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A Problem For Pericles

Ferdinand Fairfax Stone*

Although ancient Greece perhaps affords the earliest examples of comparative law in action, Zaleukos and Lykourgas being said to have traveled widely gathering information about customary and written law in preparation for the drafting of their codes,1 modern Anglo-American comparatists, with a few notable exceptions,² have left the law of ancient Greece to be studied by archaeologists, philosophers and historians. However, even though these students produced excellent studies, work by jurists is needed. Professor Kelsen's studies in international and maritime law illustrate the benefits to be gained by such study. In homage to him, this modest essay—tracing a few ideas generated in a conversation between Pericles and Protagoras—is presented.

Protagoras had been invited to the house of Pericles, where, among other matters, they discussed a recent tragic accident in which someone had been killed by a javelin during the course of an organized javelin competition taking place at an approved place. The particular question to which they addressed themselves was one of responsibility for the death: should it be placed upon the one who threw the javelin, upon those who organized the competition, or upon the javelin itself?³ Since these questions trouble us still, the responses made by the Greek philosopher-jurists (although expounded at different periods of Greek history) may be compared usefully with those made by modern jurists. In so doing, we are interested in examining the contents of the quiver or

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* Professor of Law, Tulane University. M.A. 1931, Ohio State; B.C.L. 1934, Oxford University; S.J.D. 1963, Yale University. Grateful acknowledgment is made of the aid of the American School of Classical Studies and the Hellenic Institute of International and Foreign Law in Athens in permitting preparation of this Article. I am grateful to Professor W.K. Pritchett for directing me to certain source materials.


3. An account is found in A. Burn, A Traveller's History of Greece 204-05 (1965). Burn points out that the story was made public by Pericles' son, Xanthippos, in a law suit brought by him against his father. Id. at 206-07.
bag of ideas and attitudes, rather than in tracing their historical development or in affixing such labels as “tort,” “crime,” or “delict” to them.  

I

THE RESPONSIBILITY OF THE JAVELIN THROWER

Turning, then, first to the question of whether responsibility for the damage should rest with the one who threw the javelin, the answer could be “yes,” for the act of throwing the javelin produced the man’s death in the sense that the thrower set in motion the force that caused the death. Had the javelin not been thrown (other factors remaining the same), the man would be alive. Therefore, the event, viewed objectively and without any reference to “blameworthiness,” consists of one person’s action, another’s death—with a cause and effect relationship linking them together. That the thrower did not “will” or “intend” the death, or indeed any harm to another, was to early Greek law irrelevant; the killing was “accidental” but nonetheless a killing. Professor Daube warns us not to forget that “even in the absence of intent, homicide is hardly ever purely accidental, nearly always negligent” and that to this feature the ancients were fully alive.

At this point the pleaders’ ingenuity asserts itself, and the javelin-thrower may well argue the matter from the point of view of causation. For example, in a boys’ sports club, a boy apparently retrieving thrown javelins was killed when struck by one in flight during practice. Witnesses stated that the victim ran from among the spectators. In this moot case, the father of the victim urged that the javelin thrower, having killed, must go into exile (no demand for his death having been made). The father of the killer did not plead the moral innocence of his son’s act, but rather asserted that the victim was the cause of his own death because when the javelin was in the air, the victim ran into its path. Thus, since he was himself the cause of his death, there was no homicide.

4. Professor Daube remarks that there is not a single case in the whole of Greek literature—myth, saga, history—or for that matter, in the Bible, of a man who killed without intent, being put to death, be it in the course of self-help, blood vengeance, be it by public authority, and this although there are laws which . . . objectivize dolus and impose the death penalty, say, on any killing by a direct blow. D. Daube, supra note 2, at 165.

5. Calhoun writes that “the question of right and wrong seems not to have entered into the Homeric feeling toward homicide, even though the act be committed under circumstances that would today stamp it as a brutal murder.” G. Calhoun, The Growth of Criminal Law in Ancient Greece 17 (1927). He further points out that in Homeric times “all homicides are dealt with by the relatives of the victim, who have no means of obtaining vengeance other than self help.” Id.


