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TELLING STORIES ABOUT ATHENIAN LAW: A RESPONSE TO MICHAEL GAGARIN

It is somewhat flattering to be asked to respond to a paper which takes as one of its starting points something that the respondent has published twenty years ago.[1] It can also be intellectually stimulating, particularly if (as here) it is a problem on which you have not subsequently written, because it invites reflection on those aspects of your earlier treatment where you have either changed or retained your views, as well as considering the impact of more recent work by other scholars.

In the present case I probably would want to retain at least the broad context of what I was attempting in 1993, which was to emphasise the consequences of the absence in classical Athens of certain ways of determining or developing law which are familiar from modern legal systems: judicial case law in common-law systems, and juristic writings in what I understand of their civil-law counterparts.[2] In both contexts, of course, what distinguishes Athens from modern jurisdictions is the absence of the sort of judicial authority within the lawcourt (as opposed to pre-trial hearings) that can impose or control particular interpretations of the law. But in response to Gagarin's paper, I am more than happy to support him in broadening the search for other sources of law beyond the bare texts of statutes to examine habits of statutory interpretation, including (in Gagarin's phrase) the stories that orators tell about the meaning and relevance of various laws. So let me suggest here two areas that may be worth exploring at some point in the future where appropriate space can be devoted to them, plus a couple of speculative interpretations arising out of my own continuing work on Lysias which can be put forward more briefly, before closing with a pair of examples to illustrate a broader if unresolved problem.

My first suggestion is the possibility that the rôle played by the phenomenon identified by Gagarin may have differed in different areas of law. The obvious example to consider here would be homicide, in view of the stability of membership which characterised certainly the Areiopagos and possibly to some extent the ephetic courts. In an extensive treatment, Carawan has argued for a higher level of juristic competence on the part of homicide judges than in other types of Athenian

[1] Todd (1993: 49–63), as discussed by Gagarin, this vol., at p.131 and esp. p.132.
[2] Todd (1993), at pp.60–61 and at pp.53–54 respectively.

court:[3] a significant factor here will presumably have been the extent to which the same judges heard repeated cases, which may have facilitated the development of the settled opinion of the court on how to interpret particular points of law—guided, if so, by the pleadings of successive orators.[4] It may be relevant, as noted in a different context by Lanni (2004: 304), that homicide law is also unusually detailed in its substantive provisions. It is not clear to me whether we should therefore expect a different pattern of story-telling about law in such cases, but that is perhaps too large a question to be explored within the available word-limit.

My second suggestion is that it may be worth giving some consideration to the question of precedent, because of the way that Gagarin's argument is predicated on stories about the law being told repeatedly.[5] It is notoriously the case that Athenian orators are much more concerned with reminding the jury about the likely impact of their vote in what has been termed "prospective precedent" (Lanni 1999: 43),[6] whereas their references to previous cases are significantly less common and, crucially, tend to be phrased in terms of a general appeal to treat the defendant with equal severity rather than an attempt to establish the view taken by the previous court of a point of law (Lanni 1999: 49–50). But Lanni does in this context note that there are some exceptions, including e.g. the cases of Euaion and of Euandros in Demosthenes' speech *Against Meidias*.[7] Had time and space permitted, it might have been interesting to consider why this unusual phenomenon occurs repeatedly in

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[3] Carawan (1998: 154–167), arguing that *ephetai* were selected from among members of the Areiopagos (i.e. against the view that they were replaced at the end of the fifth century by *dikastai*, pp.161–162), that they therefore shared the legal experience of Areiopagite justices (p.167), and that the sophistication of legal argument in the speeches reflects this (p.159).

[4] It is worth remembering that the Areiopagos was not just a homicide court: we have to my knowledge no evidence for any formal process of jury deliberation here (any more than in the dikastic courts, where it seems clear that the jury voted immediately after hearing the litigants), but members of the Areiopagos will have been used to meeting in other contexts as a deliberative council.

[5] E.g. "certain interpretations repeatedly prov[ing] effective in court" (Gagarin p.139 above), and esp. "it would take more than one case to establish [a litigant's assertion] as the accepted meaning of a law" (Gagarin p.133 above).

[6] As my former student Richard Stonehouse pointed out to me, this is typically presented in educative terms, but in terms not of educating the defendant (who is deemed to be beyond redemption) but of improving the rest of the citizen body. We may note the frequency with which invitations to punish are associated with phrases about making "the citizens" (or "the others") "better" (βελτίους): e.g. Lys. 14.12; 31.25; Dem. 22.35; 25.17; Dein. 1.27; Lyk. 1.67.

