MICHAEL GAGARIN (AUSTIN, TX)

# RHETORIC AS A SOURCE OF LAW IN ATHENS

Ten years ago I published a paper (Gagarin 2003) in which I argued that the litigants' rhetorical pleadings played a significant role in determining the facts in an Athenian trial. In this paper, I argue that these same rhetorical pleadings also played a significant role in determining the law for an Athenian trial. I am aware that in practice it may not be possible to separate the determination of facts and of law—an issue I will return to at the end of this paper—but for analytic purposes it is useful to begin by treating these separately.

In seeking to know what were the "sources of law" in classical Athens, we must first note that the expression can be used in two different senses, historical and legal. For Athenian law, historical sources are the evidence scholars use in their efforts to learn what the law was in Athens, whereas legal sources are the materials that Athenian jurors and others looked to in determining what the law was that they should apply to the particular case they were judging. As Todd presents them (1993: 30–48), historical sources for Athenian law include forensic speeches, historical and philosophical writings such as the *Athenaion Politeia*, a variety of other literary sources, inscriptions, documents preserved in the speeches, and archaeology. Todd then examines the legal sources (1993: 49–63) beginning with statutes, but after statutes, he can find little else: only custom and perhaps foreign law, in his view, may also function as sources of law independent of statute.

To be sure, the Athenians themselves had no concept of a "source" (in the legal sense) for their law.[1] They knew that the city had enacted a large number of laws over the years, that these laws were written down and available for all to read, and that they could not appeal to any other laws if they became involved in litigation. They knew further that in order to introduce the text of a law in court, the text had to have been presented before the trial, at an arbitration or other kind of preliminary hearing, and that the severest penalty was prescribed for anyone who cited a non-existent law (Dem. 26.24). Finally, they knew that all members of the jury had sworn an oath that they would judge the case according to the laws and decrees of the city. We should further note that the only expression Athenian litigants used to convey the sense of the modern phrase "Athenian law" was "the laws."[2] Thus, to ask

[1] I owe this observation to Charles Donahue in the discussion following my paper.

[2] TLG searches for any combination of *nomos* and *Athenaios* come up empty. Other qualifications are found ("your laws," "the established laws," etc.), but never "Athenian law," "Athenian laws," "the laws of the Athenians," or any similar expressions.

about the sources of Athenian law, one would have to ask about the sources of "the laws," a question that an Athenian would understand as asking about the sources of their statute law, to which he would probably respond "the Athenian *demos*" *vel sim*. Todd's account of legal sources, therefore, makes good sense, since in essence, the written statutes were the only source for Athenian law that an Athenian would consciously cite.

That said, I think we can press the question a bit further by asking just how an Athenian juror would have known not only what the words of the law were, but what these words meant and how, if at all, they applied to the case he had to decide. All jurors swore an oath that they would judge according to the law, but this cannot be the end of the story, since the text of the law did not necessarily make clear the law's full meaning or its applicability to the case at hand. In some cases, moreover, more than one statute may arguably be relevant, so that differing and possibly conflicting statutes may have to be considered. In such cases, how did a juror decide just what the law was as it applied to the case he was deciding?

Todd downplays such concerns by arguing that an Athenian trial was not so much concerned with applying the law to the concrete case, but treated laws as providing limits or guidelines within which the jury decided the dispute between individual litigants. Thus, jurors had to take various laws into account in reaching their decision but did not have to decide about the precise meaning or applicability of any particular statute or choose between competing statutes. Todd's position may be valid for some cases, but I think we must take more seriously the repeated emphasis in the speeches that the jurors had a duty to decide according to the law, and that this duty would have forced them to confront difficult questions about the meaning and applicability of different statutes.

Besides statutes, then, what sources could a juror look to for guidance in deciding what the law was and whether it applied to the case he was deciding? The answer I propose is that jurors and others had to look primarily to the speeches of the two litigants. In addition to introducing some statutes or parts of statutes directly by having them read out to the court by the clerk, and discussing or alluding to other statutes that were not read out, litigants also regularly told jurors what these laws meant and how they applied to the case at hand. They might also explain the legislator's purpose in enacting a statute and how this should influence the jury's interpretation of the law. My claim is that these discussions in the forensic speeches amounted to an important legal source for Athenian jurors and others at the time. Of course, speeches did not have the formal authority of statutes, but when the two litigants disputed the meaning of a statute, or cited different statutes in support of their opposing positions, the jury had no other source to turn to than the litigants' pleadings.

