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THE ATHENIAN AMNESTY AND THE 'SCRUTINY OF THE LAWS'*

Abstract: The 'scrutiny of all the laws' that Andocides invokes in his defence *On the Mysteries* is usually interpreted as a recodification with the aim of barring prosecution for the crimes of civil conflict. This article advances four theses against that traditional reading: (1) In Andocides' argument the Scrutiny was designed for a more practicable purpose, not to pardon crimes unpunished but to quash any further action against former *atimoi*, those penalized under the old regime but restored to rights in 403. In context, coming close upon the summary of Patrocleides' decree, 'all the laws' means all laws affecting *atimoi*. (2) The other evidence from inscriptions and literary testimony, for the Athenian Amnesty and similar agreements, supports this reading: the oath that closed the covenants, *mê mnêsikakein*, functions as a rule of estoppel or 'no reprise'; it was not in itself a pledge of 'political forgiveness'. In regard to the Scrutiny, as in Patrocleides' decree, the oath means that old penalties, now cancelled, can never again be enforced. (3) The Scrutiny itself was a reauthorization of the old laws for summary arrest and other standard remedies against *atimoi* who trespass or violate their restrictions. As a corollary to this re-enactment, the statute of limitations was introduced, 'to apply the laws from Eucleides': the rules punishing the disfranchised cannot be used against those whose liabilities were incurred before 403. (4) Teisamenus' decree for new legislation was prior to this revision; it is not the decree that Andocides read to the court as a document of the Scrutiny. An ancient editor simply inserted the wrong document. Teisamenus envisioned no alteration of the 'Solonian Code'; the decree for Scrutiny was an unforeseen but necessary correction. These measures were successive reforms sorting out the new hierarchy of rules, a process whose complexity is attested in Diocles' law.

IN the late summer of 403, the warring parties at Athens reached a settlement and sealed their covenants with the oath *mê mnêsikakein*. Thereafter certain essentials of their agreement were translated into law. Andocides, in his defence *On the Mysteries,* gives the only surviving account of this process (81-9). He tells us that the first reform was a 'scrutiny of all the laws', that its purpose was to shield from prosecution many citizens like himself, and that laws ratified in this process were then inscribed. In the manuscripts we find a document to verify this Scrutiny: the decree of Teisamenus. But this decree makes no reference to amnesty and describes an altogether different operation. Andocides seems to have invented a recodification that did not happen.[1]

This passage is crucial to our understanding of how democracy was reconstructed. Here we have documentary evidence alongside first-hand testimony for the founding of the new regime. But the combination creates a problem that now seems insoluble. Noel Robertson has made a compelling case that the decree of Teisamenus simply contradicts Andocides' interpretation: where the orator recalls a procedure authorizing old laws, the decree describes a protocol for drafting new laws for temporary publication.[2] Like others before him, Robertson has privileged the document and therefore discounted the orator's explanation.

* The present study has profited greatly from constructive reading by the referees for *JHS*.

[1] Rejecting Andocides' testimony: W.S. Ferguson, 'The Athenian law code and the old Attic trittyes', in *Classical Studies presented to E. Capps* (Princeton 1936) 144-58; followed by Kevin Clinton, 'The nature of the late fifth-century revision of the Athenian law code', in *Studies in Attic Epigraphy, History and Topography presented to Eugene Vanderpool* (*Hesperia* Suppl. 19, Princeton 1982) 27-37; Noel Robertson, 'The laws of Athens, 410-399 BC: the evidence for review and publication', *JHS* 110 (1990) 43-75. Attempting to reconcile Andocides' argument and Teisamenus' decree: A.R.W. Harrison, 'Law-making at Athens at the end of the fifth century B.C.', *JHS* 75 (1955) 26-35; D.M. MacDowell, *Andokides: On the Mysteries* (Oxford 1962) esp. 194-9; *id.*, 'Law-making at Athens in the fourth century', *JHS* 95 (1975) 62-75.

[2] Robertson (n.1) 45-6: 'The only source to suggest that the whole body of Athenian laws was called into question... is Andocides. The suggestion is self-serving; Andocides would have us think that Athens was created anew in 403'; we must 'take the document by itself, and then see what Andocides has made of it'. As Ferguson (n.1) 145 n.8 put it, we must accept the decree alone as 'fact': 'It is in the words of the orator, if anywhere, that we must look for perversion.'

But the next step toward a solution is surely to sever the connection.[3] Andocides never identifies the mover of the decree for Scrutiny and we have no confirmation that this was the evidence he offered. We would do well to remember: this may not be the document he intended. Let us examine Andocides' argument on its own assumptions and against independent evidence, and not be unduly prejudiced by the best guess of an editor centuries later.

By this approach, the basic questions are these: (I) What was the purpose of the Scrutiny as Andocides represents it? (II) How does this purpose compare with other evidence on the ancient amnesty? (III) How was the Scrutiny supposed to affect the workings of the law? And then (IV), how or how well does this measure connect with the other reforms of 403-400?

I. THE PURPOSE OF THE SCRUTINY (AND. 1.81-5)[4]

> When you returned from Peiraeus, having it in your power to take vengeance, you decided to let go of the past; you considered saving the city more important than personal vendettas. And so you resolved *mê mnêsikakein*[5] for what was done to one another, and with that resolve you chose twenty men to take charge of the city until the laws could be passed, meanwhile to abide by the laws of Solon and the statutes of Draco. (82) But when you had chosen a council by lot and appointed 'lawgivers', they found[6] that there were many of the laws of Solon and Draco by which many of the citizens were liable for past events. Convening the assembly, you deliberated about those (laws) and decreed first to scrutinize all the laws and then to write up in the Stoa those of the laws confirmed in scrutiny. Read me the decree... (85) So the laws were confirmed in scrutiny according to this very decree, and the ones validated were written up in the Stoa.

As Andocides presents it, the first measures of the new democracy were inspired by a concern that old charges might stir up an avalanche of lawsuits: 'many' citizens, he insists, were liable for past events under 'many' of the established laws. The peculiar concern of Andocides is one he also attributes to the framers of the early reforms, that others would be liable to the same sort of regressive prosecution that was brought against him.[7] There is no such aim of amnesty acknowledged in Teisamenus' decree, the document framed by Andocides' comments.

[3] Scholars have often discounted the connection between Scrutiny and amnesty: G. F. Schömann, *Die Verfassungsgeschichte Athens* (Leipzig 1854) 91; R. Großer, *Die Amnestie des Jahres 403 v. Chr.* (Minden 1868) 41; J. Schreiner, *De corpore iuris Atheniensium* (Bonn 1913) 92-7; P. Cloché, *La restauration démocratique à Athènes en 403 avant J.-C.* (Paris 1915) 276 with n.1, concluding, 'there was only one law designed to consolidate the amnesty: the law of Archinus [for *paragraphê*]'.

[4] Ἐπειδὴ δ' ἐπανήλθετε ἐκ Πειραιῶς, γενόμενον ἐφ' ὑμῖν τιμωρεῖσθαι ἔγνωτε ἐᾶν τὰ γεγενημένα, καὶ περὶ πλείονος ἐποιήσασθε σώιζειν τὴν πόλιν ἢ τὰς ἰδίας τιμωρίας, καὶ ἔδοξε μὴ μνησικακεῖν ἀλλήλοις τῶν γεγενημένων. Δόξαντα δὲ ὑμῖν ταῦτα εἵλεσθε ἄνδρας εἴκοσι· τούτους δὲ ἐπιμελεῖσθαι τῆς πόλεως, ἕως ἂν οἱ νόμοι τεθεῖεν· τέως δὲ χρῆσθαι τοῖς Σόλωνος νόμοις καὶ τοῖς Δράκοντος θεσμοῖς. (82) Ἐπειδὴ δὲ βουλήν τε ἀπεκληρώσατε νομοθέτας τε εἵλεσθε, εὑρισκόν τε τῶν νόμων τῶν τε Σόλωνος καὶ τῶν Δράκοντος πολλοὺς ὄντας οἷς πολλοὶ τῶν πολιτῶν ἔνοχοι ἦσαν τῶν πρότερον ἕνεκα γενομένων, ἐκκλησίαν ποιήσαντες ἐβουλεύσασθε περὶ αὐτῶν, καὶ ἐψηφίσασθε, δοκιμάσαντες πάντας τοὺς νόμους, εἶτ' ἀναγράψαι ἐν τῆι στοᾶι τούτους τῶν νόμων οἳ ἂν δοκιμασθῶσι. Καί μοι ἀνάγνωθι τὸ ψήφισμα... (85) Ἐδοκιμάσθησαν μὲν οὖν οἱ νόμοι, ὦ ἄνδρες, κατὰ τὸ ψήφισμα τουτί, τοὺς δὲ κυρωθέντας ἀνέγραψαν εἰς τὴν στοάν.

[5] For convenience I shall sometimes render this crucial phrase as 'not to recall (past) wrongs'. But, as Alan Boegehold pointed out to me, the compound *mnêsikakein* often seems closer to 'injure by recalling'. The brunt of the prohibition falls upon the second element *-kakein*; the genitive phrase that often follows, usually in the perfect (*gegenêmenôn* or *parelêluthotôn*), goes closely with the first element, *mnêsi-*.

[6] Where the MSS read νομοθέτας τε εἵλεσθε, εὑρισκόν τε, κτλ., editors have emended to the participle εὑρίσκοντες, to agree with 'you (Athenians)'. It seems preferable to keep εὑρισκον (or regularize to ηὕρισκον). For comment on key phrases, see also below at n.64.

[7] *Cf.* 86: αὐτῶν ἕνεκα τῶν νυνὶ ποιουμένων, ἵνα τούτων μηδὲν γίγνηται μηδὲ ἐξῆι συκοφαντεῖν μηδενί.

But let us recognize, first of all, that Andocides is referring to a series of measures: (1) an inaugural resolution authorized the transitional government of the Twenty; (2) a democratic council was chosen and, presumably in response to their *probouleuma*, *nomothetai* were appointed; and (3) only then when the *nomothetai* revealed the problem, did the assembly decree the Scrutiny. It is the very first decree, authorizing the interim regime, that began by acknowledging the oath that closed the covenants. Andocides emphasizes this purpose by the turn of phrase, ἔδοξε μὴ μνησικακεῖν... δόξαντα δὲ ταῦτα, as though the decree began by recognizing this prior convention.[8] The implication is at least plausible; later antiquity assumed that there was a specific decree prescribing *mê mnêsikakein*.

This historic phrase is usually interpreted as a general amnesty, granting immunity from prosecution for the wrongs of civil conflict; indeed, Andocides' testimony is often cited to illustrate this purpose. But *mê mnêsikakein* does not in itself convey 'amnesty' in this sense; despite ancient confusion, it is not synonymous with *amnestia*.[9] Scholars have often remarked upon the distinction only to lose sight of it amid the complicated events of 403-399. Andocides himself never quite says that all past offences are forgiven. What he does tell us points to a more limited effect.

Andocides regards the pledge *mê mnêsikakein* as a standard guarantee that reinforces other, more specific covenants of reconciliation. It is naturally linked with the cancellation of *atimia*. He tells us that a similar amnesty was devised on the eve of Marathon, and that the purpose was to restore to their rights those who had been exiled or disfranchised after the Peisistratids were driven out.[10] He may be mistaken or misleading about the prime beneficiaries (as he is about the role of his own ancestors), but the ancient amnesty was clearly part of popular ideology; the precedent is affirmed by Patrocleides' decree (73). And in both the ancient example and the recent parallel, the rule *mê mnêsikakein* serves as a safeguard for the former *atimoi* who are restored to their rights. As Andocides tells it, this was the commitment that saved Athens and raised her to pre-eminence.

> When the exiles returned, they put some to death and condemned others to exile, and yet others they allowed to remain in the city but deprived them of rights. (107) Afterward, when the King invaded... they resolved to recall the exiles and to restore the disfranchised to their rights (τοὺς ἀτίμους ἐπιτίμους ποιῆσαι)... giving pledges and great oaths to one another... In battle they prevailed and thus liberated Hellas and saved their fatherland. (108) Then, having accomplished such a task, they refused to 'recall wrongs' (*mnêsikakêsai*) for what had happened before (their agreement)... Because of their solidarity (*homonoein*), they won the empire...

