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Hypereides 3 and the Athenian Law of Contracts*

DAVID D. PHILLIPS
University of California, Los Angeles

SUMMARY: This article examines the Athenian law of contracts as illuminated by the particular case of Hypereides 3, *Against Athenogenes*, in which the prosecutor, Epicrates, seeks to void a contract of sale on the grounds that the defendant, Athenogenes, has employed fraud in its formation. Part 1 compares and analyzes the attested variants on the general contract law cited at Hypereides 3.13 and concludes that Hypereides' version is most likely to be correct. Part 2 discusses modifications of the right to contract created by additional legislation and addresses the value and significance of Epicrates' arguments from analogy. Part 3 offers an explanation of the strategy behind Epicrates' attribution of particular laws to Solon.

IN THE *NICOMACHEAN ETHICS*, ARISTOTLE FAMOUSLY PREFIGURES GAIUS'S division of obligations into contracts and delicts[1] as follows (1131a2–9):

> Among obligations (συναλλαγμάτων), some are voluntary and others involuntary. Voluntary obligations are such as sale, purchase, loan of money, pledge (ἐγγύη),[2] loan for use, deposit, and hire; they are called voluntary because the source of these obligations is voluntary. Among the involuntary obligations, some are secret, such as theft, seduction, poisoning, pimping, enticement of

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[1] Gai. *Inst.* 3.88: "omnis enim obligatio vel ex contractu nascitur vel ex delicto." Cf. Beauchet 1897: 4.9–11; Vinogradoff 1922: 230; Biscardi 1982: 133–35; Carawan 2006: 361n35.

[2] Including marital betrothal: see *infra*, p. 109.

> slaves from their master, murder (δολοφονία), and bearing false witness; others are violent, such as battery, imprisonment, homicide (θάνατος), rape (or "kidnapping": ἁρπαγή), maiming, slander, and insult.

Elsewhere (*Rhet.* 1376b8–9) Aristotle identifies the law as the source of his first category of voluntary, contractual obligations: "Contracts do not validate the law; the laws validate lawful contracts" (αἱ μὲν συνθῆκαι οὐ ποιοῦσιν τὸν νόμον κύριον, οἱ δὲ νόμοι τὰς κατὰ νόμους συνθήκας). Formulations such as Aristotle's constituted an important step in the conceptualization of contract law in fourth-century Athens, since this area of the law (like most others) lacked the precise definitions and technical sophistication of Roman or modern law. Nonetheless, the express statements and implicit assumptions of fourth-century Athenian litigants indicate a general understanding and acceptance of the Aristotelian principle that contractual obligation proceeds from the law.[3] It is this aspect of a contract that is usually held to distinguish it from other agreements: a contract may be broadly defined as an actionable (i.e., legally enforceable) agreement, an agreement whose breach is subject to legal remedy.[4] In Athenian law, breach of contract fell under the purview of the δίκη βλάβης, a general action for wrongful financial loss.[5]

The prominence of lawsuits arising from contracts in fourth-century Attic oratory, considered together with the foundations of a doctrine of contract laid by Aristotle, gives the lie to Henry Sumner Maine's pronouncement that "[t]he Contract-law of all other ancient societies but the Roman is either too scanty to furnish information, or is entirely lost" (1864: 328). The intriguing problem with the Athenian evidence, as we shall see, is not that it is absent or insufficient but that it is inconsistent. The inconsistency evident in the

[3] E.g., [Dem.] 35.3: "I have brought this lawsuit in accordance with the same laws by which I made the contract"; [Dem.] 42.2: Phaenippus "scorned both us and the law" in violating an agreement connected with an *antidosis*; [Dem.] 56.2: "Trusting in what and with what security do we take risks? Trusting in you, men of the jury, and in your laws, which command that whatever one man voluntarily agrees with another shall be binding" (for the formulation of the law see section 1 *infra*).

[4] E.g., Buckland 1921: 406; Nicholas 1962: 158; Farnsworth 2004: 3–4; Frier-White 2005: 29. The Restatement of the Law, Second, Contracts 2d, promulgated by the American Law Institute (American Law Institute 1981), defines a contract as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty" (§1).

[5] As, for example, in [Demosthenes] 48 (*infra*, p. 96). Commentators frequently note that the Athenians thus lacked a distinct action for breach of contract (e.g., Todd 1993: 266), but see Mirhady 2004: 56 on the possible allusion to δίκαι συμβολαίων at Dem. 32.1.

sources can be largely attributed to two factors. First, the Athenians possessed no mechanism for the authoritative interpretation of statutes; the democratic ethic demanded that law be the province of the *dêmos*, not of a specialized caste, and hence statutory interpretation operated as a function of forensic persuasion rather than juristic authority (Todd 1993: 53–54, 61–62; Johnstone 1999: 44; Yunis 2005: 194–96). Second, an attitude of veneration toward their ancestral lawgivers, Draco and Solon, caused the Athenians to preserve traditional laws that were neither designed for nor, in many cases, suited to contemporary realities (Yunis 2005: 201–2). This disjuncture is particularly significant in the area of contracts, as Solon could hardly have foreseen the range and complexity of transactions common in the fourth century. Consequently, fourth-century litigants who confronted a sixth-century law of contract that was so general as to be apparently all-embracing endeavored to limit or modify its terms to their advantage; and perhaps the most striking instance of this phenomenon occurs in Hypereides 3, *Against Athenogenes*.[6]

Hypereides 3 was delivered by an Athenian citizen, probably named Epicrates,[7] when he prosecuted Athenogenes in a *dikê blabês*[8] that took place

[6] Hypereides' speeches are numbered as by Kenyon 1906; the fragments of Hypereides are cited according to their numbers in Jensen 1917. Properly, Hypereides 3 is the first oration against Athenogenes (and is so marked by Jensen 1917, Colin 1946, Arapopoulos 1975, and Marzi in Marzi-Leone-Malcovati 1977). Harpocration possessed a second speech against Athenogenes by Hypereides, from which he quotes a total of five words (Hyp. frr. 1–2).

[7] Blass's (1894: 72; cf. 1898: 82) conjecture at §24 has been nearly universally accepted; for some cautionary observations see Whitehead 2000: 327.

[8] No indication of procedure appears in the text of the speech (or, for that matter, in its title, which is simply κατ' Ἀθηνογένους (α΄)). Nonetheless, identification of the action against Athenogenes as a *dikê blabês* (private lawsuit for damage) has long been the *communis opinio* (e.g., Kenyon 1893: xx; Blass 1894: liv; Lipsius 1896: 43; Jensen 1917: xxxix; Colin 1946: 185; Burtt 1954: 428; Marzi in Marzi-Leone-Malcovati 1977: 46; Cooper in Worthington-Cooper-Harris 2001: 96n27). The fundamental purpose of the *dikê blabês* was the redress of unlawfully inflicted financial loss, and the action covered a multiplicity of forms of loss (Osborne 1985: 56–57; Todd 1993: 279; *contra* Wolff 1943), with the result that it "is the most copiously-attested of all private lawsuits from fourth-century Athens" (Whitehead 2000: 268). Epicrates claims to have suffered a wrongful loss of 5 tal. as a result of contractual fraud and seeks redress of the loss by way of release from the contract; thus his case accords perfectly with what we know of the *dikê blabês*. An alternative view (Simonetos 1968: 476–77; cf. Cantarella 1966) holds that the action against Athenogenes was a δίκη βουλεύσεως ("private lawsuit for conspiracy," comparable to the Roman *actio* or *exceptio doli*), on the strength of §18, where the words β[ου]λεύσεως ὑμᾶς are hedged in by inconvenient lacunae. Despite his belief that the case was a *dikê blabês*,

between 330 and 324.[9] The lawsuit arose from a contract of sale whereby Epicrates purchased three slaves—a man named Midas and his two sons, in one of whom Epicrates had an erotic interest—and the perfumery they managed[10] from Athenogenes for 40 mn. In so doing he explicitly agreed to assume all debts that Midas had incurred in running the perfumery. Epicrates asserts that Athenogenes misrepresented the amount of debt in negotiating and drawing up the contract and accordingly seeks to void the contract on the grounds of fraud. In his defense, Athenogenes will rely on a general law of contract that provides that "whatever one man agrees with another is binding" (ὅσα ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ κύρια εἶναι, §13). Anticipating this argument, Epicrates contends that only "just" (δίκαια) agreements are binding, and that unjust agreements, such as the one concluded between himself and Epicrates, are void.[11] I propose here to examine the rival claims of the litigants in Hypereides 3 with three purposes: first, to reconstruct the

Kenyon (1893: 22; 1906) proposed to restore ὑ[πὲρ ὧν διώκω νῦν βου]λεύσεως ὑμᾶς: "(the contract) concerning which I am now prosecuting you for conspiracy." Jensen 1917: xlvi (add. et corr.) tentatively essayed the supplements ὑ[πὲρ ὧν οἱ νόμοι] β[ου]-λεύσεως ὑμᾶς κε[λεύουσιν αἰτίου]ς εἶναι: "(the contract) concerning which the laws of conspiracy ordain that you be liable." Jensen's reading has won considerably more support than Kenyon's (e.g., Colin 1946: 206–7; Burtt 1954: 444; Arapopoulos 1975: 42; Marzi in Marzi-Leone-Malcovati 1977: 224). Most significant is the testimony of Harpocration, who possessed the entire oration and clarifies (s.v. βουλεύσεως) the significance of the word *bouleusis* in the present passage: "Hypereides, in his *First Speech Against Athenogenes*, uses the word uniquely (ἰδίως), for a trap and a plot designed to make money." Earlier in the lemma, Harpocration defines βουλεύσεως as the name assigned to two lawsuits, each with abundant attestation from the orators: one for conspiracy to kill and another for wrongfully registering a man as a state debtor. By contrast, Harpocration characterizes the occurrence of βουλεύσεως in Hyp. 3 as an idiomatic usage: therefore, for Harpocration, there was no *dikê bouleuseôs* or *nomoi bouleuseôs* of the sort imagined, and applied to Hyp. 3, by Simonetos (cf. Colin 1946: 192). It is therefore most likely that Hypereides referred to *bouleusis* by way of (very brief) analogy with Athenogenes' connivance against Epicrates, which would be fully consistent with the series of arguments by legal analogy proferred from §13 on and resumed at §§21–22 (Whitehead 2000: 316–17, with additional proposals for the supplement at Hyp. 3.18).

[9] For the date see Whitehead 2000: 266–67 with references.

[10] That Epicrates purchased the perfumery as well as the slaves is evident from §6, where Athenogenes assures Epicrates that the debt accrued by Midas is considerably less than the value of the wares in the shop.

[11] "*Just* contracts, my good man; but for those that are not just it is the opposite: the law proclaims that they are not binding." (τά γε δίκαια, ὦ βέλτιστε· τὰ δὲ μὴ τοὐναντίον ἀπαγορεύει μὴ κύρια εἶναι.) This is an instance of "limitative" and "exclusive" γε: see Denniston 1950: 140 (s.v. γε II.1.ii).

text of the general law of contract to which Epicrates and Athenogenes refer; second, to analyze Epicrates' arguments from legal analogy, which document the development of Athenian contract law *via* Solonian and later restrictions; and third, to explain the significance of Epicrates' references to Solon.

