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A GREEK CASE IN SEARCH OF AN ANTHROPOLOGICAL POINT

CHARLES GRAY*

INTRODUCTION

The documentation for this Essay is simply the speech it is about: Demosthenes's Oration LV by the standard numbering, "PROS KAL-LIKLEA PERI CHORIOU BLABES" or "Against Callicles." I do not think it would add anything except fuss to refer to particular points in this short document whence I get to my particular points. The only way to test whether the problems and possibilities I see in the speech are really there is to read the whole thing—only eleven pages of English, or as many of Greek, in the Loeb Classical Library (Vol. VI in the Loeb ed. of Demosthenes, p. 164 ff.). I do not think there is significant obscuring of meaning in the Loeb translation by A.T. Murray, something that cannot always be said of translated texts touching law. The few remarks in the Essay preliminary to describing the case have no real source except my observations as a visitor to a number of private-litigation speeches by the Attic orators, with the guidebook, Aristotle's Constitution of Athens, in hand. Modern general books, such as R.D. MacDowell, The Law in Classical Athens, cover the same ground and much more, though I do not think there is any general book on Athenian law that has got the categories for discussing legal systems quite right.

This Paper is an essay in the strict sense. It is an experiment in analyzing an ancient Athenian case in terms I shall call "more or less lawyerly." There is no need for a nice explanation of that phrase. I am myself a nonlawyer whose legal experience is mostly with cases in the Year Books and the early modern English reports. My interest therein runs to doctrine, argumentation, and the folkways of a highly professionalized legal culture—the opposite of the Athenians'. In this excursus into Greek law, I intend to flaunt, rather than repress, habits of mind picked up from a sort of vicarious out-of-date common law practice. For the question behind the experiment is whether to think through a Greek case with those habits of mind is utterly to misunderstand it. Is it to commit flagrant (as opposed to moderate and heuris-
tic) anachronism? Is it to miss the anthropological point? Like any humanistic experiment, or essay in reading, one cannot answer the question or verify the implied hypothesis—that my “translation” of a Greek imbroglio into fairly recognizable talk about torts and statutory construction may not terribly mistake how Athenians would have construed the problem before them. My presentation certainly translates from any possible literal rendering of the Greek. My language does not sound much like what is said on the surface of the evidentiary document, whatever detailed decisions one would make in turning Greek into English. But that does not in itself falsify a translation from words into legal meaning. It is emphatically not my purpose to plead for my interpretation of the case. I really do not know. I am interested only in raising a question about the case itself, beyond which is a further question: Could one, by putting together bits of information from here and there and perhaps by doing similar experiments with other cases, begin to get a hold on the categories in which Athenians saw legal issues?

The case, *Kallikles v. Son of Teisias*, the evidence of which is a speech for the defendant written by Demosthenes, is among the Athenian cases that appear to raise substantial legal questions. These are, I think, a minority of the extant cases. Classification presents problems, and I have not completed a project of indexing the whole corpus for “legal fruitfulness.” My tentative view, however, is that most cases come at heart to factual disputes, valuable though these are for all sorts of information about the legal system. Only sometimes does a case seem—superficially perhaps, to a mentality to which the fact-law distinction is more evident than it was to Athenians—to present the court with a problem of choosing between conflicting arguable understandings of the governing law. Students of Greek law might find it profitable to reflect a little on the legal-issue cases, which of course cut through subject-matter categories, as a distinct topic. They would seem to be the best avenue into questions too large for me to define adequately, but which loom behind many inquiries, including ones that are not straightforwardly legal: How “nomic” were the Greeks or the Athenians? How capable were they of thinking, “There is the documentable (or, if not documentable, understood) law. Now what can be plausibly disputed about its meaning and what can be advanced as reasonable grounds for taking it this way or that?” How firm was the line (perhaps a wobbly line in the nature of things, but a powerful one in the history of legal culture) in their minds between a debate about what the law is and one about what it ought to be? This Essay
is a modest experiment in worrying about particulars in order to worry about such grandiosities.

I. Background

It may be desirable before taking up the case to say a little about the legal system in which it occurred. What I shall give by way of background will be fairly familiar to anyone who has looked into Athenian law, though few formulations and emphases in this area can be entirely beyond dispute. I include these preliminaries only because having them freshly in mind will probably make it easier to follow the exposition of the case.

The private-litigation speeches we have from Athens were mostly delivered to large courts—in the hundreds—called DIKASTERIA. The DIKASTERION trying any particular case was chosen by lottery from citizens who volunteered to serve, for which they were paid. The system was designed to insure that no individual dicast could predict whose case he would be trying, in order to minimize bias and bribery. Addressing such a body must have felt like addressing a political assembly of comparable or greater size, in contrast to addressing one or a few official judges or nonofficial group of the approximate size of a common law jury. We should hold off, however, from asserting that a DIKASTERION was virtually a political assembly, with the implication that its charge was conceptually different from that we normally attribute to courts of law. There may be a basis for such assertions, but it is better not to look at the cases through a semiconscious assumption that something of the sort must have been true.

The parties "just addressed" the DIKASTERION. They were not represented by advocates, though we owe our record of some cases to the fact that a party could engage a speech writer to prepare his address. (The record is distorted to an indeterminate degree by such discrepancies as there may be between what the party with a speech writer behind him actually said and the version of the speech that has descended among the collected works of a celebrated rhetorician. One can only go on the working assumption that the party's speech conformed to the version we have.) When I say the parties "just addressed" the court, I mean that the party was free, within the time limit to which speeches were subject, to say more or less anything he thought would do his case good, in any order or the order he considered most likely to be effective. If there was something like a duty to speak relevantly, I see no sign that it was enforceable by any means
except the risk of prejudicing the triers against one. Modern readers of the speeches are almost sure to feel that the standards of relevance were permissive, but they are likely to come equipped with an idea of relevance conditioned by another set of institutions (e.g., common law rules designed to limit what a lay jury supervised by a professional judge hears, lest the laymen get off the point or give way to their emotions). "Natural" relevance—that is, what is said connects by a plausible chain of inferences to something the speaker wants to maintain—seems to me well-enough observed in Athenian speeches. The motive of many utterances was no doubt to affect the dicasts' feelings, but that does not make the utterances irrelevant. Nor does it permit the hasty conclusion that there was a high moral tolerance for hunchy decision making.