Thereupon Andocides spells out what the historical example should mean for the new regime, using the very same phrasing to emphasize the parallel:

[8] Similarly Teisamenus begins (And. 1.83) by recognizing a fundamental covenant, to abide by the laws of Solon and Draco; *cf.* Xen. *HG* 2.4.42, νόμοις τοῖς ἀρχαίοις χρῆσθαι. On this conservative mandate, see below §IV.

[9] *Amnestia* as a guarantee of political forgiveness emerged in the Hellenistic period; *cf.* U.E. Paoli, *Studi sul processo attico* (Padua 1933) 122-3 with nn.2-3. Provisions for *amnestia* as specific pardon (without *mê mnêsikakein*): *SIG*^{3} 633 (Miletus, 180 BC), *SEG* 29.1130*bis* (Temnos, 2nd c. BC). Especially revealing is the treaty between Miletus and Magnesia, *SIG*^{3} 588, traditionally dated 196; S. Ager, *Interstate Arbitrations in the Greek World, 337–90 B.C.* (Berkeley 1996) 109, preferring a date in the 180s. All who served as generals or other officials in the recent conflict are to have 'amnesty and immunity' for acts of war (ἄδειαν καὶ ἀμνηστίαν, 60-4). The closing oath then follows the traditional form (78-89): πάσας διαφυλάξειν τὰς συνθήκας καὶ ἐμμενεῖν τοῖς δεδογμένοις καὶ μὴ μνησικακήσειν περὶ μηθενὸς τῶν προγεγονότων (*bis*).

[10] On Andocides' confusion and family tradition, see Rosalind Thomas, *Oral Tradition and Written Record* (Cambridge 1989) 139-44; *cf.* MacDowell, *Andokides* (n.1) 212-13.

(109) You yourselves suffered no lesser evils than they but, as good men born of good stock, showed your abiding virtue: for you (too) judged it right to recall the exiles and restore the disfranchised to their rights (τοὺς ἀτίμους ἐπιτίμους ποιῆσαι). What is there left that you owe to their honour? Not to 'recall past wrongs' (*mnesikakêsai*); for you know that the city once became great and prosperous from a more feeble beginning, and the same lies in store for us now, if we as citizens should be willing to keep sane policy and preserve solidarity (*homonoein*).

This passage connects the implications of key terms. 'Solidarity' or 'like thinking' (*homonoein*) is the commitment to common cause against the external threat.[11] 'Not to recall past wrongs' is the corollary commitment against internal conflict, not to wrong fellow-citizens by reprise of settled claims. *Mê mnêsikakein* bars the festering enmity that would come of reviving old liabilities. Past fines and debts to the polis, and the disabilities that came with them, have now been cancelled by the dispensation, 'to restore the disfranchised to their rights' (τοὺς ἀτίμους ἐπιτίμους ποιῆσαι). This restoration of rights is the essence of amnesty at Athens, going back to Solon's Amnesty Law (Plut. *Sol.* 19): Ἀτίμων· ὅσοι ἄτιμοι ἦσαν πρὶν ἢ Σόλωνα ἄρξαι, ἐπιτίμους εἶναι. And in Andocides' account this is the proper scope of the oath *mê mnêsikakein*: it does not in itself convey pardon for outstanding offences; it is a commitment to abide by other, rather specific terms of settlement.[12]

Let me be clear about the scope of this correction. This is not to deny that *mê mnêsikakein* often conveys a broader moral or therapeutic notion of 'forgetting' old enmity.[13] In the speeches, after all, the meaning of *mnêsikakein* often seems 'up for grabs', open to broad construction. The oath is invoked for purely prejudicial effect in cases that may have little or nothing to do with the amnesty.[14] And that expansive construction greatly altered the meaning over time. But we are here concerned with the value of *mê mnêsikakein* as a rule of some legal effect, in cases where the bearing of the covenants is directly *at issue*. It is this functional value that Andocides means to invoke in his defence, and it is a value that his audience would readily comprehend. In such contexts *mnêsikakein* properly means taking action on a claim that has been already disposed of, where the two parties have resolved their differences and one or the other then goes back on their commitment. Greek, after all, has quite a lexicon of antagonism and retribution, suitable to a society that interpreted every transaction in terms of 'friends and foes'. What distinguishes *mnêsikakein* from *timôrein, tinesthai,* and so on, is the clear implication that the matter for retribution has been settled;[15] a reconciliation has been reached, and yet the avenger strikes back at a wrong that should have been resolved. Classical and classicizing writers sometimes found occasion to articulate this very distinction.[16]

[11] P. Funke, *Homónoia und Arché* (*Historia* Einzelschrift 37, Wiesbaden 1980) 17-22.

[12] The fixed idea that the Athenians invoked *amnestia* of the Hellenistic type owes much to Cicero, who cited the Athenian precedent in 44 (*Phil.* 1.1). *Cf.* Großer (n.3) 38-41; L. Canfora, *Studi di storia della storiografia Romana* (Bari 1993) 307-9, insisting that Cicero used the proper term, *mê mnêsikakein*.

[13] This meaning is explored with great insight in recent work: Nicole Loraux, *La cité divisée. L'oubli dans la mémoire d'Athènes* (Paris 1997) esp. 146-72; Andrew Wolpert, *Remembering Defeat. Civil War and Civic Memory in Ancient Athens* (Baltimore 2001).

[14] For example, Lysias 30. 9-16, well analysed by S.C. Todd, '*Lysias against Nikomachos*: the fate of the expert in Athenian law', in L. Foxhall and A.D.E. Lewis (eds), *Greek Law in its Political Setting* (Oxford 1996) 101-31.

[15] *Cf.* Herodotus 8.29: the Thessalians propose to settle with the Phocians, 'let us be paid 50 talents in compensation, and we shall then have satisfaction and (thereafter) shall not recall past wrongs' – τὸ πᾶν ἔχοντες οὐ μνησικακέομεν.

[16] Thus Demosthenes objects, 23.191-3: 'One must not *mnêsikakein*... But I think this word would rightly be used if, in some crisis, a pledge of assistance had been written (βοηθείας γεγραμμένης)... Since such is not the case...' the objection *mê mnêsikakein* does not apply. *Cf.* Dem. 18.94-9: Athens made alliances with old enemies and then resisted the urge for reprisal (οὐ μνησικακήσετε). *Cf.* Aelius Aristides, *Leuktrikos* 432.1-8 (Jebb): 'if we have never received our fair share, we escape the imputation of *mnêsikakein*, though we pursue our claims against them; for whoever perpetrates some further injury when he has already satisfied his just claims... this I regard as *mnêsikakein*'.

To understand Andocides' argument we need to bear in mind this sense of the oath as a rule of legal effect. In treaties of reconciliation the pledge *mê mnêsikakein* is not in itself a bar against prosecuting partisan crimes in the first instance, but a rule against further retribution in matters that have been settled once and for all. It is essentially a rule of estoppel or 'no reprise': no going back on binding commitments.[17] In some speeches, of course, we find adversaries arguing over the implications. But in the early cases where the procedural effect of the reconciliation is directly at issue – as it is in Andocides' case – it is this primary sense of estoppel that frames the dispute.

II. *MÊ MNÊSIKAKEIN* AND ANCIENT AMNESTY

The other evidence for this rule of no reprise is found in three sources: (i) the extant inscriptions of comparable treaties; (ii) the scattered testimony on the Athenian settlement of 403; and (iii) the surviving speech from the other 'test case' where *mê mnêsikakein* is directly at issue, Isocrates' *Against Callimachus*.

(i) In treaties and decrees of the fifth and fourth centuries, *mê mnêsikakein* functions as a seal upon the agreement, a reciprocal pledge to abide by the covenants (*synthêkai*) that the parties have sworn to, not to dredge up old grievances that the covenants have specifically settled. The covenants usually include rules for resolving the inevitable disputes through the courts or other legal recourse. The closing oath 'not to recall past wrongs' is not in itself a cancellation of claims: it means that all parties must settle their grievances by the agreed conventions; there shall be no retribution outside this arrangement and no resurrecting old issues that have been resolved by stipulations in the agreement.

The Athenian alliance with the Bottiaeans (422 BC) gives us the earliest inscriptional evidence. The surviving text is fragmentary, but it is sufficient to show that *mê mnêsikakein* is not in itself a bar to lawsuits; directly preceding the instructions for the oath, there is a provision for litigation, probably requiring that certain suits be transferred to Athens. Then, in conclusion, the representatives for both sides are to swear: 'The oath for the Athenians shall be as follows: I shall defend the Bottiaeans who join in the alliance and shall keep the alliance faithfully, zealously and without deceit, according to the covenants; and I shall not recall wrongs for the past.'[18] The Bottiaean officials swear with the same closing formula. Their agreement recognizes certain measures for proper retribution, including lawsuits.

Sixty years later we find an Athenian decree dealing with rebellious allies in a similar situation (*IG* ii² 111 = Tod 142). The decree regarding Iulis on the nearby island of Ceos is more detailed and complete than the Bottiaean decree, and it is especially noteworthy for our inquiry, as much of the agreement runs parallel to the amnesty at Athens forty years earlier. Recently the island had defected from the alliance. The Athenian *proxenos* was killed and the pro-Athenian party was driven out. Chabrias soon recovered the island: the killer of the *proxenos* was tried and executed at Athens; the exiles were restored and the alliance was renewed. But upon Chabrias' departure, hostilities resumed; the pro-Athenian party was again driven out and the

[17] Estoppel has evolved into an elaborate doctrine of equity but it remains, in simplest terms, '[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true' (*Black's Law Dictionary*, ed. B. Garner (7th edn, St. Paul, MN 1999) 570).

[18] *IG* i³ 76 = Tod 68; *SEG* 3.16. The first surviving lines provide for lawsuits: [...διδόντ]ω[ν] δὲ τὰς δί[κας...], as Tod recognized (167). The oath of the Athenians: (12-16) ... ἀμυνῶ τοῖς] Βοττι[αίοις τοῖς] χσυντιθεμέ[νοις τὴν χσυμμαχίαν, κ]αὶ τὴν χσ[υμμαχία]ν πιστῶς καὶ [ἀδόλως φυλάχσω Βοττι]αίοις προ[θυμούμεν]ος κατὰ τὰ χ[συγκείμενα, καὶ οὐ μνη]σικακήσω τῶ[ν παρ]οιχομένων ἕνεκα. Oath of the Bottiaeans and provision for publication (16-22): ... οὐδε μνησικακήσω τῶν παροιχομένων ἕνεκα. Τὰς δὲ χσυνθήκας τά[σδε καὶ τὸν ὅρκον κατα]θεῖναι...

stelae publishing the oaths and covenants were struck down. Now Aristophon was sent out as general and succeeded in restoring control to the pro-Athenians. Representatives from Iulis then concluded a settlement at Athens, sealed with the standard oath on both sides, *mê mnêsikakein*.

The provisions of this decree show that the closing oath *mê mnêsikakein* is not in itself a grant of pardon or protection. Such measures have to be spelled out. The one clause that most closely approximates such a rule is the formula ἀπιέναι ἐπὶ τὰ ἑαυτῶν: the exiled leaders are now to return to their place in the community (49-51). Thus the defenders of Athens who had suffered banishment are to reclaim their property and the rights to defend it. In this instance the returnees are specifically restored to 'the property that [their enemies] confiscated contrary to the oaths and covenants' (35-8).

The principle that each of the adversaries 'return to his own estate' appears to be standard in settlements of civil conflict in the fifth and fourth centuries.[19] As we shall see, this same formula was instrumental in the Athenian settlement of 403. At Iulis it is an integral part of a complex arrangement to resolve old grievances, including litigation. Those responsible for the insurrection are punished with exile and confiscation. Their names are to be published on stelae; anyone who disputes the charge is to provide surety within thirty days and will then stand trial at Ceos and at Athens, 'according to the oaths and covenants' (41-9). Any outstanding grievances involving Athenians or Athenian *proxenoi* (amounting to more than a mina) shall go to trial at Athens on appeal (73-5). The oath *mê mnêsikakein* then follows as the seal upon this settlement, for both sides to swear.[20]

These agreements show the pledge *mê mnêsikakein* in its proper reciprocal force: even where the settlement is imposed by imperial Athens, the pledge functions as a commitment by both parties to close their dispute. Though Athens may virtually dictate the agreement, it is treated as a contractual obligation, binding upon the parties by their own accord.