1. HYPEREIDES 3.13 AND THE GENERAL LAW OF CONTRACT

The general law of contract cited at §13 in the form "whatever one man agrees with another is binding" appears in paraphrases and potential allusions at a number of locations in the Attic orators and elsewhere, but the sources present several variants on its text. The resulting reconstructions of the law can be tabulated as follows:

1. Whatever one man agrees with another is binding (ὅσα ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ κύρια εἶναι): Hyp. 3.13;[12] [Dem.] 47.77; cf. Isoc. 18.24–25; Arist. *Rhet.* 1375b8–10 (Unlimited variant, henceforth U).

2. Whatever one man *voluntarily* agrees with another is binding (ὅσα ἄν τις ἑκὼν ἕτερος ἑτέρῳ ὁμολογήσῃ κύρια εἶναι): [Dem.] 56.2; Pl. *Symp.* 196c1–2 (ἑκὼν ἑκόντι); cf. [Dem.] 48.54 (ἑκὼν πρὸς ἑκόντα) ("Voluntary" variant, henceforth V).[13] Alternatively, a negative provision against duress and/or fraud may substitute for the positive requirement of volition: cf. Pl. *Crito* 52d9–e3 (οὐχ ὑπὸ ἀνάγκης ὁμολογήσας οὐδὲ ἀπατηθεὶς οὐδὲ ἐν ὀλίγῳ χρόνῳ ἀναγκασθεὶς βουλεύσασθαι), *Leg.* 920d2–3 (ὑπὸ ἀδίκου βιασθεὶς ἀνάγκης).

3. Whatever one man agrees with another *in the presence of witnesses* is binding (κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας ἃς ἂν ἐναντίον ποιήσωνται μαρτύρων): [Dem.] 42.12; cf. Din. 3.4 ("Witnessed" variant, henceforth W).

4. Whatever one man agrees with another *that is not prohibited by law or decree* (πλὴν ὧν ἂν νόμοι ἀπέργωσιν ἢ ψήφισμα) is binding: Pl. *Leg.* 920d1–3; cf. Arist. *Rhet.* 1375b10–11; [Dem.] 44.7, which refers specifically to adoptions ("Lawful" variant, henceforth L). It must be observed that such a condition does not equate with Epicrates' assertion—corroborated by [Dem.] 44.7 with regard to adoptions (δικαίως)—that the terms of a contract must be just (J).

[12] Epicrates' attempt to limit the terms of the general contract law to "just" agreements appears nowhere else in Attic oratory (see number 4 and p. 95 below on [Dem.] 44.7, which relates only to adoption). It is, therefore, manifestly "an appeal to the spirit, not the letter, of the law in question" (Whitehead 2000: 306; cf. Vogt 1894: 205–6; Simonetos 1968: 477–79; Colin 1946: 190–91; Cohen 2005: 296).

[13] I describe this variant as "voluntary" rather than "consensual," since a ἑκών-formula could be construed as narrowing the field of consent expressed by ὁμολογήσῃ: see p. 104 *infra*.

L is, rather, a subset of J: illegal terms are *ex hypothesi* unjust (cf. Arist. *EN* 1129b11–12), but a contract can be inequitable without breaking the law.

Two conclusions are possible on the basis of this synopsis. Either the law imposed no conditions upon agreements between parties (U),[14] and the sources that impose conditions are supplementing the text of the law, or the law required one or more conditions (V, W, L, J)[15] for a contract to be valid, and the sources state, suppress, or supplement these conditions according to the exigencies of the speaker or author.[16] Before proceeding to an assessment of the various proposed conditions, we must note at the outset that the works cited above do not possess uniformly equivalent value as sources of Athenian law. As a rule, statements by litigants who pled their cases in Athenian courts are more reliable than statements by philosophers, which, depending on their context and purposes, may not have had Athenian law in mind at all. Within each genre, however, we may posit a hierarchy of credibility. In the orators, direct statutory quotations within the narrative,[17] whose falsification was punishable by death ([Dem.] 26.24), are preferable to paraphrases or allusions, which often contain fudging, omission, and expansion, not to mention blatant misrepresentation.[18] Moreover, litigants tend to be more trustworthy when they discuss laws that bear only tangentially upon their cases than when they discuss those that are directly germane, since the latter are more likely to be distorted by partisan interpretation.[19] Within the philosophical *corpus*, some passages, mostly found in the Socratic dialogues of Plato, manifestly reference

[14] Lipsius 1896: 43–44, 1905–15: 684 with n28; Whitehead 2000: 305–6 with references; Cohen 2005: 296 with n32.

[15] Vogt 1894: 209n33 (V); Beauchet 1897: 4.19 (V) (but cf. 4.39–44, where Beauchet argues for (apparently tacit) L and J requirements); Simonetos 1968: 463–64 (V); Pringsheim 1950: 43 (W); Wolff 1957: 27 (V); MacDowell 1978: 140 (V, W, J); Harris 2000: 49 (V).

[16] Cf. Pringsheim 1950: 40: "We cannot neglect the observation that the orators usually mention that part of a statute or a legal rule only which is indispensable to their argument. They omit what is of no interest in the special case."

[17] The preservation or interpolation of documents that speakers (allegedly) had read out to the court, including laws, presents its own problems, and the authenticity of such documents must be judged on a case-by-case basis. See, e.g., MacDowell 1990: 43–47; Todd 2005: 107–8.

[18] In Lysias 1, for example, Euphiletus falsely asserts a mandatory death penalty for *moicheia* (Lys. 1.26, 34).

[19] Therefore, we may attribute an optimal expectation of authenticity to laws that are directly quoted and remotely related to the speaker's case; for example, the homicide laws quoted in Demosthenes 23 (delivered in a *graphê paranomôn*) and the laws cited as examples of archaic statutory language in Lysias 10 (delivered in a *dikê kakêgorias*). Unfortunately, the general law of contract never appears in such a high-credibility context.

Athenian law. These are more valuable, and less frequent, than the passages whose referent is either general (i.e., statements made with no particular legal system in mind, as commonly in the *Rhetoric* of Aristotle) or specifically non-Athenian (such as the hypothetical legislation drafted in Plato's *Laws* for a newly-founded colony on Crete).[20]

These observations make the L and J variants immediately suspect. J can be ruled out most simply, as no source admits a stated justice requirement in the general law of contract, and Hypereides 3.13 argues only that one should be understood. [Demosthenes] 44.7 states the position of a litigant, not the contents of a law, and concerns only adoptions: "We agree in your presence that those adoptions must be valid that occur justly, in accordance with the law" (ὁμολογοῦμεν δ' ἐναντίον ὑμῶν δεῖν τὰς ποιήσεις κυρίας εἶναι, ὅσαι ἂν κατὰ τοὺς νόμους δικαίως γένωνται). Plato's law at *Leg.* 920d1–6, which imposes liability for breach of contract except in cases where the terms of the contract are illegal, duress has been applied in its formation, or performance is prevented as a result of unforeseen chance, is a measure of his own devising. Finally, Aristotle's statement of the L variant occurs in a situation that the author himself presents as hypothetical (*Rhet.* 1375b8–11): "And if by chance a law contradicts a well-regarded law or contradicts itself: for example, in some cases one law ordains that whatever people agree shall be binding (U), while another law forbids agreements in contravention of the law (L)." Aristotle is evidently familiar with unlimited laws of contract and with laws that forbid illegal contracting, and he knows that a conflict of statutes sometimes (ἐνίοτε) results, so neither U nor L falls outside the realm of possibility for contemporary Greek legislation. However, we cannot presume that Aristotle has any Athenian law in mind,[21] let alone the general law of contract represented in Hypereides 3 and elsewhere; and if he does, the general law of contract is more likely reflected in Aristotle's U variant, which is corroborated in Attic oratory, than in his L variant, which is not.

Further strong evidence against L (and J) is provided by [Demosthenes] 48, *Against Olympiodorus*. The speaker, Callistratus, prosecutes his wife's brother Olympiodorus for breach of contract by means of the *dikê blabês*. When

[20] While Plato, in composing the *Laws*, was undoubtedly affected to some degree by Athenian law, the demonstrable divergence between the two systems in a number of areas (including homicide (Pl. *Leg.* 865–874e2) and wounding (Pl. *Leg.* 874e–879b)) indicates that Plato's *Laws* is not a reliable source for Athenian law unless it is corroborated by the testimony of an independent source (Hansen 1983: 311–12; Todd 1993: 40; cf. Finley 1951: 83).

[21] Especially when we consider that Aristotle and his school studied and published on the constitutions (πολιτεῖαι) of 158 *poleis*.

Comon of Halai died intestate, Callistratus (who claims to be Comon's next of kin, §6) and Olympiodorus (who asserts that he is related to Comon through his mother, *ibid.*) agreed to divide Comon's estate equally between themselves and to cooperate in opposing any rival claims lodged by other relatives, and the two men drew up a contract to that effect (§9). As the purpose of this collusion was to deprive any relatives whose standing in Comon's *anchisteia* was equal or superior to the contractants' (most prominently Callistratus's patrilateral half-brother, §10) of their rights under Solon's law of succession (see [Dem.] 43.51; Isae. 11.1–3), the contents of the contract were blatantly illegal (and hence, by definition, unjust). Callistratus now accuses Olympiodorus of violating the contract by refusing to share estate assets discovered subsequent to the original division of Comon's property (§§15–20).