7. Recounted in A. Burn, supra note 3 at 204-05. See also J. Jones, supra note 2 at 262.
Support for the position that responsibility should rest with the actor—the thrower of the javelin—appeared in post-Homeric times on the ground that any homicide or shedding of blood, however innocently caused, brought pollution on the killer and those connected with him—his family, his clan, and his state—a pollution from which he must cleanse himself by prescribed methods of lustration if he would escape vengeance or the payment of blood-money. But forced exile was not the only kind of lustration; the shedder of blood might go into self-imposed exile to atone for his act, either because he felt guilty or unworthy or because he felt himself a source of disaster to his family and the community.

A second response to Pericles' question concerning the responsibility of the javelin-thrower for the death could be that he would be liable if the act of throwing javelins was itself unlawful. The use of the word "unlawful" assumes that we can determine what is lawful, who determines the law's content, and who judges in accordance with it. Thus in Brown v. Kendall, modern jurists had to decide whether the use of a stick to separate fighting dogs was lawful; and in Ploof v. Putnam whether tying up to a private dock to save the vessel and persons aboard caught in a sudden and violent storm constituted trespass.

Many Greeks in the Homeric period believed that the affairs of men were regulated by the gods because the gods possessed overwhelming power when dealing with man. The gods were sometimes depicted as quarrelsome, scheming, and vindictive, jealous of one another and at times of the fortune of mortals. They acted by no fixed rules; they were not accountable to ordinary moral standards. Men prayed and made sacrifice to them that they be moved to favor particular enterprises or to grant certain boons, but the gods did not always listen and there was no assurance that the sacrifice was sufficient or indeed acceptable. Further, the pronouncements of the gods were often vague and ambiguous. Law was law because the gods ordained it in advance or ex post facto, had the power to enforce or approve it, and because the people accepted and believed.

8. Calhoun says that Homeric law "knows nothing of doctrine that the shedding of human blood involves pollution or of lustral rites for homicide." G. CALHOUN, supra note 5, at 16. See also 2 R. BONNER & G. SMITH, supra note 1, at 192.
9. J. JONES, supra note 2, at 251. The text, as given by Stroud, of the First Axon of Drakon's law was "[e]ven if someone kills someone without premeditation he shall be exiled." R. STRoud, supra note 1, at 6. But later Stroud translates it "and if . . . ." suggesting that something preceded these words. Id. at 34.
10. 2 R. BONNER & G. SMITH, supra note 1, at 196 et seq.
12. 60 Mass. 292 (1850); see note 39 infra and accompanying text.
14. It is difficult if not impossible for us to appreciate fully the influence of the
In the post-Homeric period, philosophers and poets developed the notion that the gods' judgments were to be accepted not only because the gods were all-powerful, but also because they were just, and hence their decisions were just. In *The Eumenides*, Orestes, pursued by the Furies and mad because of the horror of the act that Apollo had ordered him to commit, took refuge in Apollo's temple. Apollo sent Orestes to Athena for her to "judge this quest." Athena, after a decent interval, appeared and questioned the Furies concerning their reason for pursuing Orestes. Then, turning to Orestes, she said "Why speaketh one alone, when two are here?" Orestes, having declared himself, asked that Athena "judge if ill he wrought or righteously" in killing his mother Clytemnestra. He then said that he would be still and "praise thy judgment, whatsoe'er betide." Athena did not herself act as judge, but rather established a court, on which mortals sat, to decide the matter. Apollo appeared as a witness and pled for Orestes; Athena cast her vote for Orestes. Judgment having been rendered in Orestes' favor, Athena addressed herself to persuading the Furies to reconcile themselves to the judgment, lest turmoil persist with never-ending war.

If we accept Aeschylus' account of the trial, men participated with gods in the decision of men's disputes: a mortal court was established, a procedure ordained, and Athena's vote decided the matter only because the votes of the judges were equally divided. The rudiments of the principle *audi alteram partem* may be seen. Reasons based on justice were adduced and weighed.

Though Aeschylus wrote this play in 458 B.C., he was describing events conjectured to have taken place far earlier. By Aeschylus' time, general codification of laws had taken place in Greece, beginning as early as the seventh century B.C., Drako having given Athens her first code. The movement for written law was spurred on by such poets as Hesiod who had long complained of "crooked" decisions—"crooked" because so long as the laws were unwritten and known only to the magistrates, the common man was the easy victim of injustice since he was without means of knowing the law by which his affairs were settled and his life controlled.

