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RESPONSE TO MICHAEL J. EDWARDS

Mike Edwards' paper is characteristically subtle and thought-provoking in its presentation both of law and also of rhetorical performativity. Since I have no substantial disagreement with the core of his argument,[1] my response will begin with a brief position statement on the historical problems involved in reading the speeches as legal texts. The bulk of my attention will then be devoted to two questions relating to the law of inheritance which seem to merit further discussion, focusing on the extended dispute over Hagnias' property (Isai. 11 and Dem. 43).

The problem of how to interpret the Orators as historical evidence for Athenian law is something of which I have become increasingly aware over the past decade, while completing a commentary on the first eleven speeches of Lysias. This is a problem most clearly associated with Wyse's classic but much-criticised commentary on Isaios (Wyse 1904). Criticisms of Wyse have traditionally focused on the extent of his scepticism about Isaios' statements of Athenian law.[2] Scepticism, however, can take at least two forms, and I wonder if such criticisms have always distinguished adequately between scepticism as over-confident conclusion (Wyse was for instance notoriously ready to assume that the orator's clients were always legally in the wrong and his opponents legally in the right, to an extent that is at least statistically implausible) and scepticism as doubt (which is in my view a justifiable starting-point, based on the premise that we should always suspect distortion and misrepresentation). If I now had to sketch out a methodology of legal interpretation for the commentator on the Orators, it would emphasise issues of external control (do we have any statements of law in this area by other Orators, ideally those arguing from an opposing perspective?), and – although here we can proceed only by internal inference – issues of profit and loss within the speaker's rhetorical strategy (what has he to gain from misrepresentation, and how easy would it be for the audience or the opponent to nail him?).

[1] On the juridical issues raised by Edwards' paper, my first point concerns the vexed question of the meaning (legally and otherwise) of the Greek term *anepsios*,

[1] Edwards' use of terms like "exploiting loopholes" differs in nuance but not necessarily in substance from my earlier phrase "lie his head off at the slightest opportunity" (Todd 1990: 173, quoted by Edwards at n.6), for which I should perhaps plead the rhetorical intemperance of youth.

[2] Thus e.g. Harrison (1968-71.i: 122 n.1), quoted by Edwards at n.3.

conventionally rendered "cousin", which for the English hearer would naturally denote a first cousin (that is, the child of ego's parent's brother or sister).

In cases of intestacy, Athenian inheritance law gave precedence to relatives on the father's side, provided these were within a permitted degree of kinship, but there is dispute over the precise limits of that degree. Our speeches use the term *ankhisteia* or "kinship" to denote both the fact of such relationship and any inheritance claim based on it.[3] But the defining phrase used in the inheritance law – found in speeches on both sides of the long-lasting family dispute over Hagnias' property,[4] thereby providing external control – seems to have been *mekhri anepsiōn paidōn*, lit. "as far as the children of *anepsioi* (pl.)".[5]

Edwards suggests that "*anepsios* covers what in English we would call first cousins and second cousins, and therefore it is not clear whether 'children of cousins' means 'children of first cousins' (i.e. 'first cousins once removed') or 'second cousins' (i.e. children of a parent's first cousin)",[6] but this formulation does not seem wholly satisfactory, for two reasons. The first is that although scholars have noted a couple of passages in which *anepsios* is used to denote ego's father's cousin (i.e. somebody to whom one is first cousin once removed),[7] there is to my knowledge no case of its being used more remotely. More significantly, if *anepsios* itself included second cousins, then even the most restrictive reading of *mekhri anepsiōn paides* would cover second cousins once removed. And that is precisely the issue in the first of our two surviving cases involving the estate of Hagnias, where the speaker Theopompos (himself a second cousin of the deceased) argues that his brother's son as rival claimant is not *gegonōs … ex anepsiōn* ("born from *anepsioi*", Isai. 11.5). Methodologically, the framing of this argument as a direct and explicit challenge to the opposition surely means that the boy's father Stratokles

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[3] Thus e.g. Isai. 11.5, Dem. 43.27.

