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THE ROLE OF THE COMPLAINT (*GRAPHE / ENKLEMA*) IN THE ATHENIAN LEGAL SYSTEM

Abstract: This paper examines the complaint and its relationship to the statutory charge and Athenian notions of relevance. The paper argues that the complaint did not provide a limit on what was considered legally relevant in court. Moreover, the characteristics of our surviving complaints suggest that it is unlikely that they greatly enhanced legal certainty.

Keywords: Ancient Athens, Law, *graphe*, *enklema*, Complaint, Relevance

In recent years, several scholars have focused attention on a relatively-neglected aspect of Athenian legal procedure: the complaint, the plaintiff's statement of allegations submitted to a magistrate to initiate the case and read out by the clerk of the court at the beginning of trial.[1] In private cases, the complaint or indictment[2] was generally known as the *enklema* and appears to have been submitted in writing from at least the early fourth century; in public suits, the charging document was always written down and was typically termed the *graphe*.[3] While recent scholarship is in agreement that Athenian litigants were less focused on interpreting and applying the applicable statute than on proving or disproving the specific allegations in the complaint, modern accounts of the nature and role of the complaint differ in significant respects. How we understand the complaint has important implications for our interpretation of the Athenian legal system as a whole, and particularly for the longstanding debate over the extent to which the system embodied a "rule of law."[4]

In this paper, I reassess the evidence and discuss the nature of the complaint and its relationship to the statutory charge and Athenian notions of relevance.

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1 Aesch. 1.2.

2 In modern American law, the term indictment is used for criminal cases brought by the state prosecutor, complaint for civil cases. I use the term "complaint" to describe Athenian charging documents in both public and private cases (*graphe/enklema*) because it evokes a document produced by a private party as in Athens whereas "indictment" might suggest the regularized charging document of the modern professional state prosecutor.

3 In special procedures such as *eisangelia*, the indictment was referred to by the name of the procedure. Hyp. *Eux.* 29-32.

4 For a sophisticated discussion of the controversy, with a summary of the varying viewpoints, see Forsdyke (forthcoming).

While the existing scholarship focuses on the complaint's effect on litigants' arguments and jurors' decisions, I also examine the relationship between the complaint and legal certainty—that is, the extent to which an Athenian could discern ex ante whether particular behaviors would be deemed lawful or unlawful by a court. Contrary to scholars who view the allegations in the complaint as providing a limit on what was considered legally relevant in court, I argue that there was no requirement that popular court litigants stick to the charge, and that in fact litigants in court routinely include arguments and character attacks on their opponents unrelated to the allegations in the complaint. Second, although complaints are more specific than Athens' generally vague and undefined statutes, the characteristics of our surviving complaints suggest that it is unlikely that they greatly enhanced legal certainty by providing meaningful guidance to Athenians about what behavior was likely to result in liability.

II. Modern interpretations

It may be helpful to begin by describing the three current contrasting views of the complaint: (1) a mechanism to provide fair notice to litigants of opposing arguments, however legally irrelevant from a modern point of view; (2) an opportunity for plaintiffs, through their complaint, to define what will constitute a violation of the statute for the purpose of their case; and (3) a means of narrowing the legal and factual issues in the case by setting forth the factual allegations in terms that closely follow the governing statute. Each of these interpretations of the complaint implicitly suggests a radically different view of the Athenian legal system.

Thür views the complaint as one of several mechanisms in the Athenian system that sought to ensure fairness by providing both parties with notice of the opposing litigant's arguments.[5] He points to the statement in the *Ath. Pol.* 67.1 that in private cases litigants swore to "speak to the issue"[6] and the portion of the juror's oath pledging not just to vote according to the laws and decrees of Athens, but also to vote "concerning the issue which the prosecution concerns,"[7] and argues that whatever was included in the charge, as well as in the *antigraphe* (the defendant's answer to the complaint), was considered relevant in Athenian terms (*eis to pragma*).[8] Because the animating principle was fairness, not legal precision, litigants could include personal invective and other allegations that bore little relation to the statute under which the case was brought without violating their oath so long as they included them in the complaint.[9] Thür uses this broad definition of

5 Thür 2008.

6 Ath.Pol. 67.1: καὶ διομνύουσιν οἱ ἀντίδικοι εἰς αὐτὸ τὸ πρᾶγμα ἐρεῖν.

7 Dem. 24.151: διαψηφιοῦμαι περὶ αὐτοῦ οὗ ἂν ἡ δίωξις ᾖ ("I will cast my vote concerning the issue the prosecution concerns").

8 Thür 2008: 67.

9 Thür 2008: 67-69.

relevance to reconcile the apparent contradiction between the oaths to speak and judge on the issue and the myriad personal attacks found in the surviving speeches.[10] This interpretation of the complaint implies a strongly proceduralist view of the Athenian system: the statute imposed few, if any, restrictions on the arguments a litigant could make; the statutory procedure simply provided a mechanism to get to court, and once there the parties could fight it out on their own terms so long as they had given proper notice of their arguments in their complaint and answer.

