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LAW'S ENEMIES IN ANCIENT ATHENS

The Greeks invented written laws and, until 458, virtually all Greeks praised laws without qualification. Although our often fragmentary pre-Classical mentions of “nomos” are subject to the difficulty that nomos can mean other things besides statute law,¹ from the middle of the seventh century the importance of the *nomothetês*, whose legal statutes “equal for noble and commoner alike” (Solon fr. 36.18-19 West) helped end *stasis*, is one proof among many that laws were supremely valued. In 594/3 Solon wrote some hundreds of new laws which the Areopagos was to guard (*nomophylakein*)² and the Athenians were not to change for ten years (Hdt. 1.29; a hundred years according to Plut. *Sol.* 25). Aristotle calls Pittakos, the early sixth-century *aisymnêtês* (“elected tyrant”) of Mytilene, a “craftsman of laws” (*Pol.* 1274b). According to Diogenes Laertius (1.77), “When Croesus asked him what was the greatest *archê*, he said the *archê* of the *poikilon xylon* [the shifting wood], by which he meant the law.” A legend perhaps, but at any rate an archaic one: Classical Greeks did not paint laws on rotating wooden boards (*axones*). Pittakos was famous for such pithy remarks, called *pittakeia*. Respect for nomoi was characteristic of all “non-abusive” *politeiai*. In Herodotos 7.103-4, Xerxes asks the exiled Spartan king Demaratos how free men could oppose so large an army as his. Echoing Pindar’s *nomos pantôn basileus* (see n. 1), Demaratos responded by stressing that the Spartans were free but feared the law as their master, *despotês*.³ Gomme calls Thucydides’ *oligarchia isonomos* (3.62.3) a “constitutional, law abiding government, in which all citizens have equal civil rights, though not equal political power” (*Hist. Comm. Thuc.* ad loc.). Even some tyrants obeyed the

¹ See M. Ostwald, *Nomos and the Beginnings of Athenian Democracy* (Oxford 1969) 20-56 and *passim*. On Herakleitos fr. 44, “the people must fight for the nomos as for their walls,” see Ostwald *ibid.* p. 33. On Pindar fr. 169 + POxy 2450 fr. 1, “nomos the king of all,” see W.K.C. Guthrie, *A History of Greek Philosophy III. The Fifth-Century Enlightenment* (Cambridge 1969) 131-34.

² On Solon’s *nomophylakein*, see my *Areopagos Council* (Baltimore 1989) 55-64.

³ E. Millender (“*Nomos despotês*: Spartan obedience and Athenian lawfulness in fifth-century thought,” in V. Gorman and E.W. Robinson [eds.], *Oikistes. Studies in Constitutions, Colonies, and Military Power in the Ancient World. Offered in Honor of A.J. Graham* [Leiden 2002] 33-59) argues that Demaratos’s words are ironic, but their ambivalence must nonetheless reflect a historical truth. Furthermore, Perikles’ alternative picture of Athens is also ironic (see below).

law, especially after ca. 600 when the first period of tyranny was discredited.⁴ Most famously, according to the Aristotelian *Ath. Pol.* 16.8 Peisistratos, *dēmotikôtatos* and “willing to administer everything according to the laws,” showed up in court when charged with murder, although his accuser lost his nerve and did not. At Sikyon the Orthagorids – the longest tyranny known to Aristotle (*Pol.* 1315b12) – ruled for a century until the mid-550s, and were only driven out by the Spartans. Aristotle remarks (*ibid.*), “They treated their subjects with moderation and generally obeyed the laws.”

As a social value, obeying the *nomoi* is especially well attested for Athens’ democracy, even if competing pressures from contrasting ideologies and mentalities also carried weight. The ephebes swore “to listen well to those governing at any time, and to the *thesmoi*. If anyone seeks to destroy the *nomoi* I will oppose him as far as I am able myself, and with the help of all” (see, e.g., Lykourg. 1.77). The *dikasts* swore, “I shall vote according to the *nomoi* and the decrees of the Athenian demos.”⁵ *Dikasts* are often called “guardians of the laws,” they are often asked to apply the full strength of the law (e.g., Dem. 21.34, 57, 177, 224), and the laws are often called *kyrioi*.⁶ The demos legislated that officials could not use unwritten laws (And. 1.87), they instituted the *graphê paranomôn* to eliminate confusion between laws and between laws and decrees, they appointed 500 citizen *nomothetai* annually to draft and pass new laws, and they codified their laws. Reflecting their belief in law, democratic Athenians also loved to litigate, and as Gabriel Herman has shown, in contrast to many other Mediterranean societies, they frequently proclaimed their commitment to law and legal procedure rather than private vendetta.⁷

By way of contrasting mentalities and ideologies, the Athenians also feared to be judged “professional litigants” (*sykophants*) and therefore in court often sought to establish that they were not litigious, *philodikoi* (Carey [n. 7] 41) or legal experts. A character in Menander remarks, “the laws are a splendid thing, but a man who looks too closely to the laws is clearly a *sykophant*” (fr. 545 K-T). Also contrarily, in attempting to reconcile laws with Athens’ long-standing values of personal freedom and *praotês*, “gentleness,” Demosthenes states that laws were to be enforced with greater vigilance against public persons than private citizens (25.85-87, 24.193).

