The Philosophical and Rhetorical Responses to Open Texture

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In his book *The Concept of Law* H. L. A. Hart observes that the law must refer to broad classes of persons or classes of acts, things or circumstances. This observation is not entirely original; both Plato and Aristotle also note that laws are general rules that apply to large groups of actions or persons. Plato in the *Politicus* (295a) compares legislators to trainers who "When they lay down rules for physical welfare, find it necessary to give bulk instructions having regard to the general benefit of the average pupil." In the same way the legislator "will legislate for all individual citizens, but it will be by what may be called a "bulk" method rather than individual treatment." Aristotle in the *Politics* (1292a33) also notes that the law must deal with general matters as opposed to the magistrate, who deals with particular situations." Such a division of roles is necessary "because of the difficulty of making a general rule to cover all cases." (1282b2).

Because a law must be framed in general terms, Hart states that the operation of the law depends on "the capacity to recognize particular acts, things, and circumstances as instances of the general classification which the law makes." In most cases, this is not a difficult process. From time to time, however, one encounters "fact-situations (…) which possess only some of the features of the plain cases but others which they lack." Hart mentions two possible ways to deal with this problem of the law's "open texture." The first would be to formulate rules that are so detailed that they would make it absolutely clear how they were to be applied in any given situation. The second would

be to formulate canons of interpretation, which would provide guidance about how to interpret the law when a question arises about its meaning in a particular context.

In a series of recent essays I have explored the "open texture" of Athenian law and studied how litigants in Athens and the Athenian courts approached the issues posed by "open texture." The uncorrected proofs for one of these essays was I believe posted on the website for this conference. Tonight what I would like to examine is the way the philosophers Plato and Aristotle approached the problem of "open texture" and to contrast what I believe are the different strategies developed in Plato's *Laws* and in Aristotle's *Rhetoric*. I am going to label the approach found in the *Laws* the philosophical approach, and that found in the *Rhetoric* the rhetorical approach. By comparing these two approaches I hope to cast some light on the relationship between philosophy and rhetoric in Athens during the fourth century BCE.

Let us being with the philosophical approach contained in Plato's *Laws*. This approach places more faith in the ability of the lawgiver to create a system of rules that will give clear guidance in virtually any situation. Since the lawgiver will have a philosophical training, he will have the necessary knowledge (*episteme*) to define each offense correctly. This knowledge of the essence of each offense derives from his understanding of the Forms and allows him to identify correctly whether the particular features of a given action fit the essential characteristics of the general category. A proper understanding of the essential nature of each offense will also enable him to anticipate how the law is to be applied in all possible situations. At times in the *Laws* Plato appears to think that if the lawgiver can formulate a definition that captures the essence of each crime or delict, he will be able to eliminate or minimize to the vanishing

point the law's open texture. By proceeding from general principles and applying deductive reasoning and the science of division, the lawgiver can in Plato's opinion provide judges with clear guidance about how to decide practically any dispute about the interpretation of the law. This is not to say that Plato's approach is rigid and inflexible: as we will see, some of his definitions exhibit a remarkable sensitivity to varying circumstances. I call this approach philosophical because it relies more on the philosophical wisdom of the lawgiver and because it attempts to limit the interpretative choices available both for the *rhetor*, the public speaker who might act as accuser in public cases, or the *logographos*, who was trained in *rhetorike* and wrote speeches for individual litigants in both private and public cases.

Plato's view of the difference between his approach and the standard practice of legislation in his own day is evident in a remark he makes when discussing rules about fraud in the marketplace. Plato criticizes *hoi polloi*, the majority of mankind, for believing that lying and deceit are acceptable as long as they are done *en kairo* – on the right occasion, or in the right circumstances – but leaving these circumstances undefined (*aoristos*). In his view, it is not permissible for the lawgiver to leave this matter undefined. On the contrary, he must clarify the upper and the lower limits. In other words, it is not enough for a lawgiver to lay down a general rule and then allow *rhetores* and judges to decide what circumstances permit exceptional considerations to override the rule. The lawgiver must indicate precisely where the exceptions lie and what effect they will have on the application of the rule. When discussing penalties, Plato also advises the lawgiver to give clear guidance to the judge (934b). In public cases, Athenian law gave the court the power to impose whatever fine or punishment the court deemed

appropriate after listening to arguments made by both sides. But Plato says that the lawgiver should act like painter and give a sketch of the actions to be covered by the law and thus help the judge in finding the appropriate penalty for an offender.

