

Law and Oratory in Classical Athens

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I will be talking this evening about ancient Greek law, which has been my main area of research for the last thirty years or so. More specifically I want to talk about Athenian law, and since most of our evidence for Athenian law comes from roughly 100 speeches that were delivered in actual trials in the period from about 420 to 320, I will also say a good bit about oratory. My specific goal is to explore the relationship or interaction between these two, law and oratory, and by doing so I hope to gain some insight into the nature of Athenian law. Some of you may be wondering why anyone would care about the nature of Athenian law. It's a good question. Not only is Athenian law extinct, so to speak, but it left no legacy and had, as far as we can tell, virtually no influence on any of the legal systems that followed it. In this respect it differed totally from its cousin, Roman law, which later became the basis for most of the legal systems of the Western world and many others as well. Even modern Greece has a legal system based on that of Rome, not on its ancient Greek ancestor.

The lack of any legacy means that there has been no particular incentive to study Athenian law, as there is to study Roman law. Another factor discouraging the study of Athenian law is that the Athenians themselves never studied it. Rome had a long tradition of scholars whom we call jurists, who studied their legal system and worked to clarify ambiguities, fill in gaps in the existing laws, and generally tried to rationalize and systematize the legal system. Modern scholars have continued this tradition, writing scholarly books and articles, and even continuing to call themselves jurists. Athens was different. Laws were enacted and written down, and trials were conducted, but no Athenian scholar ever studied the law, or at least if anyone did, he left behind no record of it. To be sure, philosophers were interested in law, and Plato wrote a very large work entitled *The Laws*. But this work is far from being a study of Athenian law. Rather it is a compilation of laws created by Plato for Magnesia, an imaginary city in Crete. Some of Plato's laws resemble actual Athenian laws, but many do not and his system of

punishment is a complete novelty. In essence these laws are intended to illustrate how one might run a city based on Plato's philosophical ideals, ideals which include his famous paradox that "no one does wrong willingly." In Plato's view, a person who truly knows the right thing to do will do it; accordingly, crime can only be the result of ignorance, and this means that criminals must be educated, not punished. His laws thus provide an elaborate system of education and rehabilitation for criminals, unlike anything in Athenian law.

Plato's pupil, Aristotle, also was interested in laws and wrote among other things a book on the Athenian Constitution. This work includes a description of the legal system in his day and provides important factual information about courts, officials, and legal procedure. But there is no analysis or discussion of the nature of Athenian law. Aristotle also discusses law in other works, especially the *Rhetoric* and the *Politics*, but these works are primarily concerned with other matters and only incidentally with law.

In short, there exists no tradition of scholars studying Athenian law, and so those of us who are interested in Athenian law must find our own way. And since we have very few texts of actual laws, we have no choice but to turn to the forensic speeches. These speeches come from a wide range of different types of cases, and they include a great variety of arguments, some of which seem to have little to do with law. They are the pleas of individual litigants in actual cases, and therefore they are almost certainly biased and misleading, at best. So what can we learn from them? Well, in the first place the speeches give us a direct and vivid picture of what we may call "law in action." These are real people with real concerns who have come to court to obtain justice or defend themselves against an accusation. We see their hopes and fears, their prejudices and ideals, and we can get a glimpse of how the legal system might help them, or not. This is a perspective we never see in the Roman jurists or in reading a law code or a legal textbook. And the speeches are instantly accessible. When I teach Athenian law, I don't give the students a lot of background information; I just have them read the speeches, and as soon as they do, they can begin to think about the issues that arise: How strong is the case? Where are the weaknesses? What would the other side have said? And how does the speaker's rhetoric work to support his

legal case? Of course, these questions begin to raise issues about rhetoric, and most legal scholars today are not very comfortable talking about the role of rhetoric in law. Law is not supposed to be influenced by rhetoric.