⁴ See my essay “Charismatic leaders,” in K.A. Raafaub and H. van Wees (eds.), *Blackwell Companion to Archaic Greece*, forthcoming.

⁵ See, e.g., Dem. 24.150, and E.M. Harris, “Law and oratory,” in I. Worthington (ed.), *Persuasion. Greek Rhetoric in Action* (London 1994) 149 nn. 6-7.

⁶ See M.H. Hansen, “The political powers of the people’s court in fourth-century Athens,” in O. Murray and S. Price (eds.), *The Greek City from Homer to Alexander* (Oxford 1990) 240 n. 117.

⁷ G. Herman, “Honour, revenge and the state in fourth-century Athens,” in W. Eder (ed.), *Die athenische Demokratie im 4. Jh. v.Chr.* (Stuttgart 1995) 43-66. C. Carey, “Nomos in Attic rhetoric and oratory,” *JHS* 116 (1996) 33-46, discusses the respect for *nomos* in Athenian courts. For discussion and references, see also R.K. Sinclair, *Democracy and Participation in Athens* (Cambridge 1988) 220-21 with n. 112.

Anticipating J.S. Mill, the democratic intellectual Demokritos remarked, “the laws should not prevent each person from living according to his own possibilities, provided one person does not hurt another” (DK 68 B 245).⁸ Perhaps most important, sometimes dikasts voted as they judged best, notwithstanding legal statutes.⁹

In ideology also, Athens' democrats and virtually all public texts praise the city's *nomoi*. Thucydides' Perikles says “the Athenians do not transgress the law (*paranomein*) but listen to (*akouein*) the *archai* and the *nomoi*” (2.37). In Euripides' *Suppliants*, Theseus's wise and noble mother Aithra observes that “all civilized order rests on this, the safekeeping of laws” (312-13). According to the Lysianic Funeral Oration (2.18-19), the early Athenians “conducted the city's affairs in the spirit of free men, by laws; humans should make law the touchstone of what is right, ... law was their king.” In the early fourth century [Andokides] 4 proclaimed, “Obeying the public authorities and the laws is *sôtêria* for all. Whoever ignores these has destroyed the greatest protection of the city” (s. 19). [Demosthenes] 26 calls the laws “the rulers [*archontes*] of the city” (26.5). Aeschines' third speech excoriates contemporary *rhêttores* for defying the *nomoi*. “If the laws are faithfully upheld for the polis, the democracy also is saved” (3.6).

Many democratic intellectuals defended *nomoi*. In the single surviving ancient justification of democracy, Plato's Protagoras (*Prt.* 322a-d) argues that *nomoi* made civilized life possible: laws are like the lines ruled in children's copy books as they learn to write. It is also reported that Protagoras produced a lawcode for Thurioi (Herakl. Pont. ap. Diog. L. 9.50). The Anonymous Iamblich, “this democratic sympathizer” as Guthrie calls him ([n. 1] 73), defends law as “benefiting the whole people” (3.6, 6.1, 5, etc.).

Only rarely did any Athenian publicly denigrate the laws.¹⁰ As Rosalind Thomas has shown, three ways only were used to criticize the laws in public democratic venues such as the courts.¹¹ One line of attack was to proclaim that the laws were too many and contradictory. In 20.91 Demosthenes makes this point, and Anaximenes (? *Rhet. ad Alex.* 1443a) considers it helpful when litigants' cases conflict with the

⁸ Cf. B 251: “Poverty under a democracy is as much to be preferred to so-called prosperity under an autocracy as freedom is to slavery.” Abdera, Demokritos's city, was probably a democracy: D.M. Lewis, “The political background of Democritus,” in E. Craik (ed.), *Owls to Athens*, Festschr. K.J. Dover (Oxford 1990) 151-54.

⁹ See my essay, “Law and rhetoric: community justice in Athenian courts,” in K. Kinzl (ed.), *Blackwell Companion to the Classical Greek World*, forthcoming 2006.

¹⁰ See K.J. Dover, *Greek Popular Morality in the Time of Plato and Aristotle* (Oxford: Blackwell 1974) 306-9 (“criticism of the law”). “To judge from surviving oratory, there appears to have been a fundamental inhibition against frontal assaults on the authority of law” (Carey [n. 7] 36).

¹¹ R. Thomas, “Law and the lawgiver in the Athenian democracy,” in R.G. Osborne and S. Hornblower (eds.), *Ritual, Finance, Politics: Athenian Democratic Accounts Presented to David Lewis* (Oxford 1994) 119-33.

law. A second way to criticize laws was to link them with self-serving politicians. In 24.142 Demosthenes remarks, “In this city, *dikastai*, our *rhêtores* rarely let a month go by without legislating to suit their private ends.” In *Acharnians* 532-33 Aristophanes says that Perikles “composed laws worded like *skolia*” (drinking songs), embroiling Athens in a war with Sparta. Finally, as we shall see, especially the dramatic poets might criticize Athens’ “new laws,” as opposed to its tried and true ones. Similarly, litigants and others sometimes appeal to Athens’ first lawgivers Drakon and Solon (e.g., Dem. 24.211, against those who propose laws not in the spirit of Drakon and Solon), just as US conservatives sometimes appeal to the “Founding Fathers.”