One can see how the method works in the law of sale concerning latent defects. The Athenians had a law about the sale of slaves, which required that "When anyone sells a slave, he must state in advance any ailment the slave has; should he fail to do so, there is a procedure for return (*anagoge*)." The procedure was probably similar to *restitutio in integrum* in Roman Law. The law does not specify what kinds of illnesses nor envisage the possibility that the slave may have a disease that the master cannot discern. Nor is a time limit set down. Plato's regulations are much more detailed – he lays down different rules depending on whether the seller or the buyer are skilled workers such as doctors and trainers and thus should be able to recognize diseases. He imposes a time-limit on the right of return, which makes sense since it would be unlikely that a disease noticed long after the purchase originated before the purchase and was thus the fault of the seller. But he also makes a separate rule for epilepsy, which of course might not show up as soon as other diseases. Finally, he creates a special rule for the slave who has committed murder and is thus polluted. We may find this an odd sort of defect, but since the Greeks believed that pollution could cause disease or misfortune, this provision makes good sense.

Another area where Plato is more specific and detailed than Athenian law is in regard to impiety. As far as we can tell, the crime of impiety was not defined in Athenian law, though the Athenians obviously had some idea of what the term meant and what kinds of actions normally fell under the description "impious." For instance, when

Meletus brought his charge of *asebeia* against Socrates, he listed three charges: 1) introducing new gods, 2) not believing in the gods, and 3) corrupting the young. In his *Apology,* Socrates implicitly accepts Meletus' view that these actions did constitute *asebeia* since he does not challenge his accuser on this legal point, but seeks rather to show that the charges are false on factual grounds. In the *Laws* (885b), Plato does not leave the concept undefined. Instead he lists three specific types of *asebeia*: 1) not believing in the existence of the gods, 2) believing that the gods exist, but do not pay attention to human beings, and 3) believing that the gods are easily influenced and led astray by sacrifices and prayers.

Plato's most extensive reform of Athenian law is found in the rules about homicide. The Athenians had three basic categories of homicide: 1) *phonos ek pronoias*, which was deliberate or intentional homicide, 2) *phonos akousios*, homicide committed against the will of the killer, or in other words, cases where the agent performs an action that causes death, but where the death occurs against his will, and 3) *phonos dikaios* or *kata tous nomous*, just homicide, or homicide according to the laws. There was also a category of plotting of homicide, or attempted homicide, where the defendant planned to kill but did not bring about the death of the victim. In the third category, Athenian law comes close to providing a definition of the category by listing several specific cases that come under this rubric, without however outlining the general principles that unify these different cases.

There existed potential ambiguities in regard to the first and second categories. As those who have read my essay posted on the website have seen, in *phonos ek pronoias*, there arose a question about the nature of the defendant's intent: did the accuser

have to prove that the defendant intended to kill or only that the action that caused death was intentional? This ambiguity attracted the attention of the Sophists – in the *Third Tetralogy*, the accuser adopts the less restrictive definition of the term, while the defendant tries to make the accuser's task more difficult by taking the more restrictive definition. In regard to the second category, *phonos akousios* or "involuntary homicide" there was an issue about the extent to which someone could be held responsible for a death caused by his own action. For instance, if one threw a javelin at a target in an athletic competition, and someone ran in front of the target, was hit by the javelin, and died, could the thrower be held responsible? Or if someone hired a young boy for a choral competition, but then the boy died as a result of a potion he drank to improve his voice for the performance, could he be held responsible for *phonos akousios*? These cases also drew the interest of the Sophists – the former was the subject of the *Second Tetralogy* attributed to Antiphon, and the latter the topic of Antiphon's *On the Chorister*.