To demonstrate this, I will examine several cases in which questions arise as to the meaning or applicability of a law, and will try to show how in these cases the pleadings of the two litigants functioned together with statutes as sources of law that

helped the jurors determine the meaning of the law in question. Of course, a litigant's assertion about the meaning of a law would not be authoritative (though he might try to make the jurors think that it was); it would carry weight only to the extent that it was accepted by the jurors, or by most of them, and even then it would take more than one case to establish this as the accepted meaning of a law. When it came to determining the meaning of a law, no single case had the kind of authority that, for example, the United States Supreme Court has. But in the absence of judicial authorities, litigants' speeches would have been the Athenians' only guide to the meaning of a law besides the texts of the statutes themselves.

Let me begin with Lysias 1. The speaker, Euphiletus has been accused of homicide but argues that the killing was justified. He tells a long and quite persuasive story about the happy marriage he thought he had, until one day he learned that a certain Eratosthenes had seduced his wife. He was stunned by the news and decided to catch Eratosthenes in the act. The next time Eratosthenes visited, a maid reported it to Euphiletus, who gathered a group of friends and burst into the bedroom. They found Eratosthenes in bed with his wife, whereupon Euphiletus ran him through with his sword.

In committing this act, he says, he was simply following the law's command:

> *He admitted his guilt, and begged and entreated me not to kill him but to accept compensation. I replied, "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." So it was, gentlemen, that this man met the fate which the laws prescribe for those who behave like that. (1.25–27)*[3]

Soon after this (28), Euphiletus has the clerk read out "the law." He does not say which law this is, and no text survives in the manuscripts, but it is reasonable to assume that it was a law on adultery, probably the *graphē moicheias* (*Ath. Pol*. 59.3), which may have prescribed death for adultery either as the sole penalty or as one possible penalty if the *graphē* was an *agōn timētos*.[4] Then, after again noting that Eratosthenes had offered to pay him ransom money, Euphiletus repeats his argument that he was merely obeying the law:

[3] κἀκεῖνος ἀδικεῖν μὲν ὡμολόγει, ἠντεβόλει δὲ καὶ ἱκέτευε μὴ ἀποκτεῖναι ἀλλ' ἀργύριον πράξασθαι. ἐγὼ δ' εἶπον ὅτι (26) "οὐκ ἐγώ σε ἀποκτενῶ, ἀλλ' ὁ τῆς πόλεως νόμος, ὃν σὺ παραβαίνων περὶ ἐλάττονος τῶν ἡδονῶν ἐποιήσω, καὶ μᾶλλον εἵλου τοιοῦτον ἁμάρτημα ἐξαμαρτάνειν εἰς τὴν γυναῖκα τὴν ἐμὴν καὶ εἰς τοὺς παῖδας τοὺς ἐμοὺς ἢ τοῖς νόμοις πείθεσθαι καὶ κόσμιος εἶναι." (27) οὕτως, ὦ ἄνδρες, ἐκεῖνος τούτων ἔτυχεν ὧνπερ οἱ νόμοι κελεύουσι τοὺς τὰ τοιαῦτα πράττοντας. (trans. Todd)

[4] See Carey 1995: 410–12

> *But I did not accept his offer. 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. (29)*[5]

The problem with Euphiletus' argument at this point is that even if the law he has just cited prescribed death as the punishment for adultery—and more likely it only prescribed a process in which the penalty was assessed later and thus could be death or some other punishment—it almost certainly did not authorize a person to execute a violator without a trial. Euphiletus thus has another law read out, "the law from the stele on the Areopagus" (30). The text of this law is also not preserved in the manuscripts, but it is almost certainly the law that is preserved in Demosthenes 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.*[6]

Now, strictly speaking, this is not a law about the penalty for adultery. It is a law about various circumstances, including catching a man in bed with your wife, in which you will not be punished for killing someone. It is an old law, probably enacted by Draco more than two centuries earlier. It was still in effect in Lysias' time,[7] but it seems to have been little used, since none of the many other cases of adultery mentioned in oratory or comedy is handled in this way. Most commonly the adulterer is held for ransom, as Eratosthenes evidently expected to be in this case. Thus, killing an adulterer on the spot may have seemed to many Athenians a remnant of the distant past, and Euphiletus clearly understands that the jury may be reluctant to approve of his action. On the other hand, if, as appears to be the case, there was no single statute governing adultery but rather a variety of statutes existed which might apply in different circumstances, jurors would have had to decide the proper punishment for adultery on a case-by-case basis. They would thus have had to decide about the appropriate response to adultery in this case, and in making this decision they would have had to rely primarily on information presented by the two litigants.