Thus down through the Classical period, Athens’ democracy generally supported the *nomoi*. One main reason for its support is that both in their nature and in their origin – to control “gift-devouring” aristocrats, laws were intended to be egalitarian, intolerant of elite special privilege, and protectors of the *demos*, “equal for *esthloi* and *kakoi* alike” as Solon said and Euripides and others (e.g., Dem. 21.45, 106, 142, 150) echo. “There is nothing worse for a polis than a tyrant, where first of all there are no common *nomoi*, but one man rules, taking himself for law, and equality is no more. When laws are written down, the weak and the wealthy have equal justice” (Eur. *Suppl.* 429-34). As both Aeschines and Demosthenes are pleased to say although not completely accurately, democracy is the rule of law, monarchy and oligarchy are the rule of persons (Aeschin. 1.4-6, Dem. 24.75-76). Anaximenes (? *Rhet. ad Alex.* 1420a20-22) states, “among those whose political constitution is democracy, the final appeal on all matters is to law.” In contexts even broader than democracy, Greeks generally were unhappy to obey individuals,¹² but the law was impersonal and equal for everyone.

Following Ephialtes’ reform of the Areopagos Council in 462/1, the democratic quality of laws at Athens came to be enhanced, as the democracy attained its full strength. With the ostracisms of Kimon and Thucydides son of Melesias, the *demos* more and more felt its power, at home and abroad. Aristophanes’ *Knights* openly parodied the *demos*’s conscience of its political importance, as Perikles and the “demagogues” competed for the Assembly’s support, and as public awareness of democratic ideology – “the ruling hand of the *demos*” (Aesch. *Suppl.* 604) – strengthened. Abroad, the Athenians now openly called their allies “subjects,” *hypêkooi*.

In the Assembly, *dikastêria*, and (after 403/2) as *nomothetai*, the empowered *demos* charged itself with drafting, enacting, and enforcing *nomoi*. Quite possibly and perhaps inevitably, it sometimes did so in its own interest. Although few of Athens’ laws can be dated and most are known from fourth-century texts, Perikles’ citizenship law of 451/0 among other things prevented aristocrats from marrying

¹² See my “Listening to the *archai* in democratic Athens,” in R.W. Wallace and M. Gagarin (eds.), *Symposion* 2001 (Vienna 2005) 147-58.

foreigners (cf. Kimon's mother Hegesipyle, daughter of the Thracian king Oloros). The Coinage Decree¹³ of the 440s or 420s required Athens' subjects to use Athenian weights, measures, and coins. The unwelcome Athenian "decree seller" in Aristophanes' *Birds* says he's come to sell *neous nomous*, "new laws" (1037); the three measures he mentions (against harming an Athenian; on using Athenian weights, measures, and "decrees" – *psêphismata*, a joke for *nomismata*; and against expelling or not admitting imperial officials) echo provisions of the imperial democracy.

Furthermore, however often Athens' post-462/1 democracy in fact passed laws in its own interest, conservatives hostile to the democracy repeatedly made that charge. Ca. 424 the Old Oligarch stated that at Athens "the law is *en tōi dêmōi*, in the hands of the demos" (1.18), and that people always establish laws in their own interest (1.9). Plato remarks, "each form of government enacts the laws with a view to its own advantage" (*Republ.* 338d-e, see also *Gorg.* 482e-84c, *Laws* 714b-d). In a debate at Xen. *Mem.* 1.2.41-46, Perikles tell Alkibiades that the law is simply the decision of the Assembly majority, even when it acts with force against the rich.

After 462/1 the growing power of Athens' democracy, and – at a minimum – the conservatives' view that Athens' laws served the democracy's interest, provoked democracy's critics into the extraordinary position of opposing the law. For the first time, disapproval of the city's laws is now expressed, although generally not in public fora. Most bluntly, in a pamphlet written outside Athens the Old Oligarch calls Athens a state of *kakonomia* – a *hapax*¹⁴ – in the interests of the demos, as "the demos derives its strength and its freedom from not having good *nomoi*" (1.8-9). In a typically devilish manoeuvre, Thucydides puts criticism of Athens' laws into the mouth of Kleon, Athens' arch "demagogue." Kleon expresses concern that the demos "does not recognize that a city with inferior but unmovable laws is stronger than a city which has good laws that lack authority" (3.37.3). I am pretty sure that Kleon himself never called Athens' laws "inferior." Thucydides' misrepresentation at once served to criticize Athens' laws and parody the democrats' support for them. Similarly, when addressing the demos in 6.18.7, Alkibiades tells the demos that they are safest if they govern themselves by existing *êthê* and *nomoi*, "even if these are not the best." I ever more constantly admire Thucydides for his ability to *deinôsen graphhein* and make the better cause seem the worse: note in particular his verisimilitudinous euphemisms "inferior," "not the best," rather than the Old Oligarch's "bad." When Alkibiades carried his wife Hipparete back home by force (she had gone to the archon to divorce him), an enemy [Andokides] (4.14, see also Plut. *Alc.* 8.5) remarked that he thus showed scorn for the *archai*, the *nomoi*, and all citizens.