Gagarin similarly argues that the complaint "determined the issues in the case, so that any argument directed at a point that was included in the charge was relevant."[11] But for Gagarin, the effect of this rule of relevance was not primarily to promote fairness, but to give the plaintiff the opportunity to define what constituted wrongdoing under the statute for the purpose of his case. In his paradigmatic example, the complaint against Socrates, Meletus' allegations in the complaint that Socrates introduced new divinities and corrupted the youth determined the issues the two sides had to address and the jury had to decide, even though the impiety statute did not explicitly prohibit these behaviors.[12] Although Gagarin doesn't specifically address the question of whether litigants could render personal attacks completely unrelated to the allegations relevant by including them in the complaint, he seems to envision the complaint more commonly operating by providing specific allegations that would fit loosely under the very broad categories denoted by vague statutes like *asebeia* or *hubris*.[13] He notes that defendants rarely argue that the allegations should have been brought under a different statute, and that in practice "a very wide range of conduct could be construed as wrongdoing under one of the broad categories of offenses in Athenian law."[14] Gagarin argues that litigants "for the most part"[15] address their arguments to the allegations in the complaint, and argues that on closer examination some of the character attacks in the surviving speeches are in fact related to the allegations in the complaint (but were not detailed in the charging document itself);[16] where speakers do stray from the allegations, they try to justify the digression, often by claiming that they are responding to their opponent's attacks. Gagarin's interpretation of the complaint suggests that the Athenians had a very loose and bottom-up notion of law: in essence, each plaintiff

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10 Thür 2008: 67.

11 Gagarin 2012: 295. Unlike Thür, Gagarin (2012: 295 n.6) does not think that the *antigraphe* helped determine the issues in the case.

12 Gagarin 2012: 297.

13 Gagarin 2012: 310.

14 Gagarin 2012: 311.

15 Gagarin 2012: 307.

16 The bulk of Gagarin's article (2012) argues that much of the seemingly irrelevant character evidence in the case *On the Crown* were in fact related to the allegations in the complaint.

could define what constituted wrongdoing under the statute, at least for the present lawsuit, through his statement of allegations in the charging document. In this way, Athenian law was shaped as much by litigants as by the Assembly or jurors

While Thür and Gagarin view the formulation of the complaint as highly discretionary and relatively unconstrained by the statute under which the procedure is brought, Harris argues that the parameters of the complaint were tightly circumscribed.[17] Harris presents Athenian complaints as fairly uniform, typically containing the name of the accuser and defendant, the name of the offense, any damages sought, and a description of the acts taken by the defendant that violated the statute.[18] He argues that "when describing the actions of the defendant, the accuser had to follow the language of the statute under which he had initiated his procedure,"[19] and suggests that magistrates might reject or demand changes to any complaint that did not hew closely to the "key words of the relevant statute."[20] Harris' interpretation of the complaint suggests that the Athenians adhered to a strict notion of the rule of law, in which the plaintiff's allegations in the complaint, litigants' court arguments, and jurors' decisions closely followed the legal rules expressed in Athenian statutes.

These three divergent scholarly interpretations are based on exceedingly limited evidence, even by the standards of ancient history: four apparently complete complaints,[21] four partial complaints,[22] a fictional charge from comedy,[23] and three passages that describe the content of a complaint without quoting it.[24] To make matters more confusing, the surviving complaints vary considerably, from a terse statement of the charge and the facts supporting it[25] to a lengthy narrative including allegations of multiple offenses beyond the statutory charge.[26] Not surprisingly, each scholar emphasizes the surviving complaint(s) that most closely conform to his interpretation.[27] Like most controversies in the scholarship on Athenian law, the debate over the nature of the complaint exists because there is evidence to support different viewpoints; claims of certainty or definitive proof should arouse suspicion. Nevertheless, I will attempt to make some progress on the question not only by examining the surviving complaints, but also by thinking through what the

17 Harris 2013a: 116-124; see also Harris 2013b.
18 Harris 2013a: 116-124; see also Harris 2013b.
19 Harris 2013a: 118.
20 Harris 2013a: 117, 124.
21 Dem. 45.46; D.L. 2.40; Plu. *Alc.* 22; Dion. Hal. *Din.* 3.
22 Dem. 21.103; 29.30-31; 37.22-33; Hyp. 4.29-31.
23 Ar. *Wasps* 894-97.
24 Dem. 32.27; Isoc. 15.30; Hyp. 1.12.
25 Dem. 45.46.
26 Dem. 37.22-33.
27 Thür highlights Dem. 37.22-33 and Dem. 32.27; Gagarin focuses on D.L. 2.40; Harris emphasizes as typical Dem. 45.46 and Hyp. 4.29-31.

lost complaints for some of our surviving speeches would have looked like according to different theories of the complaint.

III. The complaint and statute law

What information was typically included in the complaint, and what role did it serve in an Athenian court case? Of course, the complaints of modern plaintiffs vary enormously, from sophisticated pleadings listing the causes of action supported by extensive factual allegations, to handwritten pro se complaints that provide a layman's version of the dispute.[28] Just as is the case with modern complaints, a handful of randomly-selected complaints cannot tell us with certainty what a typical Athenian complaint might have looked like, but it can offer some indication about elements that were or were not required or expected.

