CHAPTER 1

The world of law: oratory and authority

> Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.
>
> Cover 1993: 96

> We are *foreigners* on the inside – *but there is no outside*.
>
> De Certeau 1984: 13–14

> Rhetoric names the textures of relation that make external situations and contexts internal to the truth of law.
>
> Ryan 1989: 155

ON THE INSIDE

Juridical discourse constructs a world of its own, a world of law. That legal world was, of course, embedded within the broader landscape of the polis: *nomos* means "norm" as well as "law" in Greek, and the courts were a central arena for the reproduction and negotiation of Athens' normative values and beliefs, as much recent scholarship has shown. But if the law was enmeshed in the fabric of Athenian society and ideology, it also had a discursive specificity of its own. In the *dikastēria* (courts), the Athenians developed a juridical way of looking at life, social relations, the past and the future; they also reflected self-consciously on the law itself, on its discursive boundaries, its institutional force, its internal rules and regularities. This juridical mode of thought was not, needless to say, isolated or idiosyncratic; if it were, it would have been incomprehensible. Rather the law, as Steven Johnstone has argued, was a "semiautonomous field."[1] Like the theater

[1] Johnstone 1999: 126–31. Bourdieu 1987 theorizes law's relation to the larger social field. See also the essays by Deggau, Lempert, and Nelken in Teubner 1988. Luhmann's distinction between cognitive openness and operational closure is useful in thinking about the autonomy of legal discourse. For him "closure" does not mean that a system has no interaction with its external environment (which would be virtually inconceivable) but instead that all operations, including that of distinguishing

(to which it is often compared), forensic oratory was both a stage for the performance of Athenian social dramas and simultaneously a world of its own, with its own customs, topographies, and inhabitants.

One of the most striking characteristics of this legal world is its internal consistency. Legal agents act, speak, and think in predictable ways. The ubiquitous arguments from *ēthos* (character) define legal subjects as recognizable types, not as unique individuals: a speaker claims that he is not the type of man to have done what he is accused of or, alternately, that his opponent is the type of man to have done that and more. When speakers do profess to reveal their inner thoughts their psyches are discernibly legalistic: crises of conscience are described as if they were court cases and internal monologues are carried on in the very terms of the speech that recounts them.[2] Legal arguments, too, tend to be extremely predictable, following a conventional order of exposition and ringing the changes on a number of familiar topoi; even arguments that strike us as bizarre (and there will be many in the pages that follow) adhere to generic rules of logic and presentation. Metaphysically, as well as psychologically and rhetorically, the legal world is internally consistent. Athenian litigants often based their cases on probability (*eikos*): if I had meant to kill a man, is it likely that I would have done so in broad daylight, in front of witnesses? Would I not rather have waited for night or led him to a secluded spot? This hypothetical argument presupposes that everyone thinks like the law: criminals commit their crimes with an eye toward the defense they will make in court. As we will see in Chapter 3, it also posits a set of physical and logical principles – cause and effect, intention and action – that is coherent within itself and consonant with the rhetoric and logic of legal argumentation. The entire world works like the law.

Even the gods think juridically. In Andocides 1, for instance, the prosecutors propose that the gods saved Andocides from a shipwreck expressly so that he could stand trial in Athens and be put to death for impiety (137). Andocides counters with an argument from probability: if the gods thought I had wronged them, they would never have let me go when they

internal from external, are internally motivated and validated: see 1988: 1420, 1425, 1429–31; 1990: 229–30. I take it for granted that Athenian legal discourse had vital relations with other cultural discourses (i.e. cognitive openness); the point is, though, that it itself defined those relations and determined the boundary between inside and outside (operational closure).

[2] Andocides 1.48–60 is a good example. Andocides recounts the moment, more than a decade before the trial in which he delivers this defense speech, when he had to decide whether to inform on his companions in the affair of the Mysteries and the Herms. His internal struggle over the decision (51–53) is described in terms that neatly prefigure the speech he is making in court: the juridical *krisis* is projected or introjected as a personal crisis and his defense today retrojected onto his decision then (59).

had me in the greatest possible peril – on a ship in pirate-infested waters during the winter storms – but would have punished me then and there (137–38). In fact, he tells the jurors, if we are going to speculate about the gods' intentions, I think they would be extremely angry if they saw you put to death a man they had saved (139).[3] The gods do not look down on the trial from above, but instead the divine will exists within the rhetoric of the speech, the product of its improbable logic of probability. Appeals to the divine are not unique to judicial discourse, of course, no more than arguments concerning character (*ēthos*) or probability (*eikos*). What is distinctive, rather, is the way each of these elements mirrors the logic of a forensic brief. Like any discourse, legal discourse is a fractal universe in which each part reiterates the structure of the whole. Just as tragic gods enjoin wisdom through suffering and comic gods are preoccupied by food and sex, the orators' gods think like litigants: when a god appears *ex machina*, he is generated by the machine of forensic oratory.

