ δικαιοτέροις and τῷ κοινῷ χρηστέον καὶ τοῖς ἐπιεικέσιν ὡς δικαιοτέροις. I agree with Mirhady (n. 1) 396 in preferring the second of these two readings; the context requires a firm distinction between τὸ ἐπιεικές and written *nomos*, and the positive is therefore to be preferred to the comparative. For my present purposes, however, all that matters is that *epieikeia* is offered as an alternative to *gegrammenos nomos*.

[17] Plat. *Crit.* 50c-53a.

oneself with observance both of moral rules and of statutes and to dissociate the opponent from such observance. As will be shown below, obedience to the statutes is characteristic of the good litigant. In real trials, there was more advantage to be gained from evasion of issues or straight falsification of the facts than in undermining the laws. Accordingly, it is actually difficult to exemplify in oratorical practice the advice which Aristotle gives.

Aristotle's first argument in support of the application of *epieikeia* rather than the written law is that this is what is meant by 'using our best judgement'. The last phrase here refers to the clause in the juror's oath which prescribed that in matters where there were no laws the juror was to use his 'most just opinion'. However, the dikasts' oath does not *oppose* law and justice; nor do real speeches on the rare occasions when this clause of the oath surfaces. At Dem. 39.41 in fact quite the opposite use is made of the oath, *viz.* that law and just judgement coincide.[18]

A second line of argument offered by Aristotle is that written law is subject to change, while common law, being the product of nature (*physis*), is of eternal validity. But although Athenians had personal experience of the legislative process, so that they knew in practice that laws could and did change, the orators do not in the citations of laws or their general references to the laws reflect this awareness. Quite the reverse, in fact, for there is a tendency to associate laws with the name of Solon, irrespective of the date at which the laws referred to were enacted. There is a 'doublethink' at work, which was probably typical of Athenian attitudes in general; the laws are the product of legislation involving ordinary people, but at the same time individual laws are felt to reflect the antiquity of the lawcode as a whole. This of course reflects the more conservative approach to *nomos* prevalent in the fourth century. Moreover, the more ponderous processes for new legislation and revisions to existing legislation in the fourth century made the representation of the law as something impermanent considerably less plausible that it might have been in the fifth century. The effect of all this was to provide the laws with a patina of antiquity, to suggest fixity, not fluidity. The scope for exploiting the antithesis between change and continuity was therefore restricted. If the argument from fixity and fluidity seems unhelpful, the point that the superiority of unwritten law resides in its relation to *physis* is positively dangerous. The antithesis between *nomos* and *physis*, and the preference for *physis*, would probably suggest the sophistic movement to the average Greek, and therefore create an impression of *deinotes*, cleverness. But it is a general rule in the orators, not surprisingly in view of the hostility of Athenian juries to anything resembling professionalism in legal matters, that *deinotes* is a characteristic of the opponent, not the speaker. The persistence of the stereotype of the sophist through the fourth century, and the ease with which hostility to this stereotype could be aroused in court, can be seen from [Dem.] 35.40 f.

Aristotle's third, fourth and fifth *topoi* may be taken together, since all rest on the superiority of unwritten law as being more just. The third argument is that justice is something real and beneficial, not mere semblance; written law is not just and does not perform the function of *nomos*, which is justice. The fourth, closely related, argument is that it is the dikast's task to distinguish between true and specious justice. The fifth is that it is a sign of moral superiority to utilize the unwritten rather than the written laws. None of this is to be found in the orators. Not surprisingly; for to elevate one type of *nomos* over another in this way is in effect to reduce the validity of the non-privileged category. This devaluation of written *nomos* is most explicit in the third line of argument, a bold paradox in which the status of written *nomos* as *nomos* is challenged. The nearest parallel from the orators known to me for Aristotle's downgrading of

[18] Dem. 39.41 ὥστε καὶ κατὰ τὴν δικαιοτάτην γνώμην καὶ κατὰ τοὺς νόμους καὶ κατὰ τοὺς ὅρκους καὶ κατὰ τὴν τούτου προσομολογίαν ἐγὼ μὲν μέτρι' ὑμῶν, ὦ ἄνδρες Ἀθηναῖοι, δέομαι ... For the general compatibility of oath and laws see e.g. Aischin. 3.8 τῶν ὅρκων οὓς ὠμόσατε μεμνημένοι καὶ τῶν νόμων ... and Lys. 10.32 (n. 41).

statute law is the occasional suggestion that the jurors are not merely adjudicating on the basis of law but acting as lawmakers in their interpretation of law.[19] But this is still both more subtle and more insidious than Aristotle's prescriptions, since at most it argues for a broad interpretation of the law while still upholding the authority of law; it does not oppose another authority to that of the written law.

Aristotle's sixth line of argument concerns the exploitation of contradiction. His advice has two aspects, the manipulation of disagreement between laws and the exploitation of internal contradiction within a law. The first type of argumentation can be seen, for instance, in Aischines' insistence that the law does not allow proclamations of honours to be made in the theatre (2.44-5) and Demosthenes' citation of a law which allows exceptions (18.120). The Athenians were themselves aware of the existence of contradictory laws,[20] and it was natural that such contradictions should be exploited. However, the scope for exploitation of internal inconsistency within a law, as distinct from disagreements between laws, was considerably limited by the procedural orientation of Greek laws. Although some laws in Athens were substantive (inheritance laws, for instance), there is a marked tendency for Athenian laws to be procedural, to define means of redress rather than offences.[21] Accordingly, although it was certainly possible to question the applicability of a given law in a given situation, in general there was less room for quibbling about the content of a law. There is accordingly far less interest in the precise wording of laws than Aristotle's general discussion might lead one to expect. There are, of course, exceptions. *Paragraphai* by their very nature must appeal to specific clauses in the laws dealing with special pleas. And of course cases of *graphe paranomon* and *graphe nomon me epitedeion theinai* must deal with questions of law in detail. In most surviving forensic speeches however there is not much interest in the precise details of law, beyond the demonstration (certainly important in itself) of basic legal support for a position. Lysias 10 is most unusual in its interest in the details of law, as is Hypereides' speech *Against Athenogenes*. The same objections may also be advanced against Aristotle's seventh line of opposition to the law, the exploitation of ambiguities in the written law.

