

A CONTRACT ANALYSIS OF THE TROJAN WAR

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I. INTRODUCTION

This Article concerns the intersection of ancient Greek law and ancient Greek mythology. Specifically, it employs one of the world's most famous myths as a basis for examining reciprocal agreements (i.e., contracts) in the Greek world prior to the advent of writing, the preliterate period, and at the time when writing was in its nascent stages, the protoliterate period (i.e., roughly the eighth century B.C.).

Scholars who specialize in ancient Greek law often observe that Greek law has failed to influence the law of later societies in any meaningful way. They have, in short, apologized for Greek law, concluding that "ancient Greek law has had a negligible influence on posterity."¹ Nevertheless, in *The Law in Classical Athens*, Professor Douglas MacDowell takes the position that we have a great deal to learn from studying ancient Greek law: "Law is the formal expression of a people's beliefs about right and wrong conduct, and no people in the world has had more interesting and original beliefs about conduct than the ancient Greeks."²

Classical myths enchanted us when we were children. The adventures of gods and heroes are intrinsically interesting and entertaining.³ In addition to their

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1. S.C. TODD, *THE SHAPE OF ATHENIAN LAW* 4 (1993); see also *id.* at 3 ("Law is one of the very few areas of social practice in which the ancient Greeks have had no significant influence on subsequent societies.").

2. DOUGLAS MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 8 (1977).

3. "A Greek myth is a narrative about the deeds of gods and heroes and their interrelations with ordinary mortals, handed on as a tradition within the ancient Greek world, and of collective significance to a particular social group or groups." RICHARD BUXTON, *IMAGINARY GREECE: THE CONTEXTS OF MYTHOLOGY* 15 (1994) (footnote omitted).

value for pure entertainment, Greek myths have also provided the foundation for numerous philosophical, psychological, sociological, and historical theories.⁴ Myths emerge in preliterate societies. Some myths are aetiological while others inform us about the human condition.⁵ But no matter what any given myth's original purpose or purposes may have been, myths also inevitably reflect human conceptions of right and wrong.⁶ Myths involve conflict. Some conflicts are private and some are between nations. Still other myths center on the internal conflict of an individual. Legal historians have a great deal to learn from myths. For the legal historian, the ways that mythological gods and mortals resolve their conflicts is instructive. There is a relationship—a positive correlation—between the imaginary world of the myths and the real world of the people who formulated and wrote down the myths.⁷ We have long recognized that myths serve a didactic function: the poets provided examples of acceptable conduct.⁸ Thus, it is logical to suppose that, as a general rule, the ways that mythological characters treat their property, agreements, family arrangements, and the like reflect the manner in which the

4. "[E]arly myths represent man's first attempt at philosophical speculation." ANDRE MICHALOPOULOS, *HOMER* 16 (1966).

5. See BUXTON, *supra* note 3, at 177–81.

6. "Good conduct [in the Homeric poems] is that which is appropriate in the circumstances and it will be so signaled, for this label simply indexes adherence to a norm implicitly accepted by the whole group and incapable of reflective change." ERIC HAVELOCK, *THE GREEK CONCEPT OF JUSTICE: FROM ITS SHADOW IN HOMER TO ITS SUBSTANCE IN PLATO* 34 (1978); see also *id.* at 53 ("What they did rely on for cohesion—as does any society—was a set of proprieties, of general rules of behavior which in sum total constitute 'what is right.'"); *id.* at 106, 124 ("The *nomos* and *ethos* continually recalled and illustrated in Homeric narrative and rhetoric are normative. They state and restate the proprieties of behavior as these are assumed and followed.... [I]t is particularly in the *Iliad* that restoration can be seen to depend upon the application of a set of rules recognized by the community present in the story, and recognizable by the modern reader, as a form of 'justice.'").

7. See BUXTON, *supra* note 3, at 4–5; see also *id.* at 72 (regarding the relationship between mythology and the "historical situation"); *id.* at 77 ("By constantly switching our gaze from narratives to the life of the community in which they were told, we give ourselves the best chance of recognising the social dimension of meaning."). Professor Buxton uses evidence about many facets of life where "myth reflects the ordinary world." *Id.* at 86; see also *id.* at 111 (specifically mentioning Homer in this regard).

8. See *id.* at 171, 173 (regarding Homer). According to Professor Havelock, "morality" in Homer is comprised of "a set of obligations imposed by a corresponding set of social relations within which life is lived." *Id.* at 9. Havelock posits that in Homer the "narrative frame...take[s] frequent opportunity to make occasion for exhortation, reproof, admonition, encouragement, condemnation, challenge, and the like in the course of which the assorted maxims, the proverbs, the moral law of the community will find a natural place in the mouths of the speakers." HAVELOCK, *supra* note 6, at 49. *But see* RACHEL BESPALOFF, *ON THE ILIAD* 48 (Mary McCarthy trans., 1947). Professor Bespaloff argues that the distinctions between "good" and "bad" do not necessarily exist in the *Iliad*. According to Bespaloff: "Such distinctions do not exist; there are only men suffering, warriors fighting, some winning, some losing. The passion for justice emerges only in mourning for justice...." *Id.*

culture that produced and wrote those myths (i.e., the community as a whole) thought that its property, agreements, and family arrangements ought to be treated.⁹ Simply stated, mythology provides a lens through which legal historians can examine the laws and attitudes towards law of the society that generated and transcribed that mythology.

The myth of the Trojan War is probably the most well known and enduring myth in Western culture. Homer's *Iliad* tells the story of the wrath of Achilles and the closing weeks of the war between the Greeks and the Trojans.¹⁰ The *Odyssey* recounts the tale of Odysseus' adventures on his long journey homeward to Ithaca following the war.¹¹ In addition to Homer, later Greek and Roman poets added various details to the myth of the Trojan War. Contracts play crucial parts in the story.¹² Agreements of one kind and another abound in the tale; and the results of those agreements are remarkable. This Article explores the nature of contract in the myth of the Trojan War. The goal is not to dissect every minor offer, promise, or compact.¹³ Rather, this Article focuses on the values promoted and interests protected in a representative sample of two kinds of agreements (or offers for an agreement). First, it explores four agreements in the *Iliad* that involve reciprocal promises. Agreements that involve reciprocal promises are agreements that modern contract theory treats as having "consideration"—a bargained-for-exchange, a quid pro quo.¹⁴ In conjunction with these four agreements, one offer of a reciprocal agreement that the offeree rejected is also considered. Second, the

9. See *supra* note 6. This is especially true in the case of Homer's poetry. The Athenians in the classical era used Homer to teach societal values through "civic conduct, morals, and religion." HAVELOCK, *supra* note 6, at 7. Epic in general, according to Havelock, "constitutes a massive attempt at oral storage of cultural information for reuse." *Id.* at 29; see also CEDRIC WHITMAN, *HOMER AND THE HEROIC TRADITION* 243 (1958) ("If difficulties confront a man after or because of an act, the gods must have disapproved. But there is no systematic morality which the gods sustain.").

10. See *Homer*, in *THE OXFORD CLASSICAL DICTIONARY* 718 (Simon Hornblower & Antony Spawforth eds., 3d ed. 1996).

11. See *id.* at 718-19.

12. See *infra* Part IV.

13. I have selected a representative sample for this study. I have omitted discussion of many other contract offers and contracts. For example, in Book 16, Achilles agrees to allow Patroclus to wear his armor in battle if Patroclus agrees not to pursue the Trojans beyond merely defending the fleet. Patroclus forgets his promise, ventures too far from the ships, and Hector kills him. Another example occurs in Book 20 when Hector's life is threatened before the walls of Troy. He considers offering to give Achilles Helen plus half of Troy's wealth if Achilles will agree to a truce. Another example occurs in Book 22 when Hector is about to face Achilles in their final battle. He suggests that they should agree not to mistreat the body of the one of them who dies. Achilles indignantly refuses. Furthermore, I have omitted from my discussion reference to the ritual of reciprocal gift exchange, such as the exchange of armor between Glaucus and Diomedes in Book 6 of the *Iliad*. See MICHALOPOULOS, *supra* note 4, at 131.

