PLATO AND ATHENIAN JUSTICE

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Abstract: Plato's interest in justice is pronounced and familiar. So too are his criticisms of Athenian democracy. This article suggests that Plato's conceptualization of justice constituted a direct and conscious confrontation with the highly democratic mode of justice pursued in Athens' popular courts. Yet Plato did not resist all Athenian judicial norms. His approach recalls Athenian homicide trials, which operated quite differently from the ordinary kind. Plato's signal contribution to the history of political thought may be characterized as having taken the conception of justice associated with homicide to be paradigmatic, with remarkably enduring effects.

In the study of Plato, two points seem so obvious as hardly to need restating. One is the special place of justice in his writings. As Eric Havelock observed, though Plato devoted several dialogues to single virtues, only justice received the honour of a treatise in ten books: the *Republic*, or 'On Justice' as its first editors subtitled it.[3] Yet justice is also prominent elsewhere, as in the *Euthyphro*, where it eventually supersedes holiness as the principle regulating man's relations with the gods, or the *Theaetetus*, an inquiry into knowledge trained specifically on the question of what is just. Indeed, as Jay Kennedy has recently shown, justice was often literally central: the cluster 'philosophy, justice and god' recurs at the exact centre of many Platonic texts.[4]

If justice was in some sense Plato's lodestar, then Athenian democracy was the port from which he set sail, and this is the other obvious feature of his work. Athens is the target of explicit criticism in the *Protagoras* and the *Laws*, but all Plato's writings are shot through with scepticism about the kind of democratic norms most Athenians took for granted.[5] The trial of Sokrates in 399 provides the obvious occasion for articulating this scepticism in the *Euthyphro*, *Apology*, *Crito* and *Phaedo*, but the perils of majority rule are also

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[3] E.A. Havelock, *The Greek Concept of Justice* (Cambridge MA, 1978), p. 308. Cf. J. Annas, *An Introduction to Plato's Republic* (Oxford, 1981); D. Allen, *World of Prometheus* (Princeton, 2000), pp. 243–81.

[4] J. Kennedy, 'Plato's Forms, Pythagorean Mathematics, and Stichometry', *Apeiron*, 43 (2010), pp. 10–13.

[5] *Prt*. 319b–320c; *Laws* 693d. Cf. J. Ober, *Political Dissent in Democratic Athens* (Princeton, 1998), pp. 157–247; E.M. Wood, *Citizens to Lords* (London, 2008); D. Allen, *Why Plato Wrote* (Malden, 2010).

in view elsewhere, as in the *Gorgias*, *Theaetetus* and *Republic*. Emile Faguet characterized Plato's position in the strongest possible terms. 'Socrates's death inspired all Plato's hatreds. And his hatreds inspired all his ideas . . . The foundation of his politics is nothing other than a horror of the Athenians.'[6] Others detect more ambivalence, even admiration for certain practices.[7] Yet an impression of alienation from Athenian convention remains.

These points are familiar, yet they are seldom drawn together. Plato's engagement with justice is not normally read as an intervention in Athenian politics. Indeed, for most of the last century Plato was regarded as uninterested in practical affairs, though the opposite position was once well respected and has recently been revived in a novel form by Danielle Allen.[8] Typically, Plato's political engagement is assumed to be co-extensive with the institutional proposals found in the *Republic* and the *Laws* (possibly to be supplemented by the evidence of the dubiously authored 'Seventh Letter') — which is to say not very extensive at all, since those proposals are widely (and surely rightly) regarded as flights of fancy designed to serve particular philosophical ends rather than serious recommendations for reform.[9]

Yet Plato's institutional proposals may be the wrong place to look for signs of his political activism. The crucial evidence arguably lies elsewhere, in his sustained attention to democratic judicial activity.[10] Assemblies and councils appear regularly in his work, but these appearances are swamped by references to courts (*dikastēria*), which in Athens were staffed by hundreds of ordinary citizens with full discretion over verdicts and no provision for appeal.[11] These references far exceed what one might expect in relation to Sokrates' trial. Courtrooms, juries, forensic oratory, criminal charges, penal-

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[6] E. Faguet, *Pour Qu'on Lise Platon* (Paris, 1905), p. 16.

[7] S. Monoson, *Plato's Democratic Entanglements* (Princeton, 2000). Cf. J. Annas, 'Politics in Plato's *Republic*: His and Ours', *Apeiron*, 33 (2000), p. 322.

[8] Allen, *Why Plato Wrote*. Cf. Robertson, 'Plato as a Critic of Athens', *Classical Weekly*, 29 (19) (1936), pp. 145–51; W. Agard, *What Democracy Meant to the Greeks* (Chapel Hill, 1942), p. 207; W. Jaeger, *Paideia* (Oxford, 1944); J. Frank, 'Wages of War: On Judgment in Plato's *Republic*', *Political Theory*, 35 (2007), pp. 443–67.

[9] M.I. Finley, 'Plato and Practical Politics', in M.I. Finley, *Aspects of Antiquity* (New York, 1969), pp. 73–88; Annas, 'Politics in Plato's *Republic*', pp. 303–10, 323; Wood, *Citizens to Lords*, p. 69; P. Cartledge, *Ancient Greek Political Thought in Practice* (Cambridge, 2009), p. 21; M. Schofield, 'Approaching the *Republic*' and 'Plato and Practical Politics', in *The Cambridge Companion to Greek and Roman Political Thought*, ed. C. Rowe and M. Schofield (Cambridge, 2000), pp. 190–232 and 293–302.

[10] Cf. G. Morrow, 'Plato and the Rule of Law', *The Philosophical Review*, 50 (1941), pp. 108–10.

[11] M.H. Hansen, *Athenian Democracy in the Age of Demosthenes* (Norman, 1999), pp. 178–224; A. Lanni, *Law and Justice in the Courts of Classical Athens* (Cambridge, 2006), pp. 31–40.

ties and verdicts feature throughout Plato's work, whether the topic is ostensibly judicial or not.[12]

Some of these references are easy to miss. 'Are we to fix the limits of truth by the clock?' asks Sokrates in the *Theaetetus*, which readers may not recognize as a nod to judicial practice unless they know that speakers in Athens' courts — and only in its courts — were subject to strict time limits.[13] Similarly, the line 'Are we to count names like votes and determine their correctness that way?' in the *Cratylus* may be read as voicing scepticism about majoritarianism in general, unless it is known that *counting* votes (as opposed to estimating a majority from raised hands) was a distinctively judicial practice.[14] Other items are less obscure. The *Gorgias* initially associates rhetoric with 'the courts, council, assembly and other places', then with 'the courts and other places', and finally focuses solely on the courts.[15] In the *Cleitophon*, Sokrates identifies politics fully with judging, and in the *Laws*, a *polis* is said to be no *polis* at all without law-courts properly established, while those who are excluded from judging are said to be justified in feeling they have no share in the *polis* at all.[16]

In the ancient Greek context, this emphasis is less strange than it may seem. Aristotle divided politics into two parts, deciding what is advantageous (*to sympheron*, a task for assemblies) and deciding what is just (*to dikaion*, a task for courts);[17] and while today politics is primarily associated with the former, that is, prospective policy decisions, the ancient Greeks seem to have associated it far more with the latter, that is, retrospective dispute-resolution.[18] Moreover, judicial activity was especially significant in democratic Athens.[19] Aristotle believed it was specifically through its power in the courts that the Athenian *dēmos* had gained control of the entire political system.[20] The author

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[12] E.g. *Tht*. 148b–c, 173c, 174c; *Phil*. 20e, 51a, 52e, 60c, 64d, 67d; *Smp*. 189c, 215b, 219c; *Phdr*. 266d–e; *Hipparch*. 225c; *Lch*. 196b; *Lys*. 222e; *Prt*. 337d–e; *Criti.* 106b. Cf. A. Bloom, *The Republic of Plato* (New York, 1991), p. 444.

[13] *Tht*. 158d, trans. M.J. Levett, rev. M. Burnyeat, in *Complete Works*, ed. J. Cooper (Indianapolis, 1997). Cf. *Tht*. 172d; D. Allen, 'A Schedule of Boundaries', *Greece & Rome*, 43 (1996), pp. 157–68.

[14] *Cra*. 437d, trans. C.D.C. Reeve, in *Complete Works*, ed. Cooper. Cf. E.S. Staveley, *Greek and Roman Voting and Elections* (Ithaca, 1972), pp. 73–100.

[15] *Grg*. 452e, 454b, 454e, 455a, 466a, 471e–72c, 480b–481a, 486, 508b, 508d, 511b–d, 515e, 516d, 519b, 521e, 522a–27e. Cf. *Hipp. Maj.* 304a, 304d; *Euthyd*. 290a; *Phdr*. 261b; *Tht*. 174c.

[16] *Clit*. 408b; *Laws* 766d, 768d.

[17] Arist. *Rhet*. 1358a.

[18] See e.g. Hom. *Il*. 18.497–508; Hes. *WD* 225–9; Aesch. *Eum*. 433–5; Hdt. 1.96–7; Arist. *Pol*. 1253b25; Stob. *Flor*. 2.7.iii.

[19] See D. Cammack, 'The Democratic Significance of the Athenian Courts', forthcoming.

[20] Arist. *Pol*. 1274a.

of the Aristotelian *Athēnaiōn Politeia* agreed.[21] Thucydides and Aristophanes each depicted the Athenians as obsessed with judging, the 'Old Oligarch' cast the courts as a *sine qua non* of the political system, and numerous orators described them as the 'bulwark' or 'highest organ' of the democracy.[22]

In large part, this prominence stemmed from the courts' role in disciplining politicians. Athens had its share of powerful political leaders, yet those leaders were prevented from ruling outright by their subjection to popular rule through the courts. A wide variety of political charges, including treason, accepting bribes, deceiving the *dēmos*, making illegal proposals and proposing disadvantageous laws, meant that Athenian politicians spent a good deal of time defending themselves in court and often received stiff penalties.[23] As Sokrates notes in the *Gorgias*, the careers of Kimon, Themistokles and Miltiades all came to an end through judicial action;[24] those of many others, from Perikles to Demosthenes, were temporarily stayed.[25] In short, the courts were a crucial vehicle of democracy in Athens, and Plato surely recognized this.

This article suggests that Plato did more than recognize it, however. Against those who might interpret Plato's philosophy as being relatively insulated from his political context, it reads his engagement with justice as a direct confrontation with the democratic and highly politically charged mode of justice pursued in Athens' popular courts.[26] The result of that confrontation was a novel, even revolutionary account of justice that radically challenged the foundations of Athenian democracy and has not yet ceased to inform Western political thinking. Nonetheless, this is not to suggest that Plato's account had no Athenian antecedents. In fact, his approach recalls another strand of Athenian judicial practice, namely homicide trials. This was the only area of Athenian adjudication in which a right answer was assumed to exist independently of the views of the judges, an idea Plato seems to have taken up with enthusiasm. Indeed, Plato's unique contribution to political thought may be characterized as having treated a relatively minor element of Athenian judicial practice as paradigmatic of justice in general, with remarkably enduring effects. The political dimension of this venture ought to be better known, and not only for the sake of improving our understanding of Plato's philosophy. If the argument presented here has merit, we must ask to what extent our

[21] Ps. Arist. *Ath. Pol.* 9.1. Cf. 10.1, 25.2, 27.4, 29.4, 35, 45.2, 63–8.