Indeed, not only the gods but everything that crosses the forensic stage is the product of the law's rhetorical machinery. A case may involve the terms of a contract, for example, but the actual contract is not produced or read out in court; instead, its provisions will be tendentiously paraphrased by litigants who vehemently disagree not only on the text and interpretation of the contract, but in some cases on whether there even was a contract in the first place. Likewise, in a case that rests on the legitimacy of a certain woman, the two litigants will construct competing narratives about her character and life; the jury must then decide whether she was a wife or a mistress, and sometimes whether she even existed at all. Since women could not speak for themselves in court, beyond the speaker's rhetoric the woman does not exist. Even when the orators conjure objects as explicitly extralegal, they turn out to be internal to the rhetoric of the case. Chapter 2 will examine the institution of the *basanos*, the torture of slaves for testimony. Speakers represent this as an independent source of infallible truth – if only their opponent had agreed to hand over his slaves for interrogation. In practice, it seems that the *basanos* was virtually never carried out; instead, it functions within the speeches as part of a rhetoric of dares and challenges that follows the rules of legal probability: why would

[3] Cf. And. 1.113–14. Lysias 6 is a speech for the prosecution in this same case. The prosecutor makes the argument Andocides alludes to (19) and adds that the very fact that Andocides dared to hazard a sea voyage after committing impiety is a sign of his shamelessness (20). The lead tablets discussed by Versnel 1991 may apply the same jurisprudential logic. These texts seem to contain prayers for "divine 'legal aid'" (Versnel 1991: 74) in specific court cases, and their language shows a marked forensic influence; cf. Eidinow 2007: 59–60, 62–64.

I have proposed a *basanos* unless I wanted to uncover the truth, and why would my opponent have refused unless he had something to hide? Thus forensic oratory imagines a truth beyond itself only to subsume it immediately back within its own terms.[4] The same can be said of everything these speeches represent as existing before or beyond themselves, including the characters and biographies of the two litigants, the history of their dispute, the criminal event and all its attendant circumstances and proofs. In this sense juridical discourse is a text with no *hors-texte*, and it constructs a world with no outside.[5]

This means that the sources of authority for juridical discourse – the legitimating foundations upon which individual litigants seek to ground their own claims and upon which the legal system as a whole predicates its power to sentence and to punish – are immanent to the discourse itself, generated within forensic oratory and subject to its discursive regularities. Forensic oratory has infrequent recourse to theology, but when it does (as Andocides' defense shows) divine law is the creation of human law and its human orators. So, too, we will see in the next section that when speakers appeal to the laws of the polis as a legitimating mandate, those laws are the self-interested product of legal speech. For instance, speakers frequently interpret the laws in their own favor by citing the intention of the original lawmaker, Solon or Draco, but often the legislation they attribute to these venerable lawmakers post-dates them by a century and the intention they imagine behind the statute is demonstrably fictional. The laws are interpreted with the same flexibility and according to the same logic of juridical probability as divine will in Andocides' speech. Every external ground of authority to which forensic oratory appeals proves to lie already within its own discursive terrain.

This chapter examines the ways in which Athenian forensic oratory constructs and authorizes its judicial world. The first section looks at two principles that are individually often taken as the authorizing mandate for the Athenian legal system, "popular sovereignty" and "rule of law." These two principles feature prominently in forensic oratory but they appear less as the source than as the effect of the law's authority. Juridical discourse

[4] Johnstone 1999: 70–92. Demosthenes 47 will provide a dizzying example in Chapter 2: in this false-witnessing case concerning testimony in a prior case about a *basanos* proposal and its refusal, the slave interrogation that (the speaker claims) would have resolved the prior suit instead becomes the object of the false testimony at issue in this suit, which itself could be resolved by the interrogation of the same slave, if his opponents were not blocking it. The imagined external resolution of the trial is always absorbed right back into the agonistic rhetoric of the trial.

[5] See Derrida 1976: 157–64, 1988: 136–37. Cf. de Certeau 1984: 8–14, with the quotation at the head of this chapter.

generates its authority, I argue, by situating itself as the medium of a necessary and beneficial convergence between the sovereign demos and the rule of law. The trial makes the people just and the laws democratic, and this happy convergence defines the unique jurisdiction of the law.