¹³ The Athenians did not yet distinguish laws and decrees: see, e.g., M.H. Hansen, *The Athenian Democracy in the Age of Demosthenes* (Blackwell 1991) 161-62.

¹⁴ Cf. however the Spartans *kakonomôtatoi* before Lykourgos's reforms (Hdt. 1.65.8).

Contesting something as patently, traditionally good as law required something of a *tour de force*. So, over the course of a century after Ephialtes' reforms, men unfriendly to democracy proposed no less than eight arguments against, or alternatives to, the polis's laws. Their arguments started gently, for reasons we shall see, and then turned bolder.

The first criticism of Athens' laws was directed against new laws, and was apparently first expressed against Ephialtes' reforms. In Aeschylus's *Eumenides* of 458, Athena states in her foundation speech for the Areopagos court, "here the reverence of citizens (*astoi*), their fear and kindred do-no-wrong shall hold by day and in the blessing of night alike, with the citizens (*politai*) not innovating (*epikainein*) the nomoi with evil infusions. If you stain bright water with mud, you will never find a drink" (690-95). Here is not the place to discuss the politics of Aeschylus's *Oresteia* – in this case, how far Athena's views represented the poet's. It is in any case significant that Athena's criticism of new laws is linked with the foundation of a conservative symbol against Athens' now more potent democracy. Similarly, *Prometheus Bound*, probably written not by Aeschylus but in the 440s or 430s,¹⁵ disparages the "new laws" of tyrant Zeus's new government (150-51, 404). Although I also will not comment on the politics of *Prometheus Bound*, Griffith's remark (n. 15 [1983] 9) that Prometheus's "crime against established authority may be compared to that of Sophocles' *Antigone*," in my opinion points to the anti-establishment nature of *PV*'s complaint, as we shall see. Such comments against "new laws" recur. In 414, we have noted, the unwelcome Athenian decree seller in Aristophanes' *Birds* says he's come to sell *neous nomous* (1037). By contrast, supporting parents is an "old law," *palaios nomos*, written on the *kyrbeis* of the storks (*Birds* 1353-54: cf. Solon's *kyrbeis*).

Sophokles' *Antigone*, of 442, includes the earliest appearance of a second criticism of polis law: the higher claim of unwritten (*agraphoi*) nomoi, presumably an oxymoron. Thebes' ruler Kreon stresses the importance of obeying the city's nomoi (177, 191); he says that his proclamation against Polyneikes was in accordance with the nomoi (192, 449); he says, "whoever transgresses or violates the nomoi, this man shall get no praise from me" (663-65), and the chorus agree with him (213). But Antigone objects, "I did not think your proclamation strong enough to have the power to overrule, mortal as it was, the unwritten and unailing ordinances (*nomima*) of the gods. For these have life forever" (453-57). With typical Sophoklean ambiguity, Antigone argues that she relies on a higher order against what she calls not the nomoi but Kreon's "proclamation," *kêrygma*. Also ambiguously – if less so – Ismene fears "lest with violence against nomos we override the vote and power of tyrants" (59), the chorus says Antigone "broke the

¹⁵ Cf. M. Griffith, *Aeschylus Prometheus Bound* (Cambridge 1983) 33 and reff. (Griffith himself is cautious). Against Aeschylean authorship, see M. Griffith, *The Authenticity of Prometheus Bound* (Cambridge 1977) and M.L. West, *Studies in Aeschylus* (Stuttgart 1990) ch. 3.

king's laws, *basileioi nomoi*" (381-82), and Antigone laments the *nomoi* that have brought on her doom (847). Furthermore, both Ismene (79) and Antigone herself (907) say she acted "with violence against the citizens." Thus, Sophokles does not directly state but implies that the unwritten laws of the gods may come before the city's *nomoi*, or at any rate what a man in power (cf. 663-72) presents as its *nomoi*. Echoing the earliest criticism of *nomoi* after 462/1, Kreon himself come to say that it would have been better to follow "the established laws" (1113-14). As I shall argue elsewhere, Sophokles' *Antigone* questions or rejects virtually every Athenian democratic development since 508. It champions women, the prudent young, the family, the family gods, and elite individuals, over the polis, civil authorities, men and what I call the "gung-ho" Kleisthenic generation of men equal together and superior to all others. It also rejects a powerful *stratêgos* who degenerates into tyranny, something contemporary sources make clear the demos feared of Perikles (Plut. *Per.* 16). *Antigone*'s opposition to the city's laws, here caricatured as a ruler's laws, and its support for *agraphoi nomoi*, joins this list.¹⁶

In later years, Plato (*Laws* 793a), Xenophon (*Mem.* 4.4.21), Aristotle (*Rhet.* 1.13.2, 15), and Isokrates (12.169) – all conservatives – attest the ongoing importance of unwritten laws in explicit or implicit contrast with the city's laws. By contrast, we have seen, in 403 the restored democracy expressly forbade officials to enforce unwritten laws. In public speeches democrats accept both divine laws and city laws which they do not present as opposed (Carey [n. 7] 40). For historically contingent reasons – Sophokles' opposition to the burgeoning power of the democracy and its leaders – in 442 *Antigone* struck a different stance.