My response to this is that whether we like it or not, law in practice, modern as well as ancient, is inherently rhetorical, and that perhaps the main reason to study Athenian law is that, unlike modern law, it does not try to hide this fact. Studying Athenian law thus forces us to think about rhetoric and law, and, I would argue, it helps us see how rhetorical our own law is. Law these days has entered into the popular media in a big way, starting perhaps with the O. J. Simpson case, which riveted the nation's attention, down through the Law and Order empire and its many derivatives. The Simpson case made many people question the role of rhetoric in our legal system. A common reaction was that although rhetoric should have played no role in the case, O. J. was acquitted only because the rhetoric of his lawyer, Johnny Cochran. Some of the episodes of Law and Order raise similar questions about the role of rhetoric in law. In this respect, I think we, as a society, are ambivalent. My guess is that many who deplored Johnny Cochran's rhetoric would feel very differently about the equally rhetorical pleading of an Atticus Finch or some other lawyer whose cause they agree with. And so we live with this tension between the desire to exclude rhetoric from law and the need to acknowledge that its presence in our legal system is inevitable. In this regard, the study of Athenian law can show us how one important culture devised a system that did not shy away from rhetoric but always insisted that the ultimate authority was the law.

Now, both law and rhetoric were part of Greek culture from the beginning -- that is, from the time of Homer onwards. With regard to rhetoric, the *Iliad* and the *Odyssey* stand out among ancient epics for the large amount of direct speech in them -- speech by characters other than the poet. Much of this speech is public speech aimed at persuasion, and everyone engages in it, from the kings and other leaders down to the lowly Thersites, who speaks in the assembly in Book 2 of the *Iliad*. Law is also present in Homer, most famously in a scene depicted on Achilles' great shield in Book 18. The shield, you may recall, has two cities on it, a city at peace and a city at

war, and the peaceful city is represented by just two scenes -- a wedding celebration and a trial. Clearly, for the Greeks marriage and law were the essential elements of peace and prosperity. In this trial scene, moreover, we see the essence of law for the Greeks -- two litigants pleading their case in a public forum with a group of judges, who listen to their pleas and make a decision. And for all the changes that occurred between Homer and the classical period, law remained essentially a matter of litigants pleading their case in court.

The main change after Homer came from the introduction of writing. Starting with Draco in 620 BCE and then especially Solon in about 590, the Athenians recorded a large number of laws on a wide range of subjects. These provided fixed and more or less permanent rules guiding litigants and their pleadings. Writing was also used, especially after 400, to record documents, such as witness depositions or contracts, that could then be introduced in court, though these were always read out to the jury, not given to them in written form. One other use of writing was of great importance in law, namely logography or speechwriting. Athenian litigants pleaded their cases themselves; they did not use advocates or lawyers, though they could enlist a friend to help present their case, giving him part of the total time allowed for their side. But they could also get someone else to write their speech for them, which they would memorize and deliver in court as their own. These logographers must have become quite knowledgeable about the law and about various argumentative strategies by which litigants would be more likely to prevail, and we may assume that they advised their clients on strategy in addition to writing the speech.

Logographers may have done some of the work of lawyers in our legal system, but beyond them Athenian law was characterized by the complete absence of professionals. The courts were supervised by officials with no special training, most of whom were selected by lot for one-year terms. They were assisted by a few clerks, who kept time, read out documents, and generally kept order. But no judge in our sense oversaw the proceedings or ruled on points of law. If there was a disagreement on, say, the meaning of a law, each litigant argued for his own interpretation. The jury's verdict at the end decided the case, but no one would know whether their decision was based on their acceptance of one side's interpretation of the law or on some

other factor. And because in most cases each litigant gave only one speech, he had to include arguments on all the issues that were important for his case in that one speech. So we regularly find points of law and points of fact argued together in the same speech, together with many other matters, such as pleas for or against leniency, or an attack on the opponent's character. Now, in a system such as I have just sketched, it is clear that rhetorical ability played a large role. When success or failure depended entirely on a single speech, the ability to speak well must have been a crucial factor in gaining a favorable verdict, and it is not surprising that the help of a logographer was highly valued. And because of this, some have argued that Athenian law was nothing but rhetoric -- the more skillful speaker, or more skillful logographer, would win the case regardless of guilt or innocence. But was it that simple? Did the law and the facts of the case really not matter? Or did they matter only in so far as a litigant or his logographer had the rhetorical skill to persuade the jury that his own presentation of the facts or the law was the correct one?