A safe starting point might be to say that the Athenians trusted ordinary citizens to listen to what the litigants had to say for themselves as they chose to say it—long and odd routes of inference included—and to come to satisfactory conclusions in the batting-average sense to which all tribunals are confined. What made a decision satisfactory enough in Athenians' eyes is of course a question. Was it anything else than a widespread belief that the party telling the truth about material facts won if the law was in his favor and that doubts about the law—recognized as such—were resolved intelligently (though not in the inevitable way, for of course cases worth litigating rarely have indisputably right solutions)? More questions, needless to say, impend. How do people decide what happened when they did not see it happen? Perhaps there is no acultural common sense way. Nor is there anything inborn about identifying a legal uncertainty as a distinct kind of puzzle to be approached in a special mood with special canons of thinking.

In broad and rough terms, I would call Athenian trial procedure "natural" in the sense that no "art" except the art of rhetoric constrained how a party made his case. One was not told, "There are facts, and there are formlike things called rules of law that must be shown to fit the facts. You must make it clear whether you are trying to convince us of your version of the facts or of your construction of the law. If both, you must do one before the other"—or the like. The litigants mingled the two sorts of things, as I should think people tend to do in informal agonistic situations and as the art of rhetoric perhaps usually recommends.

"Natural" trials based on speechmaking free of extrarhetorical formality are common in the world. A Roman trial before a judex
with an advocate doing the speaking conforms to the type. So do English trials over the long period when lawyers did not play a routine role in them, when the rules of evidence and the modern trial rigmarole they entail did not exist, and when a great deal of law was left to juries under the pretense that their job was to determine facts. Nor is there much doubt that the "natural" procedure had a larger place than meets the eye under those systems of law that ultimately distrusted human judgment and resorted to such devices as oath helping and ordeals to make last-ditch decisions. Athenian law is more distinctive for going all the way with human judgment than for proceeding by free-form speechmaking. Reliance on this procedure does not, however, resolve problems about the dicasts' abilities to discriminate different kinds of issues and their sense of how they were morally bound to think in their role as judges.

Subject to a couple of qualifications, Athenian litigants "just addressed" the DIKASTERION, and the DIKASTERION "just decided," then and there, by a species of secret ballot. That is, the DIKASTERION voted immediately after hearing what the parties had to say, a simple majority determining victory. There was no deliberation. Any indication of what individual dicasts thought of the arguments, by conversation with those nearby or by jeering and cheering, was off the record, so to speak; I have not seen strong evidence of its incidence or of moral attitudes toward it. There was no appeal from a DIKASTERION's judgment, though a new trial of sorts, in the form of a prosecution for perjury by the loser of critical witnesses on the winner's side, was an option, whatever the typical chances of success. (A new trial, because civil damages were assessable against the perjurer. If A's false testimony caused B's loss to C, as a result of which B was forced to pay C 1000 drachmas (d.), B could recover 1000 d. from A—plus anything more the second DIKASTERION thought would serve A right, for Athenian law accepted punitive damages. Damages were normally arrived at, after a verdict for the plaintiff on the substance, by each party's proposing an amount and making a speech in favor of his proposal; the DIKASTERION voted between the two proposals—it had no means of compromising them or rejecting both. Of course, the additional assessment procedure was not necessary in a suit for a sum certain or where the law appointed a penalty, as was the case in Kallikles v. Son of Teisias.)

Besides speaking his piece, the party introduced witnesses, usually in the form of depositions prepared beforehand, to confirm his factual assertions. Parties clearly tried to do this with care—that is,
not to let themselves be caught asserting a fact and showing nothing to support it. The sanction behind the practice was "ethical" in the sense that there was no one except the DIKASTERION itself to dismiss a plaintiff's case for lack of evidence or to pronounce that the burden of proof fell on one or the other of the parties and was unsustained. How risky it was not to have witnesses—to bet on the dicas's believing you or their going on personal knowledge or common sense inference from circumstances—is unascertainable, but the witnesses came in such clouds that one is inclined to say it was pretty risky. Carelessness outside the courtroom—neglecting to have important transactions that might become the subject of litigation witnessed—was pretty clearly regarded as suspect, or simply "poor," conduct. (Many social variables can presumably affect attitudes toward doing things before spectators or privately. I would expect Athenians to approve prudence that foresees trouble and litigation and provide against it, but also to have the attitude that decent people do not need the reminders of a mistrusting prudence to lead their lives in a public, vocal style.)

Finally, cases did not come cold to the DIKASTERION. They were processed through preliminary hearings before magistrates of various sorts, depending on the nature of the claim. There is considerable mystery about how these proceedings worked. I do not think there is reason to attribute a "law-control" function to most, or perhaps any, of them. I mean there is no sign that the magistrate had authority, or a conceptual basis, to rule out a claim for "failure to state a cause of action." The parties probably argued before the magistrate and "discovered" each other's positions. The magistrate probably had a duty, as well as a chance, to try to talk parties out of going on with a weak case or into settling an ambiguous one, but I think the law of Athens was that only a DIKASTERION could say with authority whether an alleged wrong was legally remediable. Nor do I see any sign that the magistrate sent forward to the DIKASTERION a formulation of what was to be decided that constrained how the parties must present their cases or how the court must frame its thinking. (Roman praetors produced such formulae, and so in effect did the English judges in the Year Books when they authorized or disauthorized parties to narrow the issue by a special plea—as opposed to taking the "general issue," disguised as factual but laden with law, to a jury. It is worth remembering that the English judges were professional lawyers and the praetors were scions of an office-holding aristocracy advised by lawyers. Athenian magistrates, by contrast, were one-year officers
chosen by lot from the citizenry, and there were no lawyers to advise them.)

