

THE *TETRALOGIES* ASCRIBED TO ANTIPHON

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I

The text of the speeches of Antiphon depends mainly on two manuscripts, neither of them particularly old or particularly good. One of them, now in London, was written in the thirteenth century. The other, written in the thirteenth or fourteenth century, is in Oxford. The other extant manuscripts are derived from the one in London. The two main manuscripts are themselves derived closely from their archetype.¹ They provide the three *Tetralogies*, conventionally numbered 2, 3, and 4, as well as the three speeches (1, 5, 6), whose authenticity is not now doubted. Thus the *Tetralogies* were attributed to Antiphon at the time when the archetype was written rather before the thirteenth century.

The external evidence on the transmission is scant. Dionysios of Halikarnassos expressed his respect for Antiphon in general terms without quoting his works. Although Dionysios wrote about some other Attic orators and inquired into questions of authenticity, no treatise of his on Antiphon is preserved; there is no reason to think that he wrote one. The brief note in the *Suda* and the even briefer note of Harpokration on Antiphon of Rhamnous do not name any writings. Pollux the lexicographer is a little more helpful. He has several references to speeches 5 and 6 and to Antiphontic speeches now lost, though none to speech 1, and he twice cites words from the *Tetralogies* (2.119 citing Ant. 2.3.1, and 8.21 citing 4.1.4). It follows that the *Tetralogies* existed by the second century A.D., a fact which could not otherwise be taken for granted. Pollux' attribution of the *Tetralogies* to Antiphon carries little weight. The *Life of Antiphon* (15) included in the Pseudo-Plutarchean *Lives of the Ten Orators* says that sixty speeches were current under the name of Antiphon and adds that Kaikilios of Kale Akte considered twenty-five of them spurious.

Many discussions of the *Tetralogies* in the past hundred years have concentrated on the question of authenticity: were they composed by

¹ L. Gernet, *Antiphon: Discours* (Paris 1923) 16-17. Similar information is provided by F. Blass in his Teubner text of 1871.

Antiphon of Rhamnous or by someone else, and if by someone else, who was the author? The present paper will address a different question, namely, do the *Tetralogies* reflect Athenian law and Athenian court-practice? Arguments bearing on this question may bear on the question of authenticity, but inferences about authenticity, however easy to draw, will not be drawn here.

Debts must none the less be acknowledged to two predecessors. Dittenberger's thorough inquiry should be the starting-point for all subsequent study of the *Tetralogies*. He claimed to find divergences both in diction and in law from Athenian practice. Dover, on the other hand, declared: "the law presupposed in them [is] Attic."² Dover also made two other important claims. First, he reexamined the Ionicisms of diction, which Dittenberger had noted, and he observed that they occur in common words and expressions. He inferred that they are deliberate; they cannot be explained as oversights by an Ionian who tried to speak Attic. He concluded that, if the *Tetralogies* are authentic, there must have been an otherwise unattested Ionian genre of forensic oratory which they tried to imitate. The present paper would be content to note that Ionicisms do not occur in Athenian court-speeches.

The other claim made by Dover concerned the date of composition of the *Tetralogies*, if authentic. By stylistic tests he ascertained the relative order of the three undisputed speeches, and he had an absolute date available for the earliest of them (6 in 419/8). He was able to place the fragments of lost speeches in the sequence, but he found that in stylistic features the *Tetralogies* bear no relation to the undisputed speeches. He concluded that the *Tetralogies*, if authentic, were composed at an appreciably earlier stage of Antiphon's career than his writing for real litigants. This argument appears to be the reason why many recent writers, accepting the *Tetralogies* as authentic, have favored an early date.³

² W. Dittenberger, "Antiphons Tetralogien und das attische Criminalrecht I," *Hermes* 31 (1896) 271-77; II, *Hermes* 32 (1897) 1-21; III, *ibid.* 21-41; "Zu Antiphons Tetralogien," *Hermes* 40 (1905) 450-70. K. J. Dover, "The Chronology of Antiphon's Speeches," *CQ* 44 (1950) 44-60; the remark about law is to be found on page 58. K. J. Maidment (*Minor Attic Orators* I [Loeb Classical Library, Cambridge, Mass. 1941] 34-47, especially 46-47) took a view much like that of Dittenberger, that the author was a foreigner who spent some time in Athens. Arguing against Maidment, A. W. H. Adkins (*Merit and Responsibility* [Oxford 1960, reprinted Chicago 1975] 113-14, note 27) insisted that the author was an Athenian but held that he was not Antiphon and assigned him to the last quarter of the fifth century.