Callistratus anticipates that Olympiodorus will base his defense on an allegation that Callistratus violated the contract first (§38), and he accordingly launches a lengthy preemptive strike on that issue (§§39–47). Callistratus displays no expectation that Olympiodorus will attack the validity of the contract: Olympiodorus will argue that his nonperformance is justified by Callistratus's prior breach, not because the contract was void *ab initio* owing to its illegality. The latter fact would be considerably easier to establish and presumably more persuasive to the jury, if it were true. Yet Callistratus shows no concern that the unlawful nature of his deal with Olympiodorus will come into play. Furthermore, instead of downplaying the illegality, he explains in unabashed detail how he and Olympiodorus not only conspired to disinherit their own kin but defrauded the jury in the previous lawsuit that awarded Comon's estate to Olympiodorus (§§43–45). The contract between Callistratus and Olympiodorus was therefore both illegal and unjust; Callistratus's bald admission of these points and Olympiodorus's apparent failure to posit the invalidity of the contract for these reasons give a further indication that the general law of contract contained neither an exception for illegal agreements nor a condition that the terms of a contract accord with justice in a broad sense.[22] In fact, an Athenian contract might contain

[22] Callistratus's references to *ta dikaia* ([Dem.] 48.36 οὐδ' ἐθέλει τῶν δικαίων οὐδ' ὁτιοῦν ποιεῖν "nor is he (Olympiodorus) willing to do anything at all that is just"; §58 καὶ ταῦτα ποιοῦντες τά τε δίκαια γνώσεσθε "and, by doing these things, you (the jury) will reach a just verdict"; cf. §§3, 19) are not evidence for the J variant but simply boilerplate examples of the ubiquitous trope whereby speakers describe their actions or claims as just and their opponents' as the opposite (e.g., Lys. 5.1, 12.86; Dem. 37.11; 45.1, 49; 54.2) and equate a favorable verdict with justice achieved and an adverse verdict with justice denied (e.g., Lys. 3.47, 6.42, 10.21, 13.97; Dem. 45.70, 54.42). This trope is notably prevalent in cases involving an inheritance: Isae. 1.35, 40; 2.26, 47; 4.31; 6.2, 17, 42, 65; 7.4, 37; 8.1, 5 *ter*; 11.32; Dem. 27.1 *bis*, 3, 68; 29.13, 22, 27; 30.1, 25, 36 *bis*, 38; [Dem.] 43.14, 84; 44.3, 8, 60.

language specifying that nothing, including a law, shall trump the contract (e.g., [Dem.] 35.13).[23] Accordingly, litigants can argue that a contract has equal or greater force than a law: note especially [Dem.] 35.39, "For the contract allows nothing to be more authoritative than its contents, and does not allow the production of a law, a decree, or anything else whatsoever against the contract"—the exact argument that Epicrates expects from Athenogenes (Hyp. 3.22: p. 113 *infra*).[24] Illegal and unjust contracts were not voided by the letter of the law, although litigants such as Epicrates in Hypereides 3 might argue that they were voided by the spirit of the law, leaving the jury to decide (Carawan 2006: 347–48).

W and V are likewise vulnerable, although not as easily dispensed with as J and L. The basis for W, cited above, is [Dem.] 42.12, where the speaker cites "the law that mandates that agreements between parties that they make in the presence of witnesses shall be binding" (τὸν [*scil.* νόμον τὸν] κελεύοντα κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας, ἃς ἂν ἐναντίον ποιήσωνται μαρτύρων). *Prima facie*, this appears to be a statement of the general law of contract;[25] if so, the question is whether the W requirement appeared in the law or was supplied by the speaker.

Deinarchus 3.4, which is sometimes cited in favor of W (Pringsheim 1950: 42), states that "the common law of the city ordains that if someone breaks an agreement made in the presence of the citizenry (ἐάν τις ἐναντίον τῶν πολιτῶν ὁμολογήσας τι παραβῇ), he shall be liable for his wrongdoing." The speaker then applies this law directly to the defendant Philocles, who deceived his countrymen (ὁ δὲ πάντας Ἀθηναίους ἐξηπατηκώς . . . , §4) by declaring in the Assembly (ἁπάντων Ἀθηναίων ἐναντίον καὶ τῶν περιεστηκότων) that, as general, he would prevent Harpalus from landing at Peiraeus (§1). As written, this passage describes a law that deals not with contracts but with breach of unilateral promises made publicly to the Athenian people (ἀπάτη τοῦ δήμου), and legislation to this effect is amply attested elsewhere.[26] Those

[23] For analysis and comparanda, see Cohen 2005: 299 with notes 43 and 44; Carawan 2006: 347.

[24] Such contractual clauses would be null, and argumentation based on them would be pointless, if the general contract law contained an L requirement. See also [Dem.] 42.13, 30; 56.26; and cf. Arist. *Rhet.* 1376b7–8: "a contract is a private and partial law."

[25] Since the instant a lawsuit arises from an *antidosis* (exchange of property occasioned by liturgical assignment), it is possible (albeit unlikely, given the apparently broad terms of the law) that the speaker is citing a measure relating specifically to *antidoseis*.

[26] Dem. 20.100: "if someone makes a promise (ὑποσχόμενός τι) and deceives (ἐξαπατήσῃ) the people (i.e., the Assembly: τὸν δῆμον), the Council, or a court of law, he shall suffer the extreme sanction." Similarly Dem. 20.135: "if someone makes a promise and deceives the people, trial shall take place, and if he is convicted, he shall be sentenced

who would find evidence for W at Deinarchus 3.4 rely on an editorial supplement which places the word ἑνός either immediately before or immediately after τῶν πολιτῶν;[27] the relevant law would then impose liability upon anyone who violated an agreement made "in the presence of one of the citizens."[28] Emendation of the text at this point is not mandated by any grammatical necessity, but critics have suggested that the oppositional construction (the law μὲν states . . . Philocles δὲ has done the following) requires a stronger antithesis between the respective clauses than the text presents.[29] The addition of ἑνός would contrast ἑνός with πάντας: "the law ordains that if someone breaks an agreement made in the presence of *one* citizen . . . Philocles has deceived *all* Athenians . . ."

It should be noted, however, that a papyrus containing Deinarchus 3.3–4 has εἰς ἕνα in place of ἐναντίον in the μέν-clause, which results in an equally forceful opposition by different means: ἐὰν εἰς ἕνα τῶ[ν πο]λιτῶν ὁμολογήσ[ας τις] παραβῆ<ι> "if someone makes an agreement and violates it with regard to *one* citizen . . ." (*PAntinoopolis* 81.4–5: Barns-Zilliacus 1960: 70). Owing to the papyrus's abnormal postponement of τις, Lloyd-Jones emends its text and proposes that "Dinarchus wrote ἐάν τις εἰς ἕνα τινὰ τῶν πολιτῶν ὁμολογήσας τι παραβῇ" (Lloyd-Jones 1961). This reading, which has been adopted by several subsequent editors of Deinarchus (Conomis 1975: 66; Worthington 1992: 318), is equivalent in sense to the papyrus text, as is the prescient emendation proferred by Lipsius, who substituted ἑνί τινι for ἐναντίον (Meier-Schömann-Lipsius 1883–87: 425). Thus, if either Lipsius's emendation to the manuscript text or the papyrus text, with or without Lloyd-Jones's emendation, is correct, then the single Athenian in the μέν-clause is a contractant, not a witness, and Deinarchus 3.4 supports the U variant, not the W variant, of the general contract law.[30]

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to death." [Dem.] 49.67: "if someone makes a promise and deceives the people, he shall be liable to impeachment (εἰσαγγελίαν)." According to [Arist.] *Ath. Pol.* 43.5, *probolai* for nonperformance of a promise to the people were heard in the sixth prytany; some form of this measure appears to have been enacted shortly after the trial of the Arginusae generals in 406 (Xen. *Hell.* 1.7.35). Those who deceived the people were further subjected to a curse: Dem. 18.282; Din. 1.47.

[27] Bake 1859: 110 (after); Blass 1888: 64 (before); Burtt 1954: 292 (before).

[28] Note that witnesses to a contract (like the contractants themselves) did not have to be citizens. For example, the contract and depositions at [Dem.] 35.10–14 include among the listed witnesses Cephisodotus the Boeotian and Theodotus, a tax-exempt metic (ἰσοτελής).

[29] So Bake 1859: 110; Lloyd-Jones 1961.

[30] These three versions of the text also have the advantage of heightening the parallelism between the μέν- and δέ-clauses: just as one citizen is liable for violating an agreement with

W, like L and J, is further compromised by a convincing omission, this time occurring in Hypereides 3. Epicrates gives a detailed account of the hasty negotiation and conclusion of his purchase of the slaves and perfumery from Athenogenes. Antigona, who brokered the deal and allegedly conspired with Athenogenes against Epicrates, summoned the two men to a meeting in a private home, presumably her own, and reconciled them (§5). Epicrates names only himself, Athenogenes, and Antigona as present during the reconciliation and the following transaction (assuming that Antigona did not depart the scene after the reconciliation: cf. §18). Immediately upon Epicrates' verbal acceptance of Athenogenes' offer of sale, Athenogenes produced a written contract, read it out, and sealed it "immediately, in the same house, so that no one with his wits about him[31] could hear the contents, having written in Nicon of Cephisia along with me" (§8). The contractants then went to the perfumery and deposited the document with Lysicles of Leuconoion (§9).

Thus, according to Epicrates' account, the contract was not legally or formally witnessed.[32] Lysicles served as depositary of the contract document, not as a witness to the formation of the contract; as the document was sealed before deposit, Lysicles could not know its contents unless and until the seal was broken. Even if Antigona observed the proceedings between the contractants, as a woman she could not serve as a legal witness. The only problematic personage named by Epicrates is Nicon of Cephisia. Nicon, presumably one of the friends of Epicrates who had contributed to the 40 mn. purchase price (§5), appeared in the document as Epicrates' surety (cf. §20), but Epicrates' statement that μηδεὶς τῶν εὖ φρονούντων witnessed the deal indicates that Nicon was absent when his name was entered in the contract.[33] Hence Epicrates does not call Nicon as a trial witness. Even if we play the devil's advocate and assume that Epicrates' representation is false and Nicon was present, we have good reason to suspect that if Athenogenes secured

another, Philocles is liable for violating an agreement he made with the Athenian people (not merely "in their presence": the point of ὁ δὲ πάντας Ἀθηναίους ἐξηπατηκώς etc. is that the *dêmos* was the recipient of Philocles' promise, not a disinterested witness).

[31] This should be the meaning of μηδεὶς τῶν εὖ φρονούντων without an accompanying dative (ἐμοί): cf. Colin 1946: 202; Marzi in Marzi-Leone-Malcovati 1977: 217; Arapopoulos 1975: 37; Beauchet 1897: 4.59. *Contra* Whitehead 2000: 273, 297–98 ("no one with my interests at heart"), and similarly Kenyon 1893: 11; Burtt 1954: 437; Carey 1997: 144; Cooper in Worthington-Cooper-Harris 2001: 91.

[32] This point is conceded even by Pringsheim 1950: 41, who contends that witnessing was required for the execution of a valid contract (*supra*, n15).

[33] Marzi in Marzi-Leone-Malcovati 1977: 217n23; Whitehead 2000: 298. At the beginning of the preserved part of his speech, Epicrates admits his own diminished powers of reasoning (§2), but we have no reason to believe that he would question Nicon's

his testimony at trial, Nicon would have denied witnessing the contract. As Epicrates' surety, Nicon has an excellent motive to lie. If the contract is upheld at trial, and if Epicrates defaults on his debt of 5 tal. (as seems likely from his difficulty in assembling 40 mn.—less than fifteen percent of that sum—for the purchase), Nicon will become liable for the debt; he therefore has a five-talent incentive not to testify to the formation of the contract. Epicrates could therefore be reasonably confident that his account of an unwitnessed contract would not be decisively impeached by the defense.[34] Consequently, if the general law of contract or any more specific law governing sale required the participation of witnesses as a condition of validity, Epicrates obviously would have cited it; but he adduces no such provision and instead relies on other legislation and on an alleged understood equity requirement in the general contract law (*infra*, sections 2, 3).[35]

To be sure, Athenian contracts are regularly witnessed (with the exceptions noted in n35), but the witnessing functions only as a mode of proof should the contract be contested at a later date.[36] Reconciliations, too, occur as a rule in the presence of *philoi* of both parties (e.g., Lys. 4.1–4; [Dem.] 59.46–48). Epicrates' self-confessed haste (ἔσπευδον, §8) to conclude both the reconciliation and the resulting sale without a single friendly witness testifies to his own erotically-induced stupidity (§2) and stands in stark opposition to the calculating evil of Athenogenes and Antigona, who exploited Epicrates' compromised common sense for their own benefit.[37]

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mental fitness. (Athenogenes and Antigona are not εὖ φρονοῦντες by virtue of their sinister machinations.) If the interpretation of μηδεὶς τῶν εὖ φρονούντων supported by Whitehead *et al.* (*supra*, n31) is correct, Epicrates' exclusion of Nicon is established even more definitively.