Now, not only has Euphiletus told a very effective story about the facts of the case, he has also told an effective story about the meaning of the law concerning

---

5 ἐγὼ δὲ τῷ μὲν ἐκείνου τιμήματι οὐ συνεχώρουν, τὸν δὲ τῆς πόλεως νόμον ἠξίουν εἶναι κυριώτερον, καὶ ταύτην ἔλαβον τὴν δίκην, ἣν ὑμεῖς δικαιοτάτην εἶναι ἡγησάμενοι τοῖς τὰ τοιαῦτα ἐπιτηδεύουσιν ἐτάξατε. (trans. Todd)

6 ἐάν τις ἀποκτείνῃ ἐν ἄθλοις ἄκων, ἢ ἐν ὁδῷ καθελὼν ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ' ἀδελφῇ ἢ ἐπὶ θυγατρί, ἢ ἐπὶ παλλακῇ ἣν ἂν ἐπ' ἐλευθέροις παισὶν ἔχῃ, τούτων ἕνεκα μὴ φεύγειν κτείναντα.

7 Many years later Demosthenes (23.53) treats the law as valid, though this position may be influenced by his overall argument in that speech.

adultery that would likely be persuasive, in part because of the vivid use of direct speech at crucial points, including when he quotes himself in the passage cited above:

> *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. (1.27)*

This is not everyday language; it resembles more the speech of a judge explaining to a convicted man why he must be punished. We will never know whether Euphiletus actually said anything like this, but it hardly matters. 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 have encouraged the jurors to think that Euphiletus was presenting an authoritative explanation of the law.

To strengthen his case, Euphiletus has another law read out. The text of this law does not survive, but Euphiletus explains that this law sets a lighter penalty for rape than for adultery (1.32–33). I leave aside the much-debated issue whether Euphiletus is correct that adultery was a more serious crime than rape;[8] regardless of its truth, the argument serves to emphasize the seriousness of adultery as a crime and thus the need for a severe penalty, such as Euphiletus has inflicted. And since Euphiletus has given a clear and not implausible account of the meaning of the laws on rape and adultery, it is likely that many jurors also found his argument persuasive.

All in all, Euphiletus has presented a strong, though not conclusive, argument that the laws required (or at least allowed) him to kill Eratosthenes. The prosecution, however, also gave a speech, and they almost certainly told a different story about the law. They probably began by citing the law on homicide, which clearly prescribes a trial for those accused of homicide.[9] They would have argued that this law commanded them, Eratosthenes' relatives, to avenge his death, which was a clear case of intentional homicide on the part of Euphiletus. They also presumably cited one or more laws on adultery, probably including a law about holding an adulterer for ransom and prohibiting entrapment.

Whatever the precise details of their speech, the jury would then have been left to choose between competing stories about the meaning and relevance of various laws relating to adultery and homicide. It was then up to each juror to determine for himself which litigant's story about the laws was correct in this case, and with no higher authority or any other source to look to for guidance, jurors would necessarily have been guided primarily by the two speeches they had just heard.

---

8 See Harris 1990, Carey 1995, Todd 2007: 130–34.

9 They could cite the opening lines of Draco's law (*IG* I$^{3}$ 104), or the provision cited in Dem. 23.22, that the Areopagus is to judge (*dikazein*) cases of homicide. Cf. the argument in Dem. 23.25–27.

Because the jury decided the whole case in one vote, no one could ever know to what extent their verdict was influenced by arguments about the law or which arguments about which laws had had the most influence. A litigant (or anyone else) could talk with some jurors after the trial, but they could almost certainly not interview the hundreds of jurors who had voted. In many cases, moreover, not only would the views of different jurors differ, but even a single juror might have mixed views. Only where the vote was overwhelmingly one-sided and one could talk to a reasonably large number of jurors who all gave the same reasons, only then could someone be confident that a particular line of reasoning had prevailed in the case. But this probably happened rarely, if at all.

Even so, if the jury voted for acquittal in Euphiletus' case, and especially if they did so by a large majority, this would certainly send the message that a person might be allowed to kill an adulterer found in bed with his wife. This would not necessarily have made Euphiletus' argument the authoritative interpretation of the law, but if defendants in other similar cases used similar arguments successfully, then this interpretation could achieve a *de facto* authority, and could be followed with some confidence by others. But no successful interpretation could be relied on with absolute certainty, and litigants in new cases could still try to persuade a jury that a different interpretation was the true meaning of the laws.