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16. The play was first produced in 458 B.C.
17. R. Bonner & G. Smith, supra note 1, at 67.
18. Id. at 71. Drako's code is usually dated 621 B.C. For an historical setting of the Code see R. Stroud, supra note 1, at 70.
Tumult arises when Justice is
dragged away and whenever
The written codes, publicly displayed and usually carved in stone,\textsuperscript{20} gave the people knowledge of the laws by which their affairs were governed. But there was no fixed form in which the laws were to appear, nor any limit to the matters dealt with therein.\textsuperscript{21} Nevertheless, as summed up by Bowra, "what they did was to provide a firm basis on which men could pursue orderly lives."\textsuperscript{22}

In order to understand the full impact of these codes upon the meaning of the word "unlawful" as applied to the javelin death, we must examine the Greek notion concerning law. First, the codes were thought to be codifications of ancient customary law, which law was considered to represent the will of the gods.\textsuperscript{23} Since the gods were considered omnipotent, when claims of the gods' law came into conflict with man's law, the latter must yield—Antigone refused to obey Kreon's edict on the ground that the gods' law must be obeyed.\textsuperscript{24} Modern jurists are familiar with such conflicts between positive law and natural law, and between statutes and constitutions; the problem then as now is to determine who decides the content of divine law or the constitution. Second, there were gaps to be filled in the law. Calhoun, writing of the history of Greek criminal law, concludes that in the fifth century B.C. statutory enactments began more and more to supplant unwritten custom as the source of criminal law, and that in 403 B.C. it was expressly enacted

Eaters of bribes seize her and give dooms
By crooked decisions.
Hesiod, \textit{Works and Days} 220-21. Again Hesiod wrote:
Beware you barons of such spirits.
Straighten your decisions
You eaters of bribes. Banish from your minds
The twisting of justice.
\textit{Id.} at lines 263-64. \textit{See also} Euripides, \textit{Supplices} lines 429 \textit{et seq.}

20. A copy of the Law of Homicide of Drako was ordered to be on a marble stele placed in front of the Stoa Basiliea. R. Stroud, \textit{supra} note 1, at 67.
22. \textit{Id.} at 66-68.
23. \textit{Id.} at 66-68.
24. Kreon: And didst thou dare to disobey the law?
Antigone: Nowise from Zeus, methought this edict came,
Nor Justice, that abides among the gods
In Hades, who ordained these laws for men.
Nor did I deem thine edicts of such force
That they, a mortal's bidding, should o'erride
Unwritten laws, eternal in the heavens.
Not of today or yesterday are these,
But live from everlasting and from w Ilence
They sprung none knoweth.
Sophocles, \textit{Antigone}. It is interesting to speculate to what extent its divine origin accounted for the Greek reluctance to alter the law. \textit{See} 1 R. Bonner & G. Smith, \textit{supra} note 1, at 75.
that henceforth a criminal prosecution was not to be based upon un-
written law, 25 a phenomenon well illustrated in the history of Anglo-
American criminal law. Early Greek law left many areas of man’s
activity to be regulated by family custom, individual negotiation, arbi-
tration, or agreement. Plato in The Laws, a work of great persuasiv-
eness, describes the body of Greek law as composed partly of statutes ac-
tually imposed and partly of materials for statutes. 26

Plato held that the citizen properly educated in the notions of just
and honorable conduct is a better guarantee of a just society than is a
multiplicity of statutes. To him, the end of all government and all law
is the promotion throughout the community of complete goodness. 27 For
Plato a society’s book of laws should be “far the best of its whole litera-
ture” to which other men’s works should conform or “if they strike a
different note” looked upon with contempt. 28 Since statutes were few,
Plato suggested that the so-called “unprovided-for-case” should be
viewed as if the legislator was a wise and affectionate parent rather than
an autocratic despot. 29

