

THE CAMBRIDGE COMPANION TO ANCIENT GREEK LAW, EDITED BY MICHAEL GAGARIN & DAVID COHEN (Cambridge University Press, 2005)

*Reviewed by John A. Rothchild**

Ancient Greek law is a hard sell for comparativists. Unlike the law of ancient Rome, which enjoyed a “second life” beginning with its rediscovery at Pisa and Bologna in the tenth century CE and continuing through its reincarnation in the 1804 Code Napoleon and later European codifications, the impact of the law of ancient Greece on modern law cannot be traced in anything like a straight line. Even the ancient Athenian democratic constitution, which has served as an inspiration for modern democracies, has been described as an “evolutionary dead end.”¹ Then too, ancient Greek law is relatively underdeveloped in comparison with Roman law, having flourished over a period of fewer than 150 years² as against the thousand-year reign of Roman law.³ Furthermore, the historical sources of Greek law are relatively meager; indeed, with the exception of the law of Athens, and of the Cretan city of Gortyn, evidence of ancient Greek law is practically nonexistent. Any comparativist with a practical bent, whose interest lies in examining how a given legal issue is handled by peer legal systems, will find ancient Greek law unappealing due to the enormous material, technological, and cultural differences between that ancient society and our own.

The classicist, of course, does not need to be persuaded of the value of studying ancient Greek law. Law is one of the most revealing illuminants of society, and one can hardly hope truly to comprehend a society, ancient or modern, without an understanding of the system by which the society regulates the conduct of its members. The comparativist who lacks an inclination towards the classical may, however, need an extra push before he will willingly delve into ancient Greek law. For some, the requisite push exists in the form of the very strangeness of the ancient Greek legal system to modern eyes. That strangeness is apparent in terms of both its procedure and its substance. Consider a few features:

* Associate Professor, Wayne State University Law School. ©2008 John A. Rothchild.

1. KURT A. RAAFLAUB, JOSIAH OBER, & ROBERT WALLACE, ORIGINS OF DEMOCRACY IN ANCIENT GREECE 12 (2007).

2. The classical period of Athenian law dates from around 490 to 322 BCE—from the first Persian War to conquest by the Macedonians. The bulk of extant historical evidence begins around 450 BCE, when epigraphic evidence becomes relatively plentiful. The Laws of Solon are traditionally dated to ca. 594 BCE, but there is very little historical evidence for law of that vintage.

3. The period during which Roman law developed may be dated from the writing of the Twelve Tables in 451-50 BCE through the codifications of Justinian in the 530s CE.

- In Athens, laws were enacted by an Assembly to which all male citizens were admitted⁴—the famed Athenian democracy. Legislative proposals were vetted by a Council of 500 consisting of citizens who were selected by lot to serve for a one-year term. Expertise in the lawmaking function was thus not valued.
- Nearly all government officials, with the important exception of the highest military officers, were selected by lot, and served one-year terms.
- Juries consisted of panels ranging in size usually from 200 to 500, selected each day from a pool of some 6,000 citizens empanelled at the start of the year. A jury delivered its verdict immediately at the conclusion of the trial, with no deliberation and no instruction from a judge. There was no appeal from a jury verdict.
- A litigant had to present his case to the jury, orally and personally, in the form of a narrative punctuated by the reading of witness statements and of the law. There were no lawyers, but there were ghostwriters who might create a speech for the litigant to deliver.
- A woman whose father died without any legitimate male issue could be claimed in marriage by the father's nearest surviving male relative, according to a defined order of precedence, as a means of keeping the property in the family.
- The penalty prescribed for cutting down a sacred olive tree was death.

The comparativist who is intrigued by how differently certain shared fundamental values—democracy, the rule of law—may be implemented in political and legal systems will find endless fascinations in the study of ancient Greek law.