The eighth and final argument concerns laws which are obsolete. Again, I find no trace of the argument in the orators.

Like Aristotle, Anaximenes advocates a frontal assault on the laws where necessary (1443a20 ff.), though he confines himself to attacks on specific laws, rather than on statute law as a category. His first suggestion has something in common with Aristotle's third line of argument. Where the laws which oppose us are held to be bad (*mochtheros*), we should argue that the law in question is not *nomos*, 'law', but *anomia*, 'lawlessness', 'negation of law', since it is harmful to the state, while the law is meant to confer benefit. In the same vein, Anaximenes suggests (1443a12 ff.) that we should praise the laws which support our case and criticize the laws put forward by our opponents. Not surprisingly, however, the laws are never described by litigants as *mochtheroi*. And not only do we not find litigants objecting to statute law as a type, they also avoid questioning the wisdom of specific established laws. His second proposed argument is that the jurors are not acting illegally in ignoring the law but legislating for the future. Again, we never find litigants explicitly urging the jurors to vote in contravention of the laws; this is hardly surprising, given the dikast's oath. And although we do (as was noted above) find speakers urging the jurors to regard themselves as legislators, this is always in the context of the application of a law rather than the outright subversion of a law. Anaximenes' third point

[19] Lyk.1.9 διὸ καὶ μάλιστ', ὦ ἄνδρες, δεῖ ὑμᾶς γενέσθαι μὴ μόνον τοῦ νῦν ἀδικήματος δικαστὰς ἀλλὰ καὶ νομοθέτας. Cf. Lys.14.4, [Dem.] 56.48.

[20] See Dem. 20.91, Aischin.3.38.

[21] See especially S.C. Todd (n. 8) 64 ff.

is that there is no law which prevents a man from helping society, and that annulling bad laws is helping society. Again the orators are silent.

Anaximenes agrees with Aristotle in suggesting that we exploit ambiguities in the law (1443a31 ff.). The limitations of this approach were noted above. He also agrees with Aristotle in advising appeal to *epieikeia* where a defendant cannot take a stand on the legality of his conduct (1444a10 ff.), but since he does not explicitly oppose the authority of the law, his advice does not present the moral and rhetorical problems raised by Aristotle's approach.

Taken as a whole, the advice on means of counteracting appeal to the law by the opponent is difficult to square with what actually happened in the courts. Such a marked deviation from actual practice requires explanation. There are several factors at work. First, the treatment of written law by Aristotle is the direct result of his categorization of law as a species of proof. As was observed above, although Aristotle's taxonomy has a basis in contemporary practice, law occupies an ambiguous position; it cannot be assimilated completely to other documentary means of proof. Accordingly, problems arise when Aristotle imposes on law the schema he applies to artless proof as a category. His purpose in this section of the *Rhetoric* is to exemplify ways in which the presence or absence of support from different types of artless proofs can be exploited by the litigant. For each category of artless proof he offers means of strengthening or weakening the impact of the *pistis* itself by rhetorical means. Within this schema laws, like witnesses, must allow for opposed modes of argumentation. The same is essentially true of Anaximenes, who approaches the law exactly as he approaches depositions, oaths, and evidence from torture, all of which are to be strengthened or undermined by argument according to immediate need. In both cases, the advice is the product of the theoretical structure imposed rather than of observation of actual practice.[22]

A second problem common to Aristotle and Anaximenes is a failure to take due account of the form of Athenian law. In defining law, both concentrate on its normative function. This is implied in Aristotle's definition of wrongdoing (τὸ ἀδικεῖν) at 1368b5 (quoted above) as harm done contrary to the law. This conception of law is explicit in Anaximenes (1422a2 f.; *cf.* 1424a11 f.):

> νόμος δ' ἐστὶν ὁμολόγημα πόλεως κοινόν, διὰ γραμμάτων προστάττον πῶς χρὴ ποιεῖν ἕκαστα.
>
> Law is a common agreement of the state prescribing in writing how people should act in various matters.

The emphasis here on the role of the laws in regulating conduct in general and not merely the processes of dispute settlement is perfectly natural as a description of the social function of the laws. It reflects a widespread conception of the role of law, found for instance in Perikles' statement at Thuc. 2.37.3 that the Athenians obey the laws or in the assertion of Euphiletos at Lys. 1.26 that the adulterer Eratosthenes chose to transgress the law. However, both Aristotle and Anaximenes ignore the fact that the laws fulfil their role largely by prescribing procedures for obtaining punishment and reparation. The emphasis on function leads to misunderstanding when applied rhetorically to the manipulation of the form of the laws. Aristotle may also be influenced by his own ideal formulation of the law in 1354a31 ff.; there he tells us that good laws should be as complete as possible, containing few omissions.[23] Very few real Athenian laws would meet Aristotle's ideal.

