

The Dikasts' Oath

The oath sworn by Athens' judges included two fundamental clauses: first, that the judges cast their votes "according to the laws" (κατὰ τοὺς νόμους), and second, that they use their "most just understanding" (γνώμη τῇ δικαιοτάτῃ). The meaning of the first clause has been problematic enough as scholars have debated the extent to which the Athenian judges actually followed the "rule of law". But the meaning of the second clause has been perhaps a greater puzzle, from antiquity to the present. Interpreters have generally been divided over whether the "most just understanding" comes into play only where there are no laws covering a particular situation, or if it represents a general application of equity that is to govern all the judges' considerations. In this paper I wish to consider a third possibility for this second clause. The "most just understanding", I propose, referred, originally, neither to gaps in the laws nor to equity considerations but to the question of fact, the *quaestio facti*, which corresponds to the first clause, which deals with the question of law, the *quaestio iuris*. I say "originally" because the Athenians of the classical period seem at times to forget such an implication. They were sometimes as divided over the words' meaning as we are.

The usage of the word γνώμη is enormously varied. It would allow a meaning that would make a γνώμη analogous to a νόμος (Dem. 20.104), but it would also allow one that would bring it closer to a particular understanding of the facts in a case. It is clearly also used of the overall decision formed by the judges in casting their votes collectively. We could throw in several other meanings as well. What is clear, however, is that the idioms used in the oath, κατὰ τοὺς νόμους and γνώμη τῇ δικαιοτάτῃ, can be complementary. The judges can vote both according to the laws and with their most just understanding at the same time. If the clauses were meant to be disjunctive, they would more likely both have used either κατὰ with the accusative or the dative without a preposition. The two phrases are thus not to be seen as alternatives.

To sort out this puzzle further I'd like to begin by going carefully through what we know about the judges' oath and its formulation. Then I'd like to look at the possible historical background of the phrase γνώμη τῇ δικαιοτάτῃ. Finally, I'd like to look at several passages that seem to echo the phrase in various ways.

The judges' oath, which is referred to as the dikastic or heliastic oath, nowhere survives from the classical period in its complete form, or even in a form that includes both the most significant clauses in a single text. Nevertheless consensus has formed around the reconstruction by Max Fränkel from 1878 (1).

ψηφιοῦμαι κατὰ τοὺς νόμους καὶ τὰ ψηφίσματα τοῦ δήμου τοῦ Ἀθηναίων
καὶ τῆς βουλῆς τῶν πεντακοσίων. περὶ δ' ὧν ἂν νόμοι μὴ ᾧσι γνώμη τῇ
δικαιοτάτῃ. καὶ οὔτε χάριτος ἔνεκ' οὔτ' ἔχθρας. καὶ ψηφιοῦμαι περὶ αὐτῶν
ὧν ἂν ἡ δίωξις ᾗ καὶ ἀκροάσομαι τῶν τε κατηγορουμένων καὶ τῶν
ἀπολογουμένων ὁμοίως ἀμφοῖν. ὅμνυμι ταῦτα νῆ τὸν Δία. νῆ τὸν Ἀπόλλων.
νῆ τὴν Δήμητρα. καὶ εἴη μὲν μοι εὐορκοῦντι πολλὰ καὶ ἀγαθὰ. ἐπιοκοῦντι
δ' ἐξώλεια αὐτῶν τε καὶ γένει.

I will vote according to the laws and the votes of the Demos of Athenians and the Council of the 500, and concerning matters about which there be no laws by my most just *gnome*, and for the sake of neither favour nor enmity. And I will vote concerning the matters about which the prosecution is, and I will listen to both the accusers and defendants, both of them equally. I swear these things by Zeus,

Apollo, and Demeter, and may I have many good things if I swear well, but destruction for me and my family if I forswear.

Despite its elegance and its strong support among scholars, Fränkel's reconstruction of the oath is a complex pastiche. As your handouts indicate, he must paste together no less than six different elements from many different sources, hardly any of which offers more than one or two of the six elements by itself. Only Pollux (2), a second century AD lexicographer, offers both the major clauses together.

