

PRESIDENTIAL ADDRESS 2003

New Orleans, Louisiana

Telling Stories in Athenian Law

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WHEN STUDENTS FIRST ENCOUNTER ATHENIAN LAW, it seems quite different from what they know as our own law; and when they begin to read scholarship on the subject, especially Anglo-American scholarship of the last two decades, they will probably find some discussion of the so-called “otherness” of Athenian law. Scholars these days don’t write books that try to make Athenian law more familiar, like Robert Bonner’s fine little introduction, *Lawyers and Litigants in Ancient Athens*, published three-quarters of a century ago. New approaches have taken over, approaches that, although healthy and stimulating in many ways, tend to exaggerate the otherness of Athenian law. This is not so much because historians present a false picture of Athenian law, as because they misrepresent aspects of our own legal system, relying on a traditional, idealistic view of it that is increasingly being challenged by certain branches of contemporary legal studies. When we take a more realistic look at our own system, however, Athenian law may not appear so different.

One of the new approaches to understanding our own law is to look at storytelling. Storytelling has been the subject of serious academic study for almost a century now, but it has drawn the attention of legal scholars only in recent decades, as part of the broader field of “Law and Literature.” Classicists too have studied storytelling, as well as newer approaches such as narratology and performance studies. But storytelling in Athenian law has not received much attention, so today I would like to take a couple of stories from Athenian legal cases and try to show how the study of storytelling in law can shed light on these cases and on Athenian law more generally.

I’ll begin with a story familiar to many of you, from Lysias 1, *On the Murder of Eratosthenes* (this is the case of the man who kills his wife’s lover). A

century ago this speech was considered unsuitable for students and uninteresting for scholars, but in recent decades it has become perhaps Lysias' most popular work. The main reason for its popularity is the vivid and compelling story it tells. As you may recall, Euphiletus, a farmer, recounts how he married a young woman who seemed at first the perfect wife. But after the birth of their son, he relaxed his guard over her. Then, unbeknownst to him, she began an affair with the villainous Eratosthenes—a professional adulterer, as he is characterized. Their affair continued for some time without Euphiletus' knowledge—though he now recalls several clues that, in retrospect, he should have noticed but didn't. At last, he is told of the affair by a servant of another victim of Eratosthenes' seduction, who was angry that she had been cast aside in favor of Euphiletus' wife. Stunned and enraged by the news, he determines to exact the full punishment stipulated by the law, which allows a man to kill an adulterer who is caught in bed with his wife. So he forces their maid, who has been acting as the go-between for the affair, to admit the truth and cooperate with him by telling him when Eratosthenes next visits. When that day arrives, Euphiletus rounds up several friends and they storm into the house, catching Eratosthenes *in flagrante delicto* and quickly killing him. Euphiletus assures the jury that justice has now been served. Naturally, Eratosthenes' relatives saw things differently and they prosecuted Euphiletus for homicide. The speech we have was written by Lysias for Euphiletus to deliver in his defense at the trial.

At least, that's what the speech is generally thought to be, though there are skeptics, notably John Porter, who in a recent article analyzes "the subtle fashion in which the speech exploits the motifs of the stereotypical adultery tale in achieving both its charm as a narrative and its effectiveness as a rhetorical appeal" (Porter 422). As the author correctly observes, "Euphiletus' narrative presents anything but a straightforward account of the events leading up to Eratosthenes' death" (433). Instead, the tale "has been molded by an author well versed in the conventions of comic adultery narratives" (433). The article suggests that these "performative features of the text" make it more likely that Lysias 1 was not written for actual delivery in court, but is a work of fiction written as a literary exercise. Similar challenges to the authenticity of Lysias 1 and several other Athenian forensic speeches have been advanced in the past, but this one is especially interesting for its analysis of the speech's sophisticated literary and performative features. The question I would ask is whether these features are evidence that the speech was not written for a real case.

Another approach to the speech would be to take its rhetorical and performative features as evidence for the view that Athenian trials are essentially rhetorical struggles between opposing litigants for a status-based su-

premacY, and are generally unconcerned with the strict applicability of the law to the relevant facts. In this view, Lysias 1 and other forensic pleadings achieve their effect largely through storytelling and other rhetorical strategies of questionable legal validity, not by following objective and rational principles as we do. But this assessment presumes a view of our own law that is called into question by the more nuanced approach of Law and Literature scholars.

