Theft in Plato's Laws and Athenian Legal Practice

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The general question of the relation of Plato's dialogue *The Laws* to contemporary Athenian law has, of course, received some considerable attention in the scholarly literature on Plato. Best known are, perhaps, Morrow's study of Plato's Law of Slavery, and his book *"Plato's Cretan City"* (1), as well as Gernet's lengthy introduction to the Budé edition of the *Laws*. There are, also a number of other specialized studies, none of which, however, dealt at any length with the law of theft (2).

All references to *The Laws* are to the OCT, edited by Burnet.

(1) G.R. Morrow, *Plato's Law of Slavery in Its Relation to Greek Law*, Urbana, 1939; *Plato's Cretan City*, Princeton, 1960.

(2) E. Klingenberg, *Platons Nomoi Georgikoi und das positive griechische Recht*, Berlin, 1976; Chase, "The Influence of Athenian Institutions upon the Laws of Plato", HSCP 44, 1933, 131-192; P. Schuchman, "Comments on the Criminal Code of Plato's Laws", *Journal of the History of Ideas* 24, 1963, 25-40; G. Mueller, *Studien zu den platonischen Nomoi*, Zetemata 3, Munich, 1951; H. Goergemanns, *Beiträge zur Interpretation von Platon's Nomoi*, Zetemata 25, Munich, 1960. For a complete bibliography on *The Laws*, see T.J. Saunders, *Bibliography on Plato's Laws*, New York, 1975.

As mentioned above, there is no systematic study of the relation between Plato's theft legislation and Athenian law. The problem is mentioned in passing by Chase, Gernet, and Knoch (*Die Strafbestimmungen in Platon's Nomoi*, Wiesbaden, 1960), but without a detailed discussion. References will be made to the opinions of these scholars when appropriate; but, on the whole, in what follows there will be few occasions where it is necessary to cite the work of others.

The general line of argument adopted by most scholars seems to be that Plato was intimately familiar with Athenian substantive law and procedure, and relied heavily upon them in *The Laws,* freely changing particular provisions whenever it suited his purposes to do so. Accepting this general proposition raises important methodological problems for anyone working in Athenian Law. Because of the fragmentary nature of the evidence for most areas of Athenian law there is strong temptation to draw on *The Laws,* particularly in regard to obscure points, that is, to infer from *The Laws* that similar doctrines must have existed in Athens. It is not as common today as it once was to simply cite Plato as evidence for an Athenian legal practice without any discussion of the question as to whether or not it is justifiable in that particular instance to do so, but it nonetheless still occurs all too often (3). (It may be relevant here that, with the exception of Dareste in the nineteenth century, and Gernet, few of the leading figures in Greek legal studies have made important contributions to the study of *The Laws*).

What then can be gained from comparative study of particular areas of substantive law in *The Laws* and Athenian practice? Is it the case that once having determined that Plato often deviates from Athenian law further comparative analysis becomes pointless? This chapter will attempt to show that such comparative study may prove useful in a number of ways: (1) Although I feel that one is rarely justified in inferring from the existence of a particular doctrine or procedure in *The Laws* to a similar doctrine or procedure in Athens concerning which there is some doubt or confusion, it is nonetheless the case that careful study of the *differences,* as well as the similarities, may sometimes point the way towards a better understanding of an Athenian institution. (2) Analysis of the points at which Plato departs from Athenian practice may also be important in understanding the legal and political system

(3) See e.g. M. HANSEN, *Apagoge, Endeixis and Ephegesis Against Kakourgoi, Atimoi, and Pheugontes,* Odense, 1976, 48, and CHASE, *supra* n. 2, 168.

that he develops in *The Laws*. This, of course, presupposes an inquiry into why, in each individual case, Plato chooses an alternative solution to a particular legal problem. I will argue that there are at least two kinds of *general* concerns that influence the adoption of any particular provision: The first type of consideration arises out of the fact that Plato's primary purpose is the construction of a stable political and social system. The laws of his utopia are a means to this end, and, in general, Plato shapes the law in a particular area to serve his larger purpose — sometimes sacrificing doctrinal consistency to do so. For the sake of convenience this first type of general concern will be referred to as 'political'. The second general reason for conscious change of Attic practice arises from Plato's attempt to bring theoretical order and consistency into areas of the law where traditional doctrine or practice seems to him to be irrational or theoretically unsound. This second general concern will be referred to as philosophical or theoretical reform. These two general orientations are often in conflict, as Plato's law of homicide and theory of punishment show (4); the following analysis will demonstrate that the tension between these two orientations is a determinative factor in Plato's law of theft as well. (3) A third way in which comparative analysis of individual legal topics may prove to be interesting is in regard to the problem of the coherence and unity of *The Laws*. There has, of course, been a great deal of discussion of the unity of *The Laws*, the degree to which it is unfinished, internally inconsistent, or requires revision. Here too a systematic approach at the level of individual doctrines may help in the evaluation of some of these inconsistencies.