Fränkel derives the name "Heliastic Oath" from Hyperides and Harpocration (3), although Aeschines calls it "the oath of the *dikastai*", and some late lexicographers call it "the *dikastic* oath". From Dem. 24 (4), which purports to offer the oath itself, Fränkel draws the its opening clause. However, he rejects almost three more whole sections of text from this source on the ground that they are the mistaken elaboration of the late interpreter who inserted the oath into the Demosthenic text. Most scholars, including myself, are happy to follow him in this exclusion. Beyond Fränkel's researches, I have found the phrase "according to the laws" explicitly attested as belonging to the *dikasts'* oath 25 times in the orators, and I have also observed 16 instances in which the wording's inclusion in the oath is strongly implied. Fränkel also points out other formulae that are used, such as that the judges have sworn "to obey the laws" (πείσεσθαι τοῖς νόμοις 4 end). One could argue in addition that the many occurrences of the phrase that dot pretty well all the forensic orations are in one way or another attempts by the speakers to capitalize on this clause in the *dikasts'* oath. They want to suggest that their own behavior and their cases are consistent with it. This is all to say that the textual evidence for inclusion of this phrase in the judicial oath is enormous.

The relative clause "concerning matters about which there be no laws", on the other hand, appears in only two Demosthenic texts and in Pollux, who may well rely on Demosthenes (5). Fränkel thinks that these citations leave no doubt about its inclusion in the oath. I think there is room for doubt, about which I'll say more later. Fränkel also gives consideration to the problem of the mention of an absence of laws but not an absence of votes of the *Demos* or Council. But he sees no real problem for laws standing in in this place, and no one has challenged him on this point.

The next clause, with the words "by the most just understanding", stems from five Demosthenic texts out of all the orators and from Pollux, who is again likely to be relying on Demosthenes (6). Fränkel suggests that Demosthenes also offers at one point what is probably an echo of the clause in saying that none of the *dikastai* has sworn to vote anything other than "what he thinks is just", and Isocrates offers a similarly divergent wording. Aristotle also uses it in the *Politics*, but strangely changes the phrase to "best understanding" (γνώμῃ τῇ ἀρίστῃ) from "most just understanding" when he mentions the phrase, four times, in his *Rhetoric*. I shall come back to this clause later and argue that there are actually many more echoes of the phrase in the orators.

One of the five Demosthenic texts that mention this clause, Dem. 57, actually refers not to the law courts *per se* but to the voting of demesmen in a judicial capacity as they review their membership roles (7). Fränkel was happy to include it as evidence for the *dikasts'* oath, and I see no reason not to follow him. However, this text also includes the phrase "not for the sake of favour or enmity", which Fränkel also wants to include in the oath. The presence of this phrase in the oath is not supported by any other text in any explicit way. Fränkel admits as much, but supports the clause partly because it gives the oath at least implicit reference to the possibility of bribery. But that is not a cogent reason for its inclusion. Where a close phrase is

used in Aeschines 1.178, it is applied particularly to the process of legislation and not to judicial decision making. In Plato's *Apology*, Socrates argues that "the judge is not here to play favorites with justice, but to make trial of these matters. And he has sworn not to do favors to whoever has a good reputation, but to judge according to the laws." Socrates does not imply here that the wording of the oath is "not to do favors". He only wants to stress that the oath binds the judges to judge according to the laws. This, he infers, means that they are not to do favours. However, Socrates' wording might be an indication of a line of argumentation whose repeated appearance could lead to confusion.

Fränkel's formulation of the oath makes a full stop at this point and begins again, "and I will vote concerning the matters about which the prosecution is" (καὶ ψηφιοῦμαι περὶ αὐτῶν ὧν ἂν ἡ δίωξις ᾖ) (8). This wording is explicitly supported by four texts and draws indirect support from a fifth (4, 8). Fränkel's positioning of it after the other main clauses, however, is curious. It seems a primary point, that is, that the vote should be about the prosecution's charge, which should then be informed by the laws and so on. That it stems first from the texts of Demosthenes and Aeschines, and does not appear in the earlier orators, raises a suspicion that it was added to the oath after its initial wording. However, a passage from Lysurgus, which makes exactly the same rhetorical point, that the judges have sworn to consider only the matter at hand, does not use the same wording. His departure from the logographers who were contemporary with him is curious, and Demosthenes himself in 22.43 also manages to make the same point without this wording. We are again left with the suspicion that this language may not only be late, but may not be genuine at all.ⁱ