Plato's solution to the problems posed by the traditional categories was two-fold. On the one hand, he devised a more elaborate classification; on the other, he gave a fuller description of each type of homicide. A detailed analysis of these rules would require several lectures, so I will confine myself to just three observations. First point: modern legal systems generally make a distinction between cases of murder and voluntary manslaughter. In murder the offender kills either with premeditation, that is, with intent to kill, or at least with intent to cause serious harm. In the case of voluntary manslaughter, the offender kills after being provoked by the victim. Athenian law with its three rough and ready categories found cases of provocation hard to classify. As Plato observes, this kind of case is somewhere between voluntary and involuntary homicide

and thus requires a separate category. To remedy the deficiency of Athenian law, Plato creates two intermediate categories to deal with cases of provocation. For killing in anger without intent to kill the penalty is two years in exile; for killing in anger with intent to kill the penalty is three years in exile. At the end of this period, the guilty man has his case examined by a board of guardians of the law.

Second point: Plato attempts to limit the extent to which someone could be held responsible for a death caused by his own actions but against his will. Plato does not allow a charge of unwilling homicide to be brought whenever someone's actions set off a chain of events that eventually leads to the death of another person. The law applies only when death comes about by the direct physical causality of the defendant: "And if one man kills another by his own hand, but unwillingly, whether it be by his own unarmed body, or by a tool or a weapon, or by giving a drink or solid food, or by application of heat or cold (lit. "fire or winter"), or by deprivation of air, either with his own body or through other bodies, in every case let him be considered to be one who has killed with his own and and let him pay the following penalties." In other words, the defendant's action cannot be a remote cause of death, but must be a proximate cause. Here again Plato is specifying the circumstances to be covered by the statute and attempting to remove potential ambiguities that might cause problems for judges and litigants.

Third point: Plato pays far more attention to status distinctions than is found in Athenian law. A basic principle of Athenian justice was *isonomia*, equality before the law (e.g. Thucydides 2.37.2). This meant that one should judge each person not according to his social status, but simply whether he had committed an illegal action or not. Plato

innovates again by creating special rules for the murder of slaves, parents, spouses, and siblings, another departure from Athenian law.

One of course could go on to examine other statutes, but I hope that these examples give you a general idea of Plato's approach to the problem of open texture. Plato's goal is ambitious – he aims at providing a set of rules that are so complete and so detailed that they will answer almost any question that a judge might have when confronting a case. There are of course two drawbacks to such an approach. The first is that the goal of formulating a comprehensive code is ultimately unreachable. As Hart observes, it is impossible to devise with a rule "so detailed that the question whether it applied or not to a particular case was always settled in advance and never involved, at the point of actual application, a fresh choice between open alternatives." Any definition of a key term will perforce contain terms that are undefined, and to attempt to define these terms will lead to an infinite regress. The other drawback is practical: even a rule that was so detailed that it almost completely reduced the amount of open texture would be so unwieldy and complicated that few if any could understand it, and a lawcode that contained such rules would be even worse than the heaps of legislation that afflict us today. One cannot help but sympathize with Posidonius, who complained that "a law ought to be brief so that those who are uneducated can grasp it more easily. Let its word go forth as if it were divinely inspired: let it order, not engage in debate. I think there is nothing more tedious than a law with a prologue. Show, say what you would like me to do; I am not in school; I am here to obey."

This brings us to Aristotle. In the first chapter of the *Rhetoric* (1.1.7). Aristotle appears to endorse Plato's approach: "It is right that laws, when correctly promulgated,

should define all issues, as many as possible, and leave the smallest amount possible in the hands of the judges." His reasons are that it is easier to find the small number of intelligent men needed to write laws than to find the large number needed to judge cases and that laws are the product of long reflection whereas judgments at trials are made on the spur of the moment. But doubts about this approach arise in chapter 13 of the same book. Here he observes that it is impossible to frame a rule that will cover all imaginable possibilities: Legislators "are obliged to make a universal statement, which is not applicable to all, but only to most, cases; and whenever it is difficult to give a definition owing to the infinite number of cases, as, for instance, the size and type of iron object used in making a wound; an entire lifetime would not suffice to enumerate all the possibilities. If this is left unspecified, but it is still necessary to make a law, one must speak in general terms. As a result, if a man wearing a ring raises his hand (to strike) or strikes, he is liable according to the written law and is guilty, but in reality he is not guilty. This is a case for *epieikeia*." The task of formulating laws so detailed that they leave no room for interpretation is hopeless so one must have recourse to *epieikeia*. This is not the place to enter into an analysis of this term – in what follows I will draw on recent essays by Jacques Brunschwig, Trevor Saunders, and myself. One should not mistake *epieikeia* for a different standard of justice or a different set of norms from that found in the written laws. And it is certainly not similar to the controversial doctrine of "jury nullification" in modern American law as Danielle Allen has claimed nor is it "hors du domaine du droit" as Gauthier and Joliffe have thought. As Brunschvig says, "Thus Aristotelian §pie€keia - (…) - does not seem to be a suspension, without principle and unregulated, of legal rules, nor simply a foray 'hors du domaine du droit'. It does not