In the ensuing discussion of the treatment of theft and related offences in *The Laws*, the following working hypotheses will serve to guide the discussion through the mass of detailed considerations which attach to each particular problem area in the law of theft. For the sake of argumentative clarity these hypotheses will, at this point, be stated in a somewhat overly

(4) See A. Adkins, *Merit and Responsibility*, Oxford, 1960; 293-312.

confident and exaggerated form. Modifications and qualifications will be added as the inquiry progresses. (1) Taken as a whole, the various theft provisions of *The Laws,* although scattered throughout several books of the dialogue, constitute a coherent, complete, and internally consistent law of theft. The supposed inconsistencies result from a misunderstanding of the relevant provisions. (2) The theft provisions of *The Laws* differ sharply from Athenian law in most areas. The differences that occur are in some cases to be accounted for by theoretical reform, in other cases by political considerations. The conflicting requirements of these orientations account for the strangeness of certain provisions. (3) Because of the way Plato has systematically reshaped the contours of the law of theft it is not possible in most instances to use *The Laws* as evidence for Athenian practice. There are some points at which Plato's treatment of a problem is suggestive — particularly in the troubled areas of theft of sacred property and conversion of lost property — but however suggestive it may be, Plato's legislation in these areas raises more problems than it solves. (4) Comparative analysis is important, however, in understanding what Plato has in mind. In some cases it would be quite difficult to understand the thrust of a passage without knowing the Attic tradition upon which Plato is building.

It may be helpful to begin by sketching the general outline of Athenian theft offenses so as to provide some background for a comparison. It should be emphasized that this outline represents my interpretation of the Athenian law of theft, which differs sharply in certain aspects from the generally held view. I will not defend my account here, other than to cite the relevant passages, but simply assume it to be, on the whole, accurate for the sake of the present discussion ([5]). Furthermore, for purposes of comparison with Plato, most of the differences between my account and the traditional view are irrelevant

(5) My views on the Athenian theft laws will be defended at length in a forthcoming book based upon my doctoral dissertation for the University of Cambridge.

because Plato discards so many of the Athenian doctrines and procedures which provide the basis for controversy (6).

Wrongful takings by private citizens fall into two major categories in Athenian law, which categories, for the sake of simplicity, may be labelled 'aggravated theft' and 'unqualified theft' (7). Aggravated theft encompasses a host of different offenses which share three common elements constitutive of the category of aggravated theft. These are (1) that the offender be taken in the act (ἐπ' αὐτοφώρῳ), (2) summarily arrested and placed in custody of the Eleven (ἀπαγωγή or ἐφήγησις), and (3) subject to the death penalty, either by immediate execution by the Eleven if he acknowledges his act, or after trial if he denies his guilt (see e.g. Demosthenes 24, 113-114). The offenses which share these three characteristics, and which will be referred to collectively as 'aggravated theft', are as follows:

(a) κλοπή of more than fifty drachmas from a private dwelling by day

(b) κλοπή of any amount from a private dwelling by night; in addition, the nocturnal thief may be killed with impunity, including the pursuit (8)

(c) τοιχωρυχία — forcible entry into a house (perhaps by night)

(d) κλοπή from gymnasia, baths, the agora, or similar places of any amount (9)

(e) κλοπή from the harbors of more than ten drachmas of public property (10)

(6) The best accounts of the Athenian law of theft are GLOTZ' article "Klope", in the *Dictionnaire des Antiquités Grecques et Romaines*, DAREMBERG and SAGLIO eds., Paris, 1900, 826-832; and GERNET, "Note sur la notion de délit privé en droit grec", *Mélanges Lévy-Bruhl*, Paris, 1959, 393-405.

(7) These terms are commonly applied by GLOTZ, GERNET, LIPSIUS, and most other scholars.

(8) For (a) and (b) see Demosthenes 24, 113-114; more complete references will be found in GLOTZ, *supra*, n. 6.

(9) See Demosthenes 24, 113-114, and Aristotle, *Problemata* 952a, 17ff.

(10) Demothenes 24, 113-114.

(f) λωποδυσία — forcible stripping of garments from others in public places (11).

The second major category, unqualified theft, is far simpler. This offense is prosecutable by a δίκη κλοπῆς and consists in the possession of stolen or lost property (the two are not distinguished) without proof of legitimate acquisition. This action entails the penalty of a twofold fine if the property is recovered intact, or a tenfold fine if it is sold, slaughtered, or otherwise disposed of (12). This completes the sketch of Athenian theft laws, excluding embezzlement of sacred or public property by officials, and ἱεροσυλία, which will be discussed later.

How then does Plato deal with theft of private property? What does he do with this plethora of categories, distinctions, and offenses? To put the matter simply, Plato sweeps away this entire structure of offenses and procedures, replacing the many distinctions with one overriding principle: one law and one penalty for theft, regardless of amount or circumstances (13). Consideration of the relevant passage, 857 a-c, reveals that Plato is quite consciously referring to what he regards as the

(11) Aeschines 1, 90-91; Xenophon, *Memorabilia* 1.2.62; Lysias 10,10 and 13,63; Antiphon 5,9-10; Demosthenes 54, 1,24.