The next segment of Fränkel's text (9) has the judges listening to both sides equally. The passage enjoys the explicit support of four texts of the orators, and the indirect support of a fifth. One of the texts supporting it, Isoc. 15, also mentions that the oath is sworn yearly. In Dem. 18 the orator offers several of his own insights into the reasons that Solon had for using this segment in the oath: "not only that you shall discard all prejudice, not only that you shall return equal goodwill, but also that you allow each of the litigants to employ arrangement and defense as he has wished and chosen." This sort of elaboration must have complicated the job of the later interpolators, such as the one who formulated the text of the oath that appears in Dem. 24. It was difficult for them to sort out which phrases actually belonged to the oath and which came from the logographers' arguments about the significance of passages in the oath. It seems likely that some of the logographers' arguments will also have borrowed phrases and ideas from the rhetoricians' handbooks. If so, some wording that recurs may not actually have been in the oath but will have become canonized by the rhetoricians. We can thus be cautious even about passages that appear in more than one orator.

The last section of the oath deals with invocations to the gods and the imprecations of the judges against themselves (10). Andocides and Demosthenes give support that these were included in the oath, but only Pollux names the specific gods. Fränkel draws from several other sources that are not directly related to the dikasts' oath in order to support Pollux's inclusion of Zeus, Demeter, and Apollo. But later in the same speech, Andocides throws in a wrinkle (11). In a survey of different oaths the judges will have sworn, he also mentions the oath sworn by all the Athenians after the reconciliation of 403, and that of the members of the Boule. Then he makes the claim that the dikasts have sworn to the words, "I shall not recall wrongs nor shall I be follow anything else, but I shall vote according to the existing laws."

Fränkel makes no claim that this wording actually belonged to the heliastic oath, but according to his method he might have. In this case, however, there is no other support for it as part of the dikasts' oath. It seems rather that Andocides has seen implications in the general oath of the Athenians after the reconciliation of 403 and integrated its wording with the dikasts' oath. The passage seems analogous to that in Plato's *Apology*: the speaker invents first what the dikast swears not to do, as if the wording belonged to the oath, and then confirms this invention by saying what the dikast swears in fact to do, namely, to vote according to the laws.

The purpose of my step by step analysis of Fränkel's reconstruction has been to underline how diffuse the evidence is for the oath as a whole. In at least two cases we can see where logographers have interpolated passages into the oath. One of them Fränkel recognized as such and passed over. The other, the passage from Plato's *Apology* (7), he appears to have used to support a phrase he includes, but this phrase otherwise has the support of only one text. The central point I wish to make in this paper is that the wording γνώμη τῇ δικαιοτάτῃ originally referred to the dikasts' deciding questions of fact. An obvious impediment to this interpretation is the clause in Fränkel's reconstruction (5) that says that the γνώμη τῇ δικαιοτάτῃ is to be used in matters about which there are no laws. Perhaps one could argue that questions of fact are precisely those about which there are no laws. But that is not the point Demosthenes makes when he mentions the clause. He, like most scholars who have investigated this question, sees the γνώμη τῇ δικαιοτάτῃ within the realm of the *quaestio iuris*, the question of law, or right. If Fränkel is right about the presence of this clause in the oath, my interpretation of the γνώμη τῇ δικαιοτάτῃ cannot also be right.

However, it does seem to me possible to argue against Fränkel on this issue on several points. First, Demosthenes gives an altogether different and conflicting interpretation of the force of the phrase in 23.96 (6), where he says, "the thought of their gnome will be formed from what they will hear, and when in fact they place their votes according to this, they will be acting piously." This passage clearly sees the γνώμη τῇ δικαιοτάτῃ being related to the facts of the case, about which the judges hear, not to gaps in the laws. Second, in both Dem. 57 and 23 (7), the γνώμη τῇ δικαιοτάτῃ is identified with not following favor or enmity, again an interpretation that is at odds with its being related to gaps in the law. Third, although Aristotle's use of the phrase in the *Politics* could be said to be consistent with the gap-in-the-laws interpretation, none of his uses of the idea in the *Rhetoric* is consistent with it (12). Lastly, it seems pretty clear that the laws and the γνώμη τῇ δικαιοτάτῃ are to be used simultaneously; the γνώμη τῇ δικαιοτάτῃ is not to be used only to fill gaps in the law.