make sudden interruptions in the course of legal justice, to disturb or stop it. Rather, the possibility of its intervention is anticipated and sanctioned by the legislator; it is up to the judge to bring this about or not, in accordance with the higher norm which directs the judge towards rigour or flexibility." In other words, *epieikeia* is not a set of principles that a judge or litigant can invoke when they wish to set aside the written laws. Rather it is a set of methods for interpreting the law when it comes to applying written rules to particular cases. It helps litigants and judges to identify exceptions to general rules and provides ways for dealing with these exceptions.

At this point I would like to return to Hart for a moment. At the start of my paper I note that Hart outlines two possible responses to the problems posed by open texture. One was to formulate detailed rules that address possible exceptions. The other was to provide 'canons of interpretation' that would give judges the tools needed to devise solutions when confronted with hard cases. What I would like to suggest is that while Plato took the first path, Aristotle chose the other – or at least he does so in chapter 13 of the *Rhetoric*. Here Aristotle rejects the Platonic aim of creating a perfect code as unreachable and instead lists methods that can be applied in cases where the rigid application of a legal rule would result in a decision that would be contrary to general principles of justice, which are embodied in the unwritten laws. He is not inventing these methods of argument – most of them are well attested in the Attic orators.

The first example of *epieikeia* that Aristotle gives is the famous tripartite division of actions into what I would call culpable errors or acts of negligence (*hamartemata*), wrongful acts, that is, acts where the harm is intended and that arise from the bad characters of the agent (*adikemata*), and misfortunes, accidents where the agent cannot be

held responsible because he could not have foreseen the consequences of his actions (*atychemata*). There are really two principles at work here – the first is that one should not be held responsible for actions that are beyond one's control, the unpredictable consequences of one's actions or cases of *force majeure*. This is a kind of argument that one finds in several Attic orations. For instance, Lysias in his *Against Eratosthenes* (12.25) tells the court that the defendant is going to argue that he should not be held responsible for the death of the accuser's brother because he was acting under compulsion, not of his own accord. Demosthenes (18.274-75) in fact invokes the very same tripartite division of actions in his *On the Crown* and argues that he should not be blamed for the Athenian defeat at Chaeronea because it came about from forces that were beyond his control. The second principle implicit in this tripartite division is that harm resulting from acts of negligence should not be punished with the same severity as that caused by acts of malicious intent. This principle was implicit in several written laws such as the one on damage, which imposed a payment of double damages for harm committed willingly, but only simple compensation for harm done unwillingly, that is, through negligence (Dem. 21.43). The courts of Athens also appear to have recognized the existence of mitigating factors or various excuses that could be taken into consideration when determining the penalty to be imposed (Dem. 54.21 Cf. Dem. 21.37 on possible excuses).

The next principle or perhaps strategy of interpretation is that of looking not to the law, but to the legislator, not to the letter of the law, but to the intention of the lawgiver. This strategy can be used in two situations: 1) where there is a potential ambiguity about the meaning of the law, and 2) when the rigid application of the written statue would

bring about a result that was contrary to general principles of justice. This type of argument is familiar to anyone who has read the Attic orators – I will single out only two examples. In his speech *Against Leocrates*, Lycurgus used the procedure of *eisangelia* to prosecute a man on a charge of treason for merely leaving Athens during the crisis after the Athenian defeat at Chaeronea. Even though the actions committed by Leocrates did not fit into one of the specific categories listed by the law, Lycurgus argues that it was the intent of the legislator to include actions such as his under the general category of treason. He then adduces other laws and statutes to prove his point. Aeschines also invoked the intent of the lawgiver in his speech *Against Ctesiphon* (3.41-47) when arguing for an interpretation of the laws about announcing the award of crowns in the Assembly that was clearly contrary to the standard interpretation of those laws.