14. See *RESTATEMENT (SECOND) OF CONTRACTS* § 17 (1981).

Article analyzes the two major agreements that shape the structure of the myth as a whole (although these are not found per se in the text of the *Iliad*).

A few words of caution are necessary at the outset. It is important to acknowledge that this entire undertaking is fraught with problems. First, the details of the agreements considered and discussed do not necessarily reflect the historic attitudes of any one particular culture or period in time.¹⁵ Long ago Professor Gilbert Murray observed:

In most traditional poems there are three fairly distinct elements. There are masses of mere fiction, that is, stories and personages deliberately invented by the poet out of his head. There are, secondly, the shapes of myth and folklore, which the poet narrates in good faith, as he received them, with at least a modicum of belief in their reality. And, thirdly, there are fragments of definite history.¹⁶

Because the *Iliad* began as an oral epic in the centuries before it was written,¹⁷ and because the text evolved for centuries thereafter, some of the details in the poem reflect very different time periods. Professor Cedric Whitman characterizes the problem aptly:

The bards did not hesitate to conflate times and stories, and Homer's materials come from any and all periods which precede him, some being of Mycenaean or earlier origin, some from the Dark Age and after the fall of Mycenae, and some from the poet's own time in the eighth century.¹⁸

Professor G.S. Kirk explains the consequences of this handicap: "One of the most obvious kinds of complexity in the *Iliad* and *Odyssey* is that of the different and sometimes incompatible objects, customs and beliefs that they describe. In a few cases we may hope to assign these to a definite historical period."¹⁹ Thus, the best

15. It does, however, appear that there really was a Trojan War. According to Professor Michalopoulos: "The War of Troy which forms the background of Homer's epics is now universally accepted as historical reality. Around 1250-1240 B.C.,...the Troad was invaded by a large force of Achaean chieftains, and the city was sacked and burned to the ground." MICHALOPOULOS, *supra* note 4, at 29.

16. GILBERT MURRAY, *THE RISE OF THE GREEK EPIC 178-79* (1907).

17. See HAVELOCK, *supra* note 6, at 5.

18. WHITMAN, *supra* note 9, at 27 (footnote omitted); see also HAVELOCK, *supra* note 6, at 56 ("[T]he poems essentially report a society which both in its material and its political aspects is contemporary with their final date of composition."). On the date of composition, see HAVELOCK, *supra* note 6, at 9 ("[T]he dates of composition...[are] commonly placed in the centuries between 1000 and 700 B.C., with a preference for the earlier period (footnote omitted)); MICHALOPOULOS, *supra* note 4, at 37 ("[Homer] lived not earlier than 1100 and not later than 850 B.C.").

19. G.S. KIRK, *HOMER AND THE EPIC: A SHORTENED VERSION OF "THE SONGS OF HOMER"* 149 (reprint ed. 1976) (1965). Nevertheless, to a large extent, the society depicted in Homer observes "common rituals and customs,...a common mythology, and...an

that this Article can hope to do is to shed light on contracts and contract theory as they evolved up to the time the *Iliad* was written. Therefore, although admittedly neither the myth of the Trojan War nor the elements described in the *Iliad* can be said to reflect reality at any one point in time, it is fair to say that they reflect institutions and concepts within the scope of the preliterate and protoliterate periods (i.e., prior to the eighth century B.C.). In sum, although this Article begins with the general premise that the "Homeric epic reflects the social conditions of tenth/ninth-century Greece,"²⁰ its conclusions are merely generalizations and hypotheses relating to Greek contract law in the preliterate and protoliterate periods, not definitive legal history that applies at any one place and time in Greek history.²¹

Another reason that this study is problematic is that it purports to examine law and specifically contract law. It may be more accurate and realistic to say that it examines preliterate/protoliterate customs of the agreement process rather than law strictly speaking. Professor Havelock characterizes such an inquiry as one regarding:

custom-law, apprehended not in the shape of specific edicts but as a body of maxims or sayings which describe the proprieties of behavior both personal and social. These proprieties constitute the mores of the society...identified in the...*nomoi* and *ethe*...the custom-laws, the folkways, the habits of a people.²²

assumption of social order and regulated usage." HAVELOCK, *supra* note 6, at 11; *see also id.* at 63 (citing specific examples of naval activity and colonization in the seventh and eighth centuries B.C.); *id.* at 87 ("In sum, the stories and episodes of both epics are fashioned in such a way as to take for granted a polity and life-style which are contemporary, meaning that they reflect Greek life as it was lived in the period when the poems assumed their final compositional form. The characters live and behave as people in that society would live and behave even though they often wear the fancy dress of Mycenaean legend. The institutions [and] the commerce...are those of the early maritime complex of Hellenic city-states, originating perhaps in the tenth century, but attaining their full development in the eighth and seventh centuries."); MURRAY, *supra* note 16, at 196, 201-02, 232 (specifically identifying early Greek customs and practices relating to matters such as dairy farming, war, government, marriage, land tenure, worship, commerce, and seafaring in the *Iliad* and the *Odyssey* as reflections of historical fact in the seventh century B.C.).

20. *See* MURRAY, *supra* note 16, at 179 ("[E]ven where the main subject of the fiction is romantic or marvellous, the background or setting in which it is placed is very likely to be drawn from normal life."); *see also* BUXTON, *supra* note 3, at 183 (citing Moses Finley).

21. *See* J. Russell VerSteeg, *Law and the Security of Homeric Society* 10 J. LEGAL HIST. 265, 267-69 (1989); *see also* MURRAY, *supra* note 16, at 201-03.

22. HAVELOCK, *supra* note 6, at 24.

According to Havelock, "[o]ral storage is hostile to the expression of laws and rules which are stated as such."²³

Before leaping directly into an analysis of the contracts/agreements, the principal focus of the Article, it is useful first to consider two things as background. First, Part I will survey the legal context of preliterate/protoliterate Greece in general, not merely contract law. It is, of course, profitable to appreciate that the Greek world during this formative age was, in fact, beginning to adopt laws and legal procedures. Thus, the contracts/agreements considered in Parts III and IV will not emerge in a vacuum. On the contrary, Part I demonstrates that the Greeks of the ninth and eighth centuries B.C. were laying foundations for a practical and sophisticated legal system. Part II briefly reviews the substantive law of contracts as it appeared in the classical era of Athenian law. This overview should aid in gaining a perspective on the agreement process as it developed in the preliterate/protoliterate Greek world.

II. BACKGROUND: THE BEGINNINGS OF LAW IN PRELITERATE/PROTOLITERATE GREECE

It is only fitting, indeed, that our earliest written evidence for law in ancient Greece comes from the poetry of Homer and Hesiod.²⁴ In Homer's *Iliad* and *Odyssey*, it is not unusual for individuals to resolve their conflicts simply by fighting.²⁵ Quite often in the Homeric poems, persons seek vengeance as a means to redress wrongs. But religion seems to have had very little, if any, influence on the development of early Greek law.²⁶

In classical mythology, Dike was the virgin daughter of Zeus and Themis.²⁷ Early in Greek literature, writers began using the word "*dike*" to refer to

23. *Id.* at 43.

24. Although Professor Gagarin himself frequently uses Homer and Hesiod as evidence for early Greek law, he cautions: "[W]e do find a few explicit rules of behavior...[in Homer and Hesiod]. But these rules concern a broad range of human behavior, and none of them is singled out as having a special status, not even those rules that we might be tempted to call laws." MICHAEL GAGARIN, *EARLY GREEK LAW* 10-11 (1986).

25. *See id.* at 38-39. Professor Gagarin notes:

[N]either of the principal disputes in the Homeric poems is settled by a judicial process. The quarrel between Agamemnon and Achilles is eventually settled primarily because of changes in Achilles' emotional state brought on by other events (particularly the death of Patroclus), and Odysseus's dispute with the suitors is, of course, settled by force. In both cases, however, there are attempts to settle the dispute peacefully....

Id.