³ Thus most recently H. C. Avery, "One Antiphon or Two?" *Hermes* 110 (1982) 145-58; at 155 Avery lists some who have accepted the *Tetralogies* as authentic. An earlier list of similar kind was given by P. von der Mühll, "Zur Unechtheit der antiphontischen Tetralogien," *MH* 5 (1948) 1-5. G. Zuntz ("Once again the Antiphontean Tetralogies," *MH* 6 [1949] 100-105) sought additional support for a date in the 440s from a comparison between the *Second Tetralogy* and Plut. *Per.* 36. It should not be forgotten that von der Mühll drew an

This claim can be escaped but only at a cost. One can suppose that Antiphon composed speeches for litigants in one manner of argument and language but composed the *Tetralogies*, which were not intended for any actual law-suits, in another manner at the same period of his life. On this hypothesis the Antiphon of the *Tetralogies* need bear no recognizable resemblance to Antiphon of Rhamnous, who composed the undoubted speeches. This hypothesis enables the reader to assign the name, "Antiphon of Rhamnous," to the author of the *Tetralogies* and attach any date to them, but it achieves this by emptying the name of content. Jekyll-Antiphon has nothing discernible to do with Hyde-Antiphon. The hypothesis, though tenable, is barren.

If, on the other hand, one follows Dover's argument from style to an early date for the *Tetralogies* (if authentic), one can draw conclusions which may be tentative or disputable but are at least significant. In particular something can be said about the types of argument which Antiphon favored. Greek rhetorical theory distinguished between "proofs" (*pisteis*) of two kinds: "artless" (*atechnoi*) and "artistic" (*entechnoi*). "Artless proofs" included laws, witnesses, contracts, evidence taken from slaves under torture, and oaths. "Artistic proofs" were arguments from probability in a wide sense.⁴ The custom of Athenian litigants underwent a change from sole reliance on "artless proofs" to increasing dependence on "artistic proofs." The change has been traced in the forensic speeches of Antiphon.⁵ The earliest of these (6) is content to narrate the circumstances and call the witnesses (6.15–16). The later speeches (1, 5) weigh probabilities and discuss the arguments of the other party. The *Tetralogies* consist entirely of "artistic proofs" (as observed by Maidment [above, note 2] 34). Accordingly, if Dover's argument for the date of the *Tetralogies* is right, Antiphon's practice of the art of persuasion went through three stages, from total reliance on "artistic proofs" to total reliance on "artless proofs" and then to a growing preference for "artistic proofs." In relation to the question posed in the present inquiry one need merely note that in preference for type of "proof" the *Tetralogies* are closer to Antiphon's practice late in life and to subsequent Athenian oratory than to his method in his earliest extant court-speech.

Section II will discuss the insistence of the *Tetralogies* on considerations about pollution and spirits of vengeance. Sections III and IV will examine two assertions which they make about the law of homicide.

argument against authenticity from the inconsequential remark at 2.4.9 (responding to 2.3.8 and 2.2.12); he explained the remark as an inept echo of a famous argument presented by Antiphon in the last speech of his life. Zuntz replied that the similarity is too slight to indicate borrowing. But whatever one says about the wording, the similarity of thought is palpable, and the inconsequential character of the remark at 2.4.9 demands explanation.

⁴ Ar. *Rhet.* 1. 1355B35–1356A4; 1375A22–25.

⁵ F. Solmsen, *Antiphonstudien*, Neue philologische Untersuchungen 8 (Berlin 1931).

Section V will take note of their allusion to the property-tax (*eisphora*). These topics have been discussed before, but perhaps a little more can be said about them, and the present writer is so bold as to think that he can offer a new topic for discussion in Section VI.

II

The author of the *Tetralogies* was preoccupied with pollution as a consequence of homicide and with spirits of vengeance. A list of passages mentioning these considerations will suffice: 2.1.3; 2.1.9–11; 2.2.11; 2.3.9–11; 3.1.2; 3.3.11–12; 4.1.3; 4.1.4; 4.1.5; 4.2.8; 4.3.7; 4.4.10–11.

In genuine Athenian speeches delivered on charges of homicide (Antiphon 1, 5, 6; Lysias 1, 12, 13) references to pollution are not totally absent but they are rare. The speaker of Antiphon 5 says that trials for homicide are held in the open air, so that the innocent shall not share a roof with the polluted, and that people have often suffered from admitting a polluted person to the same boat, but those sailing with the speaker have enjoyed good voyages (5.11 and 82). Prosecuting Eratosthenes, Lysias says in a merely incidental manner that the Thirty Tyrants polluted temples by entering them (12.99). Those three passages are the sole references to pollution that the present writer has noticed.

References to spirits of vengeance are not merely absent from the genuine speeches on homicide but absent where one might well expect to find them. The speaker of Antiphon 1, prosecuting his step-mother for poisoning his father, says that the latter on his death-bed charged the speaker to prosecute (1.1 and 29–30). The speaker of Lysias 13, prosecuting Agoratos for bringing about the death of Dionysodoros, says that the latter, while awaiting execution, sent for his wife, the speaker's sister, to come to the prison. Through her Dionysodoros charged the speaker and his own brother to exact vengeance from Agoratos, and believing his wife pregnant, Dionysodoros bade her impose the same charge on their future son (13.39–42 and 92–94). Both these pleaders make a considerable point of the dying man's charge; neither says that he will be persecuted by spirits of vengeance, if he fails to fulfill his task. Again in prosecuting Eratosthenes Lysias (12.100) conjectures that the dead listen to him plead and watch the dikasts vote; he fails to say anything about spirits of vengeance.