Before delving into the surviving complaints, it may be worth emphasizing some obvious points about the ways in which the complaint procedure did not effectively isolate the questions to be decided by the jury. The Athenian complaint was a far cry from the Roman formula. It was created unilaterally by the plaintiff; there was no official determination of how to narrow the issues at trial, or even agreement by both parties as to how to characterize the issue to be decided. It seems that magistrates—non-experts selected by lot for a one-year term—did not play an active role in shaping complaints; we have no evidence of a magistrate rejecting a complaint, and only two instances in which a magistrate compelled the prosecutor to amend his complaint.[29] Unlike the formula in a Roman suit, the Athenian complaint and answer did not dictate the factual or legal findings the jury was to make or the verdict that should follow from any particular jury findings. This is particularly evident in cases where the defendant might present a legal defense, such as that a contract should be voided as unjust or fraudulent similar to the dispute in Hyperides' *Against Athenogenes*, or that deadly violence was justified because it was provoked, as Demosthenes tells us the defendant Euaeon argued,[30] or that leaving Athens while it was vulnerable to attack did not constitute treason, as Leocrates appears to have argued. The complaint and answer procedure does not

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[28] To give just one example: a 2008 handwritten complaint in a Mississippi federal court arising out of a dispute over insurance coverage in the wake of Hurricane Katrina tells the story of the company's failure to provide coverage. The elements of a breach of contract action are present, but unidentified and casually interspersed throughout the story, along with legally irrelevant material such as "I do not want to sue them but they left me no other choice," "I accepted the loss of all the treasures that I have collected over my seventy-seven year lifetime… but I do not accept the cruel way I have been treated by the company I hired to protect me. They have given me more trouble and unhappiness than Katrina. I don't think they should be allowed to get away with it." Transcribed in http://slabbed.org/2009/02/17/77-year-old-lexington-aig-policyholder-acting-pro-se-files-hand-written-complaint-with-federal-court/

[29] Lys. 13.86; Is. 10.2. For discussion, see Gagarin 2012: 310.

[30] Dem. 21.75.

determine whether fraud or provocation or the absence of a statutory duty to remain in Athens during a crisis was a valid defense, even if factually proven; in cases such as these, the jury must do more than simply determine whether the allegations and counter-allegations in the complaint and answer are true. Where the plaintiff and defendant disagreed about what behaviors were covered by the statute, or, for that matter, about what circumstances merited punishment regardless of the terms of the statute, it was the jury, not the plaintiff, who determined the law of the case.

Were plaintiffs required to refer to and closely follow the statute in their complaint? Of the nine complaints that are sufficiently complete to provide information on this question, two appear to tailor the factual allegations closely to the requirements of the statute,[31] five refer to the statutory procedure in a terse statement or as part of a general description of the alleged wrongdoing,[32] and two do not refer to the statute at all.[33] The fact that two complaints—including the prosecution of Socrates, whose accusers hardly lacked sophistication—do not refer to the governing statute suggests that there was no requirement to cite the statute, let alone follow the terms of the statute closely.

In most cases, the allegations in the complaint describe the defendant's actions with specificity. For example, the complaint against Alcibiades details his alleged offenses, including mimicking the mysteries in his house and impersonating the high-priest; both Dinarchus' complaint against Proxenus and the fictional complaint in the *Wasps* describe the circumstances of the alleged thefts and the property that was stolen.[34] Meletus' prosecution of Socrates is unusual in that it offers more

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[31] In Dem. 45.46, the indictment states the charge of false witnessing and recounts the testimony the prosecutor is alleging was false. In Hyp. 4.29, the speaker describes how he brought a complaint in an *eisangelia* that mirrored the clause in the statute, "a politician does not give the best advice to the Athenian people because he has been bribed" (Hyp. 4.8), and details the bad advice his opponent had given.

[32] Plu. *Alc.* 22; Dion. Hal. *Din.* 3; Dem. 21.103; 29.30-31; 37.22-33.

[33] D.L. 2.40: ἀδικεῖ Σωκράτης, οὓς μὲν ἡ πόλις νομίζει θεοὺς οὐ νομίζων, ἕτερα δὲ καινὰ δαιμόνια εἰσηγούμενος: ἀδικεῖ δὲ καὶ τοὺς νέους διαφθείρων. τίμημα θάνατος ("Socrates does wrong (*adikei*) by not recognizing the gods the city recognizes and introducing other divinities, and also by corrupting the youth. The proposed penalty is death."); Ar. *Wasps* 895-897: ἐγράψατο κύων Κυδαθηναιεὺς Λάβητ' Αἰξωνέα τὸν τυρὸν ἀδικεῖν ὅτι μόνος κατήσθιεν τὸν Σικελικόν. τίμημα κλῳὸς σύκινος ("Cyon from Cydathenaeum indicts Labes from Aexone for wrongdoing in that by himself he ate up the Sicilian cheese. The proposed penalty is a fig-wood collar.")

[34] Plu. *Alc.* 22: 'Θεσσαλὸς Κίμωνος Λακιάδης Ἀλκιβιάδην Κλεινίου Σκαμβωνίδην εἰσήγγειλεν ἀδικεῖν περὶ τὼ θεώ, τὴν Δήμητραν καὶ τὴν Κόρην, ἀπομιμούμενον τὰ μυστήρια καὶ δεικνύοντα τοῖς αὑτοῦ ἑταίροις ἐν τῇ οἰκίᾳ τῇ ἑαυτοῦ, ἔχοντα στολὴν οἵανπερ ὁ ἱεροφάντης ἔχων δεικνύει τὰ ἱερά, καὶ ὀνομάζοντα αὐτὸν μὲν ἱεροφάντην, Πουλυτίωνα δὲ δᾳδοῦχον, κήρυκα δὲ Θεόδωρον Φηγαιᾶ, τοὺς δ' ἄλλους ἑταίρους μύστας προσαγορεύοντα καὶ ἐπόπτας παρὰ τὰ νόμιμα καὶ τὰ καθεστηκότα ὑπό τε Εὐμολπιδῶν καὶ Κηρύκων καὶ τῶν ἱερέων τῶν ἐξ Ἐλευσῖνος.' ("Thessalus, son of Cimon, of the deme Laciadae, impeaches Alcibiades, son of Cleinias, of the deme

specific subcategories of offense—introducing new divinities and corrupting the youth—than the apparently undefined impiety statute, but does not describe precisely how Socrates recognized new gods or corrupted the youth. These passages suggest that while plaintiffs were given wide latitude to include various forms of wrongdoing under the rubric of general statutes, they typically (though not always) expressed their allegations in terms of the specific actions of the defendant, rather than alleging general subcategories of wrongdoing under the statute. We will see that this has important implications for the question of the extent to which complaints provided guidance for future cases and enhanced legal certainty.