[4] Isai. 11.2, 11.11 (once in text and once in quotation of law), 11.12; Dem. 43.51 (quotation of law: the plural phrase is not used in the body of this speech, though the claimant Euboulides is described on three occasions as *anepsiou pais* or "child of cousin", at 43.26, 27, 34). What looks like a paraphrase of the same law is found at Isai. 7.22 ("if there are no *anepsioi* or *anepsiōn paides*…").

[5] For the question of whether this phrase denoted the same degree of relationship as the phrases *mekhri/entos anepsiotētos kai anepsiou* in the homicide law (*IG*, i^3.103, line 21 [restored from law at Dem. 43.57], and cf. also line 15) and *entos anepsiadōn* in a law on funerals (law at Dem. 43.62), see variously Broadbent (1968: 122-125), Bianchetti (1982: 146-149), and MacDowell (1989: 19).

[6] Edwards, this vol., p. 52; cf. similarly Edwards (2007: 175).

[7] Dem. 43.41 and 43.49. These passages were used by Harrison (1947: 43) to argue that Theopompos in Isai. 11 was justified in claiming as *pais anepsiou* (e.g. Isai. 11.10, etc.), on the basis that this phrase can therefore mean "son of a father's cousin", i.e. a second cousin. Wyse (1904: 673-674), by contrast, had assumed that the *ankhisteia* should have extended only to the deceased's first cousin once removed (= the child of his first cousin, thereby excluding Theopompos). Thompson (1970: 75) notes that the text at Dem. 43.41 has been doubted, but that there is no reason for emending Dem. 43.49.

would not naturally be regarded as Hagnias' *anepsios*; otherwise it would be too easily open to refutation. But Stratokles, like his brother Theopompos, was a second cousin to Hagnias, which implies that *anepsios* cannot normally have carried the meaning of second cousin.

Linguistically, it is perhaps worth speculating whether *anepsios* might be one of those family-relationship words that are capable of having an informal usage which everybody recognises is not strictly accurate, just as in English the brother or sister of ego's grandfather is frequently addressed or referred to informally as "uncle" or "aunt", even though everybody knows this is shorthand for "great-uncle" and "great-aunt". This is not (or at least not quite) the same as arguing that the word would have a different meaning in law from its meaning in common usage, because of the notorious fact that Athens did not have either judges or jurists able to develop an authoritative technical discourse of the type that is found in modern legal systems. Instead, the meaning of a legal statute at Athens was open to fresh negotiation between litigant and juror on every occasion. But I am coming progressively to the view that there are important questions to be asked about how Athenian juries coped with the fact that legal statutes often used (and continued to use) a vocabulary that is often quite distinct from familiar linguistic usage: *graphomai*, for instance, to denote the process of public prosecution, is not something we routinely meet in non-oratorical literature.[8]

On the question of *anepsiōn paides*, many scholars have (like Edwards) followed Harrison: not necessarily in details of interpretation (for which see below), but rather in believing that Theopompos' claim cannot have been wholly without merit, given his success in persuading not only the court but also the Arkhōn.[9] It should indeed be noted here that Theopompos' victory in Isai. 11 served to confirm rights which he had recently acquired by success in a previous case from which no speech survives, so we are talking about repeated rather than one-off success.

Harrison himself, as we saw at n. 7 above, bases Theopompos' claim on a reading of *anepsios* as capable of including father's cousin, with a second cousin therefore being *pais anepsiou* of the deceased. To my mind more attractive is the view of Thompson,[10] that the key ambiguity may lie in the plural use of *paides* in the statutory phrase *mekhri anepsiōn paidōn* (for which see n. 5 above) – his point being

[8] Some aspects of this problem are discussed in Todd (2000).

[9] For the view that we cannot be sure and possibly indeed that the Athenians themselves may not have been clear what the phrase meant, see e.g. Schaps (1975: 54 n.3); Davies (1978: 108, noting the contrast with earlier acceptance of Wyse's interpretation at Davies 1971: 79); MacDowell (1978: 107, on which see further below); Rubinstein (1993: 42 with n.32). A dissenting view is that of Thompson (discussed below).