In some types of cases the Athenian DIKASTERION was simply a court of first, as well as last, resort. For the bulk of common cases, however, there was a more significant prior phase. In these cases, the positional equivalent of the preliminary magistrate was an official called a DIAITETES, which is also the Greek word for arbitrator in the sense "judge chosen by private agreement between disputants in lieu of litigating in a public court." The DIAITETES, unlike other magistrates, was expected to make a decision after listening to the parties argue their cases in the event that he failed to arbitrate a settlement. His decision was, however, freely appealable to a DIKASTERION, so that there was little point in his agonizing over a hard case. There may, indeed, be reason to think that the proper thing for him to do was to decide more or less formally, rather than to assess conflicting testimony or try to answer difficult legal questions—that is, the DIAITETES may have been expected to decide for plaintiff if he offered witnesses for his assertions of fact unless defendant offered contradictory witnesses on the central point, in which event the decision should be for defendant.

The significant catch in cases of this sort was that evidence offered before the DIAITETES was sealed, and it was against the law to introduce any new evidence before the DIKASTERION. The rationale, if not necessarily the full historical explanation, of this rule would seem to be that it improves the odds that a case will not be taken beyond the DIAITETES to burden the major courts, since the opportunity was cut off to neglect one's case at the preliminary stage, or even throw it on purpose, and then to spring persuasive evidence at the "trial that counts." There is no reason to suppose that new issues could not be discovered or invented between the first trial and the second and new and better arguments devised, so long as the refurbished case did not depend on additional witnesses. Enforcement of the rule was presumably fairly easy, since the depositions were physically sealed in boxes, whence they could be removed in plain sight. If cheating remained possible, it was up to the DIKASTERION to ignore smuggled evidence, if not to punish the smuggler by deciding against him. (Whether Kallikles, which was not quite a commonplace suit, had passed through the DIAITETES stage is not clear. The procedure is mentioned in the speech that documents it, but in connection with other litigation brought up by defendant to show that
plaintiff had harassed him by various groundless suits in addition to the present one.)

II. **KALLIKLES v. SON OF TEISIAS**

I shall now state the facts and issues of *Kallikles v. Son of Teisias* so far as those can be made out from what one party, here the defendant, says. A speech on one side is nearly always the only evidence we have for constructing Athenian law and the view of cases probably taken by Athenian judges. As I have already suggested in defining the experiment, it is not my intention to formulate the issues and considerations in an inaccurate or anachronistic way. I shall come back at the end to features of the speech that intimate ways of thinking different from those implicit in my summary, casting doubt on the analysis.

About twenty years before the litigation, defendant's father built a wall around his CHORION, or agricultural plot. He had acquired the plot shortly before, whether by purchase or inheritance is uncertain, but purchase is more likely, because tombs on the land are said to have been made before "we"—presumably defendant's family—acquired it. He found the land in deplorable condition, because the previous owner was an absentee who had neglected it. It was beginning to be encroached on both agriculturally and by use as a way. Most important, as a result of two or three major rainstorms, runoff from the mountains above and around the plot had begun to groove out streambeds, into which water from subsequent rains could be expected to channel itself.

The wall was the answer to all these problems. It would tend to improve the physical condition and profitability of the plot, in part by blocking water flowing off the mountain and preventing further erosion. One would suppose it had the further advantage of excluding trespassers before they acquired a right of way or title to land by adverse possession (though I lack information on the existence or content of Athenian law on those subjects). The equivalent point as to the water is highly important for our case. Simplifying, or bypassing variables we shall have to deal with, one would suppose that part of the purpose in building the wall was to cut off the development of a regular watercourse in which other persons might claim to have an interest in the nature of an easement. When defendant's father built the wall, neither plaintiff's father—then owner of plaintiff's neighboring plot—nor any other neighbor protested, though no one made an express agreement not to complain in the future. Nor in the interven-
ing period had plaintiff, his father, or anyone else complained, by lawsuit or informally.

Plaintiff owned another CHORION across the road from defendant's. His basic complaint in the present lawsuit was that the wall obstructed a CHARADRA, which colloquially means a watercourse; what counts legally as a CHARADRA is part of the question in this case. Plaintiff suffered water damage as a result. Physically this seems to have been the situation: Water prevented from flowing through or over defendant's land was diverted into the road, which served as the main CHARADRA for the area. The extra amount of water in the road on the occasion of a major storm made it overflow onto plaintiff's land, causing damage which allegedly would not have occurred if there had been no wall.

The simplest elements in the defense against this claim were three. First, defendant led off, putting great emphasis on the point and suggesting that it was all he really needed to say, with an argument from acquiescence: failure on plaintiff's part to object at the most opportune time, when the wall was built, and for a considerable time thereafter extinguished any right of action he might have preserved by protesting earlier. No law is cited for this point—that is, no law saying what rights if any may be cut off by acquiescence, just what omissions count as acquiescence, and for how long one must suffer a situation adverse to one's interest before others gain a prescriptive right to perpetuate the situation. (Deliberate citation is common in Athenian cases. When a speaker wanted to invoke a written law, he interrupted his speech while the law was read out to the court. Very likely there was no written law in the area of prescription and easements. Defendant would then be arguing from common sense, common morality, and common understanding—"common law," one might say, in a sense that is a blend of those things, without the records or the professional folk memory that facilitate explicit reference to past practice in the courts. Though there are appearances to suggest that the Athenians tended to conceive of their system as jus scriptum, I do not think there is much doubt that "common law" so understood figured operationally in their jurisprudence.)