[7] Euaion's killing of Boiotos (Dem. 21.71–72), with detailed explanation of events and motives (and narrowness of vote for conviction), contrasted with Demosthenes' own treatment by Meidias (21.73–74); Euandros' conviction for arresting Menippos during the Mysteries (21.175–6), with similarly detailed comparison to the circumstances of Demosthenes' own case (21.177).

this particular speech: is it something about the orator's persona, or the fact that the speech was apparently published but not delivered?

On the subject of precedent, I have sometimes been tempted to suggest a couple of places in Lysias where it is I think at least possible that what purport to be statements about law may in fact be allusions to previous cases—albeit both these interpretations are highly speculative, because they would each require us to make an assumption about the result of the case that is putatively being alluded to. One is the argument advanced against Euandros, whose candidature as Arkhōn is being scrutinised and challenged in Lys. 26, that "if he were now undergoing his *dokimasia* before becoming a member of the Council, and his name had been written on the *sanides* as one who had served in the cavalry under the Thirty, you would reject him even without an accuser."[8] On the face of it, there are some strikingly close similarities here to the allegations faced by Mantitheos, the speaker in an evidently previous *dokimasia* case (Lys. 16), who was himself a candidate for the council, and allegedly a former member of the cavalry under the Thirty, with the evidence against him being the presence of his name on the *sanides*, or, as Mantitheos himself terms it using a possibly derogatory diminutive, the *sanidion* (wooden tablet used for temporary records, evidently here for listing names).[9] It is generally agreed that the speech against Euandros can be firmly dated to the summer of 382, and that the speech for Mantitheos must belong certainly after 394 and probably before (or at least not long after) 389.[10] Unlike that of Euandros, the result of Mantitheos' *dokimasia* is unknown: if we were to read Lys. 26.10 as alluding to it, then this would entail assuming that Mantitheos was defeated, and defeated so heavily that his case could be thought of as not having required an accuser; it would also mean that Mantitheos' case had been enough of a *cause célèbre* to be remembered at the date of Euandros' hearing, and for the result to be regarded as a statement of legal principle.[11] But why else should Lys. 26.10 refer specifically to cavalry service and to the *sanides*?

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[8] Lys. 26.10 (a different Euandros from the one in the previous footnote): <καὶ> εἰ μὲν βουλεύσων νυνὶ ἐδοκιμάζετο καὶ ὡς ἱππευκότος αὐτοῦ ἐπὶ τῶν τριάκοντα τοὔνομα ἐν ταῖς σανίσιν ἐνεγέγραπτο, καὶ ἄνευ κατηγόρου ἂν αὐτὸν ἀπεδοκιμάζετε.

[9] Prospective membership of council: Lys. 16.1, etc. Allegation of cavalry service: 16.3, 6, etc. Admission that his name was included on the *sanidion*: 16.6 (the latter combined with the assertion that his name had not been included in another official context which Lysias claims to regard as more reliable documentary evidence, viz. the Phylarkhs' list of those required to repay the *katastasis* or equipment allowance).

[10] Euandros because of his presence in the Arkhōn list for 382/1 (which incidentally implies that Lysias lost this case). *Terminus post quem* for Mantitheos is provided by the latter's record in military campaigns of 395–4 (Lys. 16.13, 15–16); *terminus ante quem* by an apparent hostile allusion to Thrasyboulos of Steiria (16.15), which would seem to make better sense either before or soon after the latter's death in 389.

[11] Given the gap between 389 and 382, this might perhaps be easier to credit if there had been other similar cases in the intervening period (cf. Gagarin's suggestion about repeated interpretations, noted above at n.5 of this response).

My second speculation concerns the allegation brought against the defendant Agoratos in Lys. 13.66 that "So then, being this sort of man, he has tried to commit *moikheia* (broadly, adultery) with wives of the citizens, and to corrupt free-born women, and has been caught as a *moikhos*, and for this the penalty is death."[12] This is an odd passage, because it is one of very few extant texts to claim that adultery is punishable by death, and to make sense of this claim involves making certain assumptions. One possibility would be to extend the suggestion put forward in another context by Gagarin's paper, viz. that the law cited at Lys. 1.28 relates to the otherwise sparsely-attested *graphē moikheias*, for which he suggests that death may have been either the sole penalty fixed by statute, or alternatively an option if the procedure was an *agōn timētos*.[13] As an explanation of Lys. 13.66, however, this would only work if the death penalty in a *graphē moikheias* were statutory, but I am not aware of any other evidence for this: certainly no such evidence is cited in the discussion of this procedure by Lipsius, who indeed suggests that the reference at 13.66 could be to the sort of informal penalty exacted by Euphiletos in Lys. 1.[14] An alternative possible explanation, however, would be to develop this suggestion by Lipsius, in a way hinted at but not developed in the first volume of my Lysias commentary:[15] this would entail assuming both that Lys. 1 was delivered earlier than Lys. 13 (which is certainly possible, as the former speech can be dated only as occurring within the career of Lysias) and also, more significantly, that Lys. 1 resulted in an acquittal, i.e. that the point of the claim at 13.66 about death being the penalty for adultery is that the jury are deemed all to know that Euphiletos in that earlier case got away with killing Eratosthenes on the grounds that the latter was an adulterer. I should perhaps emphasise that I am not by any means claiming that this second explanation is a correct one, but simply that it entails making a different set of assumptions. More significantly for present purposes, it were to be correct, then we would have another example of a *cause célèbre* being used as a statement of law.