[22] For other examples of the rigidity of rhetorical theory in comparison with actual practice see C. Carey, 'Rhetorical means of persuasion', in *Persuasion* ed. I. Worthington (London 1994) 26-45, esp. 29, 35 f., 39 f., 43f.

[23] 1354a31 ff μάλιστα μὲν οὖν προσήκει τοὺς ὀρθῶς κειμένους νόμους, ὅσα ἐνδέχεται, πάντα διορίζειν αὐτούς, καὶ ὅτι ἐλάχιστα καταλείπειν ἐπὶ τοῖς κρίνουσιν. This suggestion was also made to me independently by Dr. R.G. Osborne.

The third common factor is an overly cerebral approach to the task of persuasion, which leads both authors to pursue lines of argument which, whatever their intellectual appeal, would carry grave risks of alienating the hearer. In Aristotle's case this is typical of his whole overall approach to the art of rhetoric. On pragmatic grounds he accepts the importance of *ethos* and *pathos*, but he regards these as accommodations to the inadequacy of the hearer. The proper business of the art of persuasion is to argue.[24] This intellectual approach is visible in the relative space afforded to the different means of persuasion.

A further factor at work in Aristotle's treatment, which is generally both more sophisticated and more abstract than that of Anaximenes, is the transformation of a distinction into an antithesis. At *Rhet.* 1375a25 ff. Aristotle sees written and unwritten laws not merely as two distinct parts of a comprehensive set of imperatives and prohibitions, but as two alternative and potentially competing sources of authority. This is not in fact a common view. It is familiar to us above all through the famous speech of Antigone which is quoted by Aristotle to exemplify the dichotomy. There Antigone sets Kreon's *psephisma* against the abiding and unwritten *nomima* of the gods. But in general we find that Greek thinkers present these systems as complementary and mutually supportive. Inevitably, the two categories of *nomos* overlap, most obviously in the sphere of religion, where the speaker of Lysias 6 appeals simultaneously both to written and to unwritten *nomos*.[25] But in general the two categories are seen as governing different areas of conduct, with the unwritten laws supplementing written laws and providing additional sanctions to deal with activities not covered by the written statutes. This complementarity is seen for instance in the Thucydidean Perikles,[26] and it is true also of the other classical reference to Perikles on unwritten laws, Lysias 6. Both (with their formulation 'not only but'/'both and') presuppose written and unwritten laws as interlocking parts of a system of constraint which makes civilized society possible. This approach is also exemplified by Aristotle himself in *Rhet.* 1374a, where he associates unwritten justice with non-judiciary penalties and informal reward and with omissions in the written law; a similar definition is offered by Anaximenes at 1421b36 ff.[27] Likewise Aristotle at *E.N.* 1180a sees unwritten and written laws as mutually supportive inducements to proper conduct; so also Dem. 18.275 and Xen. *Mem.* iv.4.19.[28] It is difficult to see how this general consensus on the compatibility and complementarity of written and unwritten *nomoi* could persist if the different types of *nomos* were perceived as opposed.

However, although this aspect of the advice on the forensic use of law offered by fourth century rhetoric is of limited value, the awareness of ambiguity in the Greek attitude to law on which it rests is of use. It would for instance be a mistake to conclude from the inadequacy of Aristotle's opposition between written and unwritten law that the distinction between law and

[24] At 1354a15 ff. Aristotle asserts that logical arguments are the σῶμα τῆς πίστεως, while emotional appeals are ἔξω τοῦ πράγματος and are directed πρὸς τὸν δικαστήν. *Cf.* 1415b5 ff.

[25] See n. 12.

[26] See n. 12.

[27] Anaximenes 1421b36 ff. δίκαιον μὲν οὖν ἐστὶ τὸ τῶν ἁπάντων ἢ τὸ τῶν πλείστων ἔθος ἄγραφον, διορίζον τὰ καλὰ καὶ τὰ αἰσχρά, ταῦτα δ' ἐστὶ τὸ γονέας τιμᾶν καὶ φίλους εὖ ποιεῖν καὶ τοῖς εὐεργέταις χάριν ἀποδιδόναι· ταῦτα γὰρ καὶ τὰ τούτοις ὅμοια οὐκ ἐπιτάττουσι τοῖς ἀνθρώποις οἱ γεγραμμένοι νόμοι ποιεῖν, ἀλλ' ἔθει ἀγράφῳ καὶ κοινῳ νόμῳ νομίζεται. For Aristotle see n. 11.

[28] Arist. *E.N.* 1180a34 ff. αἱ μὲν οὖν κοιναὶ ἐπιμέλειαι δῆλον ὅτι διὰ νόμων γίγνονται, ἐπιεικεῖς δὲ αἱ διὰ τῶν σπουδαίων· γεγραμμένων δ' ἢ ἀγράφων, οὐδὲν ἂν δόξειε διαφέρειν. Dem.18.275 φανήσεται ταῦτα πάνθ' οὕτως οὐ μόνον ἐν τοῖς νόμοις, ἀλλὰ καὶ ἡ φύσις αὐτὴ τοῖς ἀγράφοις νομίμοις καὶ τοῖς ἀνθρωπίνοις ἤθεσιν διώρικεν. Xen. Mem. iv.4.19 ἀγράφους δέ τινας οἶσθα, ἔφη, ὦ Ἱππία, νόμους· τοὺς γ' ἐν πάσῃ, ἔφη, χώρᾳ κατὰ ταὐτὰ νομιζομένους. ... ἀλλὰ δίκην γε διδόασιν οἱ παραβαίνοντες τοὺς ὑπὸ τῶν θεῶν κειμένους νόμους, ἣν οὐδένι τρόπωι δυνατὸν ἀνθρώπῳ διαφυγεῖν, ὥσπερ τοὺς ὑπὸ τῶν ἀνθρώπων κειμένους νόμους ἔνιοι παραβαίνοντες διαφεύγουσι τὸ δίκην διδόναι.