Second, naturally enough, defendant went on to argue that in any event building the wall was not a "legal wrong" or a source of liability for consequent damage. Clearly, obstructing a CHARADRA was in some sense a legal wrong. There is probably no reason to think that plaintiff would have had a case in anyone's eyes if the wall had not done something like "obstructing" a CHARADRA—i.e., if it had
been built around a CHORION without even incipient streambeds and had only added to the water in the road by diverting what would otherwise have been diffused over defendant's property. We should be cautious on this point, however. It goes to the fundamentals of tort law, to which other features of the case will lead me back. Does liability arise only when damage is caused by a "wrongful act" in a stronger sense than merely "having a foreseeable tendency to harm persons within a specified range, prevention of which harm would not impose undue, uncustomary, or uneconomic costs on the actor?" (Whatever the Athenian law, examples of "wrongful in a stronger sense" would be acts done with the intention or desire to cause the harm, or gross indifference as to whether it ensued.) Anyhow, defendant sought to argue that nothing he had done counted as obstructing a CHARADRA.

Third, defendant claimed further that plaintiff had contributed to the damage by extending a wall of his own and thereby narrowing the road and narrowing it further by throwing detritus into it. That is, he reduced the water-carrying capacity of the road by his acts—possibly "wrongful" ones in some manageable sense—so as to increase the chances of its overflowing onto his CHORION. No firm statements implying a definite legal doctrine are made on this score—that is, no statements such as "the damage would not have happened but for plaintiff's own at least careless acts"—but there is a vague reliance on the extra argument that what happened was partly plaintiff's fault, even if defendant was also at fault.

These issues would define the essence of the case, save for a difficult one by which they are overlaid. Plaintiff sues for 1000 d. Defendant maintained that the damage was actually very slight, 50 d. worth at most. This would present no problem if defendant were merely combatting an inflated damage claim in the form, "I am not liable, but even if I were, plaintiff's damage was much less than he says it was." That was not the situation, however. Defendant argues vociferously that he is being sued in a DIKE ATIMETOS for the large sum of 1000 d., and that it is most unjust, indeed scandalous, for plaintiff to be so suing him when the actual damage was fairly trivial. A DIKE ATIMETOS means literally, "suit by an injured party (as distinct from a GRAPHE, or suit brought, as it were on behalf of the public, by anyone who wants to sue—the closest Athenian equivalent of criminal prosecution) in which no assessment of the damages or penalty is required." It would seem to amount to an action on a species of penal statute (if not a citable statute, at least a "common law" right so firmly
recognized that it would probably have to be explained as a "lost statute"). There must have been a law providing that when A is damaged as a result of B's obstructing a CHARADRA, A may recover the set sum of 1000 d., even though the actual damage is less (and perhaps A is limited to that sum even if the damage is more).

Assuming the law behind the suit to have been such, defendant would seem to be arguing as follows: I have not obstructed a CHARADRA and so incurred the penalty. But if there is any disposition to say I have, consider this: Would the legislature have imposed so heavy a penalty for the sort of thing I have done? Surely it meant to penalize only much more severe forms of CHARADRA-obstruction, such as blocking a large, long-recognized, public watercourse. Therefore I am outside the intent of the statute even if I am within the letter of the word CHARADRA. But if you will not grant that, consider this: The law must intend to make the large sum of 1000 d. recoverable only by those who have suffered substantial damage. Its policy must be to eliminate disputes over the quantity of damage and over appropriate penalties in excess of damage in cases where 1000 d. would not be an absurd award. (A reasonable rule might be where actual damages are at least half that. Double damages are commonly used in ancient law, in systems relying on private suits for the penalizing and deterrent effects that criminal law can achieve, but perhaps no better in many circumstances.) At any rate, without a de minimis exception a heavily penal law of this type is too ridiculously harsh to impute to the legislature. (Defendant took pains to show that plaintiff's damage was indeed minimal. "50 d. at most" looks like a casual concession, for as actually described it is hard to see how the damage could have come to that.)

A still further vein of argument seems to fall under the topic "construction by intent against the words." (A Greek name for the practice would be EPIEIKEIA—Aristotle's word, often translated "equity" and misleadingly identified with the activity of English courts of equity. Aristotle's definition of it comes to "construction of statutes by intent against the words," something English courts of equity refrained from. In England, this was left to the courts of common law; equity courts provided remedies in some situations where a common law explicitly conceived as customary was considered deficient. There is no Greek equivalent.)

The argument under the heading of construction by intent runs as follows: The situation in the case was such that if defendant had indeed constructed a CHARADRA and owed plaintiff 1000 d., he was
very likely in danger of owing 1000 d. to a number of other people as well—any neighbors farther down the hillside who would not have been damaged but for defendant's wall. It is an inherent problem of penal laws that unless they contain a limiting provision they invite multiple recoveries. Defendant, of course, had no interest in reading a limiting provision into the law—i.e., construing it to mean something like, "Anyone who obstructs a CHARADRA must pay 1000 d. to the first damagee who brings suit successfully. Recovery by such first plaintiff bars any further suits by persons damaged prior to such recovery, though if the obstruction is not promptly removed subsequent damages may sue for the penalty, subject to the same 'one recovery per time period' rule." For defendant's object was to defeat plaintiff's present suit, the first and only one. Therefore, in calling attention to the danger of further exposure, defendant must be pointing to other possibilities for "construction by intent."