While most of the surviving complaints describe with specificity what the defendant allegedly did wrong, these complaints don't provide a great deal of detail. In three cases, the complaint offers a terse sentence explaining the wrongdoing;[35] three others provide a bit more detail in a longer sentence;[36] and one includes multiple counts of giving the people bad advice due to bribery, each with a terse one-sentence description of the ill-advised decree proposed by the defendant.[37] In only two cases is there an indication that the complaint provided a detailed narrative of the dispute.[38] At least in public suits, charges were displayed in the

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Scambonidae, for committing a crime against the goddesses of Eleusis, Demeter and Cora, by mimicking the mysteries and showing them forth to his companions in his own house, wearing a robe such as the High Priest wears when he shows forth the sacred secrets to the initiates, and calling himself High Priest, Pulytion Torch-bearer, and Theodorus, of the deme Phegaea, Herald, and hailing the rest of his companions as Mystae and Epoptae, contrary to the laws and institutions of the Eumolpidae, Heralds, and Priests of Eleusis.") Similarly specific indictments include Dem. 37.22-33; 45.46; Dion. Hal. *Din.* 3; Hyp. 4.29; Ar. *Wasps* 895-897.

35 Dem. 45.46; D.L. 2.40; Ar. *Wasps* 895-897.

36 Plu. *Alc.* 22; Dion. Hal. *Din.* 3.

37 Hyp. 4.29. The beginning of the charge in Dem. 29.30-31 suggests that it included a list of items that Aphobus allegedly misappropriated, each with a terse description of the item, it's value, and how Aphobus had obtained it.

38 The charge for damage (*blabe*) quoted in Demosthenes 37.22-29 provides a lengthy account of how Nicobulus caused Pantaenetus to become a state debtor by ordering his slave to seize the money intended to pay the state treasury as rent for his mine, as well as having his slave repossess the workshop, keep the silver ore extracted from the mine, and finally sell the workshop contrary to his agreement with Pantaenetus. The charge described, but not quoted, in Dem. 32.27 also appears to have included narrative detail, such as that Protus was drunk during a storm at sea and stole documents from Zenothemis. It is difficult to know what to make of the statement in Hyperides 1.12 that the prosecutor inserted tragic verses into the complaint. Clearly this complaint was not very terse like some of our surviving complaints, but the speaker also states that the prosecutor can't name any other woman with whom the defendant committed adultery, which suggests that the complaint did not include a lengthy description of the defendant's adulteries.

agora at the statues of the Eponymous Heroes.[39] Presumably in most cases plaintiffs would prefer to include more rather than less detail in order to embarrass their opponents;[40] Demosthenes recounts, for example, how his enemy Meidias enlisted someone to bring charges against him for military desertion even though he had no intention of proceeding to trial because the notice of the charge in the agora alone would hurt Demosthenes' reputation.[41] The fact that most of our surviving complaints are fairly terse suggests that a brief description of the offense rather than a detailed narrative may have been the more common approach.

It is striking that the surviving complaints are largely devoid of character attacks, despite the ubiquity of these sorts of arguments in the surviving speeches.[42] None of the complaints, for example, report that their opponent failed to pay taxes, shirked military service, mistreated his parents, committed other offences in the past, or include any of the other character attacks common in our speeches. There are two potential exceptions in which complaints include additional legal charges, though on closer inspection these charges seem to be closely related to the dispute arising from the statutory charge. The defendant in Demosthenes 37.32-33 describes how the plaintiff included in his complaint for damages allegations that the speaker had committed other offenses, including *aikeia*, *hybris*, *bia*, and offenses against heiresses. Interestingly, in his paragraphe the speaker objected to the inclusion of these additional charges on the grounds that they came under the jurisdiction of other magistrates;[43] the implication is that the inclusion of multiple wide-ranging charges is unorthodox, and perhaps even illegal if the charges do not all fall under the same magistrate's jurisdiction.[44] Moreover, it seems that these charges, though seemingly disparate, may have all been linked to a single incident that formed part of the narrative presented by the plaintiff in his uncharacteristically lengthy charge for damage: we learn later in the speech that Pantaenetus alleged that the defendant broke into his house (presumably in an attempt to seize property for a debt) and entered the rooms of the heiresses, which might account for the charges of assault, hybris, violence, and offenses against heiresses in the

[39] Dem. 21.103. Complaints may also have been publicly posted in private suits. Ar. *Clouds* 770; for discussion, see Harrison 1998: 91.

[40] A desire not to give away one's entire case to the opponent might have a counterbalancing effect, though presumably both parties would get a preview of the other side's arguments in the *anakrisis*.

[41] Dem. 21.103.

[42] For discussion, see Lanni 2006: 59-64; Wallace 2008.

[43] Dem. 37.32-34. The speaker notes that this portion of his antigraphe has been erased from his paragraphe, and implies that it was erased by bribery or other improper means. For discussion, see MacDowell 2004: 187 n.33.