Before the death of Perikles in 429, we hear no further criticisms of *nomoi*. This respect for legal statutes is consistent with the generally positive intellectual climate of pre-war Athens. Positive attitudes toward law are reflected in Protagoras's lawcode for Thurioi (Herakl. Pont. ap. Diog. L. 9.50), Hippodamos's ideal legal system (Arist. *Pol.* 2.8), Damon's advice to Perikles to institute dikastic pay (*Ath. Pol.* 27.4), and the *dikastêrion* designed by the architect Metiochos, another of Perikles' friends (Poll. 8.121, Bekker *Anecd.* 309.17, Phot. s.v. *Metiocheion*). These activities conformed to a prevailing mood of progressive optimism. In addition, the upper classes who patronized intellectuals continued to dominate politics.

Perikles' death marked a turning point for Athens both in politics and in intellectual history. After 429 the upper classes retained their intellectual interests as the scenes in Plato show, but with the signal exception of Alkibiades, they withdrew

¹⁶ Sophokles briefly returned to these themes in *OT* 863-72, probably in the early 420s. Although "Perikles'" endorsement of both written and unwritten laws in Thucydides' Funeral Oration (2.37) is also complex, I note that Thucydides was anti-democratic and the Funeral Oration is both deeply ironic and undercut by the supposed moral degeneration caused by the plague which followed it. As always devilishly clever, Thucydides has his ostensibly democratic hero Perikles echo the concept of unwritten law which had recently emerged in anti-democratic circles.

from politics. Numerous texts parallel Xen. *Mem.* 3.7.1-2, where Sokrates says that Charmides is quite capable of serving in politics but is unwilling to do so. What explains this phenomenon? Contemporaries suggest two reasons: the demos no longer needed aristocratic leaders, and the aristocracy refused to play democratic politics with “inferiors,” including the so-called “demagogues.” No competitive honor could accrue from defeating such unworthy persons. In 428 Euripides’ Hippolytos observes (*Hipp.* 986-989, see also *Ion* 595-601):

I am unpolished in speaking to the mob,
 although among my age-group and among the few I am rather *sophos*.
 That is as it should be. Those who are base
 among the *sophoi* are rather *mousikoi* in speaking before the mob.

Like their elite patrons, intellectuals were now less involved with the democracy and in many ways became a darker, more negative force, not least in regard to nomoi. None of these later intellectuals is known to have written laws for cities. As we have seen, Thucydides’ demagogue Kleon argues in favor of even inferior laws, against elite, anti-democratic and anti-nomos intellectuals. In the Mytilenean debate, Kleon says that intelligent people “always want to show that they are wiser than the laws, and to dominate public discussion. They thus cause cities disaster. Simpler people mistrust their own intelligence, and are content to be more ignorant than the laws” (3.37). Aristophanes’ *Clouds* (1st ed. 423) also associates opposing law with Athens’ new intellectuals. The arch sophist *Adikos Logos*, “Unjust Argument,” says it was he “who first conceived the notion of arguing against the nomoi and the *dikai*” (1039-40). Having studied with the sophist Sokrates, Pheidippides rejoices in “new and clever” things and “to be able to look down on the established laws” (1399-1400). Simultaneously, various theoretical positions now evolved into more extreme and even offensive forms, as intellectuals sought fame or notoriety by bolder conceptual innovations (compare modern painting and photography). Their anti-democratic critiques of nomoi, now no longer in public like Sophokles’, became bolder, and harsher.

Whatever his earlier convictions, during the war years Antiphon was a passionate conservative and anti-democrat, according to Thucydides (8.68.1). He was executed in 411 for treason against the democracy. Extant fragments of his defense speech “suggest an intellectual arrogance and reluctance to descend to the level of the jurors that we later find in Socrates’ similarly unsuccessful *Apology*.”¹⁷ Antiphon may first attest the distinction between *nomos* (“law,” “custom,” “convention”) and *physis* (“nature”), a third and now much bolder attack on nomoi as mere conventions in conflict with nature. *Nomos* for Antiphon was entirely

¹⁷ M. Gagarin, *Antiphon The Speeches* (Cambridge 1997) 6-7. I follow Gagarin and others in identifying Antiphon the intellectual and Antiphon the logographer; contrast G. Pendrick, *Antiphon the Sophist. The Fragments* (Cambridge 2002) 1-26.

implicated in the polis's legal system, with all the apparatus of litigation and judicial process and the dangers of imprisonment, encouragement of enmity, and fending off aggression by aggression. "Justice, then, is not to transgress the laws of whatever city one lives in," but only in the sense of not being seen to transgress them. "A person would make most advantage of justice for himself if he treated the *nomoi* as important in the presence of witnesses, and treated the decrees of *physis* as important when alone and with no witnesses present ... The laws are imposed, whereas nature is necessary" (fr. 44a, trans. Pendrick). Although the relativity of *nomoi* between different societies is a major motif in Herodotos (for example, Egyptian *êthê* and *nomoi* were mostly opposite to Greek: 2.35ff.), in the preceding generation he had concluded that nonetheless "nomos is king" and laws must be obeyed (3.38). Antiphon reached the opposite conclusion. Fr. 44b, if properly restored ("[the laws of those near by] we know and observe, the [laws] of those who live far off we neither know nor observe"), implies that "the chauvinistic partiality each group shows towards its own *nomoi* is responsible for unnatural (and therefore false) distinctions such as that between Greeks and foreigners" (Pendrick [n. 17] 354).