So it seems that the clause stating that the γνώμη τῇ δικαιοτάτῃ was to be used in matters about which there were no laws is probably only one *interpretation* of the clause that was advanced twice by Demosthenes and then picked up as if part of the oath by Pollux. It represents no insurmountable obstacle for interpreting γνώμη τῇ δικαιοτάτῃ as having to do with the *quaestio facti*.

There is precious little evidence for the early history of the judges' oath. The term heliastic is usually associated with Solon as his term for the popular court. That might indicate that the oath stems from his time, as some of the passages we have seen also indicate, but it does not give us much more. The terminology of the oath may be somewhat reflected in the fragment of Draco's law (13): "The Kings judge to

be causative of murder the agent or planner, and the Ephetai *diagnonai*.” The term *diagnonai* in Draco’s text seems to reflect some of the same ideas as in the later oath. The kings, acting on information sworn to by the victim’s family make a judgement *dikazein* about the cause of death, and then the Ephetai decide *diagnonai* whether or not the killing was voluntary or not, as the subsequent text makes clear. Not only in Draco’s law, but also in other passages, decisions or determinations of motive seem to be referred to using the verb *διαγιγνώσκειν*. In later Athenian law, public arbitrators are said to render a *γνώσις* (14). What both they and the Ephetai have in common is a certain freedom in their judgement. Whereas the kings form their judgement according to sworn statements of the prosecution, the Ephetai made a determination about the much more elusive question of motive, as the *dikasterion* of the Palladion does, whose verdict is also called a *gnosis*. Likewise, arbitrators need not select either the prosecutor’s side or the defendant’s but can freely formulate a compromise. Whenever a judge or arbitrator has such a free judgement, the terms *gnome*, *diagnonai*, or *gnosis* seems to appear. In the Law Code of Gortyn, the judge is to judge (*krinein*) on oath if there is no witness to a point or if witnesses appear on both sides (1.18-24). The Code seems to invoke an economy whereby either the witness takes responsibility or the judge does, on oath. The Gortyn Law Code does not use the language of *gnome*, but it employs a similar distinction whereby the judge takes responsibility for points of fact by swearing an oath to them.

Hesiod also has a suggestive passage (15), in which he says that whoever knows *γινώσκων* what is just and speaks it should win the gods’ blessing. He describes it all on the same conditions as an oath (*WD* 280-5). But he also mentions witness testimony, which might make us wonder whether he is actually talking about witnesses and not judges, but at the same time it confirms that what the speaker knows concerns the sort of specific facts about which witness testimony is given.

Aeschylus seems to offer language very close to Athens’ heliastic oath (16): the judges are to carry their just vote from their *gnome* *ἀπὸ γνώμης φέρειν ψῆφον δικάϊαν*). Obviously in the *Eumenides* the judges are making a determination about motive, the justice of Orestes’ particular act, which is consistent with the Draco text. Elsewhere in the *Eumenides* they are said to pick their vote and decide *diagnonai* the suit with respect for their oath (*καὶ ψῆφον αἶρειν καὶ διαγνῶναι δίκην αἰδουμένους τὸν ὅρκον* 709-10).

The historical background is thus fragmentary at best, but it is suggestive.

In order to get closer to the common understanding of the phrase *γνώμη τῇ δικαιοτάτῃ* among the orators, I’d like to survey several passages now in which the language of the phrase is more loosely echoed.