Now, questions about the meaning and applicability of one or more laws were raised in many other cases besides Lysias 1. In most of these only one of the litigants' speeches survives, but in one of the few cases where we have speeches from both sides, the case "On the Crown," we know that Aeschines and Demosthenes disagreed about the meaning and relevance of laws pertaining to two matters: the need for the recipient of a crown to have passed an audit and the proper place for the presentation of a crown. Regarding the first of these, both litigants refer to the same law but interpret it differently: Aeschines (3.9–31) argues that the requirement for an audit before receiving a crown applies to the two offices that Demosthenes held at the time of Ctesiphon's decree, both of which required an audit. For his part, Demosthenes argues (18.111–19) that the law does not apply to these offices because the decree in question was not honoring him for the work he did in those offices but for his other services to the city. On the second matter, Aeschines cites a law specifying that crowns from the people must be presented in the Assembly and argues that another law which Demosthenes will cite allowing crowns to be presented in the theater applies only to crowns for foreigners (3.32–48). In response, Demosthenes argues that this second law allows crowns for Athenians to be presented in the theater, and points to a number of cases in the past where this had been done.

Scholars disagree about which speaker has the better argument on each point,[10] and the opinions of the jurors probably differed also. But the jury had to decide the case, and with regard to the meaning and applicability of these laws, jurors would have been guided primarily by the texts of the laws that were read out to them and the arguments of the two litigants about these texts. But because these arguments about specific laws formed only a small part of each speaker's case, we cannot conclude from the jury's overwhelming verdict in favor of Ctesiphon that all of the jurors, or even most of them, agreed with Demosthenes' interpretation of the law on either point.[11] Both litigants stress that the main issue in the case is whether Demosthenes has or has not always acted in the best interests of Athens,[12] and this may likely have been the determinant factor for most jurors, whatever their opinion was about the meaning of the laws. Thus the verdict in this case would probably have had little or no value as a precedent in determining the meaning of either of the specific laws that the litigants discussed.

In other cases, however, the interpretation of the law appears to be a central issue. Lysias 10, for example, apparently centers around the correct interpretation of the law on slander. Theomnestus is accused of slandering the speaker by claiming that he killed his father. Theomnestus' defense will apparently be that although he accused the speaker of killing, he did not call him a killer, *androphonos*, the word explicitly prohibited in the law, and that saying that someone killed is not the same as calling him a killer. Against this, the speaker argues that by prohibiting the use of the word *androphonos*, the law also intended to prohibit the use of equivalent expressions, such as "he killed."[13] If in fact this was Theomnestus' argument, then the case probably was decided according to whether the jury accepted Theomnestus' narrow, letter-of-the-law interpretation or the speaker's broader interpretation which seems to accord with common sense. How they decided is unknown.[14]

---

[10] See, e.g., Gwatkin 1957, Harris 1994: 141–48, 150, 2000: 59–67, MacDowell 2009: 388–89, Worthington 2013: 296, 299–301.

[11] *Contra* Harris, who argues (2000: 67) that because the jury voted for Demosthenes by a wide margin, "we are safe in concluding that the judges did not find any of Aeschines' arguments persuasive." It is certainly possible, however, that most jurors agreed with Aeschines on one or both points about the violation of specific laws, but nonetheless voted for Ctesiphon because they were persuaded by Demosthenes' defense of his service to the city, which both he and Aeschines stress is the most important issue in the case. Harris had it right in an earlier article (1994: 148): "we have no way of knowing the precise reasons why the court voted to acquit Ctesiphon."

[12] E.g., Aes. 3.49–50, Dem. 18.53–59. Both men devote far more time to the issue of Demosthenes' public career than to the alleged conflicts between the decree and the two laws.

[13] In discussing non-literal interpretations of the law, Aviles 2011 concludes that litigants only make such arguments in order to narrow the scope of a statute, but Theomnestus' non-literal interpretation would clearly expand the scope of this law.

[14] The speaker mentions that the case was heard by an arbitrator but does not reveal the arbitrator's ruling. This may suggest that he ruled against the speaker, for the speaker

Another example where the interpretation of a law appears central to the case is Isaeus 11. Here the main issue, as the speaker Theopompus presents it, is the meaning of a clause in the law on intestate succession, which Theopompus has the clerk read out to the court before he even begins his speech. The law, as preserved in Demosthenes 43.51, specifies inheritance by a set of relatives, up to and including *anepsiōn paides*, literally "children of cousins," if any of these are alive. The dispute in Isaeus 11 concerns the precise meaning of *anepsiōn paides*. Does it mean that the heirs include children of the deceased's cousins—that is, his first cousins once removed, as we would say in English—or does it specify children of two cousins—that is, children of the deceased's father's cousins, or the deceased's second cousins. Only on the second interpretation does Theopompus count as a close enough relative to inherit, and so naturally he argues for this view. Another claimant evidently argued for the first view.

