Aristotle's Doctrine of Justice and the Law of Athens

A Lecture[1]

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I

In the fifth book of the *Nicomachean Ethics* Aristotle divides the virtue of justice into universal and particular justice. Universal justice includes all the virtues that exist in the relations between men; particular justice is a virtue among other virtues and appears in two species, distributive and corrective justice. The Philosopher implicitly defines the second species as the kind of justice to be practised in the sphere of the *synallagmata*.[2] This is why the mediaeval commentators usually speak of *iustitia commutativa*—"synallagmatic justice"—from *commutatio*, in their time the best-known translation of synallagma. In view of old expressions like "fraternal correction" and new expressions like "correctional facility" (an official euphemism for "jail"), I ought to say from the outset that corrective justice is not concerned with correcting an offender's character. On the contrary: we shall see that it covers precisely the field where Aristotle wishes to exclude Plato's view of punishment as education. Corrective justice corrects the inequality between two individuals that is the effect of a synallagma.

1. This lecture was given in the Department of Classics at Dalhousie University in 2008. I am grateful to all those who offered comments. I have to thank Patrick Atherton, Christian Habicht and David Mirhady for reading the text and giving valuable advice, and Michelle and Daniel Wilband for their help with the manuscript.

2. *Eth. Nic.* V 1131b33–34: "The just in transactions (*to en tois synallagmasi dikaion*) is also something equal." In this lecture, English quotations of *Ethics* are from the translation of Martin Ostwald (Indianapolis/New York, 1962). *Synallagma* and *synallagmatic* are used as technical terms in modern civil law countries. The French *Code civil* says in art. 1102: "Le contrat est *synallagmatique* ou *bilatéral* lorsque les contractants s'obligent réciproquement les uns envers les autres." This modern concept is ultimately descended from the synallagma of the Greeks, through the intermediary of the Roman jurists Labeo and Aristo. There is however a considerable difference between the two concepts, which has been studied by Hans-Peter Benöhr, *Das sogenannte Synallagma in den Konsensualkontrakten des klassischen römischen Rechts* (Hamburg, 1965). What I say in this lecture applies only to the Greek synallagma.

Aristotle gives no definition of a synallagma; but his two catalogues, one of voluntary, the other of involuntary synallagmata, are well known.[3] His voluntary synallagmata are all contracts; almost all the involuntary ones appear to us as crimes. The modern reader is surprised at the scarcity of typical torts, for tort is the area where Aristotle's principle of corrective justice, to take away the unjust gain of the party that took too much and to restore it to the injured party, is still widely accepted. That Aristotle included both contract and crime among the synallagmata has been doubted or censured many times. This problem will be the subject of my lecture.

Concerning crime, modern critics have asked: if we extend corrective justice to the criminal law, do we not make Aristotle say that satisfaction for the victim is the purpose of punishment? Now the Philosopher's attitude in regard to vengeance does not exclude such an interpretation. Revenge is sweet, as Homer says; and Aristotle echoes such language without objecting.[4] Unease in that respect has been felt for a long time. St. Thomas Aquinas was careful not to encourage the victim's craving for vengeance: once his restrictions are all taken into account, it is still possible to treat punishment in the context of commutative justice as he does, but it is no longer inevitable. In consequence a great variety of opinions arose. Each of the spheres of justice, commutative, distributive and universal, was declared by some authors to be the seat of criminal law, while other authors created a new, third species of particular justice, the *iustitia vindicativa*. From the thirteenth to the twentieth century philosophers and theologians in the scholastic tradition, as well as secular followers and interpreters of Aristotle, took a share in this effort of systematization without reaching agreement.[5] But even if the expositors were

3. *Eth. Nic.* V 1131a2–3: "Voluntary transactions are, for example, sale, purchase, lending at interest, giving security, lending without interest, depositing in trust, and letting for hire. They are called 'voluntary' because the initiative in these transactions is voluntary. Some involuntary transactions are clandestine, e.g., theft, adultery, poisoning, procuring, enticement of slaves, assassination, and bearing false witness, while others happen under constraint, e.g., assault, imprisonment, murder, violent robbery, maiming, defamation, and character-smearing."

4. *Iliad* XVIII, 103–10. Aristotle, *Rhetoric* I 1370b, 9–12; II 1378b, 5–7. Further references in: Georges Courtois, "La vengeance chez Aristote et Sénèque à la lumière de l'anthropologie juridique," *Archives de philosophie du droit* 28 (1983): 29–66.

5. On these debates see Giorgio del Vecchio, *Justice: An Historical and Philosophical Essay*, Edinburgh 1952 (tr. of the 1946 and 1951 versions of *La giustizia*), with a wealth of references. The idea that punitive justice is a part or subspecies of distributive justice was favoured by the Scotists; according to Del Vecchio it "seems the most probable" (66, note 10). This is Del Vecchio's own philosophical opinion, more fully explained in Appendix I (181–208). Del Vecchio is aware that Aristotle himself considered punishment a matter of 'equalizing' justice (see the first sentence of his note 10 on p.65). Among the authors who mention punishment in the context of distributive justice Leibniz is one of the most conspicuous (Hartmut Schiedermair, *Das Phänomen der Macht und die Idee des Rechts bei Gottfried Wilhelm Leibniz*. Studia Leibnitiana Supp. 7, Wiesbaden 1970, 122).

all agreed, we would still have to ask what Aristotle himself thought, and we may suspect that his answer would have mentioned vengeance.

As for contract, the objections against bringing that into the domain of corrective justice have been stated for instance by the Dominicans Gauthier and Jolif, authors of one of the most important modern commentaries on the *Nicomachean Ethics*. They write:

> On voit bien quel rôle elle [la justice corrective] joue dans les rapports qui contreviennent au gré de l'une des parties—comme le vol, le meurtre, etc…,—mais on aperçoit plus difficilement ce qu'elle vient faire dans la vente, le prêt et les autres transactions du même genre, qui supposent que les deux parties s'engagent de leur plein gré et en pleine connaissance de cause… . Le plus sage est, croyons-nous, d'avouer qu'il y a là un point que l'auteur de l'*Éthique à Nicomaque* n'a pas su éclaircir autant qu'il serait souhaitable.[6]

St. Thomas' opinion on the matter is clear and unambiguous. He says:

> *Voluntariae autem commutationes dicuntur quando aliquis voluntarie transfert rem suam in alterum. Et si quidem simpliciter in alterum transferat rem suam absque debito, sicut in donatione, non est actus iustitiae, sed liberalitatis. Intantum autem ad iustitiam voluntaria translatio pertinet inquantum est ibi aliquid de ratione debiti.*
>
> Voluntary commutations are when a man voluntarily transfers something he owns to another person. And if he transfer it simply [i.e., permanently], and so that the recipient incurs no debt, as in the case of gifts, it is an act not of justice but of liberality. A voluntary transfer belongs to justice in so far as it includes the notion of debt.[7]

A lease is an example of a *translatio cum debito:* the recipient's *debitum* consists in returning the object and in paying rent. Unjust keeping is a form of unjust taking. If I have had the benefit of a journeyman's services, I may not put off compensation, for it is written: "The wages of him that hath been hired by thee shall not abide with thee until the morning." To withhold the

6. Aristotle, *L'Éthique à Nicomaque*, intr., trad. et comm. par René Antoine Gauthier et Jean Yves Jolif, 2nd ed. (Louvain/ Paris, 1970) II 359. The commentary of book V is by Fr. Jolif.