These are very large questions, and I can only discuss a few aspects of them tonight, so I want to focus on the law and what are referred to as the sources of law. Now, if you are a historian or a classicist, the term "source" has a pretty definite meaning -- an ancient historian's sources are the various kinds of evidence on which he or she bases a historical account or interpretation. Main sources for an ancient historian would include narrative histories from antiquity and documents of various kinds. Other sources might be literary works and archaeology. In this sense, the main historical sources for Athenian law are, as I've already suggested, the speeches of the Attic orators and Aristotle's *Constitution of the Athenians*. Other sources include tragedy (the trial of Orestes in the *Eumenides*, for example), old and new comedy (especially a play of Aristophanes, the *Wasps*, which among other things includes a delightful parody of a trial in which a dog is accused of stealing a cheese). Also inscriptions (though only a handful of inscribed laws from Athens have survived), historical and philosophical works, later Greek lexicographers and others who may provide information about

earlier times, and finally, archaeology.

Legal scholars, on the other hand, use “source” in a different way -- to designate where the law gets its authority. In modern Western law the three main sources of law are first, laws or statutes, which are important in all modern legal systems, second, precedent as expressed in judicial opinions (this is especially important in common law countries like the US), and third, juristic or academic writings (this is especially important in civil law countries like France or Germany). In addition, custom is generally accorded some role in most legal systems. And other legal systems may have other kinds of sources -- the Qu’ran is an important source of Islamic law.

What about the legal sources of Athenian law? I have already noted that there were no jurists, so we can dismiss the third category immediately. We have also noted that there were no judges who might render opinions, and the jury never issued an opinion; it only delivered its verdict, guilty or innocent, according to a majority vote, and with 200 or more members, it would have been impossible for the jury to deliver a judicial opinion even if they had wished to. So we can rule out precedent as a source of law, at least in the strict sense in which it applies in our own law, though a loose sense of precedent may have been at work. Custom in the sense of generally accepted rules of behavior clearly played some role as a source of law in Athens and is often cited in the speeches. And finally, statutes were certainly a source of law; in fact most scholars would probably say that statutes were the main source of law, and in their judicial oath, all Athenian jurors swore to judge “according to the laws and decrees of the Athenian Assembly and the Council.”

But if the written statutes were a major source of law in Athens, this raises the question, how did the jury know what the law was? In the US, if the two sides disagree about the meaning of a law or its relevance to a particular case, a judge decides, and later an appeals court may review his decision. But in Athens, where most laws were written in much more general language than they are today, who would decide such questions in the absence of judges? The

answer has to be that the jury decided, but what basis did they have for their decision?

Remember that the jury was selected by lot from those citizens who volunteered for jury duty.

They may have gained some experience of the law by being on juries in previous cases, but they had no professional training and many could not have had much education. So how could they be expected to produce authoritative rulings about complex legal matters the way judges do today?

The answer is that since they reached their decision after hearing only the speeches of the two litigants, these must have been their guide. In their speeches litigants often present an explanation of what the law meant, sometimes accompanied by a discussion of the lawgiver's purpose in enacting the law. In themselves, these explanations coming from litigants in the case could not have been completely authoritative, especially when (as must often have happened) the two sides disagreed about a law's meaning or relevance. And yet, almost everything the jury knew about a law would have been learned from the two speakers in the case.

Given all this, I would like to suggest that in fact the litigants' speeches should be considered a genuine source of law in Athens, filling somewhat the same role as judicial opinions do in our own law or juristic opinions do in civil law countries. That is to say, when Athenians had to determine the meaning of a law, they relied largely on the speeches of the two litigants, who would inform the jurors about both the actual text of the relevant laws (by having the clerk read these out) and about their meaning. Now, introducing a non-existent law in court was a capital offense, and so the texts of laws read out in court were probably accurate, though litigants might misleadingly cite only part of a law, and they could sometimes be quite creative in their attempts to make a statute relevant to their case. But litigants could make any argument they wished about the meaning of a law. Of course, both sides would try to make their arguments as persuasive as possible, knowing that the ultimate decision was in the hands of the jury. Since the jury voted only once, one could never be certain that the winning side prevailed because the jury accepted their view of the meaning of a law, and so no single argument or single case by itself could be authoritative. But if similar views were often expressed by other litigants and if they were regularly expressed by the winning side, then these views would gain authority and

could be followed with some confidence by others. In this sense, I suggest, that along with statutes, forensic speeches can be considered a main source of law for the Athenians.