It is impossible to say objectively which of these arguments is correct. We know that Theopompus won at least two earlier cases in his long battle over the estate of Hagnias, and this may mean that these earlier juries agreed with his interpretation of *anepsiōn paides*, but this is not certain, as they may have had other reasons for their decision. And no matter what these earlier juries decided, their verdicts were not final or authoritative, or else Theopompus would not have had to defend his interpretation of *anepsiōn paides* once again in Isaeus 11, which he also won. To judge from litigants' arguments in other inheritance cases, considerations besides the strict meaning of the law sometimes influenced the jury, especially when the application of the law left room for doubt, and Theopompus also raises a number of other issues in this case. Thus, whatever the reasoning behind any of the previous verdicts, Theopompus' opponents must have felt that they had some chance of winning a different decision from a new jury. The most we can say, therefore, is that Theopompus' interpretation of the law—that *anepsiōn paides* means second cousins—had apparently been favored by several juries and thus was probably more likely to prevail in future cases. Interestingly, there is no sign that any legislation was enacted, or even contemplated, that might have decided once and for all the meaning of the law in this context.

Although I could easily add more examples, the cases we have examined thus far are sufficient to show that Athenian litigants commonly differed concerning the meaning and applicability to their case of one or more laws, and that in such cases the jury's understanding of these laws and their applicability would have been influenced not only by the text of any relevant statutes that were read out or otherwise presented to them in court, but also by the rhetorical arguments presented by the two litigants. It seems, then, that the forensic speeches that contain these

---

would likely have mentioned a ruling in his favor; but even if the arbitrator did rule for Theomnestus, the jury in the case did not necessarily reach the same verdict. It seems likely that, as Harris (2000: 57) says, there was no dispute about the facts, but without Theomnestus' speech, we cannot be certain of this.

arguments about the meaning of a law must have been a significant source of law, in the legal sense, indeed the most important source after the texts of the laws themselves. In other words, just as the stories litigants tell about the facts of the case are a significant source for the jury's knowledge and understanding of these facts, so too the stories they tell about laws constitute a significant source for the jury's knowledge and understanding of the laws.

Now, litigants in all legal systems tell stories about the meaning of the law. In modern legal systems, the influence of these stories is usually controlled by some person of authority, typically a judge. Often there is an ultimate authority, like the United States Supreme Court, that issues binding and final decisions about the meaning of laws. But many cases still involve some degree of interpretation of the law beyond a judge's instructions or a Supreme Court's ruling, and in such cases the arguments of litigants and their lawyers can affect the meaning of our laws. Legislators may make laws, and judges or jurists may give their authoritative opinions about what those laws mean, but their opinions may still leave room for disagreement about whether or not the law applies to a specific act in a particular case. Thus, the verdict will sometimes depend not only on how effectively each side can establish the facts to favor its position, but also on how effectively each side presents its interpretation of the law as it relates to those facts. And if certain interpretations repeatedly prove effective in court, then over time the *de facto* meaning of the law may come to include those interpretations.

I emphasize the need for repeated success if an interpretation is to become authoritative. A single case in which a certain story about the meaning of the law is successful is not enough to produce a change in the law. In fact, a single success may have the opposite effect, as happened in the case of two high-profile insanity trials in the United States. In the first, in 1979, a man was accused of assassinating San Francisco Mayor George Moscone and Supervisor Harvey Milk, 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, and that this amounted to mental infirmity under the law. The argument, which was forever after labeled the Twinkie defense, was successful, and the jury acquitted the defendant. The case drew national attention, however, and the Twinkie defense was so widely ridiculed that it led the California legislature to change the law explicitly to prevent such defenses in the future.