[10] It is however worth noting here the suggestion of Broadbent (1968: 73), that Theopompos may have confused the jury into accepting a degree of relationship traced through Hagnias' mother's side (on which he was Hagnias' first cousin once removed) with agnatic status on Hagnias' father's side (on which he was, as we have seen, second cousin).

that to describe the deceased and the claimant as sons of (first) cousins means that the claimant is himself a second cousin to the deceased, and not the son of a first cousin.[11] This view had previously been considered by Harrison, who however rejected it as a "transparent quibble"; Thompson, drawing on a suggestion put forward by Miles, argues that it is a natural way of thinking if the law is framed in terms of distance of claimant and deceased from a common ancestor, rather than distance of claimant from deceased.[12]

Thompson himself seems to regard this not simply as a possible reading but as "the correct interpretation" of the statutory phrase; MacDowell by contrast considers the phrase ambiguous, though he does accept that "the original drafters of the law must have known what they meant".[13] In favour of ambiguity, it should be noted that although Theopompos does twice describe his own status in relation to Hagnias as *anepsiou pais* (Isai. 11.10, 11.18),[14] he first does so immediately after introducing his claim by telling how he and various others, including not only Hagnias but the now-deceased claimants Stratios and Stratokles, were all *ex anepsiōn gegonotes* ("born from *anepsioi*", Isai. 11.8), as if it is somehow important for him to start with the premise that "we" were born from *anepsioi* before moving to the claim that "I" am *anepsiou pais*.[15] This may suggest that he does not regard his interpretation of the law as unchallengeable.[16]

[2] My second set of questions concerns the likelihood of cases emerging which would test the limits of the *ankhisteia*, in the way that would seem to be presupposed by the shared assumption underlying both Thompson's and MacDowell's formulations, that this phrase in the law must have had one single intended meaning, at least in the mind of its legislators.

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[11] Thompson (1970: 76-79, cf. 1976: 5).

[12] Harrison (1947: 42); Thompson (1970: 77), drawing on Miles (1950: 74).

[13] The quotations are from Thompson (1970: 76) and MacDowell (1978: 107).

[14] The phrase is more common in Dem. 43 (§§ 26, 27, 32, etc.), perhaps in response to Theopompos' success.

[15] It is notable that this move is made only after Theopompos has challenged the opposition to describe the basis on which his nephew can be described as *gegonōs … ex anepsiou* ("born from [an] *anepsios*", Isai. 11.5). This could perhaps be taken to imply that use of this phrase with the singular *anepsios* would naturally be read as a claim to be the son of the deceased's first cousin, until and unless the hearers have been conditioned by the plural *anepsioi* at 11.8 to see it as a description of a group which included the deceased's father as well as the claimant's (or claimants').

[16] I am not sure how far to push the fact that forms of *gignomai*, rather than *pais*, can on occasions be used to denote issue *ad infinitum* rather than simply sons (thus Lys. 2.20): does the wording of the challenge outlined in the previous footnote therefore imply that Theopompos at least is unaware of Harrison's reading of *anepsios* as "father's cousin" (on the basis that otherwise he would be opening himself to refutation based on the fact that his nephew was himself descendant – albeit a grandson – of Hagnias' father's cousin)?

Two sorts of approaches are possible here, the first of which is to focus on demographic issues. It is hard to judge with precision how often an Athenian male might be expected to die intestate with no kin on his father's side closer than first cousin once removed or alternatively second cousin, not least because we do not have funerary inscriptions of a scale and especially type (i.e. identifying the dedicator's relationship to the deceased) which have enabled the construction of plausible kinship-simulation tables for the Roman world.[17] To the extent that similar demographic conditions obtain, however, the Roman evidence would suggest that such cases will have been extremely rare, at least for citizens. (Metics, qua immigrants, may not have had a comparable network of kin.) It is perhaps worth noting here the argument of Humphreys, based on archaeological as well as literary evidence, that extensive groupings of family tombs seem to have been rare at Athens, with Hagnias' family being one of only four known cases in which as many as four generations appear to have shared the same burial location. Indeed, Humphreys suggests that in the present case it is precisely the recurrent litigation which has served to maintain an unusually strong sense of identity within the extended family.[18]