26. *See id.* at 15-16 ("A common view of law...is that the earliest law...is strongly religious, only becoming fully secular in its later historical development. Whatever validity this view might have with respect to other societies,...religious factors are of little significance in the earliest stages of Greek law." (footnote omitted)).

27. *Dike*, in *THE OXFORD CLASSICAL DICTIONARY*, *supra* note 10, at 469.

an orderly means of dispute resolution. Both Homer and the eighth-century B.C. poet Hesiod frequently referred to *dike*. Homer and Hesiod used the word "*dike*" to refer to law, judgment, or in a more abstract sense, justice. Hesiod said that "*dike* is a distinctive feature of human societies."²⁸ According to Professor Sealey in *The Justice of the Greeks*, "the goal of *dike* or of law is to resolve disputes without violence."²⁹

Hesiod's poetry makes a strong plea for "justice" and argues that "without an effective legal process the social order will disintegrate."³⁰ In his work entitled *The Theogony*, Hesiod noted that kings thrive if they give "straight settlements," if they can provide restitution, and if they speak with "gentle words."³¹ In his poem *The Works and Days*, Hesiod described the ordinary judicial procedure as one where individuals take their disputes to a king who then renders his decision.³²

In Homer we also see evidence that Greek society was beginning to explore an orderly means of dispute resolution.³³ There are a number of instances in the *Iliad*, for example, where quarrelling individuals appeal to an impartial outsider to resolve their differences.³⁴ On several occasions, the king acts as arbiter.³⁵ In addition, both the *Iliad* and the *Odyssey* include episodes where judicial decisions were made by groups of elders rather than an individual king. In those situations, the elders made their judgments in public; therefore, public opinion presumably influenced the decision of the judges. One remarkable example of this procedure appears in Book 18 of Homer's *Iliad* when the god Hephaestus forges a new set of armor for the Greek hero Achilles. Among the many other scenes that he fashions on the face of Achilles' shield, he engraves a trial scene, apparently at a tense moment in the midst of litigation.³⁶

The people were assembled in the market place, where a quarrel had arisen, and two men were disputing over the blood price for a man who had been killed. One man promised full restitution in a public statement, but the other refused and would accept nothing. Both then made for an arbitrator, to have a decision;

28. GAGARIN, *supra* note 24, at 49.

29. RAPHAEL SEALEY, *THE JUSTICE OF THE GREEKS* 102 (1994).

30. GAGARIN, *supra* note 24, at 50. For a general discussion of Hesiod's views on justice and the legal implications of his poetry, see *id.* at 46–50.

31. *Id.* at 24.

32. MACDOWELL, *supra* note 2, at 14–16; see also GAGARIN, *supra* note 24, at 35 ("[T]he existence of an established system of judicial procedure, controlled by the kings, is presupposed by Hesiod's remarks.").

33. See GAGARIN, *supra* note 24, at 19; SEALEY, *supra* note 29, at 52.

34. See MACDOWELL, *supra* note 2, at 13.

35. *THE ILIAD OF HOMER* 2:205–06; 9:98–99; 23:485–87 (Richmond Lattimore trans., 25th reprint ed. 1976) (1951) [hereinafter *ILIAD*]; *THE ODYSSEY OF HOMER* 9:98–99 (Robert Fitzgerald trans., 1965) [hereinafter *ODYSSEY*].

36. See generally MACDOWELL, *supra* note 2, at 18–21; see also GAGARIN, *supra* note 24, at 26–33.

and people were speaking up on either side, to help both men. But the heralds kept the people in hand, as meanwhile the elders were in session on benches of polished stone in the sacred circle and held in their hands the staves of the heralds who lift their voices. The two men rushed before these, and took turns speaking their cases, and between them lay on the ground two talents of gold, to be given to that judge who in this case spoke the straightest opinion.³⁷

This scene depicts a formal public dispute resolution mechanism at work.³⁸ Professor Sealey contends that the two litigants are actually arguing about different things: one argues that he has paid the price while the other maintains that he will not accept the payment. Thus, the dispute is really about whether the payment by the former is effective to make the other's argument irrelevant.³⁹ Apparently, then, the defendant has been accused of homicide, but there is some argument either about whether the payment (*poine*) has been paid, or is, for some other reason, not acceptable.⁴⁰ According to the text, the two talents of gold had been set aside for the judge whom the people chose as having pronounced the most acceptable resolution to the dispute.⁴¹ It seems that each of several judges would have his chance to render an opinion, but that the public had the final say. Thus, we can see (even as early as Homer) that Greek law established a decidedly democratic approach.⁴²

Professor Gagarin envisions the Greek protoliterate judicial system as follows:

A judge who satisfied both litigants most of the time would gain a reputation for "justice," and once such a judge became well known, all those who basically accepted the social order and wished to have their disputes with their neighbors settled peacefully would naturally resort to this judge.⁴³

In both Homer and Hesiod, it appears that it was voluntary for disputants to use the procedure for dispute resolution.⁴⁴ Each litigant had to agree to submit his case to

37. ILIAD, *supra* note 35, 18:497–508.

38. GAGARIN, *supra* note 24, at 27 ("Clearly this is a formal, public procedure, providing a means for litigants to bring their disputes to an authoritative body for settlement.").

39. See SEALEY, *supra* note 29, at 104.

40. GAGARIN, *supra* note 24, at 32 ("Almost all scholars have maintained that one or the other of these is the sole point of the dispute....").

41. Professor Gagarin states: "[I]t is generally accepted that the two measures of gold are a prize for the elder who speaks the straightest settlement (*dike*)." *Id.* at 30 (footnote omitted).

42. MACDOWELL, *supra* note 2, at 21–22. It is probably unwise for us to assume that all early Greek communities used an orderly procedure for dispute resolution like the one described on the Shield of Achilles. We must, rather, admit that this is merely one poet's representation. See TODD, *supra* note 1, at 33–35.

43. GAGARIN, *supra* note 24, at 22.

44. *Id.* at 44 ("Even when the judges were assembled as a body, the decision to

an arbitrator. It was not until later that dispute resolution evolved into a mandatory process.⁴⁵ In addition to being voluntary, the procedure took place in a public forum, involved a judge or group of judges who tried to fashion a compromised settlement acceptable to both parties, and often involved the swearing of oaths.⁴⁶ Furthermore, apparently, the formal, public dispute resolution procedure was in place long before any substantive laws regarding conduct were established.⁴⁷

III. CONTRACT LAW IN CLASSICAL ATHENS⁴⁸

The main objective of this Article is to analyze contract law principles that emerge from preliterate/protoliterate Greece. In order to gain a better insight into this topic, it is instructive first to look ahead in time to the fifth and fourth centuries B.C.—the classical age of law in ancient Athens. Even this cursory overview of contract law and procedure in the classical era of Athenian law demonstrates how intricate and comprehensive the system eventually became. Frequently, historians find it useful to study the past in light of later developments. In this instance, given the sophisticated evolution of contract law in the classical era, it is clear that contract law had been maturing for centuries. Some of its roots, no doubt, took hold in the preliterate/protoliterate period.⁴⁹

Professor Todd explains that “freedom of contract” was an exceedingly powerful principle in ancient Athens:

The doctrine of freedom of contract was so strong at Athens that it was possible to contract out of the protection of the law, or to agree that a contract should take precedence over the law, or to expect a court of law to uphold a contract which is publicly admitted to have constituted a conspiracy to commit an unlawful act.⁵⁰

In order to make a valid contract, Athenian contract law in the fifth and fourth centuries B.C. required the existence of four elements: (1) the parties had to agree; (2) their agreement had to be voluntarily; (3) their agreement had to be made

submit a dispute for settlement was voluntary. It is worth emphasizing that the evidence for the voluntary submission of disputes is overwhelming.”)

45. In the fourth century B.C., all private disputes first went to an arbitrator who tried to mandate a settlement. *See* SEALEY, *supra* note 29, at 54, 137–38.

46. GARGARIN, *supra* note 24, at 42–43.

47. *Id.* at 50 (“[E]ven before the Greeks wrote down laws, they had developed a traditional process for settling disputes and had already begun to recognize the importance of this judicial process for the maintenance of peace and prosperity in their society.”); *see also id.* at 12, 19–20, 44–45, 51.