natural justice is without value in the lawcourts. There is a clear awareness on the part of speakers addressing the courts of a potential for abuse of the laws. The efforts of litigants to present themselves as pitchforked into litigation indicates that there is a reluctance to resort to litigation. Individual litigants may of course be misrepresenting themselves; but what matters is the ideology to which they appeal rather than the veracity of individual claims. The laws are seen as a final means of resolving a dispute, not a remedy to be applied casually. There is therefore a degree of discomfort felt by speakers citing the laws in detail, and a consequent tendency to apologize for legal knowledge displayed, as at Hyp. *Athen.* 13,[29] where the speaker prefaces a dazzling display of legal expertise with a complaint that his enemy has forced him to study the law. This attitude underlies the accusation hurled at Dem. 57.5 that the opponent Euboulides possesses excessive knowledge of the laws.[30] Most potent of all as a source of miscarriage of justice is the mixture of legal expertise and rhetorical training. So the laws can be manipulated. In addition, there is a marked tendency for speakers to lay claim to a reluctance to assert their legal rights. We find litigants presenting themselves as fair-minded people who are ready to forego the advantages which they could claim under the law in an effort to be reasonable; so for instance [Dem.] 44.8, where the speaker expresses a readiness to give up the legal advantage afforded him by the law if the case presented by his opponents is reasonable; similar is the speaker of [Dem.] 56.14, who is ready to take less than he might under the letter of the law, so as not to appear *philodikos*.[31] This attitude to law is prevalent in the *paragraphe* cases in the Demosthenic corpus; by definition, the *paragraphe* is based in technical irregularities in the prosecution, and will therefore involve reliance on specific clauses of the relevant law. However, speakers are never satisfied with the demonstration of the legal base for their objection to the prosecution, since there is always the possibility that legal expertise is being used to win an unjust victory. This suspicion of excessive legalism arises naturally from the orientation of the laws toward procedure. Although the laws deter certain types of behaviour of which society disapproves, they do so largely by prescribing remedies rather than by forbidding the acts themselves. Accordingly *nomos* and *dike* (in the sense 'lawsuit') are irrevocably linked. It is important to note, however, that this is not a straight opposition between the laws and justice. The potential for manipulation is not perceived, or at least not presented, by litigants as a flaw in the laws but simply a result of individual unscrupulousness. The laws are themselves fair in intention, but they are open to abuse. Although we find contexts in which the laws and justice are distinguished, it is usually assumed that the laws and justice are on the same side.[32] And in many contexts the laws and justice are treated as identical.[33]

[29] Hyp. *Athen.* 13 ἐξ αὐτῶν δέ σοι τῶν νόμων ἐγὼ φανερώτερον ποιήσω. καὶ γὰρ οὕτω με διατέθεικας καὶ περίφοβον πεποίηκας μὴ ἀπόλωμαι ὑπὸ σοῦ καὶ τῆς δεινότητος τῆς σῆς ὥστε τούς τε νόμους ἐξετάζειν καὶ μελετᾶν νύκτα καὶ ἡμέραν, πάρεργα τἄλλα πάντα ποιησάμενον.

[30] Dem. 57.5 οὗτος εἰδὼς τοὺς νόμους καὶ μᾶλλον ἢ προσῆκεν ἀδίκως καὶ πλεονεκτικῶς τὴν κατηγορίαν πεποίηται. *Cf.* Lys. 10.13 πότερον οὕτως σὺ δεινὸς εἶ ὥστε, ὅπως ἂν βούλῃ, οἷός τ' εἶ χρῆσθαι τοῖς νόμοις....

[31] [Dem.] 44.8 καὶ ἐὰν ἐκ μὲν τῶν νόμων μὴ ὑπάρχῃ, δίκαια δὲ καὶ φιλάνθρωπα φαίνωνται λέγοντες, καὶ ὡς συγχωροῦμεν. [Dem.] 56.14 ἡμεῖς μὲν ταῦτα συνεχωροῦμεν, οὐκ ἀγνοοῦντες, ὦ ἄνδρες δικασταί, τὸ ἐκ τῆς συγγραφῆς δίκαιον, ἀλλ' ἡγούμενοι δεῖν ἐλαττοῦσθαί τι καὶ συγχωρεῖν ὥστε μὴ δοκεῖν φιλόδικοι εἶναι. The effect is to present the speaker as an ἐπιεικής, a reasonable/equitable man, whom Aristotle (*E.N.* 1138a1 f.) characterizes as disinclined to insist rigidly on his rights, even when the law is on his side (ὁ μὴ ἀκριβοδίκαιος ἐπὶ τὸ χεῖρον ἀλλ' ἐλαττωτικός, καίπερ ἔχων τὸν νόμον βοηθόν).

[32] *Cf.* Isai. 1.35 πρὸς δὲ τούτοις ἡμεῖς ὑμῖν ἀποφαίνομεν ἐναντίας οὔσας [sc. τὰς διαθήκας] καὶ τῷ νόμῳ καὶ τοῖς δικαίοις . Dem. 19.179 φαίνεται δ' οὗτος πάντα τἀναντία τοῖς νόμοις, τοῖς ψηφίσμασι, τοῖς δικαίοις πεπρεσβευκώς. See also Dem. 35.45, 39.41.