The editors of this volume, who also author several of the contributions, are among the most highly regarded scholars of ancient Greek law. Michael Gagarin, the James R. Dougherty, Jr. Centennial Professor of Classics at the University of Texas, Austin, and David Cohen, Professor of Classics and Rhetoric at the University of California, Berkeley, have published extensively on the subject since the 1970s. As Cohen explains in his Introduction to the volume, he and Gagarin are charter members of the old guard of U.S. academics in the field: "When Michael Gagarin and I first met in Berkeley in the mid-1970s, we were the only two scholars . . . in the United States who thought of their academic specialization as 'Greek law'" (p. 1). There was a similar paucity of practitioners in England at the time, making the specialty "a largely continental European enterprise"

4. As noted in the contribution by Eva Cantarella, "Gender, Sexuality, and Law," "Athenian women were considered citizens As in every ancient culture, however, they were barred from taking part in political life. In other words, they had the *status*, but not the functions, of citizens" (p. 245). Slaves, who at times made up the majority of the Athenian population, were of course also excluded. Another contribution to the volume, Cynthia Patterson's "Athenian Citizenship Law," pp. 267-89, delves more broadly and deeply into the subject of citizenship.

(*id.*). But the center of gravity of the study of ancient Greek law has shifted dramatically in the intervening years, with a turning away from the field on the part of German and other continental scholars accompanied by an increasing interest in the United States and England. The selection of contributors to the volume is designed to represent both the more established European scholars and the younger group of Anglo-American academics. It also encompasses some scholars who specialize in other areas and thus bring an interdisciplinary approach to the study of ancient Greek law.

As indicated by the first essay in the collection, Gagarin's "The Unity of Greek Law," the very title of the book is arguably a misnomer. The question Gagarin addresses, a rather surprising one for newcomers to the field, is whether there really is such a thing as "ancient Greek law." Greece in ancient times was not a unified nation-state producing a uniform body of law, but rather a loose (and often internally warring) association of independent city-states, or *poleis*, numbering 700 or more. Each *polis* had its own legal and political system; there was no overarching national authority. The older view, held by nineteenth-century European scholars, was that despite this variety of legal systems there was an underlying unity of "juristic conceptions." In the mid-twentieth century, the late Moses Finley, who worked both in the United States and in England, challenged this thesis, drawing attention to the enormous differences in the substantive law of the various Greek *poleis*. Gagarin largely accepts Finley's critique, which remains controversial especially among European scholars, but seeks to extract a kernel of truth from the unity thesis. He argues that unity is to be found, not at the level of substantive law, but rather at the level of what he terms "procedure, broadly understood as the process of litigation and the organization of justice (legislation, courts, judges/jurors, magistrates, etc.);" (p. 34). Gagarin offers several examples of similarities among the legal systems of the Greek *poleis* that are generally not found in other legal systems of the era. He points, for example, to the facts that Greek law pays more attention to procedure than to setting penalties for offenses; that decision of a case depends upon the jurors' evaluation of debate between the litigating parties rather than upon automatic procedures such as oaths; that gaps in legislation are filled by jurors instructed to do justice in the case before them rather than by creating a new rule to govern the case as well as future similar situations; and that an absence of professionalism pervades the judicial process.

Whether the various Greek *poleis* may properly be said to evince a fundamental unity depends, of course, on what implications one wishes to draw from the existence of such unity. In its strongest form, a claim of unity may serve as the basis for filling in gaps in our knowledge about the legal system of a particular *polis* by reference to features drawn from other, better-attested systems. The propriety of drawing such inferences is of great significance, since when it comes to the law of ancient Greece the gaps in our knowledge vastly preponderate over what we actually know: as noted above, our evidence for legal systems other than those of Athens and the Cretan city Gortyn

is exceedingly thin. Gagarin, to his credit, does not make such a strong claim for the unity he discovers: "this general procedural unity is not strong enough to allow us to draw conclusions about the law of one polis on the basis of the law of others" (p. 40). His implicit claim that the procedural unity justifies using "Ancient Greek Law" in the title of this volume of essays is more supportable. As one who teaches a seminar titled "Ancient Greek and Roman Law," I am hardly in a position to object.