7. *Summa Theologiae* [herein after ST] 2–2.61.3. The translation follows *The "Summa Theologica" of St. Thomas Aquinas, Part II, literally translated by Fathers of the English Dominican Province*, London, 1929, vol. X, 164.

debitum arising from a voluntary commutation is a sin of the same kind as robbery or theft.[8]

If it is "wisest" to assume with Gauthier and Jolif that Aristotle did not express himself clearly enough, the reason for such ambiguity might be that he relied on certain knowledge and opinions of his Greek hearers which modern readers no longer share. For this reason we must turn to the law of Athens, the law that was known to Aristotle as well as to his students. In the chronological order of their discovery, we shall cast a glance on some characteristic elements of Athenian law that contributed to shape Aristotle's notions of synallagma and corrective justice.

II

In Athens and other Greek cities the procedure known as *dike* was by far the most important and in many respects the only form of legal redress. A dike that every citizen could initiate was called a public dike; private dikai were available only to the injured party. Athenian dikai of both sorts came before a court or jury of several hundred members, who decided in a vote of the simplest kind, choosing between the motions of the two parties without being allowed to deliberate or to make an intermediate choice. The public dike was punitive; but, when compared with the Roman *actio*, the private dike too appears in that character.

The penal nature of the private dike was noticed in the seventeenth century by Didier Hérauld, the most sagacious lawyer among the early writers on Athenian law. Every private dike had to be initiated by a complaint, the *enklema*, naming a wrong—Hérauld's term is *fraus et delictum*—as cause of the dike. This is how Hérauld characterizes the *enklema:* "Though it was a civil procedure, it was nevertheless instituted by means of a complaint and almost an accusation." Later legal historians have expressed this thought by saying that all dikai were penal. In these circumstances Hérauld had to give special attention to the "action for damage," the *dike blabes*. He observed that it covered a very wide field, unlike its Roman equivalents, but more akin to

8. Returning the object is a *debitum*: "*quando aliquis tradit rem suam alteri concedens ei usum rei cum debito recuperandi rem*" (ST 2-2.61.3). The wages of him that hath been hired (Douay translation): "*Ille qui conducit opera mercenarii non potest differre restitutionem, ut patet per illud quod habetur Levit. 19* [v.13]: '*Non morabitur opus mercenarii tui apud te usque mane*'" (ST 2–2.62.8). Withholding a *debitum*: *"Deinde considerandum est de peccatis quae sunt circa voluntarias commutationes. Et primo, de fraudulentia quae committitur in emptionibus et venditionibus; secundo, de usura, quae fit in mutuis. Circa alias enim commutationes voluntarias non invenitur aliqua species peccati quae distinguatur a rapina vel furto"* (ST 2–2.77 introd.). Consequently, non-performance, in so far as it is sinful, belongs to the same *species* as *rapina* or *furtum*.

the French action for *dommages et intérêts*. In particular, he was aware that the *dike blabes* served to recover loans and other contractual debts.[9]

In the early nineteenth century Hérauld—"der treffliche Heraldus," as Boeckh calls him—was still the foremost authority on Athenian law, and August Wilhelm Heffter was following his tracks when he wrote that every dike was about an alleged wrong, an *adikema*, which required satisfaction.[10] Heffter's formula impressed two eminent jurists, Friedrich Julius Stahl and Rudolph von Jhering, who adopted it as revealing a fundamental principle of Greek law. According to Stahl's *Philosophie des Rechts*, legal proceedings are retributive, seeking atonement for wrongs of the past, or protective, safeguarding property rights. He sees Athenian law as characterized by re-

9. Desiderius Heraldus, *Observationes ad Ius Atticum et Romanum, in quibus Claudii Salmasii Miscellae Deffensiones, eiusque Specimen expenduntur* (Paris, Alliot & Chastellain, 1650), also referred to, by Hérauld himself, other authors, and cataloguers, as *Animadversiones.* On the *dike blabes*, p.208b (§ II): "Actio βλάβης erat valde generalis iure Attico, & dabatur omnibus, qui damnum aliquod acceperant, pro quo nulla action specialis competebat. Erat veluti action in factum, ad damnum sarciendum; nec ea solum complectebatur, quae lege Aquilia, aut edictis de his, qui [p.209a] eiecerint vel offenderint, de servo corrupto, & similibus comprehenduntur, sed omne omnino damnum, quo quis alterius culpa passus esset. Demosthenes contra Callippum [LII 14]: … Et certe βλάβας appellabant omnia, quae quis ex aliqua re damna accepisset, quae nos dicimus, *dommages* & *interests*." On the *enklema*, p.209a (§ IV): "etsi actio civilis erat, instituebatur tamen per modum querelae, et pene accusationis, ac dicebatur ἔγκλημα. … [p.209b (§ V)] Vides ergo ἔγκλημα appellari actionem civilem, sed cui fraus, & delictum causam dederat." If Hérauld does not call the Athenian dike penal, the reason is certainly that, unlike the Roman penal actions, the dike did not admit of a concurrent reipersecutory action. On Hérauld see Pierre Bayle's *Dictionnaire historique et critique* s.v. Heraldus.

10. *Die Athenäische Gerichtsverfassung. Ein Beytrag zur Geschichte des Rechts, insbesondere zur Entwickelung der Idee der Geschwornengerichte in alter Zeit* (Cologne, 1822), 116: "Bey jedem Rechtshandel, der zur richterlichen Kognizion gelangte, wurde *in der Regel* eine vorangegangene Rechtsverletzung unterstellt, ein ἀδίκημα, nicht blos in dem Falle, wenn das Gesetz eine Handlung oder Unterlassung rechtlicher Obliegenheiten ausdrücklich als strafbar erklärte, sondern auch dann, wenn man reinen Zivil-Verpflichtungen kein Genüge leistete; überhaupt also bey jeder freywilligen Verschuldung. Der Zweck des gerichtlichen Verfahrens war die *Ahndung der Schuld*; …" The Greeks, therefore, had no actions *in rem:* "Es charakterisirt die Athenäische Rechtsverfassung so wie die der meisten griechischen Volksstämme eigenthümlich: dass sie alle Rechte nur an Personen knüpfte und insonderheit *subjektiv-dingliche* Rechte als ein Unding verwarf oder doch gar nicht kannte. Die freye Person sollte über alles herrschen; alles irdische Besitzthum tief von ihr abhängig seyn. Daher kommt es: dass wir nirgends eine Ahnung von einem positiven Unterschiede zwischen Real- und Personal-Klagen entdecken können. Wäre hier der Ort, das griechische Volksthum und die Ausbildung seiner Urideen näher darzulegen: ich getraute mich, sie auch in der Athenäischen Rechtsverfassung zu entwickeln; …" (263). On Heffter, see Gerhard Thür, "Juristische Gräzistik im frühen 19. Jahrhundert," in Michael Stolleis, ed., *Die Bedeutung der Wörter: Studien zur europäischen Rechtsgeschichte: Festschrift für Sten Gagnér* (Munich, 1991), 529–30.

tributive procedures and Roman law as typically protective.[11] Stahl's theory on the retributive and protective function of justice can be traced back to a Roman division of civil actions, which is also the subject of Jhering's essay *Das Schuldmoment im römischen Privatrecht*. Penal actions "pursue a penalty"; reipersecutory actions, as they are called in the Civil law tradition, "pursue the thing", which can be property, compensatory damages or a contractual debt.[12] The penal actions are earliest; in Roman law they gradually gave place to reipersecutory actions on one side, criminal prosecution on the other. Jhering sees their decline as part of a general progress of civilization; the Greeks, he says, "never rose to the height of purely reipersecutory actions," in spite of their other achievements. In his view, Greek actions for contract were delictal and penal, and he must have thought the same about actions protecting property.[13]