In their preoccupation with pollution and with spirits of vengeance the *Tetralogies* diverge from Athenian court-practice as attested in the extant speeches of the orators.⁶ But do they conform to court-practice as

⁶ Adkins (above, note 2, pages 100–106) draws on the *Tetralogies* and on Ant. 6.40 to show that the Athenians still had a lively concern for pollution in the late fifth century. At 6.40 the defendant says that, after the death but before legal proceedings were opened, the present prosecutor conversed with him and touched him in front of the council. This statement is part of the defendant's attempt to show that the prosecution is disingenuous. The presence in his thought of a notion of pollution is strictly conjectural.

it was early in the career of Antiphon? No decisive answer can be given to this question, but some considerations can be brought to bear on it. Pollution and spirits of vengeance were evidently matters of concern to the audiences who first appreciated the *Oidipous the King* of Sophokles and the *Libation Bearers* of Aischylos. Yet it is conceivable that Athenians disregarded in court considerations which moved them in the theater, and in this connection a feature of the *Eumenides* is suggestive. At line 235 the scene changes from Delphi to Athens. In the earlier part of the play Orestes has been purified of pollution;⁷ the question of guilt remains and is argued before the Areopagos. Thus in 458 Aischylos could expect his audience to grasp the distinction between the religious and the secular aspects of matricide. So it is not impossible that Athenian courts restricted themselves to the secular aspects of homicide as early as the time when Antiphon may have composed the *Tetralogies*.

III

Dittenberger denied on several counts that the law stated or assumed in the *Tetralogies* was Attic. In response to criticisms from J. H. Lipsius he withdrew some of his claims but continued to assert two of them. One of these concerned the repeated allegation of the *Tetralogies*, that the law forbids both unjust and just killing (3.2.9; 3.3.7; 4.2.3; 4.4.8). An Athenian law, on the other hand, said: "If in the course of prompt resistance someone kills someone who is unjustly carrying off his property or driving it away, let the death bring no penalty."⁸ Since the prohibition of just and unjust killing is stated repeatedly in two of the *Tetralogies*, and since in the second it is acknowledged by both parties, it does not appear to be a mere comment on a more complex law. *Prima facie* the author presents the prohibition as a statement of the law. Yet it would be amazing if any system of law distinguished between just and unjust homicide but imposed the same prohibition on both.

Recently M. Gagarin⁹ has recognized the enormity of the difficulty and offered an ingenious solution. The alleged prohibition lacks the form of statutory legislation, since it fails to give a sanction. Athenian law on crime commonly opened with a conditional clause, "If anyone commits such and such a deed," but a provision of that kind would make the alleged prohibition of unjust and just killing superfluous. If "just" and "unjust" mean "allowed by law" and "prohibited by law" respectively, then one half

⁷ How the purification was achieved is now disputed: see most recently A. L. Brown, "Some problems in the *Eumenides* of Aeschylus," *JHS* 102 (1982) 26–32 at 30–32.

⁸ *IG* 1³ 104, lines 37–38 (R. Meiggs and D. Lewis, *A Selection of Greek Historical Inscriptions* [Oxford 1969] No. 86); Dem. 23.60.

⁹ "The Prohibition of Just and Unjust Homicide in Antiphon's *Tetralogies*," *GRBS* 19 (1978) 291–306. Gagarin deals adequately with previous attempts to resolve the difficulty.

of the combined prohibition is self-contradictory and the other is tautological. It is surprising that the alleged prohibition is introduced into discussion by the defendant; it would appear to be in the interests of the plaintiff to cite the prohibition and of the defendant to suppress it. In the *Second Tetralogy* the dichotomy "just/unjust" is equivalent to the dichotomy "involuntary/voluntary," but in the *Third Tetralogy* it is not.

From these observations Gagarin draws the inescapable conclusion, that the repeated assertion, "the law forbids both unjust and just killing," does not state or summarize any Athenian law. Instead he draws attention to "the increasing moral sophistication of the mid-fifth century" (page 303). Some kinds of homicide, though still punishable at law, came to be recognized as just by a "more developed moral perspective." This insight, it is suggested, was summarized in the moral comment, "the law prohibits both just and unjust homicide." That comment was not a common observation, for it is not echoed in other speeches or in the plays of Euripides. But it was sufficiently current for the author of the *Tetralogies* to cite it allusively.

Gagarin's interpretation allows but does not compel the belief that the *Tetralogies* are the work of Antiphon. Certainly that prohibition is presented in the *Tetralogies* as if it were a statement of the law, not a comment on the law. In relation to the question posed in the present paper Gagarin's findings justify an even more categorical conclusion than was previously possible. The repeated assertion, that the law forbids unjust and just homicide, might serve to make a moral comment on Athenian law but it does not reflect Athenian law.