Forty years after the Athenian solution at Iulis we find a similar arrangement between the warring parties at Tegea (*SIG*^{3} 306 = Tod 202), in response to the Exiles Decree of Alexander.[21] Here we find elaborate provisions for resolving disputes about land and other property:[22] suits may be brought within a period of sixty days before a special 'foreign court' (*dikastêrion*

[19] The fundamental covenant, ἀπιέναι ἐπὶ τὰ ἑαυτῶν or ἔχειν τὰ ἑαυτῶν, encompassed the full range of citizen rights to property and legal recourse. *Cf.* Brasidas' edict at Amphipolis, Thuc. 4.105.2: τὸν μὲν βουλόμενον ἐπὶ τοῖς ἑαυτοῦ τῆς ἴσης καὶ ὁμοίας μετέχοντα μένειν; at Torone (4.114.1), τὸν βουλόμενον ἐπὶ τὰ ἑαυτοῦ ἐξελθόντα ἀδέως πολιτεύειν. With relocation, τὰ ἑαυτοῦ entails only moveable goods (at Amphipolis, τὸν δὲ μὴ ἐθέλοντα ἀπιέναι τὰ ἑαυτοῦ ἐκφερόμενον). But otherwise the primary implication is that each party will hold or recover his real property as well as moveables. *Cf.* Thuc. 5.18.5, of the cities recovered by Athens, ἐξέστω ἀπιέναι ὅποι ἂν βούλωνται αὐτοὺς καὶ τὰ ἑαυτῶν ἔχοντας. Similarly in the Athenian decree for Elaeus (341/40) *IG* ii^2 228 (= Tod 174) 11-15, Chares is to see to it, ὅπως ἂν ἔχοντες... τὰ ἑαυτῶν ὀρθῶς καὶ δικαίως οἰκῶσιν.

[20] *IG* ii^2 111 = Tod 142 (362 BC). Oath of the Athenians and the allies (56-61): Οὐ μνησικακήσω τῶν πα[ρ]ελη̣λυθότων πρὸς Κείους οὐδ[ε]νός, οὐδὲ ἀποκτενῶ... οὐδὲ φυγάδα ποήσω τῶν ἐμμενόντων τοῖς ὅρκοις καὶ τ]αῖς συνθήκαις ταῖσδε. Answered by the oath of the Ceans, 82-4. For the settlement at Ceos, see M. Dreher, *Hegemon und Symmachoi: Untersuchungen zum Zweiten Athenischen Seebund* (Berlin 1995) 120-4, 136; Dreher 150 suggests a similar intervention is recorded in the very fragmentary *IG* ii^2 281, where the closing oath, οὐ μνησικακήσω, is preserved.

[21] Diodorus 17.109, 18.8; *cf.* Justin 13.5. The event is mentioned by Dinarchus 1.81 and Hyperides, *Against Demosthenes* col. 18. Even Diodorus, writing in an era when *amnestia* was current, did not characterize this event with that term: it is called simply *kathodos* (probably following his third-century source Hieronymus). On the setting, see Ian Worthington, 'The date of the Tegea decree (Tod ii 202): a response to the *diagramma* of Alexander III or of Polyperchon?', *AHB* 7.2 (1993) 59-64; A.J. Heisserer, *Alexander the Great and the Greeks: the Epigraphic Evidence* (Norman, OK 1980) 205-29. Worthington persuasively defends the traditional date of 324; Tegea is the only community we know to have complied (and did so grudgingly). The amnesty at Mytilene (Tod 201) is built on similar arrangements, probably concluding *mê mnêsikakein,* now more plausibly dated 333/2: Worthington, 'The date of the Mytilene decree', *ZPE* 83 (1990) 194-214.

[22] A. Plassart, 'Règlement concernant le retour des Bannis à Tégée en 324 av. J.-C.', *BCH* 38 (1914) 125-60; *IG* v.2 p. xxxvi; Heisserer (n.21) 213-25.

xenikon) apparently manned by neighbouring Mantineans; after that period, it is not permitted to litigate by this special procedure but only in the citizens' court (*dikastêrion politikon*). If some cause of grievance is later discovered, recovery is severely restricted: those who returned initially must bring their claims either before the foreign court or before the citizens' court within sixty days after its inception: 'if he does not bring suit in this period, it is no longer allowed for him to litigate' – μηκέτι ἐξέστω αὐτῶι δικάσασθαι. Exiles who return after the initial period, 'when the foreign court is no longer in session', may list their claims with the generals within sixty days after their return; if there is then ground for action, the case may only be tried at another venue, at Mantinea; and again 'if he does not bring suit in this period, it is no longer allowed for him to litigate' – again, μηκέτι ἐξέστω αὐτῶι δικάσασθαι (25-37). Any such limit to litigation has to be specified; it is not implicit in the pledge 'not to recall past wrongs'.

Then the Tegeans seal their covenants with the oath *mê mnêsikakein*: 'I shall befriend the returning exiles... and not recall past wrongs (οὐ μνησικακήσω)... nor hinder the safety of any returnees' (57-62). The pledge *mê mnêsikakein* does not in itself convey immunity from prosecution; rather, it enforces the agreed restrictions on how far retribution can go.

(ii) Now, bearing in mind these parallels, let us turn back to the amnesty that Andocides invoked in 400/399. Here we have no single reliable document, but the scattered testimony indicates the same principle that we find in the inscribed treaties. There was no general pardon for outstanding offences but rather a set of covenants resolving the most pressing disputes.[23]

At Athens, as elsewhere, recovery of lost property was a major concern. Under the Athenian arrangement citizens were entitled to reclaim real property outright, apparently without compensation to the holder.[24] Such is the natural implication of the formula ἀπιέναι ἐπὶ τὰ ἑαυτῶν ἕκαστον, and we find confirmation in the fragmentary speech *Against Hippotherses*.[25] The latter document also indicates that the returnees were empowered to recover any moveable property that was simply appropriated by the oligarchs and not sold for state revenue.[26] Moveables (including slaves) that had been sold for the state had to be repurchased from the current owner, apparently at the same bargain price (or possibly at half that price).[27] There was also a specific

[23] A useful reassessment of the covenants was given by T. Loening, *The Reconciliation Agreement of 403/402 BC in Athens* (*Hermes* Einzelschrift 53, Wiesbaden 1987). Stephen Todd's Cambridge dissertation, 'Athenian Internal Politics 403–395 BC with Particular Reference to the Speeches of Lysias' (1985, unpublished) gives an excellent critique of the self-congratulatory tradition and the scholarship that has followed it, with a survey of evidence on the terms of amnesty (59-70) and a catalogue of apparent violations (71-154).

[24] On the formula ἀπιέναι ἐπὶ τὰ ἑαυτῶν, see above n.19. For recovery of real property, *cf.* Isoc. 16.46. Lysias, *Against Hippotherses*, involves a dispute over slaves, but gives incidental confirmation for the rule on real property. The advocate for Lysias notes that Lysias as a non-citizen owns no land or houses which he would have recovered had he been a citizen (35-46). For various parallels, see H.-J. Gehrke, *Stasis. Untersuchungen zu den inneren Kriegen in den griechischen Staaten des 5. und 4. Jahrhunderts v. Chr.* (Munich 1985) 262-4.

[25] J.-H. Kühn, 'Die Amnestie von 403 v. Chr. im Reflex der 18. Isokrates-Rede', *WS* NF 1 (1967) 35, assumes 'die Rückkehr in die Haupstadt... auch die Wiedereinsetzung in die alten Rechte'; but denies that it entails full restoration of property rights. Similarly, Loening (n.23) 53 argues that the formula does not convey full property rights, that some compensation was required; his argument relies upon a doubtful reading in Lysias, *Against Hippotherses*; see now M. Sakurai, 'A new reading in *POxy* 13.1606', *ZPE* 109 (1995) 177-80.

[26] Thus Loening (n.23), rightly. This is the natural implication of *Hippotherses* 30-5: those who had 'seized this property, valued at 70 talents, were not able to dispose of it or acquire it over many days'. Evidently the agents for the Thirty were responsible for seeing that confiscated property was sold, presumably with two-thirds of the revenue to the state, or to purchase it from the state if they saw fit to legitimize their depredations. Hippotherses and associates had not done so. Property that had been properly paid for had to be repurchased by returnees, but property that had not been converted to state revenue could be simply seized by the returning owner.

[27] Loening (n.23) 51-2 assumes that payment is half the purchase price, and the holders are not required to sell at that price. But this is overly generous. It is clear that Hippotherses *made a claim* for half the value of the item(s) at issue, but thus far Lysias has refused to pay; his advocate insists that he is entitled to recover his chattel without compensation.

covenant that 'informants and denouncers', including those who had shared in the proceeds of confiscation, could not be prosecuted for that complicity.[28] Of course, there would be disputes over who the rightful owner was or what was fair value. But the Athenians seem to have put off such cases: ordinary civil suits simply had no recourse to the courts in the first year.[29] Disputes involving property confiscated by the new regime could be brought before the special court of the 'syndics'; but otherwise, by barring property disputes from the ordinary courts, the Athenians provided a powerful inducement to abide by old decisions or settle in arbitration.

Public liabilities – fines and debts to the polis – were cancelled. This cancellation, as we shall see (§III), was part of the traditional amnesty recognized in Patrocleides' decree (Andoc. 1.76-80), and Andocides claims that the same policy wiped the slate clean in 403. Whatever we make of Andocides' testimony, *Athenaion Politeia* almost certainly alludes to such measures (40.3): the new regime at Athens 'not only erased charges (αἰτίας ἐξήλειψαν) incurred under the old regime, but also paid off jointly the moneys which the Thirty had borrowed for the war, though the covenants required separate payments'.[30] This cancelling of past charges is often construed as a reference to general amnesty, a pardon for partisan crimes.[31] We are to understand 'erasure', ἐξαλεῖψαι, metaphorically: they swore to forgive past offences and thus erased them from memory. But wherever *Ath. Pol.* speaks of 'erasure', he means literally to delete the actual records.[32] And in this context the author is tallying financial considerations: he commends the new regime for paying off debts incurred by the oligarchs and resisting the call for land redistribution. So, if we read this phrase in the usual sense and in keeping with the context, it refers to the erasure of decrees and legal decisions, thus cancelling old debts and disabilities.

Major crimes of bloodshed and official wrongdoing were addressed by specific covenants. Warrant and arrest to the council were disavowed.[33] Traditional proceedings for homicide were authorized against the killer 'by his own hand', the *autocheir*. But charges of complicity in the proscriptions of the Thirty were expressly disallowed.

The handling of such divisive crimes preoccupies the author of *Athenaion Politeia*. This problematic passage will require detailed treatment elsewhere. Here let me simply suggest that the pledge *mê mnêsikakein* may have much the same sense as we find in the inscribed treaties, though that meaning is difficult to discern amid the complications into which this clause is introduced. After devoting two-thirds of his account to arrangements for the oligarchs' enclave at Eleusis, the author concludes his fragment of the covenants with the rule for homicide and for

[28] Isoc. 18.20, discussed below, p. 10. Loening (n.23) 56 insists there was no such clause; it was simply implicit in the amnesty.

[29] D.M. MacDowell, 'The chronology of Athenian speeches and legal innovations in 401–398 B.C.', *RIDA* 18 (1971) 267-73. Lys. 17.3 refers to a case prosecuted as soon as *dikai astikai* were allowed, with trial in 401/400. Todd takes issue: 'Athenian Internal Politics' (n.23) 13 n.15, 210-12. And David Whitehead has now shown that the end of the *iustitium* may be earlier than that first dated trial: 'Athenian laws and lawsuits in the late fifth century B.C.' (forthcoming in *Mus.Hel.*). But I doubt that MacDowell's chronology needs to be altered by much.