In the second case, in 1982, John Hinckley shot and nearly killed President Reagan, a crime that shook the country. Hinckley was acquitted largely on the testimony of six psychiatrists, who assured the jury that he had a "diminished (mental) capacity" at the time of the crime. A popular uproar ensued and a new law was passed that restricted future insanity defenses by more precisely defining "diminished capacity," putting the burden of proof on the defense not the

prosecution, and by limiting the role of testimony from expert witnesses in such cases. In both cases, in other words, the defense's successful argument about the law led to legislation that sought to prevent similar interpretations of the law in the future.[15]

In Athens, on the other hand, when there was a dispute about the meaning of a law—for example, whether the law on slander (at issue in Lysias 10) should apply narrowly to only the words explicitly mentioned or more broadly to the concepts contained in those words—not only was there no higher judicial authority who could decide the question, but as far as we know, no legislation was ever passed, or even contemplated, that might revise or clarify the meaning of this law or any other existing law. Nor does any litigant ever suggest that an ambiguity in the law could or should be eliminated by legislation. One reason for this is probably that litigants seem to think it impossible that the law could be ambiguous. On the contrary, they appear to take for granted that the meaning of the law is clear, and that any interpretation other than their own is simply wrong.

Aeschines makes this point in his discussion of the law on audits in *Against Ctesiphon*. After explaining the meaning of the law and indicating how Demosthenes will dispute this meaning, he has the text of the law read out and adds that when others dispute the meaning,

> *it is the job of you jurors to remember the law and confront their insolent claims with it; and you must reply to them that you refuse to tolerate an unprincipled sophist who thinks he can nullify the laws with his words. . . . Men of Athens, the public speaker and the law must say the same thing. When the law says one thing and the public speaker another, your verdict should go to the just claim of the law, not the insolence of the speaker. (3.16)*[16]

In other words, any opponent who proposes a different interpretation of the law is misstating the law; his words and the words of the law are not saying the same thing. Demosthenes, of course, with equal confidence will give his own, completely different, interpretation of the law (18.111–19).

Similarly, on the issue of where crowns should be presented, Aeschines, knowing that Demosthenes will introduce a different law, emphasizes the impossibility of two valid laws conflicting with one another. The law introduced by Demosthenes, he argues, cannot allow for the presentation of crowns in the theater, as it may seem to do, because this would contradict the law Aeschines cites, which requires crowns to be presented in the Assembly:

---

[15] For a brief history of the evolution of the insanity defense see Ewing 2008: xvii–xx.

[16] ὑμέτερον ἔργον ἐστὶν ἀπομνημονεύειν καὶ ἀντιτάττειν τὸν νόμον πρὸς τὴν τούτων ἀναίδειαν, καὶ ὑποβάλλειν αὐτοῖς ὅτι οὐ προσδέχεσθε κακοῦργον σοφιστὴν οἰόμενον ῥήμασι τοὺς νόμους ἀναιρήσειν . . . χρὴ γάρ, ὦ ἄνδρες Ἀθηναῖοι, τὸ αὐτὸ φθέγγεσθαι τὸν ῥήτορα καὶ τὸν νόμον· ὅταν δὲ ἑτέραν μὲν φωνὴν ἀφιῇ ὁ νόμος, ἑτέραν δὲ ὁ ῥήτωρ, τῷ τοῦ νόμου δικαίῳ χρὴ διδόναι τὴν ψῆφον, οὐ τῇ τοῦ λέγοντος ἀναισχυντίᾳ. (trans. Carey)

> *If . . . this kind of habit has insinuated itself into your political practice, so that there are invalid laws publicly inscribed among the valid laws and there are two laws opposed to one another dealing with a single issue, what term could one use for a constitution in which the laws order one both to do and not to do the same things? But this is not so. (3.37–38)*[17]

Demosthenes concurs, and elsewhere he explains the legislative process for ensuring that no two laws conflicted:

> *You see the excellent method that Solon provides for enacting laws. First, it comes before you, men who have sworn an oath and exercise supervision over this and other matters. Next, opposing laws are repealed so that there is one law for each subject. This avoids confusion for private individuals, who would be at a disadvantage in comparison to people who are familiar with all the laws. The aim is to make points of law the same for all to read as well as simple and clear to understand. (20.93, trans. Harris)*[18]

Both Demosthenes and Aeschines, then, appear convinced that their understanding of these laws is correct and no other interpretation is possible. The jurors had to decide between the two with no guidance from any independent authority or other sources, besides the pleadings they had just heard. As noted above, the verdict in favor of Demosthenes did not necessarily mean that all or even a majority of jurors accepted his interpretation of either of the laws in question; but it probably gave some weight to his position, especially in view of the magnitude of his victory,[19] and could thus influence future cases where the same issues arose.