It has been fashionable to say that the Greeks did not or could not
produce a legal science. 30 They developed no traditionally accepted
canons of statutory constructions. 31 They were more interested in
reaching just and acceptable decisions than in the niceties of analogy;
their statutes were suspected of being purposely vague and couched in
general terms. The cases were pled before popular courts, whose vote
was more often won by appeals to common sense than to technical terms.
But even though all these conclusions about Greek law and a legal

26. Plato, The Laws of Plato 858 (A. Taylor transl. 1934). The Laws is a
treatise on the principles of jurisprudence in which Plato presents a theory of the con-
stitution and a comprehensive legal code for the guidance of citizens. Professor
Taylor, in his introduction, compares it with the treatises of Hegel [G. HEGEL,
The Philosophy of Right (1821)] and Pufendorf [S. PUFENDORF, Element-
orum Jurisprudentiae universalis libri II (1672)], and one might add Gro-
tius [H. Grotius, De jure belli ac pacis (1625 or 1631)] and Bracton [H. deBRACHTON,
Tractatus de Legibus et consuetudinibus Angliae (c. 13th century)] in that while
their writings did not constitute law in the sense of statute or code they were of great
persuasiveness.
28. Id. at 859.
29. Id.
30. See, e.g., F. SCHULZ, ROMAN LEGAL SCIENCE 55 (1946); J. JONES, supra note
2, writes in his preface:
The Greeks never reduced their law to a system; it has been a stock example
of “law without jurisprudence.” Some have denied it the name of law at
all—at the one extreme there are the exponents of a theory of “pure law” who
consider all law to be the product of juristic science, and at the other the
practical lawyers for whom there is not law but “tough law” or “lawyers’ law.”
31. J. JONES, supra note 2 at 300.
science are again under review and subject to possible revision, the Greek notion of "unlawfulness" did lack precision. Applying these notions of prevailing Greek law to the case at hand of the javelin death, there seems no evidence that the javelin-throwing was unlawful when and where and by whom it was done.

Yet a third response to Pericles' question of the responsibility of the javelin thrower is that he will be responsible for the death only if fault on his part can be shown. In *Brown v. Kendall*, the Supreme Judicial Court of Massachusetts in the middle of the last century considered a situation in which the defendant, in attempting to separate two fighting dogs one of which was his own, by beating them with a stick injured the eye of the plaintiff who was standing behind him. The plaintiff sought to hold the defendant liable on the ground that his act directly caused the plaintiff's damage. The defendant did not deny that his act caused the damage, but maintained that for him to be liable the plaintiff must prove that the defendant was at fault, either because that which he did was unlawful, or because the defendant intended harm to the plaintiff, or because he acted negligently under the circumstances. Since the act was not unlawful, since he did not intend the harm, and since he had exercised due care, the defendant was not liable. This decision resembles the well-known judgment of the English court in *Stanely v. Powell*, in which the defendant's shot, due to a ricochet, struck a beater who was engaged to drive game toward the guns of the defendant's shooting party. The court dismissed the action because it could not find any fault on the part of the shooter (the bird shooting was lawful, the defendant intended harm only to the pheasant and his conduct met the standards of due care).

As discussed earlier, ancient Greek law treated homicide as a matter to be avenged by the dead man's kinsmen and friends. If they wished to pardon or excuse the blood-shedding or if they chose to accept blood-money in lieu of vengeance, that was their affair; the community as such was not involved and hence the state of mind of the killer was not immediately involved. However, some killings were regarded as so heinous as to interest the community. Falling within such category were the slaying of parents, of a guest, and particularly

32. 60 Mass. 292 (1850).
33. [1891] 1 Q.B. 86.
34. 1 R. Bonner & G. Smith, supra note 1, at 16-17.
35. Professor Daube argues very convincingly against the prevailing opinion that early Greek law was not concerned with "the subjective nuances of a deed." He points out that no case can be found in which an unintentional killer was put to death. He cites examples in which an unwitting killer goes into exile and finds friendly hospitality. He points out that the ancients are less intrigued by the accidental deed than the deed committed in error. D. Daube, supra note 2, at 174.
36. 1 R. Bonner & G. Smith, supra note 1, at 16-17; 2 id. at 201-02, 210;
the slaying of a member of another community, which act potentially could involve the community of the slayer in the orbit of vengeance. In these cases, the community came to appreciate its possible involvement should the family and friends of the victim elect not to take action themselves.  