Perhaps the fundamental question raised by Gagarin's paper is, how far did Athenian law courts operate on the basis that interpretation had to be contested afresh on every occasion, or alternatively, how far was this a system in which the recurrence of concurring interpretations might take on something like the force of settled law? There may be issues here arising out of the continuing debate among scholars over the applicability to Athens of the term 'rule of law'. Here I think my

[12] Lys. 13.66: γυναῖκας τοίνυν τῶν πολιτῶν τοιοῦτος ὢν μοιχεύειν καὶ διαφθείρειν ἐλευθέρας ἐπεχείρησε, καὶ ἐλήφθη μοιχός· καὶ τούτου θάνατος ἡ ζημία ἐστίν. For the question of whether Agoratos' status as an alleged former slave is being presented here as an exacerbating circumstance, see the discussion of Gärtner (1997: 42–44) in Todd (2013: 45).

[13] Gagarin, at n.4 and accompanying text.

[14] Lipsius (1905–15.ii: 432 n.50). Of more recent scholars, Carey (1995: 410) states simply that "we do not know the penalty."

[15] Todd (2007: 50 n.31), suggesting that Lys. 13.66 (erroneously referred to there as 13.68) "may suggest that Eratosthenes' case [= Lys. 1] was still fresh in the speaker's mind."

current view (in the light again of work done over the past couple of decades) would be that on the one hand, scholars like Harris are undoubtedly correct to emphasise the extent to which orators tell juries that their task is to implement the law;[16] but on the other hand, that this is not incompatible with the view that appealing to the rule of law is fundamentally an ideological statement (what sort of democratic state are we?). Here I find very attractive Gagarin's emphasis on law as something for orators to tell stories about: jurors do not have to articulate the reasons for their decision, and it is worth noting again the absence of mechanisms to police or control such interpretations within the court room.

This brings me to a closing problem, which I shall illustrate with two examples. It is sometimes suggested that in cases of inheritance, Athenian dikastic juries may have shown a tendency to vote in favour of blood-ties rather than wills, though the evidence for this is not in fact as clear-cut as might appear.[17] But assuming for the sake of argument that such a tendency did exist (which is not I think implausible), should we classify remarks like those in Isaios 1 as a legal principle,[18] i.e. (in Gagarin's terms) as an example of orators telling consistent stories about law? or should it be better seen as a social prejudice, or indeed possibly (depending on how you read *Ath.Pol.*'s claim that the oligarchs of 404/3 repealed the clauses restricting testamentary freedom)[19] as an example of class prejudice?[20]

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[16] See the discussion, with refs., in Gagarin's paper (notes 22–25 and accompanying text); it is a topic that I have tended to avoid writing about, barring a probably over-brief discussion in Todd (1993: 299–300).

[17] Admittedly Isaios, in the most explicit statement of this position, commends the courts for their habit of deciding in favour of those who claim by kinship rather than those who claim by will (Isai. 1.41: τοῖς κατὰ γένος ψηφίζεσθαι μᾶλλον ἢ τοῖς κατὰ διαθήκην ἀμφισβητοῦσιν), but we should not forget that that is precisely what he is wanting the jurors to do in the present case. Then there is Aristoph., *Wasps* 583–587, where Philokleon sets out a disdain for the testator's intention as evidence for the unrestricted power of the *dikastai*, but it is worth emphasising that he does not say "we give the *epiklēros* to the next of kin," but to "anyone whose entreaties persuade us" (ὅστις ἂν ἡμᾶς ἀντιβολήσας ἀναπείσῃ, trans. Sommerstein, Aris & Phillips): i.e., the joke is about capriciousness, not about consistency of social prejudice. A third passage, Arist., *Prob.*, 29.3 = 950b5–9, does speak of those in "some law courts" (ἐνίοις δικαστηρίοις) voting for kin ahead of wills, but is not explicitly a reference to Athens.

[18] Isai. 1.41, cited in previous footnote.