[22] Thuc. 1.77; Ar. *Knights* 1315, *Clouds* 206–8, *Peace* 500–5; Ps. Xen. *Ath. Pol*. 3.2–9; Lycurg. 1.3; Dem. 57.56; Aeschin. 3.7. Cf. Dem. 7.7, 13.16, 21.222–5, 24.2, 24.37, 24.152, 57.56; Aeschin. 1.4–5, 3.6, 3.23; Lycurg. 1.4, 1.138; Din. 3.15.

[23] R. Knox, 'So Mischievous a Beast: The Athenian *Demos* and its Treatment of Politicians', *Greece & Rome*, 32 (1985), pp. 132–61.

[24] *Grg*. 516d.

[25] Thuc 2.65.3; Diod. 12.45.4; Hyp 1.

[26] As implied, perhaps, by H.T. Wade-Gery, *Essays in Greek History* (Oxford, 1958), pp. 196–7.

thinking about justice remains indebted to Plato's and what the political implications may be.

I
From *to dikaion* to *dikaiosynē*

One indication of Plato's confrontation with Athenian judicial norms appears in one of the most familiar scenes in Western philosophy, the clash between Thrasymachos and Sokrates in Book I of the *Republic*.[27] Though the claims that arise in this encounter are complex, the topic under discussion seems clear: it is the nature of justice. Yet two Greek terms, both regularly translated 'justice', appear in this section.[28] One is *to dikaion*, what is right or just. This is the subject of Simonides' definition, discussed earlier in the dialogue,[29] what Thrasymachos, in his initial interjection, demands Sokrates define,[30] what Thrasymachos himself defines as 'nothing other than the advantage of the stronger' (later 'the good of another, the advantage of the stronger and the ruler'),[31] and the substance of the first round of Sokrates' interrogation of Thrasymachos.[32] The other is *dikaiosynē*, the main subject of the earlier conversation between Sokrates and Polemarchos,[33] the search for which Sokrates likens to the search for gold,[34] and the substance of the second round of Sokrates' interrogation.[35] Most importantly, it is *dikaiosynē*, not *to dikaion*, that forms the focus of the rest of the work.[36]

This raises two important questions. (1) Are *to dikaion* and *dikaiosynē* true synonyms? (2) If not, why might Plato have wished to turn the conversation from *to dikaion* to *dikaiosynē* in this way?

To begin with the first question, there are good reasons to suppose that *to dikaion* and *dikaiosynē* were conventionally distinct and that the difference between them would have been plain to Plato's early readers. One is that

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[27] Useful recent discussions include C. Nederman, 'Giving Thrasymachus His Due', *Polis*, 24 (2007), pp. 26–42; D. Novitsky, 'Thrasymachus and the Relativity of Justice', *Polis*, 26 (2009), pp. 11–30; W. Welton, 'Thrasymachus vs. Socrates: What Counts as a Good Answer to the Question: What is Justice?', *Apeiron*, 39 (2006), pp. 293–317.

[28] As noted by Schofield, 'Approaching the Republic,' p. 204. A third Greek term translated 'justice' is *dikē*, the spirit or practice of justice (often used to mean 'trial', 'judgment' or 'penalty') and the name of a daughter of Zeus. Since this term is not of direct interest in the *Republic*, I do not explore it further here.

[29] *Rep*. 331e, 332c, 335a, 335e.

[30] *Ibid.*, 336c–d.

[31] *Ibid.*, 338c, 343c.

[32] *Ibid*., 338e–343a.

[33] *Ibid*., 332c–336a.

[34] *Ibid.*, 336e.

[35] *Ibid.*, 345a–354a.

[36] *Ibid.*, 357d ff.

Aristotle, perhaps only a couple of decades later, included them separately in the list of human goods presented in the *Rhetoric*.[37] Another is that Aristotle apparently wrote separate treatises on each, one entitled *Peri tōn dikaiōn*, 'On Just Things' (the plural of *to dikaion*), and the other *Peri dikaiosynēs*.[38]

A survey of their usage prior to Plato confirms this distinctness. *To dikaion* is as old as extant Greek literature. It appears twice in the *Odyssey*, counterposed first with violence and then with the mistreatment of guests.[39] Another early example (*c*.500–25) is epigraphical. A bronze plaque laying out rights of pasturage in a newly settled Lokrian community states that in the absence of family members closer than brothers who can inherit the right, men may pasture 'according to what is just' (*ka to dikaion*).[40] Evidently, *to dikaion* could denote either an action or an outcome,[41] and may thus be translated either 'the just thing' or 'what is just', although, as Enrico Pattaro argues, the best rendering may be 'what is right' or 'what is as it ought to be', in line with the root *dikē*, which he translates 'right'.[42] Significantly, *to dikaion* cannot denote a person. A person can be *dikaios* (or *dikaia* if female), but the neuter adjective *dikaion* must refer to a thing, and the article *to* suggests 'thing in general' — hence 'what is right' in an impersonal sense.[43]

Dikaiosynē, on the other hand, is a younger term and used differently.[44] We find it first in Herodotos' *History*, written in the last half of the fifth century, where it would seem that like other Greek words ending *-osynē* (such as *sōphrosynē*, 'moderation', or *polypragmosynē*, 'busybodiness'), it denotes a personal quality — a virtue or vice, in this case a virtue. Often the

[37] Arist. *Rhet*. 1362b. Confusingly, 'justice' is often used to translate both terms here as well, e.g. J.H. Freese (Cambridge, 1926); H. Lawson-Tancred (London, 1991), though he glosses them separately as 'a kind of communal expediency' and 'a virtue of the soul' respectively (pp. 92–3). Note that Aristotle's definition of *to dikaion*, 'a kind of advantage with respect to the community' (my translation), is not so distant from Thrasymachos'.

[38] Diog. Laert. 5.22, 5.24.

[39] Hom. *Od*. 20.322–3, 21.311. Cf. E. Pattaro, *The Law and the Right* (Dordrecht, 2005), pp. 293–4.

[40] *Archaic Times to the End of the Peloponnesian War*, trans. C. Fornara (Baltimore, 1977), §33. Original in *A Selection of Greek Historical Inscriptions*, ed. R. Meiggs and D. Lewis (Oxford, rev. edn. 1988), §13. Cf. F.D. Miller, Jr., 'Aristotle's Philosophy of Law', in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, ed. F.D. Miller, Jr. and C.-A. Biondi (Dordrecht, 2007), p. 103.

[41] Pattaro, *Law and the Right*, pp. 269–94.

[42] *To dikaion* is often discussed as though it denoted an act only: e.g. G. Hourani, 'Thrasymachus's Definition of Justice in the *Republic*', *Phronesis*, 7 (1962), p. 110, where it is glossed as 'a loose word for just action'. However, as the Lokrian example shows, it can also refer to an outcome or state of affairs.

[43] H.W. Smyth, *Greek Grammar* (Cambridge, 1984 [1920]), §§1023, 1153a.

[44] E.A. Havelock, '*Dikaiosunē*: An Essay in Greek Intellectual History', *Phoenix*, 23 (1969), pp. 49–70.

relevant agent is a king: *dikaiosynē* is the attribute that enables kings to judge (and therefore to rule) soundly.[45] But the term is also used in relation to fair-mindedness and trustworthiness in non-ruling individuals.[46] In either case, 'righteousness' is a good translation, since it signifies a personal quality rather than an action or state of affairs.[47] Havelock, moreover, suggests that, although we cannot know for sure, the term was probably coined not long before we first see it. While other *-osynē* words appear regularly in this period, *dikaiosynē* appears just nine times before the end of the fifth century and only becomes common currency by the end of the second decade of the fourth century.[48] As a result it seems possible that it originated no earlier than 450, 'to express a notion that had not hitherto demanded it'.[49]

Accordingly, although the English word 'justice' may indicate either 'what is right' or 'righteousness', and 'justice' is frequently used to render both *to dikaion* and *dikaiosynē*, *to dikaion* and *dikaiosynē* are not synonyms.[50] This matters a great deal in the *Republic*, because it suggests that Thrasymachos and Sokrates are interested in two distinct questions. Thrasymachos wants to define what is right, which calls for a description of something impersonal, some class of actions or states of affairs. Like *to dikaion*, both his suggested definitions, 'the advantage (*to sympheron*) of the stronger' and 'the good (*to agathon*) of another', feature the substantive use of the neuter adjective and thus make sense linguistically as equivalents, whatever their possible philosophical demerits. But *to sympheron*, 'the advantageous', and *to agathon*, 'the good', make much less sense as responses to the question 'what is righteousness?', which is what most interests Sokrates. That question calls not for a description of an impersonal 'thing in general', but for an account of an agent's internal state.[51]

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[45] Hdt. 1.95–8, 2.141–52, 7.163–4.

[46] *Ibid.*, 6.73, 6.85–7, 7.44–52.

[47] See D. Wolfsdorf, '*Dikaiosynē* and *Hosiotēs* at *Prot*. 320–1', *Apeiron*, 35 (2002), p. 191; Annas, *Introduction to Plato's Republic*, pp. 11–12. As Annas notes, 'morality' is another possible translation. Cf. Pattaro, *Law and the Right*, pp. 274–5, with Havelock, *Greek Concept of Justice*, pp. 230–1.

[48] The nine fifth-century contexts are Hdt. 1.95–129, 2.141–52, 6.73 and 85–7, 7.44–52, 7.163–4; the papyrus Antiphon, 87 B44 2.346 in *Die Fragmente der Vorsokratiker*, ed. H. Diels and W. Kranz (Berlin, 1952); Thrasymachos (as cited by a commentator on Plato), Diels-Kranz, *Vorsokr*. 85 B 8; Thuc. 3.63.3–4; and Damon (as cited in a Philodemus papyrus), Diels-Krantz, *Vorsokr*. 37 B4. The appearance of *dikaiosynē* in the Theognidea (147–8) Havelock believes to be post-fifth century.

[49] Havelock, '*Dikaiosunē*', p. 51.

[50] Bloom's translation is scrupulous in this respect, consistently rendering *to dikaion* as 'the just' and *dikaiosynē* as 'justice'.