[34] Since Epicrates has the contract read out to the jury in §12, it is highly unlikely that his description of it here suppresses any other names (such as the names of witnesses) that appeared in the document.

[35] Note, too, that the speaker of Lysias's fragmentary speech *Against Theomnestus* (*POxy* 1606 = Lys. frr. 151–52 Carey) seeks the enforcement of a contract (for a loan of 30 mn.) that he explicitly describes as unwitnessed (ἄνευ μαρτύρων). Another litigant states as bald fact that "contracts with those who manage banks occur without witnesses" (τὰ μὲν γὰρ συμβόλαια τὰ πρὸς τοὺς ἐπὶ ταῖς τραπέζαις ἄνευ μαρτύρων γίγνεται), noting that bankers "handle a lot of money and are considered trustworthy on account of their profession" (Isoc. 17.2 (cf. §53), on which see Finley 1951: 88n18; Cohen 1992: 205; Mirhady in Mirhady-Too 2000: 82n1).

[36] Beauchet 1897: 4.22, 26–27, 48; Finley 1951: 88n18; Carey-Reid 1985: 200-1; cf. Carawan 2006: 360. Theophrastus considers the overuse of witnesses in certain circumstances to be a sign of pathological obtuseness (*Char.* 14.8) or distrust (*Char.* 18.5).

[37] Cf. Colin 1946: 202n2. Contrast Epicrates' carelessness with the precautions taken against undisclosed debt at [Dem.] 42.28.

The elimination of L, J, and W leaves V as the only possible limited variant of the general contract law, and indeed V garners more substantial support from the sources than the other three. Darius, the speaker of the pseudo-Demosthenic oration *Against Dionysodorus* ([Dem.] 56.2), refers to "your laws, which mandate that whatever one man voluntarily agrees with another shall be binding" (τοῖς νόμοις τοῖς ὑμετέροις, οἳ κελεύουσιν, ὅσα ἄν τις ἑκὼν ἕτερος ἑτέρῳ ὁμολογήσῃ, κύρια εἶναι). Passages elsewhere highlight the presence of bilateral volition by means of a varying polyptoton that explicitly describes both parties as ἑκόντες. In his prosecution of Olympiodorus, Callistratus states that his contract with Olympiodorus was entered into willingly by both and was confirmed by oaths (ὡμολόγησεν [*scil.* Ὀλυμπιόδωρος] καὶ συνέθετο ἑκὼν πρὸς ἑκόντα καὶ ὤμοσεν, [Dem.] 48.54). In the *Symposium* (196c1–3), Plato has Agathon declare, "Everyone willingly renders all service to Eros, and the laws, the kings of the city, state that whatever one willing man agrees with another willing man is just (ἃ δ' ἄν ἑκὼν ἑκόντι ὁμολογήσῃ . . . δίκαια εἶναι)." The *Symposium* is set in Athens, and Agathon is an Athenian tragedian, so Plato clearly intends this statement to refer to Athenian law. In the *Crito* (52d3–e5), Socrates, impersonating the Laws of Athens interrogating himself, asks "if we speak the truth when we assert that you have agreed (ὡμολογηκέναι) to conduct your civic life in accordance with us." After Crito assents to the existence of this social contract, Socrates continues as the Laws: "Then you stand in violation of your contract and agreement (συνθήκας . . . καὶ ὁμολογίας παραβαίνεις) with us, since you did not make the agreement under duress or misrepresentation and were not forced to reach a decision in a short time (οὐχ ὑπὸ ἀνάγκης ὁμολογήσας οὐδὲ ἀπατηθεὶς οὐδὲ ἐν ὀλίγῳ χρόνῳ ἀναγκασθεὶς βουλεύσασθαι), but rather over seventy years, during which you were free to leave (Athens), if we did not please you and the agreement did not appear just to you (μηδὲ δίκαιαι ἐφαίνοντό σοι αἱ ὁμολογίαι εἶναι)." Thus, while the Laws do not apply the word ἑκών to either Socrates or themselves, they establish his volition by eliminating the factors of duress and fraud that would compromise it. Plato also has "wrongful compulsion" (along with illegality and unforeseen impossibility of performance, but not fraud) void a contract in the hypothetical laws drawn up for Magnesia (ἤ τινος ὑπὸ ἀδίκου βιασθεὶς ἀνάγκης ὁμολογήσῃ, *Leg.* 920d1–6).

There is, therefore, a significant amount of evidence that can be adduced in favor of V. It is worth noting, however, that the only passage that refers to a single discrete law is the last, which is also the only one that does not apply to Athens. While Olympiodorus may be alluding to one or more discrete laws, he does not specify any in the relevant passage; and the three remaining speakers—Darius in the *Against Dionysodorus*, Agathon in the *Symposium*,

and Socrates in the *Crito*—all speak of "the laws" of Athens in the plural (τοῖς νόμοις τοῖς ὑμετέροις, [Dem.] 56.2; οἱ πόλεως βασιλῆς νόμοι, *Symp*. 196c2–3; φαῖεν at *Crito* 52d8 has as its understood subject οἱ νόμοι, expressed at 50c4, 51c6). Darius and Agathon thus speak of, and Socrates speaks for, the totality of Athenian law, not an individual statute such as the general contract law. It is, of course, defensible (if not always accurate) to assert that the collectivity of laws says *x* when one member of that collectivity says *x*, and in fact Athenian speakers are demonstrably flexible in their use of ὁ νόμος/οἱ νόμοι.[38] It is also tenable to represent "the law," either discrete or collective, as saying *x* when *x* represents its spirit but not its letter: for example, we may justifiably say, "The law says that killing is wrong," even though such language appears in no statute. In the present case, speakers may have introduced various ἑκών-formulae into the general contract law in order to emphasize the element of volition present in ὁμολογήσῃ. Moreover, even if V does represent statutory language, since the relevant passages use the totality of Athenian law as a reference point, we cannot assume *prima facie* that the language containing V comes from the general contract law, as opposed to another law dealing with a specific type of contracts (cf. *infra*, section 2).

Other features of the relevant passages further problematize V. Most fundamental is the fact that the sources lack consistency in the way in which V is expressed. First, a basic distinction can be drawn between positive and negative versions; the former, which include one or more forms of the word ἑκών, appear both in oratory and in Plato, while the latter, which state circumstances that negate volition, occur only in Plato. On these grounds we may reasonably conclude that if V is genuine, the law stated it positively, whereas Plato aimed to achieve greater specificity by defining ἑκών by elimination.[39] Yet within the positive version we find further variation:[40] ἑκὼν

[38] E.g., Lys. 1.26: "It is not I who shall kill you but the law of the city (ὁ τῆς πόλεως νόμος) . . . you chose to commit such an offense . . . rather than to obey the laws (τοῖς νόμοις) and behave yourself"; Lys. 1.33–34: ". . . The man who enacted the law (τὸν νόμον) made death the penalty for them (i.e., seducers). So, gentlemen, the laws (οἱ νόμοι) have not only acquitted me of wrongdoing but have actually commanded that I exact this punishment."

[39] Note, too, that Plato puts a positive statement of V into the mouth of Agathon, a character whose legal intellect can be presumed (in Plato's mind, at any rate) to operate on a less complex level than that of the characters who define V negatively; namely, Socrates (speaking as the Laws) and the anonymous Athenian Stranger who does most of the legislating for Magnesia.

[40] This is true of the negative version as well: in the *Crito* Socrates implies that general duress, fraud, and time restriction in decision-making compromise the validity of

(ἕτερος ἑτέρῳ) in [Demosthenes] 56; ἑκὼν ἑκόντι in the *Symposium*; and ἑκὼν πρὸς ἑκόντα in [Demosthenes] 48. This inconsistency may indicate that V is a supplement to the letter of the law, although we must concede that if the first and most legalistic version is correct, the others are not only accurate but natural paraphrases: a speaker might well prefer to utter the smooth and emphatic ἑκὼν ἑκόντι or ἑκὼν πρὸς ἑκόντα rather than attempting the stylistic contortions required to adapt ἑκὼν (ἕτερος ἑτέρῳ) to his particular needs.[41]

In the latter two cases, furthermore, the inclusion of V is motivated by concerns external to the law. The subject of discussion in the *Symposium* is Eros, and in this part of his declamation Agathon contends that Eros is immune from committing or suffering wrongdoing, because he is neither affected by force nor employs active compulsion himself (οὔτε γὰρ αὐτὸς βίᾳ πάσχει . . .—βία γὰρ Ἔρωτος οὐχ ἅπτεται· οὔτε ποιῶν ποιεῖ, *Symp.* 196b7–c1). To prove the latter point, Agathon asserts that everyone serves Eros willingly (ἑκών) and adduces V. Thus Agathon's purpose is to disclaim the use of compulsion by Eros on the grounds that when internal volition and external compulsion coincide, the former renders the latter moot. To underscore the presence of volition, Agathon uses ἑκών three times within two lines,[42] just as earlier in the sentence he employs βία twice in quick succession to emphasize the absence of force. Nor is this a new issue when Agathon raises it: Agathon's compulsion-volition contrast looks back to the beginning of the festivities (176e4–6), where the participants pass a *lex symposii*, resolving (δέδοκται, a locution borrowed from the Assembly) "to drink as much as each wishes (βούληται), and that nothing be compulsory (ἐπάναγκες)." The context of Callistratus's assertion of V in [Demosthenes] 48 shows that here too the speaker is not primarily concerned with the law. Callistratus presents Olympiodorus's volition and his own not as evidence for Olympiodorus's breach of contract, but rather to prove that Olympiodorus has lost his mind under the influence of his mistress (μαίνεσθαι §53, μαίνεται §54, μαίνεται

a contract, while in the *Laws* fraud is omitted and two new factors are added (L and unforeseen impossibility of performance). As regards the Athenian general contract law, L has already been ruled out; unforeseen impossibility of performance can also be discarded with confidence (see p. 95 *supra* for the reliability of Plato's *Laws* as a source for Athenian law).

[41] Note, however, that "*X* ἑκὼν ὡμολόγησε μοι . . ." would represent ἑκὼν ἕτερος ἑτέρῳ accurately, if perhaps at the price of emphasis.