(12) The tenfold penalty is based upon acceptance of the text of the statute given at Demosthenes 24, 105. The statute was universally accepted until its rejection by Lipsius (*Das Attische Recht und Rechtsverfahren*, Hildesheim, 1966, 440, n. 7) who argued for reading "diplasion". Glotz, *supra* n. 6, 829 followed Lipsius. Kaser ("Die Altgriechische Eigentumsschutz", ZSS 64, 1944, 134-205, 146 n. 34) regards the question as open and finds none of Lipsius' reasons for rejection to be compelling. The reasons for accepting the manuscript reading are too complex to be set out here; but, as Kaser notes, none of the reasons for emending the text can withstand scrutiny. Lipsius' argument really boils down to the fact that he can find no reason for the twofold-tenfold distinction (He labels it "undenkbar"); but on the theory of objective criminality, it makes perfect sense. For the fact that the property is not recovered intact, provides unequivocal proof that the possessor did not in fact intend to return it to the owner but had appropriated it to his own use. See D. Daube, *Studies in Biblical Law*, 89ff.

(13) C.F. Chase, *supra* n. 2, 166.

unnecessary doctrinal convolutions of Athenian theft law. The Athenian Stranger states the principle as follows:

> "If someone steals, whether something great or something small, let there be one law and one penalty in all cases. If someone is convicted in such an action and has sufficient property apart from his κλῆρος, he must pay double the value of the stolen property. If he doesn't have sufficient property let him be imprisoned until he either pays up or persuades the one who has had him convicted to let him off. If someone is convicted in an action for theft δημοσίᾳ let him be released from prison either when he has persuaded the city or paid double".

There are a number of points here which deserve mention. First of all the reaction of Cleinias to this statement of the law of theft clearly shows the way Plato wanted to underscore his break with Attic tradition. For Cleinias replies with astonishment: "How can we possibly say that we will not distinguish between a thief who steals something valuable and one who steals a trifle, or from sacred or secular property? Shouldn't the legislator match the penalty to the different circumstances of theft?" Plato seems to regard the Athenian distinctions in penalty — twofold fine in some circumstances, death in others — as morally and philosophically unjustifiable. It is for this reason that at this point he leads the discussion into the theory of punishment. Most scholars have seen the subsequent discussion of the theory of punishment as a strange digression, or have viewed the discussion of theft as a mere excuse, a "Kunstgriff", for the philosophical excursus (14). These views fail to recognize the way the philosophical discussion of the nature and theory of wrongdoing and punishment provides the theoretical framework for the theft reform based upon the overriding principle of 'one law, one penalty'. A detailed analysis of this complicated and controversial section on the theory of punishment is beyond the scope of this study, but I would draw particular attention to Sections 859 and 862 which show that Plato still has theft in mind when he develops

(14) See KNOCH, *supra* n. 2, 11-12, who discusses the literature.

the crucial argument that the legislator's evaluation of an act must not be based upon external circumstances, but rather the moral state of the actor. It is this important point which justifies the principle of uniform penalties. This restructuring of the law of theft according to a general philosophical theory is what I had in mind when I referred earlier to Plato's concern for philosophical or theoretical reform of legal doctrine. However, the theft passage in question also provides evidence of the competing motivation that I mentioned, that of shaping the law according to larger political concerns. It should be noted that citizens convicted of theft may only pay the fine from the property they have apart from their κλῆρος. This is because of the general principles that the number of allotments shall remain fixed, that no person may alienate their allotment, that no citizen may be punished with confiscation of all his property, etc. These, of course, are all part of Plato's effort to ensure the permanence and stability of the social structure he elaborates in the dialogue. This results in the rather strange position he takes in regard to penalties for theft. If a man can pay, he pays. If not, he goes to jail until he can pay or he is let off (855). In either event there is a clear inconsistency with the philosophical principles concerning punishment which he develops. For according to the theft provisions two similarly situated offenders may meet with vastly different fates depending simply upon the fortuity of external circumstances; how much property they have, whether or not someone else is willing to lend them the money, whether or not they are let off by the injured party, etc. Here one can see how both political and philosophical concerns interact in the way that Attic law is reshaped by Plato.

There remains a further point concerning the theft provisions of 857, which will also provide the transition to the next section to be considered. At 857b the Athenian says, "If someone is convicted in an action for theft δημοσίᾳ, let them be released from prison when they have either persuaded the city or paid double". This passage has been generally interpreted to concern theft of public property. Seen in this way it clearly conflicts