In thinking about our own law, most people would acknowledge the existence of literary and rhetorical features, but these are generally considered irrelevant to the true work of law, and in many cases are judged to conflict with that work. Recall the outrage expressed by most white Americans after the O. J. Simpson verdict, which was generally condemned as overly influenced by the rhetoric of Johnnie Cochran, who turned the jury's attention away from the crime itself and, instead of directly addressing the facts of the case, told a story of racism in the Los Angeles Police Department. But Cochran's story, though perhaps more provocative than most, was not the perversion of justice that some judged it to be. His story, like most other closing arguments, simply gave the jurors a context for thinking about the case, and they found that story more compelling than the story told by the prosecution. As James Boyd White has said, "the law always begins in stories" (168).

White is not just referring to the oral arguments of litigating attorneys. He also sees storytelling in the accounts litigants give to the court or to their attorneys, in the testimony of witnesses, the deliberations of the jurors, the decisions of judges (including judges on appeals courts right up to the Supreme Court), and even in legislation. Stories pervade our law, according to White, and properly so, for telling stories is as fundamental to human culture as speech itself. Stories play an essential role in creating culture, and no aspect of society is untouched by their influence. White and others reject the view that law is an exercise in deduction from general rules to solutions for specific cases. Rational deduction is present, of course, but always in the context of a story, and the story does more than we think to control the reasoning process. Even those aspects of our law that seem the most rational and objective and that have no parallel in Athenian law inevitably rely on stories.

Studies of judicial opinions, for example, including those at the highest levels of appeal, have clearly shown the importance of stories. In one recent study, Anthony Amsterdam and Jerome Bruner examine opinions on school desegregation in the last half century by lower courts and by the Supreme Court. They show how beginning in 1954 with *Brown v. Board of Education* (which was the initial decision to end school segregation) court opinions told a story going back to the days of slavery and Jim Crow. In this story, federal

courts became the good guys, working to correct the injustice of unequal treatment in the past. In the eighties and nineties, however, court opinions told a different story, one that began at a different point in time. This story ignored the history of segregation before *Brown v. Board of Education* and began instead with the court-ordered desegregation of schools in the decades after *Brown*. This story also presented the courts as the good guys, but now they were righting the wrongs of integration, not segregation, by alleviating the burdens that earlier courts had imposed on local communities when they forced them to integrate. This story allowed the courts to overturn almost all the desegregation orders of the fifties and sixties. Of course, in both periods the courts justified their decisions with a host of citations of precedent and rational arguments. But, as Amsterdam and Bruner show, all this judicial reasoning had to be given a context, and that context was supplied by whichever story the courts chose to tell.

But the most powerful and overriding story in law today may be that of the progressive history of law as an institution grounded in reason and working for the betterment of humankind. In this story, Athenian law is a strange, primitive affair, soon overtaken by that first true legal system, Roman law. Most modern legal scholars are much more comfortable with the logical treatises of Roman jurists than with the stories of Athenian orators, but trial lawyers who deal with the reality of litigation are more appreciative of the art of storytelling. One handbook for lawyers learning how to litigate states, “one of your primary roles is that of storyteller.” “When you prepare for trial, step back from the microscope and consider your overall story. Its clarity and credibility will probably play as great a role in the outcome as any single event or piece of crucial evidence.” “Trial stories very much resemble those you learned as a youngster, such as ‘Goldilocks’” (Bergman 10–12). Now, the story a lawyer tells does not materialize automatically from the facts of the case; he must create the story from the facts that are available. Of course, the facts may be in dispute, but even an agreed upon set of facts may and often does give rise to competing stories. That’s one reason why cases go to trial. On the other hand, there are also constraints on which stories can be told on the basis of a given set of facts. In other words, your story must fit the facts, but other stories may also fit the same facts.

These rules governing storytelling were recognized as early as the second half of the fifth century, in Antiphon’s *Second Tetralogy*. This is the hypothetical case about a boy who was killed by a javelin that was thrown by a young man during a training session. The plaintiff is the dead boy’s father. His story is simple: this young man threw a javelin that hit and killed my son; therefore he must be convicted and punished for killing my son. In this story the young

man is the killer. But the accused's father tells a different, more complex, story: my son threw a javelin, just as he ought to have done, but the boy, by mistake, ran out in front of it and was hit by it. Thus, the boy was responsible for his own death, and no further action is needed. This story outrages the plaintiff, but it is not inconsistent with the facts. The defense acknowledges that, "If the javelin had hit and wounded the boy because it carried outside the boundaries of its proper course, then we would have no argument, or no story to tell [the Greek is "no *logos*"], to refute the charge of homicide. But in fact, the boy ran under the trajectory of the javelin and placed his body in its path" (Antiphon 3.2.4). In other words, the defendant's story fits the facts as we have them, just as the plaintiff's does. If the facts were slightly different, however, he would have to tell a different story.