[33] *Cf.* [Dem.] 42.2 ὥσπερ ἐξουσίαν δεδωκότος αὐτῷ τοῦ νόμου ποιεῖν ὅ τι ἂν βούληται καὶ μὴ ὡς δίκαιόν ἐστιν. See also Isai. 4.21, Hyp. *Athen.* 13.

It is from this tacit acceptance that the laws are just that Lys. 1.49 derives its force:

> πολὺ γὰρ οὕτω δικαιότερον ἢ ὑπὸ τῶν νόμων τοὺς πολίτας ἐνεδρεύεσθαι, οἳ κελεύουσι μέν, ἐάν τις μοιχὸν λάβῃ, ὅ τι ἂν βούληται χρῆσθαι, οἱ δ' ἀγῶνες δεινότεροι τοῖς ἀδικουμένοις καθεστήκασιν ἢ τοῖς παρὰ τοὺς νόμους τὰς ἀλλοτρίας καταισχύνουσι γυναῖκας.
>
> This [i.e. to annul the laws] is far better than to have the citizens ambushed by the laws, which prescribe that if someone captures a *moichos* he should treat him as he sees fit, while the trials have become far more dangerous for the victims of injustice than for those who bring shame on the wives of others in contravention of the laws.

Here the speaker sees the citizens as being entrapped by the laws. In fact, he does not mean the laws at all, but the application of the laws by those sitting in judgement; but the paradox of laws as ensnarers is a powerful reflection of the prevailing ideology of the laws as fundamentally just.

The notion of *epieikeia*, as a counterweight to the rigid application of the written statutes, shared by Aristotle and Anaximenes also plays a significant role in forensic contexts. At *Rhet.* 1374b1 ff. Aristotle sees the exercise of *epieikeia* as the tempering of the strictness of the law with reference to factors such as the circumstances in which an act is committed, the motive, and the general character of the parties to a suit; both there and at *E.N.* 1143a21 ff., *epieikeia* is closely associated with forgiveness, συγγνώμη.[34] Again, however, rhetorical guidelines prove less subtle than actual practice. The blunt opposition of *epieikeia* and law favoured by rhetoricians is avoided. *Epieikeia* figures in surviving oratory not as text but as sub-text; explicit appeal for *epieikeia* is in fact not found in the orators.[35] Where *epieikeia* is mentioned explicitly, it is as a characteristic of parties to a suit rather than a quality to be displayed by the jurors. It is important to bear in mind however that we lack the brief speeches allowed for the assessment in *agones timetoi*, where explicit appeals for *epieikeia* might naturally figure. The avoidance of pleas for *epieikeia* by defendants in the defence speech proper is readily understood; a plea based on extra-legal considerations will inevitably be taken as an acceptance of the weakness of the defendant's legal position and therefore an admission of guilt. What the speaker can do, however, is excite sympathy for his situation, or for his relatives, or request gratitude for past services. Alternatively, he may present his opponent as a man of low character, an habitual malefactor, a figure worthy only of hostility from the jury. Better still, he may present the opponent as someone who habitually uses the legal system for his own profit and advantage. These all amount to a means of inducing the jurors to hesitate before applying the rigour of the law. Pity for relatives is meant to induce the jurors to reflect on the injustice of punishing the innocent along with the guilty. Mention of past services to the city is meant to give the jurors a countervailing impression of the overall worth of the speaker which will have the effect of reducing the significance of his offence. Character assassination is intended to make the jurors ask whether the opponent deserves a favourable verdict. It is of course an impossible task to distinguish clearly the different effects sought through these devices. Some are obviously intended in part to affect the jurors' view of the veracity of the parties to the

[34] *Cf.* also Anaximenes 1444a10 ff. Mirhady (n. 1) 396 n. 7, 399 argues that *epieikeia* in Aristotle is to be distinguished from common law. It is however difficult to disentangle the two concepts completely. Evidently the two are not completely identical, but they are closely associated for Aristotle, who makes no attempt to distinguish them precisely. At *Rhet.* 1374a27 ff., he discusses *epieikeia* in the context of his definition of written and unwritten *dikaia*; he defines it as 'justice contrary to written law', particularly associated with imprecision and omission in the law (cf. *E.N.* 1137b11 ff.), which in context is explicitly one of two aspects of unwritten *dikaia* (for the close relationship between *epieikeia* and *to dikaion* see *E.N.*1137a33 ff.). *Epieikeia* and unwritten *nomos* are associated at 1375a29 ff.

[35] *Cf.* Harris (n. 1) 140.

action and therefore their decision on questions of fact. But all are in part a tacit insurance policy against the possibility that the factual case will go against the litigant. That there was a real, if unquantifiable, possibility that such extra-legal considerations would carry weight with the jurors is clear from the attempts of prosecutors to close the possibilities for leniency and urge harshness.[36] The jurors' readiness to give weight to such considerations is in harmony with the ideology of law implied by the disinclination (affected or real) of litigants to insist on their legal rights, which was discussed above. The application of the laws must be tempered with broader considerations of fairness and with the knowledge that the laws are subject to abuse.