[51] The distinction I draw between *to dikaion* and *dikaiosynē* applies equally to other examples of neuter adjectives used substantively and corresponding personal qualities, such as *to hosion*, 'what is pious', and *hosiotēs*, 'piety', and *to sōphron*, 'what is moder-

Such an account is exactly what we get in the rest of the *Republic*, as Sokrates investigates the soul of the righteous agent. Of course, since the state of someone's soul is difficult to discern from the outside, Sokrates' account of *dikaiosynē* includes a description of the activity by which a righteous soul may be known: the definition of *dikaiosynē* offered at the end of Book IV, 'doing one's own business', is of this form.[52] But though *dikaiosynē* can be manifested in action, Sokrates' righteous agent is righteous whether he acts or not. 'Doing one's own business' refers primarily to the activity of the three parts of the soul, not to the actions of the agent whose soul it is.[53] Being righteous, on this account, is thus a permanent psychic state as opposed to a practice (as Aristotle would later characterize it).[54] *To dikaion*, by contrast, necessarily presupposes action, either directly (by itself denoting an act) or indirectly (as the origin of an outcome that is *dikaion*).

The difference between Thrasymachos' and Sokrates' accounts has been described as that between an act-centred and an agent-centred conception of justice.[55] As the foregoing suggests, this gets at something valuable, but it is nonetheless arguably better avoided, since it is not clear that there exists at this point in the *Republic* a single concept 'justice' that the objects of Thrasymachos' and Sokrates' interest can be said to be different conceptions *of*. At this stage, all we have is one term denoting 'what is right' and another denoting 'righteousness', and as yet no very clear understanding of their relationship. This brings us to the second question asked above. Plato evidently wishes to turn from discussing what is right to discussing righteousness. Why?

Two clues in the text suggest an answer to this question. One is that, as Glaukon's contributions at the beginning of Book II (a retelling of the myth of Gyges and a sketch of the lives of a righteous man deemed unrighteous and an unrighteous man deemed righteous) seem designed to suggest, he who possesses Sokratic *dikaiosynē* will possess it whether or not anyone else sees this is the case.[56] In this respect, Plato employs *dikaiosynē* almost as a non-evaluative term: that is, it does not express a judgment on the part of any particular agent. It simply denotes an enduring personal attribute, like having blue eyes. *To dikaion*, however, both within and beyond Plato's works, cannot help having evaluative force. Its counterposition to violence, maltreatment of guests and wrongful pasturage expresses a judgment on these activities — and this presupposes the existence of an agent doing the judging. An

ate', and *sōphrosynē*, 'moderation'. In all cases conventional Greek usage before Plato distinguished between the two kinds of term.

[52] *Rep.* 443d.

[53] *Ibid.*

[54] *Ibid.*, 435c–444e.

[55] See Annas, *Introduction to Plato's Republic*, pp. 153–69.

[56] *Rep.* 357a–367e.

indication of this appears in Thrasymachos' definitions. What is right, on his account, is right *in relation to* a particular agent: to the stronger, to another, or to a ruling party, i.e. a tyrant, an oligarchical elite, or a *dēmos*. What is important here is not who the agent is but simply the fact that *to dikaion* presumes the existence of some agent in relation to whom a given action or state of affairs can be said to be *dikaion*.[57] In the examples from the *Odyssey*, the relevant agent is Penelope and her community. In the Lokrian decree, it is the Lokrians. *To dikaion* by itself does not suggest anything about the agent involved, but neither does it simply denote a given action or state of affairs: it is itself a judgment on them, which implies the existence of a judge.

The other clue appears at the beginning of Book I, when the theme of right action is first canvassed. The conversation begins with the elderly Kephalos worrying about being asked to 'pay the penalty' (*didonai dikēn*) in the world below for misdeeds committed in this one.[58] This leads him to rattle off a list of possible wrongs: cheating another man 'even unintentionally', playing someone false, or remaining in debt to a god for a sacrifice or to a man for money.[59] Kephalos is not interested in whether these actions *are* right or wrong, or what the basis for making a judgment of that sort might be: that is, he is not interested in investigating the concept of 'right' itself. He cares only about whether these actions have been performed: that is, effectively, whether or not he possesses *dikaiosynē*. Sokrates confirms that this is the object of Kephalos' anxiety with his first comment. 'But this very thing, *dikaiosynē*, is it really truth-telling without qualification and giving back whatever one has received?'[60] This is the first time the word *dikaiosynē* itself appears in the text. But Sokrates seems correct to identify righteousness, not *what* is right, as the thing on Kephalos' mind.

As the discussion moves away from Kephalos' personal predicament, it is easy to lose sight of its origins in this passage. But these origins are revealing. As we have seen, Sokrates, as Plato depicts him, is not interested in classifying different kinds of action; he wants to consider agents in themselves. Specifically, the Kephalos episode suggests that his interest lies in *judging* these agents. Kephalos expects to be held accountable after death for misdeeds *he may not even know he has committed*, and it is *that* perspective — that of the omniscient, immortal judge — that is developed in the rest of the work. Contrast this with Thrasymachos' approach to *to dikaion*, which has the perspective of a human agent at its foundation. Thrasymachos is not terribly

[57] The equivalence is not exact, since as emerges in response to Cleitophon, Thrasymachos ultimately resists the notion that the ruling agent is himself the final judge of what is right (*Rep.* 340b–341a). Nonetheless, Thrasymachos' rulers do function as standards or measures of *to dikaion*.

[58] *Rep.* 330d–e.

[59] *Ibid.*, 331b.

[60] *Ibid.*, 331c.

interested in the identity of that agent: he seeks only to give a general account of *to dikaion* in relation to it. Certainly no judgment is offered as to the suitability of that agent to function as a standard of right in the first place.

Accordingly, if Thrasymachos represents a possible approach to the question 'what is right?', we can say that Plato turns the tables on it. Rather than take the relevant human agent for granted and seek to describe the kind of things that can be said to be *dikaion* in relation to it, Plato, in effect, turns to the judging agent and asks: 'What is this agent's relationship to what is right?' This not only marks a shift from an act-centred to an agent-centred approach: it also opens up a space from which the judging agent itself, whose character is not scrutinized under Thrasymachos' approach, can be judged and found wanting. This is arguably a *political* move because 'what is *dikaion*?' is the question that ordinary Athenians asked themselves every day in the popular courts when judging the disputes that came before them, while 'what is *dikaiosynē*?' is a lever that can be used to question their right to sit in the seat of judgment in the first place.

II
Deciding *to dikaion* in the Popular Courts

In Book I, Chapter 3, of the *Rhetoric*, Aristotle divides politics into two parts: deciding what is advantageous (*to sympheron*) and deciding what is just (*to dikaion*).[61] On Aristotle's account these are not merely two distinct questions. They also fall to different institutions to decide. Deciding what is *sympheron* is a task for the assembly, deciding what is *dikaion* a task for the courts.[62]

In classical Athens, what was *dikaion* was in almost all cases decided democratically, by taking the majority view of hundreds of randomly selected ordinary citizens as the verdict of the *polis*, following a public trial in which speeches were heard from both sides.[63] Athens was not alone in deciding disputes this way, and the mode of reasoning about *to dikaion* featured in our Athenian sources was surely not unique to Athens.[64] Where Athens stands out is in the quality of evidence we have relating to judicial decision-making by its citizens, and — especially in relation to Plato — in the significance of this activity for the history of political thought.

The essential question decided by judges in the Athenian courts was whether the defendant deserved punishment for a specified act. This question

[61] Arist. *Rhet*. 1358a–59a.

[62] Aristotle does not deny that questions of right will sometimes be discussed in the assembly, or of advantage in court. But he does argue that these considerations are beside the point. *Rhet*. 1358b.

[63] Hansen, *Athenian Democracy*, pp. 178–224; Lanni, *Law and Justice*, pp. 31–40. Homicide trials were decided differently, as is discussed in the next section.

[64] Cf. E. Robinson, *Democracy Beyond Athens* (Cambridge, 2011); H.M. Hansen and T.H. Nielsen, *An Inventory of Archaic and Classical Poleis* (Oxford, 2004).

was broken down into two parts: first, whether or not some penalty was deserved, and second, what it should be. In some cases, penalties were fixed by law: for example, the third conviction for making an illegal proposal in the assembly or council led automatically to loss of citizenship.[65] Normally, however, once conviction was announced, the prosecutor and defendant each proposed what they considered an appropriate punishment, and the judges decided between them (they were not allowed to split the difference).[66] Dispute-resolution in the Athenian popular courts thus involved two distinct judgments: whether the defendant's actions had been *dikaia* or *adika*, right or wrong, and if wrong, how best to re-establish *to dikaion* in the eyes of the community.[67]

In making these judgments, judges were subject to two forms of guidance. The first was the dikastic oath, which was taken by every citizen listed on the judicial roll, six thousand citizens annually selected at random from those who volunteered. The exact content of the oath is disputed, but at a minimum it seems to have included the following four pledges: to vote in accordance with the laws and decrees of the Athenians;[68] to vote only about matters pertaining to the charge;[69] to listen to both sides impartially;[70] and to judge (*dikazein*) with one's most righteous judgment (*dikaiotatē gnōmē*).[71] The oath-taker then called on Zeus, Apollo and Demeter and invoked a curse on himself and his household should he break his word.[72]

The second form of guidance was the speeches given in court. Since judges were not expected to have prior knowledge of cases or of potentially relevant laws or decrees, all the material on which their decisions were based had to be provided by litigants themselves during the trial.[73] The content of the litigants' speeches depended entirely on what they believed would sway the judges; they could use the time allotted to them in any way they chose.[74]

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[65] Hyp. 4.11–12.

[66] Hansen, *Athenian Democracy*, pp. 202–3.

[67] Dem. 20.119, 21.21; Lys. 3.46, 13.97, 14.47, 19.67.

[68] Aeschin. 3.6; Ant. 5.7; Dem. 20.118.

[69] Aeschin. 1.154; Dem. 45.50.

[70] Aeschin. 2.1; Dem. 18.2; Isoc. 15.21.

[71] Dem. 23.96, 57.93.

[72] Cf. E. Harris, 'The Rule of Law in Athenian Democracy: Reflections on the Judicial Oath', *Ethics & Politics*, 9 (2007), p. 57; R.J. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle* (Chicago, 1938), pp. 152–6; A.C. Scafuro, *The Forensic Stage* (Cambridge, 1997), p. 50.

[73] For the protagonists in Athenian trials (litigants, including sycophants, advocates, speech-writers and witnesses), see S.C. Todd, *The Shape of Athenian Law* (Oxford, 1993), pp. 91–7.

[74] However, they might open themselves to further charges of false witness, subornation or perjury. See R. Osborne, 'Law in Action in Classical Athens', *Journal of Hellenic Studies*, 105 (1985), pp. 57–8.