[44] In a similar vein, Lycurgus says that although Leocrates' actions left him open to a charge (presumably impiety) for abandoning his father's bronze statue in the temple of Zeus the protector, he "did not think [he] should put the name of Zeus the Protector on the indictment when trying this man for treason." Lyc. 1.137.

complaint.[45] The other exception is in Isocrates' *Antidosis,*[46] in which the defendant states that the complaint included an allegation of corrupting the youth. This allegation may not be personal invective at all. It may well have been relevant to the property determination for the antidosis: the speaker states that in his speech the plaintiff alleges that he has made "enormous sums of money" by teaching young men public speaking.[47] Thus our surviving complaints typically include only descriptions of wrongdoing covered by the statutory offense. And even in the two exceptional cases which include additional charges in the complaint, those additional allegations seem to be closely related to the statutory offense.

The surviving complaints do not suggest that litigants typically included allegations and character attacks unrelated to the charged offense in order to make them "relevant" in an Athenian court. It may be helpful to imagine what the missing complaints for some of our surviving speeches would have had to include under this theory of the complaint. In cases where the parties are involved in a long-running dispute, would the prior incidents and litigation described by the speaker in the speech be included in the complaint? For example, the speaker in Demosthenes 53 *Against Nicostratus*, an *apographe* suit, includes a description of a host of bad deeds committed by his opponent as part of their ongoing enmity: he vandalized the speaker's fruit and olive trees; he sent a free boy onto his property to pluck a rose bush in the hopes that the speaker would think him a slave, cuff him, and be liable for hybris; and he attacked the speaker when he was walking at night.[48] It is possible that the complaint for this case, which does not survive, included these allegations, but this seems unlikely if our surviving complaints are at all representative.

What about allegations, frequently met in our surviving speeches, that the defendant committed crimes against other people in the past:[49] would these be included in the complaint? Demosthenes, for example, provides in his prosecution of Meidias a description of wrongs Meidias has committed against a variety of people, noting that most of them did not bring suit because they lacked the money, or the speaking ability, or were intimidated by Meidias.[50] None of our surviving complaints include past crimes against other parties, and it seems unlikely that these allegations were included in Demosthenes' complaint against Meidias.[51]

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45 Dem. 37.45. For discussion, see Harris 2013a: 123.

46 I am assuming that even if this is a fictional speech that it follows the conventions of actual trials.

47 Isoc. 15.30.

48 Dem. 53.14-17.

49 E.g., Aesch. 1.59; Din. 2.9-20; Lys. 6.21-32; 13.64-67; Dem. 21.19-23; 25.60-63; 34.36. For a list of references to an opponent's criminal record, see Hunter 1994: 111-115.

50 Dem. 21.128-130, 141.

51 In fact, Demosthenes suggests that Meidias' offenses are so numerous that he will list them from his notes for as long as the audience is willing to listen. Dem. 21.130. It

Notably, Demosthenes does not argue that these past offenses help prove that Meidias is guilty of wronging Demosthenes; rather, Demosthenes suggests that the jury, through its verdict, should punish Meidias for these previous crimes, which were presumably not included in the complaint: "for if a man is so powerful that he can commit acts of this sort and deprive each one of you from exacting justice from him, now that he is securely in our power, he should be punished in common by all of us as an enemy of the state."[52]

Even more striking than prosecutors' recitation of the defendant's past crimes, from a modern point of view, is the use in court speeches of arguments cataloguing the crimes and bad character of an opponent's father and ancestors. In the speech prosecuting the younger Alcibiades for military desertion (*lipotaxion*), for example, the prosecutor recounts how the defendant's father betrayed the city and suggests that the jury should convict in part for this reason: "he is the son of Alcibiades, who persuaded the Spartans to fortify Decelea, sailed to the islands to make them revolt, was a teacher of evil for the city, and campaigned more often with the enemy against his fatherland than with the citizens against the enemy. In return for this, you and your descendants have a duty to punish any members of the family you can get your hands on."[53] Presumably the allegations against the elder Alcibiades, which play an important role in the prosecution speech, were not included in the complaint.

To summarize the findings so far, 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 committed by the defendant against the plaintiff or others.

IV. The complaint and relevance

Did the complaint determine what was considered "relevant" in an Athenian court, and did litigants abide by this notion of relevance? Recent scholarship has made an important contribution by pointing out the importance of the complaint in the Athenian legal process and revealing that the modern emphasis on the statute under which the case was brought may be anachronistic. Athenian litigants were less focused on interpreting and applying the applicable statute than on proving or disproving the specific allegations in the written complaint. Moreover, some popular court litigants certainly believed that they should stick to "the issue" (*to*

seems hard to believe that this long list of unrelated offenses against other people was included in the complaint.

52 Dem. 21.142. For a similar sentiment, see Lysias 30.6: "since [the defendant] has not paid the penalty for his crimes individually, you must exact satisfaction for all of them collectively."

53 Lys. 14.30.

pragma), by which they likely meant the allegations in the complaint, and offer excuses when they stray from these questions.[54] But here's where I part company with the recent scholarship on the complaint: (1) unlike in the homicide courts, I don't think there was a formal relevance requirement in the popular courts throughout the classical period. (2) I don't think there was a clear norm about how closely a speaker should stick to the complaint in the case, and in fact in Athens' ad hoc system this question was itself up for dispute in each case: while some speakers hewed closely to the complaint and suggest discussion of other matters is irrelevant, others encourage jurors to base their decision at least in part on matters unrelated to the allegations in the complaint. (3) The routine use of certain types of extralegal evidence such as appeals to pity and character evidence in our surviving speeches are hard to square with a view that litigants and jurors focused narrowly on the factual allegations in the complaint. I have argued these points at some length in my book, *Law and Justice in the Courts of Classical Athens*;[55] I won't repeat these arguments in detail but will highlight a few points that I think support my view that Athenian litigants did not feel limited to the allegations in the complaint.