Aristotle's notion of common or universal law is not entirely without value. It is however used in ways not anticipated by Aristotle. Although the laws of Athens carry great authority, it appears that they gain still more authority if they can be shown to be in agreement with laws elsewhere in Greece, and even beyond. This is the case, for instance, with Isaios' discussion of the laws of adoption at 2.24;[37] the same law, allowing a man without children to adopt an heir, is according to Isaios observed not only throughout Greece but also among barbarians; i.e. this is a truly universal law. A similar point is made by Isokrates 19.50. Likewise, when Lysias wishes to stress for the jurors the seriousness of the offence of *moicheia* at 1.2, he insists that all Greek cities regard *moicheia* as the most serious of offences, irrespective of the political system; as a result even oligarchies, which discriminate in favour of the rich and powerful, allow equal rights to all where this offence is concerned. The appeal to laws outside Athens implies an opposition between the law of the individual community (*idios nomos*) and law which is recognized in most or all communities (*koinos nomos*), along the lines of Aristotle's distinction; and this in turn implies the *nomos/physis* antithesis,[38] and the superiority of universal law. But the antithesis is never drawn explicitly, and the tacit notion of universal law is used not to subvert the authority of written law, as Aristotle prescribes, but to enhance that authority.

III

The opposite set of arguments offered by Aristotle, on the treatment of the law when it is in our favour, is less contentious. Aristotle argues that the phrase 'most just opinion' relates to areas where the juror does not know the law. This is closer to the juror's oath than his counter-formulation. He also offers the argument that there is no difference between having no laws and not using the laws. This can be exemplified in surviving oratory.[39] He also offers the argument

[36] As Dem. 21.148 μὴ τοίνυν ὑμῖν, πρὸς τῷ μὴ καλόν, μηδὲ θεμιτὸν νομίζετ', ἄνδρες δικασταί, μηδ' ὅσιον εἶναι τοιούτων ἀνδρῶν οὖσιν ἀπογόνοις, πονηρὸν καὶ βίαιον καὶ ὑβριστὴν λαβοῦσιν ἄνθρωπον καὶ μηδένα μηδαμόθεν, συγγνώμης ἢ φιλανθρωπίας ἢ χάριτός τινος ἀξιώσαι, 225 δεῖ τοίνυν μήτε λητουργίας μήτ' ἔλεον μήτ' ἄνδρα μηδένα μήτε τέχνην μηδεμίαν εὑρῆσθαι, δι' ὅτου παραβάς τις τοὺς νόμους οὐ δώσει δίκην, 24.175 οὔκουν δεῖ δοκεῖν, νῦν μαλακισθέντας, τότε τῶν ὀμωμοσμένων ὅρκων ἀμελήσαντας ὑμῖν αὐτοῖς χαρίσασθαι παρὰ τὸ δίκαιον, ἀλλὰ μισεῖν καὶ μηδ' ἀνέχεσθαι φωνὴν μήτε τούτου μήτ' ἐκείνου, τοιαῦτα πεπολιτευμένων. *Cf.* 25.81.

[37] Isai. 2.24 καὶ τοῖς μὲν ἄλλοις ἅπασιν ἀνθρώποις καὶ Ἕλλησι καὶ βαρβάροις δοκεῖ καλῶς οὗτος ὁ νόμος κεῖσθαι, ὁ περὶ τῆς ποιήσεως, καὶ διὰ τοῦτο χρῶνται πάντες αὐτῷ. *Cf.* Isokr. 19.50 ἥκω πρὸς ὑμᾶς ἔχων...νόμον ταύταις [sc. ταῖς διαθήκαις] βοηθοῦντα, ὃς δοκεῖ τοῖς Ἕλλησιν ἅπασι καλῶς κεῖσθαι, Lys. 1.2 περὶ τούτου γὰρ μόνου τοῦ ἀδικήματος καὶ ἐν δημοκρατίᾳ καὶ ὀλιγαρχίᾳ ἡ αὐτὴ τιμωρία τοῖς ἀσθενεστάτοις πρὸς τοὺς τὰ μέγιστα δυναμένους ἀποδέδοται ...

[38] It also implies that this antithesis had permeated from intellectual debate into the collective consciousness.

[39] *Cf.* Lys. 14.11 εἰ ἐξέσται ὅ τι ἂν τις βούληται ποεῖν, οὐδὲν ὄφελος νόμους κεῖσθαι, Dem. 21.57 ἀλλὰ μὴν οὐδέν ἐστ' ὄφελος καλῶς καὶ φιλανθρώπως τοὺς νόμους ὑπὲρ τῶν πολλῶν κεῖσθαι, εἰ τοῖς ἀπειθοῦσι καὶ βιαζομένοις αὐτοὺς ἡ παρ' ὑμῶν ὀργὴ τῶν ἀεὶ κυρίων μὴ γενήσεται.

that one should not seek to be more clever than the laws. Though I can find no specific example of such blunt advice to the jury (it is the opponent who tends to be represented as aspiring to be cleverer than the laws), the orators are full of examples of exhortations to the jurors to apply the full rigour of the laws,[40] and reminders of the dikasts' oath to judge according to the laws.[41] In general this clause of the juror's oath is invoked much more frequently than the 'just opinion' clause, precisely because of the explicit restriction in the oath on the exercise of 'just opinion'.

Anaximenes has considerably less to say on this subject, presumably because the rhetorical demands of a situation in which the laws may be cited with confidence are considerably less. The logical counterpart to the advice that the opponent's laws be denigrated (1443a12 ff.) is that we should praise the usefulness of laws which we cite. It is not uncommon for citation of the law to be accompanied by praise of the law.[42] He also suggests that the jurors be reminded of their oath to judge according to the laws and be discouraged from tampering with them; specifically, they are to be told that they are to judge the facts not the laws, and to legislate on other occasions rather than in court. The latter advice can be exemplified in oratory;[43] the frequency of the reminder of the oath to vote according to the laws has already been noted.