with the law at 941c-d which unequivocally provides for the death penalty for citizens convicted of theft of public property. This inconsistency has been treated in a number of ways. Gernet comments that there is either something we don't understand, or it is just one of those contradictions one finds in *The Laws* (15). Chase comments, "Only small minds are never inconsistent" (16). And Knoch and many others have used these passages as evidence for the unfinished and incomplete state of the dialogue (17). Is there another explanation? To begin with the wording of the provision in 941c, the phrase 'If someone steals δημόσιον, great or small...' seems more like what one would expect for a provision concerning theft of public property, than does 857 with its use of the adverb δημοσίᾳ. In fact, the use of δημοσίᾳ here is extremely puzzling if the passage is taken to refer to theft of public property. The word δημοσίᾳ occurs eleven times in *The Laws*; in no other passage is it used in this sense (18). For the most part, it is used in opposition to ἰδίᾳ, in the sense of 'both in public and in private life' (19). Twice it is used, however, in the sense of 'in public, in a public place'. For example at 800c7 it is used of a sacrifice performed in a public place; in 873e2 it is used of competitions held in public. If one recalls here that in Athenian law the opposition of public and private places was an important factor in shaping the theft laws, then the provision in 857 makes perfect sense. According to Demosthenes 23, 113-114 and *Problemata* 952a-b theft in public places like the baths, gymnasia, or assembly was punished by death; whereas theft from private dwellings was so punished only if the amount exceeded fifty drachmas or the theft occurred at night. In the first part of 857 Plato eliminates one of the major criteria of the theft laws by saying that

(15) See GERNET's Introduction to the Budé edition of *The Laws*, cci-ccii.

(16) CHASE, *supra* n. 2, 167.

(17) KNOCH, *supra* n. 2, 11-12, and especially n. 14.

(18) 626a6; 626d8; 647b1; 713e8; 800c7; 857b1; 873e2; 890b2; 899e1; 940d8; 953b.

(19) See e.g. 626a6; 626d8; 647b1; 713e8.

the value of the stolen property is irrelevant. (Demosthenes also begins his exposition of the theft statutes with theft of more than fifty drachmas). Then Plato also discards the 'aggravating' circumstances which Demosthenes lists next: stealing private property of any value from public places like the baths or gymnasia. Seen in this light the blatant contradiction with 941c disappears. One passage concerns theft of public property, the other, theft of private property from public places. In accordance with his principle of 'one law, one penalty' regardless of external circumstances, Plato includes the reference to theft δημοσίᾳ as a specific rejection of the Athenian provision that punished theft from public places with death. It should be noted here that Plato also seems to have done away with the offenses of λωποδυσία and τοιχωρυχία as distinct varieties of theft punishable by death. The general theft provision of 857 would seem to encompass them as well, except that the τοιχωρύχος or λωποδύτης may still be killed by the victim under the appropriate circumstances.

It may be useful now to turn to a closer examination of 941b-d itself. As mentioned above, shortly after the Athenian Stranger begins his discussion of theft the discussion suddenly shifts to the general theory of punishment, leaving unanswered Cleinias' important questions about the drastic changes in the law of theft (857). In 859 the Athenian promises the detailed examination of theft which the reader has expected ever since the apparent digression on punishment interrupted the exegesis of the theft provisions themselves, but that promise is not immediately fulfilled. There is indeed some discontinuity here, for when the Athenian turns back to the subject at hand after the exposition of the theory of punishment he says that he will take up where he left off before the digression, and then promptly turns to the law of homicide (864c-d). It is not until 941 that the promised consideration of theft finally comes.

The section of *The Laws* that begins at 941b is normally regarded as simply presenting the legislation pertaining to theft of public property (20). This it undeniably does, but it has

(20) See e.g. GERNET, *supra* n. 15, cci.

a broader significance as well. The first thing to be noticed is that the section begins with a general discussion of *all* theft: "Theft of property is unworthy of a free man, and robbery an act of shamelessness". Then follows the type of preamble one would have expected at 857, also applying to theft in general. Finally come the particular laws concerning theft of public property. I would argue that 941 represents the general theoretical discussion promised at 859, and that consequently the discussion of theft at 857 and 941 should be read together, and the important theoretical remarks in 941 be seen as applying to the earlier theft provisions as well. The justification for this lies in the fact that the discussion at 941c4-d4 clearly refers back to and complements both the provisions of 857 as well as the ensuing discussion of punishment. The lines 941c4ff. read as follows: "If someone steals something belonging to the public, whether the property is valuable or a trifle, he must receive the same penalty". This is clearly consistent with the principle announced in 857 that for theft there should be one law and one punishment regardless of amount and circumstances. The next lines provide the theoretical justification for this principle that was conspicuously absent in 857 and was later promised in 859. These next lines, 941c5ff. are as follows: "For someone stealing something small does so with the same desire, but with a lesser capability than one who steals something great. And he who removes something great which he did not himself set down commits a complete act of wrongdoing. But the law does not punish either with a greater penalty than the other according to the value of the stolen property, but rather in this manner, that the one is perhaps still curable, the other not". I will discuss in a moment the offense mentioned here of removal of property, punished with a tenfold fine; but, for the present, what is important is that these lines clearly build up the discussion of punishment which begins at 857, and follow precisely the conclusions reached in 862 whereby punishment is meted out according to internal moral states rather than external circumstances. This preamble to the law of theft of public property thus should also be regarded as the missing preamble to 857. Why Plato separated the two theft provisions

is an interesting problem, but whatever the answer, they form a coherent whole, encompassing also the important provisions concerning removal of left or abandoned property.