IV

The second legal point on which Dittenberger insisted concerns the treatment of someone found to have killed involuntarily. The *Second Tetralogy* deals with a young man who threw a javelin at a target in a gymnasium, but a boy ran across the path of the javelin and was killed. The young man's father, pleading in his defense, envisioned "destruction" as the consequence of conviction (3.2.10; 3.4.9). Athenian law imposed exile on the person convicted of involuntary homicide. Dittenberger argued (mainly from Plato, *Laws* 11.865E) that the exile was limited to one year. Lipsius argued (from schol. *Iliad* 2.665) that the exile lasted five years.

In fact there is more to be said both about Athenian law and about the *Second Tetralogy*. The exile imposed as a consequence of involuntary homicide had no temporal limit in Athenian law but continued until the relatives of the victim, or select members of his phratry if no

relatives survived, admitted the killer to “pardon” (*aidesis*).¹⁰ In the *Second Tetralogy* the two parties speak in different terms about the prospective penalty. The defense says, without specification, that the consequence of conviction will be “destruction” (*diaphthora* 3.2.10, cf. 3.4.9). This vagueness may perhaps be explained by the readiness of accused persons to magnify the loss threatening them. The terms chosen by the prosecutor reveal more. He urges the judges “to exclude the killer from the places from which the law excludes him” (ἐῖργοντας ὧν ὁ νόμος εἶργει τὸν ἀποκτείναντα, 3.1.2), and he hopes that the killers will be “excluded from appropriate things” (ἐῖργόμενοι τῶν προσηκόντων, 3.3.11). He does not say what places he means, but his phrases can best be understood as alluding, with variation, to a standard procedure of classical Athenian law. The person accused of homicide, but not yet convicted, was “excluded from the things specified in the laws” (ἐῖργεσθαι τῶν νομίμων).¹¹ If this interpretation of the prosecutor’s words in the *Second Tetralogy* is right, it follows that the author has mistaken the restriction put on a person accused of homicide for the disability inflicted on one judged to have killed involuntarily.

V

The defendant in the *First Tetralogy* says that he has contributed to many and large levies of *eisphora* (2.2.12). Such an assertion conforms to the practice of defendants in the late fifth and fourth centuries. About the end of the fifth century the speaker of Lysias 21 boasted of his liturgies, including two payments of *eisphora* (21.1–5). It is another question whether there were frequent levies, or indeed any levies, of *eisphora* at the time when Antiphon may have composed the *Tetralogies*. An answer to the question depends on understanding a remark of Thucydides.

In a participial clause Thucydides (3.19.1) says three things: that in 428/7 the Athenians levied an *eisphora*, that it yielded 200 talents, and

¹⁰ IG I³ 104, lines 10–19; Dem. 23.72. Demosthenes elsewhere (21.43) mentions *aidesis* among the consequences of a finding of involuntary homicide but fails to mention exile; possibly by the time of the orator it had become customary that *aidesis* followed immediately on the finding of the court; this hypothesis would allow easy understanding of the case mentioned by Aristotle, *Mag. Mor.* 1.1188b31–37. On the nature and development of *aidesis* I am convinced by the theory of E. Ruschenbusch, “*Phonos*. Zum Recht Drakons und seiner Bedeutung für das Werden des athenischen Staates,” *Historia* 9 (1960) 129–54; I defend that theory in “The Athenian Courts for Homicide,” *CP* 78 (1983) 275–96. The most recent discussion of *aidesis* is by M. Gagarin, *Drakon and Early Athenian Homicide Law* (New Haven 1981) 48–52.

¹¹ Ant. 6.35–36; Ar. *Ath. Pol.* 57.2. For the meaning of the phrases and for discussion and further references see E. Ruschenbusch, *Untersuchungen zur Geschichte des athenischen Strafrechts* (Köln, Graz 1968) 18, and P. J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford 1981) 641.

that something happened for the first time. It used to be supposed that Thucydides said here that the eisphora of 428/7 was the first ever levied by the Athenians. A difficulty arose, as long as the financial decrees of Kallias were assigned to 434/3, for the first of the two decrees alludes to levy of eisphora as a recognized practice.¹² But a new scrutiny of the content and purport of the decrees suggests a later date.¹³

A different way of understanding the remark of Thucydides has been suggested by R. Thomsen and defended by J. G. Griffith.¹⁴ According to this Thucydides said that in 428/7 for the first time the sum levied as eisphora was as much as 200 talents. There may have been earlier levies of eisphora, known to Thucydides, but these did not reach so high a level. So Antiphon may have composed the *First Tetralogy* many years before 428/7. It would still be a little surprising to learn that levies of eisphora were frequent before the Peloponnesian War. The expenses of the Samian War and of the expeditions sent to Corcyra in 433 appear to have been born, not by the Athenians, but by the treasury of Athena.¹⁵ But it is credible that eisphora was levied repeatedly during the First Peloponnesian War.

There are thus two rival interpretations of the remark of Thucydides. One says that the eisphora of 428/7 was the first ever levied by the Athenians; the other says that it was the first to yield as much as 200 talents. Since Thucydides wrote for a panhellenic audience and could not presuppose knowledge of the history of Athenian taxation among his readers, his meaning must have been clear to contemporaries from the wording. Modern sensitivity to a language no longer spoken is necessarily imperfect, but perhaps a choice can be made.