Andocides (17) strongly suggests the phrase at the beginning of his speech *On the Mysteries*. He has confidence he says that the judges will understand *γνώσεσθαι τὰ δίκαια* and thus rescue him justly and according to the laws. The words “according to the laws” are a clear reference to the judges’ oath. The specific object of the judges’ understanding is the unjust treatment Andocides has been subjected to. Further confirmation of this interpretation comes in sections 8-9, where Andocides clearly makes reference to the judges understanding the justice of his case, about the *πραχθέντα*, the facts. Antiphon makes a similar connection between the judges understanding justice and having regard to the fact of the case, *εἰς τόδε τὸ πρᾶγμα* (5.8).

In several passages (18), such as Isocrates, 19.16, the complementary nature of acting according to the laws and acting justly are emphasized. Many passages include

only the phrase “according to the laws” and leave out reference to the “just gnome”. But those that do add a further reference, however implicitly invoking these specific words, can guide our understanding of what they thought was meant by the phrase. For instance, in Dem. 23.2 he argues, “all of you, if you wish to learn correctly about these matters and to judge the suit according to the laws justly, you must not only direct your attention to the what things are written in the decree, but also look at their consequences.” Here the adverb δικαίως seems to stand in for the phrase γνώμη τῇ δικαιοτάτῃ. In order to judge justly the dikasts must, as the passage says, “learn correctly about these matters” (ὀρθῶς περὶ τούτων μαθεῖν) and look at consequences” (τὰ συμβησόμεν' ἐξ αὐτῶν σκοπεῖν). That is, they must learn the facts as distinct from the purely legal issues.

Some passages (19) seem to reflect the phrase by offering the word γνώμη in its verbal form κατὰ τοὺς νόμους γινώσκετε τὰ δίκαια (Dem. 33.38). The speechwriters are making an easy shift between the noun and the verb. In Dem. 43.34 there seems another version of this substitution, where the judges are urged to vote for whoever seems to speak more according to the laws and more justly. From the subsequent passages in the speech we learn that in a previous trial the judges had been deceived (43.38), and, reading on, we learn that through lies the opponents “said nothing just” (δίκαιον δὲ οὐδὲν ἔλεγον 43.42). A “just” statement here would be one that gave the dikasts accurate information about the facts of the case.

Staying with Dem. 43 for a moment, I'd like to look at the end of the speech and the appeal to the judges' oath there. The speaker appeals, “help the laws and take care for the dead . . . ; by doing these things you will vote what is just and what is consistent with your oaths.” Again, if the method of substitution is correct, then by a chiastic arrangement the reference to τὰ δίκαια refers to the specific facts related to the interests of the deceased. But, interestingly, adherence to the laws is referred to as τὰ εὖορκα (“consistent with the oath”). To me this suggests a closer connection between the oath and adherence to the laws than between the oath and the “just understanding”. Hyperides 4.40 provides a similar formulation: “having looked at the impeachment and the laws vote whatever to you seems just and consistent with the oath.” We know that laws are explicitly mentioned in the oath, so we can draw a connection between “laws” and εὖορκα. The impeachment, or *eisangelia*, will have included the statement of facts, leaving us again with statement of the facts and a connection to the phrase “what seems just”.

Dem. 52.2 (20) makes a very close connection between just γνώμη and deciding a case without a partisan bias. “I ask of you then, if ever you judged some other matter itself by itself, not by taking either side in your gnome, neither the prosecutors' nor the defendants', but having looked at the justice, in this way come to an understanding also now.” Besides making clear the absence of partisan bias, the text also makes clear the close connection between just gnome and the matter, the pragma, itself, that is, the question of fact.

In Dem. 58 (21) a young speaker invokes also the language of the oath, “if I speak just things and according to the laws, help me.” Again the surrounding passage allows us to make a connection between the δίκαια and the facts of the case as opposed to the laws. He urges the judges to look at the matter itself (αὐτοῦ τοῦ πράγματος) and not at the fact that it is only a young man who is presenting the case and not Demosthenes. The laws, he says, have the same authority regardless.

In some contexts (22) the gnome clearly represents not only the judges' understanding of the particular facts of the case, but also their judicial decision as a

whole. That seems what Isaeus is getting at when he says that his opponents are persuading the judges “to vote opposite to the laws, to justice, and to the gnome of the deceased” (1.26). He draws a parallel between the gnome of the deceased and the judges’ gnome.