Inevitably, this meant that speakers presented what Adriaan Lanni has called a 'wide-angle' view of cases.[75] This might include the background to the dispute, including any previous legal actions,[76] extenuating circumstances or aggravating factors;[77] attacks on the character of the opposing party, along with that of his ancestors, family, friends and associates;[78] discourses on one's own (and one's family's) excellent reputation and history of service to the *polis*;[79] and emotional appeals to the judges to consider the effects of their verdict, including bringing weeping children up onto the platform.[80] Speakers also commonly quoted laws and decrees they considered relevant[81] (although not necessarily the law under which the charge had been brought),[82] discussed decisions given in similar cases,[83] and quoted lines of poetry.[84] All these elements were viewed in the same light as 'evidence'.[85] But what the judges took to be relevant to their decision was left entirely up to them. Once both sides had been heard and had been given a chance to respond to each other, the judges simply lined up to cast their ballots, in secret, for either prosecutor or defendant. They neither discussed the case among themselves nor left any record, apart from the vote itself, of what they had found to be persuasive.

This manner of adjudication has been viewed with extreme scepticism. The evaluation of Henry Maine is typical: 'The Greek intellect, with all its mobility and elasticity, was quite unable to confine itself within the strait waistcoat of a legal formula . . . questions of pure law were constantly argued on every consideration which could possibly influence the mind of the judges. No durable system of jurisprudence could be produced in this way.'[86] Lofberg, in 1917, agreed: 'a startling amount of all kinds of irrelevant matter was

[75] Lanni, *Law and Justice*, p. 8, citing K.L. Scheppele, 'Foreword: Telling Stories', *Michigan Law Review*, 87 (1989), p. 2096. Cf. C. Carey, *Trials from Classical Athens* (London, 1997), p. 18.

[76] Dem. 43.1–2, 53.4–17; Is. 2.27–37. Cf. Lanni, *Law and Justice*, pp. 46–8.

[77] Ant. 4.1.6, 4.3.2; Dem. 54.10.

[78] Andoc. 1.100; Lys. 14.25–26, 30.2; Aeschin.1.153, 1.179, 3.170; Is. 5.46, 8.40; Din. 2.8–13. Cf. Hyp. 4.32.

[79] Dem. 36.54–5; Hyp. 1.14–18. Character evidence is the most common form of 'extra-legal' argumentation in our extant popular court speeches, used in seventy out of eighty-seven (Lanni, *Law and Justice*, p. 60).

[80] Lys. 20.34. Cf. Ar. *Wasps* 562–70.

[81] Aeschin. 1.20–35; Hyp. 3.13–19.

[82] Lys. 30; Hyp. 3; Dem. 54.

[83] Dem. 21.71–6; cf. Lys. 1.34–6, 14.4.

[84] Lyc. 1.100, 103, 107; Aeschin. 1.148–53.

[85] On the classification of laws as evidence, see Arist. *Rhet*. 1355b. Cf. Todd, *Shape of Athenian Law*, pp. 58–9; A.R.W. Harrison, *The Law of Athens: Procedure* (Oxford, 1971), pp. 134–5.

[86] H.S. Maine, *Ancient Law* (London, 1920), p. 81.

brought into nearly every case'.[87] According to B.B. Rogers, translator of Aristophanes' *Wasps*, 'it would be difficult to devise a judicial system less adapted to the due administration of justice'. In his view, a 'large assembly' could 'rarely if ever form a fit tribunal for ascertaining facts or deciding questions of law'. Its members 'lose their sense of individual responsibility to a great extent, and it is apt to degenerate into a mere mob, open to all the influences and liable to be swayed by all the passions which stir and agitate popular meetings'.[88]

Grote, by contrast, gave a relatively sympathetic account.[89] More recent studies, such as those by Allen and Lanni, have also succeeded in showing that Athenian adjudication at least made sense in its own terms: it was not an anomaly in an otherwise essentially modern legal system.[90] Other scholars, such as Edward Harris, have sought to show that Athenian judges took the constraints of the rule of law more seriously than has been supposed.[91] Yet however we evaluate the system, one point is clear: Athenian *dikastai* had absolute discretion over their verdicts, both as to what they should be (what we may call a first-order decision) and how they should be reached (a second-order decision).

To be sure, the dikastic oath required judges to judge in accordance with the laws and decrees of the *polis*. But since judges were free to decide for themselves how, if at all, the laws and decrees brought to their attention applied to any particular case, the interpretative options available to them were not necessarily reduced.[92] Similarly, though precedents were sometimes cited by the litigants, there was no requirement that they be followed by the judges, nor could any such requirement have been enforced. Prosecuting Aristokrates on a charge of illegal proposal in 352, Demosthenes readily admitted that similar proposals had previously been allowed. But the key question, he argued, was not whether such things *had* happened, but whether they *ought* to have happened. 'Do not let them tell you that those old decrees were upheld by other juries', he urged: 'ask them to satisfy you that their plea for this decree is fairer than ours'. Failing that, he argued, 'I do not think that you ought to give greater weight to delusions of others than to your own judgment'.[93] Crucially, moreover, the judges' power to give greatest weight to their own judgment was strongly protected. In a political system notorious for holding responsible persons to account, only judges and assembly-goers were deliberately left

[87] J.O. Lofberg, *Sycophancy in Athens* (Chicago, 1917), p. 12.
[88] Quoted R.J. Bonner, *Lawyers and Litigants* (Chicago, 1917), pp. 89–90.
[89] G. Grote, *A History of Greece* (New York, 1861), Vol. 5, pp. 381–407.
[90] Allen, *World of Prometheus*, pp. 168–96; Lanni, *Law and Justice*, pp. 41–74.
[91] Harris, 'Rule of Law'.
[92] Cf. Todd, *Shape of Athenian Law*, pp. 49–63.
[93] Dem. 23.98, trans. Murray.

unaccountable for their decisions.[94] Judges were also considerably better protected than assemblygoers from pressure to justify themselves informally. The lack of discussion among judges, the secret ballot, and the fact that decisions could not be appealed[95] meant that whatever considerations each judge took to be dispositive was an entirely private matter.

Such judicial discretion may provoke anxiety. What if judges came up with the wrong verdict? What if innocent individuals were punished for crimes they had not committed, purely on account of the ignorance or prejudice of the judges? In the context of classical Athens, this anxiety is often expressed in the form of a specific question. What about Sokrates? Even those sympathetic to the Athenian mode of adjudication readily describe his execution as an 'outrage'.[96] Was not his death a direct result of the Athenians' unlearned, populist and discretionary approach to judicial decision-making?

An important clarification is necessary here. Athenian judges were surprisingly seldom asked to decide the facts of a case. Those were usually agreed by both sides. Their task was primarily interpretative. They had to decide if the actions of the defendant had been *dikaia* or *adika*, just or unjust, and this complicates the notion of a 'wrong' verdict considerably.[97] For example, when Leokrates was accused of treason by Lykourgos in 330, the relevant action — Leokrates' departure from Athens after the battle of Chaironeia eight years earlier, when the citizenry had been asked to stay in the *polis* to defend it against further attack — was not disputed. It was admitted that Leokrates had gone abroad with his family and that he had spent the intervening years working overseas as a corn merchant.[98] What the judges had to decide was whether or not this constituted treason, which was a question of interpretation rather than fact. Or take cases of illegal proposal. The fact that a given defendant had *made* a given proposal was not at issue: that was a matter of public record. What the judges had to decide was whether the proposal in question had been *paranomōn*, 'beyond the laws', which was, again, an interpretative task.

Something similar can be said about the charges against Sokrates. Sokrates was accused of impiety (*asēbeia*) for not believing in the gods worshipped by

[94] See further M. Landauer, '*Parrhēsia* and the *Dēmos Tyrannos*', *History of Political Thought*, 33 (2012), pp. 185–208.

[95] Though see Osborne, 'Law in Action', p. 52.

[96] Lanni, *Law and Justice*, p. 1. Others describe it as 'judicial murder', e.g. J. Dunn, *Democracy* (New York, 2005), pp. 43, 198; Robertson, 'Plato as a Critic', p. 149.

[97] Cf. Arist. *Rhet*. 1354a: 'The only business of the litigant is to prove that the fact in question is or is not so, that it has happened or not; whether it is important or unimportant, just (*dikaion*) or unjust (*adikon*), in all cases in which the legislator has not laid down a ruling, is a matter for the dikast [judge] himself to decide . . .' (trans. Freese). Cf. *Euthphr*. 8b–e; *Ap*. 18a.

[98] Lyc. 1.55, 59.

the rest of the *polis* and for corrupting the youth.[99] But not even Plato suggested that Sokrates did *not* hold heterodox religious beliefs. Indeed, his mention of Sokrates' *daimon* in the *Apology* and the fact that he left open the possibility that Sokrates was a monotheist rather confirms the case.[100] Equally, it was common knowledge that Sokrates was happy to impart his views to whichever young men cared to listen, and that he did this for free.[101] The question for the judges was whether or not this behaviour was impious, and a narrow majority decided it was.[102]

Not all cases in Athens followed this pattern. Sometimes the facts were in dispute, and then the judges had a trickier task: they had to decide who was lying.[103] But most of our surviving cases do conform to this model, and in large part this is because of another well-known feature of Athenian laws, their vagueness. In a modern legal setting, when faced with a question such as 'was this act treason?', 'is this proposal illegal?' or 'is this teaching impious?', the natural first step would be to determine the relevant definitions of 'treason', 'illegality' and 'impiety' provided in the laws and consider whether the defendant's actions accorded with them. If they clearly did (or did not), one might be tempted to argue that the verdict was — or should be — a foregone conclusion. But this step was not available in Athens.[104] Athenian laws were famously unspecific: as Robin Osborne put it, they had an 'open texture'.[105] Generally, as Lanni explains, the laws simply stated 'the name of the offence, the procedure for bringing the suit under the law, and in some cases the prescribed penalty'; they did not 'define the crime or describe the essential characteristics of behavior governed by the law'.[106] The law of Kannonos of 410 is a classic example. 'If anyone wrongs (*adikei*) the *dēmos*

[99] R. Bauman, *Political Trials in Ancient Greece* (London, 1990), pp. 106–7.

[100] *Ap.* 31d. Cf. M. Burnyeat, 'The Impiety of Socrates', *Ancient Philosophy*, 17 (1997), p. 4; T. Samaras. 'Who Believes in Socrates' Innocence?', *Polis*, 24 (2007), p. 5.

[101] D. Cohen, *Law, Violence, and Community in Classical Athens* (Cambridge, 1995), pp. 189–90.

[102] According to the *Apology*, if thirty judges had voted the other way, Sokrates would not have been convicted. Assuming a panel of 500 judges (the minimum necessary to judge a public charge), this implies 281 votes for the prosecutor against 220 for the defendant. Cf. Bauman, *Political Trials*, pp. 170–1.

[103] Compare e.g. Aeschin. 1 and Dem. 19 (opposing sides of the same case featuring irreconcilable contradictions).

[104] It is not really clear that a legal decision can be a foregone conclusion in any legal system, strictly speaking: that is to say, the connection between law and act is always a matter of interpretation (a point to which I return in the conclusion). Nonetheless, the necessity of interpretation is especially obvious in the Athenian case.