To turn now briefly to the laws themselves, they provide that a foreigner or slave convicted of theft of public property should be punished at the discretion of the court in the light of the probability that he is curable. The citizen, on the other hand, convicted of such an offense is to be put to death as incurable, regardless of whether he is taken in the act or not. No distinction is made, as in Athenian law, between theft by officials and theft by private citizens. There are a number of interesting points here, including the reference to being taken in the act, as well as the penalties. In Athenian law, embezzlement of public funds could be punished either by a tenfold fine or death. Plato, in accordance with his principle of 'one law, one penalty' has removed the dual penalties. Here again we see the philosophical concern for theoretical consistency (21). On the other hand, however, he adopts the death penalty for political reasons, in accordance with his theory of punishment: Those who are incurable must be eliminated from the body politic

(21) As pointed out above, no distinction seems to be made between misappropriations of public property by officials and by private citizens. This, it will be seen, also seems to be the case for theft of sacred property, where ἱεροσυλία is the only offense discussed by Plato. One possibility is simply that Plato forgot about embezzlement. This seems rather unlikely to me, for I think it is hardly coincidental that *both* embezzlement of sacred as well as public property were omitted. This is especially true in the light of the prominence of these offenses in Athens. A more plausible albeit speculative possibility is that Plato has eliminated the distinction between larceny and embezzlement as part of his philosophical reorganization of the law of theft. That this is perhaps a natural tendency is shown by developments in modern law; particularly the Theft Act of 1968 which eliminated what were regarded as the archaic distinctions between larceny and embezzlement. Given Plato's general theoretical approach towards the criminal law, guided by the dual principles of 'one law, one penalty' and punishment according to internal moral states rather than external circumstances, it is perhaps not surprising that no distinction is made between the different forms of misappropriation of public and sacred property.

the way that a surgeon cuts away diseased flesh to promote general health. Further, slaves and foreigners are given a lighter punishment, not because Plato is sympathetic towards them, but rather because they have not had the benefit of being raised in the city described in *The Laws*. Their offense thus does not necessarily imply that they are incurable, and incurability is the only justification for the death penalty.

Finally, as mentioned above, Plato provides that the citizen is to be put to death whether caught in the act — ἐπ' αὐτοφώρῳ — or not. This would seem to imply that in Athenian practice this is not the case. This is extremely interesting, for the universally held view is that the ἐπ' αὐτοφώρῳ requirement applies only to certain offenders classified as κακοῦργοι, and not to those accused of embezzling public funds (22). There seem to be three possibilities here. The first is that perhaps Plato has simply mixed up his Attic law; I would reject this as rather unlikely. A second possibility is that the remark about ἐπ' αὐτοφώρῳ really applies to the earlier provisions about theft of private property (857), where it would fit quite well as one of the aggravating circumstances that Cleinias felt was conspicuously missing from the Athenian's proposed law of theft. I do, in fact, believe that being taken in the act was one of the aggravating circumstances that Plato quite deliberately eliminated from his law concerning theft of private property, but this still does not at all explain its quite unequivocal application in 942a2 to theft of public property. There is a third possibility, however, which is suggestive, but also points up the difficulty of arguing from Plato back to Athens. This possibility is simply that Plato knew more about this area of Athenian law than we do, and that being taken in the act was some way an important factor in the prosecution of theft of

(22) CHASE, *supra* n. 2, comments on Plato's mention of ἐπ' αὐτοφώρῳ here (168), but he does not have a firm grasp of Athenian law and simply assumes that Demosthenes 24, 113 applies exclusively to theft of public property. He even mentions stealing a cloak or oil flask from the gymnasium, but seems to assume that these objects are public property. He does not consider the problem of embezzlement.

public property. Is there any corroborative evidence for this? There is, but it is by no means conclusive. There are, in fact, two passages which speak of officials prosecuted for embezzlement being taken ἐπ' αὐτοφώρῳ. One is Dinarchus's oration *Against Demosthenes* 77, but there is no factual context in which to evaluate his remark, and it is possible that it is simply a typical rhetorical exaggeration. The second passage, Aeschines' *Against Ctesiphon* 10, is more substantial but also not conclusive. The speaker remarks that because of corruption it happens all too often that officials who were caught in the very act of embezzling public funds nonetheless are acquitted. Here, however, he may simply mean that they were manifestly guilty rather than that they were taken in the act in the technical sense as a requirement for liability; once again a definitive interpretation is not possible. It seems unlikely to me under those circumstances that Plato's remark about ἐπ' αὐτοφώρῳ does not reflect something about Attic law that remains obscure to us. However, what that 'something' is remains unknown and underscores the difficulties in attempting to use *The Laws* to explain Athenian practice.