Similarly, in *Clouds* (423 BC), Pheidippides argues at length that it is perfectly fine to beat one's father and even one's mother. "Scorning the established *nomoi*" (1400), he justifies beating his father by appealing to the natural world: "Consider chickens and those other animals, how they retaliate against their fathers; and after all, what difference is there between them and us, except that they don't propose decrees?" (1427-29). Similarly, in *Birds* 755-59 (414 BC), the chorus leader says that at Athens whatever is disgraceful in terms of human *nomos*, like beating one's father, is *kalon* among the birds.¹⁸

The *nomos/physis* distinction is pervasive in Thucydides (who began to compose his *History* in 431), especially in the "Melian dialogue," set in 416 and implying a downward spiral in Athenian political morality that is historically false (Guthrie [n. 1] 85-86; see also 1.76.2 [justice never deters the stronger from advantages], and 4.60.1). In the Mytilenean debate, set in 427, in response to Kleon's point that the *demos* should follow even inferior laws, Diodotos counters that *nomoi* cannot inhibit men's natural inclination to do wrong. By nature all men err and no law will prevent them: expediency is the only valid criterion for political action (3.44.4-45).¹⁹ It is uncertain how far Thucydides himself composed these speeches. It is significant that – no democrat – he wants his readers to agree with Diodotos, not with the democratic Kleon who supports *nomoi*.

In Plato's *Republic*, the Chalchedonian intellectual Thrasymachos presents a bolder version of the *nomos/physis* thesis. For him, "justice is the interest of the stronger," because all governments, whether tyranny, aristocracy, or democracy,

¹⁸ See also *Birds* 1347-68 and N. Dunbar, *Aristophanes Birds* (Oxford 1995) 468-70.

¹⁹ On *nomos/physis* in these speeches, see M. Ostwald, *From Popular Sovereignty to the Sovereignty of Law* (Berkeley and Los Angeles 1986) 308, and Guthrie (n. 1) 87. S. Hornblower, *A Commentary on Thucydides I* (Oxford 1991) 423, is more cautious.

make laws in their own interest: the government “is the thing that is strong” and laws proclaim what is just (*Republ.* 338c-339a). Like Thucydides and Antiphon, the historical Thrasymachos also seems to have been no democrat. One of his speeches mentions the *patrios politeia*, an anti-democratic motif, and the need sometimes to disobey city officials (DK 85 B1). Confirming that advocating *physis* over *nomos* implies hostility to democracy, Plato states that those who claimed the superiority of *physis* were attracted to “a life of domination over one’s fellows and a refusal to serve others as *nomos* demands” (*Laws* 890a).

The most extreme version of the *nomos/physis* distinction occurs in Plato’s *Gorgias*, where Kallikles says that laws and justice are not fixed by governments but by the weak, like the many in a democracy, to protect themselves from the strong. However, equality is not justice, nature is justice, and nature is self interest (482e-484c), laws are chains or bonds on nature. We know little about the historical Kallikles except that he was friendly with Andron (Pl. *Gorg.* 487c), who was a student of sophists (Pl. *Prt.* 315c) and like Antiphon one of the 400 oligarchs who misruled Athens in 411.

The fourth argument against *nomoi* is that they are weak. The anti-democratic Antiphon (fr. 44a) complains that laws are not very helpful in aiding sufferers or stopping perpetrators. According to Thucydides (we have noted), during the plague people stopped obeying the laws (2.53.4: but I question his description of the scale of Athens’ moral collapse), and in opposing the “demagogue” Kleon, his Diodotos says that no law can prevent men from doing what they want. In Plutarch (*Sol.* 5), the sage Anacharsis remarks that laws were like spider webs, “holding the weak and delicate who might be caught in their meshes, but torn in pieces by the rich and powerful.” The comment is perversely clever, as laws were intended to regulate the rich and powerful. It is therefore significant that the context is anti-democratic. Plutarch continues, “It was Anacharsis, too, who said, after attending an assembly, that he was amazed to find that here the wise men pleaded causes, but the fools decided them.”

The ineffectiveness of laws is for once a theme that could be mentioned in public, where however it is given a democratic spin. In a well known passage (21.24-25), Demosthenes proclaims that without the *demos*, the laws themselves can do little:

And what is the strength of the laws? If one of you is wronged and cries aloud will the laws run up and stand at his side to assist him? No. They are only letters, and incapable of such action. Wherein resides their power? In yourselves, if only you support them and make them all-powerful to help him who needs them. So the laws are strong through you and you through the laws.

In Kritias’s *Perithous* (fr. 22), one speaker observes, “The upright character no orator can pervert, but the law he often turns upside down and dishonors with his talk,” thus blaming politicians for corruption. In Eur. *Ion* 1045-47 the old servant

proclaims, "when one seeks vengeance on one's enemies, no laws lie in the path" (cf. Hekabe in *Hecuba* 864-67).