The twenty-two essays that make up the volume are organized under five headings. The first heading, "Law in Greece," includes the Gagarin essay described above as well as three more essays addressing topics that apply, at least to some extent, to ancient Greek law generally rather than to the law of a particular *polis*. One of these essays, Rosalind Thomas's "Writing, Law, and Written Law," explores the complex interrelationship of unwritten and written law in archaic and classical Greece. We moderns have a tendency to view written law as the only real law: unwritten law is viewed as mere custom, and as not conducive to the rule of law, due process, or democracy.⁵ Thomas's essay shows that things are not so simple. The association of written law with democracy, for example, did not hold true in archaic times. The earliest and most extensive collections of written laws are from Gortyn and other *poleis* of Crete; yet these *poleis* lacked democratic institutions, and the low level of literacy "strongly suggests that ordinary Cretan citizens were not reading these laws"⁶ (p. 47). Lycurgus, the traditional lawgiver of Sparta, is said to have actually forbidden his laws to be written. The justification for this stance, as attributed to Lycurgus by Plutarch, is illuminating: "For he thought that the most material points, and such as most directly tended to the public welfare, being imprinted on the hearts of their youth by a good discipline, would be sure to remain, and would find a stronger security, than any compulsion would be, in the principles of action formed in them by their best lawgiver, education."⁷ In other words, the educative effect of custom is more efficacious than the compulsion of written law, a view that ill accords with modern theories of general deterrence. Spartan experience supports the Lycurgan view, since "[t]he Spartans were notorious for their rigid adherence to their [unwritten] laws" (p. 51). It is striking also that the Athenians' famous revision and codification of their laws, completed in 403/2 BCE,⁸ seems to have been a dead letter, as the forensic orators do not refer to it after 399 BCE (p. 59). Even Aristotle

5. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), Chief Justice Marshall famously extolled the virtues of a written constitution, calling it "the greatest improvement on political institutions."

6. Gagarin, in his essay "Early Greek Law," counters this point with the opinion that "those who were likely to find themselves involved in litigation probably could read these texts" (p. 92). In contrast to Thomas, who finds there was no sharp distinction between unwritten custom and written laws (p. 50), Gagarin asserts that "writing created the idea of law" (p. 92).

7. PLUTARCH'S LIVES, *Lycurgus*, at 75 (trans. John Dryden n.d.).

8. Upon completing the codification, the Athenians declared that no law passed before 403/2 BCE was valid unless included in the codification, and no unwritten law

in the *Politics*, writing just a few decades before the end of the Athenian democracy, displays a continuing ambivalence about the value of written law (p. 59).

The collection's second subject heading is "Law in Athens I: Procedure." The essays in this section address the workings of the legal system that is, by a wide margin, the best documented of any Greek *polis*. The introductory essay, S.C. Todd's "Law and Oratory at Athens," begins by describing the role of the orator and the logographer in Athenian trials. The conduct of those trials is worlds apart from that of the modern trial. The action consisted of a narrative of the events, told by one of the litigants, punctuated by the reading of witness statements and legal texts, followed by a corresponding presentation by his adversary. There were no opening statements, no cross-examinations, no objections, and indeed no lawyers. The litigant's speech could, however, be furnished by a ghostwriter, called a logographer, whose existence is never acknowledged in the course of the trial. Some 110 of these speeches have come down to us, authored by a group of ten logographers who are known as the Attic Orators. These speeches constitute the most important source of our information about the Athenian legal system. That fact supports Todd's thesis in the remainder of the essay, which is that our dependence on these texts results in our having a distorted view of the Athenian legal system.