As homicide in Greek law ceased to be simply a concern of the kith and clan of the victim and came to be regarded as a proper matter for judicial inquiry, a distinction was drawn between intentional killing for which the Areopagus was the proper tribunal, unintended homicide—for example, by accident—tried by a tribunal sitting in the Palladium, and justified homicide tried by a tribunal sitting in the Delphinium. Such distinctions involved an inquiry into the state of mind of the killer and the circumstances surrounding the act.

In viewing the struggles of the seventh and sixth centuries B.C., before the time of Solon’s reforms, two factors must be considered: First, many men were coming to believe that their protection rested not only in divine law and justice interpreted and applied by priests and rulers, but also in man-made constitutions and written codes; second, Solon’s writing singled out as the prime source of the evils besetting Athens the lawlessness of the times, when its leaders often grew rich on injustice and the individual citizen could not escape unaided from his leaders’ “unjust spirit.” For Solon, as for some other statesmen, the only remedy could be found in Eunomia, the rule of law, whereby order and harmony could be produced, crimes repressed, insolent and lawless outrage curbed, “crooked” judgments corrected, so that man might be brought to wisdom and moderation. It was in this spirit that Solon as lawgiver made his laws, and was said to be the first to establish permanent machinery for the punishment by the state of crimes.

But if it was Solon who was credited with establishing true crimi-
nal legislation, it was Plato who presented a sensible basis for distinguishing between “crime” and “tort,” between “wrong” and “detriment,” between the violation of a right and the mere infliction of loss or detriment.\(^4\) Plato pointed out that citizens often cause \textit{mutual} damage in their associations and relations with one another but that not all damages are caused by \textit{wrongs}.\(^5\) Continuing, he argued that when one person unintentionally causes harm to another “of no set purpose” such was not in his view a wrong.\(^6\) Plato urged the legislator to do all he could “to make the damage good, to recover the lost, to rebuild the dilapidated, replace the slaughtered or wounded by the sound.” The detriment is to be repaired as a \textit{tort}.\(^7\)

On the other hand, damage done \textit{intentionally} is a “malady of the soul and must be cured if possible.” Not only must this man make good the damage caused, but the legislator must see to it that the wrong-doer is taught and constrained to avoid repeating it or at least to do it more rarely.\(^8\) This man has committed a \textit{wrong}—a \textit{crime}—and society is to play a part in his reform. Should the legislator find the man incurable, he will declare that longer life is not a boon for this man or for his neighbors and so may rid society of him.\(^9\) Thus, although Plato taught that “bad men universally are always bad against their own will,”\(^60\) he recognized that with some the malady was incurable.

Applying Plato’s view to the case discussed by Pericles and Protagoras, it is possible that to him the accidental killing would constitute a “tort” but not a “crime,” a “detriment” but not a “wrong,”\(^51\) and the javelin thrower would be held to make compensation for the death but would suffer no further punishment.

In this connection, the ideas expressed in the case of \textit{Vincent v. Lake Erie Transportation Co.}\(^52\) are relevant, for in \textit{Vincent} the defend-

\begin{itemize}
\item \textit{Plato}, \textit{supra} note 26, at 860-61.
\item \textit{Id.} at 861.
\item \textit{Id.} at 862. “Wrong” is here used very much in the sense in which we would use “crime” or would impose punitive damages.
\item \textit{Id.}
\item Professor Taylor terms it “part of Plato’s high originality that the distinction between criminal law and the civil law of torts is made for the first time on a clear and intelligible principle.” \textit{Taylor, Introduction} to Plato, \textit{supra} note 26, at xlix.
\item \textit{Plato}, \textit{supra} note 26, at 862.
\item \textit{Id.} at 860. Plato also wrote:
If we can bring a man to this—to hatred of iniquity, and love of right or even acquiescence in right—by acts we do or words we utter, through pleasure or through pain, through honor bestowed or disgrace inflicted, in a word, whatever the means we take, thus and only thus is the work of a perfect law effected.
\item \textit{Id.} at 862.
\item Thus Plato defines “wrong” as “the name I give to the domination of the soul by passion, fear, pleasure or pain, envy or cupidity” alike in all cases, whether damage is the consequence or not. \textit{Id.} at 863-64.
\item \textit{109 Minn.} 456, 124 N.W. at 221 (1910).
\end{itemize}
ant was required to compensate the plaintiff for damage done even though he was faultless. While defendant's ship was tied up at the plaintiff's dock to discharge cargo, a violent storm arose that prevented defendant, in the exercise of sound seamanship, from getting underway. Accordingly, the vessel remained moored to the dock, defendant using all proper means and care to prevent damage to the dock. Nevertheless, the dock was damaged. The court found no fault on the part of the defendant either in trespass or negligence but nevertheless ordered the defendant to repair the damage caused, arguing that the defendant had made use of the plaintiff's dock to save his ship and cargo and so should pay for the damage caused by such use.53