[105] Osborne, 'Law in Action', pp. 43–4. Originally H.L.A. Hart, *The Concept of Law* (Oxford, 1961), pp. 119, 121. Cf. Cohen, *Law, Violence and Community*, pp. 152, 189–90; M. Christ, *The Litigious Athenian* (Baltimore, 1998), p. 25; C. Carey, 'The Shape of Athenian Laws', *Classical Quarterly*, 48 (1998), p. 93.

[106] Lanni, *Law and Justice*, pp. 67–8.

of Athens, then that man, while chained up, is to be tried before the *dēmos*, and if he is found guilty, he is to be killed by being thrown into a pit and his money confiscated and a tithe given to the goddess.'[107] Exactly what 'wronging the *dēmos*' meant in this context was left to the judges to decide; and the same was true of almost every other wrong prohibited in Athenian law.[108] What 'treason', 'illegality' or 'impiety' meant was a question for judges, not legislators, to decide.[109]

On one view, this vagueness was a major weakness in the Athenian legal system. In the words of Moses Finley, the judges 'had too much latitude, in the sense that they could not only decide on a man's guilt but could also define the crime he had committed'. Finley added: 'When impiety — and this is only an example — is a catch basin, no man is safe.'[110] It may be natural to worry that virtually any act might be defined as criminal on this basis. But the claim that a term may function as a 'catch basin' directs us to think further about the way that words acquire meaning — and this in turn raises the possibility that the standard Athenian approach to adjudication may not have been the recipe for injustice that many have feared.

Arguably, there is a deep analogy between the conventional Athenian conception of 'what is right' (*to dikaion*), as revealed in the activity of the popular courts, and an account of language that is widely accepted today. The Athenians seem to have assumed that what is *dikaion* is intersubjectively constituted in the same way as is the meaning of any term. That is, they seem to have imagined that there is no 'external' or 'objective' right answer to the question of whether any given act is *dikaion* or *adikon* beyond the answer given by the community itself. The only available measure or standard for such an answer was other members of the same community, and for this reason the decision of a sufficiently representative panel of Athenian citizens could not be 'wrong'.

To clarify this argument in the linguistic context, consider the word 'treason'. It would make no sense to claim that 'treason' has an objective meaning independent of the way it is used by the community of English speakers. If that were the case, languages could not evolve, though of course they do. Equally, however, it would make no sense to claim that the meaning of

[107] Xen. *Hell*. 1.7.20.

[108] Cf. Arist. *Rhet*. 1374a8. An exception is laws relating to family and religion, which were often more substantive in character. See Carey, 'Shape of Athenian Laws'.

[109] Aischines suggested intriguingly that co-speakers ought to be disallowed in cases of *graphē paranomōn* on the specific basis that in such cases, 'the question of right (*to dikaion*) involved is not an indefinite one (*aoristos*), but is defined by your own laws . . . in indictments for illegal motions there lies ready to our hand as a rule of justice (*kanōn tou dikaiou*) this tablet, containing the measure proposed and the laws which it transgresses'. The defendant could therefore 'show that these agreed with each other' and then 'take his seat' (Aeschin. 3.199–200). This strongly suggests that *to dikaion* was normally assumed to be indeterminate.

[110] Finley, 'Socrates and Athens', in *Aspects of Antiquity*, p. 72.

'treason' is wholly subjective, that is, that it can mean one thing for me — 'betraying one's country', say — and something else for you — 'cheating on one's spouse' — with no way to decide which definition is better. If *that* were the case, all communication would be impossible.[111] A more plausible account starts and finishes at the level of the linguistic community. The range of meanings of any given term is intersubjectively constructed through its use by members of that group over time: it is produced, defined, sustained and changed exclusively in relation to the group itself.[112] Accordingly, if one wants to determine the meaning, or meanings, of the term 'treason', there is nothing for it but to explore how it is used by members of the linguistic community in question, in as many contexts as seems necessary. Conceivably, there is no other standard by which to ascertain the meaning of any given word.

The Athenians seem to have approached 'what is right' in their popular courts in a similar way. The question of whether a defendant deserved punishment for a given act was not, for them, one that had an 'objectively' correct answer, to be deduced either from the laws themselves or in some other way. But equally, they did not think that 'what is right' in any particular case was fully subjective, that is, one thing for one citizen and another for another, with no way of choosing sensibly between them. Rather, both the actions and the ideas of the ancient Athenians suggest that, in the normal run of things, they took 'what is right' to be intersubjectively constituted: both diachronically, in the sense that the idea of *to dikaion* held by each citizen was tested and refined by his interactions with the rest of the community over time, and synchronically, in the sense that every particular verdict was a snapshot of the views of a random sample of the community at a particular moment.

Importantly, moreover, it was taken for granted that there would often be disagreement over what was *dikaion* in any particular case. The *absence* of disagreement could be treated as a sign of a frivolous lawsuit: in public cases, prosecutors who failed to win at least a fifth of the judges' votes were heavily fined.[113] But this merely suggests the significance, on this conception of *to dikaion*, of not taking the view of any single citizen or small group as decisive, but rather of canvassing the views of a large sample, and the larger the better in important or controversial cases. This is exactly what the Athenians did. For cases involving large sums of money, or that were especially politically significant, the Athenians doubled or tripled the number of judges required to hear the case, from 500 to 1000 or 1500.[114] This surely reflected a desire to

[111] Cf. L. Wittgenstein, *Philosophical Investigations* (London, 2001), §§244–71.

[112] In this sense the whole is necessarily prior to the part, to borrow Aristotle's formulation (*Pol*. 1253a20). See further D. Cammack, 'Aristotle's Denial of Deliberation about Ends', *Polis*, 30 (2013), pp. 246–7.

[113] See E.M. Harris, 'The Penalty for Frivolous Prosecutions in Athenian Law', *Dikē*, 2 (1999), pp. 123–42, with citations.

[114] Hansen, *Athenian Democracy*, p. 187.

minimize the chances of getting a freak result. The Athenians seem to have aimed to represent as closely as they could the view of the whole community on the matter, congruent with the limitations of space and expense (since judges were paid for their time).

There is a clear affinity between the conception of 'what is right' sketched here and the philosophy of Protagoras, at least as suggested by the line 'man (*ho anthrōpos*) is the measure (*metron*) of all things: of those which are, that they are, and of those which are not, that they are not'.[115] Moreover, although Plato repeatedly construed this claim as though it referred to a *single* man,[116] thus making Protagoras open to charges of both subjectivism ('all appearances exist') and relativism ('what appears to you is true for you')[117] — and although various modern scholars have followed Plato on the subject referred to in this line, though not necessarily on the inferences[118] — it is certainly possible that Protagoras' 'man' was meant to denote the species or the community rather than a single individual.[119] If that is the case, then Protagoras' teaching would seem to have been very close to Athenian practice as I have described it.

But the idea that human beings can function as measures of 'what is' and 'what is not', particularly in respect of *to dikaion*, was not unique to Protagoras. It also appears in Aristotle. Aristotle's objection to the emotional manipulation of judges by speech-makers rested on precisely this foundation: one ought not 'warp' the 'rule' (*kanōn*) that one was going to use.[120] Aristotle also believed it was impossible to lay down laws about things that were subjects for deliberation (*peri hōn bouleuontai*), including the relationship of law to 'particular matters' (*hekasta*). On such questions, he said, 'men do not deny that it must be for a human being to judge', they merely dispute how *many* men ought to perform that task;[121] and Aristotle himself took it for granted that provided certain conditions were met, it was better for a large group of ordinary citizens to produce these judgments than a single outstanding man, or even a few outstanding ones.[122] Protagoras seems to have suggested the same thing, albeit with fewer conditions.[123]

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115 *Tht*. 152a3–8.

116 *Crat*. 386a; *Tht*. 160e. Cf. however *Prt*. 328a.

117 See C. Farrar, *The Origins of Democratic Thinking* (Cambridge, 1988), p. 49.

118 E.g. *ibid*.; P. Woodruff, 'Rhetoric and Relativism in Protagoras and Gorgias', in *The Cambridge Companion to Early Greek Philosophy* (Cambridge, 1999), p. 302.

119 H. Segvic, *From Protagoras to Aristotle* (Princeton, 2009), pp. 16, 25–6.

120 Arist. *Rhet*. 1354a.

121 Arist. *Pol*. 1287b20–25 with 1286a25–32.

122 *Ibid.*, 1281a40–b10, 1286a25–32. Cf. D. Cammack, 'Aristotle on the Virtue of the Multitude', *Political Theory*, 41 (2013), pp. 175–202.

123 *Prt*. 323a–d.

The Athenian approach to adjudication suggests that most Athenians held similar views. Interestingly, however, the Athenians did not reason this way in all cases. Homicide trials operated very differently, revealing an alternative conception of *to dikaion* at work — one echoed, in striking ways, by that advanced by Plato.

III
Deciding *to dikaion* in the Homicide Courts

Though most disputes in Athens were heard in the popular courts in the manner described above, cases of homicide were treated differently.[124] To begin with, they were normally judged by a restricted group of people. Altogether there were five distinct homicide courts, although four of these seem to have been subsets of the fifth, the Areopagos council, which also gave its name to the homicide courts as a whole.[125] In an earlier era the Areopagos had been the aristocratic governing body of the city, but in the classical period it consisted solely of people who had been selected by lot to be one of the nine chief archons, and its function was almost exclusively to judge cases of homicide. Provided they passed their audit (*euthyna*), all archons joined the Areopagos on a permanent basis. Hansen estimates it probably included around one hundred and fifty people at any one time, around two-fifths of whom will have been over sixty.[126] The entire body heard cases of intentional killing, including wounding, arson and poisoning resulting in death,[127] while panels of fifty-one judged cases in the other courts. The Palladion heard cases of unintentional homicide and the killings of slaves, metics and foreigners; the Delphinion, cases in which the defendant admitted having killed but argued that he had acted lawfully and therefore did not deserve punishment; the Prytaneion, cases in which an animal, inanimate object or unknown agent had caused death; and the court at Phreatto, cases of homicide against citizens who were already in exile for another offence, meaning that they had to argue their case from a boat anchored offshore.[128]

As well as being judged by a distinct set of citizens, homicide trials operated significantly differently from those held in the popular courts. Three

[124] Commercial maritime suits were also treated differently in that greater reliance was placed on written contracts (Lanni, *Law and Justice*, pp. 167–71). However, in other respects the process was the same as that described in the previous section.

[125] Our sources refer to judges in the smaller courts as *ephetai*, and some have argued that they were not Areopagites but randomly selected citizens. See however E. Carawan, '*Ephetai* and Athenian Courts for Homicide in the Age of the Orators', *Classical Philology*, 86 (1991), pp. 1–16; Lanni, *Law and Justice*, pp. 84–7.

[126] Hansen, *Athenian Democracy*, p. 289.

[127] Ps. Arist. *Ath. Pol*. 57.3; Dem. 23.22.