One source of distortion derives from the uneven survival and transmission of the logographic texts. The texts that have survived represent only a small proportion of those produced during the hundred-odd years when the Attic Orators were active. Reputation of the author is one determinant of which texts survived, and chance is another: "there is good reason to believe that a process of deliberate or accidental selection has preserved groups of speeches together in ways that do not fully reflect the balance of their author's activity" (p. 105). We know much about inheritance and family law due to the survival of speeches by Isaeus, an orator who specialized in those areas. We have only four speeches addressing *dokimasia* (the examination procedure that was used to assess a candidate's fitness for public office), all of them from the corpus of a single author, Lysias. And what we know about commercial law derives primarily from the speeches of Apollodorus. Whether the picture of these areas of law conveyed by such limited sources is an accurate one is an unresolved issue. Similarly, Todd notes the distorting effects of the facts that (1) speeches written by paid logographers represent the litigation of the monied classes; (2) we normally have only the speech delivered by one side, and do not know the outcome of the case; (3) the speeches we have almost always omit the text of the witness statements and the cited laws, indicating only the point at which they were to be read; (4) the speeches tell us nothing about what occurred between the parties

was enforceable. See DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 47 (1978).

before the trial; and (5) the speeches as published may not have been identical with the speeches as delivered.

Todd's point that the limitations of our sources of evidence yield a distorted picture of the Athenian legal system has broader implications that we would do well to keep in mind. The narrowness and selectivity of historical evidence, while it tends to be extreme in connection with ancient history, is a factor in the study of many other places and times. Just as the careful pollster qualifies his results with a statement of the possible range of error, historians should take heed of possible errors introduced by biases in the historical record when they state their own results.

The next section of the book is titled "Law in Athens II: Substantive Law." The contribution by David Cohen, "Crime, Punishment, and the Rule of Law in Classical Athens," addresses the vexed question of how the Athenians conceived of the difference between civil infractions and criminal conduct, and whether indeed there was any separate concept of crime at all. In Athens there was no public prosecutor, and all lawsuits were brought by individual litigants; the principal modern hallmark of criminal prosecution is therefore absent.⁹ Procedurally, causes of action were divided into two classes: those initiated via a *dike*, and those via a *graphe*. The former is usually referred to as a "private" action, the latter as a "public" action. The most significant distinction between the two forms is that "a *dike* may only be brought by the aggrieved party or, in the case of homicide, by relatives of the victim, whereas any citizen could prosecute a wrong for which the law provided a *graphe*" (p. 212). In addition, with most types of *graphai* a plaintiff who failed to receive at least twenty percent of the jurors' votes, or who dropped the case, was subject to a substantial fine of 1,000 drachmas, and might be barred from bringing the same type of action again,¹⁰ but such penalties did not apply in the case of a *dike*.

It might at first seem, as concluded by some earlier scholars, that public prosecutions were the equivalent of our criminal actions and private prosecutions the equivalent of civil, but the logic for including a transgression in one category rather than the other is often obscure. The most glaring anomaly is homicide, which is brought via a *dike*. Cohen advances the view that for Athenians the key conceptual distinction was between actions that threaten harm to the community, and those that implicate only private interests. That is certainly a plausible position, but it does little to explain why actions were classified as public rather than private. Thus, Cohen discusses a law speech in which Demosthenes purports to explain why what we would consider a contract breach (failing to return deposited funds) gives rise to a *dike*, but an act of *hybris* (a difficult term that includes

9. Public prosecution is a more recent phenomenon than some might think. In England, for example, until the 1880s "prosecution was a matter of private initiative except in case of political offenses, and was privately conducted." 3 ROSCOE POUND, JURISPRUDENCE 264 (1959).