11. *Die Philosophie des Rechts* (5th ed. 1878, repr. Darmstadt 1963), II 1.163–64: "Der Gedanke der schützenden Gerechtigkeit erscheint in seiner Klarheit und Bestimmtheit erst in der römischen Weltepoche, weil erst hier die subjektive Berechtigung ihre volle Anerkennung erhält. … Dagegen das Recht der Athenienser ist vorherrschend durch den Gedanken der vergeltenden Gerechtigkeit bestimmt. Es entspricht das ihrem ganzen Lebensprinzip. … Was sie im Innersten erfüllt, das ist der Gedanke der Nemesis, der Gedanke, dass auf menschliche Schuld nach ewiger Ordnung die Strafe und das Verderben unaufhaltbar, unerlässlich folgen. Wie dieser Gedanke in ihrer Poesie mit ergreifender Wirkung waltet, so ist auch die vergeltende Gerechtigkeit das Princip ihres Rechts. … Darum ist ein vollständiges Vergeltungssystem, ein System der öffentlichen Belohnungen und Strafen, bei ihnen durchgebildet, wie nirgend anders. Darum trägt selbst die Civilrechtspflege, die doch ihrer Natur nach der schützenden Gerechtigkeit dient, bei ihnen wenigstens die Form der Vergeltung, es gibt nämlich, die Diadikasien ausgenommen, keine Klage ohne ἀδίκημα… ." Recent publications on Stahl: Wilhelm Füssl, *Professor in der Politik: Friedrich Julius Stahl (1802–1861)* (Munich, 1988); Christoph Link, "Friedrich Julius Stahl: Christlicher Staat und Partei der Legitimität," in Helmut Heinrichs et al., eds., *Deutsche Juristen jüdischer Herkunft* (Munich, 1993), 59–83. In English: Peter F. Drucker, "Friedrich Julius Stahl: His Conservative Theory of the State," *Society* (New Brunswick, NJ) 39 (July/August 2002): 46–57, tr. of *Friedrich Julius Stahl: Konservative Staatslehre und geschichtliche Entwicklung* (Tübingen, 1933); Ruben Alvarado, *Authority not Majority: The Life and Times of Friedrich Julius Stahl* (Aalten, 2007). Alvarado is publishing an English translation of *Die Philosophie des Rechts* (*The Philosophy of Law*, Aalten, 2007–).

12. For Stahl as well as for the civilians some actions can perform both functions. The origin of Stahl's terminology is shown by the fact that Savigny and some of his contemporaries use the term "erhaltende Klagen" in the sense of "reipersekutorische Klagen": Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, V (Berlin, 1841), 38–41.

13. *Vermischte Schriften juristischen Inhalts* (Leipzig, 1879), 230–31, where, in a "Nachtrag" to the original text of *Das Schuldmoment*, Jhering says about Greek Law: "Jede Klage mit Ausnahme einer gewissen Kategorie von Klagen (διαδικασίαι), also auch die Klage aus dem Contract, hat zu ihrem Grunde die zu Behauptung einer von dem Gegner verschuldeten Rechtsverletzung (ἀδίκημα) und ihrem Zweck die Ahndung der Schuld mittelst Schätzung derselben (τίμημα), … . Jede derartige Klage war daher eine Delictsklage, jedes Unrecht, auch das objective, ward unter den Gesichtspunkt des Delicts gebracht, jede Verurtheilung unter den der Strafe. … Unähnlich dem römischen, hat das griechische Recht das Strafelement im Privatrecht und

The tradition reaching from Hérauld to Jhering was interrupted, when the brilliant and seductive doctoral dissertation of Gerhard Alexander Leist convinced two generations of scholars that the procedure known as *diadikasia* had served as a general action for ownership, and hence as a reipersecutory action.[14] Jhering's contribution was soon forgotten. There, in two pages, Jhering had sketched a ground-plan; but now the various elements of his insight had to be discovered anew. In that respect, Louis Gernet made a beginning in his "thèse" of 1917, and continued to lay weight on the delictal nature of the dike. Hans Julius Wolff advanced in the same direction; his study of the *dike blabes* led up to a theory of Greek contract, which won Gernet's approval.[15]

According to Wolff the binding force of a Greek contract was not the result of a promise or a concurrence of wills: the contract took effect when one party transferred to the other an object or an advantage for an agreed

Civilprocess nie ausgeschieden, sich also nie zu rein reipersecutorischen Klagen erhoben. Auch auf dem Höhepunkt seiner Cultur hat es den Gesichtspunkt, dass jeder Anspruch auf einem ἀδίκημα von Seiten des Gegners beruht, beibehalten." Before Jhering, Eduard Gans had drawn similar conclusions from Heffter's study of the dikai: "Es gibt keine Realklagen, sondern nur Personalklagen. Ein Unterschied zwischen persönlichen und dinglichen Klagen existiert noch nicht. Das attische Recht kannte nur *actiones personales*, keine Vindikationsklagen.": Gans, *Naturrecht und Universalrechtsgeschichte: Vorlesungen nach G.W.F. Hegel*, ed. Johann Braun (Tübingen, 2005). In a last addition to his "Nachtrag," Jhering announced that he had changed his mind on the penal remnants in modern private law: in some cases, he said, they could be useful, in view of "the lawlessness of our present age in business life": p. 239–40. Jhering's ideas on the evolution of law have received much attention in recent years. See Okko Behrends, "Rudolf von Jhering und die Evolutionstheorie des Rechts," in Günther Patzig, ed., *Der Evolutionsgedanke in den Wissenschaften* (Göttingen, 1991), 80–100; Gerhard Luf and Werner Ogris, eds., *Der Kampf ums Recht: Forschungsband aus Anlass des 100. Todestages von Rudolf von Jhering* (Berlin, 1995, bibliographical references by Alexander Somek on p. 57 note 2); Okko Behrends, ed., *Jherings Rechtsdenken: Theorie und Pragmatik im Dienste evolutionärer Rechtsethik* (Göttingen, 1996, bibliographical references by Ralf Dreier on p. 222 note 2).

14. *Der attische Eigentumsstreit im System der Diadikasien* (Jena, 1886, Diss. Tübingen).