[42] *Symp.* 196c1–2: πᾶς γὰρ ἑκὼν Ἔρωτι πᾶν ὑπηρετεῖ, ἃ δ' ἂν ἑκὼν ἑκόντι ὁμολογήσῃ

καὶ παραφρονεῖ §55, μελαγχολᾶν §56, παραφρονῶν §56). Olympiodorus's failure to discharge contractual obligations that he willingly assumed is only one indicator of his derangement, which is further evidenced by the fact that he has never taken an Athenian citizen wife (§53), that he perjured his contractual oath (ὤμοσεν §54),[43] and that his nonperformance harms his sister and niece (§§54–55). The reciprocal volition of the contractants is not even emphasized within this description of Olympiodorus's symptoms: it appears in the middle of the list rather than in a position of prominence at the beginning or end.

It is also notable that Epicrates omits V in his statement of the general contract law in Hypereides 3. Not only is there no ἑκών-formula or equivalent in his statement of the general contract law, but the word ἑκών never occurs in the speech.[44] If the law included V, it could hardly have escaped Hypereides that such volitional language could have been turned to his client's benefit (Lipsius 1896: 4, *contra* Vogt 1894: 209n33). Epicrates argues clearly and persuasively that although he was certainly willing—in fact, eager to the point of irresponsibility—to buy Midas and sons, he was unaware of the amount of debt incumbent upon Midas. He therefore could not (and presumably would not) have voluntarily assumed all five talents that Midas owed; Athenogenes' misrepresentation of the amount of debt owing on the perfumery (§§6–7, 10) was a necessary ("but-for") cause of the conclusion of the contract. Epicrates admits that he agreed (ὁμολογήσας, §7) to assume the debts because he was unaware of their extent; thus Hypereides reveals that he does not consider ὁμολογεῖν (echoed in the law at §13) to imply full and informed volition. Accordingly, if a ἑκών-formula appeared in the general contract law, we could reasonably expect from Epicrates an explicit argument that the law includes ἑκών alongside ὁμολογεῖν because ἑκών mandates a higher degree of volition than ὁμολογεῖν alone: a requirement ὁμολογεῖν ἑκών admits the possibility ὁμολογεῖν ἄκων. While Epicrates ὡμολόγησεν, he did not do so ἑκών, and his contract with Athenogenes is therefore void.[45] However, in discussing

[43] The swearing of reciprocal oaths, like witnesses (*supra*, p. 100) and the written instrument (*infra*, p. 105), was a regular, but optional, confirmatory element of Athenian contracts.

[44] Ἄκων appears once (§27) but describes the alleged mental state of Athenogenes, not Epicrates ("Midas, . . . whom he claims to have released unwillingly . . .").

[45] Nor, as far as I am aware, does any other Athenian litigant argue expressly that he ὡμολόγησεν ἄκων or anticipate that his opponent will do so. In homicide cases, by contrast, where the term ἄκων figured prominently in the text of Draco's law (*IG* I^3 104.17 *bis*), litigants regularly draw upon the ἑκών/ἄκων distinction: e.g., Lys. 13.28, 52–53; cf. Ant. 3 α 2, 4 α 6.

the general contract law, Epicrates maintains that the fraud perpetrated by Athenogenes has violated its spirit (which, according to Epicrates, includes a justice requirement), not its letter; arguments on the basis of actual statutory language arise only later, in connection with separate laws. Thus Epicrates' handling of the general contract law in Hypereides 3, in which he ignores V and attempts to assert J, serves as a final and persuasive, if not conclusive, indicator *e silentio* against V.

Most likely, therefore, the general law of contracts read as it does in the version given by Epicrates—ὅσα ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ κύρια εἶναι—and thus contained no language mandating the presence of witnesses, the volition of the contractants (as apart from the consent expressed by ὁμολογήσῃ), or the lawful or just nature of the contract. In the case of a subsequent dispute, however, juries might well weigh one or more of these factors in deciding whether to enforce or annul a contract, as expected by the speakers of [Demosthenes] 48 and 56 (V), [Demosthenes] 42 (W), and Hypereides 3 (J).[46] Witnesses, in particular, were regularly employed, but the function of witnesses was not to validate the contract but to facilitate proof of the contract's existence and/or contents should they come into question at a later date. The same is true of the composition and deposit of a written instrument of contract: while commonly employed as methods of proof,[47] these were not required under the general law of contracts.[48]

[46] Cf. Carawan 2006: 348. As discussed above (p. 96), Callistratus in [Demosthenes] 48 appears to be oblivious to the potential relevance of L.

[47] [Dem.] 33.36: "all men, when making a contract with each other, seal it and deposit it with persons they trust for this purpose: so that if they dispute anything, they may revisit the document and from that conduct their scrutiny of the point at issue (ἐντεῦθεν τὸν ἔλεγχον ποιήσασθαι περὶ τοῦ ἀμφισβητουμένου)."

[48] Contracts in writing, although ubiquitous, are also generally not required in the modern Common law (Frier-White 2005: 207). In Athens, there may have been one exceptional (yet prominent) case in which a written instrument was required. It has been argued that in the fourth century, in order to be actionable by a δίκη ἐμπορική (e.g., [Dem.] 56), a contract had to be in writing (Isager-Hansen 1975: 151–52; Carey-Reid 1985: 233); but see *contra* Gernet 1955a: 186–87. The relevant text is Dem. 32.1: "The laws ordain, gentlemen of the jury, that the lawsuits over contracts (συμβολαίων) concerning transport to and from Athens be available to ship-captains and merchants, and also over matters for which a (written?) contract exists (καὶ περὶ ὧν ἂν ὦσι συγγραφαί)." The question of interpretation is whether the law required that both of the stated prerequisites (import/export *and* a *syngraphê*) be met (Isager-Hansen; Carey-Reid; Pearson 1972: 254; Cohen 1973: 100-1 with refs.), or if either one sufficed (import/export *or* a *syngraphê*: Gernet; Hitzig 1907: 227; Partsch 1909: 153).

Therefore, according to the Roman and modern typology, this is a law of consensual contracts.[49]

2. RESTRICTIONS ON CONTRACTS AND EPICRATES' ARGUMENTS FROM ANALOGY

None of our sources for the general contract law names its author. Whatever the antiquity of the rule it expresses (which may well antedate Solon and even Draco), the law itself must be Solonian or later, since Solon repealed all the laws of Draco except those dealing with homicide ([Arist.] *Ath. Pol.* 7.1). The simple and all-encompassing language of the general contract law creates the presumption of early passage: such simplicity is more congenial to the legislative and economic needs of Archaic Athens than to those of the fifth or certainly the fourth century, when the increasing complexity of the Athenian economy demanded more detailed measures to regulate sale of goods and maritime loans.[50] Thus the general contract law is most probably a product of the sixth century[51] and may have been authored by Solon

[49] Contracts are broadly divisible into three types (*D.* 44.7.1.1 (Gai. *Aurea* 2); Finley 1951: 76; Todd 1993: 255; Nicholas 1962: 167–98; Farnsworth 2004: 9–10). (1) *Consensual* contracts arise from the mutual consent of the contractants alone (as in the Roman contract of sale (*emptio venditio*): Gai. *Inst.* 3.135; *D.* 44.7.2.pr). The consensual nature of Athenian contracts was generally accepted until it was challenged by Pringsheim 1950; see Carawan 2006: 339–44 (whose conclusions differ from mine) for a perceptive and useful analysis of the terms of the consensualist debate. (2) *Real* contracts depend upon the delivery of a thing (*res*). Theophrastus, *Laws* fr. 21.4 Szegedy-Maszak describes sale as a real contract, but he is discussing the laws of the Greek *poleis* generally, not those of Athens, and he frequently makes recommendations and pronouncements on his own authority (see Todd 1993: 237–40). While some (Pringsheim 1950: 90–92; Demeyere 1952: 256; cf. Carawan 2006: 350) have argued that Athenian sale was a real contract, the extreme rarity of the *arrhabôn* (deposit) in Athens (Beauchet 1897: 4.423; Finley 1951: 80–81; Millett 1990: 175–76; note that no *arrhabôn* is paid in Hypereides 3) indicates that the *arrhabôn* was an option employable when the buyer could not pay the entire purchase price immediately (cf. Isae. 8.23) and that the lexicographers are correct in describing the *arrhabôn* as a means of safeguarding rights and obligations already established by contract (*Suda* s.v. ἀρραβών; *Etym. Mag.* s.v. ἀρραβών; cf. Harpo. s.v. βεβαιώσεως). (3) *Formal* contracts require a specified procedure, such as the presence of witnesses, a written document, or a fixed verbal formula (as in the Roman *stipulatio*).

[50] In particular the regulations surrounding the *dikai emporikai*: see Cohen 1973; Lanni 2006: 149–74.

[51] *Contra* Gernet 1955b: 220, who places the law "à l'extrême fin du V^e^ siècle"; Carawan 2006: 339, 372–73 (*ca.* 402).

himself.[52] Modifications of the right to contract were not incorporated into the general contract law but, as commonly in Athens,[53] were created by additional legislation. Hypereides 3 and other sources document the resulting contradictions between the general law of contract and other laws governing discrete transactions, and thus illustrate the Solonian origins and subsequent development of the Athenian law of contracts.

Already under Solon's code there were laws that explicitly limited Athenians' freedom of contract. The most famous of these, embodied in the reform known as the *seisachtheia* ("Shaking-Off of Burdens"), was the ban on contracting loans on the security of the person of the borrower (and his kin) ([Arist.] *Ath. Pol.* 6.1; Plut. *Solon* 13.4–5, 15.2; Ruschenbusch 1966: F 69a–c). Moreover, Solon's law banning the export of agricultural produce other than olive oil[54] presumably rendered contracts concluded for such purposes invalid. Thus Solon asserted at least a tacit distinction between actionable and nonactionable agreements. Still more legislation that compromised freedom of contract—some of it attributed to Solon—appears in Epicrates' discussion of the laws that he cites as analogical proof of his assertion that Athenian law protects only "just" contracts (§13). We will address these in the order of Epicrates' presentation.

First (§14) Epicrates adduces a law that prohibits lying in the agora (ὁ μὲν τοίνυν εἷς νόμος κελεύει ἀψευδεῖν ἐν τῇ ἀ[γορᾷ]).[55] This measure clearly

[52] On the identification of Solonian laws, see Scafuro 2006, who argues for the broadening of the criteria employed by Ruschenbusch 1966: note especially the survival of Solon's *axônes* through (and past) the fourth century (Scafuro 2006: 176–77) and the Teisamenus decree (Andoc. 1.83–84; cf. Scafuro 2006: 177), which confirmed Solon's laws in the general recodification of 403. Ruschenbusch does not include the general contract law in his catalogue; Solonian authorship of the general contract law is posited (albeit uncritically) by Grivas-Christodoulou 2002: 90–91, who list the law (L variant) as "Article (Ἄρθρο) 177" of Solon's code.

[53] On the Athenian phenomenon of legal development by addition rather than by amendment or repeal of previous legislation, see Todd 1996: 120–31. The frequent contradictions that resulted (cf. Lys. 30.3), combined with the absence of rules of statutory construction (apart from the precedence of laws over decrees, established in 403/2: *infra*, p. 114; cf. Robinson 1995: 131–39), helped impel the Athenians to conduct a systematic recension of their body of laws, which lasted from 410/09 to 400/399 (Lys. 30; Andoc. 1.81–89). Note, however, that the recodifiers did not resolve all statutory conflicts: they were content, for example, to retain the general contract law despite the evident contradictions it posed with other laws (see below).