[30] *Ath. Pol.* 40.3-4: οὐ γὰρ μόνον τὰς περὶ τῶν προτέρων αἰτίας ἐξήλειψαν, ἀλλὰ καὶ τὰ χρήματα Λακεδαιμονίοις ἃ οἱ τριάκοντα πρὸς τὸν πόλεμον ἔλαβον ἀπέδοσαν κοινῇ, κελευούσων τῶν συνθηκῶν ἑκατέρους ἀποδιδόναι χωρὶς... ἐν δὲ ταῖς ἄλλαις πόλεσιν οὐχ οἷον ἔτι προστιθέασιν τῶν οἰκείων οἱ δῆμοι κρατήσαντες, ἀλλὰ καὶ τὴν χώραν ἀνάδαστον ποιοῦσιν. The risk of retaliatory fines is illustrated by the turn of events at Phleius in 384–379: Xen. 5.2.10, 5.3.10-13, 25; *cf.* Gehrke (n.24) 263.

[31] Notably Loraux, *La cité divisée* (n.13) 152-4, treating this erasure as a therapeutic strategy. The essay containing this comment, 'De l'amnistie et de son contraire', was originally published in *Usages de l'oubli* (Paris 1988); later translated by Corinne Pache in *Mothers in Mourning, with the Essay 'Of Amnesty and its Opposite'* (Ithaca and London 1998) 89-91.

[32] *Aleiphein* and its compounds in *Ath. Pol.*, all used of deleting the written record: 36.2, 47.5(*bis*), 48.1, 49.2. The metaphor is rare outside drama. Loraux cites *Theaetetus* 187b.

[33] The bouleutic oath amended to include this restriction: And. 1.91. Relied upon by Philon to quash *endeixis*: Isoc. 18.22. On homicide law and the amnesty, see E. Carawan, *Rhetoric and the Law of Draco* (Oxford 1998) 125-33.

the special accountings available to the Thirty and their colleagues (39.5-6). The pledge *mê mnêsikakein* is closely joined to the provision for prosecuting homicide by traditional remedies, and that was probably its most important application for those who returned or remained in Athens; the rule against pursuing accessories or accomplices in murder is reinforced by the closing oath.[34] There is then the exception regarding the Thirty and other principals of the oligarchic regime. Initially, these men were signatories to the peace but not parties to the covenants at Athens; they are not protected by the fundamental provision, 'each to return to his own estate', ἀπιέναι ἐπὶ τὰ ἑαυτῶν ἕκαστον. Such is the situation as Xenophon reports it, and he is probably reliable on this point: the Thirty and colleagues were initially excluded from the restoration (*HG* 2.4.38): if they trespass in Athens, they are virtual outlaws.[35] In *Ath. Pol.* and Andocides, however, we find a peculiar reprieve for the Thirty, an exception to the exception: 'no one is to "recall past wrongs" against anyone *except* against the Thirty [and their colleagues] *and not* against them *if* they stand accountings'.[36]

By the first exception, the Thirty are simply excluded from the amnesty, and therefore targeted for retribution.[37] The exception to the exception then grants them protection, if and only if they have first submitted to a reckoning in court. Their crimes are subject to litigation in a specific forum, and only thereafter are they protected from reprisal.[38]

Much as we saw in the treaties at Iulis and Tegea, the pledge *mê mnêsikakein* closes the covenants that provide for property and personal rights, as a guarantee of security for those who are parties to the covenants. There is no question of barring *mnêsikakein* against the Thirty unless and until they join in the covenants and a legal decision has disposed of the claims against them. *Mê mnêsikakein* means that once charges are assigned a specific resolution, there is no retribution outside that remedy, and no going back on sanctioned decisions. The oath in itself does not cancel other, unresolved wrongs. It is only because retributive measures are prohibited by specific covenants that the guilty are protected by the amnesty.

The closing oath in the treaties naturally suggests that an important effect of *mê mnêsikakein* was to blunt the violence of self-help. The parties swear to aid and defend those who abide by the covenants. Those who violate the rule are guilty, typically, of retributive violence, as we see in the literary tradition. Plato, for instance, speaks of those who prevail in civil conflict and then disregard the laws, pursuing their vendettas in bloodshed, σφαγαῖς μνησικακοῦντες.[39] The

[34] The homicide provision in *Ath. Pol.* 39.5 is corrupt but plausibly reconstructed: see M. Chambers' apparatus, *Aristoteles'* Athenaion Politeia (Leipzig 1986), and P.J. Rhodes, *A Commentary on the Aristotelian* Athenaion Politeia (Oxford 1993) *ad loc.* At some point in the tradition a scribe or editor apparently thought that what was required was a rule specifically regarding retributive violence; *cf.* T. Thalheim, 'Zu Aristoteles' Ἀθηναίων Πολιτεία', *BPW* 19 (1909) 703, reading εἴ τις... ἐκτείσαιτο.

[35] Lysias 12.35 and [Lys.] 6.18 attest that the Athenians made proclamation against the surviving oligarchs outside Athens, offering a reward dead or alive.

[36] *Ath. Pol.*'s report of this provision parallels Andocides (1.90) and could derive from him. Leaving aside the arrangements for a separate enclave at Eleusis (moot by 400), the only covenants that *Ath. Pol.* attests for Athens are those promoted by Andocides: the rule for homicide (39.5); the cancellation of public liabilities (40.3); and this provision for the special accountings.

[37] In the standard closing, such as we find at Iulis and Tegea, the parties swear *mê mnêsikakein* and, in the same breath, to protect and defend all who join in the covenants; those who violate or remain outside the covenants are not protected and may be treated as public enemies.

[38] Confusion has arisen from *Ath. Pol.*'s reference to the accountings of Rhinon and his colleagues (38.4). From this example scholars suppose that the Thirty *et al.* might remain in Athens safely for some time pending their accountings. But *Ath. Pol.* makes this distinction: Rhinon's group remained in office, 'took charge under oligarchy and rendered accounts under democracy' in the ordinary way, at the end of their term; the arrangement in 39.6 applies to those who were driven from office and took refuge in Eleusis. *Ath. Pol.* seems unaware of any holdover from the Thirty who might have remained at Athens. Presumably any who returned for accounting would have safe passage, as for voluntary exiles in the homicide law, Dem. 23.72.

[39] *Seventh Letter* 336e-337a; *cf.* Thuc. 4.74.2-3, 8.73.6; Diodorus 15.40.1-2.

anecdote in *Ath. Pol.* 40.2 probably represents the same situation: the *mnêsikakôn* was pursuing self-help, seizing property or retaliating against persons directly, not through litigation.[40] The punishment that Archinus demanded – summary execution – suggests in itself that the *mnêsikakôn* was caught in an act of violence. And *Ath. Pol.*'s comment, that 'no one thereafter recalled past wrongs', makes better sense if we give *mnêsikakein* that common implication of violent reprisal.[41] After all, Archinus had to devise another remedy for abuse of the courts.

(iii) The rule governing disputes among citizens over property or other rights – that '*dikai* and *diaitai* concluded under democracy shall be valid' – was among the covenants soon translated into law.[42] By this rule any legal decision or settlement in arbitration under democracy, whether old or new regime, remained binding. And violation of this rule provides a clear instance of what constitutes *mnêsikakein* in litigation.

Such is the issue in Isocrates' speech *Against Callimachus*, apparently the 'test case' for the law of *paragraphê* that Archinus authored. Scholars have generally supposed that the original ground for *paragraphê* was violation of the oath *mê mnêsikakein* as a vow of political forgiveness; *paragraphê* barred prosecution of partisan crimes in the first instance.[43] But let us briefly reconsider what Isocrates says about the substance of the law and its original intent.

Isocrates never says that prosecuting for partisan crimes was identified in the law as grounds for *paragraphê*. He lays out the legal ground more specifically. The essence of the law is the new procedural rule, that 'if anyone brings suit contrary to the oaths, the defendant is allowed to block the suit (*paragrapsasthai*), and the archons will introduce this issue first'.[44] The oaths and the covenants that they guarantee constitute a commitment to resolve disputes in specific ways; violating those commitments is what constitutes *mnêsikakein*. *Paragraphê* is designed as a remedy against plaintiffs who violate this commitment to close old disputes. The new remedy is especially suited to the kind of case that Callimachus has brought, reviving claims that were previously settled by the rule '*dikai* and *diaitai*... under democracy shall be valid'.

The legal issue is thus defined, §4: Callimachus is 'not only prosecuting contrary to the covenants but also lying about his claims, moreover, in a matter already settled in arbitration'.[45]

[40] Ordinary courts were closed to civil suits for some time (above, n.29). Any regressive public suit that made it to court must be dealt with by the court as the highest authority, and Archinus had no grounds to punish a man for retribution that the court had sanctioned.

[41] The usual view, that the *mnesikakôn* had been prosecuting illegal lawsuits, is awkward at best; see Rhodes, *CAAP* (n.34) *ad loc.*, reasoning that the effective barrier to vindictive litigation was really Archinus' law for *paragraphê*. See Carawan (n.33) 130-2.

[42] Dem. 24.56 = Andocides 1.87-8, ⟨Νόμος.⟩ Τὰς δὲ δίκας καὶ τὰς διαίτας κυρίας εἶναι, ὁπόσαι ἐν δημοκρατουμένῃ τῇ πόλει ἐγένοντο. [Τοῖς δὲ νόμοις χρῆσθαι ἀπ' Εὐκλείδου ἄρχοντος.] The limitation 'from Eucleides' is out of place: in Dem. 24.56, we find a more competent version without the rule 'from Eucleides'; see below at n.67. The substance of the first provision in both versions is confirmed by Isoc. 18.24 and by Andocides 1.88: 'You ratified *dikai* and *diaitai*, all those transacted under democracy, *so that there be no default upon obligations nor resurrecting settled suits, but private transactions should take effect*.'

[43] Thus H.J. Wolff, *Die attische Paragraphe* (*Graezistische Abhandlungen* 2, Weimar 1966); J.-H. Kühn (n.25) 31-73. Kühn is misled on many points by the fixed assumption that the trial is about amnesty in the modern sense, as a bar to prosecuting injuries in the first instance. Thus he explains away the emphasis on the prior settlement and the specific covenant protecting informants (discussed below). He assumes that amnesty itself is *at issue*, therefore that the case belongs to a year of great crisis, soon after 403 (pp. 50-1); passages suggesting a later date must be late addenda (pp. 70, 73).

[44] Isoc. 18, *Against Callimachus:* (2-3): εἰπόντος Ἀρχίνου νόμον ἔθεσθε, ἄν τις δικάζηται παρὰ τοὺς ὅρκους, ἐξεῖναι τῷ φεύγοντι παραγράψασθαι, τοὺς δ' ἄρχοντας περὶ τούτου πρῶτον εἰσάγειν, λέγειν δὲ πρότερον τὸν παραγραψάμενον, ὁπότερος δ' ἂν ἡττηθῇ, τὴν ἐπωβελίαν ὀφείλειν, ἵν' οἱ τολμῶντες μνησικακεῖν μὴ μόνον ἐπιορκοῦντες ἐξελέγχοιντο μηδὲ τὴν παρὰ τῶν θεῶν τιμωρίαν ὑπομένοιεν ἀλλὰ καὶ παραχρῆμα ζημιοῖντο. A. Dorjahn, *Political Forgiveness in Old Athens: The Amnesty of 403 B.C.*. (Evanston, IL 1946), supposed that this summary is all text of the law (and he is often followed) but the final clause (ἵν' οἱ τολμῶντες μνησικακεῖν... ἐξελέγχοιντο) is surely the orator's insight.