First, there are many sources suggesting that a relevancy rule applied in the homicide courts, but not in the popular courts.[56] For example, the speaker in Antiphon 5 objects to being prosecuted for homicide in a popular court because his accusers were not required to swear to keep to the point: "You should have sworn the greatest and most powerful oath, … in very truth that you would accuse me only concerning the homicide itself (*auton ton phonon*), [arguing] that I killed, with the result that, had I done many bad acts, I would not be convicted for any reason other than the charge itself, and, had I done many good deeds, I would not be saved because of this good conduct."[57] Several additional passages attest to a widespread belief that the homicide court verdicts, unlike popular court verdicts, represented a straightforward determination regarding the homicide charge.[58]

The report in the *Ath. Pol.* 67.1 that litigants in private cases before the popular courts took a similar oath to speak to the issue has left no trace in our surviving speeches. While some popular litigants do suggest that speakers should stick to the issue and offer excuses when they fail to do so,[59] these statements are phrased as an

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54 Gagarin 2012: 307-309.

55 Lanni 2006.

56 Many of the passages referring to the relevancy rule refer specifically to the Areopagus; Antiphon 6.9 suggests that the rule applied to the other homicide courts as well.

57 Ant. 5.11. See also Lyc. 1.11-13. For discussion, see Lanni 2006: 75-114.

58 Lyc. 1.11-13; Dem. 23. 65-66; Xen. *Mem.* 3.5.20; Ant. 5.8-14; 6.6. Although the rule was not adhered to in all respects, and although our sources exaggerate the effect the rule had on the nature of argumentation and decision making in the homicide courts, there are significant differences between our surviving homicide and popular court speeches. For discussion, see Lanni 2006: 75-114.

59 For discussion, see Gagarin 2012: 307-309.

informal expectation, not a legal requirement.[60] For example, the popular court speaker in Lysias 9 asserts that it is inappropriate for his opponents to discuss his character: "Are they [my opponents] unaware that it is fitting [*prosekei*] for them to speak on the issue?"[61] By contrast the speaker before the Areopagus in Lysias 3 asserts that "it is not lawful [*ou nomimon*] to speak outside the issue in your court."[62] In his response, Wallace proposes an intriguing thesis to reconcile the statement in the *Ath. Pol.* with the prevalence of extralegal arguments in the popular court speeches and the many passages suggesting a different standard of relevance in different types of court: while a law prohibited speaking outside the issue in the homicide courts, the litigants' oath was the only constraint on popular court speakers, a constraint that was apparently more honored in the breach than in the observance. This is certainly possible,[63] though if popular court litigants swore an oath to keep to the point throughout the classical period, we would expect litigants to chastise their opponents for violating their oath when they strayed from the allegations of the complaint much in the way that they remind jurors to abide by their oath to render their verdict according to the laws.[64] In any case, what is beyond dispute is that the Athenians viewed the homicide courts as enforcing a stricter standard of relevance than the popular courts.[65]

It is not surprising that some litigants suggest that popular court speakers (and jurors) should restrict themselves to the allegations in the complaint just as homicide speakers were required to do. The Areopagus was revered as the finest lawcourt in Athens,[66] and there seems to have been significant ambivalence about the laxer standard of relevance in the popular courts.[67] Lycurgus' *Against Leocrates* offers an example of a popular court speaker who urges the jurors to hold the speakers to the higher relevancy standard required in the Areopagus: "I will make a

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60 Lene Rubinstein has pointed out to me that the fact that *sunegoroi* (co-speakers) were not required to swear an oath in the popular courts suggests that discussion beyond the allegations in the complaint was permitted in these courts.

61 Lys. 9.1: τί ποτε διανοηθέντες οἱ ἀντίδικοι τοῦ μὲν πράγματος παρημελήκασι, τὸν δὲ τρόπον μου ἐπεχείρησαν διαβάλλειν; πότερον ἀγνοοῦντες ὅτι περὶ τοῦ πράγματος προσήκει λέγειν;

62 Lys. 3.46: ἔχοιμι δ' ἂν καὶ ἄλλα πολλὰ εἰπεῖν περὶ τούτου, ἀλλ' ἐπειδὴ παρ' ὑμῖν οὐ νόμιμόν ἐστιν ἔξω τοῦ πράγματος λέγειν…

63 In at least one passage, the homicide courts' relevancy rule is described in terms that suggest a legal provision rather than merely an oath: "But in this suit, when they are prosecuting for homicide and should, under the law, make accusations only regarding the charge itself…" (ἐν δὲ τούτῳ τῷ ἀγῶνι, φόνου διώκοντες καὶ τοῦ νόμου οὕτως ἔχοντος, εἰς αὐτὸ τὸ πρᾶγμα κατηγορεῖν) (Ant. 6.9).

64 Moreover, the passage in Antiphon 5.11 quoted above suggests that the defendant objects to being in a popular court because, unlike in a homicide court, the prosecutor was not required to swear to speak to the point.