However, the real limitation in the treatment of the utilization of the support of the laws by Aristotle and Anaximenes is that it appears to be envisaged solely in terms of the direct support of specific laws cited on substantive issues. As with the inadequacy of the arguments against the authority of statute law, individually and collectively, this limitation arises from excessive schematism, together with an emphasis on the intellectual element in the act of persuasion to the detriment of the affective. The superimposed schema makes the treatment of the topic unduly specific, since it ties the rhetoric of law to citations of specific laws and leads the rhetoricians to ignore the broader uses of law in oratory. Although the citation of laws intended to convince the jury of the legal support for the speaker on the main issue plays a major role in the orators, there is a broader rhetoric of law which is not tied to artless proofs. Essentially, the aim of this rhetoric is to tap the reservoir of respect for *nomos* which the Athenians shared with other Greeks. The effect is partly to assist the speaker in projecting an appealing *ethos*, partly to stimulate the audience to the appropriate emotion, rarely to appeal to reason. In this respect again, actual usage deviates from Aristotle's instructions. Moreover, the rhetoric of law appears to bear no discernible relation to the most important discriminator for Aristotle in terms of usage, that is, whether the law is with us or against us. For Aristotle the law is to be pressed or undermined in court according to its precise support for our case or our opponent's. But the rhetoric of law is martialled irrespective of the precise legal position, in fact in some cases where a precise appeal to the law would probably be damaging to the speaker. Put simply, the law is more often a blunt instrument than the sharp instrument Aristotle envisages. We find the authority of law marshalled not only in the context of a specific appeal to one or more laws but in portions of the speech where *ethos* is the primary effect sought or where emotional appeal is the dominant effect. I offer a few examples of this broader rhetoric.

[40] Dem. 21 is particularly rich in examples: *cf.* 21.34. 57, 177, 224.

[41] E.g. Lys. 10.32 ὧν μεμνημένοι καὶ ἐμοὶ καὶ τῶι πατρὶ βοηθήσατε καὶ τοῖς νόμοις τοῖς κειμένοις καὶ τοῖς ὅρκοις οἷς ὀμωμόκατε; Dem. 21. 177 τοῦτο γάρ ἐσθ' ὃ φυλάττειν ὑμᾶς δεῖ, τοὺς νόμους, τὸν ὅρκον, 18.121 ἀλλ' οὐδ' αἰσχύνει ... νόμους μεταποιῶν, τῶν δ' ἀφαιρῶν μέρη, οὓς ὅλους δίκαιον ἦν ἀναγιγνώσκεσθαι τοῖς γ' ὀμωμοκόσιν κατὰ τοὺς νόμους ψηφιεῖσθαι. See in general Harris (n. 1) 149 nn.6-7.

[42] *Cf.* Isai.6.49 ταυτὶ τὰ γράμματα, ὦ ἄνδρες, ὑμεῖς οὕτω σεμνὰ καὶ εὐσεβῆ ἐνομοθετήσατε ..., Dem. 21.48 ἀκούετε, ὦ ἄνδρες Ἀθηναῖοι, τοῦ νόμου τῆς φιλανθρωπίας, ὃς οὐδὲ τοὺς δούλους ὑβρίζεσθαι ἀξιοῖ, 36.26 f.

[43] *Cf.* Lys.15.9 καὶ μὲν δή, ὦ ἄνδρες δικασταί, εἴ τῳ δοκεῖ μεγάλη ἡ ζημία εἶναι καὶ λίαν ἰσχυρὸς ὁ νόμος, μεμνῆσθαι χρὴ ὅτι οὐ νομοθετήσοντες περὶ αὐτῶν ἥκετε, ἀλλὰ κατὰ τοὺς κειμένους νόμους ψηφιούμενοι.

(*i.*) There is a strong tendency for litigants to associate themselves with the laws or to appropriate for themselves the discourse of law. There is no simple correlation here with the amount of legal support for the speaker's case; accordingly this aspect of the rhetoric of law does not fall neatly into the 'law on our side' half of Aristotle's antithesis. The clearest case is in Lys. 1, where the speaker bases his case on his strict adherence to the law, to the extent of asserting at one point that he is merely the physical agent of the law,[44] despite the fact that (as is generally recognized) he is at the very least interpreting the law over-narrowly. But this is merely the most dramatic instance of the invocation of *nomos*. When Antiphon praises the homicide laws, he is in part drawing for his own purposes on the widespread respect for these laws.[45] There is of course an ambiguity here, already noted, for although the speaker aligns himself with the laws he dissociates himself (unless his status makes such dissociation implausible) from knowledge of the laws.

(*ii.*) There is an equally strong tendency to associate the opponent with breach of the laws. The opponent is someone who despises the laws.[46] The opponent can be represented as the enemy of the laws, or otherwise placed into outright opposition to the laws. Thus at Lys. 6.10 the jurors are told that they cannot have both the laws and Andokides; either the laws must be expunged or they must be rid of Andokides.[47] At [Dem.] 59.115 the laws are envisaged as actually presenting the case against Neaira.[48] Even where the opponent is obedient to the letter of the law, he may still be represented as abusing the laws; he may be represented as someone who knows the laws but exploits them for personal advantage. Strict legality is not enough. The rhetoric of law is not just about legality but about justice and reasonableness.