In full the sentence reads:

Προσδεδόμενοι δὲ οἱ Ἀθηναῖοι χρημάτων ἐς τὴν πολιορκίαν, καὶ αὐτοὶ
ἐσενεγκόντες τότε πρῶτον ἐσφορὰν διακόσια τάλαντα, ἐξέπεμψαν
καὶ ἐπὶ τοὺς ξυμμάχους ἀργυρολόγους ναῦς δώδεκα καὶ Λυσικλέα
πέμπτον αὐτὸν στρατηγόν.

Thucydides proceeds to relate the fortunes of Lysikles.

¹² A. W. Gomme (*A Historical Commentary on Thucydides* II [Oxford 1956] 278) recognized the difficulty and supposed that Thucydides meant that the eisphora of 428/7 was the first since the beginning of the Peloponnesian War.

¹³ C. W. Fornara, "The Date of the Callias Decrees," *GRBS* 11 (1970) 185–96. Fornara suggests 418 as the date of the decrees. I am convinced by his arguments, although the date of 434/3 has since been defended by D. W. Bradeen, "The Callias Decrees Again," *GRBS* 12 (1971) 469–83. The supposed epigraphic grounds for assigning both decrees to the same day have been undermined by W. K. Pritchett, "Callias: Fact or Fancy?" *CSCA* 4 (1971) 219–25, and any further inquiry into their date ought to take this into account.

¹⁴ R. Thomsen, *Eisphora* (København 1964) 144–46; J. G. Griffith, "A Note on the First Eisphora at Athens," *AJAH* 2 (1977) 3–7.

¹⁵ *IG* I³ 363 and 364 = Meiggs/Lewis Nos. 55 and 61.

Scrutinizing the participial clause about payment of eisphora, Griffith compares other passages where Thucydides writes “then for the first time.” He finds eight such passages (τότε πρώτον six times, πρώτον τότε twice). In one of these (8.86.4) the text is uncertain. In five of them (1.96.2; 2.56.2; 3.40.2; 3.104.2; 7.4.6) the words “then for the first time” precede the verb or participle, and special reasons can be found why in the remaining two passages (2.68.5; 8.97.1) Thucydides departed from this “preferred word-order.” The departure from it in the participial clause at 3.19.1 then requires explanation, such as may be provided by that interpretation of the meaning which Thomsen and Griffith defend.

Griffith’s argument from the order of the words within the participial clause is not decisive. The number of passages available may not suffice to determine Thucydides’ preference. If πρώτον τότε is the right reading at 8.86.4, as some editors have thought, then that sentence departs from the apparently preferred order. Even if Thucydides did usually prefer the word-order occurring in the five noted passages, it need not follow that the meaning found by Thomsen and Griffith at 3.19.1 was the historian’s reason for departing there from that word-order. Furthermore a different approach can be made to understanding the order of the words in the participial clause. J. D. Denniston (*Greek Prose Style* [Oxford 1952] 44) wrote: “As regards beginning and end, it is generally admitted, and is indeed beyond dispute, that the weight of a Greek sentence or clause is usually at its opening, and the emphasis tends to decline as the sentence proceeds.” He offered illustrations from Plat. *Rep.* 618E, Dem. 32.19, 33.25, Plat. *Prot.* 310B. As a basis for a theory of Greek word-order Denniston’s doctrine is inadequate.¹⁶ As a rule of thumb it may serve for interpreting much Greek prose, although Denniston only claimed that it held “usually,” not necessarily always. In the participial clause at Thuc. 3.19.1 the opening words καὶ αὐτοί do indeed suggest that “the weight . . . is . . . at its opening.” If so, the older interpretation is to be preferred. That is, Thucydides says that in 428/7 the Athenians levied an eisphora for the first time. He adds the incidental information that it yielded 200 talents.

Moreover, the structure of the sentence as a whole is a better guide to meaning than the order of words in the participial clause considered in isolation. Due importance must be allowed to the two occurrences of καί. The sentence opens by saying that the Athenians were in need of money for the siege of Mytilene. It states their consequent actions in two clauses which balance one another. The second of these clauses contains a finite verb and the word καί, whose force here is perhaps equivalent to “also.” That clause says that the Athenians sent twelve ships to exact

¹⁶ K. J. Dover, *Greek Word Order* (Cambridge 1960) 32–34 (“Yet the term ‘emphasis’ is for a variety of reasons unsatisfactory,” 32).

money from their allies. The reader will remember that the Athenians had sent out six ships with the same task in 430 (2.69). The first of the two balanced clauses begins with the striking words *καὶ αὐτοί*. Its participle, *ἐσυνεγκύντες*, is not equal in weight to the opening participle of the sentence, *προσδεόμενοι*, but much stronger. For if the two participles were equal in weight, a milder connective, such as *τε*, would be required instead of *καὶ αὐτοί*. The first of the two balanced clauses, the participial clause, states something for which Thucydides has given no precedent. Surely it records a new departure in Athenian financial practice; they even taxed themselves.