48. *See generally* MACDOWELL, *supra* note 2, at 139–59; TODD, *supra* note 1, at 257–82.

49. *Cf.* BUXTON, *supra* note 3, at 135 (“From the outset we must bear in mind the possibility that, in comparing the predominantly Athenian data about law with the more panhellenic testimony of mythology, we are ourselves reducing the real diversity of a historical situation....”).

50. TODD, *supra* note 1, at 264 (footnote omitted).

in the presence of witnesses; and (4) their agreement had to be just.⁵¹ In *The Justice of the Greeks*, Professor Sealey emphasizes the importance of the intent of the parties for contract validity: "It may well be that any agreement seriously intended was an enforceable contract, with witnesses often invited and writing employed as safeguards against misunderstanding and default."⁵² Moreover, Sealey remarks:

[M]ost transactions appear to have owed their validity merely to the intention of the parties; written records may often have been made and witnessed, but these were conveniences, not elements of the transaction. There is no trace of any required set of words or gestures comparable to the Roman *stipulatio* or *mancipatio per aes et libram*.⁵³

Athenian contracts did not have to be in writing. Evidence is strong that Athenian contract law bound buyers and sellers from the moment of their agreement onwards. For example, once a buyer had paid a deposit (*arrabon*) to his seller, the seller was legally obligated to hold the property secured by the deposit until the time fixed by their agreement for final payment.⁵⁴

There were several laws that proscribed misrepresentation in sales transactions. First, sellers in the Agora were not permitted to say things that were untrue. In a more particularized context, slave sellers were legally obligated to declare to their buyers any of the slave's bodily faults. A buyer could return for a refund any slave whom the buyer later discovered had a defect the seller had not identified at the time of the original sale.⁵⁵ Second, prior to selling real estate, Athenian law required that a prospective seller give a state official sixty-days written notice of his intent to sell.⁵⁶ Since there was no land registration procedure to protect prospective buyers, this requirement of written notice gave the public an opportunity to catch a swindler.

A legal action called *dike blabes* was used as a cause of action to recover, as a general theory, for any kind of economic loss that one might incur.⁵⁷ Thus, plaintiffs could and did use *dike blabes* as a theory to recover for breach of contract, for example, failure to repay a loan.⁵⁸ If a plaintiff could convince the jury that the defendant had caused the economic loss intentionally, the defendant had to

51. See MACDOWELL, *supra* note 2, at 140 (citing, inter alia, Demosthenes and Plato); see also SEALEY, *supra* note 29, at 61 ("There is little information about the legal aspects of contractual obligations...."); TODD, *supra* note 1, at 265 ("There is no sign of strict contractual formalism in any Athenian source.").

52. SEALEY, *supra* note 29, at 62.

53. *Id.* (footnote omitted).

54. See MACDOWELL, *supra* note 2, at 139.

55. *See id.*

56. *See id.*; TODD, *supra* note 1, at 238.

57. See generally MACDOWELL, *supra* note 2, at 149-53.

58. See TODD, *supra* note 1, at 266, 279.

pay twice the amount of the loss.⁵⁹ Thus, *dike blabes* was a popular cause of action with Athenian plaintiffs.

The Athenians maintained a complex and thriving trade that relied, at its core, on contract law.⁶⁰ Most commerce was retail and most took place on the Agora. As a general rule, except during a brief period in the fifth century B.C., an alien could not trade in the Athenian Agora unless he paid a special tax (*xenika*).⁶¹

The "controllers of the market" (*agoranomoi*) served as a specialized court to arbitrate disputes brought in the market.⁶² There were five *agoranomoi* in the Agora and five in the Athenian port, the Peiraeus.⁶³ Particular laws the *agoranomoi* applied prohibited, for example, misrepresentation; selling adulterated goods; and sprinkling water on fish to fool prospective buyers into thinking they were fresh. Some fish prices also seem to have been established by law.⁶⁴

The "guardians of grain" (*sitophylakes*) constituted a specialized panel, consisting of five to twenty men selected by lot, that enforced laws concerning the sale of grain.⁶⁵ Some laws dealt with prices and others pertained to the quantities of grain that any one seller was allowed to stockpile. Another unique judicial entity was the *epimeletai tou emporiou*, a commission that superintended the sale of grain in the wholesale market that was conducted in the Peiraeus at the *Emporion*.⁶⁶

The board called the *metronomoi* (ordinarily five in the Agora and five in the Peiraeus) inspected measures and weights. In addition to the *metronomoi*, Classical Athens had a state-owned slave who held the position of "official coin tester."⁶⁷ He sat in the Agora and inspected any suspect coins to judge their authenticity. The penalty for making counterfeit coins was death.⁶⁸ But clearly death was not the penalty for merely trying to use a counterfeit coin. Any person attempting to use an imitation coin could always allege that he had received the fake from some third party.

The broad scope and complexity of Athenian contract law as it existed in the fifth and fourth centuries B.C. suggests that, in all likelihood, contract principles had been evolving for centuries—perhaps having some recognizable shape as early as the preliterate/protoliterate period. It is that shape that we hope to discern by examining contracts in the *Iliad* and in the myth of the Trojan War.

59. See MACDOWELL, *supra* note 2, at 151.

60. See generally *id.* at 155–59.

61. See *id.* at 156.

62. See *id.* at 157; TODD, *supra* note 1, at 321.

63. See MACDOWELL, *supra* note 2, at 157.

64. See *id.*

65. See *id.*; see also TODD, *supra* note 1, at 321 ("[B]y the 320s BC, their numbers had had to be increased from ten to thirty-five." (citation omitted)).

66. See MACDOWELL, *supra* note 2, at 157–58.

67. *Id.* at 158.

68. See *id.*

IV. CONTRACTS IN THE *ILIAD*

A. Introduction

This section probes four "contracts" in the *Iliad*: (1) Achilles' and Calchas' agreement that Calchas will tell Achilles why Apollo is punishing the Greeks, and Achilles, in return, will protect Calchas from Agamemnon; (2) Hector's agreement to give a handsome reward to the soldier Dolon in exchange for Dolon completing a dangerous spying mission; (3) the god of sleep Hupnos' and Hera's agreement that Hupnos will make Zeus fall asleep, and in return, Hera will give him material wealth and a young girl; and (4) Achilles' and Priam's agreement to exchange Hector's corpse for a ransom. If analyzed in modern terms, these appear to be reciprocal promises, supported by consideration, in which both parties intended to benefit.⁶⁹ This section also looks at one other situation that would plainly fall into the category if an exchange of reciprocal promises where both parties intended to benefit, except the offeree rejected the offer: Agamemnon offered material wealth to Achilles if he would return to battle. Four of these transactions are intended to further the cause of the war in some way. Two are contracts for an intangible—information. One is a bargain involving a trade of goods⁷⁰ for services. And only one is an exchange involving tangible goods.⁷¹

B. Achilles-Calchas

Near the beginning of the *Iliad*, the god Apollo unleashes his bitter anger against the Greeks. Achilles asks the prophet, Calchas, to reveal to him the cause of Apollo's anger.⁷² Calchas promises to tell Achilles the reason for Apollo's anger if Achilles will agree to protect him.⁷³ Calchas fears that Agamemnon will seek to punish him if he reveals the cause of Apollo's wrath and, thus, wants Achilles' promise of protection in return for his promise to reveal the cause. Achilles agrees to provide protection and Calchas complies by explaining the cause of Apollo's anger.⁷⁴ Soon after Calchas explains the reason for Apollo's anger, Achilles begins his famous sulking. Thus, we never learn directly whether he upholds his part of the bargain by protecting Calchas.

69. See *supra* note 14 and accompanying text. In the *Iliad*, individuals routinely exchange gifts such as armor and weapons. It has become apparent that gift exchange of this sort, although reciprocal, is really more of a ritualistic obligation connected to a warrior's honor than a voluntary contract where both parties expect to benefit from the transaction. Therefore, this Article does not treat these ritualistic exchanges of gifts as contracts. See *supra* note 13.