(*iii.*) The future of the laws themselves is in the balance. The jurors must give aid not just to the litigant but also to the laws.[49] The right decision in the present case will confirm the validity of the laws.[50] The wrong decision in the present case will have the effect of invalidating the laws. The jurors thus have the choice of voting for the opponent or siding with the laws. The laws are the basis for ordered society, as we are reminded on occasion.[51] As such they are a source of fear.[52] The deterrent power of the law prevents unscrupulous men

[44] Lys. 1.26 ἐγὼ δ' εἶπον ὅτι 'οὐκ ἐγώ σε ἀποκτενῶ ἀλλ' ὁ τῆς πόλεως νόμος...'.

[45] Ant. 6.2, καὶ τοὺς μὲν νόμους οἱ κεῖνται περὶ τῶν τοιούτων πάντες ἂν ἐπαινέσειαν κάλλιστα νόμων κεῖσθαι καὶ ὁσιώτατα.... The use of the same motif at 5.14, though rather closer to Aristotle's general treatment of law (since it is closely linked to the speaker's objection to the procedure used against him), again seeks to achieve an emotional effect rather than to prove a substantive point.

[46] *Cf.* [Dem.] 42.2 καταφρονήσας ἀμφοτέρων, καὶ ἡμῶν καὶ τοῦ νόμου..., Lys. 14.9 οὕτως ὑμῶν κατεφρόνησε ... καὶ τῶν νόμων οὐκ ἐφρόντισεν.

[47] Lys. 6.8 οὐκ οἷόν τε ὑμῖν ἐστιν ἅμα τοῖς τε νόμοις τοῖς πατρίοις καὶ Ἀνδοκίδῃ χρῆσθαι.

[48] [Dem.] 59.115 ἡγεῖσθε δὲ μήτ' ἐμὲ τὸν λέγοντα εἶναι Ἀπολλόδωρον μήτε τοὺς ἁπλογησομένους καὶ συνεροῦντας πολίτας, ἀλλὰ τοὺς νόμους καὶ Νέαιραν ταυτηνὶ περὶ τῶν πεπραγμένων αὐτῇ πρὸς ἀλλήλους δικάζεσθαι.

[49] [Dem.] 26.27 παρακαλέσαντες οὖν ὑμᾶς αὐτούς, ἄνδρες Ἀθηναῖοι, βοηθήσατε μὲν τοῖς νόμοις.... *Cf.* Lys. 10.32 (n. 41), Dem.21.225 (n. 50).

[50] Lys. 1.34 ἐν ὑμῖν δ' ἐστὶ πότερον χρὴ τούτους ἰσχυροὺς ἢ μηδενὸς ἀξίους εἶναι, Dem. 21.224-5 ἡ δὲ τῶν νόμων ἰσχὺς τίς ἐστιν; ἆρ' ἐάν τις ὑμῶν ἀδικούμενος ἀνακράγῃ, προσδραμοῦνται καὶ παρέσονται βοηθοῦντες; οὔ· γράμματα γὰρ γεγραμμέν' ἐστίν, καὶ οὐχὶ δύναιντ' ἂν τοῦτο ποιῆσαι. τίς οὖν ἡ δύναμις αὐτῶν ἐστιν; ὑμεῖς ἐὰν βεβαιῶτ' αὐτοὺς καὶ παρέχητε κυρίους ἀεὶ τῷ δεομένῳ. οὐκοῦν οἱ νόμοι θ' ὑμῖν εἰσιν ἰσχυροὶ καὶ ὑμεῖς τοῖς νόμοις. δεῖ τοίνυν τούτοις βοηθεῖν....

[51] [Dem.] 58.56, [Dem.] 59.115; *cf.* Dem.21.221 ff.

[52] Lys. 14.15 ἀλλ' ὅμως οὐκ ἐτολμᾶτε ἀπολιπεῖν τὰς τάξεις οὐδὲ τἀρεστὰ ὑμῖν αὐτοῖς αἱρεῖσθαι, ἀλλὰ πολὺ μᾶλλον ἐφοβεῖσθε τοὺς πόλεως νόμους ἢ τὸν πρὸς τοὺς πολεμίους κίνδυνον. *Cf.* [Dem.] 59.86.

from exploiting their advantages over others. Yet the laws themselves are also perceived as weak. The clearest statement (and the nearest Demosthenes comes to a devaluation of written law in line with Aristotle's examples in the *Rhetoric*) is Dem. 21.224.[53] The laws, we are told, have no power in themselves. They are inert. It is through their enforcement by the jurors that the laws become a force for order in society. The same image of the laws lies behind the many other passages in which the jurors are asked to make the laws *kyrios*. There is thus a paradox in the presentation of the laws in oratory.

IV

In conclusion, it seems that, on the issue of the role of law in oratory, the advice of Aristotle and Anaximenes should come with a health warning, that use of the arguments proposed could seriously damage a litigant's chances of success, at least as far as the attempts to undermine the authority of law, general and specific, are concerned. Accordingly we find that speakers who have to face real juries in real trials do not use the arguments favoured by the rhetoricians. Both authors also, in concentrating on the specific question of the extent to which the litigant's factual case finds support in the laws, ignore the broader uses to which law was put in oratory of the period. But although the discussion of *nomos* in surviving fourth century rhetoric is flawed, it offers a useful starting point for an examination of the ambiguities in the Athenian attitude to law, and used with caution it may still provide a useful approach to reading the orators.[54]

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[53] See n. 50.

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