Thus, although no single case could establish an interpretation as authoritative, a single case could carry some weight depending on the size of the verdict[20] and the centrality of the legal issue to the case. If, for example, Euphiletus won his case overwhelmingly, his interpretation could have considerable influence on future trials; but the case would not establish this view as authoritative unless several other

---

[17] εἰ γὰρ . . . τοιοῦτον ἔθος παραδέδυκεν ὑμῶν εἰς τὴν πολιτείαν ὥστ’ ἀκύρους νόμους ἐν τοῖς κυρίοις ἀναγεγράφθαι, καὶ δύο περὶ μιᾶς πράξεως ὑπεναντίους ἀλλήλοις, τί ἂν ἔτι ταύτην εἴποι τις εἶναι τὴν πολιτείαν, ἐν ᾗ ταὐτὰ προστάττουσιν οἱ νόμοι ποιεῖν καὶ μὴ ποιεῖν; ἀλλ’ οὐκ ἔχει ταῦθ’ οὕτως. (trans. Carey) Dem. 24.32–36 makes a similar point.

[18] συνίεθ’ ὃν τρόπον, ὦ ἄνδρες Ἀθηναῖοι, ὁ Σόλων τοὺς νόμους ὡς καλῶς κελεύει τιθέναι, πρῶτον μὲν παρ’ ὑμῖν, ἐν τοῖς ὀμωμοκόσιν, παρ’ οἷσπερ καὶ τἄλλα κυροῦται, ἔπειτα λύοντα τοὺς ἐναντίους, ἵν’ εἷς ᾖ περὶ τῶν ὄντων ἑκάστου νόμος, καὶ μὴ τοὺς ἰδιώτας αὐτὸ τοῦτο ταράττῃ καὶ ποιῇ τῶν ἅπαντας εἰδότων τοὺς νόμους ἔλαττον ἔχειν, ἀλλὰ πᾶσιν ᾖ ταὔτ’ ἀναγνῶναι καὶ μαθεῖν ἁπλᾶ καὶ σαφῆ τὰ δίκαια. For the work of the Nomothetai in overseeing fourth-century legislation see most recently Rhodes 2003. The process was created not by Solon but by legislation at the end of the fifth century.

[19] Aeschines received less than one-fifth of the votes and thus had to pay a fine.

[20] The jurors’ votes were counted and the total was presumably announced to the court, so that it would be known to all.

litigants made the same argument in other cases and also succeeded. At some point—exactly when is impossible to say—this interpretation of the law would cease being challenged and the law's meaning would be established. It could still be challenged, but challenges would be so unlikely to succeed that they would occur only rarely, and perhaps for other motives.[21]

In sum, the rhetorical arguments of litigants had a significant influence on the Athenians' understanding of the meaning of their laws, and in some circumstances could determine this meaning authoritatively. This is not to suggest that rhetoric somehow could override the law, or that it was more important than law in the Athenian system. By general consensus statutes were the primary source of law; they were given the primary place in the judicial oath that all jurors swore and litigants regularly call on the jury to decide according to the laws. That the Athenians believed in the rule of law cannot be doubted.[22] But a commitment to the rule of law and to deciding cases according to the laws (as required by the judicial oath) did not obviate the need to interpret laws with respect to the case at hand.[23] The oath also contained a clause requiring jurors to decide cases according to their "most just judgment" (*tēi dikaiotatēi gnōmēi*). Even if this clause applied only in cases where there was no law, and more likely it was not restricted to these,[24] interpretation of the law and of its application would be necessary in most cases. We should also note that law and justice go hand in hand in Athenian forensic rhetoric: not only is justice never introduced in opposition to law,[25] but law is never introduced in opposition to justice either. Thus, to use one's most just judgment in interpreting a law is not only consistent with the rule of law but is often an essential part of the process of deciding according to the law. The Athenian jurors were bound by their oath to decide according to the law, but they were free, and had to be free, to decide according to their best judgment just what the law was in relation to the case at hand. And that judgment was necessarily influenced by the arguments they had heard the two litigants make.

Finally, in this paper I have concentrated on the interpretation of laws, but in actual practice the jurors would have had to consider facts and laws together. This situation was not peculiar to Athenian law. Even today in the common law, in which judges are regularly called on to interpret the law, interpretation (as one scholar puts it) "requires a constant conversation between the facts and the rules."[26] Judges must

[21] A homicide accusation, for example, barred the accused from entering most public places, and thus could be used (as in Antiphon 6) to prevent the accused from prosecuting others in an unrelated case.