The sentence may accordingly be translated or paraphrased thus:

The Athenians were in need of additional money for the siege. They even taxed themselves by a property-tax for the first time (it yielded 200 talents). They also sent out twelve ships, under the command of the general Lysikles with four colleagues, to levy money from the allies.

This interpretation of the sentence does justice to its structure and its particles. The alternative offered by Thomsen and Griffith cannot be proved wrong, but the older way of understanding the sentence is at least as defensible as theirs. If epigraphic evidence is found attesting a levy of *eisphora* before 428 in a context known to Thucydides, it will be a decisive argument in favor of Thomsen and Griffith. If epigraphic evidence is found indicating that there were frequent levies of *eisphora* before the Peloponnesian War, it will show that the assertion of the *First Tetralogy* (2.2.12) is something to be expected in Athenian court-practice early in the career of Antiphon. Meanwhile an easy way of understanding the sentence of Thucydides points to the opposite conclusion.

VI

The *Second Tetralogy* opens with the following assertion of the prosecutor:

Τὰ μὲν ὁμολογούμενα τῶν πραγμάτων ὑπὸ τε τοῦ νόμου κατακέκριται ὑπὸ τε τῶν ψηφισαμένων, οἱ κύριοι πάσης τῆς πολιτείας εἰσὶν· ἐὰν δέ τι ἀμφισβητήσιμον ᾖ, τοῦτο ὑμῖν, ὦ ἄνδρες πολῖται, προστέτακται διαγνῶναι.

Those among occurrences that are admitted are decided in advance by the *nomos* and by the things voted [?], these being the masters of our whole political society; but if anything is open to dispute, it has been assigned to you, fellow citizens, for determination.

The participle *ψηφισαμένων* is difficult to interpret in this passage. It has commonly been taken to mean “decrees” (things voted); it was so

understood by V. Jernstedt, L. Gernet and K. J. Maidment.¹⁷ More recently F. D. Caizzi (*Antiphontis Tetralogiae* [Milano 1969] 211) has understood the participle as masculine, not as neuter, and has taken it to mean “judges.”

Three grammatical points concerning this participle call for attention.

1. If the participle is neuter, it is surprising that the relative pronoun occurs in the masculine plural after a compound antecedent of which the last element is neuter plural. But an adequate parallel can be found at Dem. 19.259. In the phrase in the *Second Tetralogy* the predominant idea in the author’s thought is evidently *nomoi*, not decrees.
2. If the participle is masculine and refers to the judges, one might expect it to be future, not aorist, since the judges have still to vote at the time when the speech is supposedly spoken. Such an expectation could not be secure, since an aorist participle sometimes looks ahead to a one-time act of the future. But aorist participles often have temporal force, referring to the past. In a forensic speech a participle of *ψηφίζεω* in reference to judges would most likely have future form, since it would echo the opening word of the dikastic oath, which was the future indicative of the same verb (below, note 18).
3. The aorist middle participle *ψηφισαμένων* has middle, not passive, force. Therefore it is masculine here and means the judges. If the participle were passive in meaning and referred to decrees, it would have the form of the aorist passive (*ψηφισθέντα*) or of the perfect middle-passive (*ἐψηφισμένα*).

The third point tells strongly against the traditional interpretation. Yet there are decisive arguments against Caizzi’s interpretation. Her view destroys the contrast between the two sentences quoted above from the opening of the *Second Tetralogy*. On the one hand (*men*) cases where the facts are not in dispute are determined in advance by the *nomos* and *τῶν ψηφισαμένων*, but on the other hand (*de*) cases where there is dispute are submitted to the judges for decision. The contrast

¹⁷ Jernstedt’s view is indicated by his proposed emendation of the relative clause to the neuter plural (reported by T. Thalheim in his Teubner text of 1914). Gernet (above, note 1, page 72) rendered the passage: “Quand on s’ accorde sur les faits, la cause est jugée d’ avance ou par la loi ou par les décrets qui régissent toute la vie de la cité.” Similarly Maidment (above, note 2, page 89): “Cases in which the facts are agreed upon are settled in advance either by the law or by the statutes of the Assembly, which between them control every branch of civic life.” A friend has suggested that the phrase in the opening of the *Second Tetralogy* means “by the law and by those who voted it, sc. the law.” But in Attic usage “to make law” is *νόμον τίθεσθαι*, *ν. δοκιμάζειν* or *ν. γράφειν* (Andok. 1.82–89; Dem. 20.89–91; Ar. *Ath. Pol.* 7.1, cf. 12.4); I do not know of any occurrence of *ν. ψηφίζεσθαι*.

says that the judges have no role to play in cases of the first kind (the assertion may be a tendentious simplification of legal procedure, but that is beside the point). It follows that τῶν ψηφισαμένων, which have a part to play in cases of the first kind, are not judges. Again, in saying "by the *nomos* and τῶν ψηφισαμένων" the author of the *Tetralogies* alluded with stylistic variation to a familiar phrase, "the *nomoi* and the *psêphismata*," which will be considered shortly. Doubtless he expected his readers to recognize the phrase and admire the variation.