The fourth principle is to look not to the action itself, but to the *prohairesis*, or deliberate choice (presumable of the defendant). In other words, when it is clear that the defendant has committed an illegal action, one can always argue that he lacked the intent to break the law and thus is not guilty. Aristotle later gives the example of a person who talks to an enemy, but does not commit treason. This kind of argument is found in a case described in a speech of Dinarchus (1.58). A man named Polyeuctus was reported by the Areopagus to the Assembly for having spoken with someone who was in exile in Megara and who had thus probably been convicted of a serious public offense. At his trial however it was discovered that he spoke to the person because he was married to his mother and was only trying to help him in time of misfortune, not to overthrow the government of Athens. We would say that the defendant's action fit the objective features

of the crime, but that he lacked the *mens rea*. For other examples I refer you to my essay on the role of *epieikeia* in the Athenian courts.

Aristotle lists other examples of *epieikeia*, not all of which are relevant to the problem of interpreting and applying the law. The last items in the list are examples of the characteristic of the man who has the moral quality of *epieikeia*, but this is not the place to go into the tension between the two strands in Aristotle's discussion of this term. Here I would refer you to the essay of Brunschvig.

I hope that this analysis has made clear the differences between the approach to open texture found in Plato's *Laws* and that found in Aristotle's *Rhetoric*. In closing, I would like to pose a few questions that may serve as the basis for discussion. First, to what extent is the approach of the *Laws* characteristically Platonic? Is it different from his attitude to legislation in the *Republic* and the *Politicus*, and if so, why? Second, to what extent is Plato's approach in the *Laws* the typical philosophical approach? Third, to what extent is Aristotle's approach in the *Rhetoric* different from that in his *Politics* and to what extent is it similar to that found in other rhetorical works such as the *Rhetorica ad Alexandrum* and Cicero's *De Oratore* and above all Quintilian? Finally, if one can accept this general distinction between a philosophical and a rhetorical approach in these works, and you may not, what was the reason why philosophy took the approach that it did and why did rhetoric take a different approach? These are the questions that I am going to leave open.

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1. Discussion of "Open Texture" – Hart (1961) 121-130

2. Laws as General Rules – Plato *Politicus* 295a, Aristotle *Politics* 1292a33

3. "Open Texture" in Athenian Law – Harris (2000), (2004a), (2004b)

4. The Lawgiver Should not Leave Exceptions to a Rule Undefined - Plato *Laws* 916d-e

kibdhle€an d¢ xrØ pãnta êndra dianohy∞nai ka‹ ceËdow ka‹ épãthn …w ßn ti g°now ˆn, toËto ⁄ tØn fÆmhn §pif°rein efl≈yasin ofl pollo€, kak«w l°gontew, …w §n kair“ gignÒmenon •kastote tÚ toioËton pollãkiw ín Ùry«w ¶xoi: tÚn kairÚn d¢ ka‹ ˜pou ka‹ ıpÒte étãktvw ka‹ éor€stvw §«ntew tª l°jei taÊt˙ pollå zhmioËnta€ te ka‹ zhmioËsin •t°rouw. nomoy°t˙ d¢ oÈk §gxvre› toËto éÒriston §çn, éll' µ me€zouw µ §lãttouw ˜rouw ée‹ diasafe›n, ka‹ dØ ka‹ nËn …r€syv.

Every man should think that counterfeiting and lying and deceit form in effect one group. the many are in the habit of applying the adage (they are wrong) that any such action, if done at the right time, would generally be correct. But by leaving the where and the when without order or definition they often do much damage to themselves and others because of this saying. But it is not permitted for the lawgiver to leave this undefined. On the contrary, one must always clarify the limits, either greter or smaller.