[128] Arist. *Pol*. 1300b29–30; Lanni, *Law and Justice*, pp. 75–8.

pre-trials were held;[129] defendants were banned from public and sacred spaces before the trial;[130] trials were held in the open air;[131] the most solemn sacrifices were made;[132] and an elaborate series of oaths was taken. At the start of trials, the prosecutor swore that the defendant had committed the offence, and the defendant swore he had not. During trials, witnesses swore both as to the truth of their testimony and as to whether the defendant had committed the crime. Finally, after the verdict was announced, the winner swore that he had told the truth and that the judges had decided correctly.[133]

The mode of argumentation in homicide suits was also strikingly different. For once, a relevancy rule applied: speakers were not allowed to go 'outside the issue' (*exō tou pragmatos*),[134] which seems to have been interpreted as prohibiting discussions of character and possibly emotional appeals to the judges.[135] There was another important difference. In the popular courts, as we have seen, the judges were asked to decide what was right or just, that is, what was *dikaion*. But another pair of concepts regularly appears in connection with homicide. That is truth (*alētheia*) and what is true (*to alēthes*).[136] In homicide trials, judges had not only to decide what was right; they also had to decide what was *true*. Antiphon emphasized the distinction this suggested. 'The laws, the oaths, the sacrifices, the public announcements and all the other things that happen in a homicide suit are very different from other procedures because the facts themselves (*auta ta pragmata*), concerning which the stakes are greatest, must be known correctly (*orthōs gignōskesthai*)'.[137] Evidently, something was deemed to be at stake in homicide trials that was not at stake in others.

These differences demand an explanation. A significant factor may be the age of the procedures, as Lanni has suggested. Homicide procedures were the oldest in use in Athens and no doubt represented an earlier way of doing things.[138] Yet the allusions to truth that feature in these cases and the additional note of reverence for the Areopagos that appears throughout our liter-

129 Ant. 6.42.

130 Aeschin. 2.148; Ant. 5.10, 6.4.

131 Ant. 5.11; Ps. Arist. *Ath. Pol.* 57.4.

132 Dem. 23.67.

133 Aeschin. 2.87; Ant. 5.11. Cf. D.M. MacDowell, *The Law in Classical Athens* (Cornell, 1978), p. 119; D.M. MacDowell, *Athenian Homicide Law: In the Age of the Orators* (Manchester, 1999), pp. 90–109; R. Parker, *Polytheism and Society at Athens* (Oxford, 2007), pp. 102–3.

134 Arist. *Rhet*. 1354a.

135 Lanni, *Law and Justice*, pp. 96–105. See e.g. Lys. 3.44, 3.46.

136 Aeschin. 2.87; Din. 1.1, 1.6, 1.57–9; Ant. 3.3.3, 6.18.

137 Ant. 6.6. Cf. Ant. 5.88. Trans. Lanni, *Law and Justice*, p. 79.

138 Lanni, *Law and Justice*, pp. 105–7. Cf. Ant. 5.14.

ary sources suggests something more.[139] The severity of the penalties might seem relevant: intentional homicide led automatically to execution, burial outside Attika and confiscation of property, while unintentional homicide resulted in exile.[140] But death and exile were also regularly used as penalties in other cases, so that suggestion will not suffice.[141]

A better explanation is arguably found in the religious significance of homicide cases. An unnatural or improper death was said to leave a *miasma* or polluting stain on the *polis*.[142] Part of the purpose of homicide trials was thus to attribute responsibility to the right person (or animal or object) in the right way, so the stain could be removed.[143] Several ancient authors cited pollution as the explanation for holding the trial out of doors.[144] Religious significance also helps to explain why these cases remained in the hands of the Areopagites, since the chief archons traditionally had significant religious duties.[145] It also explains the elaborate oath-taking, particularly the final oath sworn by the victorious party: the idea was apparently to transfer any *miasma* resulting from a wrong verdict from the judges to the victorious party himself.[146]

Most important, the religious dimension of homicide may explain the discursive difference between speeches in homicide trials and those in all other kinds. Arguably, the stakes seemed greatest in homicide suits because not only other citizens, but also the *gods*, were deemed to be an interested party. The gods' concern that their shrines and temples not be polluted may have suggested to the Athenians that an 'external' or 'objective' right answer existed to the question of what was *dikaion* in cases of homicide in a way that was not true in other cases. In a case of treason or illegal proposal, the only interested parties, conceivably, were other citizens: there could thus seem to

139 Aesch. *Eum*. e.g. 681–710; Dem. 23.65–7; Lyc. 1.1–12; Lys. 6.14; Ant. 6.51; Xen. *Mem*. 3.5.20. Discussed in Lanni, *Law and Justice*, pp. 78–80.

140 Defendants in trials of intentional homicide could also go into exile halfway through the trial if they thought they were likely to be convicted. Dem. 23.69; Ant. 5.13; cf. MacDowell, *Athenian Homicide Law*, pp. 113–16.

141 An obvious example is Sokrates' execution for impiety.

142 Ant. 2.1.3, 2.1.10–11, 4.1.2–3. Cf. Ant. 5.82–3; *Euthphr*. 4b–c. See also R. Parker, *Miasma* (Oxford, 1996), pp. 104–43.

143 The significance of *miasma* in the development of homicide procedures has recently been downplayed. See Parker, *Miasma*, esp. pp. 121–5; I. Arnaoutoglou, 'Pollution in Athenian Homicide Law', *Revue Internationale des Droits de l'Antiquité*, 40 (1993), pp. 109–37; E. Carawan, *Rhetoric and the Law of Draco* (Oxford, 1998), pp. 17–19; Lanni, *Law and Justice*, p. 110. However, while the procedures doubtless had an important sociological basis, our sources show that fourth-century Athenians did conceive of them in religious terms, and that is the important point here.

144 E.g. Ant. 1.10, 5.11; Dem. 20.158, 23.65–7, 23.72.

145 Ps. Arist. *Ath. Pol.* 56.4, 57.1–4, 58.1.

146 Ant. 2.2.11, 2.3.10, 3.3.11, 4.1.4, 6.6.

be no 'right' or 'wrong' verdict on these questions beyond what the citizen community itself took to be right. In cases of homicide, however, the supposition that the gods also had a view may have altered the nature of the reasoning involved. It meant that in homicide cases — and only homicide cases — Athenian judges could be thought of as struggling to reach a decision which in some sense existed independently of their own judgment, i.e. that reflected a truth beyond their own norms and evaluations.

It is worth clarifying that, just as in other types of suit, the question before the judges in homicide trials was often one of interpretation rather than fact. Again, both sides might agree on the events leading up to the death; what was at issue was who or what had ultimately been responsible for it (and hence for the subsequent pollution).[147] This was a much murkier issue and raised puzzling issues of causation that the Athenians seem to have found fascinating. A famous, though probably fictional, example involved the death of a boy from a javelin thrown by a classmate as he ran across a gymnasium. Was the thrower responsible, or the victim, or even the javelin itself?[148] A modern coroner would have the option of recording a verdict of 'accidental death' in these circumstances, but that was not available in Athens, possibly since the problem of *miasma* would remain. Cases of this sort suggest why the court at the Prytaneion was deemed necessary. Even if death had been caused by an inanimate object, it was still important to interpret the chain of events correctly, in order to ascertain the innocence of any associated human agent and to cast the offending object beyond the boundary of the *polis*.[149]

Again, as in the popular courts, not all homicide suits followed this pattern. Sometimes the events leading up to the death were uncertain, and then the relevant question was simply 'did the defendant do it?', a factual question familiar from any whodunnit.[150] In such cases, the truth of the matter clearly rested on relevant facts, and these clearly existed independently of the views of the judges. In cases such as that involving the javelin, however, the truth of the matter was essentially a question of interpretation. It raised the same issues as deciding *to dikaion* in the popular courts, except that in cases of homicide, *to dikaion* could be supposed to have a reality beyond the views of the judges, because the gods could be presumed to care about the result. From the perspective of the judges, what was *dikaion* in a case of homicide could thus be conceived of as a question with an objectively correct answer rather than an intersubjectively constituted one. In effect, the interest of the gods converted a question of 'right' into one of 'truth' or 'fact'. What was right became

147 E.g. Lys. 1; Ant. 1, 6.

148 Ant. 3; cf. Plut. *Per.* 36. See also B. Williams, 'Recognizing Responsibility', in *Shame and Necessity* (Berkeley, 1993), pp. 50–74.

149 Aeschin. 3.244; Patmos schol. on Dem. 23.76.

150 E.g. Ant. 2.

something that could be *known*, or not known, in a way that *to dikaion* in other cases could not be; and this, I suggest, is where Plato comes in.

IV
Plato's Intervention

Plato's signal contribution to political thought may be characterized as taking the idea that *to dikaion* exists independently of the norms of the political community — a claim that, on the standard Athenian view, applied only to a limited subset of religiously significant cases — and applying it to all human experience. There is always an externally or objectively correct answer to questions of right and wrong on the Platonic view: it is the answer accepted by the gods (or, as often in Plato's telling, god), who are supremely righteous, and it applies in all cases because the gods have an interest in everything we do. Like the truth in homicide cases, moreover, it can only be known or discerned; it is not *created* by any agent, be it a single man, a group, or even the gods themselves;[151] and it can be discerned only by a select few: those who possess *dikaiosynē*, which, midway through the *Republic*, is identified as the state of having gazed on and internalized the true 'form' of *to dikaion*, 'the right' or 'the just'. On Plato's account, this state is accessible to philosophers alone. Yet, arguably, the doctrine of the forms recalls the kind of knowledge the Athenians imagined themselves to be groping after in homicide trials, but that they do not seem to have imagined existed in any other context, such as cases of treason or proposing disadvantageous laws.