There remains another possible way of understanding the troublesome participle. Perhaps by τῶν ψηφισαμένων the author meant "those who voted the decrees." He would refer, not to the judges, but to the assembled citizens who passed the decrees which could bear on disputes. This interpretation does justice to the contrast of the two sentences and to the allusion to the stock-phrase. Admittedly it gives the participle a tortuously compressed meaning, but it escapes grammatical difficulties and the sense which it provides is more satisfactory than the other renderings proposed.

Thus the traditional interpretation, though perhaps requiring modification, looked in the right direction. The author indicated the law and, perhaps by reference to the public assembly, the decrees. A little more can be learned about the author tentatively by paying attention to the stock-phrase, "the *nomoi* and the *psêphismata*." This phrase was familiar in the fourth century from the dikastic oath, which opened with an undertaking to vote "in accordance with the *nomoi* and the *psêphismata* of the people of the Athenians and of the council of five hundred."¹⁸ In the fourth century *nomoi* and *psêphismata* were the two distinct sources of law. Hypereides (5 *Against Demosthenes*, col. 1) expressed amazement "if in the case of Demosthenes alone of all people in the city there is no force in the *nomoi*, which require the will which one expresses for one's own sphere to be valid, or in the *psêphismata* of the people, in accordance with which you have sworn to cast your vote." Often pleaders reminded dikastai that they had sworn to vote "in accordance with the *nomoi*" and refrained from adding "and the *psêphismata*."¹⁹ This was understandable, since the laws had higher validity; in 403/2 the Athenians adopted explicitly the rule that no *psêphisma* of the people or of the council should override a *nomos*.²⁰ The phrase "(in accordance

¹⁸ M. Fränkel, "Der attische Heliasteneid," *Hermes* 13 (1878) 452–66. The full form of the opening occurs at Dem. 19.179 and in the document given at Dem. 24.149. An allusion to it, without mentioning decrees of the council, is to be found at Dein. 1.84.

¹⁹ Reminders to this effect are often inserted in subordinate clauses: Isai. 11.6; Isok. 15.173; 19.15 (addressed to an Aiginetan court); Dem. 18.121; 20.118; 23.101; 36.26; [Dem.] 34.45; 58.25; 58.36. In other reminders there is less syntactical subordination: Plat. *Apol.* 35C; Lys. 22.7; Dem. 21.42; [Dem.] 46.27; Aischin. 3.6; Dein. 1.17.

²⁰ Andok. 1.87 and 89; cf. Dem. 23.87; 24.30.

with) the *nomoi* and the *psêphismata*” could occur without reference to the dikastic oath. Inscriptions of the second century honor ephebes and their officers for observing “the *nomoi* and the *psêphismata* of the people.”²¹

Before 403 the sources of law were both simpler and more complex. In the years 403–399 the Athenians carried out a revision of the laws.²² Then or a little later they instituted a distinct procedure for amending the *nomoi*; its crucial feature was that proposed amendments were to be submitted, not to the assembly of citizens, but to a board of nomothetai, for ratification or rejection.²³ Before 403 the only way to make new law in Athens was by vote of the assembled people. Consequently as late as 400/399 Andokides (1.95–98) could call a *psêphisma* of 410/09 a *nomos*, indeed a *nomos* of Solon, and Xenophon (*Memorabilia* 1.2.42) could attribute to Perikles the assertion that anything voted by the assembled people was *nomos*. Athenian opinion was reluctant to recognize that new law was made; the current laws were the *nomoi* of Solon and the *thesmoi* of Drakon (Andokides 1.83).

The sources of law were simpler before 403, in that there was only one way to make new law. In other respects they were more complex. For one thing in 403/2 the Athenians adopted the rule that no magistracy should enforce any unwritten *nomos*.²⁴ The explicit adoption of this rule may suggest that it had not been respected before, and the suspicion is strengthened by a sinister remark attributed to Perikles; allegedly he once said that in cases of impiety one should enforce, not only the written laws, but also the unwritten laws on which the interpretive science of the Eumolpidai depended.²⁵ Moreover, although before 403 there was no distinctive procedure for making *nomoi*, the Athenians already recognized in some sense a difference in degree of authority

²¹ IG II² 1009, line 34; 1028, lines 27, 75, 87.

²² Andok. 1.83–84; Lys. 30.4. Among several modern studies the following may be mentioned: A. R. W. Harrison, “Law-Making at Athens at the End of the Fifth Century B.C.,” *JHS* 75 (1955) 26–35; S. Dow, “The Athenian Calendar of Sacrifices: the Chronology of Nikomakhos’ Second Term,” *Historia* 9 (1960) 270–93; id. “The Walls Inscribed with Nikomakhos’ Law Code,” *Hesperia* 30 (1961) 58–73.