Now, constructing a story from the facts (i.e., storytelling) is an art, and has recently been studied as such by a folklore scholar named Sam Schrager. Schrager uses the methods of folklorists to analyze the performances of some of the best trial lawyers in the United States, and the results are fascinating. One part of the study revolves around a set of cases prosecuted by a Philadelphia District Attorney named Roger King. King is black, as are most of the players in his cases, and one pair of trials in particular illustrates his storyteller's art. The two trials involve four men accused of murdering a drug dealer. King first tried one of the accused, and then tried the other three together in a second trial. In both trials the evidence was roughly the same—fairly strong but largely circumstantial—and much depended on how the cases were presented to the jury. This is where King's mastery of the art of storytelling proved itself.

In both trials, King's case turned on whether the jury believed the testimony of several witnesses who were themselves involved in drugs and other criminal activities and who had told different stories at different times. In the first trial one of these witnesses was asked by the defense why anyone should believe his present version of events; he answered that one person believed him. When the defense counsel blundered and asked who, the witness answered, "God": when he decided to tell the truth (he said), he prayed to God and he knew that God believed him. In his summation, King seized on this small point and told the jury a story of sin and redemption: this witness was born into a life of poverty and crime but that didn't mean he was a bad man. Far from it. He has now repented and is trying to escape from his former life of sin. The jury can help redeem this man by believing his testimony and convicting the accused. They quickly complied.

Fresh from this victory, King then prosecuted the other three defendants. The witnesses and evidence were essentially the same, but the remark about God was never made, and King could not effectively tell the same story. So,

instead of sin and redemption, he told a story of sin and punishment. In this story, these same witnesses, together with the defendants with whom they associated, were portrayed as the scum of the earth; they preyed on decent members of society and represented everything that the good men and women of the jury loathed and feared. Would the jury look the other way and pretend they were not really affected by these people's crimes? Or would they do their duty as citizens, face the fact that drugs and crime were poisoning society and threatening us all, and then give these criminals the punishment they deserved. Again, the jury accepted the story and convicted all three.

Now, there is much in Schrager's discussion of these cases that I cannot discuss today. But the point I want to stress is that from the same set of facts King constructs a different story for each trial, one a story of redemption, the other a story of punishment. Both stories are highly traditional, even mythic; both stories rely on characters familiar from the life and culture of the community and both are rooted in the strong Christian traditions of black American culture. And both storytellings ask the jurors to write the ending the story requires, the ending demanded by justice. The required ending is redemption in the one case and punishment in the other, but both will be achieved by a guilty verdict. And both stories are not only effective, but also in some sense true. These witnesses undoubtedly were sinners, and according to Christian belief they deserved punishment; but according to that same belief they also deserved to be given a chance for redemption. Both moral outcomes can be justified, and both stories can be seen to be consistent with justice.

Not all cases present similar possibilities, of course, but juries often do have to make decisions between stories that may both be true and that are both in some sense consistent with justice. The trial lawyer's job (or in Athens the logographer's job) is to tell the story he wants the jury to believe and tell it as effectively as possible. This is the task Lysias performs so effectively. Eratosthenes' relatives, of course, must have told a very different story. They would probably have begun their story not with the perfectly harmonious Athenian family suddenly invaded by evil, but with the innocent Eratosthenes being lured to bed by the seductive wife of Euphiletus (perhaps even with Euphiletus' full knowledge). In this story, the maid would be a co-conspirator and Eratosthenes a mere victim. What man, after all, could resist such seduction? Then, after the seduction, the three conspirators—Euphiletus, his wife, and the maid—plotted to entrap the innocent Eratosthenes and slaughter him in cold blood. Unlike Euphiletus' story, which has already ended with the crime being punished, and thus leaves nothing more for the jury to do, the relatives' story would not yet have reached its end; their story will only end when the jury convicts Euphiletus. Then the crime will have been punished.

If the other side told something like this story, how would the jury decide between them? Even with more evidence about the “facts” of the case and with the tools of modern forensic science, it would not necessarily be possible to decide with any certainty. Neither side, surely, told “the truth, the whole truth, and nothing but the truth” (whatever that may be), but both litigants may have told a story that was true as they saw it. In many situations in life, two people in all honesty will tell two different stories. Each chooses the starting and ending points, selects the details, and shapes the characters according to his own perspective. People do not necessarily distort their stories, at least not consciously, in order to make them more favorable to themselves; rather the story is the only means they have of understanding the situation, and as soon as they begin to think about it, their thoughts take the form of a story. As White says, narrative is “the archetypal form of human thought in ordinary human life” (175). And the stories we construct are necessarily told from our own limited perspectives.