To see how this worked in practice, I want to look at one of the best known cases we have, Lysias 1, *On the Killing of Eratosthenes*. In this case, the speaker, Euphiletus has been accused of intentional homicide and is arguing that the homicide was justified. He tells a long and quite persuasive story about finding Eratosthenes in bed with his wife and killing him. His marriage had been a happy one, he reports, until one day, unbeknownst to him, Eratosthenes saw his wife at the funeral procession for Euphiletus's mother and determined to seduce her. He succeeded, and the affair went on for a while with Euphiletus completely in the dark, until one day an old woman, the servant of one of Eratosthenes' previous conquests who now was unhappy that he had abandoned her, came and informed Euphiletus about the adultery. He was stunned to learn of it, he says, and his first step was to confront the maid, who had acted as a go-between. Using harsh threats, he persuaded her to confess all and to agree to help him catch Eratosthenes in the act. The next ti

I reckoned that the law of the city should have greater authority; and I exacted from him the penalty that you yourselves, believing it to be just, have established for people who behave like that.

Then, to prove his point, Euphiletus has the actual law read out to the jury; it reads as follows (cited from Dem. 23.53):

If someone kills a person unintentionally in an athletic contest, or seizing him on the highway, or unknowingly in battle, or after finding him next to his wife or mother or sister or daughter or concubine kept for producing free children, he shall not be exiled as a killer on account of this.

Now, the first thing to note about this law is that it does not, in fact, prescribe death as the penalty for adultery. It does not say that if you catch a man in bed with your wife, you must kill him, any more than it instructs you to kill your opponent in an athletic contest. It is a law about circumstances in which people will not be punished for killing. Second, this is an old law: lawfully killing a man on the highway refers to a time when highway travel was plagued by highwaymen and brigands (think back to the time of Robin Hood), and certain Greek words used in the law were by Lysias' day archaic or obsolete. In fact, the law was probably enacted by Draco, the first Athenian lawgiver, more than two centuries before this case. Thus, even though the law was still in effect in Athens, it is very likely that by this time killing an adulterer would have been viewed by most Athenians as unduly cruel and highly unusual. Other evidence we have, including other speeches and plays of Aristophanes, mention various penalties for adultery but not the death penalty, and it had probably been a long time since an adulterer had been killed on the spot like this. Thus, the vast majority of Athenians probably did not think that if you found an adulterer in bed with your wife, you should kill him.

On the other hand, the jurors in this case would not have been thinking about the general issue of how one should treat an adulterer; rather they would understand this particular act within the context of the events Euphiletus has just finished narrating; and from this perspective, they might have been moved to think differently, for he has told a very effective story, making it

especially effective by his vivid use of direct speech, which he includes several times in the course of his story. In the passage I just read, for example, he even quotes himself telling Eratosthenes (1.27):

It is not I who will kill you, but the law of the city. You have broken that law and have had less regard for it than for your own pleasure. You have preferred to commit this crime against my wife and my children rather than behaving responsibly and obeying the laws.

Now, this is not the ordinary language of everyday speech; it resembles more the speech of a judge, explaining to a convicted man why he must be punished. Whether or not Euphiletus actually said anything like we'll never know, but no matter. The vividness of the scene and the formal, judicial quality of Euphiletus' pronouncement, which is followed quickly by the reading out of the law in its archaic language, would certainly have encouraged the jurors to think that Euphiletus was presenting them with an official judicial explanation of the law.