[45] Isoc. 18.4: οὐ μόνον παρὰ τὰς συνθήκας δικαζόμενον ἀλλὰ καὶ περὶ τῶν ἐγκλημάτων ψευδόμενον, καὶ προσέτι δίαιταν ἡμῖν γεγενημένην

Under the Ten (the last phase of the oligarchic regime), Callimachus was apprehended as he was about to leave the city with money belonging to one of the rebels in Peiraeus, and the money was confiscated. Isocrates' client was present when the money was seized and Callimachus held him partly responsible. After democracy was restored, they reached a settlement in arbitration, and Isocrates' client assumed he had rid himself of liability by paying part of the loss. But later Callimachus brought suit for a much larger sum.

When Callimachus tried to reopen the case, the archon initially rejected his suit on the basis of a sworn affirmation (*diamartyria*) that the matter was already settled in arbitration.[46] Now in a further attempt to revive his claim, Callimachus argues a new issue, that the defendant was not just an accessory but the informant and instigator of the whole affair. But by this time, Isocrates' client can invoke the law for *paragraphê*.

The matter at hand has nothing to do with partisan crimes. Both Callimachus and Isocrates' client had remained in the city until the last days of the oligarchic regime (when Callimachus appears to have gone to Peiraeus *en route* to a more secure refuge elsewhere). The case now before the court is not a matter of prosecuting an old injury that had gone unpunished: it is a secondary suit over a matter that should have been settled once and for all.

The new remedy, *paragraphê*, was thus designed to enforce the rule of no reprise. 'Those who dare to recall past wrongs' are not simply those who act with forbidden motives but those who take up old claims that were resolved by a prior decision. And chief among those binding decisions were the specific stipulations in the covenants.

The litigious ingenuity of the Athenians is notorious, and it is precisely because a decision in one instance so often led to further litigation at higher stakes that the Athenians resorted to *paragraphê* and other means of estoppel.[47] Such safeguards later proved ineffectual, even counterproductive. But in the early restoration era, when unresolved grievances might escalate into factional violence, there was a compelling need for an effective closing device. There would be many cases where a dissatisfied claimant would not abandon the old dispute with his inveterate enemy: perhaps he would claim that the early decision was not valid; or perhaps he could insist upon some new issue not covered by the previous decision.

In the case against Callimachus, the issue for the jury to decide is of this sort. It is not a single question that the archon might decide from affidavits (as he did initially when Callimachus renewed his claim). There is a second question for the jury to decide by their best judgement, whether the defendant can claim protection under the covenant acquitting 'informants and denouncers'. The importance of this rule is indicated in the argument that follows, and the connection of thought is especially indicative for our inquiry.

In §23, we are told that Thrasyboulus and Anytus, though they know the men who listed their property for confiscation – the *apograpsantes* – 'nonetheless do not dare to bring suit against them or recall past wrongs' (οὐ δίκας λαγχάνειν οὐδὲ μνησικακεῖν). By the usual interpretation, the two terms – 'bring suit' and 'recall past wrongs' – are practically synonymous: there were no lawsuits against those who had taken others' property. But that reading is mistaken on two counts. The phrase οὐ δίκας λαγχάνειν οὐδὲ μνησικακεῖν naturally implies two distinct alternatives.[48] Δίκας λαγχάνειν refers to the decisive point in proceedings where the case is

περὶ αὐτῶν. The third phrase in the tricolon is climactic and meant to seem decisive.

[46] Isoc. 18.12: οὐκ εἰσαγώγιμος ἦν ἡ δίκη διαίτης γεγενημένης.

[47] R. Osborne has aptly dubbed this open-ended process 're(dis)tribution': 'Law in action in Classical Athens', *JHS* 105 (1985) 40-58. The development of *paragraphê* as a function of this process will be treated in detail elsewhere. On later tradition (and modern misreading), see E. Carawan, 'What the laws have prejudged: *paragraphê* and early issue-theory', in C. Wooten (ed.), *The Orator in Action and Theory in Greece and Rome* (Leiden 2001) 17-51.

[48] As Victor Bers pointed out to me in correspondence.

'allotted' for trial; by contrast μνησικακεῖν may refer to other measures outside court. And, as we have seen, there is no bar against asserting rights to property established under democracy; returnees are entitled to reclaim what is theirs. Citizens could simply take possession of their land and houses; most of their moveable goods could be recovered. Thus Thrasyboulus and Anytus were able to seize their real property and secure whatever moveable goods they could find – they were not barred from exercising their claims against *the holders* of that property.

The point that Isocrates wants to make is that even the champions of democracy had not prosecuted by any means, in court or out, the *apograpsantes*, those who had listed property for confiscation and were then rewarded with part of the proceeds.[49] These accomplices in the depredations of the Thirty are protected, just as Isocrates' client claims to be, by the specfic covenant regarding informants and denouncers.

The covenants are treated as a contractual agreement, much like the sworn 'release and quittance' that resolved private disputes.[50] In this regard, the pledge not to recall past wrongs has a special relevance to the covenant upon which Isocrates' client based his first line of defence: the rule that *dikai* and *diaitai* under democracy shall be valid. This was among the measures recently translated into law, as Isocrates emphatically recalls (24). Recent legislation gave binding force to the settlements that citizens made among themselves, in order to resolve the real grievances that could not simply be forgiven. These personal commitments were parallel and instrumental to the greater reconciliation of the warring parties. And as Isocrates so grandly puts it (27-34), the very viability of their society depended on the sanctity of such covenants.

III. THE SCOPE OF THE SCRUTINY AND ITS LEGAL EFFECT

From this profile, we see that the Athenian amnesty recognized certain rights and remedies in the covenants, and the oath *mê mnêsikakein* was the closing of that settlement. Andocides insists that this commitment was the inspiring purpose for a measure 'scrutinizing all the laws'. His words are usually interpreted as requiring that all laws of the traditional code be somehow edited and reinscribed in order to build in the protections of amnesty. But if we follow his argument, it is clear that he envisions a much more limited revision. (i) He is chiefly concerned with the rules of amnesty that affected his own case: the order that *atimoi* be restored to their rights, and there be no reprise of past penalties. (ii) The process by which this was implemented is never explained. He would read the relevant reform to an audience who knew what it meant. We are not in that position, but we can deduce much of the process and its legal effect from the way Andocides argues upon that evidence.

(i) Andocides' account of the scrutiny and subsequent legislation comes near the middle of an extended argument on the legality of the case against him, §§71-105. He begins by defining the issue (71): 'Cephisius here has brought his *endeixis* according to the established law but he makes his accusation based upon a decree that came earlier [than the new regime].' He then explains that Cephisius cited Isotimides' decree of 415 as the basis for his suit, a measure that barred from sacred areas 'those guilty of impiety by their own admission'. In effect, Isotimides

[49] As Todd recognized, 'Athenian Internal Politics' (n.23) 108. J.-H. Kühn (n.25) 64 n.47 accepted the rule regarding informants and denouncers but discounted it in this case, supposing confiscations under the oligarchs were not regarded as lawful *phasis* and therefore the informants were not covered by this safeguard.

[50] As illustrated by the agreement in [Dem.] 59.45-7, concluding μὴ μνησικακεῖν. See A. Scafuro, to whom I owe this parallel, *The Forensic Stage: Settling Disputes in Greco-Roman New Comedy* (Cambridge 1997) 121-2. This aspect of private settlements is reflected in Aristotle, *Rhet.* 1381b4, describing credible characters as μὴ μνησικακοῦντας μηδὲ φυλακτικοὺς τῶν ἐγκλημάτων ἀλλ' εὐκαταλλάκτους, suggesting not that such persons simply abandon their grievances but that they adhere to their settlements, 'well reconciled'. *Mê mnêsikakein* invoked the same principle in community reconciliation as in private settlements: Dem. 40.46.

had declared that anyone who admits to some impiety, as Andocides apparently did, can then be arrested if he shows his face in the prohibited areas. Andocides now promises to show 'that this decree is abrogated and invalid' (τοῦτο τὸ ψήφισμα λέλυται καὶ ἄκυρόν ἐστιν).

This is the burden of the long argument that follows. Andocides has to admit that the suit against him conforms to valid **procedural law** for *endeixis* against *asebeis*, but he is contending that the **legal decision** that rendered him liable to that procedure has been invalidated. It is now unenforceable: the barrier imposed by Isotimides in 415 cannot be enforced by the remedies valid in 400.

This way of framing the issue is puzzling to modern readers. We naturally take Andocides' words as meaning that he cannot be prosecuted for a crime: he committed impiety and apparently admitted as much in 415; he cannot now be prosecuted for that. But for the argument that follows, it is essential to remember that the issue is framed rather differently, in a manner peculiar to the Athenian way of justice. A penalty of *atimia*, such as befell Andocides, must be enforced by concerned citizens on their own initiative, and that enforcement would usually fall to personal enemies of the transgressor.[51] The issue in our case is best understood in these adversarial terms: it is a question of whether Andocides' enemies can still enforce the old penalty and exclude him from sacred areas or seize him if he trespasses. He never stood trial for the original offence. The *atimia* imposed by the decree was as effective a sentence as any verdict of a court. By Andocides' argument, that past sentence is now expunged. The case against him is an attempt to enforce that old penalty.

The legal issue is usually construed in a somewhat paradoxical way, so as to account for what seems an obvious breach of amnesty. If, indeed, the new community has pledged to forgive all offences before 403, how can Cephisius' suit even come to court? By the prevailing solution, the crime for which Andocides is prosecuted is not the original act of impiety (in 415) but the trespass in prohibited areas in 400.[52] Of course, the matter of trespass – whether Andocides was caught violating public areas – is never debated. That is the paradox: under the amnesty, the case can come to trial only because the crime at issue is the trespass, but the litigants themselves ignore that question.[53]

The Athenians do not seem to have regarded the trespass as an issue for trial: it is a procedural requirement for the arrest or for 'warrant'.[54] In order to seize the offender or threaten him with forcible arrest, the citizen who takes this duty upon himself must catch the offender trespassing in the prohibited areas; that is essential for the magistrate to authorize the arrest. Thus in the two homicide cases prosecuted by *endeixis* and *apagôgê*, the restricted areas constituted a threshold for seizing the offender and bringing him to justice. These two cases are precisely parallel to Andocides' case in two crucial respects: (1) the defendant is seized when he violates a

[51] In this instance the *endeixis* was merely a weapon of intimidation: Cephisius left Andocides at liberty until the trial, expecting him simply to retreat into exile. Instead, Andocides stood his ground, believing that the warrant was invalid because his status had changed.

[52] MacDowell, *Andokides* (n.1) 201: 'The amnesty of 403 was, legally, quite irrelevant to And.'s case. He was being prosecuted for entering temples in 400.' Similarly, in *Athenian Homicide Law* (Manchester 1963) 138, and *The Law in Classical Athens* (London 1978) 121-2, MacDowell explains the case against Agoratus (for complicity in a homicide): the prosecutor evades the amnesty by proceeding against the trespass (after democracy was restored).

[53] This is true even of [Lys.] 6: amid the rantings against Andocides *pharmakos*, it never occurs to this writer that the amnesty defence is bogus because the crime at issue is the trespass.

[54] In Ant. 5, the defendant had to be arrested while trespassing in Athens, but the speech for trial shows that the question of whether he trespassed is never debated. In the case against Agoratus (Lys. 13.85-7) the troublesome question of whether the prosecutor apprehended Agoratus *ep' autophôrôi* could be easily answered if the crime at issue were the trespass. But the speaker never even considers this implication. Again, when Demosthenes discusses homicide arrest (23.80), he treats the prohibited areas as a sort of threshold for punishing the killer, not as though the trespass was a separate crime (bringing defilement). *Cf.* Carawan (n.33) 362-5.

restriction that applied automatically, without decision of the court;[55] and (2) we might expect the trespass to be an issue in itself because the known killer carries the taint of defilement and the risk of gods' wrath, just as the *asebês* brings disaster on the community. But the question of trespass – whether the accused actually violated the areas where he must not go – is never raised.[56]

It is the original crime with its automatic penalty that is at issue. Andocides wants to show that this liability is cancelled and now unenforceable. In this connection he discusses at length the decree of Patrocleides of 405. Scholars have puzzled over the relevance of this measure.[57] But Andocides has good reason for presenting it as he does, as prologue to the Scrutiny.

