

ROBERT W. WALLACE (EVANSTON, IL)

LEGAL COMPLAINTS, RELEVANCE IN COURT
SPEECHES, AND COMMUNITY WELFARE:
RESPONSE TO ADRIAAN LANNI

Further advancing our understanding of issues she first discussed in Gagarin and Cohen's *Cambridge Companion to Greek Law* (2005) and her *Law and Justice in the Courts of Classical Athens* (2006), Adriaan Lanni's fine paper confronts a seemingly vexing albeit familiar set of conundrums, for which she typically proposes good solutions, if perhaps not avoiding certain problems epitomized by her phrase Athens' "legal system." Two issues are central. First, how do we define "the complaint" (singular), when attested examples differ, permitting Gerhard Thür, Michael Gagarin, and Edward Harris to defend three different ways of understanding this term? Second, why do so many courtroom speeches include materials that are irrelevant to the formal charge and the legal issue, especially when various sources indicate that litigants were supposed to speak *eis to pragma* or *ouk exo tou pragmatos*? How might we explain why so many extraneous comments were tolerated?

On the first question, Lanni usefully sets out extant evidence for Athenian complaints, and critiques three recent attempts at defining the complaint, at the end proposing a more general definition of her own, which we shall consider. In fact, as non-jurists the Athenians simply had no definition of this term, so it appears that plaintiffs mostly stated their immediate charge as seemed best to them, and *to pragma* was not strictly limited to what was specified in the complaint. Only twice in our sources do Athens' lay-magistrates suggest a change in wording, in both instances to make clear that the venue for a suit was appropriate (Lys. 13.86, Is. 10.2). Of recent approaches, Thür 2008 rightly downplays legal precision in Athenian courts, even if some litigants use precision as a debating strategy. In place of it, he advances the principle of fairness, arguing that both in the *anakrisis* and in complaint and *antigraphê*, each side in a lawsuit was obliged to reveal to the other the general arguments and texts they planned to use in court, by means of the *anakrisis*' obligatory questions and answers between both sides, and the preservation of documents in *echinoi*. As Lanni points out, however, most complaints do not specify a number of the arguments and issues raised in the speeches, most notably their mass of character attacks. As for the preservation of documents, the use of *echinoi* in *dikastêria* is attested at most once, in a *dipinto* on

the lid of an *echinos* from the late fourth or early third century (i.e., outside the classical period). This *echinos* transferred a “*diamarturia* from the *anakrisis*” and several other texts presumably to a *dikastêrion* (Wallace 2001, with reff.). If this *diamarturia* was being transferred for a *dikê pseudomarturiôn* as Thür suggests quite plausibly, everything in that type of suit hinged on the accuracy of a witness’s testimony, a copy of which had to arrive safely in court. As I have argued (Wallace 2018), each Attic law typically specified its own procedures. It may therefore remain uncertain if and how widely *echinoi* were employed in other types of lawsuits, where they are nowhere attested. *Echinoi* and fairness are best attested from ca. 400 in the public arbitrations of many private suits (*dikai*), instituted during a twenty-year period dominated by the idea of *homonoia* (concord).¹ If fairness seems a very British concept, born on the sports fields of Eton and alien to many cultures, was there a Greek word for it? Actually yes, *epieikeia*, which LSJ defines as fairness and decency, sometimes (as they note) as “opposed to strict law.” In 7.33-34 the wealthy not-very-democratic Isocrates says that in early Athens, judges enforced the laws on money-lending instead of yielding to *epieikeia* towards those who were not rich and had to borrow money. In *Rh.* 1374b (1.13.13-20), Aristotle writes:

What is *epieikes* bids us to be patient when we are wronged; to settle disputes by negotiation and not by force; to prefer arbitration to litigation, for an arbitrator goes by the *epieikes* of a case, a judge by the law, and arbitration was invented with the express purpose of securing full power for *epieikes*.²

Demosthenes 44.8 says that *dikaia* and *philanthropia* sometimes triumph over the laws. It may seem unlikely that the Athenians justified dikastic legal procedures by means of *epieikeia*, given that in the fourth century, laws and *epieikeia* were opposed. By contrast, some courtroom arguments, for example regarding an opponent’s behavior under the Thirty tyrants, could well be considered both unfair and illegal, after the 403 amnesty and *mê mnêsikakein*. Yet they occur, and were apparently tolerated.