70. This contract can only be called a swap of "goods" for services if one can characterize delivering a wife as a "good."

71. Here I realize that some may be offended that I would refer to a dead body as a "good." Nevertheless, I can think of no better characterization.

72. *ILIAD*, *supra* note 35, 1:62–64.

73. *Id.* 1:76–77.

74. *Id.* 1:85–100.

This agreement was fashioned to protect two different interests. First, Achilles wanted information that he hoped would help the Greeks win the war. He hoped that if he knew why Apollo was angry, he would be able to use that information to appease the god and, thereby, reverse the fortunes of the war. Calchas simply wanted security. Like witnesses who seek police protection prior to giving information, Calchas wanted to insure his own personal safety once Agamemnon discovered that he (Agamemnon himself) was largely to blame for causing Apollo's anger. Both of these interests—the desire for information that could help the army's cause and the desire for personal safety—seem entirely legitimate. Eventually, Apollo leaves the Greeks alone because his priestess was released. Indeed, Achilles' purpose was successful (much to his dismay at losing Briseis). Furthermore, we have no evidence suggesting that Agamemnon injured Calchas. Thus we may hypothesize that an agreement of this kind—a reciprocal exchange of information by one party for services (bodyguardlike protection)—was acceptable in preliterate/protoliterate Greece.

C. Hector-Dolon

In Book 10, Hector, the Trojans' greatest warrior, is looking for someone from his ranks to volunteer as a spy. He offers a variety of valuable goods to the soldier who will go on a dangerous sleuthing mission and return with information.⁷⁵ A soldier named Dolon agrees to go,⁷⁶ but Dolon insists that Hector take an additional step in order to formalize his promise: "Come then, hold up your sceptre before me, and swear upon it / that you will give me the horses, and the chariot made bright / with bronze, that carry the blameless son of Peleus."⁷⁷ Thus, we see that Dolon perceives that some degree of formalism—swearing an oath on the sceptre—is required to cement the deal. And, indeed, Hector comprehends and willingly complies: "Hector took the staff in his hand, and swore to him: / 'Let Zeus, loud-thundering lord of Hera, now be my witness, / himself, that no other man of the Trojans shall mount these horses, / since I say they shall be utterly yours, and your glory.'"⁷⁸

Homer frames this as an offer for what contemporary American law would characterize as a unilateral contract.⁷⁹ In other words, the offeree could only accept by performing, not merely by promising to perform. Homer characterizes Hector's offer as *epiorkos*, an "empty oath."⁸⁰ At first blush, one might think that *epiorkos* means "empty" in the sense of intentionally deceptive, but that is not the case.⁸¹ The *Lexicon of the Homeric Dialect* interprets this particular Homeric use

75. *Id.* 10:303–12.

76. *Id.* 10:314–27.

77. *Id.* 10:321–23.

78. *Id.* 10:328–31.

79. See I. Maurice Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 136–39 (1916).

80. ILLAD, *supra* note 35, 10:332. The word "empty" is *epiorkos*.

81. See *supra* Part III (regarding misrepresentation in classical Athenian contract

of *epiorkos* as "unintentional falsity, the fulfillment of the oath turning out to be impossible."⁸² Thus, *epiorkos* does not suggest that Hector was planning to renege on his promise. In fact, the use of *epiorkos* clearly shows that Hector's offer is for a unilateral contract, not a bilateral one. Returning with information was a condition precedent to payment. Otherwise, Dolon's mere agreement to undertake the mission would have constituted a valid acceptance and would have forced Hector to pay once Dolon agreed to go.

Modern contract doctrine would treat Dolon's undertaking of the task as creating an option contract that would freeze Hector's offer for a reasonable period of time.⁸³ Unfortunately, neither the word *epiorkos* nor the outcome of this contract inform us as to whether the characters in the *Iliad* treated unilateral contracts differently from the way that we do in modern American contract law. Dolon was unsuccessful and failed to return. The text is silent as to whether Hector ever sought to revoke (or even considered trying to revoke) his promise. Thus, we simply cannot know whether unilateral contracts in the Homeric world were revocable up until the time that the offeree completed performance and thereby accepted.

D. Agamemnon-Achilles: The Rejected Offer

Throughout the *Iliad*, there are many occasions when a character makes an offer that another simply rejects.⁸⁴ One poignant example occurs in Book 1 when Chryses, the father of Agamemnon's war prize, Chryseis, offers to buy back his daughter. The Greek soldiers heartily approve of this solution and exhort Agamemnon to accept. He turns down the offer, however, and Achilles calls for a meeting to decide what to do next.⁸⁵

In most instances where an offer is rejected, the rejection is the last we hear of it. One offer, however, turns out very differently. In Book 9, Agamemnon is desperate for Achilles to return to the battle. He is so desperate that he offers Achilles lavish riches if he will come back. Specifically, he offers seven tripods, ten talents of gold, twenty cauldrons, twelve horses, seven women of Lesbos,⁸⁶ plus the girl Briseis, the initial cause of Achilles' sulking.⁸⁷ Achilles, in no uncertain

law).

82. RICHARD JOHN CUNLIFFE, A LEXICON OF THE HOMERIC DIALECT 148 (Univ. of Oklahoma Press 1963) (1924).

83. See RESTATEMENT (SECOND) OF CONTRACTS § 45 (1981).

84. See *supra* note 13.

85. ILIAD, *supra* note 35, 1:11-54. Havelock characterizes the father's offer as "a reasonable proposal." HAVELOCK, *supra* note 6, at 127; see also *id.* at 129 ("Agamemnon by rejecting [Chryses'] plea rejected a 'vote' of the agora, and the results proved painful.").

86. Havelock suggests the value of this offering: "The gifts proffered by Agamemnon to Achilles as part of the reconciliation are perhaps conceivable as worthy of an oriental monarchy, but they would bankrupt any Greek state." HAVELOCK, *supra* note 6, at 93; see also *id.* at 131-33 (describing the pomp and ceremony associated with Agamemnon's delivery of the "lavish compensation").

87. ILIAD, *supra* note 35, 9:120-35. Agamemnon adds: "All these gifts shall be

terms, flatly rejects Agamemnon's offer.⁸⁸ In modern contract law, Achilles' unequivocal answer rejecting Agamemnon's offer would immediately terminate his power of acceptance.⁸⁹ Thus, even if Achilles were to change his mind later and wish to "accept," he would no longer be capable of doing so. Of course, in the story, Achilles does return to the fight.⁹⁰ Clearly, he does not return hoping to acquire Agamemnon's promised bribes, but rather out of rage at the death of his dear friend Patroclus.⁹¹ Nevertheless, upon his return, Agamemnon handed over to Achilles precisely the items that he had promised him: the tripods, the cauldrons, the horses, the girls from Lesbos, the ten talents of gold, and Briseis, too.⁹² If this were all that we knew, we might be tempted to conclude that, unlike modern contract law, Agamemnon was still bound by his initial promise, Achilles' rejection notwithstanding. But Achilles makes it clear that Agamemnon is not legally bound: "Agamemnon," he says, "the gifts are yours to give if you wish, and as it is proper, / or to keep with yourself."⁹³ Nevertheless, giving Achilles the exact items promised shows Agamemnon felt morally obligated, even though the law reflected in the *Iliad* apparently did not recognize a legal obligation in circumstances such as these, where, as in modern American contract law, the offeree's rejection immediately releases an offeror from any further obligation.

E. Hera-Hypnos

In Book 14, Zeus' wife Hera desires to put Zeus to sleep so that he will be unable to continue helping the Trojan cause.⁹⁴ Hera approaches Hypnos,⁹⁵ asks him to induce Zeus to slumber, and offers him a golden throne in return.⁹⁶ Hypnos is extremely reticent. He reminds Hera that the last time he put Zeus to sleep, Zeus awoke in a rage and would have beaten Hypnos savagely if Night had not rescued him.⁹⁷ When Hypnos balks, Hera then offers to give Pasithea, one of the younger Graces, to Hypnos in return for his soporific deed.⁹⁸ At this point, we learn

his at once...." *Id.* 9:135. Professor Michalopoulos argues that "the nature of the gifts is indicative of the system of barter still prevalent in Mycenaean times." MICHALOPOULOS, *supra* note 4, at 75.