Patrocleides authored an emergency measure to absolve or forgive public debts and disabilities;[58] it is an 'amnesty' in the other familiar sense of 'commuting sentences already imposed'. The forms of *atimia* are stipulated in great detail, and all records of those who are subject to these penalties are to be expunged. This would include specific decrees imposing loss of rights upon the officers who served under the Four Hundred; these must be literally erased – to abrogate the decree means to destroy the inscribed text.[59]

Thus Patrocleides' decree is a targeted amnesty for those who were already sentenced or otherwise subject to certain liabilities. It is not a bar to prosecuting crimes that have not been previously addressed; rather, it expunges past penalties. It deals with a few cases pending and yet to be decided, but it has nothing to do with offences outstanding; it only affects those who are already listed in official records as liable to loss of rights.[60] These persons are no longer subject to the regular means of enforcement, such as the *endeixis* that has brought Andocides to trial.

Andocides' situation may seem unrelated to the cases enumerated by Patrocleides: he was not listed by name among those sentenced as *atimoi*. But he ignores the distinction and proceeds as though his case is precisely analogous to that of *atimoi* named in decrees. The 'warrant' against him was based on the rule that any concerned citizen could seize the known *asebês* if he trespassed in prohibited areas, and that rule applied even if the *asebês* was nowhere sentenced by name in the official record. Evidently his judges agreed that this is a distinction without a difference. And the jury of the people, after all, is the supreme arbiter of what the law entails.

So, for the purposes of this argument, Andocides is treating the *endeixis* as a 'secondary remedy', to enforce or execute a sentence imposed by an earlier decision. And in this regard the oath *mê mnêsikakein* in especially relevant. Patrocleides' decree says nothing about 'primary remedies' that deal directly with the crime; rather, it cancelled penalties already imposed and to this extent invalidated the means of enforcing those penalties. The oath *mê mnêsikakein* comes immediately after the rule requiring that all record of state-debtors or others subject to old lia-

[55] In cases where the original crime was already tried and an *atimos* then violated restrictions imposed by the prior verdict, the issue might well be the gravity of the trespass or whether the prohibition really applies; such cases would correspond to modern 'civil death' issues, involving convicted felons who exercise the rights that they have lost; see *Black's* (n.17) 238. Such a case would not ordinarily go to the jury for trial; the magistrate could dispose of it.

[56] Andocides is also accused of laying a suppliant's bough on the altar; this count of the indictment was invented to provide new grounds for the suit, beyond the old liability. But it has nothing to do with trespass by an *atimos*; it would be a violation for anyone, of any status.

[57] As MacDowell observed (*Andokides* (n.1) 200-1), there is no hint that Patrocleides' decree specifically cancelled Isotimides' decree; if it had, Andocides would have said so. The authenticity of the inserted document is generally accepted. Many of the suspect details might derive from the collector's handling, especially at beginning and end. Thus the prescript lacks all but the mover; Andocides promises an oath of *homonoia,* which the document lacks.

[58] A detailed analysis of the various categories is given by M.H. Hansen, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense 1976) 55-90.

[59] Such are the decrees imposing ἀτιμία κατὰ πρόσταξιν. On abrogating, see Alan Boegehold, 'Andokides and the decree of Patrokleides', *Historia* 39 (1990) 149-62.

[60] A clause in §78 covers suits in *euthynai* that have not yet gone to court (μήπω εἰσηγμέναι). Otherwise, all measures deal with sentences already imposed.

bilities shall be erased. So it has no effect upon outstanding offences; it deals only with those transgressions for which some penalty was once imposed and is now cancelled.

That is the sense in which Andocides invokes the rule *mê mnêsikakein*, as he proceeds from Patrocleides to the Scrutiny: it bars the enforcement of past penalties. Whether Patrocleides' decree directly affected Andocides' case is doubtful. He does not say that his own status is altered by it. He dwells upon the earlier measure to introduce the basic mechanism involved in the Scrutiny of laws, a principle essential to his defence. In both amnesties what was enacted was not a measure to forgive and forget offences that had never been punished, but a specific limitation on the enforcement of old disabilities that would otherwise render citizens vulnerable to arrest or other summary and potentially violent recourse. This is what Andocides means when he says that 'you voted to erase *all these decrees*'.[61] And this kind of reform is what he seems to have in mind when he speaks of 'scrutinizing *all the laws*'.

(ii) Now (80) Andocides remarks upon a crucial difference in the situations in 405 and 403. Patrocleides' decree had not recalled those exiled for past offences; it simply offered security to those who remained. In 403, however, there was a general recall of exiles (with the usual exceptions) and Andocides therefore saw fit to return. The recall of exiles is encompassed by the fundamental covenant of reconciliation, that all parties return to their rightful place, ἀπιέναι ἐπὶ τὰ ἑαυτῶν.[62] In principle, this standard agreement cancels old disabilities. For without restoration of legal-and-political rights, the mere opportunity to return to Athens offers no security: if he is still to be regarded as an *atimos*, the returnee could once again be persecuted by his enemies, denied the right to enter public areas or to litigate in his own behalf.

The fundamental covenant of restoration also required a more radical change in public remedies. Patrocleides simply cancelled decrees and other legal decisions. The Scrutiny alters the system at a more basic level; for it affects traditional laws that continue in force – the *nomoi* of Solon and the *thesmoi* of Draco. Many of these prescribe general remedies in conditional form ('if a man kill...' and so on). In conventional terms, this corpus sometimes encompassed later decrees affecting the application of the ancient law; thus the Athenians might speak of Demophantus' decree against subverting democracy as a 'law of Solon' because it simply applied an ancient principle to a specific context. But in the Scrutiny, significantly, it is only *laws* ratified that are to be written up. No *decrees* are reauthorized or reinscribed in this process.[63] On the contrary, as Andocides later remarks, decrees counter to the amnesty were to be erased, as a consequence of the early reforms; none of the Solonian Laws was quite so radically altered.

> (103) They brought their *endeixis* against me according to established law, but made their charge according to a decree that is past and irrelevant... [For] you reconciled with those you had fought against, swore the oaths, recalled the exiles and restored the disfranchised to their rights; and for their sake you demolished stelae, made certain laws invalid, and erased decrees.

[61] And. 1.76: **ταῦτ'** οὖν ἐψηφίσασθε ἐξαλεῖψαι **πάντα** τὰ ψηφίσματα. The ταῦτα is resumptive and refers back to all the measures that Andocides has listed. He turns to the Scrutiny of 'all the laws' without any such listing but implying 'all relevant laws'.

[62] This is the formula repeated by Xenophon, *HG* 2.4.31, 38, first invoked by Pausanias and then by Thrasyboulus. For restoration of rights, see above n.19; *IG* ii^2 111 = Tod 142, 49-51; Aeschines 3.154, of war orphans assuming their property and the rights that go with it.

[63] Thus Andocides argues *a fortiori* (86), ὅπου οὖν ἀγράφωι νόμωι οὐκ ἔξεστι χρήσασθαι, ἢ που [ἂν] ἀγράφωι γε ψηφίσματι παντάπασιν οὐ δεῖ γε χρήσασθαι.

Here Andocides repeats his formulation of the legal issue (= §71) and links it to the traditional effects of amnesty: the recall of exiles and cancellation of past *atimia* (§§107-9). To secure the rights of returnees, certain decrees were erased and the relevant procedural laws were somehow inoperable. He does not say that *laws* were erased, but rather that they were invalidated, and the natural implication is that certain laws were invalid for specific applications. It is ideologically untenable to abrogate a law of Solon absolutely. Andocides' audience would take this for granted, as he turns from Patrocleides' decree to the setting of the Scrutiny.

The Scrutiny evidently emerged from a conservative mandate in the covenants, to adhere to the ancestral laws and to add certain safeguards. Let us recall what he tells us about this reform, first the way he introduces it, and then the corollary measure that comes after it (§§85-6).

Andocides says (§81) that when democracy was restored in the autumn of 403, a committee of twenty was chosen to govern 'until the laws could be passed',[64] meanwhile to abide by the laws of Solon and the *thesmoi* of Draco. New legislation was immediately anticipated in consequence of the covenants. But then, in §82, the measure for Scrutiny is introduced not as the fulfilment of that commitment but as an urgent interruption: 'when you had chosen a council by lot and appointed "lawgivers", they found that there were many of the laws of Solon and Draco by which many citizens were liable for past [obligations]... you decreed to scrutinize all the laws and then to write up in the Stoa those confirmed in scrutiny'.

Andocides then invokes the decree for Scrutiny (beginning §83) and thereafter a measure that he describes only as 'a law that you all apply' (§85). For the first document the editor inserted the decree of Teisamenus; and for the second, the simple rule, 'Use no unwritten law'. The latter is plainly a piece of guesswork. Later Andocides calls for the reading of new, supplementary laws (§87), and the document in the manuscripts begins with the same rule, 'Use no unwritten law'. The editor has simply repeated the clause from one context to another, although Andocides makes a distinction between the two measures. This and the other laws listed in §87 are summarized by Andocides (§89) not as products of the Scrutiny but as typical of the laws envisioned at the outset, when the bilateral commission of twenty was chosen, to govern 'until the laws could be passed'. As Andocides describes it, the Scrutiny interrupted this plan for supplementary legislation, and 'the law that you all apply' (§85) goes with the Scrutiny.

The *nomothetai* had found that some of the old laws of continuing validity – Andocides says 'many' – would be in conflict with the new order, and the decree for Scrutiny was the solution to this conflict. Thus, if we follow Andocides' argument, we should assume that in §83 the court heard a decree about a targeted revision: not all laws exhaustively, but those that the first board of *nomothetai* identified as regressive and potentially divisive. When he says 'all the laws', he means all within that context, much as he characterized Patrocleides' decree in the preceding paragraphs; that is, all measures imposing some *atimia*.

The supplementary laws listed in §87 – 'Use no unwritten law; no decree shall be superior to a law'; and so on – do, indeed, affect the whole body of laws. But the Scrutiny, as Andocides reveals it, deals only with the laws relevant to the case at hand, those that enforce penalties already imposed or automatically incurred. These would be past liabilities of various sorts: some by default on public obligations; others by trial judgement; others, as in Andocides' case, by decree. The laws in question would be those providing general rules about what to do when an

[64] MSS ἕως ἂν οἱ νόμοι τεθεῖεν. Stahl's emendation is easy (ΑΛΛΟΙ for ΑΝΟΙ), and it seems to give good sense (the laws of Draco and Solon are in effect, *while other* laws will be passed). But ἕως ἄν with optative meaning 'until' is quite plausible (Smythe 2421, with various parallels). The passage (above n.4) presupposes an arrangement for necessary legislation. Evidently it was agreed in the *diallagai* that an interim committee would govern until the democratic machinery could be re-established; this would require the services of *nomothetai*; the twenty would serve until these fundamental laws were in place.

atimos violates his restrictions. The laws 'written up in the Stoa' were all of these measures reauthorized in the Scrutiny to exclude liabilities incurred before the year of Eucleides.[65]

After the decree for Scrutiny, the clerk reads 'the law that you all apply', and Andocides proceeds in §86 to explain that law as a measure specifically relevant to the laws revised in the Scrutiny: 'Is there any exception *here* (ἐνταυθοῖ) by which an officer can introduce [a case] or anyone of you can prosecute in any way other than according to the laws (here) inscribed? So, *where* it is not permitted to apply a law that is not inscribed, surely one must not apply a decree not inscribed.' The turn of thought clearly implies that the law he has just read to the court in §85 was a law enacted in connection with the Scrutiny, 'when [the laws] were written up'; it applied specifically to the laws ratified in the Scrutiny and listed in the Stoa. The first formulation of the rule 'Use no unwritten law' thus applied to the remedies contained in these revised procedural laws: one cannot invoke a version that is not here inscribed.[66]

The rule 'to apply the laws from Eucleides' was probably part of this law bridging the Scrutiny to the other reforms. Andocides later invokes it repeatedly, and always with this emphasis. It is out of place where the editor has added it to the law in §87, *dikai* and *diaitai* concluded under democracy shall be valid. We find a more competent version of that law in Dem. 24.56, and there, in place of the limitation from Eucleides, we find a fitting corollary to a restoration law on *dikai* and *diaitai*: 'any acts or judgements concluded under the Thirty, private or public, shall be invalid'.[67] The concocted law in Andocides 1.87 perversely joins a rule validating private claims with a limitation that contradicts it.