65 Lyc. 1.11-13; Dem. 23. 65-66; Xen. *Mem.* 3.5.20; Ant. 5.8-14; 6.6.

66 E.g. Xen. Mem. 3.5.20; Dem. 23.65-66; Lyc. 1.12.

67 Lanni 2006: 105-114.

just accusation, neither lying nor discussing irrelevant matters. You see that most of those who come before you make the oddest speeches, either giving advice here on public matters, or making accusations and slanders about all things except the subject matter of the vote you are about to cast….And you are the cause of this state of affairs, gentlemen, for you have given authority to those who come before you here, even though you have in the Areopagus court the most noble example of the Greeks… Looking to [the Areopagus] you should not allow them to speak outside the point."[68]

Yet alongside speakers who argue that litigants and jurors should focus narrowly on the allegations in the complaint, there are also passages suggesting that jurors should take past offenses, including offenses against other people and offences committed by the defendant's family, into account in reaching their verdict: recall the passages from Demosthenes' *Against Meidias* and Lysias' *Against Alcibiades* discussed earlier.[69] In a similar vein, the speaker in Lysias 30 states, "And it is your duty, gentlemen of the jury, to punish Nicomachus, recalling what sort of people his ancestors were and the ingratitude he has displayed toward you by his illegal behavior. Since he has not paid the penalty for his crimes individually, you must exact satisfaction now for all of them collectively."[70] We cannot know for certain how the average Athenian juror conceived of his task, but our surviving speeches suggest that even the relative importance of the allegations in the complaint as opposed to extra-legal arguments such as character attacks and past offences was open to dispute in any individual case.

Finally, the widespread use of character evidence and appeals to pity in our surviving speeches suggest that at least some portion of popular court speakers and jurors considered arguments not related to the allegations in the complaint to be "relevant" to a popular court verdict.[71] The character of a defendant was, of course, sometimes viewed as probative evidence of whether the defendant was guilty of the charge,[72] but we have seen that speakers sometimes explicitly urge the jury to punish the defendant for past offences as well as for the current charge.[73] Moreover, arguments about the character and public services of the speaker's ancestors and of the prosecutor are harder to explain as relevant to the allegations in the complaint. Finally, the common practice of appealing for the jury's pity based on the

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68 Lyc. 1.11-13.

69 Dem. 21.142; Lys. 14.30.

70 Lys. 30.6. Similarly, the speaker in Dinarchus, *Against Aristogeiton* (Din. 2.11) argues that Aristogeiton should be given the death penalty in part because of his previous crimes: "you know quite well that his [Aristogeiton's] whole life, as well as his recent conduct, justifies the extreme penalty."

71 For a discussion of how forensic speeches range beyond arguments relevant to the charge to address community concerns, see Wallace 2008.

72 For discussion, see Lanni 2006: 59-64.

73 Din. 2.11; Lys. 30.6; Dem. 21.142.

misfortunes that will befall the defendant and his family if found guilty[74] clearly reflect a belief that the jury's verdict will not be limited to an evaluation of the allegations in the complaint.

In sum, although some litigants and jurors may have thought that arguments unrelated to the allegations in the complaint should be considered irrelevant, there was no legal restriction throughout the classical period against making other arguments, and our surviving speeches suggest that many litigants and jurors viewed some types of such extra-legal arguments as central to the jury's verdict.

V. The complaint and legal certainty

Let's turn now to the relationship between the complaint and legal certainty. Recent scholarship has focused on how the complaint may have shaped litigants' arguments and influenced jurors' decisions. But if we want to understand the extent to which the Athenian legal system approximated a rule of law, it is even more important to ask whether the Athenians' focus on the complaint enhanced predictability and deterrence, particularly given the notorious lack of definition in most Athenian statutes.[75] That is, even if the vaguely-worded statutes didn't give Athenians much guidance on whether certain behaviors were likely to be found to violate the statute, did the more specific allegations in complaints enhance the predictability of Athenian courts? We will see that in most circumstances, the complaints from previous cases would not provide meaningful ex ante guidance about what behavior would result in punishment.

As a result, it is unlikely that complaints served a major role in elucidating the meaning of vague statutes and thereby boosting legal certainty and predictability.

One preliminary question is whether potential litigants would have ready access to past complaints and the jury verdicts that resulted in those cases to help them anticipate how a jury would interpret the relevant statute. According to post-classical sources, public indictments were kept in the Metroon from the end of the fifth century.[76] It is much less clear whether verdicts were recorded.[77] The extent to which the Metroon offered an organized, "user-friendly database" is controversial.[78]

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74 For discussion, see Lanni 2006: 53-59.

75 For discussion of the vagueness of statutes, see Lanni 2016: 56-57.

76 According to a story in Athenaeus, Alcibiades erased an indictment in the Metroon (Athen. 9.407b-c); Plutarch quotes the indictment of Alcibiades (Plu. *Alc.* 22); and Diogenes Laertius writes that Meletus' indictment of Socrates was still in the Metroon in his day (D.L. 2.5.40). For a skeptical discussion of these passages, see Sickinger 1999: 131-133.

77 The evidence turns largely on Plutarch's recording of the verdict in Alcibiades' trial and epigraphical evidence of court verdicts. The latter, as Todd (1993:46-47) points out, tend to have an "administrative subtext" which may not suggest the regular recording of legal decisions for use in future cases. For a more optimistic view of these sources, see Faraguna forthcoming; 2006: 197-205.