88. *ILIAD*, *supra* note 35, 9:345 ("He will not persuade me."); *id.* 9:374 ("I will join with him in no counsel, and in no action."); *see also* MICHALOPOULOS, *supra* note 4, at 74 ("He refuses to accept Agamemnon's apology and rejects the offer of gifts.").

89. *See* RESTATEMENT (SECOND) OF CONTRACTS § 36(a) (1981).

90. *ILIAD*, *supra* note 35, 19:364-424.

91. *See* MICHALOPOULOS, *supra* note 4, at 86.

92. *ILIAD*, *supra* note 35, 19:238-50.

93. *Id.* 19:146-48.

94. *Id.* 14:231-78.

95. The English words hypnosis, hypnotic, hypnotize, and so on, are derivatives.

96. *ILIAD*, *supra* note 35, 14:237-41.

97. *Id.* 14:256-61.

98. *Id.* 14:267-69. ("Come now, do it, and I will give you one of the younger / Graces for you to marry, and she shall be called your lady; / Pasithea...."); *see also* MICHALOPOULOS, *supra* note 4, at 62.

something worthwhile. Hupnos is clearly interested in Hera's latest offer, but before he accepts, he demands certain formalities, as Dolon did in his agreement with Hector. Hupnos demands that Hera swear her promise:

"Come then! Swear it to me on Styx' ineluctable water.
With one hand take hold of the prospering earth, with the other
take hold of the shining salt sea, so that all the undergods
who gather about Kronos may be witness to us.
Swear that you will give me one of the younger Graces,
Pasiythea, the one whom all my days I have longed for."

He spoke, nor failed to persuade the goddess Hera of the
white arms,
and she swore as he commanded, and called by their names on all
those
gods who live beneath the Pit, and who are called Titans.⁹⁹

Immediately after Hera swore on her promise, Hupnos and Hera departed and Hupnos kept his part of the bargain.¹⁰⁰

Although these formalities fall short of demanding a writing, swearing an oath in the presence of witnesses is a more stringent, formalistic requirement than a mere oral agreement of the parties. Professor Havelock observes that Homeric contracts ordinarily exhibit certain characteristics. According to Havelock, Homeric contracts "depend for their effectiveness upon the conservation of precise wording, however simple, [because] in an oral society such conservation is guaranteed against the vagaries of personal willfulness or bad memory only by the presence of listeners, that is, witnesses who witness the oaths and hear promises given and received."¹⁰¹

F. Priam-Achilles

Near the end of the *Iliad*, Priam ransoms Hector's body from Achilles.¹⁰² Professor Rachel Bupaloff has noted that this transaction is unique in the *Iliad*: "Here...occurs an exceptional deviation from the laws of the mechanism of violence; this is the only case in the *Iliad* where supplication sobers the man to whom it is addressed instead of exasperating him."¹⁰³ Zeus met with Thetis, Achilles' divine mother, and told her to go to Achilles and instruct him to return Hector's body to Priam.¹⁰⁴ Thetis did what Zeus requested, and because of Thetis' persuasion, Achilles consented to accept Priam's ransom and to return Hector's

99. ILIAD, *supra* note 35, 14:271-79.

100. See BUXTON, *supra* note 3, at 146 ("Relations between the Iliadic Olympians are based on a combination of violence, deception, negotiation, and reciprocity.")

101. HAVELOCK, *supra* note 6, at 23.

102. ILIAD, *supra* note 35, 24:563-94.

103. BESPALOFF, *supra* note 8, at 98.

104. ILIAD, *supra* note 35, 14:111-19.

corpse.¹⁰⁵ Homer does not detail the precise items that comprise the ransom Priam offered but tells us that it consisted of “innumerable spoils for the head of Hektor.”¹⁰⁶ This transaction has a clear offer and what may be an acceptance through a return promise. Priam entreats Achilles: “accept the ransom we bring you, which is great.”¹⁰⁷ And Achilles replies, “No longer stir me up, old sir. I myself am minded to give Hektor back to you.”¹⁰⁸ Even if these words would not be sufficient to form a bilateral contract,¹⁰⁹ moments later Achilles transfers Hector’s body to Priam, an act that clearly would constitute acceptance of a unilateral contract through performance.¹¹⁰

This agreement consists of an exchange of a corpse for money.¹¹¹ Priam wants to have his dead son’s body so that he can take care of it according to religious custom.¹¹² Achilles apparently acquired the right to retain the body by defeating Hector in battle. Here we glimpse what may properly be termed international law. Winners are expected to retain possession of the dead and losers are expected to give a ransom for the return of the bodies. This seems to have been simply a risk and cost of participation in warfare.

G. Lessons Learned

Having examined this sampling of contracts (and the promise that Agamemnon functionally treated as a contract), there are some general observations that we can make. First, examining the goals of the parties helps determine whether the applicable law sanctioned these agreements. In the Hector-Dolon contract, Hector’s goal, like Achilles’ in his agreement with Calchas, was to secure information that could provide an advantage to his army in the war effort. For his part, Dolon sought personal wealth. It is difficult to say whether Dolon’s death while in pursuit of his mission should be interpreted as a negative comment about the agreement itself. Does Dolon’s failure indicate that he was punished for seeking personal wealth in return for spying? We saw Achilles turn down

105. *Id.* 24:120–40.

106. *Id.* 24:579.

107. *Id.* 24:555–56.

108. *Id.* 24:560–61. This position stands in stark contrast to his threats to Hector at the time that Hector was *in extremis*: “[N]ot if they bring here and set before me ten times / and twenty times the ransom, and promise more in addition, not if Priam son of Dardanos should offer to weigh out / your bulk in gold...but the dogs and the birds will have you all for their feasting.” *Id.* 12:349–54.

109. See *supra* Part IV.C (regarding the Hector-Dolon unilateral contract).

110. “Achilleus himself lifted him and laid him / on a litter, and his friends helped him lift it to the smooth-polished / mule wagon.” *ILIAD, supra* note 35, 14:589–91.

111. Historically speaking, the Trojans must have been adept at negotiating business contracts. Professor Michalopoulos relates: “Troy, reputedly a very wealthy city, obviously derived its wealth from trade; and most of its commerce must have been halted by the presence of the Achaean armies on the plains.” *MICHALOPOULOS, supra* note 4, at 99.

112. *ILIAD, supra* note 35, 24:656–67 (describing the funeral rites that Priam plans for Hector).

Agamemnon's offer of personal wealth. In that case, Agamemnon's offer was, like Hector's, an offer for a unilateral contract. Agamemnon offered wealth if Achilles would return to battle, that is, provide a military advantage. Since Dolon dies and Achilles refuses Agamemnon's offer, one possible interpretation is that the Greeks of Homer's day believed there was something wrong with this kind of contract. From a policy standpoint, this is understandable. To the warriors in Homer, honor and prowess in war were principal goals. Thus, participation in war—fighting and spying included—was, perhaps, not something that ought to be exchanged for mere earthly possessions.

The contract between Hera and Hupnos, like the agreement between Hector and Dolon and Agamemnon's offer to Achilles, involves an exchange of goods for services. The goods in the Hera-Hupnos contract—a golden throne and a pretty girl—are forms of personal wealth. In this case, both Hera and Hupnos get what they wanted. The Hera-Hupnos contract is also very similar to the agreement that Agamemnon proposed to Achilles. One party offers tangible wealth in return for intangible services. And in all three cases, the intangible services are designed to give a military advantage. Professor Buxton makes the point that when patterns like this recur in mythology, they tell us something about the social reality of the times.¹¹³ Dolon failed, Achilles did not even accept the offer (although we later discover that Agamemnon, in fact, gave him the things that he had promised when Achilles did return to battle), but Hupnos accepted Hera's offer and successfully knocked Zeus unconscious. Although accepting personal wealth in return for services that advance the war effort may be unbecoming a soldier, we may hypothesize that there was nothing wrong with a god doing it.