This union of law and demos, justice and polis is effected by means of rhetoric, "the textures of relation that make external situations and contexts internal to the truth of law," as Michael Ryan puts it in a quotation that serves as one of the epigrams to this chapter. But if juridical discourse authorizes itself through rhetoric, it does so only by effacing that rhetoric, by pretending, for instance, that popular sovereignty and the rule of law converge serendipitously within the course of the trial, and not through the careful manipulations of a self-interested speaker. Juridical oratory thus takes up a contradictory relation to itself, in which authorizing the juridical often entails denying the rhetorical. The second section of this chapter examines the ambivalence within forensic oratory to its own rhetoricity, an ambivalence expressed not only through bifurcation between the honest, transparent oratory of the speaker and the deceitful oratory of his opponent, but also, more interestingly, in the form of a self-repudiation in which the speaker, in order to deny that he is deceitful, denies that he is a *rhētōr* or that his speech is rhetorical.

This repudiation of rhetoric creates unexpected rhetorical effects within the text, as speakers deny what they are and become what they are not. These effects will be traced in detail in one speech, Demosthenes 25 *Against Aristogeiton*, in the final section of the chapter. That speech constructs an orderly legal cosmos, encircling it with rhetorical chains beyond which it seeks to banish the defendant, Aristogeiton. But in the process of creating this nomic structure it also creates various rhetorical by-products that are not so easily exiled. The rhetoric that produces and authorizes this world of law also renders it unstable.

This destabilizing effect is important. The boundless boundedness of legal discourse, in which every outside is already inside the law, risks depriving it of any ground at all: it risks enclosing law within a hermetic circle of self-reference in which "the law is the law" and there is no justice beyond the given decision of a jury in a given trial. Likewise, if within the homogenous landscape of juridical discourse everything works like the law, then there is no internal standpoint from which to critique the law. But rhetoric, I propose, offers such a standpoint, for the very language with which legal discourse hopes to authorize itself exposes the contingency and constructedness of that authority. Rhetoric, which oratory seeks to banish from the courthouse, always necessarily dwells inside it and this paradox

exposes the mechanisms by which juridical discourse imposes and enforces the boundaries between inside and outside. This simultaneous repudiation and persistence – its persistence in the form of something repudiated – makes rhetoric a point of heterogeneity within the homogenous world of law, a point of vacillation between the natural and artificial and between the legitimate and illegitimate, that deconstructs that world's coherence and authority. Rhetoric is a "privileged instability" within judicial discourse that allows us to question, as the following chapters will, the law's violence and exclusions, its amnesias and desires, its genealogy and self-relation.[6] This first chapter paves the way for these critiques by examining not only the law's discursive strategies of authorization but also, and more importantly, how those strategies necessarily fail to achieve the fixity they aim for and how that failure itself becomes the paradoxical foundation of Athens' juridical cosmos.[7]

NOMOS, DEMOS, POLIS

There are two primary sources of authority cited in Athenian forensic oratory: "the laws" (i.e. the written statutes) and the jurors as representatives of the demos. Litigants appeal to each as the decisive foundation of justice, sometimes even within the same speech. The speaker in Antiphon 6 refers to the homicide laws as "by universal agreement the most excellent of all laws and the holiest; they happen to be the most ancient laws in this land and they have always been the same and dealt with the same issues, which is the greatest sign of a well-established law." Therefore, he concludes, "you must not learn from the prosecutors' speeches about the laws and whether or not they were well established but you must learn from the laws about their speeches and whether they are instructing you rightly and lawfully or not" (6.2 = 5.14). But in the next sentence he emphasizes the effective

[6] The phrase "privileged instability" comes from Derrida 1992a: 21, where it describes the aporetic gap between law and justice.

[7] My discussion of the law's self-authorization in this chapter parallels Steven Johnstone's excellent study (1999). He argues that forensic oratory attempts "to overcome the indeterminacy of rhetorical language and to stabilize the relationship constituted through that language" (3) by appealing to seemingly external sources of authority and truth, but that these are in fact always determined by the rhetoric of the litigants and thus are actually the desired effect, not the precondition of the trial. His book analyzes well the strategies by which speakers seek to surmount the instability of rhetoric, but does not examine that instability itself (which in places appears to be merely an effect of the impersonal relation between speakers and jurors, 2, 90), nor does he explore its lingering effects within the speech. My discussion shifts the focus from the rhetorical strategies for securing authority in the face of linguistic indeterminacy to the way that indeterminacy persistently destabilizes law's authorizing strategies and structures.

power of the jurors' verdict, for there is only one vote, he says, and "if the jury reaches the wrong decision it is stronger than justice and truth" (6.3 = 5.87). If a defendant is found guilty, he explains, he must abide by the sentence even if he is innocent, "for he must obey the verdict even if it goes against the truth" (6.5 = 5.87). On the one hand, the laws are the sole basis for justice in the case; on the other hand, the jurors' decision, even if it is wrong, is final and authoritative.