10. See CHRISTOPHER CAREY, TRIALS FROM CLASSICAL ATHENS 12 (1997).

violence directed at a person with an additional element of intent to humiliate the victim) is brought via a *graphe*. In Cohen's explication of Demosthenes's point: "Alleged wrongdoing in voluntary contractual or other financial transactions is posited as fundamentally distinct from crimes of violence because of the nature of the threat the latter poses to public order . . . [T]he physical victim of hubris is not the only victim but all of the citizens as well, because the failure to punish such an offender only produces more such acts against citizens and thus creates a situation where all ordinary citizens are in danger" (p. 218). But this is no distinction: unpunished transgressions involving contractual or financial matters will beget more of the same, no less than unpunished acts of malicious violence. Private interests can always be reformulated as public ones.¹¹ The public/private distinction was no more coherent in ancient times than it is recognized to be in our post-realist age.

In the end, the best explanation for why homicide was brought via a *dike* rather than a *graphe* might be the historical one. Athenian homicide law in the classical period was a holdover from the law of Drakon, the semi-mythical seventh-century BCE Athenian lawgiver. In Drakon's time there was no such thing as a public action: the *graphe* was introduced by Solon at the beginning of the sixth century BCE. The inborn conservatism of Athenians with respect to religious matters—homicide was viewed as an act that offended the gods and brought about ritual pollution—made them unwilling to update the law of homicide to make it enforceable via *graphe*.¹² Furthermore, "it may indeed be that in part at least the pattern is the result of piecemeal legislation, such that the reason why a particular offence gives rise only to a *dike* is that this (rather than a *graphe*) was the choice of the people who proposed and/or voted for the law in question."¹³

The section of the book under the heading "Law Outside Athens," consisting of three essays, is not as successful as the other sections. The section combines John Davies's essay on "The Gortyn Laws" with two other essays on Greek law in Egypt during the Ptolemaic period. The city of Gortyn is notable for having the best-documented legal code of all the Greek *poleis* other than Athens. The code that has come down to us is in the form of inscriptions on stone, dating from perhaps 600 BCE through the mid-fourth century BCE, with the principal text (called the "Great Code") dating from roughly 450 BCE, and thus somewhat earlier than the main corpus of Athenian law. The Gortyn code is therefore of great intrinsic interest, but Davies's presentation of it is not well suited to the nonspecialist. It features more source material, and less synthetic and interpretive material, than is desirable for an introductory account. Quotations of the code

11. See, e.g., John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 221 (1991) ("For example, an individual's private interest in the enforcement of a contract can also be described as the collective, public interest in the security of transactions.").

12. See MACDOWELL, *supra* note 8, at 59; CAREY, *supra* note 10, at 26.

13. S.C. TODD, *THE SHAPE OF ATHENIAN LAW* 110 (1993).

are numerous, and sometimes lengthy (some quotations run half a page, or even a full page), and the Greek is rendered into a stilted and elliptical English, reminiscent of the Roman Twelve Tables, that impedes comprehension. A brief exemplar: "If they dispute about a slave, each asserting him to be his, if a witness should testify, to give judgment (*dikadden*) according to the witness, but if they give witness for both or for neither, the judge is to decide (*krinen*) under oath" (p. 312).

The contribution by Hans-Albert Rupprecht, "Greek Law in Foreign Surroundings: Continuity and Development," discusses various elements of Greek law as transplanted into the Ptolemaic regime in Egypt, which ran from the conquest of Egypt by Alexander in 332 BCE to its takeover and incorporation into the Roman empire by Octavian in 30 BCE. There is little effort to relate the evolution of this transplanted law to any environmental influences, and the essay's discussion does not add much to the author's conclusion that the transplanted Greek law "preserved its basic structure over the centuries into Roman times" (p. 338). Joseph Modrzejewski's chapter, "Greek Law in the Hellenistic Period: Family and Marriage," addresses the same context (Ptolemaic Egypt) as does the one by Rupprecht. The editors might perhaps have commissioned an additional piece on a distinct aspect of non-Athenian law. Moreover, the author's conclusion, that "the evolution of the Greek family law in the Hellenistic world acts according to its own dynamics, determined by political and social conditions and not by the influence of the local environment" (p. 354), seems insufficiently supported by the chapter's discussion.