One such possibility comes to a restatement of the argument from acquiescence in the context of the penal suit: "The law means, though it does not say, that persons damaged as a result of an obstructed CHARADRA may recover 1000 d., provided they make timely protestation, putting the obstructor on notice that they reserve the right to sue for the penalty if any damage occurs." I am not sure that reading this qualification into the law is more reasonable than reading in what I call a limiting provision, but perhaps it is neither less reasonable than that nor unreasonable in itself. It is a kind of solution to the problem of multiple suits, because if any considerable number of neighbors protested, the wall builder would either have to change his plans or run a serious risk with open eyes; a person, knowing his exposure to be limited to 1000-2000 d., might choose to take his chances with one or two protesters. As to the immediate merits of the construction, if one wanted to deter something badly enough to make a severely penal law and wanted to restrict standing to sue to persons damaged in at least some degree (instead of extending it to any member of the public by creating a GRAPHE), would one not be uneasy lest potential beneficiaries design their behavior to maximize the chance of a windfall? (Instead of letting you know that if any harm comes to me from your wall I will try to stick you for 1000 d.—thus giving you a chance to halt construction, seek to buy my release, or whatever—I create the impression that I have no objection, tacitly encouraging you to carry on and to form expectations of safety. I wait for a little bit of luck in the form of a little bit of damage.)
The third-party factor also points in other directions. Suppose we suggest this thesis: "The legislature intended, though it did not express this intent, to confine recovery to persons who would have been able to recover for the damage under the same circumstances in the absence of a penal law." If we arbitrarily adopt this construction, plaintiff's case has some weaknesses. Is long acquiescence in a danger-creating situation a bar to recovery "at common law," as it were—for Athens, that is to say "in an ordinary DIKE for BLABE," or civil lawsuit for causing harm? Would substantial contribution to the damage by plaintiff's own acts not surely bar actions for unintentional damage? If, however, we waive these weaknesses (i.e., concede that acquiescence is no bar in situations unaffected by penal legislation and that plaintiff here did not contribute substantially enough), at first sight plaintiff's case looks strong. There is a causal link between defendant's act and plaintiff's damage, the harm was foreseeable, plaintiff may not have been hurt much, but he was hurt some.

If it is objected that this may not have been enough to engender liability under Athenian law and thus that some further mark of "unlawfulness" must appear on defendant's conduct, then it may be fair—i.e., non-solecistic by recognizable standards of legal argument—to invoke the penal law itself: In a DIKE before the statute, plaintiff would have had to argue that defendant's act was "unlawful" in some further sense than "foreseeably apt to damage plaintiff"—if not malicious or reckless, then antisocial, commonly regarded as such, bad for the public, or at least bad for more people than just plaintiff. When our task is to imagine a DIKE after the statute, it may be permissible to say, "Any doubt about the inherent 'unlawfulness' of obstructing a CHARADRA has been cleared up by the making of the statute. The legislature has declared its wrongfulness. Surely this is not an instance of making something wrong ex nihilo, where no one would have dreamt of calling it wrong before." I do not of course know that this is good Athenian jurisprudence. It is a way of talking I would not put past an old-regime English court. I am inclined to think that the postfactoism in the notion of a "declaratory" act operating in the way I describe, or the offensiveness of such talk to legal positivism, are latter-day scruples unlikely to get in the way when law is being done "naturally."

If, however, we bring in the third parties, plaintiff's case is not so good, for in an ordinary DIKE on the same facts the following argument would be persuasive: If defendant had not built a wall, damage would have happened to some neighbors. The water, carried through
defendant's land would proceed by that route onto the land of neighbors below on the same side of the road, digging or deepening erosive streams on their property and putting them in a position where self-defensive measures would risk liability for obstructing a CHARADRA. It is probably a safe assumption that this would not be actionable damage. Probably, in Athens as in most places, if you just leave things in their natural state, and somebody is worse off than he would be if you intervened, you do not as a rule have to pay. But its not being actionable does not mean it is not damage; nonintervention would have imposed costs on some people, which defendant's self-interested intervention avoided. Of course this scenario will only apply if the CHORION next below defendant on his side of the road was not enclosed strongly enough to keep water out. There is no suggestion that it was so enclosed. If it were, water would have backed up on defendant's land, causing him loss over and above the erosion of his property by incipient CHARADRAI and by overflowing from the road, which of course might overflow in heavy enough rain, walls or no walls. "Bad luck!" one might say, but costs to the defendant must still be entered on the bill of social costs. On the other hand, by building the wall, defendant increased the risk of flooding from the road for an indefinite number of other landowners—for those of them, that is, who had not built walls or other antiflood devices. People might build them from a mixture of motives, as defendant did. They might have been well-advised to even if the only motive were flood control, and even if no walls—defendant's or other people's—existed, walls whose effect would be to make the road's overflowing more likely under some weather conditions and more harmful in the event that some flooding occurred. What would it have cost all those in any danger of being affected by defendant's wall to take self-protective steps not already taken, all things considered? How would those costs offset the savings for himself and others that defendant effected by building the wall? Just guessing, which is all there is to do, there are probably good grounds for supposing that defendant's interference with the geographic status quo was a socially economizing measure.

There is no evidence in the speech of the specific local situation, though it can be taken to exclude some extreme variables, such as that most of the neighbors already had flood-proof enclosures around their CHORIA. It may be significant that defendant claimed to have offered arbitration by neighbors aware of the local facts, in rejecting which plaintiff displayed his crooked preference for brandishing the letter of the law in front of a non-local DIKASTERION. The stran-
gers might conclude that defendant had imposed a real burden on his neighbors, whereas the locally informed would know that he was protecting himself as some others perhaps had done and nearly everybody in those parts thought it prudent to do—protecting himself against serious loss while only very slightly endangering others and perhaps doing them a favor by reminding them they had better not put off until tomorrow the modest investment in a wall, dike, or ditch of their own. The neighbors’ failure to protest—acquiescence again, which defendant especially stresses—suggests that that is how they saw it. It is an equity against the plaintiff in the case that he himself had put up an antiflood barrier of sorts, only he had apparently not done a very good job of it. The cost difference between a sloppy job in this line and an adequate one might, I should think, be small.