15. Louis Gernet, *Recherches sur le développement de la pensée juridique et morale en Grèce (Études sémantique)* (Paris, 1917), especially the first part: "Les notions de délit et de peine." Cf. "Sur la notion du jugement en droit grec," in L. Gernet, *Droit et société dans la Grèce ancienne* (Paris, 1955, repr. 1964), 72–73: "… Aristote a défini les concepts d'obligation contractuelle et d'obligation délictuelle. Mais je pense qu'en vérité, toutes les δίκαι sont du type délictuel: l'action dite pénale est la forme dans laquelle se déduisent les droits en justice, comme on dirait en langage moderne, toutes les fois qu'un rôle de demandeur peut-être attribué à l'une des parties. … Dans la pratique, c'est à une seule catégorie de δίκαι que nous avons affaire: le même schème de l'action est commun à toutes; l'action elle-même a pour base un ἔγκλημα, une 'plainte', qui comporte les mêmes éléments sous les mêmes formes et se termine régulièrement par la mention du τίμημα, c'est-à-dire de la réparation exigée." At this point we can refer to Hérauld's remarks on the *enklema*. On Gernet and Wolff, see Gernet's "Note sur la notion de délit privé en droit grec," in *Droits de l'antiquité et sociologie juridique: Mélanges Henri Lévy-Bruhl* (Paris, 1959), 393–405, esp. 403–05.

purpose so as to suffer damage (*blabe*), if the recipient did not fulfil his duties. This transfer makes the parties debtor and creditor; Wolff calls it an "act of disposal" or a "disposition for a determined purpose."[16]

Another step in the same direction was taken when Arnold Kränzlein challenged and Gerhard Thür refuted the notion that the *diadikasia* had been a general action for ownership.[17] Their work strengthened the evidence for the delictal character of all dikai and for that peculiar closeness and similarity of public and private dikai which had prompted Hérauld to call the private *enklema* "civil, yet almost an accusation." Eberhard Ruschenbusch observed this close resemblance from the other side, as it were, when examining the public dike. Hérauld's formula *paene accusatio* can be complemented by Ruschenbusch's discovery that, in the history of the Athenian public dikai, the accuser gradually moved into the position of a plaintiff, according to the

16. Wolff's German term is "Zweckverfügung": "Die Grundlagen des griechischen Vertragsrechts," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* [herein after SZ], *Romanistische Abteilung* 74 (1957): 63–65. When writing in English he says "act of disposal" and "disposition for a determined purpose": "Debt and Assumpsit in the Light of Comparative Legal History," *The Irish Jurist* 3 (1966): 131–32, reprinted in his *Opuscula Dispersa* (Amsterdam, 1974). These expressions take their origin from the precise and technical meaning of the word "Verfügung" in German legal science, not from its manifold and variable use in literary or everyday German. "The relationship of obligation (*Verpflichtungsgeschäft*) concerns the obligation to transfer or alter a proprietary interest but does not, of itself, achieve the transfer or alteration. The actual transfer occurs exclusively by virtue of the transfer transaction (*Verfügung*)…": Sir Basil Markesinis, Hannes Unberath, Angus Johnston, *The German Law of Contract: A Comparative Treatise*, 2nd ed. (Oxford/Portland, Oregon, 2006), 29. See especially Walter Wilhelm, "Begriff und Theorie der Verfügung," in Helmut Coing and Walter Wilhelm, eds., *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert* II (Frankfurt, 1977), 213–31. The concept of "Verfügung" has also been adopted in other countries. Austria: Franz Gschnitzer, *Allgemeiner Teil des bürgerlichen Rechts*, 2nd ed. (Vienna/New York, 1992), 451, 483. Switzerland: Pierre Engel, *Traité des obligations en droit suisse*, 2nd ed. (Berne, 1997), 145–47 ("l'acte de disposition"); Daniel Staehelin, *Bedingte Verfügungen* (Zurich, 1993) 1-13. On a more independent Italian tradition: Gino Gorla, *L'Atto di disposizione dei diritti* (Perugia, 1936, Annali della R. Università di Perugia, vol. XXXVI, Serie 5, vol. 13). Summaries of Wolff's doctrine: Gerhard Thür, "Recht im antiken Griechenland," in Ulrich Manthe, ed., *Die Rechtskulturen der Antike* (Munich, 2003), 237–38; H.J. Wolff, "Greek Law," in *Encyclopaedia Britannica*, *Macropaedia* 15th ed., 8 (1974), 398–402 (Regrettably, this most useful article has been dropped from the *Macropaedia* and is now hard to find). More detailed: Wolff, "Recht I, Griechisches Recht," in *Lexikon der Alten Welt* (Zurich/Stuttgart, Artemis 1965), 2526–28. Alternatives to the term "Zweckverfügung" are discussed by Arnold Kränzlein, "Zu den Privatpacht-Hypomnemata der ersten zwei nachchristlichen Jahrhunderte," in *Symposion 1977: Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Cologne/Vienna, 1982), 307–324, esp. 307–12.

17. Arnold Kränzlein, *Eigentum und Besitz im griechischen Recht* (Berlin, 1963), 140–43; Gerhard Thür, "Kannte das altgriechische Recht die Eigentumsdiadikasie?", *Symposion 1977*, 55–69. If, as I suspect, the *dike karpou* turns out to be a kind of subspecies of the *dike blabes*, the main difference between Kränzlein's and Thür's interpretation will disappear.

pattern of the private dike. The Roman and modern distinction between crimes and civil wrongs does not fit Athenian law.[18]

All these labours to establish the retributive nature of the dike were set into a wider context, when, in more recent years, scholars gave particular attention to the Greeks' preoccupation with honour and vengeance and to their manner of viewing a trial as a contest, an *agon*. As legal historians we tend to see vengeance as something that existed in a remote and primitive past and vanished after giving birth to better things: civil and criminal procedure. But now a number of excellent studies have taught us more about Athenian lawsuits of the classical age as a means to inflict vengeance and retribution and to assert one's honour. The art of deciding a dispute about property without staging a contest for honour and status was discovered by the Romans; the Greeks neither knew nor desired it. From that side, too, light is shed on the Greek preference for retributive justice.[19]

III

Each of these contributions to Greek legal history is important to the understanding of Aristotle's corrective justice; but none is more obviously relevant to our problem than Wolff's theory of Greek contract. Wolff did not know St. Thomas' concept of *translatio cum debito;* but his own term "an act of disposal for a determined purpose" sounds like a paraphrase and almost a translation of St. Thomas' Latin formula. St. Thomas and Wolff make use of the same thought, the one to explain Aristotle's voluntary synallagma, the other to explain Greek contract as he found it in the forensic speeches of the Attic orators, in inscriptions and in the papyri. The two interpretations give each other a great amount of support. Their coincidence was noticed by Michel Villey, the French philosopher of law.[20]

18. Eberhard Ruschenbusch, *Untersuchungen zur Geschichte des Athenischen Strafrechts* (Graezistische Abhandlungen 4, Cologne, 1968), 47–64. The writings of Ruschenbusch quoted in this lecture have been reprinted in his *Kleine Schriften zur griechischen Rechtsgeschichte* (Wiesbaden, 2005). *Idem*, "Das Vergehen und dessen Ahndung im griechischen Recht," *Das Gymnasium* 95 (1988): 369–74; S.C. Todd, *The Shape of Athenian Law* (Oxford, 1993), 67–70, 109–12; David Cohen, "Crime, Punishment and the Rule of Law in Classical Athens," in Michael Gagarin and David Cohen, eds., *The Cambridge Companion to Ancient Greek Law* (Cambridge, 2005), 211–35.

19. As an introduction to these problems one can read David Cohen, *Law, Violence and Community in Classical Athens* (Cambridge, 1995), esp. ch. 5 "Litigation as feud," and Christel Brüggenbrock, *Die Ehre in den Zeiten der Demokratie: Das Verhältnis von athenischer Polis und Ehre in klassischer Zeit* (Göttingen, 2006), esp. ch. VI "Die ehrenhafte Art der Konfliktführung: Rache oder Recht?"

20. *La formation de la pensée juridique moderne*, 4th ed. (Paris, 1975), 467. Cf. Gernet, "Note sur la notion de délit privé," quoted above in note 15.