5. Law about Latent Defects in Sale of Slaves - Hyperides *Against Athenogenes* 15

metå d§ taËta ßterow nÒmow §st‹ per‹ œn ımologoËntew éllÆloiw sumbãllousin, ˜tan tiw pvlª éndrãpodon prol°gein §ãn ti ¶x˙ érr≈sthma, efi d¢ mÆ, énagvgØ toÊtou §st€n. ka€toi ˜pou tå parå t∞w tÊxhw nosÆmata ín mØ dhl≈s˙ tiw pvl«n ofik°thn énãgein ¶jesti,

Suda s.v. §nagvgØ ofik°tou:

toË pray°ntow ofik°tou, e‡ ti ßxei nÒshma, efi mØ proe€poi ı pvl«n, §f€hsin ı nÒmow t“ »nhsam°nƒ diakr€nesyai prÚw tÚn peptrakÒta, prÒteron épogracãmenon prÚw tåw érxåw tØn afit€an.

6. Plato's Rules on Latent Defects - Plato *Laws* 916a-b

"If a man sell a slave who is suffering from phthisis or stone or strangury or the 'sacred disease' (as it is called), or from any other illness, mental or physical, which most men would fail to notice, although it be prolonged and hard to cure – in case the purchaser be a doctor or a trainer, it shall not be possible for him to gain restitution for such a case, nor yet if the seller warned the purchaser of the facts. But if a professional person sell any such slave to a lay person, the buyer shall claim restitution within six months, saving only in the case of epilepsy, for which disease he shall be permitted to claim within twelve months. [case to be tried by doctors – penalties set forth] If a lay person sells to a lay person, there shall be the same right of restitution and trial as in the cases just mentioned; but the losing party shall pay the selling price only. If a man knowingly sells a murderer, if the buyer is aware of the fact, he shall have no claim to restitution for the purchase of a such a slave; but if the buyer is ignorant, he shall have the right for restitution as soon as the condition is observed, (. . .)

7. Definition of Impiety – Plato *Laws* 885b

yeoÁw ≤goÊmenow e‰nai katå nÒmouw oÈde‹w p≈pote oÛte ¶rgon éseb¢w eflrgãsato •kΔn oÛte logon éf∞ken ênomon, éllå ©n dÆ ti t«n tri«n pãsxvn, µ toËto ˜per e‰pon oÈx ≤goÊmenow, µ tÚ deÊteron ˆntaw oÈ front€zein ényr≈pvn, µ tr€ton eÈparamuyÆtouw e‰nai yus€aiw te ka‹ eÈxa›w paragom°nouw.

No one who believes that the gods exist according to the laws has ever yet willingly done a sacrilegious deed or uttered a word contrary to the law, but a person who is subject to one of the following conditions: either he does not believe what I have just said, or second, he believes that the gods exist but pay no attention to human beings, or third, believes that being easily influenced, they are led astray by sacrifices and prayers.

8. Athenian Categories of Homicide – *Constitution of the Athenians* 57

A) *phonos ek pronoias* – intentional homicide tried at the Areopagus – penalty: death or permanent exile
B) *phonos akousios* – unwilling homicide – tried at the Palladion – penalty: exile until settlement is reached with victim's relatives
C) *phonos dikaios* or *kata tous nomous* – homicide that is just or according to the laws tried at the Delphinion
d) *bouleusis phonou* – planning a homicide ("attempted murder") – penalty: unknown
On this category see Harris (2001)

Potential ambiguity in category A – Harris (2004b) 245-51

Cases involving category B: Antiphon *Second Tetralogy* (3), Antiphon 6.

9. Plato's Categories of Homicide

a) homicide that is willing, done with complete injustice, as the result of a plot against the victim (869e)

b) homicide committed in anger, with intent to kill (866d-868a)
c) homicide committed in anger, without intent to kill (866d-868a)
d) unwilling homicide that requires exile (865b)
e) unwilling homicide that incurs no guilt but requires purification (865a-b)
f) homicide committed correctly (*orthôs*) and requiring no purification (874b-c)

10. The Problem of Provocation – Plato *Laws* 867b

diÚ xalepo‹ dior€zein ofl t‟ yum‟ praxy°ntew fÒnoi, pÒteron •kous€ouw aÈtoÁw ≥ tinaw …w ékous€ouw nomoyetht°on.