Lys. 9.19 (23) refers to a judgement by the Treasury officials, but he uses much the same language as the judges’ oath. He writes, “don’t be aroused by their slanders to vote against me, and don’t invalidate those who have deliberated better and justly; for they did everything both according to the laws and according to what was probable.” Again, if the speaker is referring to the oath, both to the phrase “according to the laws” and to the phrase “by the most just understanding”, then the laws are identified here with what is better (βέλτιον) and “justly” is identified with what is probable (τὸ εἰκός), which refers to a determination of fact. Two sections later, he makes a clearer connection between “just things” and gnome, saying that he has confidence in the judges’ gnome that he will achieve “just things” τυχῶν μὲν γὰρ τῶν δικαίων (πιστεύω δὲ τῇ ὑμετέρα γνώμῃ) (9.21).

In Dem. 24.78 (24) the gnome seems to be identified as the organ by which a judicial decision, a gnosis, is reached. In the formulation of the oath, however, since a specific law is under debate, laws are substituted by *politeia*. The gnome, however, is concerning the particular matters upon which the judges vote. Again, that seems other than the question of law.

An extended passage at the end of Lysias 15 (25) exploits the judges’ oath repeatedly. Starting in 8 he suggests that understanding justice τὰ δίκαια γνῶσεσθαι means not giving special attention to what a person or group of people says, or doing favours for anyone. In 9 he turns to the laws and says that the judges must vote according to the existing laws. In 10 he adds a twist and says that they have sworn to vote what is best for the city, without regard to an individual. This argument seems a variant of the justice argument. In 11 he turns back to the laws, saying that they must be more important than the requests of individuals. Finally, in 12 he turns back to gnome again, insisting that the judges have the same gnome that they had when in great danger, an argument akin to that in 10, concerning what is best for the city.

In Isaeus 6.65 (26), the speaker emphasizes the religious implications of an inheritance and thus the piety of the judges in casting their votes. In his formulation there is no reference to gnome, but justice appears as a separate matter from the laws.

In Dem. 32.23 (27), the speaker argues that it would be shameful if Athenian judges decided (γνοίητε) that the property of Athenian citizens was to be given to pirates. Then he mentions a vote about things being actionable, which I infer to be a reference to laws. Something that is actionable is covered by laws, which is made clear in the next section. Finally he invokes the gods, as the judges do when swearing their oath. The whole passage seems strongly to suggest an extended reference to the oath, mentioning both the major clauses as well as the invocation. Here, however, he avoids the language of a “just” gnome and opts instead for the moral vocabulary αἰσχρὸν καὶ δεινόν.

Time to summarize. An Athenian trial consisted, as Demosthenes says (28), of a vote with an oath, an argument, and a judgement. Although the oath in its longer form likely took much the form that Fränkel formulated, its basic components were, first, to vote according to the laws, and second, by one’s “most just understanding”. The orators emphasize legal conformity far more than the “just gnome”, but if we are flexible, we can see hints of the “just gnome” in references to justice, as in Is. 11 (29).

But the thrust of this paper has been that the “just gnome” refers primarily to the *quaestio facti*, the determination of the facts of a case. Isaeus 3.12 (30) is one of a number of passages in which gnome appears in its verbal form and rests on witness testimony about facts.

The oath and a consistent pattern of argumentation make clear that the judges were expected to bring a well-understood methodology to bear in order to achieve a just understanding. They were to avoid prejudice and enmity or favour; they were to hear out both sides equally; and they were only to consider matters that were to the point.

In the Athenian legal context, however, facts are not as valueless as we might suppose them. The recurring phrase τὰ δίκαια γνῶσεσθαι indicates that what the judges were supposed “to understand” was not just the plain facts of the case but the inherent issues of justice in them. For this reason, when they used their “most just gnome” to come to a gnosis, they not only claimed an accurate understanding of the facts, but also made a judgement about their, in a sense, “natural” outcome according to justice. For this reason, gnome and diagnonai can also refer to judicial outcomes.

ⁱ AP says the litigants swear to speak to the point. The issue seems covered in this way. It would be curious if different wording were used in the judges’ oath.