The fifth argument against polis laws I shall cite in the "sophist" Hippias's version, at least according to the anti-democratic Xenophon (*Mem.* 4.4.14). According to Hippias in Xenophon, "laws cannot be thought of much account, since the very men who pass them often reject them or amend them."²⁰ Hippias of course is also associated with the *nomos/physis* distinction (Pl. *Prt.* 337c-d). By contrast, Athens' public ideal is reflected in Demosthenes' story (24.139-41) that the Lokrians changed only one law in 200 years, because would-be legislators had to propose any new measure with a noose around their neck. The promise Solon extracted from the Athenians not to change the *nomoi* for 10 (or 100) years implies the same notion.

Criticism of the *demos*'s habit of changing laws also appears in public contexts, in particular on the comic stage. In *Clouds* 1420-29 when his son Pheidippides proposes to beat him, Strepsiades objects, "but nowhere is it *nomos* that a father should be so treated." Pheidippides retorts,

Well, wasn't it a man who made that law in the first place, a man like you or me, and didn't he persuade the men of old by argument to accept it? Is it then any less open to me in my turn to make a new law for sons in the future, that they should beat their fathers in return?

Furthermore, as Carey writes, in Aristophanes' *Ekklesiazousai* 813-17 "the skeptical observers of the new dispensation in Athens note that Athenian *psêphismata* never last," and "the play culminates in an extensive depiction of new sex laws in action, with a grotesque pantomime in which two old hags repeatedly insist on their right under the new laws to the sexual attentions of a luckless young man"; in *Thesmophoriazousai* 361-62 the chorus pronounce an imprecation on those who replace *nomoi* and decrees.²¹ Although we cannot determine the context, a character in Plato comicus (fr. 220) also complains about frequent changes of law. "Go away for three months, and it's no longer the same city." In the interpolated ending of Aeschylus's *Septem* (possibly from the late fifth century), the chorus states, "what the city approves as *dikaia* is sometimes this, sometimes that" (1071-72).

A sixth argument against obeying the city's *nomoi* was based on the *demos*'s alleged hypocrisy in themselves not obeying these laws. This argument may make an early appearance in Thucydides, as we have seen. In the plague, he claims, the *demos* lost its fear of gods and *nomoi*, and in the Mytilenean episode the *demos* changed its mind and emended a decree sentencing the islanders to death, which Thucydides outrageously condemns them for although they were merciful. The most famous appearance of this argument comes in 405, when according to the anti-

²⁰ See Guthrie (n. 1) 119, 138.

²¹ C. Carey, "Comic law," *Ann. Univ. Ferrara*, ns 1 (2000) 65-86.

democratic Xenophon (*Hell.* 1.7.12), the demos was told it was illegal to try the Arginousai generals as a group. At this “the masses called out that it was terrible if someone did not allow the demos to do what it wanted” – *prattein ho an bouletai*. Ostwald ([n. 19] 444) accepts this remark as historical: “for the first time in Athenian history the principle of popular sovereignty was asserted to its logical conclusion.” He contends that toward the end of the fifth century, the sovereignty of laws was giving way to the power of the demos. Xenophon’s phrasing, however, shows that this passage is not history but anti-democratic slander. His “masses” parody the democratic ideal of personal freedom, of “living as you like,” by repeating the conservative perversion of it, “doing what you want,” something even democrats condemned.²² Xenophon’s statement is not history but anti-democratic propaganda: the democracy won’t obey its own laws, but wants to do whatever it wants.

This sixth argument also recurs elsewhere. For example, in *Republic* 563d, after discussing how in democracies the citizens chafe at any *douleia*, Plato says, “finally they pay no attention to the laws written or unwritten, so that they may have no *despotês* over them.” In democracies, he complains, “even if some law forbids you to serve as a public official or a dikast, you nonetheless serve as a public official and a dikast if it occurs to you to do so” (557e, see also *Laws* 701b). This argument also colored anti-democratic historical reporting. The Aristotelian *Ath. Pol.* claims that after Ephialtes the demos paid no attention to the laws as it had done before (26.2), and that after 403 the demos was *kyrios* and did everything by decrees and the courts (41.2). In *Pol.* 1291b14 Aristotle admits that in a democracy the law may prevail at least in theory, but in a large state that is practically impossible. Aristotle regards as typical of extreme democracies that decrees prevail over laws and democrats do not adhere to the laws (*Pol.* 1292a4-37, cf. 1293a9-10, 30-34, 1298a28-33).

This sixth argument has a subsection: the demos did not obey the laws because they were unclear. The dikasts were therefore constrained to do as they saw best. *Ath. Pol.* 9.2 remarks,

the fact that the laws have not been drafted simply or clearly ... inevitably leads to disputes; hence, the courts have to decide everything, public and private. Some think that Solon made his laws obscure deliberately to give the people the power of decision. This is not likely; the obscurity arises rather from including the best solution for every instance in a general provision. It is not right to judge his intentions from what happens now but by analogy with the rest of his provisions.²³

²² See, e.g., *Soph. Ajax* 1073-88, *Plato Laches* 179a, *Xen. Hell.* 1.7.12, and the introduction of my book still in progress on personal freedom.

²³ In *Pol.* 1274a 5-21 Aristotle again argues that Solon was not to be blamed for the current democracy. According to *Ath. Pol.* 35.2, one of the Thirty’s earliest actions was to abolish any unclear laws of Solon. See also *Plut Sol.* 18.4, 25.6 on the obscurity of Solon’s laws.