[54] Plut. *Solon* 24.1–2, citing the law from Solon's first axon (on which see Stroud 1979).

[55] Quoted by Harpo. s.v. κατὰ τὴν ἀγορὰν ἀψευδεῖν; cf. Dem. 20.9.

addresses fraud in contracts of sale (Harris 2000: 48), which Epicrates imputes to Athenogenes: "you made a contract to my detriment by lying in the middle of the agora." As commentators have noted (Colin 1946: 191; Whitehead 2000: 308–9), Epicrates himself distorts the facts here: the contract was concluded in Antigona's house, not in the agora (p. 99 *supra*). Thus the terms of this law do not invalidate the contract.[56] Nonetheless, the law may apply directly to Athenogenes and indirectly to Athenogenes' employment of fraud in negotiating the contract, if a later conversation described by Epicrates took place in the agora. Three months after the sale (§9), Athenogenes had told Epicrates "by the perfume shops" that he was unaware of the amount of debt Midas had incurred (§12). Epicrates persuasively maintains that Athenogenes, a successful professional perfumer, could not have been so negligent as to be blind to the enormous debt accrued by one of his shops. If, therefore, the jurors accept Epicrates' account of this conversation, then they may regard Athenogenes' bad faith as proven, and they may accordingly convict Athenogenes and void the contract—not, properly, on the basis of the law, but on grounds of equity.[57]

Next (§15) Epicrates cites another law concerning contracts (ἕτερος νόμος . . . περὶ ὧν ὁμολογοῦντες ἀλλήλοις συμβάλλουσιν), which mandates that the seller of a slave advertise any illness (ἀρρώστημα) in the slave and empowers the buyer to return the slave if the seller has failed to do so. This provision amounts to a warranty against a specific type of latent defect (illness; the example given by Epicrates is epilepsy) in a specific type of merchandise (a

[56] See, however, Whitehead 2000: 307–8 on "strict" and "loose" definitions of the agora.

[57] Virtually all commentators contend that the appeal to equity is the cornerstone of Epicrates' case (e.g., Kenyon 1893: xix; de Falco 1947: 148; Meyer-Laurin 1965: 15–19; Whitehead 2000: 269), but see section 3 *infra*. On the influence of considerations of equity in decision-making by Athenian juries note especially Isoc. 7.33: in contrast to present practice, Athenians of former times "saw that people judging lawsuits (not "people on trial," as Too in Mirhady-Too 2000: 190: κρίνοντας, not κρινομένους) concerning contracts made no use of issues of equity but obeyed the laws" (ἑώρων γὰρ τοὺς περὶ τῶν συμβολαίων κρίνοντας οὐ ταῖς ἐπιεικείαις χρωμένους, ἀλλὰ τοῖς νόμοις πειθομένους). See further Arist. *Rhet.* 1372b18–19, 1374a26–28, 1375a31–33; *EN* 1137a31–b38, including the definition of equity as "justice: not justice according to the law but a rectification of the justice in the law" (τὸ ἐπιεικὲς δίκαιον μέν ἐστιν, οὐ τὸ κατὰ νόμον δέ, ἀλλ' ἐπανόρθωμα νομίμου δικαίου: 1137b11–13). At [Dem.] 44.8, the speaker offers to concede the disputed estate to his opponents, even if the law does not support them, if the jurors decide that their claim is equitable (καὶ ἐὰν ἐκ μὲν τῶν νόμων μὴ ὑπάρχῃ, δίκαια δὲ καὶ φιλάνθρωπα φαίνωνται λέγοντες, καὶ ὡς συγχωροῦμεν). These contemporary statements seem to me to refute Harris's (1994) argument against the influence of equity in Athenian courts.

slave): the return of a slave with an undisclosed illness rescinds the sale. The buyer is thus protected not only against knowing fraud by the seller who conceals a known defect but also against unintentional misrepresentation by the seller who is unaware of a defect.[58]

This law, like the previous one, limits the validity of contracts of sale, but it does so after the fact: an otherwise valid sale is subject to nullification if and when latent illness is discovered. It, too, provides an imperfect analogy to Epicrates' case, since the sale of Midas and sons concurs with the law as to the category of goods (slaves) but not the type of latent defect (the debt concealed by Athenogenes). Epicrates argues from this law that his contract should be voided *a fortiori* on the basis of the financial loss suffered by the respective buyers: an epileptic slave, he asserts, inflicts only the loss of his purchase price, while Epicrates' liability for Midas's debt has bankrupted himself and his friends (Harris 2000: 52).[59]

Shifting his focus from the objects to the performers of transactions—or, as he puts it, from laws concerned with slaves to those dealing with free people—Epicrates next discusses the contract of betrothal (ἐγγύη).[60] Among other qualifications, the legislator specified that betrothal must occur "justly" (ἐπὶ δικαίοις).[61] Epicrates contrasts just (and therefore lawful) betrothal with a situation in which "someone betrothes the wife(-to-be) by lying (ψευσάμενος)," and concludes: "Thus the law makes just betrothals valid and those that are not just invalid" (οὕτως ὁ νόμος τὰς μὲν δικαίας ἐγγύας κυρίας, τὰς δὲ μὴ δικαίας ἀκύρους καθίστησιν, §16).[62] The phrasing of this summary

[58] Theophrastus (*Char.* 17.6) considers excessive anxiety over the possibility of latent defect in a cheaply-bought slave to be a symptom of the "ungrateful grumbler" (I borrow this translation of μεμψίμοιρος from Diggle 2004: 376).

[59] Hypereides might have had Epicrates argue that the tendency to accumulate potentially crippling debt indicates a mental ἀρρώστημα equivalent to the physical ἀρρωστήματα apparently covered by the law. Several *obiter dicta* in the Demosthenic *corpus* posit pointless or excessive expenditure as evidence of insanity (Dem. 8.25, 19.138; [Dem.] 50.35; cf. Dem. 21.69 "it is perhaps insanity to do something beyond one's ability"); note, however, that Aeschines characterizes Timarchus's reckless spending as indicative of moral failure, not mental illness (Aeschin. 1.94–105).

[60] Note that Aristotle lists ἐγγύη among his ἑκούσια συναλλάγματα (*supra*, n2).

[61] Epicrates quotes the phrase ἦν ἄν ἐγγυήσῃ τις ἐπὶ δικαίοις δάμαρτα directly from the law: cf. [Dem.] 46.18. Note the presence of δάμαρ, an obsolete word in fourth-century prose, which is immediately glossed as γυνή (as also at Lys. 1.30–31: ἐπὶ δάμαρτι . . . ἐπὶ ταῖς γαμεταῖς γυναιξί).

[62] The lie would presumably come in one of two forms: the betrother misrepresents either his relationship to the woman (thereby fraudulently asserting his standing as her *kyrios*) or the woman's citizen status. Apollodorus accuses Stephanus of both falsifica-

of the law on betrothal intentionally recalls Epicrates' previous interpretation of the general law of contracts, which validates only "just" agreements (τά γε δίκαια) and declares unjust ones void (τὰ δὲ μὴ . . . ἀπαγορεύει μὴ κύρια εἶναι, §13). Hypereides doubtless hoped that this parallelism would hoodwink the jurors and compensate for the fact that the betrothal law contained a stated J requirement that the general contract law lacked. Again, as with the two preceding laws, the law on betrothal governs only that specific type of contract and thus does not apply directly to Epicrates' contract of sale.[63]

So far, Epicrates has cited legislation within the area of contracts. He goes further afield in adducing his last two laws, commencing at §17 with a partial and selective quotation of the law on succession authored by Solon.[64] Limiting his paraphrase to the list of conditions that invalidate a will, Epicrates states that this law "ordains that it shall be permitted to dispose of one's own property however one wishes, unless (he does so) on account of senility, disease, insanity, or under the influence of a woman (γυναικὶ πειθόμενον), or under constraint by detention or duress (ὑπὸ ἀνάγκης)." All these nullifying conditions impair the testator's volition, and in the following section Epicrates applies this V requirement in Solon's provisions on wills to his own contract. He contends that Antigona's influence (ἐγὼ τῇ Ἀθηνογένους ἑταίρᾳ ἐπείσθην, §18) and the duress applied by both Antigona and Athenogenes led him to conclude the contract (ἀναγκασθεὶς ὑπὸ τούτων ταῦτα συνθέσθαι, *ibid.*; Carawan 2006: 349). While Epicrates expressly appeals to the letter of the inheritance law as his succor, his interpretation of the law again prominently features the vocabulary of validity (κύριος/ἄκυρος) and justice (δίκαιος/ἄδικος),[65] thereby continuing the series of verbal parallels between the text

tions in connection with the marriages of Phano in [Dem.] 59. I follow here the reading of Kenyon's 1906 text.

[63] It might be argued, however, that betrothal is analogous to sale in that the amount of the woman's dowry was a negotiable (and in some cases determinative) consideration: cf. Harrison 1968–71: 1.5–6.

[64] Cf. [Dem.] 46.14; [Arist.] *Ath. Pol.* 35.2; Isae. 4.16, 6.8–9; Plut. *Solon* 21.3–4. Solon's name does not appear in Epicrates' preserved discussion of this law, but note the significant lacunae in sections 18 through 21. Epicrates may, in fact, not have had to name Solon, since the law was well-known and Solon's name appeared in it. If, as Harris 1994: 135–36 has forcefully argued, repeated jury service gave the average Athenian juror significant familiarity with the law in general, Epicrates' jury will have been especially familiar with Solon's inheritance law owing to the inordinate number of lawsuits it produced (cf. [Arist.] *Ath. Pol.* 35.2).

[65] §§17–18: "Seeing that unjust wills (αἱ μὴ δίκαιαι διαθῆκαι) are not even valid (κύριαι) concerning a man's own personal property, how should this contract be valid (κύρια) for

of the general contract law and Epicrates' interpretations of more congenial (but less relevant) statutes.

In order to explain Athenogenes' and Antigona's purpose in applying duress, Epicrates revisits the issue of fraud. Having asserted that he concluded the contract under duress (ἀναγκασθείς),[66] he asks Athenogenes, "Are you standing on the contract that you and your courtesan got sealed by catching me in a trap (ἐνεδρεύσαντές με),[67] and concerning which I am now prosecuting you for conspiracy (βουλεύσεως: *supra*, n8)?" The "trap," here as in §12,[68] consisted in Athenogenes' failure to disclose the extent of Midas's debts; it is at this point in the speech that Epicrates uses arguments from probability to establish that Athenogenes, "a third-generation perfumer" (ὁ ἐκ τριγωνίας ὢν μυροπώλης) and the owner of three shops (§19), knew of the debt and intentionally concealed it. Although fraud is not an issue in Solon's law on wills any more than in the general contract law, Epicrates asserts another verbal parallel here, arguing that he was defrauded of 5 tal. while "under constraint" (κατειλημμένον; cf. καταληφθέντα at the end of the paraphrased law on wills).[69]

Athenogenes, who concluded it to the detriment of my property? And if someone, while persuaded by a woman, writes a will for the disposition of his own property, the will will be invalid (ἄκυροι), but if I was persuaded (ἐπείσθην) by Athenogenes' courtesan, I must be destroyed as well, when I have as my greatest support that which is written in the law (τὴν ἐν τῷ νόμῳ γεγραμμένην), having been compelled (ἀναγκασθείς) by these people to conclude this contract?"