The point I mean to conjure up by a little commonplace law and economics is that imposing tort liability for unintentional damage tends to come down to deciding whether a party who did cause damage, which could have been foreseen, acted in a socially economizing way or not. I do not know that that is true of imposing tort liability in Athens, but I think there are hints of the idea in some things defendant said in his “natural” way, obviously without any of the vocabulary I have used. In other words, I think he might have been saying in his fashion, “Look, if this were a straight DIKE for BLABE, I do not believe you would give plaintiff any damages, not even the 50 d. or so representing his actual loss. You would intuit that what I have saved myself, and some other neighbors as well, clearly outweighs any properly accounted detriment to other parties, including plaintiff. It is socially beneficial to make plaintiff absorb his loss when he has not responded to the incentives to take precautions.”

The recognizable vocabulary that does surface in the speech is, “private property is private property” or “I’ve got a right to protect me and mine and to do what will augment the value of my property, come what may to others, at least within generous limits; it’s the others’ lookout what they do with their property in response to what I’ve done with mine.” Maybe Athenian law had a private-property bias, meaning a propensity to forget the ordinary principles of torts (whether those are stated in foreseeable-harm or socially-economizing terms) when use of physical, especially real, property by its owner was in question. There are two objections to that supposition. One, it does not make much sense, except insofar as a property bias is merely a rule of thumb for an ultimate social-economizing criterion. (In other words, until the contrary is shown, property owners who make im-
provements that are presumptively rational from a self-interested point of view are probably saving or gaining on the social account book, all factors considered, including the ones that tend to be forgotten in the heat of inconvenience by victims and their sympathizers.)

Two, it feels un-Athenian to me—untrue to this public-minded, sociable, hyper-political culture, where being a good citizen, good neighbor, or good guy figures so largely in what people say about each other, in praise or in blame. The attitude that it is good to keep up one's property and protect oneself when it does not really hurt neighbors very much—especially sensible neighbors, who keep up their property, accept a certain amount of bad luck in their lives, and do not go out of their way to blame others even if it is somewhat someone else's fault—sounds quite Athenian to me. It translates into a social accounting theory of liability overlaid with a mild rule-of-thumb property bias.

I have now indulged in a lengthy ratiocination on the assumption that to win a suit on the penal law one must show that one ought to win an ordinary DIKE for BLABE with the same facts. I have assumed that the penal law intends this without making it explicit. Is there any reason so to construe it? Yes.

One can make an argument with the flavor of what in the English legal vocabulary would be called "construction to save the common law." Causing damage by obstructing a CHARADRA was, we assume, an actionable wrong before the statute. Now comes the statute. Did the makers intend to modify the prior law or to substitute a quite different system? "To modify the law" is the right answer if something like the English maxim is operative. That is always what legislation is meant to do if an intent to innovate radically is not crystal clear. To empower persons who could have recovered actual damages plus a discretionary penalty before (if we take it that Athenian law tolerated or expected a penal element in damage awards) to recover a set penalty is a modification; it would be a more drastic innovation to empower those who could not have recovered even actual damages before to recover the penalty now.

There is a more material point, however. If the legislators had meant to institute a new system for controlling the antisocial act of CHARADRA obstructing, they could have provided a GRAPHE. Not having taken that "criminalizing" step, they must have conceived the 1000 d. as partly penalty and partly liquidated damages and must have arrived at the sum of 1000 d. with both things in mind. The sum is awfully high for a pure reward to a gratuitous, if public-spirited,
prosecutor. It only begins to make sense if thought of as a standardization that will fit the bulk of cases without serious injustice. The assumption must have been that most suits would involve at least several hundred drachmas of damage. The plaintiff in a standard case is benefited and encouraged to sue by being relieved of the necessity to prove how much he was damaged, and he is insured of an additional penalty instead of left to the graces of the DIKASTERION. Surely a law so conceived and so beneficial to damagees—especially one who has suffered relatively little harm—cannot also mean to relieve plaintiffs of the burden of showing that they could have maintained an action "at common law."

Finally, for the strongest argument of all, there are the very points I made above under a hypothesis. Can the legislature have meant to penalize, harshly, activity that benefits society more than it costs it? (A trivial penalty would be another matter—a sort of tax on activity likely to cost others something, even if it is really beneficial and should in strictness not be taxed. That sort of penalty would function as a mild incentive to make sure the activity is worth the surcharge before you embark on it, in which case the chances of its being socially beneficial are improved.) An effective way not to impose an indiscriminate penalty would be to insist that the set recovery not be awarded unless plaintiff could sustain a DIKE for BLABE. Assuming the law so intends, the way is open to argue, as above, that owing to the net beneficialness of the wall, (or, though I think this less likely, a more nearly "absolute" right of self-protection in the landowner) there should be no liability in this case, notwithstanding some small loss by plaintiff resulting from defendant's wall.

So much for construction by intent. There may be another argument in the nature of "common usage expounds the law." Defendant puts a good deal of emphasis on the absence of protest about the wall by other neighbors, as well as plaintiff himself. On what theory could that be relevant? It is plausible to urge that if A tolerates a situation created by B that constitutes a danger to A, A should eventually lose title to represent B's creating the situation as tortious. But should the acquiescent conduct of C, D, and others within the same danger affect A's legal powers? There is a colloquial or rhetorical way of dragging C and D in, which may be how they are dragged in by our speaker: "Of course A made no objection when B built his wall. Nobody did, and there were plenty of people in the same position as A. A and others did not acquiesce because they were careless about their interests, though they would probably have cut off their right to sue if that
had been the reason. A failed to complain because it did not occur to him, or to anyone else, that there was anything to complain about, or perhaps because A knew the neighbors would laugh at him if he did so.” (In the actual case, it was plaintiff’s father, cast as a good guy, who was silent, along with the rest of the neighbors, when the wall was built and for some time afterwards.) In short, the third parties figure only to explicate the quality of plaintiff’s behavior. It makes a question whether acquiescence by laches or by nonperception of any wrong is more damning. The case might show an Athenian disposition to think that neglecting your interests is less fatal to your right to assert them much later than giving signals sincerely and without negligence that encourage a man to believe his acts are normal and inoffensive.