The book's final section, "Other Approaches to Greek Law," contains a heterogeneous group of essays addressing law's intersection with comedy, tragedy, political theory, and philosophy. The inclusion of dramatic texts among the sources of ancient Greek law may seem surprising. But the ancient Greeks produced no legal treatises, and the scraps of the law that we can glean from the inscriptions and forensic oratory that have come down to us leave many gaps. Thus we must make what use we can of "the works of historians, philosophers, and even dramatists."¹⁴ The Old Comedy of Aristophanes, chock-full of political satire, offers a particularly rich vein to mine for more scraps of the law.¹⁵ Robert W. Wallace's "Law, Attic Comedy, and the Regulation of Comic Speech" focuses our attention on freedom of speech in the Athenian democracy. Modern readers of Aristophanes are apt to be startled at his merciless lampooning of prominent politicians and other public men. For example, in *Wasps*, staged in 422 BCE during the difficult times of the Peloponnesian War, he portrays both Kleon and the radical Athenian democracy itself in highly unflattering terms. Kleon, a former tanner who from the death of Pericles in 429 until his own demise in 421 was the leading politician in

14. J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 5 (1992).

15. The index to A.R.W. HARRISON, THE LAW OF ATHENS, VOL. II (1971) contains forty-eight citations to passages of Aristophanes as sources of law.

Athens, is referred to obliquely as a “foul creature” with a smell of “rotting leather” who, in a dream related by another character, “held up a pair of scales and began to weigh the ox hide and the people like so much lard.”¹⁶ The central characters of the drama are named Philokleon (Lover-of-Kleon) and Bdelykleon (Hater-of-Kleon), the former an addled old man who is addicted to serving as a juror. The drama presents the jury courts, a pillar of the Athenian democracy, as dens of injustice. This sort of talk would be punished as sedition at nearly all historical places and times, yet it was generally tolerated in Athenian comedy. Wallace’s essay reviews three instances in which the Athenian democracy attempted to put a throttle on seditious comedy. The only one with any bite, a decree of 440 BCE that apparently forbade lampooning the *polis* or particular individuals, was in effect for only three years before it was abolished. Wallace links this decree to then-current events: Athens was then at war with Samos, a war that some accused Pericles of having ginned up at the behest of his mistress Aspasia, who hailed from Samos’s rival Miletos.¹⁷ On that view, the decree was one aimed at squelching criticism of a polity, and its leader, for starting an unpopular war for the wrong reasons. Score one for those who champion the relevance of ancient history to modern times.

In sum, the Cambridge Companion is an enormously worthwhile read for fans of diachronic comparativism, for classicists with an interest in ancient law, and for legal scholars who wish they had studied classics. In general it is quite accessible to the nonspecialist. Greek terms are explained and transliterated, and little background is assumed. It must be said that there is substantial variation in the level at which the various essays are pitched: some of them will be tough going for newcomers to the field, moving rapidly from introductory to more sophisticated themes, and making profligate use of Greek terms. The book thus achieves the goal that the publisher sets out on the half-title page: “The volume is intended to introduce non-specialists to the field as well as to stimulate new thinking among specialists.”

16. *Wasps*, in ARISTOPHANES, *THE COMPLETE PLAYS* 203, 207 (trans. Paul Roche 2005).

17. See PLUTARCH’S LIVES, *supra* note 7, *Pericles* 257 (“these measures against the Samians are thought to have been taken to please Aspasia”). The American Founders knew their Plutarch, Hamilton referencing this episode in Federalist No. 6: “The celebrated Pericles, in compliance with the resentment of a prostitute, at the expense of much of the blood and treasure of his countrymen, attacked, vanquished, and destroyed the city of the *Samnians*.” THE FEDERALIST NO. 6, at 54-55 (Alexander Hamilton) (Clinton Rossiter ed., 1961).