If any of the jurors still had doubts, shortly after this scene Euphiletus has another law read out to reinforce his argument. The text of this law does not survive in our manuscripts, but according to Euphiletus's explanation after the text has been read out, the law sets a lighter penalty for rape than for adultery (1.32-33):

You hear, gentlemen: if anybody indecently assaults (i.e. rapes) a free man or boy, he shall pay twice the damages; if he assaults a woman (in those categories where the death sentence is applicable), he shall be liable to the same penalty. Clearly therefore, gentlemen, the lawgiver believed that those who commit rape deserve a lighter penalty than those who seduce: he condemned seducers to death, but for rapists he laid down double damages. He believed that those who act by violence are hated by the people they have assaulted, whereas those who seduce corrupt the minds of their victims in such a way that they make other people's wives into members of their own families rather than of their husbands'. The victim's whole household becomes the adulterer's, and as for the

children, it is unclear whose they are, the husband's or the seducer's. Because of this the lawgiver laid down the death penalty for them.

This passage not only emphasizes the seriousness of adultery, it reiterates that the law sets death as the penalty for adultery, and it explains why the lawgiver treated adultery so severely. Of course, there are clear flaws in Euphiletus' argument -- clear to us at least. To take just one example, the law that justifies homicide (quoted earlier) speaks only of killing a man caught in bed with your wife; it would apply just as much to someone who had broken into your house and was raping your wife as it would to someone who was committing adultery with her. Moreover, to say that the lawgiver set the death penalty for adultery is, as we have seen, misleading at best. And neither Lysias nor anyone in his audience could possibly have known what Draco was thinking when he enacted this law two centuries earlier. Thus, Euphiletus' explanation of the lawgiver's thinking is pure fiction. To be sure, Athenian litigants often explain why a lawgiver enacted a certain law, but these explanations are always tendentious and purely speculative; it is no different here. But Euphiletus has given the jury a clear and not implausible lesson about the meaning of the laws on rape and adultery, and my guess is that many of the jurors found it persuasive.

Of course, the prosecution also gave a speech, though as is often the case, this speech has not survived, and so we do not know any details of the case they presented. Certainly they did not present the case as the story of a happy marriage being destroyed. Perhaps they told of an unhappy wife seeking the love that she was not getting from her husband. More likely, they denied that Eratosthenes was having an affair and accused Euphiletus of using his wife to lure Eratosthenes into a compromising position in order to kill him. A scheme to lure men into precisely this situation is portrayed in Demosthenes 59 *Against Neaira* (64-69), where the speaker describes how Stephanus and his consort Neaira pretended that Neaira's daughter was a common prostitute, and when a man came to visit her, they waited until the couple was actively engaged in sex, and then burst in and grabbed him and held him until his family or friends paid a stiff ransom for seducing their daughter. It's not impossible that Eratosthenes' relatives alleged a

similar scheme on the part of Euphiletus and his wife, though in this case the objective was not ransom money but death, perhaps in retaliation for some earlier injury.

All this is just speculation, of course, but whatever story the prosecution told, they almost certainly included a different story about the law against adultery. My guess is that they cited one or more of the laws concerning adultery that were actually in use at the time, all of which would result in less severe penalties than death. They probably also cited a law governing the holding of an adulterer for ransom if such a law existed, or if not, they almost certainly mentioned that this course of action was common practice. They almost certainly argued, moreover, that the law did not set death as the penalty for adultery. Whatever their precise arguments, the jury would then have been left to choose between competing stories, not only stories about the facts of what actually happened, but also stories about just what the law on adultery was. And since there was no impartial authority who could tell them what the law meant, as a judge would do in our system, the jurors would have to determine for themselves the meaning of the laws presented to them and their relevance to the case. And the jury could rely only on the two speeches they had just heard, perhaps supplemented by other speeches they may have heard in previous cases and by their own knowledge (if any) of other cases of adultery.