[66] At the beginning of his speech, Epicrates admits that the compulsion upon him came from his *erôs* for one of Midas's sons—which we would consider internal motivation, not external duress (cf. Pl. *Symp.* 196c1–2 (*supra*, p. 101))—abetted by Antigona ("*erôs* drives out our nature, when it takes a woman's versatility as its partner," §2). Here, however, Antigona and Athenogenes are named as the agents of duress, and there is no mention of *erôs*.

[67] For the trope of the lover "caught in a trap" cf. Presley 1969.

[68] "We asked (Athenogenes) if he were not ashamed of lying and setting a trap for us in the contract by not advertising the debts (ἐνεδρεύσας ἡμᾶς ταῖς συνθήκαις, οὐ προειπὼν τὰ χρέα)."

[69] Unfortunately, our understanding of this passage is hampered by significant lacunae surrounding the word κατ]ε[ι]λημμένον. If Jensen 1917: 78 was correct to place ποδοστράβῃ before κατ]ε[ι]λημμένον (cf. Harpo. s.v. ποδοστράβη)—a restoration accepted by Colin 1946: 207, Arapopoulos 1975: 44, and Whitehead 2000: 318 (deFalco 1947: 180 and Marzi in Marzi-Leone-Malcovati 1977: 224 have ποδοστράβῃ followed by the simplex εἰλημμένον)—then Epicrates is alluding specifically to the detention (ὑπὸ δεσμοῦ) clause rather than the general duress (ὑπὸ ἀνάγκης) clause of the law on wills.

As before, these echoes endeavor to obscure the fact that Solon's inheritance law has no direct application to the contract between Epicrates and Athenogenes. The law on wills, while containing a convenient V requirement, is even more remotely connected to Epicrates' case than the three laws previously cited: while both wills and contracts of sale have as their purpose the alienation of property, a will is not a contract. This is tacitly admitted by Epicrates: for as much as he wishes to read the V provisions of the inheritance law into the general law of contract, he carefully and consistently distinguishes between a will (διαθῆκαι, διατίθεσθαι) and a contract (συνθῆκαι, συντίθεσθαι).[70] The specific difference is that a will is rendered valid by the unilateral declaration of the testator, while a contract requires reciprocity of promises.[71] In the modern Common law of contracts, this reciprocity is enshrined in the central doctrine of consideration,[72] which Athenian law prefigured in granting validity to whatever *one party* agreed *with another*: ὅσα ἂν **ἕτερος ἑτέρῳ** ὁμολογήσῃ κύρια εἶναι.[73]

Epicrates goes on to contend that even in the absence of Athenogenes' clearly established fraud, he should only be liable for the debts that he knew of when he concluded the contract (Carawan 2006: 349), since Midas took out the relevant loans when he was Athenogenes' property (§21). In support of this position, Epicrates cites his final law. Solon, the democrat *par excellence* (ὁ δημοτικώτατος), "knowing that many sales are made in the city," mandated that "whatever losses and expenses slaves occasion shall be discharged by the master for whom the slaves are working" (τὰς ζημίας ἃς ἂν ἐργάσωνται οἱ οἰκέται καὶ τὰ ἀναλώματα διαλύειν τὸν δεσπότην παρ' ᾧ ἂν ἐργάσωνται οἱ οἰκέται, §§21–22).[74]

[70] Note also that Aristotle does not include wills in his list of ἑκούσια συναλλάγματα (*supra*, p. 89).

[71] Note that Epicrates repeatedly stresses this defining feature of wills, in contrast with his contract: §17 τὰ ἑαυτοῦ διατίθεσθαι (in his paraphrase of the law), περὶ τῶν αὑτοῦ ἰδίων . . . διαθῆκαι; §18 εἰς διοίκησιν τῶν αὐτοῦ . . . διαθήκας γράψῃ.

[72] See, e.g., American Law Institute 1981: §71: "(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. (3) The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation . . . "

[73] On the application of consideration theory to Athenian contract law cf. Wolff 1957: 64n89; *contra* Carawan 2006: 367n51.

[74] Both the significance of ζημίας and the restoration ἀ[ναλώμ]ατα are disputed (see Whitehead 2000: 324 with references). A ζημία can be either a simple financial loss or a legal penalty; and for ἀ[ναλώμ]ατα some read ἀ[δικήμ]ατα "offenses" or (less probably) ἁ[μαρτήμ]ατα "misdeeds." Whitehead prefers the juridical option in both instances,

Of all the legislation cited by Epicrates from §14 on, this law bears most directly upon the matter of liability for Midas's debts, although Athenogenes will argue that its provisions are superseded by the clause in the contract that explicitly transferred Midas's debts to Epicrates (§10; cf. §22 "but you (Athenogenes) dismiss the law and talk about broken contracts"). Yet, perhaps owing to Hypereides' recognition of this fact, this is also the law that Epicrates' interpretation distorts most blatantly. The assignment of liability for loss to the slave's employer (τὸν δεσπότην παρ' ᾧ ἂν ἐργάσωνται), not to his owner, indicates that the law concerns not the sale of slaves but their loan or lease for use.[75] Therefore, while Epicrates' observation that this potential for loss balances the opportunity for gain (see n74) may be rationally well-grounded, the gains in question do not accrue to the owner of the slave (τοῦ κεκτημένου αὐτόν), as he states, but to the employer.

The conflict between this law and the general contract law presents an evident difficulty for Epicrates, which he endeavors to solve in favor of the former by an argument *a fortiori* (Whitehead 2000: 325). "Solon," he claims, "does not think that even a decree which someone drafted justly (δικαίως) should be more authoritative (κυριώτερον) than the laws, but you (Athenogenes) think that an unjust contract (τὰς ἀδίκους συνθήκας) should prevail over all the laws."[76] Athenogenes would have cogent grounds for such an opinion

contending that "the difficulty with ἀ[ναλώμ]ατα is that it would make this law all too supportive of [Epicrates'] case. He could surely not . . . have been bound by a contract which violated this (or indeed any) law outright; and H(ypereides) would not have made his client cite so many laws from §13 onwards if this one alone had been enough to settle the matter." These are weighty objections, but answerable. (1) Applicability to Epicrates' case is surely a reason to accept, not to reject, ἀ[ναλώμ]ατα. Indeed, if the cited law dealt only with responsibility for offenses committed by slaves, it would have no connection whatsoever to Epicrates' case, since Epicrates nowhere accuses Midas of amassing his debts illegally. Moreover, Epicrates justifies the provisions of the law in purely financial terms: "Rightly so; for, in fact, if the slave does some good business or finds employment, (the profit) belongs to his owner." (2) While therefore applicable to Epicrates' case, the law in this form is not dispositive (*pace* Whitehead), since the general contract law included no L requirement (*supra*, pp. 95–97) and Epicrates specifically agreed in his contract with Athenogenes to assume any and all debts incumbent upon Midas (§10). See further section 3 *infra*.

[75] Aristotle's χρῆσις and μίσθωσις respectively (*supra*, p. 89). Of course, in the default (and most frequent) case, the employer of a slave will have been his owner, but in that situation the owner will have been liable *qua* employer, not *qua* owner.

[76] It must be noted as a *caveat* that this sentence is heavily restored. Editors, however, concur as to its sense (while disagreeing on the restoration of certain words). Kenyon's (1906) text, with editorial variants in parentheses, reads: καὶ ὁ [μὲν Σόλων, οὐδ'] ὅ δικαίως ἔγραψεν ψήφ[ισμά τις τῶν γε νόμων (τοῦ νόμου Jensen, Colin, de Falco, Marzi)] οἴεται

(although he obviously would not describe the contract as "unjust"), since, as we have seen (*supra*, pp. 95–97), the general contract law contained no legality requirement, and accordingly Athenian contracts might include a clause asserting the supremacy of their authority. In anticipation, Epicrates applies the "justice" and "validity/authority" dichotomies one last time: if a just decree cannot trump a law, then an unjust contract certainly cannot—especially since "everyone agrees" (παρὰ πάντων ὁμολογεῖται: cf. ὁμολογήσῃ in the general contract law) that Solon's law on liability for slaves is just (δίκαιον).

The deceptive statutory interpretation in §§21–22 arguably becomes most transparent in Epicrates' ascription of the hierarchy of legislation to Solon.[77] Hypereides surely knew—as did Epicrates, if, as he claims, he researched the laws of Athens "night and day" in preparing his case (§13)—that the statute that established the primacy of laws over decrees was not Solonian but was passed in the archonship of Eucleides (403/2: Andoc. 1.87, with MacDowell 1962: 128), nearly two centuries after Solon's legislation and less than eighty years before Epicrates' lawsuit.[78] The motive behind this misrepresentation becomes clear upon examination of the presence and absence of Solon in Epicrates' legal argumentation.

3. HYPEREIDES, EPICRATES, AND SOLON

Among the canons of interpretation in American law is the rule that when statutory provisions of different dates conflict, "the later controls the earlier" (Robinson 1995: 134). The Athenians not only lacked an equivalent principle but, by contrast, accorded special (but not controlling) status to laws on the basis of their antiquity.[79] Therefore, the designation of a law as Solonian is not merely an alternative to "Athenian" but demonstrates the speaker's approbation of the law, whether tacit or (frequently, as here) explicit. The gen-

δεῖν κυριώ[τερον εἶναι, σὺ δὲ οἴει (καὶ Jensen, Colin, de Falco, Marzi) τ]ὰς ἀδίκους συνθ[ήκας δεῖν (ἀξιοῖς Jensen, Colin, de Falco, Marzi) κρατεῖν πάντων τ]ῶν νόμων.

[77] Athenians sometimes employ a partial anachronism in referring to the body of law of the democratic *polis* as the work of (Draco and) Solon (e.g., Dem. 18.6; Aeschin. 3.257; Whitehead 2005: 325 with references; Todd 1996: 128—note, however, that in some instances (e.g., Andoc. 1.83; Lys. 30.2) the phrase appears to be specific and literal). But referring summarily to Athenian law under the name of its most prominent creator is not the same thing as falsely attributing a specific law to Solon. See further section 3 *infra*.

[78] As Athenogenes was an Egyptian metic and probably composed his own defense (Epicrates calls him λογογράφος at §3), Hypereides and Epicrates may have wagered that he would be unable or unprepared to refute their allegation of Solonian authorship.

[79] Homicide laws of Draco: Ant. 5.14, 6.2; cf. Dem. 23.66. Laws of Solon: Aeschin. 1.6, 183; 3.175. Cf. Scafuro 2006: 194.

eral absence of rules of statutory construction meant that when confronted by conflicting applicable laws, an Athenian jury could choose which one to enforce (Todd 1996: 125).