To speak of the correct or intended meaning of the phrase is of course to presuppose that the function of legislation is to deal with situations that are expected to arise. But there can be other motives for the ways in which laws are worded, and we should at least consider the possibility that this phrase in the law should be read not so much as an expectation that the outer limits of the *ankhisteia* will be an issue that requires close attention, but rather as an ideological statement about the nature of the family, intended to privilege relatives on the father's side, at least to the extent that they can reasonably be regarded as kin, ahead of those on the mother's.[19]

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[17] See e.g. Saller (1994: 43-69), a reference which I owe to Tim Parkin. Saller's preferred computer simulation for the bulk of the male population in the Roman world (his tables 3.1.d-e, based on a model with life expectancy at birth [e_0] of 25 years, and with average age at first marriage being 20 years for females and 30 years for males) suggests that 62% of 70-year-old males would have at least one living son (82% at least one living child of either sex), 64% at least one living grandson (75% at least one living grandchild), and 54% at least one living nephew (68% at least one living nephew or niece), with figures for living children and nephews/nieces declining slowly after ego's early or mid fifties, but those for grandchildren rising much more steeply. This is of course a much more restricted range of kin than any definition of the Athenian *ankhisteia*, since Saller's tables do not include cousins, great-nephews, etc.

[18] Humphreys (1980: 115-116, 123). It is worth noting that the most plausible reconstruction of the family history places the common ancestor Bouselos as "active early in the fifth century" (Davies 1971: 79).

[19] We may note here that a significant proportion of ego's kin on the father's side can be expected to share the deceased's deme and phratry, because membership in these groups was hereditary in the male line; by contrast, ego's kin on the mother's side will only share membership in these groups if her family happen to belong to the same deme or phratry as her husband. I have elsewhere described the Athenian inheritance system as

As well as demographic factors, however, two socio-legal considerations may be relevant in estimating the frequency with which inheritance claims will have involved the outer fringes of the privileged kin-group. Both of them are features of the Athenian legal system which to us appear decidedly odd.

The first is that Athenian inheritance law distinguishes sharply between the rights of sons (including also those adopted *inter vivos*) and those of all other claimants (whether by will or through kinship). The former inherit automatically, at the moment of their father's death, in equal shares; indeed, in a sense a son's rights actually pre-date his father's death, because if he happens to predecease his father, his share will be divided among his own sons.[20] Other claimants, by contrast, require a lawcourt to adjudicate in their favour, and their rights are apparently regarded as dating only from the moment of successful litigation, rather than from the fact of their having survived the deceased: such at any rate is the natural inference from Isai. 11.10, where Theopompos evidently succeeded in persuading the court that the rights of his brother Stratokles had lapsed because the latter had died before the hearing of their joint claim to Hagnias' estate, and therefore that Stratokles' son could not inherit his father's claim even though Stratokles had clearly survived for at least some time after Hagnias' death.[21]

The second principle derives in a sense from the first, because of what has been described as "the essentially relative character"[22] of the legal processes for establishing inheritance rights at Athens. The standard procedure for claiming a contested inheritance was *diadikasia* (*epidikasia* if uncontested), the function of

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"male-oriented but not agnatic" (Todd 1993: 217): i.e. that although male relatives take precedence over females within the same degree, nevertheless a closer relationship through the female line takes precedence over a more distant relationship traced through males (e.g. a sister's son ahead of a paternal uncle).

[20] For this principle (division *per stirpes* rather than *per capita*), see Harrison (1968-71.i: 131 with n.1).