As mentioned in passing above, the section concerning theft of public property refers back to other provisions concerning removal of left, lost, or abandoned property. These provisions, found at 913-914, present a number of difficult problems, not the least of which is determining what Plato had in mind here. To outline the provisions briefly, Plato begins by considering the case of the man who finds and appropriates treasure trove (913a-914a). Plato treats this as a religious matter which is to be settled by consultation with Delphi. He then considers the general case of where a man finds property which has unintentionally or intentionally been left somewhere by another and takes it home to him (914b-c). Such an offender is to be beaten if he is a slave, and punished with a tenfold fine and considered to be servile and lawless if a citizen. There are several important issues here. First of all, is this seen as theft? On the one hand, the words κλοπή and κλέπτειν are not used at all in the section. Yet there are a number of factors which indicate

that this offense is to be considered as falling within the scope of the theft laws describe above: (1) The most obvious is that Section 941 explicitly refers back to this section (914) as an example of another variety of theft punishment with a lighter penalty than theft of public property. (2) The provision begins at 941b1 by saying that the same law applies to all cases regardless of the value of the property. This is, of course, the general principle enunciated in 857 and 941 as applying to all cases of theft. (3) Part of the penalty for the finder is that he is to be thought 'servile', ἀνελεύθερος. This is the same word which is used to introduce the general discussion of theft at 941: κλοπή is ἀνελεύθερον.

Assuming that the provision concerning finders is to be seen as a theft offense, what is one to make of it? Why doesn't Plato use the words κλοπή or κλέπτειν once in this long section? At first glance there would seem to be an internal inconsistency here. Plato has announced the principle of 'one law, one penalty' so what is the justification for a tenfold penalty for the finder of left, lost, or abandoned property, as opposed to the twofold penalty for normal theft of private property? Why the extreme differentiation in penalties? There is no complete answer to these questions, but perhaps the key to one, and it is connected with the question of why the word κλοπή does not appear in the passage. First one should recall that when Plato in 941 refers back to this passage he characterizes the act of the finder as one who, let us provisionally translate, 'removes' the property. The verb he uses is κινεῖν. This verb is used three times in the description of finding treasure trove, including in the quotation of the traditional adage at 913b9: "Don't 'remove' those things which should not be moved — ἀκίνητα". In the provision concerning the finder κινεῖν occurs again in the penalty provision '... and let him pay ten times the value of the thing removed...'. Now the verb κινεῖν in addition to its other standard meanings, has the specialized meaning of seizing, violating, or making off with sacred property. This sense is, of course, captured in the proverb which Plato quotes in the passage. Κινεῖν is often used in this way in Thucydides and

Herodotus of those who plunder temples or sacred property, and the same meaning occurs, although with less frequency, in the orators (23). In the passage concerning finders this makes perfect sense, for, as I mentioned above, the appropriation of treasure trove, is regarded as a sacred matter. Likewise, in regard to left or lost property in general, Plato says it is to be regarded as having been consecrated to and under the protection of the goddess of the wayside (941b5). This provides a superficial explanation of the severe penalty, for if the taking is regarded as a taking of consecrated property it would be clearly distinguishable from ordinary takings of private property, and the more severe penalty would thus not violate the maxim of 'one law, one penalty'. The more basic question remains, however, as to why Plato chose to regard lost, left, and abandoned property as consecrated. As stated above, there is, at present, no fully satisfactory answer for this question. Plato also treats the taking of fruit from a neighbour's trees in the same manner, speaking of the protection of a god, and referring ahead to the law which provides that no one should 'remove' (κινεῖν) property which he himself did not put down (845). Once again the motivation for treating theft of fruit in this way is unclear, but it is striking that, as in 914, the words κλοπή and κλέπτειν are not used (24).

(23) Herodotus 1, 183, 187; 6, 134; Thucydides 1, 143; 2, 24; 4, 98; 6, 70; Demosthenes, *Against Androtion* 71; Lycurgus, *Against Leocrates* 25; Isocrates, *Panegyricus* 156.

(24) Cf. 842e-843b, which uses κινεῖν of offenses concerning ὅροι. On theft of fruit see KLINGENBERG, *supra* n. 2, 147-163, whose discussion is learned but does not really address the interesting and difficult questions. There seems to be no evidence for such provisions regarding theft of fruit in Attic law, but this certainly does not mean that there weren't any. Such provisions would be unlikely to find their way into an oration, and an argument from silence would be ill-advised here. This is particularly apparent if one considers Plato's provision concerning κλοπή of water (844b). There is no evidence elsewhere in Greece for such an offense, and it might be tempting to conclude that this was simply Plato's invention if an inscription concerning theft of sacred water had not survived from Athens (ca. 400 BC, SOKOLOWSKI LSG 178). Once again, the dangers of arguing from Plato to Athens, or vice versa, in the absence of substantial evidence, are apparent.