Now, litigants in all legal systems tell stories about the meaning of the law. Our own legal system strictly limits the role of such stories, so that lawyers in our system do not make or interpret the law: judges do that, and most of the work lawyers do involves a relatively small amount of story-telling. But more cases than one might think involve some degree of interpretation of the law beyond the judge's instructions, and in such cases lawyers and their stories can have a significant impact on the meaning of our laws. I am thinking of homicide cases where the admitted killer was subject to provocation that may or may not justify the killing as self-defense, or rape cases where the victim knew her attacker, but at some point resisted (so-called date rape), or any case where some degree of mental infirmity may have played a role. In such cases legislators may make laws, and judges may tell jurors what those laws mean, but the verdict will still depend to a large extent on how successfully the lawyers on each side can

explain the meaning of the law as prohibiting or allowing these actions in a specific case. Just what, for legal purposes, constitutes self-defense, or rape, or adequate resistance to a rapist, or mental infirmity? A judge can tell the jury what the law means, but each side will still try to get the jury to understand the judge's instructions in a way that favors their side. And if certain explanations by lawyers repeatedly prove to be effective in certain types of cases, then over time the actual meaning of the law will change.

Compared to a century or two ago, for example, defenses based on insanity have expanded considerably, both in number and variety. These changes are now incorporated in statutes or judicial opinions, but they were first urged in trials where lawyers told compelling stories about what the law really meant. I stress, however, that stories need to be successful repeatedly, not just in one case. This was made clear in a case in 1979 that a few of you may recall, perhaps from seeing it portrayed in the movie *Milk*, in which San Francisco Mayor George Moscone and Supervisor Harvey Milk were assassinated, in large part because Milk was the first openly gay person elected to the San Francisco Board of Supervisors. The defense lawyer in the case successfully argued, among other things, that his client had become temporarily deranged under the influence of eating too many Twinkies, a high-sugar junk food. The strategy was immediately labeled the Twinkie defense, but afterwards the Twinkie defense was so widely ridiculed that it resulted in a counter-reaction, and the legislature changed the law explicitly to prevent such defenses in the future. In other words, it takes repeated cases, not just one, to change the law.

To return now to Athens, my argument essentially is that in this same way litigants' stories played a role in shaping the law in Athens, but without the control imposed by authoritative judges, the role of litigants was much greater -- so great, in fact, that we can legitimately conclude that forensic oratory was a major source of Athenian law. In other words, in order to decide cases, an Athenian jury needed to know the law -- not just the wording of a law but its full meaning -- and in Athens, the jury's main source for this knowledge was the two litigants' speeches in the case. The power of any single litigant to make law in this way was

tempered by the fact that, as today, more than a single case was required. Thus, Euphiletus' argument that the law provided the death penalty for adultery, did not make this the law, even if he won his case. But if other litigants made the same argument and were repeatedly successful, in time this litigant-made law would become authoritative.

Now, for modern scholars oratory is not very satisfactory (to say the least) as a source of law. Not only were litigants' opinions subject to no kind of hierarchical control (as judicial opinions are in common law with out appeals system), but it is fairly obvious that some of the opinions expressed in the preserved speeches misrepresent the meaning of the law or the lawgiver's intention. In addition, there must have been many cases in which litigants' opinions about the meaning of a law conflicted with one another, as they do in the famous case *On the Crown*, where we actually have both speeches. Still, to judge from the speeches, Athenian litigants seem to have shared a fairly broad common understanding of the general meaning of their laws. And the important point for them was that the meaning of their laws was ultimately determined by the community, the *demos*, not by some elite authority. For a basic tenant of Athenian thinking about government was that their legal system was an essential part of their democratic system of government, and as such, its primary aim should be to serve the needs of the *demos*, which it appears to have done well.

This is not to say, however, that Athenian law was all rhetoric. As I have already noted, statutes were the primary source of law and litigants regularly call on the jury to decide according to the laws. But when questions arose about these laws, the Athenians left these questions in the hands of the jury to decide, and any such system of broad public decision-making depends to a certain degree on rhetoric. Plato deplored the large presence of rhetoric in Athenian law, just as he deplored democracy as a political system. But for the majority of Athenians, it was not only acceptable but desirable that law should be in the hands of the people and should accordingly be subject to the influence of rhetoric. But the ultimate source of control in the legal system was still the laws.