[21] This is in sharp contrast to modern jurisdictions, which tend to envisage inheritance rights as coming into existence at death: hence the existence of rules determining the order of survivorship in cases where several persons perish in one incident. (In English law, for instance, the so-called *commorientes* rule in § 184 of the Law of Property Act 1925 is that "such deaths shall [subject to any order of the Court], for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder"; subsequent legislation however has modified this rule in its application to spouses, especially in case of intestacy, to prevent the combined estates passing entirely to the relatives of the younger one in cases where the couple have no children.) Survivorship is important for modern jurisdictions because it may have implications for inheritance tax, and will normally determine whether a bequest goes to the heirs of the beneficiary or the reversionary heir of the original testator: Athens had no concept of death duties; and by linking inheritance rights to a court's decision, it removed the need to determine survivorship.

[22] Harrison (1968-71.i: 220).

which was to determine which of the competing applicants had the better right, but further claims could apparently be submitted on the same basis up to five years after the death of the successful claimant.[23]

The combined effect of these rules is that claimants other than sons become in a sense no more than life-tenants of the inherited property: only if such a claimant produces his own son, and if that son inherits in turn and without dispute, does the estate in question definitively pass into his hands.[24] But the more that such rules applied in practice to keep the ultimate destination of an inheritance provisional for a generation after the death of the original owner, this will inevitably have distorted the demographic position because of the death of those who would previously have been claimants.[25]

In Hagnias' case, the consequence was to permit Sositheos, a member of a rival branch of the family, to re-open the challenge against Theopompos' heir Makartatos following the former's death. The dates of these various events are contested, but even a late dating for Hagnias as proposed by Humphreys leaves a gap of approximately three decades between the latter's death and the hearing of Sositheos' claim.[26] But what is significant here is the wording of Sositheos' claim to Hagnias' *klēros* ("estate", Dem. 43.1, etc.): in other words, that the estate that Theopompos had inherited is conceived of as continuing to exist as a separate and identifiable part of Theopompos' property.

It is of course hard to be sure how far such language reflects reality on the ground, because to describe an opponent as possessing two or more estates is a powerful allegation of greed and exploitation.[27] But we do hear of at least one other case in which a subsequent hearing granted the totality of an inherited estate to a

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[23] This is generally inferred – e.g. by Wyse (1904: 340) and by Harrison (1968-71.i: 247) – from a combination of Isai. 3.58 (five-year period after the death of the *klēronomos* [inheritor]) and Dem. 43.16 (law permitting cases to be reopened after the death of a successful *epidikasia* claimant "provided the *prothesmia* [statutory period of limitation] has not elapsed").

[24] There are similar rules restricting the capacity of an adopted heir himself to adopt: for discussion of disputed points, see Harrison (1968-71.i: 85-86) and Rubinstein (1993: 17-18).

[25] It is worth noting that Sositheos in Dem. 43 claims the property in the name of his son Euboulides after having had the latter posthumously adopted as the child of his maternal grandfather: the reasons for this are not stated, but one (possibly coincidental) consequence is to move him one generation closer to the deceased Hagnias.

[26] Humphreys (1983) accepts the traditional date of 361/0 as the date of Phylomakhe's initial success in gaining the estate, in a hearing shortly before Isai. 11 (the evidence is a witness testimony at Dem. 43.31); she proposes a date in the 340s for Dem. 43 (in view of epigraphic evidence for Makartatos' as-yet unborn second son); but she rejects the identification of Hagnias with the ambassador of that name recorded at *Hell.Oxy.* VII(II).1, thereby allowing her to down-date this event from 396/5 to some time in the 370s.

[27] E.g. Dem. 42.21, as well as Isai. 11.47.

claimant who at the earlier hearing twelve years previously had received only a third of it (Isai. 5.7), which would seem to suggest that the other two-thirds of the estate was envisaged as being still identifiable in a form that could be handed over. The existence or otherwise of a market in land will of course have affected this: to the extent that an Athenian inheriting a piece of landed property was expected to run it as a going concern rather than selling it off and using the cash to expand his existing holdings, the effect will have have been to make it easier for a particular inheritance to be recognised as an identifiable sub-set of his possessions.

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