These stories are then judged by judges and jurors who do not know which, if either, is true. Even the lawyers often don’t know whether their own clients’ stories are true. In the end, one has to make a judgment, and in doing so, in law as in life, one has to rely not just on whether the story conforms to the facts but also on its plausibility (what the Greeks called *eikos*), and this depends in large part on its artistry—the effective use of detail, the use of familiar, even stereotypical characters, and other rhetorical and performative features. In addition, we judge stories according to their conformity with our own values and beliefs, so that the art of good storytelling is also in part a matter of matching one’s story to the traditions and beliefs of one’s audience.

Many of these features of storytelling are similar in Athenian and US law, but there are important differences too. In our law, judges are often asked to set limits to the story that can be told, and these judicial decisions can be crucial for the outcome of a case. Can a wife accused of killing her husband begin her story with the history of her husband’s past abuse? Or does her story only begin when she decided to do away with him? Can a man accused of rape begin his story with the history of his accuser’s past sexual life? Or must the story be limited to the act of rape itself? In such situations, and in many others, judges rule according to supposedly objective rules and standards, but we know that rules evolve over time and decisions vary from place to place, from judge to judge, and even from case to case. Athenian law provided no such rulings and seems to have been content to let litigants begin and end their stories wherever they wished and extend them as they felt was relevant. Whether this led to greater injustice is doubtful. Indeed, the restrictions imposed by our own system may lead as often to less justice as to more justice.

The stories told in Athens and today are also constrained by cultural features that are different in the two societies. One obvious difference affects stories about women. Since the jury and almost everyone else present in an Athenian court was male, women were present primarily as characters in stories told by men. Many stock characters and roles were available for women in these stories—dutiful wife, grieving widow, corrupt prostitute, and others—and if litigants wanted their stories to carry conviction, they had to construct characters who conformed, at least in general, to these cultural types. Speakers could give their characters a certain amount of individualization within these types, but these cultural constraints also posed problems for a litigant, especially when he was faced with conflicting demands, as Lysias is in creating the role of Euphiletus's wife.

The standard adultery tale provides clear paradigms for the roles of Euphiletus (the naive cuckold) and Eratosthenes (the skillful seducer), but the traditional role of the wife in a story of adultery was that of a skilled and conniving participant in the affair, and this role does not fit the needs of Euphiletus' case. If he were relating the story to his friends at dinner or at the local taverna, there would be no problem. They could all agree that wives cannot be trusted, women in general are lustful, and so on. But in court his case depends on directing all the jury's anger at the one person whose punishment is relevant to the case, Eratosthenes. To the extent that his wife has an active role in the affair, Eratosthenes' role, and consequently his guilt may be diminished. Thus, although by careful reading we can see that Euphiletus' wife must have played a large role in the affair, Lysias keeps her generally in the background. And the same is true of the maid, for whom there was also a ready-made paradigm—the servant as liaison—and who could easily have been given a much larger role. But that too would have taken the focus away from the sole villain, Eratosthenes.

A similar difficulty faced another Athenian litigant who tells the story of a wife's unfaithfulness, the speaker in Antiphon 1, *Against the Stepmother*. The authenticity of this speech has also been questioned by scholars for many of the same reasons as Lysias 1, among them that it relies heavily on a narrative, and that the main character, the stepmother, is explicitly cast as the well known mythological husband-killer, Clytemnestra. Antiphon's speech is written for this woman's stepson, who is accusing his stepmother of poisoning her husband. She is defended by her sons, who are his half-brothers. The stepson presents several arguments in addition to the usual pleas for sympathy for the victim, and for himself, the surviving son. He criticizes his half brothers for disloyalty to their dead father. He also tells of a challenge he made to interrogate the household slaves under torture so that they could testify that

on an earlier occasion the stepmother confessed to giving her husband poison, and her only excuse on that occasion was that she thought the poison was a love potion. And he criticizes his opponents for refusing this challenge. But most important of all he gives a vivid account of the events surrounding his father's death, which occurred perhaps seven or eight years earlier, when he was still a boy.

Unlike Lysias' story, which is about a crime that (according to the speaker) has already been punished, Antiphon's story, like most prosecution stories, concerns a crime that in his view has remained unpunished until now. It is the story of an evil woman who poisoned her husband with the help of a servant who worked for a good friend of her husband as his maid and sexual servant—the Greek term is *pallakê*. At dinner one night this maid gave the husband and the friend a drug, supplied by the stepmother. The friend died on the spot; the husband died twenty days later, and the true killer, his widow, has thus far escaped punishment. Hence this trial.