78 Thomas 1989: 37; cf. Sickinger 1999: 147-157.

In any case, in none of the three cases in which a litigant cites a complaint from a previous case is there any suggestion that the document was obtained by consulting court records.[79] In two instances, the cited complaint involves related litigation, which makes it more likely that the speakers in these instances were using copies from personal or family records similar to those commonly attested in the ancient world.[80] In the third instance, the speaker presents simultaneously as evidence testimony from the arbitrator who heard the prior case along with the complaint in that case,[81] which raises the question of whether the arbitrator rather than an archive may have led the speaker to the document. In the one instance where a speaker describes his process of researching past cases, only oral interviews are mentioned: Meidias "goes around inquiring and collecting examples of people who have at any time been assaulted."[82]

But even if complaints and the resulting jury verdicts were readily accessible, most charges were likely either too general or too specific to offer any meaningful guidance for future litigants. The terse complaints that simply provide a one-sentence description of the offense[83] don't offer any useful information beyond the statute. More detailed allegations—for example lists of specific decrees that were alleged to be unconstitutional in a *graphe paranomon* or a detailed narrative of how the defendant schemed to swindle the defendant out of his property as in Demosthenes 37[84]—were likely too case-specific to offer much guidance to a prospective litigant trying to figure out if his contemplated behavior would incur liability under the statute. That is, unless someone was contemplating behavior nearly identical to that of the defendant in the previous case—e.g. he planned to propose a law very similar to the one previously challenged by a *graphe paranomon*—the complaint in the prior case wouldn't offer much guidance on whether the law he was considering would be found to be *paranomon*.[85]

But there is one type of complaint that might provide meaningful content to a vague statute: complaints that suggest more specific subcategories of the statutory offense that may apply to future cases. Meletus' charge against Socrates is an example of a complaint that is in this sweet spot of intermediate specificity that is most useful for extracting generally applicable principles. By charging Socrates with introducing new divinities and corrupting the youth, Meletus' complaint

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79 Dem. 25.55-58; 32.26-29; 38.15. For an argument that these indictments were likely obtained from an archive, see Faraguna forthcoming.

80 Dem. 38.15; 32.26-29.

81 Dem. 25.58.

82 Dem. 21.36.

83 E.g. Dem. 45.46; Dio. Hal. *Din.* 3; Ar. *Wasps* 895-897; Dem. 21.103; 29.31.

84 Dem. 37.22-29.

85 For the same reason, the specific list of decrees allegedly contrary to the interests of the people listed in the *eisangelia* charge in Demosthenes 4.29-31 would offer little ex ante statutory guidance.

served to warn citizens that these behaviors could be construed as *asebeia* and thereby gave some content to that undefined offense. The complaint against Alcibiades also offers some information about what might constitute impiety, such as mimicking the mysteries, along with less useful detail about Alcibiades' specific acts. It should be noted that while the process of extracting the general rule from a complaint like the one against Alcibiades is second-nature to modern lawyers, it was less common (though not unprecedented) in Athenian oratory.[86] It may be anachronistic to assume that Athenian logographers would analyze a complaint in the way a modern lawyer would. In any case, we have seen that at least among our surviving complaints, complaints that provide meaningful guidance for statutory interpretation were unusual.

There are also several structural features that limited the role of the complaint in enhancing legal certainty and predictability even in cases like Socrates' where the complaint seems to help define the statute. If complaints but not verdicts were recorded, the fact that a single volunteer prosecutor interpreted the statute to prohibit the allegations in the complaint does not mean that an Athenian jury would necessarily agree with this interpretation. Even where the outcome of a case was known, in the absence of binding precedent there was no guarantee that a future jury would interpret the legal issue in the same way. Moreover, an acquittal could mean that the jury rejected the prosecutor's interpretation of statute as expressed in the complaint, or simply that the jury thought the defendant was factually innocent. Even guilty verdicts could be subject to multiple interpretations. Where the charge alleged multiple acts, even a guilty verdict does not resolve which acts the jury believed constituted the crime. For example, did Socrates' conviction indicate that the jury believed that corrupting the youth constituted impiety, or merely that jury found him guilty of not recognizing the gods of the city? The potential for uncertainty was particularly high in cases that were politically charged or occurred in a time of crisis: it seems likely that more was going on in Alcibiades' case than a straightforward determination of whether he had mimicked the mysteries as charged in the complaint. Finally, complaints like the one against Socrates might suggest that the behaviors described in the complaint could be interpreted to fall under the statute, but they of course provide no guidance for a potential litigant on whether other types of behavior not mentioned in a previous complaint would likely result in liability under the statute. Prosecutors could include a wide variety of wrongs under the broad categories of behavior covered by vague statues like *hubris* or *asebeia*; in essence, as Gagarin notes, "Athenian law allowed litigants to turn virtually any matter into a legal issue."[87]

For all these reasons, even an interpretation of the complaint as strictly limiting the range of litigants' arguments and jurors' verdicts would not significantly alter

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86 For discussion see Lanni 2004: 160-164.

87 Gagarin 2012: 311.

the view that the Athenian legal system did not have sufficient legal certainty and predictability to constitute a rule of law.

VI. Conclusions

Athenian litigants and jurors were likely more focused on whether or not the allegations in the complaint were proven than whether the requirements of the statute under which the case was brought were met. Prosecutors had wide discretion in formulating allegations that fit only loosely under a statute, and in that sense Athenian litigants had broader power to shape and define the law than modern litigants. But I've also argued that litigants' arguments and jurors' verdicts were not limited to the allegations in the complaint, and that complaints did not meaningfully enhance legal certainty and predictability. There has been a tendency in recent scholarship to view the complaint as a sort of soft version of the Roman formula that narrows the legal and factual issues in a case; I have tried to argue that the complaint likely had little effect on relevance or predictability in Athenian courts.

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