In Epicrates' case, the *prima facie* controlling statute is the general contract law. Unfortunately for Epicrates, however, the letter of this law favors Athenogenes. In the first instance, therefore, Epicrates endeavors to turn Athenogenes' best weapon against him by convincing the jurors to import an understood justice requirement into the general contract law. Accordingly, by citing his first three analogous laws (on lying in the agora, disclosure of latent defects in slaves, and betrothal), Epicrates posits a unitary legislative intent to combat contractual fraud. If the Athenians subscribed, universally or predominantly, to such a construct of undifferentiated legislative intent (cf. Todd 1996: 121), this argument might well succeed, and the jury could thus find for Epicrates on the basis of his persuasive statutory interpretation, and not merely on the basis of equity (or sympathy for a fellow citizen against an Egyptian metic).[80]

Yet the praise showered by Athenian litigants upon the ancestral lawgivers, frequently in contrast with more recent legislative and litigious practice (e.g., Lys. 30.28; Isoc. 15.230–35, 312–13), suggests that Athenian jurors were capable of—though manifestly not always successful at—identifying and discriminating between the acts and aims of discrete legislators.[81] Consequently, in case he fails to demonstrate the presence of an implied J requirement in the general contract law, Epicrates must present the jurors with alternative controlling legislation and persuade them to privilege it over the general contract law. The law on wills, although it conveniently invalidates the act of a testator under female influence (as Epicrates was in consenting to his contract), does not govern Epicrates' case, but he uses it as a springboard to reassert the fraud perpetrated upon him by Antigona and Athenogenes, concluding with the question, "Who is the right person (δίκαιος) to pay the debt: the one who bought (Midas) later or the one who has long since possessed all the money that was loaned?"

[80] §§27, 3. On Epicrates' appeal to Athenian xenophobia, see especially Cooper 2003.

[81] At Dem. 23.51, for example, Euthycles informs the jury, "This law (just cited) is a law of Draco . . . as are all the others I have cited from the homicide laws," thereby distinguishing Draco's homicide laws from later laws on the subject. Harris 2000: 50–51 is too simplistic in asserting that "the Athenians believed that all their laws were the product of one legislator." However willing Athenian litigants were to adopt the single-legislator construct as a legal fiction (Johnstone 1999: 26; Lanni 2006: 69), they were well aware that their laws had been written by multiple legislators, from Draco and Solon to the *nomothetai* of the fourth century (see, e.g., the Teisamenus decree at Andoc. 1.83–84; Dem. 20.91).

Epicrates, of course, answers in favor of the latter, and proposes that if Athenogenes disagrees, Solon's law on liability for slaves shall decide the question: "let our arbitrator (διαιτητής) be the law that was established not by those in love or those plotting against the possessions of others, but by the greatest of democrats, Solon" (§21). Hypereides' choice of the word διαιτητής serves a double purpose: it indicates that Epicrates invests the following law with an authority equivalent or superior to that of the general contract law, since it can settle the issue alone; it also recalls (albeit imprecisely) the role of Solon himself as mediator (διαλλακτής) and lawgiver.[82] In fourth-century Athens, as David Whitehead observes,[83] διαιτητής normally referred to a person, not a law. Athenian arbitration came in two forms: compulsory non-binding arbitration for all disputes involving sums of over 10 dr., conducted by allotted citizen males in their sixtieth year ([Arist.] *Ath. Pol.* 53.2–6), and voluntary binding arbitration, in which the disputants chose their arbitrator(s) (Dem. 21.94; Isoc. 18.11; [Dem.] 52.16; Harrison 1968–71: 2.64–66; MacDowell 1990: 317–18). Epicrates here figuratively challenges Athenogenes to undergo the latter process and submit to the binding judgment of Solon's law, thus encouraging the jurors to base their decision on the slave liability statute; perhaps Epicrates volunteers and personifies this law as διαιτητής, while omitting discussion of a human arbitrator, because Athenogenes had prevailed in compulsory arbitration.

It is no coincidence that this law, unlike all the others Epicrates has previously discussed, is explicitly attributed to Solon. The general contract law is cited without attribution, and Epicrates' only comment on it is that it (tacitly) restricts validity to "just" contracts, as he promises to demonstrate by means of comparison with the laws that follow. Epicrates naturally reserves commendation for laws whose text favors his case, beginning with the provision against lying in the agora, which "lays down the finest of all rules" (πάντων . . . παράγγελμα κάλλιστον παραγγέλλων, §14). But with the exception of the last in the series, even these advantageous laws lack personal

[82] Note that διαιτητής at the beginning of the clause is balanced by Σόλων at the end. On Solon as διαλλακτής (which may have been part of his official title: Jacoby 1949: 175–76; Manfredini-Piccirilli 1977: 181–83; *contra* Rhodes 1993: 120–22), see [Arist.] *Ath. Pol.* 5.2; Plut. *Solon* 14.3, *Amat.* 18 = *Mor.* 763d9-e1 (cf. *Praec. reip. gerend.* 32 = *Mor.* 825d8). Epicrates presumably avoided describing Solon's law as his and Athenogenes' διαλλακτής because he was not seeking mediation or reconciliation (which had already been attempted through the agency of Antigona), but rather a verdict favorable to himself and detrimental to his adversary.

[83] Whitehead 2000: 322–23, noting the connection between arbitration and equity at Arist. *Rhet.* 1374b20–21.

attribution: the author of the betrothal statute—almost certainly Solon[84]—is called simply "the lawgiver" (τῷ νομοθέτῃ, §16), and most strikingly, Solon's well-known law on wills apparently passes by without disclosure of its provenance. Epicrates holds Solon's name in abeyance until the slave liability statute, which differs from the previously-cited provisions in that it does not simply serve as a supplementing analogy to the general contract law but provides the jury with a direct legal basis for holding Athenogenes liable for Midas's debts.

Attribution of the slave liability law to Solon is designed to persuade the jurors to privilege it over the general contract law. Epicrates' fulsome praise of Solon as ὁ δημοτικώτατος reflects upon the contents of his law and thus predisposes the jurors to view it in a favorable light (cf. Johnstone 1999: 31); he then explicitly opposes his own reliance on Solon's provisions regarding liability for slaves to Athenogenes' accusation of breach of contract (σὺ δὲ τὸν νόμον ἀφεὶς περὶ συνθηκῶν παραβαινομένων διαλέγῃ: p. 113 *supra*), which is grounded in the general contract law (§13). Finally, if the jurors harbor any remaining doubts as to which of these two laws they should enforce in their verdict, Epicrates endeavors to solve their dilemma by asserting that the statute assigning primacy to laws over decrees—which he falsely credits to Solon in order to invest it too with the attendant *gravitas*—decisively grants the Solonian slave liability law controlling authority over his and Athenogenes' "unjust" contract. Thus, in case his argument on the general contract law fails, Epicrates twice invokes the name of Athens' most venerated lawgiver in the hope that it will convince his jury to privilege the earlier (the legislation congenial to his case that he expressly ascribes to Solon) over the later (the general contract law, represented as post-Solonian by omission). No wonder that the greatest of Roman advocates expressed admiration for Hypereides' skill:[85] whether a juror accepts Epicrates' interpretation of the general contract law or his argument for the controlling status of the statute on liability for slaves, he has a basis in law to convict Athenogenes and void the contract.

CONCLUSION

Throughout the oration against Athenogenes, Hypereides exploits to his client's full advantage the democratic principle that permitted any Athenian to assert his interpretation of the law and rewarded the litigant whose interpretation proved most persuasive to a citizen jury. Under an authoritarian system

[84] Ruschenbusch 1966: F 48b = [Dem.] 46.18 (*lex*) (clearly the source of the paraphrase at Hyp. 3.16: see n61 *supra*); Whitehead 2000: 312.

[85] Cic. *Brutus* 35–36; cf. *de Orat.* 1.58, 2.94; Quint. *IO* 10.1.77. The *Against Athenogenes* is singled out as an exemplar by [Longin.] *de Sublim.* 34.3.

of statutory construction, the laws cited by Epicrates on lying in the agora, defective slaves, and betrothal might be ruled out of discussion as irrelevant to Epicrates' case. But under the Athenian system, with no apparatus to determine a recognized hierarchy of *nomoi* and with every law embodying the will of the *dêmos* (Yunis 2005: 202), Epicrates could argue that the legislative intent manifested in these analogous laws was not only equally relevant with but identical to that manifested in the general contract law. On this view, the terms of laws become arguably transposible (cf. Lanni 2006: 69): if a seller cannot defraud a buyer in the agora, he should not be able to do so in a private home; if one type of undisclosed defect (illness) rescinds the sale of a slave, another type of undisclosed defect (debt) should do likewise; if female influence voids one type of transaction (a will), it should void another type of transaction (a sale); finally, and most crucially for Epicrates' purposes, if the legislator stated a J requirement for contracts of betrothal, the same requirement must be understood for contracts of sale.

Such argumentation, however, is clearly vulnerable to *reductio ad absurdum*, and so Hypereides also advances an alternative line of reasoning that asserts a hierarchy of *nomoi* which supports Epicrates' case. Although all laws express the will of the *dêmos*, some laws are more democratic than others, and none are more democratic than those authored by ὁ δημοτικώτατος Solon. Any juror who remains skeptical about importing an unstated J requirement into the general contract law is accordingly presented with the slave liability law, whose attribution to Solon marks it as inherently superior to the anonymous general contract law and certainly more worthy of enforcement by a democratic jury. But, skilled rhetorician that he is, Hypereides does not openly acknowledge the possible conflict of statutes, since that might compromise his assertion of a J requirement in the general contract law. Rather, as far as he is concerned, the conflict lies between *all* the laws as a unified group and Athenogenes' unjust contract; and to declare a victor he appeals again—and falsely—to Solon. Indeed, Hypereides' conviction that the name of Solon will carry significant persuasive power is perhaps best evidenced by the risk he is willing to have his client take in representing the statute establishing the supremacy of laws over decrees, which was enacted by the restored democracy in 403/2, as Solonian.

Since the verdict in Epicrates' lawsuit is unknown, we cannot know whether this gambit succeeded, or even, more generally, which (if any) of his arguments the jury found compelling. Nonetheless, Epicrates' vigorous exercise of his democratic right to interpret the laws of his city as he saw fit is valuable in itself, as his legal argumentation vividly demonstrates the degree to which the meaning of Athenian laws was subject to constant negotiation under the

influence of forensic rhetoric.[86] In fourth-century Athens, what the law said was carved in stone; what the law meant was determined in each individual and independent case by the arguments of the litigants and the decision of the jury.[87]

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[86] A major factor contributing to this flexibility in interpretation was the characteristic lack of substantive definitions in Athenian laws: see, e.g., Todd 1993: 61–62; Yunis 2005: 201; Lanni 2006: 67–68.

[87] Cf. Johnstone 1999: 1, 23, 33. On the resulting phenomenon of "legal insecurity" in Athens see Lanni 2006: 115–48.

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