[19] *Ath.Pol.* 35.2 (trans. Rhodes, Penguin): "They annulled the laws of Solon which provided scope for disagreement (ὅσοι διαμφισβητήσεις ἔσχον), and the discretionary power which was left to jurors, in order to amend the constitution and leave no opportunity for disagreement (lit. "straightening the *politeia* and making it *anamphisbētētos*"). For instance, in the matter of a man's bequeathing his property to whoever he likes, the Thirty gave the testator full and absolute power (κύριον ποιήσαντες καθάπαξ), and removed the attached difficulties ('except when he is insane or senile, or under the influence of a woman'), so that there should be no way in for malicious prosecutors (*sykophantai*); and they did likewise in the other cases."

My final example comes from an area of procedural law in which several members of the Symposion have published important work.[21] It concerns the torturing of slaves for evidence, which is notoriously and repeatedly described by the Orators as a more reliable form of evidence than the testimony of witnesses, in what evidently purport to be statements of legal principle.[22] Does the recurrent nature of such statements—to my knowledge, the Orators contain only one example of the counter-argument, that it is in the nature of those under torture that they will say whatever they think the torturer wants to hear[23]—constitute an example of orators telling a recurrent and therefore authoritative story about law? Not I think if one accepts the earlier and very persuasive argument of Gagarin that orators are far more ready to issue challenges to torture but do not normally respond to such challenges.[24] But how then could one tell the difference between recurrent stories that are statements of settled law and those which are statements of social prejudice? This, as I said in my introduction, is a problem that I am not sure I know how to resolve.

[20] I.e., if the passage in the previous footnote is read as implying that the Thirty were more sympathetic to testamentary freedom *per se* (either because they had less conservative attitudes to the family, or perhaps because they were less distrustful of written wills), though the only explanation explicitly offered by *Ath.Pol*. is one that sees them attempting to restrict the scope for statutory interpretation in a somewhat naïve bid to limit the power of the democratic juries.

[21] E.g. Thür (1977) and Gagarin (1996).

[22] The similarity of phrasing and word-order between Isai. 8.12 and Dem. 30.37 suggests a legal as well as a rhetorical topos ("of those who have testified as witnesses, some have before now been held to be testifying untruthfully, whereas of those who have been tortured, none have ever been convicted of making untrue statements under torture": τῶν μὲν [Dem. adds γὰρ] μαρτυρησάντων ἤδη τινὲς ἔδοξαν οὐ τἀληθῆ μαρτυρῆσαι [Dem. has οὐ τἀληθῆ μαρτυρῆσαι ἔδοξαν], τῶν δὲ βασανισθέντων οὐδένες πώποτε ἐξηλέγχθησαν ὡς οὐκ ἀληθῆ ἐκ τῶν βασάνων εἰπόντες [Dem. has εἶπον]).

[23] Antiphon, 5.31–32, at §32: πρὸς τούτων εἰσὶν οἱ βασανιζόμενοι λέγειν ὅ τι ἂν ἐκείνοις μέλλωσι χαριεῖσθαι.

[24] Gagarin (1996: 9), noting a significant numerical disparity between nearly forty cases where the orator reports his own challenge to the opponent, versus only four where he seeks to explain his rejection of a challenge issued by the opponent (three of the latter being cases where he does so in order to explain the contrast with the supposedly superior challenge that he had issued in return). Ant. 5.31–32, as noted by Gagarin (1996: 8) is not a response to a challenge, but an attempt to undermine the credibility of torture that has been carried out unilaterally by the opposition.

BIBLIOGRAPHY

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

Gagarin, M. (1996), "The Torture of Slaves in Athenian Law", *Classical Philology*, 91.1: 1–18.

Gärtner, M. (1997), "Les discours judiciaires de Lysias: l'esclave, une figure fantasmatique", *Dialogues d'histoire ancienne*, 23.2: 21–45.

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

Lanni, A. (1999), "Precedent and Legal Reasoning in Classical Athenian Courts: a noble lie?", *American Journal of Legal History*, 43: 27–51.

Lanni, A. (2004), "'Verdict Most Just': the modes of Classical Athenian justice", *Yale Journal of Law and the Humanities*, 16: 277–322.

Lipsius, J. H. (1905–15), *Das attische Recht und Rechtsverfahren, unter Benutzung des Attischen Prozesses von M. H. E. Meier und G. F. Schömann*. 3 vols., Leipzig.

Thür, G. (1977), *Beweisführung vor den Schwurgerichtshöfe Athens: die Proklesis zur Basanos*. Vienna.

Todd, S. C. (1993), *The Shape of Athenian Law*. Oxford.

Todd, S. C. (2007), *A Commentary on Lysias, speeches 1–11*. Oxford.

Todd, S. C. (2013), "Male Slave Sexuality and the Absence of Moral Panic in Classical Athens", *Bulletin of the Institute of Classical Studies*, 56.2: 37–53.