If, however, the third parties’ conduct is relevant in a stricter legal way, it must be under some such theory as this: When one has to decide a hard question of law, it is appropriate, though not conclusive, to look at what most members of the community appear to think, by the implication of their conduct or otherwise. Is such-and-such a legal wrong with liability consequences, granted that it is an act by A that caused some loss or evil to B? If that seems difficult to decide, as where there is not a long record of successful recoveries or unsuccessful attempts at recovery, it is at least relevant to look at “common usage.” Nobody has brought suit before. Why not? Is there stronger evidence than the absence of litigation that the conduct is not thought of as tortious? One kind of reinforcing evidence might be the fact that offended parties have refrained even from informal ways of expressing displeasure or anxiety. Or, for a slightly different approach, what does the rather odd law in this case mean? Does it, for example, regard such-and-such an act as “obstructing a CHARADRA” and intend to expose anyone who does harm by that act, no matter how much, to a huge penalty? Among all the other considerations bearing on that, it is relevant to ask whether there are a lot of people who have suffered or might suffer from the act and, if so, whether they have shown any inclination to suppose that the law might apply to them and might indeed entitle them to a handsome windfall. If it never occurred to those with an interest to construe the law in the way that would serve their interest, who are we—the court—to say they misconstrued it?

Looking farther afield: Do people in Athens get excited when their fellow citizens take steps to keep water out of their premises? Do they scold and sue about that sort of thing in contexts where there
is no question of obstructing a CHARADRA? No, says the speaker expressly, trying to get his city judges to empathize with a rural situation. Everybody in town has a drain to divert rainwater, and everybody expects, as it were, to get his feet wet when the drains discharge into the street. That’s life; you have to expect a certain amount of inconvenience and perhaps minor damage resulting from householders’ normal self-protective measures. It is at least relevant how the community feels about situations really closer to the one before us than serious, grossly damaging CHARADRA-obstruction would be. The law, which after all the Athenian people made, must be concerned about something else than the kind of situation people in Athens show no sign of concern about.

I do not think referring to the conduct and attitudes of people in the street to expound doubtful law sounds at all un-Athenian. Someone may say it sounds all too Athenian, that it counts as a symptom of a fundamentally anomic culture. (“See, these Athenians do not really understand what it is to have law and interpret law. They have the props all right—law on the books, habits of genuflection before law and lawabidingness, lawsuits and processes of law. But when it comes to deciding cases, their notion of law is so open and unconstraining that it is really something else. The laws on the books only provide occasions for debates in lawsuits about what the law ought to be—or more properly, about how particular disputes should be resolved, for there is not much to suggest that the Athenians are particularly disposed to inquire about how similar cases have been decided before or to worry about consistency if a given decision seems right here and now. Of course providing occasions means something: The debates occur in a context created by law making and are consequently not the same as naked political debates. They simply focused on, ‘What do we want?’ or ‘What do we think morality requires?’ We have just seen a way in which legal argument is different from merely political, for the DIKASTERION is not being baldly asked what it wants the law to be or considers just, as if it were nothing other than a delegate or minversion of the Athenian Assembly. Rather, it is being asked to look at community attitudes, in a sense to estimate what the Assembly would do if it were to legislate in detail about CHARADRA obstructing. But that activity is still far from true judicial activity—from thinking of law as squarely ‘there,’ as having a meaning although not self-evident and as requiring construction with primary reference to what the legislature did have in mind.”)

I am not concerned to oppose such an interpretation, only to warn against adopting it too eagerly. "Common usage expounds the law" has a sufficiently Athenian flavor. It can even be taken as a key to the central conception of Athenian democratic jurisprudence—a conception of the judicial process as not a replica, but an extension of the legislative—and of a notion of law as inherently incomplete, not "there" with a meaning to be found, but sketched in by the people and waiting to be filled out by consideration of what the people really want when the need for detailed law arises. It is worth remembering, however, that "common usage expounds the law" belonged to the armory of traditional English jurisprudence too—the jurisprudence of a nomic world if there ever was one.

In the days before stare decisis, the primary English sense of "precedent" was not what a court has decided in a like case, but what some relevant class of persons has done in practice, whence inference about the law was deemed legitimate. The idea seems to present difficulties analogous to those of inferring "ought" from "is," but they can be removed by saying that one is really only claiming that sometimes what people other than judges think the law to be is fair enough evidence of what it is. In English jurisprudence, that usually meant evidence of what the law was at a remote time for which there was little direct evidence—if you like, what judges then would probably have held if they had had occasion to, or if any record of their holdings survived. Or else it meant evidence of how the law was understood by privileged persons—the King, government officials, Parliament, lawyers—conceived as in some measure sharing with judges competence to know the law and responsibility to frame their actions on a conscientious attempt to understand its true requirements. Compared to Athenian, English jurisprudence was traditionalistic and undemocratic. I bring up the parallel only to say that community usage and understanding of the law can find a place, though not a commanding one, in systems all too convinced that law has a solid existence and a meaning to be found, that judges possess a distinct and possible art, and that legal oughts and wish-it-could-bes are sharply distinguished from legal is-es. An interesting use of the maxim in England was to get around a more formidable one: "No prescription against a statute," an application of Nullum tempus occurrit regi. Once in a while, in a pinch, it was possible to say that an old statute never put into execution, although certainly not rendered invalid by the running of time, must not have been understood to permit the use somebody was now trying to make of it, for otherwise, in all that time, it would have
been attempted. An Athenian saying, "Look, no one has ever shown signs of thinking the act against CHARADRA obstruction can be used this way" is in a sense saying the same thing. Perhaps not even he would go as far as, "Desuetude invalidates a statute of clear meaning; a statute no one has ever thought of using cannot be said to exist, to be part of the law of Athens or the will of the Athenian people."