In this same context and perversely, some anti-democrats now claimed that unlike the demos they *did* obey the law. In what Peter Rhodes calls a very anti-democratic chapter, *Ath. Pol.* 28 asserts that Theramenes was prepared to work for any government provided it did not transgress the laws, but he would not yield to lawlessness.²⁴

Seventh and penultimately, as we have seen, Thucydides has Perikles say (2.39.4) that courage produced by character was better than courage induced by nomoi. Kritias's *Perithous* (quoted earlier) perhaps echoes this theme: "The upright character no orator can pervert, but the law he often turns upside down and dishonors with his talk." This argument from character was normally also anti-democratic (as were Thucydides and Kritias). Thus for example Isokrates writes (*Areop.* 7.39-41),

our forefathers charged the Areopagos Council with supervising *eutaxia*, a Council which considered that those who believed that the best men are produced where laws are prescribed with the greatest exactness were blind to the truth; for in that case there would be no reason why all the Greeks should not be on the same level, in so far as it is easy to borrow written codes from each other. But they thought, virtue is not advanced by written laws but by the habits of everyday life ... Where there is a multitude of specific laws, it is a sign that a polis is badly governed ... It is not by decrees but by morals that *poleis* are well directed.

The eighth and final argument against nomoi was that a wise governing elite needed no laws. This argument is of course a central premise of Plato's *Republic*. In *Republic* 339a-340b, for example, Sokrates shows that sometimes even rulers make mistakes in the laws, which therefore do not serve their interests. The guardians should decide each case on its merits. I need not rehearse Plato's anti-democratic credentials. As Antisthenes also said, "the wise man in his activity as a citizen will be guided not by the established laws but by the law of *aretê*" (see further Thomas [n. 11]).²⁵ According to Plutarch (*Lyc.* 13.3), in Sparta Lykourgos prohibited written laws so that regulations could be changed as circumstances changed.

These eight arguments against the nomoi and democracy mostly had a checkered run. In the end, none prevailed against law. As we have seen, democrats mostly co-opted the notion of unwritten laws but as a supplement to written laws, not to replace them. In discussing forensic strategies, Aristotle (*Rhet.* 1368b5ff., 1373b, cf. 1375a25) and Anaximenes (? *Rhet. ad Alex.* 1421b37-22a2) mention

²⁴ P.J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford 1981) 285.

²⁵ Although anti-democratic in ancient Greece, this concept is also responsible for the principle of jury nullification in the United States. As in legal cases involving Greenpeace or other civil dissenters, an American jury has the right to ignore the law in favor of what it thinks just. However, attitudes toward law are historically contingent. In the US, people often say you can't get far by obeying the law. As in Protestantism and anti-state liberalism, each person should decide for himself what is reasonable.

appealing to unwritten law, but such appeals are rarely attested. Against divine law Euripides (*Ion* 1312-13) retorts that the gods' laws of sanctuary for criminals are unjust and unwise; lines 440-43 comment on the gods' lawlessness; in *Suppliants*, Theseus's stress on "the written laws," *gegrammenôn de tôn nomôn* (433), surely implies criticism of the unwritten kind.

We also hear little about the relativity of law after "the sophists" disappear, nor does the wartime *nomos/physis* distinction last long: it was too shocking even for Plato. In his posthumous *Bacchae*, Euripides explains at length that *nomoi* are based on *physis* and are linked with the divine (890-96). Complaints that the laws were bad, or could be amended, or were not necessarily obeyed by the *demos*, the *demos* took seriously at the end of the fifth century, and instituted a series of constitutional reforms to remedy these problems. Even still, Aristophon's seventy-five acquittals for proposing illegal measures suggest that the courts were reluctant to overturn Assembly decisions, whatever the law. As for the argument from character, Isokrates repudiated the point he made in *Areopagitikos* two years later in *On Peace* and then in *Antidosis*, making clear that he had been accused of being anti-democratic (see, e.g., 8.95, 15.285, cf. 7.56-70). Finally, against Plato's wise elite, his own student Aristotle objected that "to establish the rule of a human being is to bring in a wild beast ... The rule of law, on the other hand, is the rule of intelligence without appetite" (*Pol.* 1287a15-31). If it is better that certain persons rather than others should rule, let them be established as guardians and servants, *hyperêtai*, of the laws. Even Plato came to abandon this notion. His *Laws* established rule by law and by *nomophylakes*, but he now observes that no mortal soul can bear supreme and irresponsible power without losing wisdom and integrity (691c). "One of the finest of your laws," Plato's Athenian says to his Spartan, "is the one absolutely prohibiting any of the young men from inquiring whether any of the laws is good or not" (634d). In *Politicus* 302c-303, Plato states that correct constitutions rule by law. Henceforth, Aristotle's and Plato's alternative strategies were to coopt the democratic concept of the rule of law and transform it either according to a "censorial" model or else by collapsing the democracy's separation of public and private.²⁶

²⁶ D. Cohen, *Law, Violence and Community in Classical Athens* (Cambridge 1995) ch. 3, "Theorizing Athenian society: the rule of law."