The contours, foundations and implications of this set of claims are aired and explored across Plato's works, in ways both large and small. We may note, for example, the transformation, in the *Euthyphro*, of Meletos' claim that Sokrates had corrupted young men into the claim that Meletos '*knows how* the youth are corrupted and who are those who corrupt them': a turn from an interpretive question, the answer to which would depend on an intersubjectively constituted understanding of what it meant to corrupt, to a question of knowledge or fact.[152] Or the distinction drawn between true and false judges in the *Apology*, where Sokrates explicitly strips the title 'judge' (*dikastēs*) from those who have failed to find him innocent: being a true judge evidently meant coming up with the right answer (or at least, we can say, what Sokrates considered to be the right answer).[153] Or Sokrates' celebrated acceptance of the laws of Athens in the *Crito*: this is often regarded as a contradiction of his position in the *Apology*, when he defies the Athenian public with the words 'Men of Athens, I am grateful and I am your friend, but I will obey the

[151] E.g. *Euthphr*. 6a–b, 7b–e, 8d.
[152] *Ibid*., 2c. Italics mine.
[153] *Ap*. 40a.

god rather than you'.[154] What is less often recognized is that when, in the *Crito*, Sokrates blames his conviction on the interpretation of the laws offered by the men of Athens rather than on the laws themselves, he thereby rejects the authority of the citizen body to decide for itself what is *dikaion*, which was the foundation of Athenian law.[155] Finally, we should note the connection between the effort to establish objective meanings for words in the *Cratylus* and Plato's awareness, revealed in two dialogues, that there was an analogy between the construction of language and that of *to dikaion* on the conventional conception of that term. Alkibiades, in the first dialogue of that name, states explicitly that the people who had taught him *ta dikaia* were the same as those who had taught him Greek.[156] The same idea appears in the *Protagoras*.[157] This suggests that Plato understood that the intersubjective construction of language itself had to be denied if his more significant attack on the intersubjective construction of justice was to succeed.[158]

A full analysis of Plato's works in this light would be of great interest, but we may focus here on two points. The first is Plato's enthusiastic (and seemingly innovative) development of the idea that the gods care about every human wrong, not merely some discrete subset of wrongs. This thought appears in a variety of places, including the *Republic*: the divine judges (*dikastas*) who reward and punish human beings after death attend to 'all the wrongs they had ever done', not merely to certain categories of wrong.[159] The same perspective features in the *Gorgias*, in the activity of Minos, Rhadamanthys and Aiakos, the supremely just judges of the afterlife,[160] and in the *Phaedo*.[161] But it appears most fully in Book X of the *Laws*. First, the argument 'that the gods exist, and that they are good and honor justice (*to dikaion*) more than do men' is identified by Klinias as 'the best defence of all our laws'.[162] The Athenian Stranger agrees: the non-existence of the gods must be disproved as a necessary prelude to obeying the laws. But two other 'false notions' about the gods must also be removed: that they 'exist, but pay no heed to human affairs', and that they 'do pay heed, but are easily won over by prayers and offerings'.[163] All three propositions — the non-existence of the gods, their lack

154 *Ibid.*, 29d.

155 *Cri*. 54c.

156 *Alc*. 1. 110e.

157 *Prt*. 328a. Cf. Farrar, *Origins of Democratic Thinking*, p. 83.

158 Cf. Ober, *Political Dissent*, p. 215, n.107; M. Foucault, 'The Discourse on Language', in *The Archaeology of Knowledge and the Discourse on Language* (New York, 1972), pp. 218–19, 227, 232.

159 *Rep.* 615a. Cf. *ibid*., 330d–e.

160 *Grg*. 523a–27e.

161 *Phd*. 113d–115a.

162 *Laws* 887b, trans. T.J. Saunders. Cf. *Laws* 624a.

163 *Ibid.*, 888b–c.

of interest in the doings of men, and their willingness to transgress justice (*to dikaion*) when paid off — are then comprehensively attacked.[164] One point is especially noteworthy: the argument that 'God also cares for the World-All' is wrapped into the argument for his existence in a way that his unwillingness to be 'seduced away from justice with gifts' appears not to be.[165] Care for all things would, on this account, appear to be presupposed by God's very existence. Accordingly there would seem to be *no* sphere in which human beings may decide what is right for themselves. There is always an independently existing answer, which they may discern successfully, or not.

The second important point is that with which this article began: the transition from *to dikaion* to *dikaiosynē* as the object of attention in the *Republic* and its implications for both Plato's philosophy and for later understandings of justice. From the beginning of Book II *dikaiosynē* is established as the focus of the work,[166] and from Book IV it is formally defined as the state in which the elements of the soul 'do their own business'.[167] The question we may now explore is what this allows Plato to do.

As we have seen, the question 'what is *to dikaion*', as raised by Thrasymachos and pondered daily by ordinary Athenian citizens in the popular courts, functions in effect as an invitation to all comers to exercise their judgment. The question 'what is *dikaiosynē*', by contrast, directs attention to the nature of the judging agent. Presumably, this turn would seem desirable if one wished to argue that only someone with *dikaiosynē* can judge correctly what is *dikaion*, although Plato nowhere articulates this explicitly. What is clear, though, is that directing attention to a judge's personal qualities raises the possibility that not everyone will possess the necessary credentials to judge well — that is, not everyone will be found to possess *dikaiosynē*. This is not a necessary inference: Protagoras, for example, is depicted as suggesting that a sense of *dikē*, right, was common to all human beings.[168] But asking the question 'what is *dikaiosynē*?' does open up a space from which would-be judges can themselves be judged and found wanting. If they are discovered to lack this virtue, their responses to the question 'what is *to dikaion*?' might be ruled out — and rightly so, on this approach.

The crucial question then is: who is to be disbarred from judging on this basis? Or, put another way: who possesses *dikaiosynē* and how do they acquire it? In Book IV, we are told that *dikaiosynē* means the possession of a rightly-ordered soul (a condition very close to *sōphrosynē*, a significantly

164 *Ibid.*, 888c–907d.
165 *Ibid.*, 902–3, 907a.
166 *Rep.* 357d. Cf. e.g. 363a, 368b–c, 392c–d, 427d, 432b–c, 443d, 517d, 545a, 612b.
167 *Ibid.*, 443d.
168 *Prt.* 323a–e.

older term).[169] But Plato goes further. In Books V and VI, he posits a new notion of *to dikaion* that goes before and anchors all particular manifestations of that concept, and he does this explicitly in order to provide an intellectual basis for *dikaiosynē*. The new conception of *to dikaion* he advances is an eternal 'idea' or 'form' gazed on by a select few, and this act, or state, of gazing is then established as what defines *dikaiosynē* as a human quality.[170]

It is important to notice that the existence of *to dikaion* as an ideal form is not intrinsically presupposed by the concept *dikaiosynē*, which as we have seen predated Plato. Rather, the form *to dikaion* is brought in by Plato as a way of demarcating clearly the difference between those who possess *dikaiosynē* and those who do not.[171] Equally, however, it is important to notice that Plato arrives at the existence of the form *to dikaion* via his investigation of the concept of *dikaiosynē* rather than as a direct response to Thrasymachos' original question, 'what is *to dikaion*?'. This is presumably because without being channelled through specific human agents, the existence of *to dikaion* as an eternal form might be nothing to us. Just as the existence of the gods may mean nothing to us without their intervention in human affairs, the existence of an eternal form could be irrelevant to human society without some mediating channel. If no human being can *get* to the forms, they might as well not exist, or, at least, we would have little option but to act as though they do not. Thus the manifestation of the form *to dikaion* in a human being is a critical step in Plato's account. This is where *dikaiosynē* comes in. He who has *dikaiosynē* is the philosopher, who gazes on eternal realities, including *to dikaion* in its true, timeless form.[172]

This seems a critical move in Plato's argument for two reasons. The first is political. As we saw above, judicial activity was of great political significance in the ancient Greek *poleis*, and it formed a major theme in Plato's works. But it is especially important in the *Republic*. This is presaged in an illuminating way during the search for *dikaiosynē* in Book IV. Sokrates has just 'caught sight of something', though Glaukon has yet to see it.[173] To help him, Sokrates returns to the theme of 'everyone doing one's own work', and poses the question: 'Look at it this way if you want to be convinced. Won't you order your rulers to act as judges in the city's courts (*tas dikas . . . dikazein*)?' 'Of

[169] Cf. C.W.R. Larson, 'The Platonic Synonyms, *Dikaiosyne* and *Sophrosyne*', *The American Journal of Philology*, 72 (1951), pp. 395–414.

[170] That access to the forms is limited to only a select few is generally asserted in Plato's works, rather than argued for. *Rep.* 493e–494a, 503b; cf. *Pol*. 297c.

[171] As the analogies of the divided line and the cave show, Plato envisaged a series of steps towards the forms. 'Right opinion' was a possible state; true knowledge was not necessary in order to act well. Nonetheless, the boundary between right opinion (*orthē doxa*) and knowledge (*epistēmē*) was clearly marked.

[172] *Rep.* 500c.

[173] *Ibid.*, 432d.

course', Glaukon replies.[174] Sokrates goes on to establish that the judges will aim for no citizen to have what belongs to another or to be deprived of what is his own, which leads directly to the 'discovery' of *dikaiosynē*. But what is arguably most significant about this exchange is the apparent naturalness of the assumption that the rulers of a *polis* and its judges will be identical. Later, this equation is confirmed in a considerably showier way with the establishment of the philosopher-rulers, but its seeds are already present. Judging has already been identified as a constitutive function of a ruler. Hence, in the Socratic *polis*, the rulers must be those who know what is truly just, which is to say the philosophers.

From the democratic Athenian perspective, what is significant about this result is that it mirrors the way the Athenian *dēmos* ruled: by virtue of its control of the courts. It thus makes transparent the connection between Plato's preoccupation with the theme of justice and his hostility to Athenian democracy with which this article began. If there is a right answer to questions of justice that only the philosopher can 'see', there is no way anyone else can legitimately act as a judge, and hence, on the standard Greek conception, rule.

The *Republic* embraces this result directly.[175] In the *Laws*, the position softens. Taking into consideration the significance of participating in judging for acquiring the feeling that one is a real citizen of a *polis*, which he admits to be beneficial, the Athenian Stranger allows some space for democratic judicial activity of the ordinary Athenian kind.[176] But he radically alters the political consequence of this activity by stripping the democratic judges of Magnesia of *final* judicial authority. All cases will be open to appeal to a higher court, composed of men elected for the task, and it is they who will hold supreme authority.[177] As in the *Crito*, Plato resists the right of ordinary citizens to interpret their laws for themselves. Yet this was not only the foundation of the administration of justice in Athens; it was arguably the foundation of the rule of the *dēmos* overall.[178] Plato's philosophical intervention thus posed a radical and pointed challenge to the strength and extent of *dēmokratia* in Athens.

We may thus offer another answer to the question recently posed by Danielle Allen: 'What did Plato do?'[179] What Plato arguably did was to attack Athenian democracy by formulating a new conception of justice and its administration that was not open to being controlled by ordinary citizens, hence challenging their grip on rule over the *polis* itself.