If for Gagarin (2012) each plaintiff’s complaint sought to define an Attic statute for the purposes of his own case, definition here could be considered rather abstractly legalistic, as opposed to merely specifying the plaintiff’s main charge.

¹ See my article, “Public arbitrators in fourth-century Athens: guiding the democratic lot” in *Dike. Essays on Greek law in honor of Alberto Maffi*, eds. L. Gagliardi and L. Pepe, forthcoming.

² See also Arist. *NE* 5.10, that *epieikeia* is better than *dikaïosynê*, because “it is not legal justice but a rectification of legal justice,” as sometimes laws’ general statements do not cover all cases, and if the lawgiver were present, he would recognize this. “The fair man is content to receive a smaller share, although he has law on his side.”

Complaints typically indicated some but not necessarily all the ways a plaintiff was accusing a defendant of breaking the law, and some of these accusations could be ambiguous. In the complaint against Sokrates, the ambiguous charge of “corrupting the youth” was a clever way of charging Sokrates with having taught some of Athens’ Thirty tyrants, a charge that the amnesty of 403 made illegal but Meletos found a way to include it even in the formal complaint (did the *basileus* say nothing?). Plato’s Sokrates briefly defends himself against this charge (not a religious charge) in *Apology* 32c-e, about Leon. He might have protested in a *paragraphê* that the prosecutors were violating the amnesty, but Plato sought to avoid mentioning Sokrates’ involvement with the Thirty, the real issue at trial, by having him say that he was accused of corrupting the young because they imitated his style of cross-examination (23c-d: again not a religious charge), or because he corrupted them in religion (26b, where however Plato expresses uncertainty whether religion was the issue in this clause). Many scholars have noticed that people’s behavior in 404 was often brought up against them in later trials, although doing so was formally illegal. It seems the jurors did not care, for reasons we shall see.

Lanni presents her own understanding of the complaint at the end of section 3: “it seems that plaintiffs were not required to refer to or closely follow the statute in formulating their complaint. It seems that they did, however, generally offer a specific but brief description of wrongdoing by the defendant that would fit at least loosely under the statutory procedure through which the case was brought, and typically did not include allegations of other legal wrongs.” In fact, many Attic statutes were vague, not least as it was impossible for most laws to specify the many individual offenses they might cover. Hence, there was little for a litigant to “closely follow,” he merely had to find the right magistrate and convince him that his charge was *eisagôgimos*, admissible. As in the case of Sokrates, extant complaints often indicate specific offenses that plaintiffs considered relevant to the charge, but lay-magistrates, ordinary citizens as Lanni notes, evidently could accept vague charges like “corrupting the young” without compelling the prosecutor to specify that charge’s religious component or arousing a firestorm of objections that such a charge violated the amnesty. In order to get his case into court, the plaintiff told the magistrate what charge he was bringing, and the magistrate needed to accept it. No further purpose of the complaint is attested or required.

Our second problem is raised by the many comments in Athenian court speeches that seem irrelevant to the complaint, including comments on people’s characters or unrelated deeds including by ancestors, or appeals to pity.

To begin, were extraneous comments in court forbidden by law? On the Areopagos, Lysias 3.46 says, it was not *nomimon* to speak *exo tou pragmatos*. In 1.11-13, in a *dikastêrion*, Lykourgos says he will not *exo tou pragmatos legein*, which he says is forbidden on the Areopagos, but “you” dikastic jurors allow litigants to digress. Notwithstanding Lysias and Lykourgos, Lanni attributes this

provision to the homicide courts generally, not just to the Areopagos, although that suggestion might depend on whether the hypothetical general claims in Antiphon 5.12 and 6.6 may have generalized from the practice of Athens' most prestigious court.³ Although Lanni does not go into it, Antiphon 6.6 provides an explanation for forbidding irrelevancies in homicide trials, especially where the condemned person is executed right afterwards. In such trials, "it is extremely important for the facts to be assessed correctly in light of the risks... by misjudging the case."