In this Essay, I have tried to show that the case can be seen in ways that demote "common usage expounds the law." The idea is present, but among others, one "fountain of argument" spouting away with the rest, some of which are compatible with a simple image of judges facing the law and interpreting it—never mind what anyone else thinks it means, the majority of affected parties, drain-maintaining householders and those they inconvenience, the sovereign Athenian people, or we ourselves wearing our political hats. The case can be so seen, but should it? How central is "exposition by usage" in the tissue of arguments, and how far should the implications of its presence be carried?

III. Conclusion

Well, there's the case. Or is it? Have I misstated it, mistranslated, or put the issues and arguments together in a possible form, but not one Athenians would recognize? I shall not go deeply into self-scrutiny, but I do want in concluding to address the most prominent feature on the speech's surface that I have so far not said anything about explicitly. What I have in effect done is translate the speaker's remarks under a familiar Athenian rubric into the arguments about tort law and statutory construction above, perhaps legitimately, perhaps not.

The rubric is SYKOPHANTIA. Precisely what the word meant is a problem. "Malicious prosecution" is the idea, but what a given society understands by that is as problematic as the meaning of a Greek word (from which our "sycophant" descends, but without much resembling its ancestor). When does an unwarranted, weak, or losing lawsuit turn into something worse—indeed into an offense, as SYKOPHANTIA was in Athenian law? People with good, or at least plausible, claims can sue from hateful motives, and claims that are ludicrously weak can be wishfully believed in by those who pursue them (especially when they have no lawyers). Arguably, no hope of winning is a sufficient curb on bringers of frivolous suits from motives that are malicious in the sense that the plaintiff's only serious inten-
tion is to put the defendant to trouble (and to expense where litigation is costly and adequate recovery of costs by winners is not provided for), to gain a forum for publicizing himself and abusing the defendant, and on an off-chance to prevail, if the court is very ignorant, stupid, or corrupt. If one is not satisfied with that curb and feels called on to invent a category of "malicious prosecution," one is faced with the problem of finding a workable test for the mixture of bad-enough claims and bad-enough motives that fall under it.

Tricky as the category may be, however, the Athenians had it in the form of SYKOPHANTIA. Their reliance on GRAPHAI and penal laws (instead of creating some form of public prosecution for crimes, such that criminal cases actually brought to trial are at least mythologically guaranteed nonmalicious—the English grand jury is an excellent device for that) probably goes a long way toward explaining the felt need. Systems relying on that technique—not only the Athenian—are bound to be troubled by a special form of sleaziness: people who make a trade of spying out offenders and suing for the penal reward, who characteristically try to blackmail the victim first and resort to litigation only after the attempt fails. It is tempting under such a system to believe that there must be a way of separating the litigative racketeer from the penal prosecutor whose character and motives are probably clean enough. Penal legislation makes public servants of those who are willing to prosecute and engenders a class of villains with the same stroke.

*Kallikles v. Son of Teisias* is an important document for the meaning of SYKOPHANTIA. Defendant repeatedly charges plaintiff with it in his speech. In the abstract, the elements of the concept implied by its employment in this case would seem to be: (a) pursuing a weak claim all too superficially justified by the letter of the law, especially when success will yield a sure penal recovery; (b) suing for a large penalty when the actual damage, which in this case was necessary to confer standing to sue, was very disproportionately small; (c) bringing such a suit in the face of plaintiff's father's and, to some extent his own, failure to object to defendant's conduct over a long time; (d) bringing it in the face of the apparent opinion of other parties affected by defendant's activities, and perhaps even of most Athenians, that there was no occasion for complaint; and (e) bringing this suit as part of a pattern of litigation, with the alleged objective of ruining defendant and doing him out of his CHORION. (I have not gone into the last of these elements. It is hard to reconstruct legally the other suits by plaintiff and his kin that are mentioned. They are brought up to
suggest that the present suit is only one link in a chain of unjustified or tricky legal maneuvers inspired by hostility and lust for defendant's property.) The ethical postulates on which these elements add up to behavior worse than bringing a weak lawsuit—if it is really weak—can be imagined; there is no reason why they should not add up to "malice" in Athens, even if other societies would hesitate to reach the same sum.

More interesting to me than the abstract meaning of SYKOPHANTIA is its jurisprudential function. It is possible to construe defendant's use of the category as follows: Defendant does not sharply conceive plaintiff's problem as primarily a weak claim. Fundamentally, he sees himself as entitled to win because he is being sued by a bad man. He does, to be sure, think he would have some decent arguments against a respectable opponent—mainly that what he did was not under the geographic circumstances (because the wall only blocked recently formed streambeds on his own land) what would ordinarily be called obstructing a CHARADRA—that is, his act was not within the words of the law, for the words should be taken in their usual sense. But the rest of what defendant says all focuses on the point, "I should prevail against this SYKOPHANTES. If you say the words of the law are against me, so be it. Plaintiff remains a bad man and a bad Athenian. Athenian law intends that such people should be punished, which is not compatible with letting them take advantage of the law to their gross and unjust enrichment. Any way in which the law might be construed, in spite of my reservations, to favor an honest plaintiff is overridden by a more fundamental legal policy—by the need to protect the law against its abusers."

Maybe that is the essence of what defendant wants the DIKASTERION to think. Whether it is right in the circumstances may be what the dicasts are most likely to ask themselves. Beyond doubt, one end of defendant's rhetoric is to blacken plaintiff as a SYKOPHANTES. Who knows but what a handful of sympathy votes from dicasts unable to think beyond their distaste for SYKOPHANTIA could mean victory for defendant? But what about the other dicasts, perhaps most? It is possible that behind the familiar refrain "SYKOPHANTES!" they will hear no more than defendant's contention that plaintiff's case is weak and will see that a reasonable argument can be made for its weakness along the lines I have sketched—lines "more or less lawyerly" in legal cultures closer to our own. It is hard to tell.