Plato's reasoning might also be used to support some of the plans now being advanced to deal with injuries received in motor vehicle collisions. In the case of ordinary collisions, such plans require that judicial determination of "fault" give way to an administrative order that compensation be made by the participants' insurers, either one participant to the other or each insurer to his insured, thus making each whole. However, if the conduct of one of the parties is sufficiently reprehensible, for example, driving while intoxicated, an additional penalty or punishment would be imposed.

In determining the responsibility vel non of the javelin thrower for the damage caused, it remains to be asked what effect ancient law gave to such pleas as those of insanity, intoxication, mistake, minority, senility, and duress.54 If the javelin thrower denied responsibility for the damage on the ground that he was insane at the time of the act, and his insanity was established by a proper tribunal, Plato would require that compensation be made to the victim or his family, but he would remit the rest of the sentence unless the actor's act had resulted in the taking of life, thereby incurring the pollution of homicide. In such an event, Plato would require the insane person to be exiled for a full year in another country, providing further penalties should he return before the year expired.55 Similar results would obtain were the act committed while the actor was "so disordered by disease, so extremely aged, or of such tender years to be virtually insane."56 Thus, it might be said

53. Id. at 460, 124 N.W. 223.
54. The fact that the damage was caused when the actor was drunk was regarded by Pittacus as a reason for imposing a greater penalty upon the offender. 1 R. Bonner & G. Smith, supra note 1, at 82. See also, Aristotle, Politics 98-99; D. Daube, supra note 2, at 166-67 (slaying of Antinoos by Odysseus).
55. Aristotle, Nicomachean Ethics 48-53 (D. Ross transl. 1925) (contending that men and lawgivers punish and exact redress from those who do evil except when it is done under compulsion, or through ignorance for which the agent himself is not responsible).
56. Plato, supra note 26, at 864.
57. Id.
that with regard to "tort" and "detriment," the pleas were not effective; they affected only the crime or "wrong."

Similarly, modern common law and recent French law regard insanity as a defense to a tort action only in a restricted number of situations. Other civil law countries regard the absence of "will" in cases of insanity, or extreme minority, as an absence of the capacity for fault. Modern German law adopts a compromise position permitting equitable adjustments where justice demands. 58

Ignorance as a source of misconduct is divided by Plato into two kinds. If a man causes damage through ignorance pure and simple, he has committed a crime, but the penalty will be light. 59 If, however, a man causes damage through ignorance combined with a "conceit of his own wisdom" so that he "supposes himself to know all about matters of which he knows nothing whatever" the legislator should regard his act as a "source of grave and monstrous crime."

Such a concept would be analogous to the modern common-law notion of reckless disregard of the consequences, which carries full criminal liability. 60

Ancient Greek law provided that in certain instances even intentional shedding of blood would not be considered to be a crime. 62 Plato lists certain such instances of justified homicide: he that slays a thief entering a house by night with intent of robbery; he that in his own defense slays a "footpad;" he that slays another who offers "hurtful violence to a free woman or boy," the slayer being either the victim of the attack or the victim's father, brother, or son; the slaying of one taken in the act of "enforcing his wedded wife;" the slaying in defense of a father's life (the father not being engaged in a criminal act) or in like defense of child, brother, or mother of his children. 63 Other writers mention additional instances: one who slays an opponent in the games; 64 one who slays in war; 65 one who slays an adulterer caught with his wife or

58. See generally Stone, Civil Liability for Damage caused by the Insane, in 1 Festschrift für Ernst Rabel 403-19 (1954).