Wolff's best-known critic, Arnaldo Biscardi, was calling for more proof and pointing out dangers of Wolff's terminology, rather than presenting a fundamentally different thesis. When he came to make a positive statement of his own, it was not far from Wolff's position. Biscardi had made a fruitful study of the term synallagma; he knew and accepted St. Thomas' interpretation of *commutatio*. This is why he could say that, in a voluntary synallagma, the debtor's liability resulted not so much from a bilateral manifestation of wills as from the creditor's initial performance, which called for a counter-performance.[21] This language in relation to Aristotle can be used as a cautious way of expressing Wolff's central idea on Greek contract. From different sides, both Wolff and Biscardi were approaching the same point indicated by the *Doctor communis*.[22]

21. Arnaldo Biscardi, "Quod Graeci synallagma vocant," in Pan. D. Dimakis, ed., Μνήμη *Georges A. Petropoulos* I (Athens, 1984), 50 (also *Labeo* 29, 1983): "… la nozione di συνάλλαγμα—equivalente al latino *commutatio* nella traduzione scolastica, perpetuatasi dall' *Ethica* aristotelica alla *Summa theologica* di S. Tommaso d'Aquino—rappresenta il 'giusto correttivo' degli squilibri nell' ordine sociale in senso lato: difatti, come la legge ricollega all' atto illecito il sorgere di un' obbligazione equilibratrice per il delinquente, così la controprestazione della parte che ha ricevuto la prestazione dell' altro contraente costituisce, più che la manifestazione bilaterale di volontà, il presupposto e l'essenza del rapporto obbligatorio da atto lecito." In the debate on Greek contract, Biscardi's peculiar strength is his understanding of synallagma, both in Aristotle and in the Roman jurists. The way was prepared by Alberto Maffi, who says in his perspicacious essay, "'Synallagma' e obbligazioni in Aristotele": "È dunque il fatto oggettivo di aver acquisito un vantaggio che vincola il ricevente alla controprestazione." (*Atti del II seminario Romanistico Gardesano*, Università degli Studi di Milano, Pubblicazioni dell' Istituto di Diritto Romano 15, Milan, 1980), 19. Maffi objects however to Gernet's "intento di conciliare la teorizzazione aristotelica del synallagma con la teoria delle obbligazioni esposta da Wolff nell' articolo di 1957" (*ibid.* 30). It is true that Aristotle's "idea motrice" is "l'equilibrio dello scambio" (*ibid.* 23, note 11), whereas the Greek law of contract, as described by Wolff, is dominated by the notion of *blabe*. But the benefits of that equilibrium and the damage caused by its disturbance are only the good and the bad side of the same thing. Had this not been Aristotle's view, he could hardly have written: πρὸς τοῦ βλάβους τὴν διαφορὰν μόνον βλέπει ὁ νόμος (*Eth. Nic.* V 1132a4). Moreover, when speaking about a legal precept or principle, a philosopher will normally say more on its foundations and purposes than the legislator, whose most obvious duty it is to deal with violations, such as *blabe*.

22. Apart from what he found in Aristotle, St. Thomas could not know anything about positive Greek law. He wrote about justice and understood what the term *commutatio*, synallagma, had to mean in the context of Aristotle's doctrine. However, certain differences between St. Thomas' and Aristotle's doctrine are due to their different legal background. For the law known to the Athenians and to Aristotle, the only way to enforce a contract was to award a sum of money to the creditor. Therefore, Aristotle could give his doctrine of contract a very simple shape. But in later Roman law and in the Canon law the courts, as a rule, enforced specific performance. Enforcement therefore gained a certain independence from damage. Once there was damage, a claim could be based on justice; but even where no damage had occurred, the virtue of truthfulness could require performance of a contract. According to St. Thomas and the Thomists, Natural law is in favour of enforcing such a claim, on the strength of the promise. On

The debate about Wolff's thesis continues and has become more lively in recent years.[23] It still turns on the consensual contract, a concept that is not always understood in the same sense.[24] In Wolff's writings, that concept implies all the essentials of the Roman consensual contract. According to the Roman primers of law, the *Institutiones*, contracts are made in four ways: *verbis*, *litteris*, *re*, and *consensu*. In the first three *species*, consensus has to be accompanied by another element, such as handing over a thing in the "real contract"; in the fourth species consensus is sufficient by itself. Greek contract, as seen by Wolff, is closer to the real than to the consensual contract, on account of the act of disposal or transfer.[25] Moreover, in the Roman consensual contract, more visibly and obviously than in the real contract, the creditor's *actio* results directly and immediately from the agreement, without the intermediary of damage.[26] This is of great importance to Wolff's theory, which originated from a study of the *dike blabes*. In Rome, the consensual contract presupposes a clear distinction between contractual and delictal liability. The Roman contractual creditor sues for performance, not for damages. It is only at the end of the procedure that the traces of an older concept become visible: then, the *iudex* assesses the value of the claim

the problems resulting from this position, see John Barton, ed., *Towards a General Law of Contract* (Berlin, 1990), esp. the contribution of James Gordley, "Natural Law Origins of the Common Law of Contract," 367–465; Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991), esp. 73, 103, 106; *idem*, "Contract Law in the Aristotelian Tradition," in Peter Benson, ed., *The Theory of Contract Law: New Essays* (Cambridge, 2001), 265–334, esp. 327; *idem*, "A Perennial Misstep: From Cajetan to Fuller and Perdue to 'Efficient Breach'," *Issues in Legal Scholarship* (Berkeley Electronic Press), Symposium: Fuller and Perdue, 2001, Article 4.

23. The idea of a Greek consensual contract still has its defenders. See the debate between Edward E. Cohen ("Consensual Contracts at Athens") and Éva Jakab ("Antwort auf Edward Cohen") in *Symposion 2003* (Vienna, 2006), 73–91. Cf. Photios P. Katzouros' learned and independent-minded defence of the *dike synthekon parabaseos:* "Pollux et la 'δίκη συνθηκῶν παραβάσεως'," in *Symposion 1979* (Cologne/Vienna, 1983) and "Le rhéteur Ménandre et la δίκη συνθηκῶν παραβάσεως," in Μνήμη *Georges A. Petropoulos* I, 457–64.

24. This important observation was made by Edwin Carawan, in "The Athenian Law of Agreement," *Greek, Roman and Byzantine Studies* 46 (2006): 341: "…the two sides may be arguing at cross-purposes. By 'consensual contract' the realists seem to mean one thing and the consensualists something else." For "at least" three meanings of the term "consensual" see A.W.B. Simpson, *A History of the Common Law of Contract* (Oxford, 1975), 166, note. 1.

25. "Grundlagen des griechischen Vertragsrechts," *SZ Rom. Abt.* 74 (1957): 65. Wolff points out that the Roman innominate contract is even closer to his "Zweckverfügung" than the real contract (*ibid.,* 66).

26. Max Kaser, *Das römische Privatrecht* I, 2nd ed.(Munich, 1971), 526: "Bei den Konsensualkontrakten genügt daher der formfrei erklärte consensus, die Einigung im Willen, um ohne Sachleistung und ohne Formalakt die Verbindlichkeit zu erzeugen. … Der Leitgedanke des formfrei verpflichtenden Leistungsversprechens beherrscht nicht nur die Konsensualkontrakte, er wirkt auch bei der Loslösung der Realkontrakte von ihren vermutbaren deliktischen Wurzeln mit… . "

and awards a single sum of money.[27] In Athens, however, every private dike aimed, in all probability, at damages or rather at a composition, in money. It had that character from its beginning; the plaintiff's assessment had to be written on the initial bill of complaint, the *enklema*.[28] The size of the popular courts and their rigorously simple and uniform way of deciding would have made it difficult for them to specify what had to be performed. Once those courts had the shape we know from the Attic orators, it was hardly possible for a consensual contract in the Roman sense to develop. As far as Athens is concerned, this seems to me a strong argument in Wolff's favour. If we understand the term "consensual" as Wolff expected it to be understood, we have to conclude that no Athenian contract can be called consensual, since the Athenian debtor's liability is always a liability for damage.