For this reason murders committed in anger are difficult to classify whether the law should consider them willing or unwilling.

11. The Category of Unwilling Homicide – Plato *Laws* 865b-c

§ån d¢ aÈtÒxeir m°n, ênvn d¢ épokte€n˙ tiw ßterow ßteron, e‡te t‟ •autoË s≈mati cil‟, e‡te Ùrgãnƒ µ b°lei µ p≈matow µ s€tou dÒsei µ purÚw µ xeim«now prosbol¦ µ sterÆsei pneÊmatow, aÈtÚw t‟ •autoË s≈mati µ di' •t°rvn svmãtvn, p ãntvw ¶stv m¢n …w aÈtÒxeir, d€kaw d¢ tin°tv tåw toiãsde.

12. Posidonius' Complaint – Seneca *Ep*. 94.38

Legem enim brevem esse oportet, quo facilius ab imperitis teneatur. velut emissa divinitus vox sit: iubeat, non disputet. nihil videtur mihi frigidius, nihil ineptius quam lex cum prologo. mone, dic quid me velis fecisse: non disco, sed pareo.

"A law ought to be brief so that those who are ignorant can grasp it more easily. Let its word go forth as if it were divinely inspired: let it order, not engage in debate. I think there is nothing more tedious, more clumsy, than a law with a prologue. Show, say what you would like me to have done; I am not in school; I am here to obey."

13. Aristotle Appears to Endorse the Platonic Approach – Aristotle *Rhetoric* 1.1.7

14. Impossibility of Framing a Law to Cover all Possible Cases – Aristotle *Rhetoric* 1.13.13-4

énagka›on m¢n ¬ kayÒlou efipe›n, mØ ¬ d°, éll' …w §p‹ tÚ polÊ. ka‹ ˜sa mØ =ñdion dior€sai di' épeir€an, oÂon tÚ tr«sai sidÆrƒ phl€kƒ ka‹ po€ƒ tin€. Ípole€poi går ín ı afi∆n diariymoËnta. ín oÔn ¬ édiÒriston, d°˙ d¢ nomoyet∞sai, énãgkh èpl«w efipe›n, Àste kín daktÊlion ¶xvn §pãrhtai tØn xe›ra µ patãj˙, katå m¢n tÚn gegramm°non nÒmon ¶noxÒw §sti ka‹ édike›, katå d¢ tÚ élhy¢w oÈk édike›, ka‹ tÚ §pieik¢w toËto §st€n.

15. Nature of *Epieikeia* – Brunschvig (1996), Saunders (2001), Harris (2004a)

16. Examples of *Epieikeia* or 'Canons of Interpretation' – Aristotle *Rhetoric* 1.13.16-17

A. People should not be held responsible for acts beyond their control or whose consequences cannot be foreseen – Lysias 12.25; Antiphon 6.15; Dem. 18.274-75

B. Acts done with deliberate intent and those done through negligence do not deserve the same penalty – Demosthenes 21.36-41

C. The Intent of the Lawgiver should be Taken into Consideration – Aeschines 3.41-47

D. One Should Consider the Mental Element as well as Objective Element – Dinarchus 1.58 (Cf. Aristotle *Rhetoric* 1374a)

§f' oÂw te går de› suggn≈mhn ¶xein, §pieik∞ taËta, ka‹ tÚ tå èmartÆmata ka‹ tå édikÆmata mØ toË ‡sou éjioËn, mhd¢ tå étuxÆmata. ¶sti d' étuxÆmata m¢n ˜sa parãloga ka‹ mØ épÚ moxyhr€aw, èmartÆmata d¢ ˜sa mØ parãloga ka‹ mØ épÚ ponhr€aw, édikÆmata d¢ ˜sa mote parãloga épÚ ponhr€aw t' §st€n. (. . .) ka‹ tÚ mØ prÚw tÚn nÒmon éllå prÚw tÚn nomoy°thn skope›n, ka‹ mØ prÚw tÚn logon éllå prÚw tØn diãnoian toË nomoy°tou, ka‹ mØ prÚw tØn prçjin éllå prÚw tØn proa€resin, . . .

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