For other courts Lanni is right, no source says that a law enforced relevancy. The speaker of Dem. 57.66 claims there were many things he might say of his opponent's deeds and lies, "but as you consider these *exo tou pragmatos*, I shall leave them out." In 1.176 Aeschines appeals to the dikasts not to let his opponent stray into irrelevancies, because it is fitting (*prosêkei*) to speak *peri tou pragmatos*. Neither mentions a legal prohibition.

Yet if not a law, according to [Arist.] *Ath. Pol.* 67.1, court speakers at least in private cases took an oath to stick to the *pragma*. According to Demosthenes 24.151, jurors took oaths "to vote in accordance with what the prosecution is about." When Lykourgos complains that except on the Areopagos, many speakers digress, advise, or defend against other charges and jurors permit this, he urges, "Give your vote in keeping with your oath," in a public trial for treason, *prodosia* (1.13, cf. 1.1). So, except on the Areopagos (or possibly in homicide cases generally), it seems there was no law but litigants and jurors took oaths regarding relevance (so also Thür 2008: 66). Why was there no law? As with accusations of false witness, why could a litigant not have sought to vacate a verdict on the grounds of irrelevant testimony? The Athenians never seem to have introduced this possibility, again for reasons we shall see.

How far did litigants and jurors abide by their oaths? As we have noted, in 1.13 Lykourgos complains that although it is unjust for prosecutors to speak *exo tou pragmatos*, "you judges have granted this possibility to those who appear before you." In 21.225 Demosthenes complains that "No excuse — neither public services nor pity nor personal influence nor forensic skill" should matter if a person is guilty of breaking the law, which suggests that these factors sometimes carried weight. In *Meander* 1972 Romuald Turasiewicz (whom no recent scholar cites though I did in my 1989 Areopagos book — which nobody cites either) observed that speakers on the Areopagos did not obey the law against speaking *exo tou pragmatos*.

Could the problem be that litigants might disagree how far some material might or might not be relevant? Scholars before Lanni each advanced *one* explanation as to why at least some of this material might be considered relevant. Rhodes (2004: e.g. 156) argues that some of it was relevant to the "larger story" of these disputes. According to Lanni in 2005 and 2006, some of it provided context information to

³ Otherwise, Lyk. 1.11-13, Dem. 23.65-66, and Xen. *Mem.* 3.5.20, cited by Lanni in n. 58, do not refer to homicide courts generally.

“take into account the particular circumstances of the individual case.” According to Thür in 2005 and 2008, we have seen, speakers include irrelevant materials but as a matter of fairness mention such material in the charge, so it is no longer irrelevant at least to the charge. Gagarin like Thür argues that speakers mostly stick to the charge, but not from fairness; instead, the prosecutor’s charge seeks to define the statute. Much of Lanni’s paper shows that while several speeches do here support Gagarin and Thür, many speeches do not stick to the charge, including abuse, praise for military service by self or ancestors, and appeals to pity.

As to what might be relevant, it is evident that litigants did not bring forward all kinds of subjects not directly linked to the charge. Certain themes recur. Appeals to pity reflect basic Athenian democratic values of *praotês*, gentleness, and *epieikeia*. Above all, according to many sources, jurors were influenced by testimony about a litigant’s contributions to the community, even though these sources could protest such testimony. In 12.38 Lysias says of his opponents, “the expedient, so common in this city, of saying nothing to answer the accusation, but saying other things about themselves they deceive you, showing you that they are good soldiers or have captured many ships of the enemy.” In 30.1 Lysias says that even if a defendant seemed guilty he could be acquitted if he mentions brave deeds by ancestors and proves he has served the city well. Demosthenes 25.76 states, “before now I have seen some men on trial, being convicted by the actual facts and unable to show that they have not done wrong, take refuge in the moderation and self-control of their lives, others in the achievements and public services of their ancestors, or in similar pleas, through which they induced their judges to pity and goodwill.”