59. In speaking of wrongs committed through ignorance, Plato said that when ignorance is "conjoined with impotence, since the consequent misconduct is puerile or senile," the legislator "will treat it as an offence, indeed, and make laws against its perpetrator as an offender, but those laws will be the mildest and most indulgent of his whole code." Plato, supra note 26, at 863.

60. Id. Somewhat akin to the modern notion of "reckless disregard" as found in cases of misrepresentation [Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931)] and defamation [New York Times Co. v. Sullivan, 376 U.S. 254 (1964)] and in the notion of holding oneself out to have professional skill.

61. See generally G. Williams, Criminal Law 24 (2d ed. 1961).

62. 2 R. Bonner & G. Smith, supra note 1, at 203.

63. Plato, supra note 26, at 874.

64. Demosthenes, Against Aristocrates; see 2 R. Bonner & G. Smith, supra note 1, at 203; Plato, supra note 26, at 865. See also D. Daube, supra note 2, at 169-70.

65. 2 R. Bonner & G. Smith, supra note 1, at 203.
mother, or sister or daughter or concubine; the death of a patient under treatment by a physician.

Finally, we must note the importance of the argument of causation. In times when all shedding of blood brought pollution and exile on the one who caused it, one could escape the consequences only if the shedding of blood was caused by the victim himself or by someone other than the accused. Thus, in the "moot case" concerning the boy who ran in front of the target in a gymnasium where X was practicing with the javelin and was accidentally killed, X's father argued at X's prosecution for accidental death that since the victim (unlike the other spectators) moved within range of the javelin, his death was due to himself and not to X. Two interesting suggestions for excusing X's act were made in the course of the second speech for the defense: One, that the boy might easily have guarded against running in front of the target, since he was quite at liberty to remain standing still; two, that if the boy ran within range of the javelin at his master's summons, then the master would be the person responsible for the boy's death.

Similarly, if an alleged aggressor was struck by the defendant and died as a consequence of the blow, the defendant might be held not to have "caused" his death. Antiphon's Third Tetralogy posed this case: an old man, X, quarreled with a young man, Y, as they sat drinking; they came to blows and X was seriously injured; he received medical attention but ultimately died; X's relatives prosecuted Y for wilful murder. Among other arguments advanced by Y was the following: It was the aggressor who was the cause of the blows he received and hence he is the person responsible for his death. "I would not have defended myself unless I had been struck by him"; thus my innocence is attested both by the law and by the fact that my opponent was the aggressor; in no way am I his murderer; "[I resisted him] with his own weapons . . . and returned him blow for blow." In Roman law, one is reminded of the case put by Alfenus: a lamp was removed from in front of a shop and the shopkeeper pursued the thief to get

67. "In the case of all medical practitioners, if the patient meet his end by an unintentional act of the physician, the law shall hold the physician clear." Plato, supra note 26, at 865. See also J. Jones, supra note 2, at 263.
68. Antiphon, Second Tetralogy IV.4-6, reprinted in 1 Minor Attic Orators 85 (K. Maidment ed. 1941).
70. Id. IV.4-6.
71. 1 Minor Attic Orators, supra note 68, at 118 (editor's introduction).
72. Antiphon, supra note 68, II.3-6.
73. Id. II.6-9.
74. Id. II.3-6.
back his lamp, whereupon he struck the shopkeeper with a whip. In
the ensuing melee the shopkeeper put out one of the thief's eyes. Al-
fenus refused damages on the ground that *culpa* rested with him who
struck first with the whip—the thief.\(^7\) Although the Roman jurist
treated the matter under the rubric of *culpa* rather than causation,\(^7\) the
case is analogous.