This conclusion can be viewed in a wider context. The absence of the consensual contract, observed by Wolff, the absence of actions for specific performance, observed by Gernet and acknowledged by Wolff, the absence of "protective" and reipersecutory actions, observed in various ways by Stahl, Jhering, Kränzlein and Thür, the lasting presence and influence of revenge, explored in recent years—all these characteristic traits of Greek law are in some degree the consequence of the Athenians' political option for large popular courts and powerless magistrates.[29]

27. Kaser, *op. cit.* 224: "Mit der Zeit nimmt *actio* neben der prozessualen auch eine materiellrechtliche Bedeutung an und bezeichnet das Recht, vom Gegner das zu erzwingen, was mit dem Prozessverfahren erreicht werden kann. Das ist bei den Leistungsklagen die dem Kläger zustehende Leistung, (note 8:) nicht etwa nur die Geldsumme, in die der Beklagte in der *condemnatio pecuniaria* verurteilt wird." Cf. Kaser, *Das Römische Zivilprozessrecht*, 2nd ed. (Munich, 1996), 371–73.

28. Justus Hermann Lipsius, *Das Attische Recht und Rechtsverfahren* (Leipzig, 1905–1915), 252.

29. The mention of vengeance in this context requires a word of explanation. The Greeks were more preoccupied with vengeance than the Romans, and it is true that this trait is prior to all influences of legal procedure. Cf. Hans-Joachim Gehrke, "Die Griechen und die Rache: Ein Versuch in historischer Psychologie," *Saeculum* 38 (1987): 121–43. But the democratic character of Athenian procedure is one reason why the consideration of revenge for the victim was never abandoned in Athens. Wolfgang Kunkel explains the origin of the Roman *iudicia publica* as the rise of "a drastic police-jurisdiction directed against those guilty of crimes of violence, arson, poisoning, and theft" (*An Introduction to Roman Legal and Constitutional History* [Oxford, 1966, tr. J.M. Kelly], 61, based on Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* [Munich, 1962], esp. 133–37). The principle of that jurisdiction was public order, not vengeance for the victim, and it became possible to distinguish a criminal and a civil sphere in the modern sense. In Athens, the weak position of the magistrates did not allow anything like "a drastic police jurisdiction." Another consideration may be added: to the Athenians democracy did not mean elections but sortition. In Rome, the *nobiles* could compete with each other for office; for the Athenian upper class the *agon* before the jurors fulfilled a similar purpose. (Cf. the comparison with Rome at the end of David Cohen's *Law, Violence and Community in Classical Athens*, 193–94.) The more we recognize

IV

So far the discussion has accounted for the presence of contract among Aristotle's synallagmata. We are still faced with the numerous "involuntary" synallagmata on his list that would be called crimes today. Here again, Athenian law can help our understanding of Aristotle.

The work of Ruschenbusch has given us the certainty that the Roman and modern distinction of criminal and civil procedures, and hence of crimes and civil wrongs, cannot be applied to Greek law. The Athenians distinguished between private dikai, concerning wrongs against individuals and needing to be instituted by the injured party, and, on the other hand, public dikai, available to every citizen and concerned with acts directed against the whole community, like treason or theft of public funds. The private dikai aimed at giving satisfaction to the victim. Collective self-defence and collective vengeance were the most visible purposes of the public dikai, with conscious deterrence becoming more and more important.[30] The fact that some wrongs done to individuals affect the community as well was taken into account in various manners;[31] but the general principle remained the same: when an individual was the victim of an offence, he sued in a private dike. The exceptions to that rule show the importance of revenge in Athenian litigation. In a number of cases where the victim normally could not sue, for reasons of law or of fact, every citizen was allowed to raise a public dike. This reforming measure was ascribed to Solon, and the Aristotelian "Athenaion Politeia" says characteristically: "he gave permission for anyone who wished to seek vengeance for those who were wronged."[32] The verb used here is *timorein*, "to

how strongly Athenian law was shaped by the democratic character of the courts, the more we wish to be better informed on procedure in pre-democratic cities. Hence the great interest of the recent debate on the existence of "protective" and retributive procedures in Gortyn: G. Thür, "Eigentumsstreit und Statusprozess in der grossen Gesetzesinschrift aus Gortyn," *Dike* 5 (2002): 95–109 and A. Maffi, "Processo di status e rivendicazione in proprietà nel codice di Gortina: 'Diadikasia' o azione delittuale?", *Dike* 5 (2002): 111–34. Cf. Maffi, "Funzione giurisdizionale e regimi politici nella Grecia arcaica e classica," in Silvio Cataldi, ed., *Poleis e politeiai* (Alessandria, 2004), 305–14.

30. See the summaries of Athenian law in Trevor J. Saunders, *Plato's Penal Code* (Oxford, 1991), 102–04 ("The state as an injured party") and 120–22 ("Purposes").

31. Ruschenbusch, *Untersuchungen,* 49.

32. Translation of P.J. Rhodes, who, however, writes "to seek retribution." Both translations are correct, but need some explanation: in the case of "vengeance" it must be understood that the vengeance takes the form of an accusation in the courts, in the case of "retribution" we have to remember that such retribution was exacted in the interest of the victim. My interpretation of Solon's measure follows that of Ruschenbusch, *Untersuchungen,* 47–53, cautiously accepted by P.J. Rhodes, *A Commentary on the Aristotelian* Athenaion Politeia (Oxford, 1985), 159–60. On the Solonian origin of this reform: Rhodes, "The Reform and Laws of Solon: An Optimistic View," in Josine H. Blok and André P.M.H. Lardinois, eds., *Solon of Athens* (Leiden/Boston, 2006), 255–56; Michael Gagarin, "Legal Procedure in Solon's Laws," *ibid.,* 263.

avenge," originally: "to safeguard honour." In Athens, where considerations of honour always had a strong influence on litigation, a desire to take vengeance in the courts on behalf of relatives and friends was natural. The wording of the reforming laws did not exclude the victim, if he wanted to conduct a public dike himself and was in a position to do so. In that case he sacrificed compensation in money for the sake of a more complete and conspicuous vengeance. He knew that the popular courts were more inclined to inflict a large fine, for the benefit of the public treasury, than to award large damages to the injured party. Moreover, in a public dike there was often the possibility of the death penalty. It was generally believed that the suffering of the offender was compensation for the victim.

The great critic of vengeance through the courts is Plato, who wants all penalties to be regarded as educational measures in the interest of the offender. As a result, he has to see damages too in a new light. He writes: "We have not defined the difference between these two categories of wrongs (*adikemata*), voluntary and involuntary. In all states, every lawgiver who has ever appeared treats them as distinct, and the distinction is reflected in his laws."[33] Consequently no one, so far, has obtained compensation without alleging an *adikema* and demanding punishment. If the citizens of Plato's Cretan city are to understand the purely educational and remedial character of punishment, there must be a form of compensation that implies neither a voluntary nor an involuntary wrong, but no wrong at all.[34] Jhering has observed that the Greeks "never rose to the height of a reipersecutory action"; Plato invited them to get there by one big leap.