The next question to be considered is, 'Given that Plato arranged his law concerning left, lost, and abandoned property in the way that he did, what is its relation to Athenian law?' It was argued above that in Athenian law the taking of lost property was treated as a case of simple theft, prosecutable by a δίκη κλοπῆς. The penalty was a two-fold fine if the property was returned intact, tenfold if it was not (25). It is, of course, striking that Plato also punishes the appropriation of lost property with a tenfold fine. His provision begins: 'If someone leaves something whether voluntarily or involuntarily...' The Athenian statute, found in Demosthenes 24, 105 begins: 'If someone loses something...' There are perhaps three similarities in the provisions apart from the penalty — but I would not press them very far. The first is that in Demosthenes the finder may, at the discretion of the court, be punished with five days in the stocks in addition to the fine: this is clearly a public *Ehrenstrafe*. Likewise in Plato, in addition to the fine, the man is to be thought to be servile and lawless — likewise an *Ehrenstrafe*. Secondly, the Athenian statute provides that the man who does not return the property intact is to be punished with a tenfold fine. This failure to return the property is an objective manifestation of the fact that the man did intend to steal the property he found, and thus justifies the imposition of the harsher penalty. Similarly, in Plato there is a provision that the finder 'carry the property to his home' 914b6. Is this also an objective requirement for liability? I wouldn't press this point too hard, but it should be noted that if the finder was simply somewhere on the road with the property there would be no way of telling whether or not he was on his way to return it. This is, of course, always a problem in the treatment of appropriation of lost, left, or abandoned property — distinguishing between the good faith finder who really does plan to return the property, and the thief who does not. Athenian law addressed the problem by means of different penalties based upon the way in which the finder had treated the property. Perhaps Plato is providing an analogous criterion.

(25) See *supra* n. 12.

This second point of similarity is related to the third one, which has to do with the fact that in treating the appropriation of lost property the statute quoted by Demosthenes (24, 105), like Plato's provision, does not use the normal vocabulary of theft; κλοπή and κλέπτειν do not occur. This circumstance is rather puzzling, and I can only hazard a guess at the reason for it. If the standard case of κλοπή as a specific crime centers around the concept of a taking from possession by stealth or force, then it may be either that the open quality of the appropriation, or the fact that the lost property is regarded as no longer being in the possession of the owner, renders the appropriation distinct from the type of taking that the verb κλέπτειν implies when applied to a specific offense. As stated above, the taking of the lost or left property is ambiguous; the man may in fact be about to return it. This is not the type of taking which constitutes objective proof of the fact that the man is a thief; hence the requirement that he carry the property home. On this view, in both Demosthenes and Plato, κλέπτειν is not used to describe the appropriation of lost property because the stealthful or forceful taking that κλέπτειν describes does not occur. From a broader perspective, however, such an appropriation is regarded as a theft offense (κλοπή) in the more general sense of κλοπή as 'misappropriation'. Similarily, we can today speak of theft and mean either the specific offenses associated with larceny, or the whole range of 'theft offenses' which includes fraud, embezzlement, burglary, etc.

The final theft offense to be considered is ἱεροσυλία. Plato classifies ἱεροσυλία as one of the three greatest crimes that a citizen can commit, grouping it together with subversion and treason (854 ff.). In Athenian sources it is also listed together with treason, or treason and murder, but is often grouped together with other theft offenses. Certainly the seriousness with which Plato regards this offense may also be relevant to the previous discussion of the severe penalty for those appropriating 'consecrated' property left unattended. In any event, Plato repeatedly emphasizes the heinousness of ἱεροσυλία and states more than once that any citizen who, having been raised

in this model state, could commit such a crime, is plainly incurable.

Indeed the language of disease and cure is prominent in the passage, particularly in the preamble to the law. After the preamble, the actual law is as follows: "Whoever may be convicted of committing ἱεροσυλία, if he is a slave or foreigner, having branded his misfortune on his hands and face, and having whipped him as much as the judges may deem fit, let him be cast naked beyond the boundaries of the country... If, on the other hand, some citizen is ever found doing some such thing, that is committing such a great and unspeakable offense against his parents, or the gods, or the state, let the judge consider him as already incurable, considering that the sort of education and upbringing he has had from childhood did not restrain him from the greatest evils. And the penalty for him is death, the least of evils, and he will furnish an example for others, dishonoured and removed beyond the boundaries of the country. And let there be honour and praise for the children and family if they escape the character of their father..." (854d-855a).

There are a number of points to be noted here, some concerning Plato alone, others the comparison with Athens. First of all, what is ἱεροσυλία? Plato offers no definition of the offense; indeed in the law itself he simply says: 'If someone is convicted of committing ἱεροσυλία' (he uses the active participle of the verb). Clearly Plato assumes that the reader will understand what he means and this in itself points towards his dependence on Athenian law. Here Plato is clearly in the tradition of Athenian penal legislation in regard to ἱεροσυλία and theft, for it is typical that the statutes, and the orators, only define the offense in a conclusory way. The typical statute is: 'If someone steals' or 'If someone commits ἱεροσυλία...' Such a formulation of course assumes that one knows what κλέπτειν or ἱεροσυλία in fact is. Aristotle, in the *Rhetoric* (26), argues for the need for precise definitions of offenses, and it is interesting to see that

(26) 1374a.