II

RESPONSIBILITY OF THE ORGANIZERS OF THE COMPETITION

Turning now to the second possibility mentioned by Pericles and
Protagoras, that of action against the organizers of the competition in the
course of which the fatal accident took place, we know very little about
the rules or customs in these matters. Professor Harris states that Greek
athletic meetings were civic functions run by boards of officials elected
by the state and that even as today one of their prime problems was that
of finance—the aid of rich "angels" was sought.\(^7\) As to the board's fi-
nancial responsibility either to spectators or participants we know little.
Gardiner refers to the javelin-throwing accident debated in Antiphon,\(^8\)
but without comment; Harris mentions the likelihood that the attendants
who dealt with disobedient athletes probably kept "recalcitrant" spec-
tators in line.

If, however, we consider the reverence that the Greeks had for the
care and development of the body,\(^7\) the fact that these games for which
the javelin throwers prepared were an integral part of religious festivals,
the fact that skill with the javelin was important to war, and the fact that
the state was involved in fostering the games, it would seem doubtful
if the sponsors of the event would be held responsible for accidental
deaths to spectators under such circumstances.\(^8\)

III

THE RESPONSIBILITY OF THE JAVELIN

Finally, we turn to the third possible source of responsibility for the
boy's accidental death, the javelin itself. Plato in *The Laws* provides that
if an inanimate thing cause the loss of a human life—an exception
being made for lightning or other such visitations of god—any object

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77. H. Harris, *Greek Athletes and Athletics* 151 (1964).
79. Bowra quotes an Attic drinking song: "For a man health is the first and
best possession, Second best to be born with shapely beauty, And the third is wealth
honestly won, Fourth are the days of youth spent in delight with friends." M. Bowra,
*supra* note 19, at 91.
80. H. Harris, *supra* note 77, at 158.
which causes death by its falling upon a man or his falling against it shall be sat upon in judgment by the nearest neighbor, at the invitation of the next of kin, who shall hereby acquit himself and the whole family of their obligation; on conviction the guilty object to be cast beyond the frontier. 81

An interesting case occurred at Thasos in the fifth century. After the death of the famed athlete and statesman Theogenes, one of his political enemies, continuing a feud begun in Theogenes' lifetime, expressed his dislike by administering nightly whippings to Theogenes' statue, which stood in the center of the city. On one such night, the statue toppled from its base, fell on the whiper and killed him. His relatives brought action against the statue, which was found guilty and following the Dra-konian law cast beyond their land and sunk into the sea. 82 Thereafter, a plague descended on Thasos; the pythian priestess at Delphi was consulted about what action to take and she advised the officials of Thasos to "restore the exiles." At first this was thought to mean the persons in exile, but a second oracular consultation determined that she meant the statue, and it was recovered; 83 Pausanias wrote that recovery was by certain fishermen in their net. 84 Accordingly, Burn suggests that the answer to the problem posed by Pericles and Protagoras would probably be that the javelin should be cast into the sea after proper trial, 85 and lest we smile we should recall that a railway train that struck a band of sheep was claimed by the Crown under the law of deodand as recently as the last century in England, 86 and that by means of the personification of ships and companies we visit forfeitures and penalties upon their inanimate assets. 87

CONCLUSION

We do not know what resolution Pericles and Protagoras made of the problem of the javelin-killed lad, but we do know that their analy-

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81. Plato, supra note 26, at 873-74. Kenyon, in a note to his translation of Aristotle, On the Athenian Constitution (K. Kenyon transl. 1891), calls this a "relic of primitive custom by which any object that had caused a man's death was put upon its trial. In later times it may have served the purpose of a coroner's inquest."
82. R. Stroud, supra note 1, at 82.
83. Dio Chrysostom, Discourse XXXI, 95-98.
84. Pausanias, Description of Greece VI, 11.6.
85. A. Burn, supra note 3, at 205.
86. Deodands were abolished by statute. 9 & 10 Vict. c. 62 (1862); see 1 E. Jowitt, Dictionary of English Law 612 (1959).
sis raised questions that we still debate: What is an “accident”? What do we mean by “fault”? What degree of responsibility do we have for damage caused to our neighbor? What do we mean by “repair”? What can we say of causalité in a world of complicated relationships? Perhaps the most significant single feature that our age has added to their discussion is the notion of insurance against such risks. Thus we have moved the problem from the realm of value judgments to the realm of actuarial statistics, thereby creating better computers but a diminished sense of personal responsibility. Pericles would, I suspect, not be amused.