Aristotle's position in regard to punishment is determined by the traditional Greek distinction between wrongs directed in the first place against an individual and wrongs inflicted directly on the city as a whole, the distinction that governs Athenian legal procedure. As far as wrongs done directly to the city are in question, Aristotle is glad to follow Plato's new teaching and to replace the various ill-defined motives by the single principle of educational punishment. Besides, in his view there can be no synallagma between the whole and the part, the city and the citizen.[35] But in the case of wrongs between individuals he continues to regard satisfaction for the victim as the aim of punishment. The state, he says, cannot exist without exchange—exchange of good things in the first place, but also retribution for bad things. If they cannot return bad things for bad, the citizens will think that they are in the

33. *Laws* IX 861b, tr. Trevor Saunders (Penguin).

34. *Laws* IX 862a. Saunders, *Plato's Penal Code*, 142–43.

35. Nor can there be a synallagma between master and slave or father and child, since they are also considered the whole and the part: *Eth. Nic*. V 1134a25–35, b9–17.

position of slaves, and the state will not hold together.[36] In this view, the traditional view of the Greeks, revenge was a kind of human right, or at least a right of the free citizen. Here we have come to the point where the position of Aristotle and St. Thomas' Christian position cannot be the same.

V

Concerning synallagma, we cannot discuss in any detail what that word meant before the Philosopher came to employ it. Yet the Attic orators' use (or non-use) of the term synallagma can contribute to our understanding of Aristotle. The brief remarks I shall make on this question owe much to the work of Silvio Cataldi[37] and to a recent article by David Mirhady.[38]

Aristotle may have been the first to use the phrases "voluntary" and "involuntary synallagmata." Before him, Plato had spoken of voluntary and involuntary *symbolaia*, giving us an impression that this pair of concepts was already known to his readers. Ever since Guillaume Budé, modern scholars have normally treated synallagma and symbolaion as synonyms.[39] This understanding is often correct and even inevitable, but not always.

36. *Eth. Nic*. V 1133a24, b15–18 (*allage*), 1133a2 (*metadosis*). 36. The problems of retribution and punishment in Aristotle are discussed convincingly by Margaretha K. Debrunner Hall, "Das zweigliedrige 'Strafrecht' des Aristoteles: Geschlagene Amtsträger und unfreiwillige Rechtsbezichungen," *SZ, Rom. Abt*. 105 (1988): 680–94. See also the comparison of Plato's and Aristotle's doctrine in Danielle S. Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* (Princeton/Oxford, 2000), 245–91.

37. S. Cataldi, "Note di lessico tecnico-giuridico: *Symbolaion* in Platone," *Vichiana* 10 (1981): 157-62 (hereafter in this note: P); "Contributo all storia del diritto creditizio: Symbolaia e synallagmata in Aristotele," *Apollinaris* (1982): 194–213 (A); "La struttura del rapporto creditizio e il diritto reale del creditore nell'orazione demostenica 'Contro Panteneto'," in *Studi in onore di Arnaldo Biscardi*, Vol. III (Milan, 1982), 423–44 (D); *Symbolai e relazioni tra le città greche nel V secolo A.C.* (Pisa, 1983) (S). Of special importance to our purpose: "*Symbolaion* è un rapporto giuridico nascente da una transazione di prestito in denaro… (D 434, note 42, cf. S 107). "Contratti di credito" are "i *symbolaia* per eccellenza" (P, 105). In one and the same passage, symbolaia can have "il duplice valore sia di 'rapporti creditizî' contratti per o dalla piazza di Atene, che di 'rivendicazioni legali' sorgenti ad Atene sulla base di tali rapporti creditizî…" (S, 110). As for Aristotle, "laddove… Aristotele è lontano da intenti teorico-sistematici *symbolaia* e *synallagmata* sono interscambiabili" (A, 201, note 38). But where he does pursue such systematic interests, he avails himself of the fact that at his time, at least in Attica, the use of the word synallagma was still quite indeterminate (A, 200, note 37 on 201). In his account of corrective justice, synallagmata has a more general meaning than symbolaia (A, 201, note 39). Synallagmata is an "Oberbegriff"; it includes the symbolaia (A, 196, cf. 113). "Proprio fondandosi sulla struttura del rapporto creditizio… Aristotele impianta la categoria omologa dei rapporti sociali rilevanti per il diritto (*synallagmata*)…" (A, 199–200).

38. D.C. Mirhady, "Contracts in Athens," in *Law, Rhetoric and Comedy in Classical Athens: Essays in Honour of Douglas M. MacDowell* (Swansea, 2004), 51–63. Mirhady favours the translation "contract" (51) and shows its appropriateness for the fourth-century orators.

39. Guilelmus Budaeus, *Commentarii linguae Graecae*, s.v. *symballo* (Venice, 1530, n.v.), 291; (Basle, 1557, repr. 1966, *Opera* IV), 864 l.40: "Hoc etiam Συναλλάττω dicitur, &

A great variety of translations has been suggested for symbolaion. Even if we confine ourselves to the Athenian sources of the classical age, we have to consider "contract," "obligation," "claim" and "agreement," words with a distinct legal significance, and also "dispute," a term that seems not to fit in at all. Our evidence comes from two main groups of sources, and the meaning attested in the older group is not necessarily the older meaning. Moreover, what appears to us as two different meanings may have appeared to the Greeks as the same meaning used in different contexts. In the later group, the forensic speeches of the fourth century, the word symbolaion commonly refers to a legal arrangement or legal relation between private individuals, voluntary, as Plato would have said, and resulting in a pecuniary debt. A loan is the typical symbolaion. In such cases the translation "contract" can be used, as long as we understand contract in the Roman sense, applying the term not to all agreements but only to those which give rise to a debt. The symbolaion was considered a bond, tying the debtor to the creditor: the expressions for ending the symbolaion show that payment and release by the creditor were seen as "dissolving" the bond and "liberating" the debtor.

In the older group of sources, fifth-century decrees of the Athenian assembly dealing with the political and jurisdictional relations between Athens and her allies, a wider meaning of the word prevails: here symbolaion can signify any cause or dispute that needs to be resolved—in court if necessary. Such causes could have a penal character. In that case it was natural to call them involuntary symbolaia, *akousia symbolaia*, and the distinction of voluntary and involuntary symbolaia may well have arisen from these circumstances. The wider and the narrower meaning have in common that the symbolaion is not meant to last indefinitely, but calls for a resolution. This common meaning is always present and always primary; the question of how the symbolaion came into being is secondary.[40]

Συνάλλαγμα, ἀντὶ τοῦ συμβολαίου." Cf. Ugo Petronio, "Sinallagma e analisi strutturale dei contratti all'origine del sistema contrattuale moderno," in John Barton, ed., *Towards a General Law of Contract* (Berlin, 1990), 224.