In an article published in 2006 (which again nobody cites), I associated these kinds of arguments with the community orientation of Greek law. Already from the seventh century, many communities appointed lawgivers to remedy the “crooked justice” of “gift-devouring *basileis*,” with laws that people’s assemblies approved, that were equal for all (Solon fr. 36.18 West), and that came to be enforced by people’s courts. Laws protected communities, and so the Athenians were prepared to view courtroom judgments as fostering similar goals. Community-oriented materials were therefore considered relevant toward reaching just verdicts. Even litigants who protest against irrelevant arguments include these kinds of materials, often within the same speech. The community in court enforced the laws which they saw as their common protector. As Andokides 4.19 proclaims, “Obeying the authorities and the laws is safety for all. Whoever ignores these has destroyed the greatest protection of the city.” Virtually no Attic text questions the prior importance of the community over any individual: this was a central tenet of Athenian civic and political ideology. According to Xenophon (*Hell.* 1.7.21), Euryp托leomos called it “disgraceful” to put the interests of his relatives over the interests of the whole polis. The democrat Lysias, the oligarch Andokides, the fourth-century speech in [Andokides] 4 all proclaim the priority of the community

over individual concerns. As Andokides states, “those who do not identify their interests as individuals with yours as a community can only be hostile to the city.”⁴

Community welfare was of overriding concern in Athens’ laws and courts. Therefore testimony relevant not to the charge but to community welfare was welcome in Athens’ courts. The defendant in Lys. 3.46-48 closes by saying of his prosecutor, “I could tell you many other things about him, but as it is not *nomimon* to speak *exo tou pragmatos* in your court, please remember these things, give your vote for justice, and do not suffer me to be unjustly ejected from my native land, for which I have braved many dangers and performed many public services. No harm have I ever brought upon that land, nor has any of my ancestors; nay, many are the benefits that we have brought her. Justly, then, should I receive your pity, and that of all men, not merely if I should meet with such a fate as Simon wishes, but even for having been compelled, as a result of such transactions, to stand my trial on such a charge.” For this speaker, community service was not *exo tou pragmatos*, but should be rewarded with justice in this case.

Finally, Lanni’s last section on legal certainty, whether the success or failure of a charge helped guide the Athenians in their future conduct, seems more a modern question than anything that would occur to Athenians. Law was a separate discipline in Roman and modern times. It mostly was not in Greece, but was “embedded” in wider social concerns, even if, when it suited them, Athenians sometimes presented law as an independent force. Just so, Lanni concludes that charges and verdicts did not guide Athenian behavior (in 2004: 168 she called Athens’ legal “system ... all too unpredictable”). Although she suggests that Meletos’ charge against Sokrates “served to warn citizens that [introducing new gods and corrupting the young] could be construed as *asebeia*,” even in this case she has doubts. As everyone knew, the main reason Sokrates was prosecuted and convicted was his association with the Thirty tyrants, although the 403 amnesty meant that charge could not be brought. The main legal charge against him, impiety, was a convenient pretense, and should not have affected anyone’s behavior. Many Athenians doubted Athens’ gods with impunity, most notably Athens’ dramatists. However, if someone’s action harmed Athens, such as losing a battle or teaching scorn for democracy to Athens’ future tyrants, the Athenians went after him by any means they could, seemingly regardless of fault. That was very nearly a legal certainty, and how their system worked: the community came first. What the Athenians learned from Sokrates’ trial is that it was exceedingly dangerous to advocate overthrowing the democracy, although that was not the formal charge brought against him. Anti-democrats’ alternative strategy after 399 was to advocate “returning” to the “ancestral democracy,” as each conservative imagined it.

rwallace@northwestern.edu

⁴ Andok. 2.2-3; cf. Lys. 31.6, 31.17-18, 21.18, 22.14; [Andok.] 4.1, 19.

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