Thus reconstructed, the law that was actually read in §85 was something to this effect: concerning *atimoi*,[68] one can only invoke the laws written up in the year of Eucleides, and one can only enforce liabilities beginning in that year.[69]

Consistent with this aim, the Scrutiny made minor revisions in public remedies; MacDowell recognized that these changes would amount to little more than 'exceptions'.[70] But what we have learned about the amnesty and the legal reforms of the early restoration suggests a clarification to MacDowell's reading. We have seen that the pledge *mê mnêsikakein* is not a grant of pardon or immunity for outstanding wrongs. As a rule of legal effect, *mê mnêsikakein* was a limitation on the enforcement of past liabilities to the polis: wherever the covenants have disposed

[65] Part of the same agenda was the re-enacted citizenship law, which also limited secondary remedies against former *atimoi* by re-establishing status and property rights. We are told that the qualifications for citizenship and inheritance were strictly applied from 403, but not retroactively (Dem. 43.51, 57.30). By another theory, G. Kuhn, 'Untersuchungen zur Funktion der Saülenhalle III. Die Stoa Basileios in Athen', *JDAI* 100 (1985) 200-26, argues that the laws posted in Stoa Basileios in 403/2 were those *not* amended in the Scrutiny (such as the homicide law).

[66] Gerhard Thür has argued, 'Rechtsvorschriften und Rechtsanwendung in Athen (5./4. Jh. v. Chr.)', in *Timai J. Triantaphyllopoulou* (Athens 2000) 89-100, that the rule against unwritten law was not a juristic principle but an instruction to the archons. I would add, that reading of the rule especially suits this context: as corollary to the Scrutiny, the archons are to authorize only the remedies 'written up' in the Stoa and only 'to apply from Eukleides'. Thus Andocides asks first (§86), 'Is there any exception here by which an officer can introduce [a case]...?'

[67] Dem. 24.56: τὰς δίκας καὶ τὰς διαίτας, ὅσαι ἐγένοντο ἐπὶ τοῖς νόμοις ἐν δημοκρατουμένηι τῆι πόλει, κυρίας εἶναι... ὁπόσα δ' ἐπὶ τῶν τριάκοντ' ἐπράχθη ἢ δίκη ἐδικάσθη ἢ ἰδίαι ἢ δημοσίαι, ἄκυρα εἶναι. It is again doubtful whether this is the document intended, but it is clearly not constructed from the orator's argument, as Demosthenes makes no reference to the rule on *dikai* and *diaitai* – indeed he is dealing with public obligations.

[68] Like Solon's Amnesty Law (above, n.12), this measure probably began with a genitive to mark the category: ΑΤΙΜΩΝ.

[69] As MacDowell recognized, *Andokides* (n.1) 128, the rule to apply the laws from Eucleides is a statute of limitations: '[it] is the law carrying out the decision in 81, μὴ μνησικακεῖν...'.

[70] MacDowell, *Andokides* (n.1) 194-5, explains the process: 'So in 403 it was decided to review all the laws to decide which of them needed to have fresh clauses added to cover the eventualities not foreseen before 404/3... Many laws (perhaps nearly all) having recently been revised were now perfectly adequate as they stood... some laws in force before 404 had been destroyed by the Thirty... these had to be reinscribed.' On the latter, see below n.79.

of a liability, that decision is final. Ordinary *graphai* were similarly barred in cases violating the covenants, but the more urgent aim of the limitation (and the one of immediate concern to Andocides) was to restrict secondary and summary remedies: the rule to apply the laws from Eucleides was chiefly a safeguard for those who would otherwise be threatened with forcible arrest or confiscation. Such are the measures that Andocides emphasizes when he later summarizes the effect of the scrutiny and the 'law that you all apply': 'for public liabilities – those subject to *graphai* or *phaseis* or *endeixeis* or *apagogai* – for these remedies you voted to apply the laws from Eucleides' (§88).

So the essential process of scrutinizing the laws comes down to this: of the traditional laws – the *nomoi* of Solon and *thesmoi* of Draco – all those prescribing remedies against *atimoi* had to be listed at the Stoa as a matter of public notice that these procedures would apply only to liabilities incurred since the return of democracy. The text would follow the succinct, conditional phrasing of the procedural laws: if a man is in default on his debts to the state, he is barred from public business; if a man is *atimos* by reason of some official misdeed or failed obligation, let him be seized (*apagogê*) if he trespass in prohibited areas; or let his property be denounced (*phasis*) and seized in payment; if the concerned citizen has first given information and is authorized by a magistrate (*endeixis*), he cannot be prosecuted for death or injury that results from forcible arrest or seizure.[71] As corollary and closing to this recension came 'the law that you all apply' – that only the laws here inscribed may apply to the prosecution of *atimoi,* and always with the general limitation, 'These laws must apply from Eucleides' archonship.'

Decrees that imposed specific disabilities before 403 would thus be invalidated, with the necessary implication that the relevant inscriptions be deleted or amended. It is this process that Andocides refers to in §86, indicating that only the laws listed in this inscription can be the basis for secondary remedies, and that certain decrees were thus cancelled by the rule 'no decree shall be superior to a law'. And, as he attests in §103, the cancelled decrees were then erased.

To illustrate the practical effect of this reform, Andocides poses three hypothetical cases: What would happen to each of his accusers, if the amnesty were not in force? The chief prosecutor, Cephisius, had defaulted on his old obligations as a collector of revenues (92-3): he had gone into exile, and upon his return he would have been imprisoned by order of the council; for such was the law (ὁ γὰρ νόμος οὕτως εἶχε). Now Cephisius enjoys his rights and property in safety because of the general limitation on past liabilities: 'because you voted to apply the laws from Eucleides' archonship, [Cephisius] expects to keep what he collected and make no payment, and yet has become a citizen instead of an exile – *sykophantes* instead of *atimos* – because you apply the laws now established' (ὅτι τοῖς νόμοις τοῖς νῦν κειμένοις χρῆσθε). If he had remained an *atimos* for old debts to the polis, he would still be subject to summary arrest or other forcible action by anyone willing, if he ventured into the courts and other public areas.

This passage indicates that, in some sense, 'apply the laws from Eucleides' means both to limit prosecution only to *liabilities incurred* since Eucleides, and also to use the *laws enacted* in or after the year of Eucleides.[72] These two formulations describe the same rule: the relevant laws were apparently re-enacted in the year of Eucleides so as to take effect from that year and thus cancel liabilities previously incurred.

In §94 a similar limitation protects Meletus. The latter was notoriously complicit in the arrest of Leon of Salamis; he is now protected by the specific covenant on homicide and by the general rule limiting summary action against those who have incurred an automatic disability. For a

[71] *Cf.* Dem. 23.51, with Hansen, *Apagoge* (n.58) 113-18; Carawan (n.33) 82.

[72] MacDowell argued, 'Kephisios escaped prosecution in two distinct ways': he is not liable *both* because one must apply the laws from Euclides *and* because one can only apply the current laws, and the current law does not allow arrest and imprisonment on order of the council. But Andocides certainly proceeds as though the two are one and the same.

known killer, like any *atimos*, could be forcibly arrested in violation of prohibited areas; the person who undertakes to apprehend him is ordinarily protected by law.[73] Under the new regime, the killer who had struck by his own hand (*autocheir*) was still subject to all the traditional remedies, but the 'planner', instigator or accomplice could not be prosecuted for past events. For any involvement in a homicide after 404/3 the old rules still apply – Meletus, the accomplice, would risk arrest and prosecution if his crime had come afterward. As Andocides puts it, 'this was the law earlier, and a good one, and it is still the law, and you apply it: let the planner be subject to the same measures as the perpetrator'. Yet under the new regime, the sons of Leon have no right to prosecute or 'pursue' the culprit for their father's killing – οὐκ ἔστι φόνου διώκειν – because, again, 'one must apply the laws from Eucleides'. Of course, that limitation bars prosecution in court, but the more urgent aim is the barring of self-help or summary action against the known accomplice who intrudes, as Meletus did, in a public forum.

IV. THE CONNECTION TO OTHER REFORMS

The hypothetical cases thus confirm the nature of the Scrutiny and the disparity between that process and Teisamenus' decree. With the last of these hypotheses the document in the manuscripts reveals the practical difficulties created by this limitation. Old laws were written up with a later 'starting date'. That rewriting caused confusion and required a measure to sort things out, hence the law of Diocles. That measure allows us to place the Scrutiny in the sequence of reforms and to understand the conflict with Teisamenus.

The last of Andocides' hypotheses is the case against Epichares, and here we find the decree of Demophantus against subversion and collaboration. This decree was originally enacted in 410 and imposed automatic outlawry, the severest form of *atimia*, upon any persons who serve in public office under an oligarchic regime. This measure does not apply against those who served under the oligarchs of 404, as Epichares did. But we have testimony of both Demosthenes and Lycurgus that the decree was again valid in the fourth century.[74] Indeed Lycurgus assumes that Demophantus' decree was *originally* enacted in 403. The cause of Lycurgus' confusion is revealed in the document itself. For in the prescript we find a starting date, ἄρχει χρόνος, probably added when the text was reinscribed. In the manuscript someone has corrected this starting date to the date of original enactment – when it would have been pointless and unparalleled.[75] Evidently this menacing decree, standing guard by the *bouleuterion*, was amended with a later limitation: 'time begins from Eucleides' or from the first prytany of that year. And seventy years later that revision was the source of Lycurgus' confusion.

The Scrutiny was essential to the new hierarchy of rules. There may have been no systematic recodification, but we have ample evidence that there was much reordering of old measures. Diocles' law was probably enacted within a year before or after Andocides' trial, and it addresses this problem of sorting out the new laws from the old.[76]

[73] As in the cases of Agoratus and Menestratus (Lysias 13): see Carawan (n.33) 354-72, esp. 371-2. The exception regarding the 'planner' or accomplice is confirmed by *Ath. Pol.* 39.5.

[74] Demophantus remains valid: Dem. 20.159; decreed 'after the Thirty', Lyc. *Leocr.* 124-7.

[75] Patrocleides' decree indicates that there was no general amnesty after the fall of the 400: officers were subject to various disabilities (at least until 405), and some were inscribed as exiles (and not even reprieved in 405). Before Demophantus, ἄρχει χρόνος provisions affect specific obligations – terms of a treaty, schedule of payments, etc. – not procedural laws.

[76] Dem. 24.42: ΝΟΜΟΣ: Διοκλῆς εἶπεν· τοὺς νόμους τοὺς πρὸ Εὐκλείδου τεθέντας ἐν δημοκρατίαι καὶ ὅσοι ἐπ' Εὐκλείδου ἐτέθησαν καὶ εἰσὶν ἀναγεγραμμένοι, κυρίους εἶναι. τοὺς δὲ μετ' Εὐκλείδην τεθέντας καὶ τὸ λοιπὸν τιθεμένους κυρίους εἶναι ἀπὸ τῆς ἡμέρας ἧς ἕκαστος ἐτέθη, πλὴν εἴ τωι προσγέγραπται χρόνος ὅντινα δεῖ ἄρχειν. ἐπιγράψαι δὲ τοῖς μὲν νῦν κειμένοις τὸν γραμματέα τῆς βουλῆς τριάκοντα ἡμερῶν· τὸ δὲ λοιπόν, ὃς ἂν τυγχάνηι γραμματεύων, προσγραφέτω παραχρῆμα τὸν νόμον κύριον εἶναι ἀπὸ τῆς ἡμέρας ἧς ἐτέθη.

> The laws enacted under democracy before Eucleides and as many as were enacted in the year of Eucleides and which have been inscribed are valid, but those enacted after Eucleides and enacted hereafter shall be valid from the day in which each was enacted, except if there is notation of a 'starting date'.[77]
>
> For the laws now established (*nûn keimenois*) the secretary to the council shall make a notation within thirty days. Hereafter, whoever holds the office of secretary, let him immediately append the notation, 'law valid from the day of enactment'.