Lastly, two of the contracts involve the observation of a formality: swearing an oath while grasping a symbolic object. Hector holds his sceptre while making his promise to Dolon, and Hera clasps both the earth and sea while promising to Hupnos. In both instances, witnesses are present (soldiers for Hector and the "undergods" for Hera). Also, in both instances, the party with lower status—presumably the party in the weaker bargaining position—is the one who insists that the other swear the oath. Thus, as a practical matter, both symbolism and witnesses could be important elements of Homeric, and, therefore, preliterate/protoliterate Greek, contracts.

V. CONTRACTS THAT SHAPE THE MYTH AS A WHOLE

Two contracts truly are the centerpieces of the entire story. One is a pact between the Greek princes ("Princes' Contract"); the other is a contract between Paris and Aphrodite ("Paris-Aphrodite Contract"). Mythologically speaking, the conflict that evolved into the Trojan War can be traced back to these two contracts.

113. BUXTON, *supra* note 3, at 76 ("[T]he most potentially revealing features of the tales are precisely those which recur.").

The young Helen, daughter of Zeus and Leda, was so beautiful that many Greek princes wished to marry her.¹¹⁴ Each was afraid that if he ultimately won her hand, one of the others (or even perhaps all of them) would seek revenge and attempt to take her from him by force. Thus, Odysseus proposed that the princes enter into a contract. Simply stated, he suggested that they all agree that those who were not picked to be Helen's husband would take up arms against anyone who tried to take Helen away from the one who was picked.¹¹⁵ Thus, each gained the security of knowing that, if picked, he would have the support of the others. This contract made a great deal of sense, and it is an arrangement that permitted a private agreement to have a significant prophylactic effect. This cooperation provided security and a civilized solution. It stands in stark contrast to the barbarous behaviour of Penelope's suitors in the *Odyssey*.¹¹⁶ The Princes' Contract, then, is an example of a rational, preplanned mechanism designed to avert the kind of chaos that might have otherwise resulted if each prince had acted in complete self-interest.

Each prince who entered the agreement presumably thought himself better off for entering the contract. Let us assume there were fifty suitors vying for Helen's hand.¹¹⁷ Each apparently thought it better to pledge a willingness to support the lucky husband than to risk having Helen as a wife without the support of the others. Assuming that each prince had an equal chance of being picked, each had a two percent chance. Presumably, Helen was so desirable that the odds were near one hundred percent that, in the absence of a strong enough deterrent, one of the forty-nine losers would become embittered and try forcibly to wrest her away from the winner, who, as it turned out, was Menalaus of Sparta. On the other hand, chances were close to zero that any one of the losers would try to take Helen from the winner if the other forty-nine (the husband plus the other forty-eight) stood ready to oppose the aggressor with swords drawn.

The Prince's Contract makes a positive and humane statement about the civilization in preliterate/protoliterate Greece. The leaders of the society had the foresight to recognize the volatile nature of the courtship of Helen and planned a peaceful settlement in an attempt to prevent bloodshed *ex ante*. To be sure, it is not a completely nonviolent solution. The princes did after all agree to protect the husband with arms (not to take the perpetrator to court), but the intention was to establish such a strong deterrent in their agreement that none of them would dare to oppose the eventual husband. Of course, as it turned out, the contract had

114. See MARK P.O. MORFORD & ROBERT J. LENARDON, *CLASSICAL MYTHOLOGY* 352 (5th ed. 1995). For a narrative account of the myth of the Trojan War in general, see *id.* at 350-90.

115. *Id.* at 352.

116. See *Homer*, in *THE OXFORD CLASSICAL DICTIONARY*, *supra* note 10, at 719 (commenting on "the boorish behavior of the suitors").

117. Fifty is not an uncommon number for large groups in Homer. Priam had fifty married sons. *ILLAD*, *supra* note 35, 18:41-50. Odysseus' household required fifty maid servants. *ODYSSEY*, *supra* note 35, 22:421.

unforeseeably grave consequences. The Greeks who lost their lives in the Trojan War lost them in pursuit of honoring the Prince's Contract. None of the princes could have imagined how a goddess' vanity would intercede to completely alter the risk he took when agreeing to fight the person who might take Helen.

The Paris-Aphrodite Contract results from the well known Judgment of Paris, which Homer apparently knew. Although it is not directly recounted in the *Iliad*, there is a clear reference to it in Book 14, where Hera's displeasure with the other gods (i.e., gods who were urging Achilles to treat Hector's corpse with respect) was attributed to the Judgment of Paris: "because of the delusion of Paris / who insulted the goddesses when they came to him in his courtyard / and favoured her who supplied the lust that led to disaster."¹¹⁸ The myth of the Judgment of Paris began when Peleus and Thetis did not invite Eris, the goddess of discord, to their wedding.¹¹⁹ Eris, feeling snubbed, concocted one of literary history's most evil schemes. She procured a golden apple and inscribed it "For the fairest." She then crashed the wedding feast and tossed the apple onto the table. Three goddesses, Hera, Athena, and Aphrodite, each argued that it should be her's. They asked Zeus to decide. He refused because he feared his wife's anger in the event that he did not choose her. He passed the buck and suggested that the Trojan prince Paris, the son of Priam, act as arbiter.

In retrospect, it seems unfortunate that Zeus elected not to decide the case himself. His decision not to hear the case is just the opposite of what history preserves as the tradition for kings acting as judges in preliterate/protoliterate Greece. As was noted above, the *Iliad* contains several instances where people who are arguing appeal to an impartial outsider to resolve their disputes, and on several occasions, a king acts as arbiter.¹²⁰ It is worthwhile to recall that Hesiod's *Theogony* taught that kings thrive if they give "straight settlements," if they can provide restitution, and if they speak with "gentle words."¹²¹ It was also Hesiod who characterized dispute resolution by the king as the ordinary judicial procedure.¹²² Curiously, there are other instances when Zeus shies away from decision making in the *Iliad*. For example, while he sits on the fence, he permits both gods and goddesses to take part in the battle directly.¹²³

118. *ILIAD*, *supra* note 35, 14:28-30.

119. Who can blame them? I didn't invite her to my wedding either. For a discussion of the myth, see MORFORD & LENARDON, *supra* note 114, at 353.

120. *See supra* note 34 and accompanying text.

121. *See GAGARIN, supra* note 24, at 24; *see also supra* text accompanying note 31.

122. MACDOWELL, *supra* note 2, at 14-16; *see also GAGARIN, supra* note 24, at 35 ("[T]he existence of an established system of judicial procedure, controlled by kings, is presupposed by Hesiod's remarks."); *supra* note 32 and accompanying text.

123. *See BESPALOFF, supra* note 8, at 77 ("There is nothing of the judge in this watcher-god. A demanding spectator, he accepts the law of tragedy that allows the best and most noble to perish...."); *cf. MICHALOPOULOS, supra* note 4, at 18 ("Zeus was regarded in the epics of Homer as the ultimate arbiter of heavenly and earthly affairs and as the dispenser of law and justice among both gods and men.").