Now the heart of Antiphon's case is his narrative account of two episodes—the fatal dinner and an earlier scene in which the two women planned the poisoning. Antiphon almost certainly had no direct source for this planning scene, and must have simply created the details out of thin air, including the conversation he relates between the two women, in which the stepmother explicitly confirms that she is the primary agent in the plot. He even quotes her as saying she will procure the drug herself. The maid's task is only to serve it. As Antiphon tells the story, the stepmother feared that she was losing her husband's affection, so one day, having learned that the *pallakê* was about to be set up as a prostitute, she summoned her and told her about her own desire to regain her husband's love. She suggested that a love potion would help both women regain their men's affections. She would provide the drug and the maid could then serve it. Antiphon then describes the dinner, some time later. As the two men celebrated the rites of Zeus Ctesius, the maid poured the drug into their wine, adding an extra dose for her master in the hope that he would love her even more. The men then drink, with predictable effect. The *pallakê* was executed immediately, and this woman, who masterminded the affair, must now receive the punishment she deserves.

The story is effectively told, even if it does not have quite the vividness of Euphiletus' story, but scholars have traditionally judged the case as a whole to be very weak, if in fact it is a real case and not just a literary exercise. The story is not confirmed by any evidence and, according to most scholars, none of the other arguments would carry much weight. What these scholars fail to appreciate, I think, is the effectiveness of Antiphon's *story*, especially considering the difficulty he faced in portraying his characters. Whatever her motive,

the stepmother was apparently induced to give her husband poison or a love potion by actions on his part. If the husband were having an affair, this would not, of course, justify his murder, but it would still be the kind of behavior that the plaintiff would not want to call attention to, since it would create more sympathy for the stepmother and less for her victim. So he carefully skirts around the issue and speaks only vaguely of her fear of losing his love. But the defense would also have to be very careful in telling their story, since if they played up the husband's unfaithfulness, this could be seen as providing a good motive for the murder. It would not have been easy to portray her as a victim and then argue that she had no motive for murder, and, as I have argued elsewhere, the claim that she thought she was giving a love potion, not a poison, would have been problematic with the all-male jurors, who would probably consider a woman who gave her husband a love potion just as dangerous as one who gave him poison. So Antiphon's story might well have been more compelling than the defense case.

Antiphon's case suggests one reason why stories play a large role in almost all Athenian forensic speeches—because in the absence of most of the tools of forensic science Athenians had to rely more on storytelling than we do. They could not, as we can, identify the drug used, measure its effects at different dosages, trace its source, and so on. But the amount of storytelling in Athenian law does not make it totally different from our own law, provided we accept the lesson taught by the Law and Literature movement, that “the marginal—the language, the rhetoric, the narratives of law—are central to understanding its justice” (Goodrich 115). From this perspective—from the margins—we can see that our law depends in a fundamental way on subjective rhetorical elements, including storytelling, that are often considered trivial at best. And in this respect, Athenian law is not so different. If many Athenian litigants devote much of their pleadings to telling stories that exploit the motifs of stereotypical tales from myth and literature, this does not make these speeches merely literary exercises outside the boundaries of appropriate legal pleading, either in Athens or today. Far from it. Telling stories is essential in law today, and it was even more essential in Athenian law. The Athenians were very good storytellers and the logographers tell many good stories. That may make their pleas resemble good literature, but it also makes them good law.

Thus, the fact that Lysias 1 or Antiphon 1 or any other Attic speech relies on a narrative account of events and uses stereotypical motifs to construct that account should be taken as a sign of the logographer's success in making his case to the jury by using the legitimate art of storytelling. Like all stories, Euphiletus' story is selective; it uses stereotypical characters and plot lines,

and it draws on traditional features of the storyteller's art—building suspense, narrating focalization, and so on. Of course, there was another story to tell about the same events, as there almost always is, and these two stories were put in competition with one another in the *agôn*—the trial, or contest between plaintiff and defendant. In the end, just as today, the jury had to choose between Euphiletus' story and the very different story told by Eratosthenes' relatives. Their choice was not necessarily between a true story and a false one; the jury may have felt—as every jury I myself have been on has felt—that there was some truth and some justice on both sides. In the end the determinant factor may have been the narrative skills of the two litigants. But this does not mean the resulting verdict would have been unjust, in Athenian law or in our own. It means, simply, that no legal system in the world can or should avoid telling stories. In this respect the Athenians were very much like us.

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