The procedure envisioned in this law is rather more complicated than we would assume from Demosthenes' comments. The orator regards the reference to starting dates simply as an allusion to the continuing legislative practice of making certain statutes, especially those that prescribe payments or other specific performance, to take effect from a particular date (often the first prytany of the following year). He makes no reference to the more complicated arrangement in this document – and that is one sign of its authenticity.[78] For the law of Diocles clearly refers to the arrangements for applying the various laws in the early restoration era, and Demosthenes makes no allusion to that context.

Diocles is dealing with a situation where there are certain laws enacted before 403 whose validity is unaltered under the new regime, and a separate group of 'established laws' enacted in the year of Eucleides and hence valid from that year. In regard to the latter he specifies: all those that have been inscribed or 'written up'. He does not envision a rule that all old laws are valid only from Eucleides; the first group of laws enacted before Eucleides is valid absolutely, without limitation. The second category, those laws ratified in the year of Eucleides, would include the supplementary legislation of that year, but the emphasis appears to be upon a separate category of old laws that were specifically 'written up' in that year and hence effective from that year.

The phrasing of Diocles in regard to the second group of 'established laws' corresponds to what Andocides says about the products of Scrutiny: these were old laws, such as the procedural laws for *apagôgê*, *endeixis* and *phasis*, against debtors and *atimoi*, that were re-enacted and hence made valid from Eucleides and written up for public notice.

As Andocides tells it, the purpose of writing up these laws in the Stoa was to give notice of the momentous limitation: one cannot prosecute by arrest, warrant and so on, for any old liabilities going back before 403 – the laws here listed now run from Eucleides. It appears to be laws like these that are particularly indicated in Diocles' second category, where he speaks of 'the laws enacted in the year of Eucleides and which have been inscribed'. As for the supplementary legislation of that year – the lawmaking authorized by Teisamenus – those of greatest consequence were not subject to time limit. Such rules as 'No decree shall be superior to a law' are not limited 'from Eucleides' but affect all legislation of any date.[79]

Where Diocles calls for the secretary to make notation within thirty days for the laws currently established (τοῖς μὲν νῦν κειμένοις), the natural implication is that the secretary will have to add some note to distinguish which time-frame applies: whether a given law is one of the old laws of continuing validity, without limitation; or it is one of those (re)enacted in the year of Eucleides and made valid from that date; or, again, it may be one of those enacted in the year or

[77] Or literally, 'a time at which (the law) must begin'.

[78] For authenticity of laws in Dem. 24, *cf.* MacDowell, 'Lawmaking' (n.1) 62. See also M.H. Hansen, 'Diokles' law (Dem. 24.4) and the revision of the Athenian corpus of laws in the archonship of Eukleides', *C&M* 41 (1990) 63-71.

[79] In addition to the drafting of new, supplementary laws, the first *nomothetai* were surely meant to restore laws deleted by the Thirty (as Lene Rubinstein reminded me); *cf.* schol. Aeschines 1.39. This duty was perhaps implicit in Teisamenus' preamble. But such measures would not be included in Diocles' second category: the laws restored would be those authorizing the democratic institutions, the workings of the courts and the like. For these measures the limit from Eucleides has no relevance.

so after Eucleides. For the first and last categories, presumably, the secretary will note (if needed) 'valid from enactment'. But for the measures affected by the second category he will have to make a specific notation: 'the time runs from Eucleides' (ἄρχει χρόνος ἀπ' Εὐκλείδου).

Thus Diocles' law tends to confirm what the orator says about the Scrutiny as a way of implementing the amnesty. And these considerations make it all the more clear that the Scrutiny was a correction that came after Teisamenus' decree. Consider the contradictions.

Teisamenus begins with a preamble acknowledging the inviolable convention, 'to use the laws and measures of Solon and the *thesmoi* of Draco'. This decree does not countenance altering the old laws, but that is precisely what the Scrutiny does. The orator envisions a process of limiting the *old* laws to be valid only from the year of Eucleides. Teisamenus describes a protocol for publicizing *new* laws, as *addenda* to the Solonian Code. The decree calls for the first *nomothetai*, appointed by the council, to submit newly proposed laws for a month of deliberation leading to a decision by the council and ratification by a second body of *nomothetai*, a momentous innovation that Andocides ignores. Again, Andocides says that the measures ratified in the Scrutiny were inscribed in the Stoa (presumably the Stoa Basileios). Teisamenus speaks of posting proposed laws before the eponymous heroes and then publishing the newly ratified laws in the same place, 'on the wall where they were inscribed before'. Thus Teisamenus' measure deals with introducing new laws, and with temporary publication of those laws in the making.[80] As such, it is not a measure that enters into Andocides' argument: it is simply the wrong document.[81]

It is conceivable, of course, that Teisamenus' decree was the document Andocides intended: assume that Teisamenus' preamble affirming the Solonian code implies a 'canonization' of those laws, as a preliminary to new legislation (as Harrison suggested); or perhaps the scrutiny of pending legislation by the council and jury of *nomothetai* actually refers to a procedure for amending old laws, adding 'exceptions' (MacDowell's approach). By either reading, the juristic distortion is perhaps tolerable. But we would not give such meaning to these clauses if we were not convinced *a priori* that the argument and the document must somehow be reconciled.

If we read Teisamenus' decree without borrowing from Andocides, there is no connection to the amnesty. And if we read Teisamenus as a text apart, I suggest, it becomes all the more significant. Teisamenus provided the prototype for later *nomothesia*, as a new procedure for new legislation (as most scholars recognize); the Scrutiny would serve as the paradigm for the later review of old laws, the *epicheirotonia tôn nomôn* (as occasionally acknowledged). But Teisamenus' protocol for new legislation does not anticipate alterations to the ancestral laws; it is rather ideologically grounded in the conservative agenda, 'to abide by the laws and measures of Solon and the *thesmoi* of Draco'. The new laws are cast as addenda to this old framework, not as abrogating or amending the sacrosanct laws. The new legislation will follow a more rigorous procedure, with the aim of making new measures consistent with the ancestral code. The integrity of the laws is thus ensured against the arbitrary succession of decrees that characterized the old democracy.

As a measure of this character, Teisamenus' decree must have preceded the Scrutiny. Teisamenus' measure appears to be part of a package of legislation fulfilling a commitment of the new regime, an initiative agreed to in the covenants: to abide by the ancestral laws and to enact into law certain fundamental rules that the parties had settled upon. Teisamenus' measure

[80] Agreeing with Robertson on Teisamenus' protocol (though doubtful on other points), *cf.* P.J. Rhodes, 'The Athenian code of laws, 410-399 B.C.', *JHS* 111 (1991) 99.

[81] An old solution whose time has come, proposed by J. Droysen, *De Demophanti Patroclidis Tisameni populiscitis quae inserta sunt Andocidis orationi* περὶ μυστηρίων (1873). His other theses were less promising, but he was followed in regard to Teisamenus' decree by Schreiner (n.3) 94-5. Droysen's solution was roundly rejected by E. Drerup, 'Über den bei den attischen Rednern eingelegten Urkunden', *Jahrbücher für classische Philologie* Suppl. 24 (1898) 232.

thus follows upon the mandate that Andocides refers to in §81: '[the people] chose twenty men to take charge of the city until the laws could be passed, meanwhile to abide by the laws of Solon...'. The decree authorizing the Twenty precedes Teisamenus and anticipates the programme of legislation for which Teisamenus then provided the protocol. It was the first measure, authorizing the interim goverment, that apparently began with a preamble embracing the pledge *mê mnêsikakein*: Andocides introduces it by saying 'you resolved not to recall wrongs... and with that resolve you chose [the Twenty]'.[82] Teisamenus' decree came thereafter, but before the decree for Scrutiny.

The Scrutiny interrupts the intended work of the lawmakers. After they had set to work restoring the laws, the *nomothetai* realized that former *atimoi* were vulnerable to secondary remedies under old and valid laws, and thereupon the decree for Scrutiny was passed. The Scrutiny itself was probably a summary process in the assembly, like the later *epicheirotonia tôn nomôn*: the people had only to vote up or down, whether a set of laws should be reauthorized to take effect for the new year. In 403/2 the laws confirmed in the Scrutiny were to be written up for prominent display in the Stoa Basileios where concerned citizens might also consult other traditional laws of great importance for the transition, the laws of bloodshed in particular. Thereafter the work of the lawmakers proceeded on schedule: laws that had been abrogated by the Thirty were restored; and certain supplementary laws, such as the rule that no decree shall override a law, were enacted.

By this reconstruction Teisamenus' decree preceded the Scrutiny, without anticipating conflict between the ancestral laws and the new regime. It has nothing to do with the Scrutiny – indeed, the Scrutiny came as a correction to Teisamenus, qualifying his fundamental premise. The question then arises of how the document made its way into the manuscript. Andocides himself would not have included any documents in his original 'prepared text' for trial, and it seems highly unlikely that he would include the famous decrees in the version he circulated afterward. The Athenians of this era are simply not so fascinated with historic documents as they became thereafter.[83] Some time after Andocides' death, probably in the context of Alexandrian scholarship, an enterprising editor found documents for this speech. He probably drew upon Craterus or some other collector of decrees. The collection of documents that he drew upon seems largely reliable; the decrees of Patrocleides and Demophantus are substantially authentic. And for those two decrees, our editor seems to have made the right choice. But the editor sometimes misconstrued the documents available to him; thus, at a loss for 'the law that you all apply' in §85, he settled for an obvious doublet, the first of the supplementary laws listed in §87 (concocted from the summary in 89). And when he came to the law that '*dikai* and *diaitai* under democracy shall be valid', he completed the document with the law that Andocides invokes in the next breath, 'One must apply the laws from Eucleides', though the latter deals only with public liabilities and runs counter to the rule on *dikai* and *diaitai*.[84]

Thus the editor took it upon himself to fill out the gaps in our text, and when he came to the decree for Scrutiny he seems to have chosen the wrong document, not the decree for scrutinizing old laws nor the statute that limited their application, but the one measure that Craterus or

[82] Robertson, 'Laws of Athens' (n.1) 60, supposes that the Twenty were 'very likely' the same officers as the *nomothetai*, relying on schol. Aeschin. 1.39. But Andocides' account gives a plausible implication which Teisamenus tends to confirm: the first *nomothetai* were nominated by the council, and that democratic council was chosen by lot after the Twenty took control.

[83] In the later fourth century BC the Athenians reinscribed certain historic decrees as patriotic monuments; probably at the turn of the third century (or later), Craterus set to work, largely relying on extant inscriptions. See esp. Noel Robertson, 'False documents at Athens', *Historical Reflections* 3 (1976) 3-24; C. Habicht, 'Falsche Urkunden zur Geschichte Athens', *Hermes* 89 (1961) 1-35 (esp. 28, on Craterus). *Cf.* Thomas, *Oral Tradition* (n.10) 90-1.

[84] As argued above at n.67.

another collector had transmitted as the defining innovation of the new regime, the beginning of a new way of legislation that overthrew the tyranny of decrees.

The importance of the Scrutiny was lost upon later antiquity. The Athenian amnesty was largely misconstrued in Roman times. *Amnestia* emerged as an outright pardon for offences committed in civil conflict, a dispensation by the sovereign body – as Cicero intended his Senate decree for the assassins of Caesar. But the reconciliation at Athens in 403 followed a different principle: the pledge *mê mnêsikakein* served as a closing device upon a contractual arrangement for recognized remedies with specific limitations, to settle the grievances that could not simply be forgiven. And for the Athenians this closing of the covenants shaped the very concept of law.[85]

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[85] Covenant as foundation of Law: e.g. Isoc. 18.27-34; Arist. *Pol.* 1280b; *Rhet.* 1376b; and perhaps most famously in Plato, *Rep.* 359a. See, for now, J. Ober, *The Athenian Revolution* (Princeton 1996) 161-87, esp. 185, suggesting that the settlement of 403 approximated John Rawls' 'original position' (*A Theory of Justice,* Cambridge, MA 1971).