The second reason that the manifestation of *to dikaion* in a human being proves a critical move in Plato's argument is conceptual. I suggested above

[174] *Ibid.*, 433e.
[175] *Ibid.*, 473d.
[176] *Laws* 766d, 768a.
[177] *Ibid.*, 767d–e.
[178] Cammack, 'Democratic Significance of the Athenian Courts'.
[179] Allen, *Why Plato Wrote*, p. 141.

that the *dikaiosynē* of the philosopher functions as a channel through which *to dikaion*, the form, can be made active in human society. It would be equally accurate, on the account given in the *Republic*, to say that the philosopher embodies *to dikaion*. The philosopher not only gazes at the eternal realities, he will also 'endeavor to imitate them' and 'as far as may be, to fashion himself in their likeness and assimilate himself to them'.[180] Indeed, not only will the philosopher attempt to fashion himself in their likeness, he may be required to reproduce their likeness in others. He is imagined 'stamping on the plastic matter of human nature in public and private the patterns (*paradeigmata*) that he visions there'.[181] The philosophers will 'glance at' *to dikaion*, *to kalon* and *to sōphron* 'in the nature of things', and 'alternately at that which they are trying to reproduce in humankind', and there will be no better 'craftsman' of *sōphrosynē* or *dikaiosynē* or any other virtue.[182]

This process of assimilation and reproduction may sound straightforward, yet it has a profoundly important result. In the soul of Plato's philosopher, the conventional distinction between *dikaiosynē* and *to dikaion*, the virtue within and the state of affairs without, itself dissolves. As in the case of the judge-rulers, this dissolution is presaged in an illuminating way earlier in the *Republic*, in the analogy posited between the city and the soul. When both *dikaiosynē* and *to dikaion* are translated 'justice', the significance of this analogy and of the coming merger of the two concepts into one in the person of the philosopher is lost. But this significance is profound. We ought to feel it is as strange to seek for *dikaiosynē* in a *politeia*, a political system or structure, as it would be to seek for courage or moderation in that structure. That is, the search for virtue among the *members* of the relevant body would not be strange; what is strange is to search for it among the *relations* of the members of the body to each another. Similarly, the suggestion that *to dikaion* can be found among members of a political body was entirely familiar. *To dikaion*, 'what is right', was standardly used as a way of marking out the relations between citizens.[183] But Plato does not pursue that idea. Instead, he explicitly sets out to discover *dikaiosynē*, righteousness, in the relations between individuals in a *politeia*, rather than in individuals themselves.

The enduring significance of this move is that, conjoined in the person of Plato's philosopher, the concepts *to dikaion* and *dikaiosynē* — normally used to denote 'what is right' and 'righteousness' respectively — become effectively interchangeable.[184] This interchangeability is definitively established in Book VII of the *Republic*, in the course of the analogy of the Cave.

[180] *Rep.* 500c, trans. Shorey.

[181] *Ibid.*, 500d.

[182] *Ibid.*, 501b, 500d.

[183] See especially Arist. *NE* Book V.

[184] The same reasoning would apply to the equivalent pairs *to hosion* and *hosiotēs*, *to sōphron* and *sōphrosynē*, etc. (see n. 51, above).

The philosopher leaves the cave to gaze at the forms, including *to dikaion*; when he returns, however, the object of his attention is identified not as *to dikaion*, but as *dikaiosynē*.[185] It is also presaged at the end of Book I.[186] When, following the failure of his discussion with Thrasymachos, Sokrates muses on his continued ignorance of what *dikaiosynē* is, Plato has him say something that, to a Greek, must have sounded very strange indeed. 'Now I know nothing,' Sokrates says, 'for if I don't know what *to dikaion* is, I shall hardly know if it is a virtue (*aretē*) or not'.[187] Most Greeks would surely have found it very difficult to understand how *to dikaion*, 'what is right' in the sense of an outcome, could possibly be construed as a virtue, as if it were equivalent to *dikaiosynē*, 'doing what is right'. Yet Plato, in the *Republic*, aims to provide the conceptual apparatus necessary to equate the two.

The dramatic and profoundly influential result of that move was that a concept of 'justice' that could encompass both 'righteousness' and 'what is right' became thinkable, apparently for the first time. Yet this new concept, connoted by Plato as *dikaiosynē* / *to dikaion* used interchangeably (and in English by the capacious term 'justice'), was not equally constituted by its antecedents. Rather, righteousness as a form of human activity became the handmaiden of a strictly intellectual conception of what is right: right as a form of knowledge independent of human agents.

Strikingly, the epistemological groundwork of this thought may precede Plato. It is arguably indicated in Sokrates' reported dictum, '*aretē* is *epistēmē*', virtue is knowledge.[188] If so, then the distinction between human activity and outcomes or states of affairs may already have seemed dissolved. Moreover, some such dissolution may indeed be necessary if what is right is to be conceived as having objective reality, rather than being intersubjectively constituted as the Athenians seem to have believed. It was left to Plato, however, rather than Sokrates, to show in writing how this might be done; and to the extent that we remain persuaded by a conceptualization of justice as a form of knowledge, accessed through experts, that ought to govern human activity — as opposed to a form of activity, developed in community, that itself helps to constitute what is known — Plato seems partly responsible for getting us there.

V
Conclusion

While none of Plato's institutional proposals — 'philosopher-kings', 'nocturnal councils' and so on — were to gain long-term traction, his influence on the

[185] *Rep.* 517d.
[186] See also *ibid.*, 336a and 343c.
[187] *Ibid.*, 354b.
[188] *Grg.* 460b–d, 509e5–7; *Prt.* 345e, 360d3; *Meno* 87, 89; *Lach.* 198; *Charm.* 173.

conceptualization of justice has been profound. To be sure, the immediate context was unpropitious. The main foothold of an objective conception of *to dikaion* in Athens, i.e. the distinctive treatment of homicide, began to be eroded in the late fifth century. Rather than being heard by the Areopagos in the traditional fashion, an alternative procedure known as *apagōgē*, previously used for offences such as theft, highway robbery and seizure of persons, began to be used to bring homicide before the popular courts, where it was judged in the ordinary way.[189]

The significance of the Areopagos as a vehicle for ascertaining both 'what is right' and 'what is true' may thus have been fading. On the other hand, from the 340s the Areopagos began to gain power in another way, through another procedure, *apophasis*.[190] This procedure cast the Areopagos in the role of an apparently neutral fact-finding institution: it required the Areopagites to produce a preliminary report, most commonly in relation to charges of treason, corruption and official misconduct, to establish the facts of a case before it went to the popular courts.[191] Yet if this new role could be construed as political, it scarcely helped Plato's cause. It certainly confirmed the special relationship of the Areopagos to knowledge;[192] yet the fact that the popular courts were ready to acquit defendants whom the Areopagos found to have committed the acts of which they were accused only confirms the final authority of ordinary citizens as judges.[193]

In the longer term, however, Plato's innovations, in particular the focus on *dikaiosynē*, could be seen to be gaining ground. A useful witness here is Diogenes Laertios. Prior to Plato, works whose titles were later translated 'On justice' bear the title *Peri tou dikaiou*, while later ones bear the title *Peri tou dikaiosynē*.[194] The only exception here is Aristotle, who wrote separate works on each.[195] It is tempting to speculate on the contents of Aristotle's texts, especially given the possible influence of Protagoras on his thought.[196] Apparently he at least resisted the dissolution of the distinction between *to dikaion* and *dikaiosynē* that Plato had advanced. Judging from his extant works he will have exhibited a less intellectualist position as well. But as Diogenes also relates, Aristotle's school was short-lived. His immediate lineage died with

[189] See M.H. Hansen, *Apagōgē, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense, 1976); E. Volonaki, '*Apagōgē in Homicide Cases*', *Dikē*, 3 (2000), pp. 147–76; Lanni, *Law and Justice*, pp. 103–5, 112–13. See e.g. Ant. 5; Lys. 13.

[190] P.J. Rhodes, 'Athenian Democracy after 403 BC', *Classical Journal*, 75 (1980), pp. 305–23.

[191] See Din. 1, 2 and 3; and Hyp. 5; Lanni, *Law and Justice*, pp. 57–9.

[192] Cf. Aeschin. 1.92; Dem. 23.25; Ant. 1.22.

[193] Din. 1.55–9. Cf. Lanni, *Law and Justice*, pp. 56–7.

[194] Cf. Diogenes' accounts of Simon (I and II) and Speusippos, Xenocrates and Aristotle respectively.

[195] Diog. Laert. 5.22, 24.

[196] Segvic, *From Protagoras to Aristotle*.

his student Theophrastos.[197] Not until the middle ages was he fully revived, and the Aristotle of the Thomists was a very different character.

The reception of Plato has been different. This is not the place to trace the path of his works to the present day, but something significant may be inferred from the fact that, alone among classical authors, we appear to have all, or nearly all, his writings. Platonism was evidently sufficiently congruent with Christianity for his works to be continually recopied (in the Greek east if not, until the fifteenth century, the Latin west).[198] The importance of this fact can hardly be overstated. It means Plato has been able to exert a more abiding influence on Western political thought than any other ancient thinker.

This influence remains visible today. For though the standard Athenian approach to adjudication is both compatible with democratic politics and philosophically defensible, the dominant modern conception of justice and its execution is arguably much closer to Plato's. Of course, few would accept Plato's argument about the forms as it stands. But an alternative intellectualist approach to justice is available, according to which justice is knowledge because the nature of transgressions is defined in the laws. Hence judicial decision-making requires expertise in law. Since ordinary people lack this expertise, they cannot act as judges (though they may participate in judicial activity in a more attenuated way, as jurors).

This view may seem more attractive than Plato's, but it has the same shape and shares some of the same assumptions; and it is not unproblematic. One reason for doubt goes back to the point about language made above. The core supposition of the alternative intellectualist approach is that the whole body of law considered together is, or could be, effectively self-interpreting. If one had access to all the relevant information given in the laws, one could make a perfect judgment. So Montesquieu: judgments ought to be 'fixed' by being 'ever conformable to the letter of the law', and judges 'no more than the mouth that pronounces the words of the law'.[199] These hopes are echoed in the work of Ronald Dworkin, for example, whose superhero-judge Hercules assumes that the laws with which he deals are structured by a coherent set of principles, to be applied in the same way to each case that comes before him.[200] Both accounts reveal a commitment to the idea that there is a right answer to every legal problem available in the laws themselves, which can be ascertained if only the judges in each case are sufficiently disinterested to act as a proper vehicle.

An Athenian democrat, however, could he be brought to understand this view, would probably respond that laws are not self-interpreting, in the same

[197] Diog. Laert. 'Prologue', §15. Cf. J. Barnes, 'Life and Work', in *The Cambridge Companion to Aristotle* (Cambridge, 1995), pp. 1–26.

[198] See e.g. J. Hankins, *Plato in the Italian Renaissance* (New York, 1990).

[199] Montesquieu, *The Spirit of the Laws* (New York, 1949), p. 153.

[200] R. Dworkin, *Law's Empire* (Cambridge MA, 1986), pp. 239–43.

way and for the same reason that any linguistic item is not self-interpreting. The need for human beings to judge does not arise merely because the laws themselves cannot speak. Human agents — specifically, members of the linguistic community in question — are necessary because only they can decide on the meanings of the terms laid down in laws and how every particular case relates to them. No amount of technical training will help with that, nor will the lack of it make one a less capable judge.

As Aristotle argued, 'men do not deny that it must be for a human being to judge' such matters; they merely dispute how *many* men ought to perform that task.[201] Plato's preference was for a very small number, on the basis of an account of justice that rested on the internalization of outside knowledge. Athenian democrats opted for many, on the basis of their membership in a community whose judgments were taken to be the final measure of what was right for those within it. Not the least remarkable feature of democracy today is that the conception of justice held by many self-described democrats seems closer to Plato's than to that of his fellow citizens.

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[201] Arist. *Pol*. 1287b20–25 with 1286a25–32.