But since Zeus refuses to decide their conflict, the goddesses secure Paris as arbiter and each try to bribe him. In legal terms, each goddess' attempted bribe is the functional equivalent of a contract offer. Hera offers him power and wealth, Athena offers glory in war, and Aphrodite offers the most beautiful woman on earth for a wife. Paris chooses Aphrodite and with her help, travels to Greece, steals Helen from Sparta, and takes her back to Troy.¹²⁴ Interestingly, to the extent that marriage was considered a contract, Helen's departure breached her marriage contract with Menalaus. Even so, Professor Michalopoulos takes the position that Helen's breach of her marriage contract was not willful because Aphrodite inflicted passion on the unsuspecting Helen.¹²⁵ As an aside, modern legal theory would treat conduct of this nature as a tort—tortious interference with a contract.¹²⁶ Athena herself was also guilty of this tort when, in Book 5, she inspired Pandarus to break the truce that was in effect between the two armies.¹²⁷

The Paris-Aphrodite Contract is simple. Aphrodite made the offer: "Paris if you award the apple to me as the fairest, I'll give you the most beautiful woman on earth." Paris accepts Aphrodite's offer by choosing her. Presumably he either said, "I choose Aphrodite," or just handed the apple over to her. Whether Aphrodite's offer would be construed as an offer inviting a unilateral contract or a bilateral contract is of little consequence. Aphrodite, in any event, kept her part of the bargain by assisting Paris and helping him to secure Helen. In a well-known scene in Book 3 of the *Iliad*, Priam, Troy's king, tells Helen that he does not blame her for the war, but rather he blames the gods: "I am not blaming you: to me the gods are blameworthy / who drove upon me this sorrowful war against the Achaians."¹²⁸ Indeed, as Professor Bespaloff has observed: "The real culprits, and the only ones, are the gods, who live 'exempt from care', while men are consumed with sorrow."¹²⁹ In any case, some classicists have argued that the "rape of Helen" was a very old part of the myth, perhaps originating from a literary ancestor in Phoenicia in the middle of the second millennium B.C.¹³⁰

Thus, the two contracts crash headlong into one another. The Paris-Aphrodite Contract triggers the condition in the Princes' Contract. Modern American law would treat Paris' absconding with Helen as a condition precedent to the Greek princes' performance. Stated simply, the princes had no obligation to take up arms to support Helen's husband unless someone took her away (or tried to take her away). Under the terms of their agreement, once Menalaus notified the

124. See MORFORD & LENARDON, *supra* note 114, at 352–58.

125. See MICHALOPOULOS, *supra* note 4, at 134.

126. See generally W. PAGE KEETON, PROSSER & KEETON ON TORTS § 129 (5th ed. 1984).

127. *ILIAD*, *supra* note 35, 5:290. Professor Whitman remarks that this instance is evidence of "how little the figures of the gods were bound to any moral or theological idea." WHITMAN, *supra* note 9, at 222.

128. *ILIAD*, *supra* note 35, 3:164–65.

129. BESPALOFF, *supra* note 8, at 68.

130. MICHALOPOULOS, *supra* note 4, at 136.

other princes (who by now had become kings) that someone had taken Helen away, they were required to come to Menalaus' aid.¹³¹

For the most part, the kings responded to Menalaus' call, honoring their bargains. Odysseus and Achilles initially tried to avoid performance but eventually were persuaded to keep their promises, and they, too, joined the preparations for war.¹³² Odysseus' attempt to stay at home is instructive. When Palamedes went to Ithaca to exhort Odysseus to come to the war, Odysseus pretended to be insane. He yoked an ox and a donkey together and began to plow salt in his fields.¹³³ When Palamedes put Odysseus' infant son, Telemachus, in front of the plow, Odysseus veered his ox and donkey away from the infant, betraying his pretense.¹³⁴ This detail suggests that insanity would have been a valid excuse for failing to keep his bargain. Modern contract law recognizes contract defenses such as impossibility, impracticability, and frustration of purpose,¹³⁵ and it is fair to assume that one party's mental incompetence would excuse performance under one of these theories.

Macroscopically speaking, then, the myth of the Trojan War pits two contracts against one another: one a contract among men designed to protect the legitimate interests of marriage and to deter violence; the other a contract between a man and a goddess designed to satisfy the goddess' vanity and the man's physical/sexual desire. Initially, both contracts achieved the results that the parties desired. Menalaus received the aid for which he had bargained (and, indeed, none of the princes that we know of broke his promise). And both Paris and Aphrodite got what they wanted: Helen and the apple, respectively. In the end, however, the Greeks take Troy, and Helen returns to Sparta with Menalaus. So, in the final analysis, the goals of the Princes' Contract were achieved and the goals of the Paris-Aphrodite Contract were partially achieved and partially thwarted.¹³⁶ The main goal of the Princes' Contract was to provide a security mechanism for Helen's husband. The Greek victory ultimately—although imperfectly—obtains that purpose. Inextricably related to the primary goal of the Princes' Contract was the secondary goal: to create a strong deterrent, in other words, to discourage the other princes from trying to take Helen away from her husband. This goal was also achieved. None of the contracting princes attempted to take Helen from

131. This is, however, merely the literary-mythological cause of the Trojan War. Historically, "some disagreement in their trade relations with Troy [probably] led to the conflict." *Id.* at 30. "[T]he war of Troy was actually fought nearly four centuries before Homer's time, and...the causes of that war were almost certainly political and economic." *Id.* at 30-31. For a discussion of the possibility that there may be a kernel of historical truth in the "rape of Helen," see MURRAY, *supra* note 16, at 197-98.

132. MORFORD & LENARDON, *supra* note 114, at 366-68.

133. *Id.* at 366.

134. *Id.*

135. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 265-67, 271 (1981).

136. See BUXTON, *supra* note 3, at 147 ("In relationships between Iliadic gods and mortals, imbalance of power is always the decisive factor.").

Menalaus—it was a nonparty, an outsider, who did that. The princes, however, could not control the behavior of those who, like Paris, were not parties to the contract. This is simply one of the limitations of private agreements: they cannot bind third parties. Finally, one goal of the Paris-Aphrodite Contract is frustrated by the Greek victory: Paris in the end has the most beautiful woman on earth taken away from him. He does not get to keep that which had been promised to him in return for his granting the apple to Aphrodite. Aphrodite, on the other hand, apparently to this very day has the apple on her mantelpiece.

VI. CONCLUSION

In the beginning, we started with the premise that the consequences of a party's conduct reveal the approved custom or "legality" of that conduct in preliterate/protoliterate Greek society.¹³⁷ Why, then, does Paris lose Helen, the woman given to him as consideration for his giving the golden apple to Aphrodite? One answer is that the Greeks of the preliterate/protoliterate period believed, as a matter of public policy, that it was more important to promote the goals of the Princes' Contract than the goals of the Paris-Aphrodite Contract.¹³⁸

The contract among mortals sought to foster values more important to the community than the values embodied in the contract between the goddess, Aphrodite, and the mortal, Paris. The Princes' Contract had both proactive and reactive components. Proactively, the agreement endeavored to deter the parties from trying to disrupt the marriage in the first place. Reactively, it provided armed enforcement to protect the marriage if actually threatened. Maintaining order, preserving marriage, and deterring violence are values befitting civilized society. The gods, for their part, appear unconcerned with human notions of legal fairness. Aphrodite's vanity drove her to fashion an agreement that both triggered the condition in the Princes' Contract and also willfully interfered with Menalaus' and Helen's marriage contract.¹³⁹ In their private agreements, their contracts, we

137. See *supra* note 6 and accompanying text.

138. It is unclear whether the significance of the contrast between the Princes' Contract and the Paris-Aphrodite Contract would be adversely affected if "Fate"—rather than Zeus—were responsible for the success or failure of the agreements at issue. Professor Michalopoulos observes:

While the line of demarcation between the jurisdiction of Zeus and that of Fate (*Moir*a, *Aisa*) is often shadowy and while we sometimes find the expression *Dios aisa* (the fate of Zeus) employed, yet on the whole man's destiny in the *Iliad* is controlled by *Moir*a against which even the gods have no final power.

MICHALOPOULOS, *supra* note 4, at 116. For more on the relationship between Zeus and Fate, see WHITMAN, *supra* note 9, at 228.

139. See *supra* notes 123–25 and accompanying text; see also MICHALOPOULOS, *supra* note 4, at 17 ("Some gods are seen to pursue their charming vagaries according to their nature and without much regard for norms of morality."). Michalopoulos specifically mentions Aphrodite in this regard. See *id.* at 57–58 ("In the *Iliad* and *Odyssey* the gods are

observe humans and humane values in Homer's world rising above the wanton anarchy of the gods.¹⁴⁰

completely human in their behavior and often considerably less noble than the heroes of the epics."); *id.* at 67 ("The Olympians behaved like overgrown, rambunctious children with adult, human appetites."); *see also* HAVELOCK, *supra* note 6, at 51 ("[T]he acts and decisions of such gods are not ethical or moral in our sense.").

140. *See* BESPALOFF, *supra* note 8, at 123.