40. For references concerning *symbolaion* see P. Kussmaul, "Zur Bedeutung von *symbolaion* bei den attischen Rednern," in Christoph Schäublin, ed., *Catalepton: Festschrift für Bernhard Wyss zum 80. Geburtstag* (Basle, 1985), 31–44, esp. 37–39 on "dissolving" the bond and "freeing" the debtor. Good remarks on symbolaion in Konrad Zacher, *De nominibus Graecis in* αιος, αια, αιον (Halle, 1877, in *Dissertationes philologicae Halenses* vol. III), 195–96. Perhaps we can risk a tentative historical outline of the terms *symbolaion* and *symballein*: (1) The middle *symballesthai* is attested already in the Iliad with the meaning "to meet someone." This use of the verb seems to be the reason why *symballesthai* and *symballein* appear, throughout the centuries, signifying an agreement on something to be done, whether that agreement has a legal character or not. In those instances the verb refers to the meeting or agreeing of persons. In the sense of "to agree" it has given rise to *symbolai*, the name of a certain kind of international treaty on matters of jurisdiction (Philippe Gauthier, *Symbola: les étrangers et la justice dans les cités grecques*, Nancy,

Once the phrases *akousia* and *hekousia symbolaia* existed, they must have been understood as explaining the liability for delict by a reference to contract. Where we have to take into account what voluntary and involuntary symbolaia have in common, we can hardly avoid the term obligation.[41]

1972, 101–02). (2) The noun *symbolaion* has a different origin. Herodotus (V 92 η3) used it as a synonym of *symbolon*, token. The most convincing discussions of symbolon are Walter Müri, *Symbolon* (Berne, 1931, now in his *Griechische Studien*, Basle, 1976), 1–34 of both editions, and Gauthier, *Symbola,* 64–71. Where they disagree, I follow Gauthier 65–66 rather than Müri, 15. In the case of *symbolon* and *symbolaion*, the underlying verb *symballein* does not refer to persons coming together, but to a tally, the two halves of which can be joined in order to prove a claim. According to Gauthier (72–73) the word symbolaion comes from symbolon, though in that case one would expect a derivative to end in *-eion* rather than in *-aion*. I must leave the answer to the linguistic experts. It seems safer to think of a descent from *symbole*, "bringing together," and to assume that symbolaion meant "that which requires symbole" or "which exists for the sake of symbole." Tallies served to identify a guest-friend, a depositor or a lender. The term for tally, symbolon, came to apply to other kinds of tokens as well: in the sixth century it appears with the meaning of "sign." When written documents began to be used, they were also called *symbolaion*. In the papyri almost any legal document can be called by that name, and travelers to Greece will remember the word *symbolaiographos* appearing on modern notaries' signs. (3) *Symbolaion* as a general term for "document" is absent from the Attic sources of the classical age. Instead, we see another use of the term, a use that might well be of Attic origin. The word symbolaion came to mean the relation between two parties, originally, it seems, the parties that had agreed on the token (Gauthier, 72–73). From the means of proving a claim the name symbolaion was shifted to the claim itself. Originally the claimant was a creditor; but "claim" is also, almost always, a suitable translation for the wider meaning of symbolaion, attested in the decrees concerning the Athenian league. For use in that group of texts, Wolfgang Schuller chose "Anspruch," the German equivalent of "claim." (*Die Herrschaft der Athener im Ersten Attischen Seebund*, Berlin/New York, 1974, 53, note 20. For other translations see Christian Koch, *Volksbeschlüsse in Seebundsangelegenheiten*, Frankfurt etc., 241, 480, note 39.) Most expressions for solving a symbolaion and freeing those who are bound or constrained by it are the same in both groups of sources. In some passages it is not clear how far the term symbolaia covers public dikai (Koch, loc. cit., 480–81, note 40). From our modern standpoint we would expect the symbolaia to be a distinctive feature of private law. But we must remember that the lawsuits in question came from different cities; the distinction between public and private dikai existed in Athens but not in every Greek city. Moreover, even a public dike was an *agon* between two individual citizens. Finally, the decrees were phrased by the Athenian side, from its own point of view, not by the allies. In many cases the demos of Athens could see itself in the superior position of a judge of last resort and consider all others involved in the case, individuals and cities alike, to be on an equal level, claimants of some sort. This equality is reflected in the term symbolaion. As far as I can see, these are the reasons why the term symbolaion can extend on occasion to matters that would be called criminal today. At any rate, the wider meaning of symbolaion seems to be a feature of a particular group of decrees. After the fall of the Athenian empire decrees of that sort became impossible, and the meaning "contract, loan" appears again in a dominant position, a position that was probably strengthened by the verb *symballein* in its sense of "to contribute." Secondary influences of that kind should always be considered as possible.

41. Commenting on *Eth. Nic.* V 1130b30–1131a9, Joachim Camerarius says in his excellent *Ethicorum Aristotelis Nicomachiorum explicatio* (Frankfurt, Wechel, 1578) 202: "συναλλάγματα autem sunt quae et συμβόλαια, res et negotia quae in congregatione civili contrahuntur, quorum

Those who said "voluntary and involuntary symbolaia" placed delict next to contract, creating a common sphere for the two, and moving, knowingly or unknowingly, towards the notion that the symbolaion is a matter of compensation rather than of penal retribution. If understood in this way, the term symbolaion agrees well with Plato's effort to separate punishment and compensation.

In the Attic sources symbolaion is far more frequent than synallagma, which has a somewhat different sense, less restricted to matters of money, as far as the rare occurrences allow a conclusion. In Aristotle's writings the two terms are often synonymous; but in his discussion of corrective justice he uses only the word synallagma. So we may conclude this lecture, and return to our starting point, by suggesting that he did so for two reasons. Firstly he wanted his audience to understand that there is a difference between his involuntary synallagma and Plato's involuntary symbolaion, inasmuch as his own concept leaves space for penal suffering and penal retribution as a means to resolve an involuntary synallagma.[42] Secondly he wanted to hint at the link between synallagma and *allage*, exchange—that exchange which he views as the condition of human society and which gave rise to the mediaeval term *iustitia commutativa*.

apud Iurisconsultos commune nomen est Obligatio, iuris vinculum, ut illi loquuntur, quo necessitate astringimur alicuius rei solvendae secundum nostrae civitatis iura. … Atque haec et ξυμβόλαια et συναλλάγματα veteres nominarunt. Nam non modo res rationesque, sed & culpae contrahuntur. Posteriores tamen Graeci συμβόλαιον litterarum obligationem appellarunt." (Cf. Inst. Just. 3.13 pr.) Using the term *contractus*, St. Albert the Great had expressed the same insight: "contractus sumitur hic large pro omni communicatione, qua aliquis debitor efficitur alteri, et sic etiam in furtis et rapinis est quidam contractus et non tantum in communicationibus voluntariis, secundum quod proprie sumitur contractus." *Opera* t. 14, *Super Ethica* (ed. W. Kübel, Münster, 1968–87), 337 (8). For *obligatio*, see also Gernet, *Droit et société*, 72 and Gauthier, *Symbola*, 72–73.

42. Ernest J. Weinrib, a classical scholar as well as a common lawyer and an expert in the law of torts, argues that "in the history of legal philosophy, private law is Aristotle's discovery." (*The Idea of Private Law*, Cambridge, MA /London, 56–66, esp. 56. Cf. Weinrib, "Aristotle's Forms of Justice," in Spiro Panagiotou, ed., *Justice, Law and Method in Plato and Aristotle*, Edmonton, Alberta, 1987, 133–52.) To a large extent I agree with Professor Weinrib; but if the view I am suggesting in this lecture, expressed more fully by M. Debrunner Hall (*art. cit.*, *SZ, Rom. Abt.* 105, 1988: 680–94) is correct, the title of discoverer of private law will have to be given to Plato as well as to Aristotle. Attempting to establish the true nature of criminal law, Plato had to distinguish it from private law. Aristotle, looking for a principle common to compensation and punishment, chose to remain closer to the standpoint of traditional Greek law.