in this regard Plato is often no more precise a legislator than his Attic predecessors. How do we know then what Plato means by ἱεροσυλία? We cannot rely upon Attic evidence, if for no other reason than that we encounter similar problems there. It nonetheless seems from two passages in the introduction to the law on ἱεροσυλία, that Plato intends the offense to be limited to theft from temples (853d5 and 854a6f). However, the details of the offense remain obsure and we cannot be sure that he did not intend that embezzlement of sacred funds or theft of sacred property outside of temples should fall under the same provision. This problem of what ἱεροσυλία means is only exacerbated by the fact that in Plato's actual statute concerning ἱεροσυλία by a citizen the wording is much different than in the provision concerning slaves. Instead of repeating or following what he started to say at the beginning of the law, namely: 'If someone is convicted of ἱεροσυλία...', he begins again, and rather than speaking directly of ἱεροσυλία, says: 'If, on the other hand some citizen is found doing such a thing, committing some great and unspeakable offense against the gods or the city or his parents ... etc.' This is to cast the net rather wide indeed. One need perhaps not take this too seriously, for the same discrepancy occurs in the statutory formulation of the provision concerning theft of public property (941c). There the provision for slaves and foreigners is similarly straightforward, speaking of κλοπή as one would expect. But in the provision for citizens Plato again uses vehement, exaggerated language saying: 'If a citizen is convicted of plundering (συλᾶν) and forcibly violating his fatherland...' So in the ἱεροσυλία passage perhaps one should just regard the broad language as part of Plato's attempt at exhortation and persuasion, yet it might be wise to hesitate before summarily concluding, as some scholars have done, that Plato narrowly defined ἱεροσυλία as actual theft from temples, and thus based his law closely upon an Athenian model (27).

In a variety of other particulars Plato's law of ἱεροσυλία

(27) See e.g. CHASE, *supra* n. 2, 151, who states that "The parallelism needs no comment", and GERNET, *supra* n. 15, cxiii.

clearly differs from Athens, and the differences are for the most part attributable to the types of general concerns discussed above. As in Athens the penalty for citizens is death, and the body is cast beyond the borders, but unlike in Athens there is no confiscation of property (28). This, of course, is due to the overriding principle that confiscation is not to be allowed so that the number of κλῆροι may remain fixed. No total ἀτιμία is permissible, for the function of the institution of punishment is either to reintegrate the offender within the community, or to eliminate a diseased member completely by means of the death penalty (see 855c ff.). Further, unlike Athens, slaves are subjected to severe corporal punishment but are not put to death, once again in accord with Plato's general principles of punishment. There are a number of other points in which Plato differs from Athenian law, including all the procedural aspects of ἱεροσυλία, but what I have mentioned so far should indicate that those scholars are somewhat hasty who summarily conclude that the parallelism of Plato's law of ἱεροσυλία to Athenian law is on its face so close as to require no comment (29).

To conclude, a few remarks on the problem of the unity and unfinished state of *The Laws* may be appropriate. I do not wish to express an opinion on this problem taken as a whole, rather solely in regard to the theft laws. It seems to me that, with some reservations, *The Laws* provide a complete, coherent, and carefully thought out pattern of legislation which covers the whole range of the law of theft. I will try now to outline briefly the provisions as a whole and show the way that they interrelate with one another. Section 857 provides for a uniform penalty for all theft of private property based upon the principle of 'one law, one penalty'. This principle also governs Section 941 which provides for the death penalty for any citizen stealing public property, regardless of amount or circumstances.

(28) For Athens see CROSBY, "Greek Inscriptions", Hesperia 10, 1941, 14-26, no. 1.

(29) See *supra* n. 27.

This section, 941, refers back to 914, concerning the appropriation of lost, left, or abandoned property, which section also explicitly adopts a uniform penalty regardless of amount. The law on lost property (914) then flows into a section concerning disputes regarding the ownership of property, where one party contends that the other is in possession of something that doesn't belong to him. Once again the provision is said to apply regardless of whether the value of the property is great or small. The provision on the house search at 954a5 fits in with the action over disputed property (30). If someone suspects another of being in possession of his property, he is entitled, following certain procedures, to search the man's house for it. If the man does not allow the search then he is taken to court, and, if convicted is fined twice the amount of the property. That is to say he is treated as a thief in accordance with the general penalty for theft of private property established in 857. These are the main provisions regarding theft. There is in addition the provision regarding theft of fruit which, however mysterious it may be in other respects, is seen to fit into the whole, as it explicitly refers forward to the provisions on appropriation of left or lost property. The homicide laws deal with the problem of killing the night-time thief in the house or the cloak-snatcher. There is an additional provision concerning receiving stolen property. The theft provisions thus cover the full range of problems related to theft that one would expect. In regard to their unity and need of revision, it seems particularly impressive to me that, scattered throughout the dialogue as they are, they interlock as clearly as they do, referring back and forth to one another and invoking the same general principles. This is not to deny that there are a number

(30) There is so little evidence for the details of the house search in Athenian law that there is no point in discussing the possibility of similarities. See MACDOWELL, *The Law in Classical Athens*, London, 1978, 148; CHASE, *supra* n. 2, 168.

There is a further reference to theft at 933e in a general provision concerning penalties, but this passage is not relevant to the present consideration of the law of theft.

of puzzling or even bizarre aspects of the theft provisions, but these do not seem to be due to haphazard construction. Thus there may be aspects of Plato's legislation on theft which remain obscure to us, but the underlying reason may simply be our ignorance rather than any oversight on Plato's part [31].

(31) I would like to express my appreciation to Professors Moses FINLEY, David DAUBE, John CROOK, and Dieter SIMON who read this paper in draft and offered helpful suggestions and criticism.