²³ The most informative text is Dem. 24.20–26 and 33. Among modern discussions attention may be drawn to U. Kahrstedt, “Untersuchungen zu athenischen Behörden II: Die Nomotheten und die Legislative in Athen,” *Klio* 31 (1938) 1–32; M. H. Hansen, “Athenian *Nomothesia* in the fourth century B.C. and Demosthenes’ speech against Leptines,” *C&M* 32 (1980) 87–104. A systematic account of the matter is provided by M. H. Hansen, *Nomotheterne*, *Opuscula Graecolatina* 15: 3 (København 1977).

²⁴ Andok. 1.85–89.

²⁵ Lys. 6.10. The orator introduces the alleged remark of Perikles with “they say that . . .,” but it has a good chance of being authentic, since it does not conform to any stock-picture of the statesman. Even if inauthentic, it attests an Athenian view about unwritten laws.

between *nomoi* and *psêphismata*. This is at least implied by the existence of the procedure of *graphê paranomôn*, whereby a *psêphisma* could be challenged in court on the grounds that it conflicted with the *nomoi*.²⁶

Before 403 Athenian principles of legislation were not fully clear. The Athenians believed that their *nomoi* had been written down by Solon. But measures voted by the public assembly added to the body of law, and such measures could be called *nomoi*. On the other hand measures voted by the public assembly were *psêphismata*, and by instituting and maintaining the procedure of *graphê paranomôn* the Athenians recognized that *nomoi* had authority superior to that of *psêphismata*. References to "law" and "decrees" could be conjoined; the chorus in the *Thesmophoriazousai* of Aristophanes express disapproval of various kinds of people, including those who try to change "decrees and law" (*ψηφίσματα καὶ νόμον*, 361). Clarity was achieved in and after 403, when the *nomoi* were revised and a distinct procedure for amending them or adding to them was devised. The resulting clarity is reflected in the fourth-century phrase, "(in accordance with) the *nomoi* and the *psêphismata*," attested in the dikastic oath and occasionally elsewhere.

One may wonder how the opening clause of the dikastic oath was worded before 403. Explicit reference both to *nomoi* and to *psêphismata* in that clause is not likely, since such reference would reflect the clarity achieved after 403. Since *nomoi* had greater authority, it is understandable that even in the fourth century orators usually reminded dikasts merely that they had sworn to vote in accordance with the *nomoi*, without mentioning the *psêphismata* (see note 19). Consequently it is likely that before 403 the dikastic oath opened with a bare undertaking to vote "in accordance with the *nomoi*" and did not add "and the *psêphismata*." That, in short, is what one might expect, and the expectation is fulfilled by Antiphon in one of the speeches of undisputed authenticity; addressing the dikasts, he says (5.85): "For you have sworn to judge in accordance with the *nomoi*."

It would be foolish to claim certainty in such a context, but since the opening of the *Second Tetralogy* mentions the *nomos* and, directly or indirectly, the *psêphismata* as different items, it is more likely to have been composed after 403 than before. It echoes a phrase current in and after the fourth century, but probably that phrase was not current in the time of Antiphon.

²⁶ The existence of the *graphê paranomôn* before 403 is attested by Andok. 1.17 and 22; [Plut.] *vitae decem orat.* 833D; Harpok s.v. *keleontes*; Thuc. 8.67.2; Ar. *Ath. Pol.* 29.4; Xen. *Hell.* 1.7.12. For discussion see H. J. Wolff, "Normenkontrolle" und Gesetzesbegriff in der attischen Demokratie, Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Philosophisch-historische Klasse (1970) 47–50.

VII

A few years ago it was argued that the plea of self-defense did not bring a case as one of lawful homicide before the Delphinion but could be entered against a charge of intentional homicide before the Areopagos.²⁷ The thesis is highly plausible but much (though not all) of the evidence is drawn from the *Third Tetralogy*. That is unfortunate. This inquiry has found that, not only in their Ionicisms, but also in some other features the *Tetralogies* diverge from Athenian law and practice. In yet other features they conform to the practice of the fourth century, but probably practice was different during the early years of Antiphon's activity. Consequently the *Tetralogies* are not sufficient testimony to Athenian law and practice, unless there is additional evidence from less suspect sources.²⁸

²⁷ M. Gagarin, "Self-defense in Athenian Homicide Law," *GRBS* 19 (1978) 111–20.

²⁸ I should like to acknowledge my indebtedness to the late U. Knoche. Many years ago his lectures on the Athenian orators offered valuable insights and first aroused my interest in the *Tetralogies*. From him I learned to respect Dittenberger's study of them. This paper has avoided the question, who the author of the *Tetralogies* was. Two considerations bearing on that question may be added here in the belief that they are new. 1. Some readers, for example Maidment (above, note 2, page 47) have been struck by the archaic style of the *Tetralogies* and have hence inclined to suppose an early date of composition. The "archaic" features of style may, however, be not archaic but archaizing. 2. From von der Mühl's argument (above, note 3) it appears that the author of the *Tetralogies* admired Antiphon. It does not follow that in composing the *Tetralogies* he imitated any works of Antiphon or that he ascribed his compositions to Antiphon.