[22] Even David Cohen has explicitly endorsed the Athenian commitment to the rule of law (Cohen 2005), though Harris seems to continue to see him as a diehard opponent of the rule of law (e.g., Harris 2006).

[23] See Kästle 2012: 174–75 with n. 63.

[24] Harris 2006 argues for such a restriction; *contra* (most recently) Kästle 2012: 185–86.

[25] Harris 2006: 168–70.

[26] Scheppele 1988: 102; see more generally 86–106.

always decide not only how to interpret the law in relation to the established facts, but also which of the many facts in the case are relevant to the law in question. This is true even when they are hearing cases on appeal, where litigants concentrate on questions of law; litigants on appeal introduce the facts that they consider relevant to understanding the application of laws to their particular case, and judges must in turn decide which facts are relevant to their decision about the law.

For jurors in Athens, the facts and the law were even more closely interwoven, since litigants necessarily included all their arguments about both in their one speech. In Lysias 1, for example, Lysias arranges the facts so that they tell the story of a crime, adultery, and its punishment, not the story of a homicide and its justification. This arrangement produces a certain interpretation of the facts—a story of adultery and its punishment—and this in turn allows Lysias to tell a particular story about Draco's law, namely that it prescribes death as the penalty for adultery, rather than that it justifies homicide in certain situations. The prosecution, as noted, certainly had a different understanding of the facts and thus also of the law. They probably told the story of a homicide, committed by Euphiletus, for which the law on homicide demanded punishment. But the speaker's strategy is to make the punishment of adultery the primary story of both the facts and the law, so that the jurors will focus on this particular story of adultery and on the laws concerning adultery, not the laws concerning homicide. Thus, in practice the rhetoric of legal interpretation is intertwined with the rhetoric of factual determination.

In sum, in Athens the laws were primary, but in most cases rhetoric was crucial to deciding which laws were relevant, what these laws meant, and how they should apply to the case at hand. In this respect, rhetoric was a significant source of Athenian law.

## BIBLIOGRAPHY

Aviles, Domingo. 2011. " 'Arguing against the Law.' Non-Literal Interpretation in Attic Forensic Oratory." *Dike* 14: 19–42.

Carey, Christopher. 1995. "Rape and Adultery in Athenian Law." *Classical Quarterly* 45: 407–17.

Carey, Christopher, trans. 2000. *Aeschines*. Austin TX.

Cohen, David. 2005. "Crime, Punishment, and the Rule of Law in Classical Athens." In *The Cambridge Companion to Ancient Greek Law*, ed. Michael Gagarin and David Cohen, 211–35. Cambridge.

Ewing, Charles Patrick. 2008. *Insanity: Murder, Madness, and the Law*. Oxford.

Gagarin, Michael. 2003. "Telling Stories in Athenian Law." *Transactions of the American Philological Association* 133: 197–207.

Gwatkin, W. E., Jr. 1957. "The Legal Arguments in Aischines' *Against Ctesiphon* and Demosthenes' *On The Crown*." *Hesperia* 26: 129–41.

Harris, Edward M. 1990. "Did the Athenians Regard Seduction as a Worse Crime than Rape?" *Classical Quarterly* 40: 370–77.

Harris, Edward M. 1994. "Law and Oratory." In Ian Worthington, ed., *Persuasion: Greek Rhetoric in Action*, 130–50. London.

Harris, Edward M. 2000. "Open Texture in Athenian Law." *Dike* 3: 27–79.

Harris, Edward M. 2006. "The Rule of Law in Athenian Democracy: Reflections on the Judicial Oath." *Dike* 9: 157–81.

Harris, Edward M., trans. 2008. *Demosthenes Speeches 20–22*. Austin TX.

Kästle, David Julius. 2012. "Νόμος μεγίστη βοήθεια." *Zeitschrift der Savigny Stiftung* 129: 161–205.

MacDowell, D. M. 2009. *Demosthenes the Orator*. Oxford.

Rhodes 2003. "Sessions of Nomothetai in Fourth-Century Athens." *Classical Quarterly* 53: 124–29.

Scheppele, Kim Lane. 1988. *Legal Secrets: Equality and Efficiency in the Common Law*. Chicago.

Todd, Stephen C. 1993: *The Shape of Athenian Law*. Oxford.

Todd, Stephen C., trans. 2000. *Lysias*. Austin.

Todd, Stephen C. 2007. *A Commentary on Lysias: Speeches 1–11*. Oxford.

Worthington, Ian. 2013. *Demosthenes of Athens and the Fall of Classical Greece*. Oxford.