"The laws" (*hoi nomoi*) occupy a prominent place in Athenian forensic oratory, which draws upon and exemplifies the "enormous reservoir of respect for *nomos*" in Athenian culture.[8] Speakers frequently cite written laws and claim that these laws support their case or, alternately, that their case supports the laws. They have the text of a statute read out by the court secretary for the benefit of the jurors, for "there is nothing like hearing from the law itself" (Dem. 21.46).[9] They call upon the jurors to uphold the laws, appealing frequently to the dikastic oath sworn by every juror at the start of his year of service, and in particular to the jurors' pledge to "vote in accordance with the laws and the decrees of the demos of the Athenians and the Council."[10] Numerous speeches culminate in a rousing ode on this theme: "By the gods and spirits I beg you, jurors, do not allow the victim to be insulted, but remember the law and the oath you swore and what has been said about the matter, and vote according to the laws, in conformity with justice and your oath" (Is. 2.47).[11] When the jurors vote, as they have sworn to do, in accordance with the laws, justice is done.

The generality of this injunction to "vote according to the laws" suggests that the laws functioned in forensic oratory not just as a series of specific regulations but as a broader regulatory ideal.[12] An opponent who has transgressed a single – and sometimes quite technical – statute will be accused of "trying to overthrow the laws." For example, Lycurgus, prosecuting Leocrates for treason because he had fled Athens after news of its defeat

[8] Carey 1996: 36. See also Sealey 1987: 50–52, 146–48; Harris 1994a: 133–37. Harris 2004: 21–34 examines the definition of *nomos* in Athens.

[9] The laws quoted in modern texts and translations of the speeches are generally later additions (usually extrapolated from the surrounding text) and are considered spurious except where confirmed by external evidence: see Todd 1993: 44–45. De Brauw 2001–02 analyzes citation of laws as part of a rhetoric of *ēthos*.

[10] This was the first clause of the oath and is the one most often alluded to. The text of the oath cited at Dem. 24.149–51 is probably not authentic, but this first clause at least seems to be relatively secure. For discussion of the oath, see Cronin 1936; Bonner and Smith 1938: 152–56; Todd 1993: 54–55; Johnstone 1999: 33–42, 60–62; Mirhady 2007. Harris 1994a: 149 nn. 6–7 provides a list of references.

[11] See also Ant. 5.96; Aesch. 3.257; Dem. 27.68, 39.41, 45.87; Is. 4.31.

[12] Todd 1993: 18; Carey 1996: 44–46.

at Chaeroneia, suggests that a transgression against any particular law is a transgression against legality in general (64–67). He refers to the intent of the original lawmaker, a fiction employed throughout forensic oratory to conceptualize the laws as a fixed, traditional, and coherent code.[13] The lawmaker did not differentiate between different degrees of illegality but only asked whether a certain act would harm society if it became widespread. Imagine, he continues, that someone entered the Metroön, the public building where copies of the statutes were kept, and erased a single statute, arguing that there's no harm in deleting just that one (66). In the same way Leocrates, by breaking this one law, has assaulted the very idea of law. "The laws" in this passage signify both a discrete set of legal regulations, the work of a single venerable lawmaker enshrined in the Metroön, and the concept of law as an abstract and universal principle.

Such rhetoric, with its strategic slippage between the concrete and the abstract, has led some scholars to posit that Athenian legal practice was grounded upon the theoretical credo of "the rule of law," an adherence not only to the specific *nomoi* of the polis but to *nomos* as a general principle.[14] More recently, however, a number of students of Athenian law have challenged this view, questioning the role of both "the laws" as a foundation of authority and "the rule of law" as a guiding tenet of Athenian forensic practice.[15] They point out that Aristotle, in his discussion of rhetorical strategies for use in the courts, lists the laws in the category of "artless proofs" (*atekhnoi pisteis*) along with witness testimony, oaths, and contracts.[16] This suggests that in his view the laws had persuasive not determinative force, that citing a law could strengthen your case (just as supplying witnesses or a written document could) but would not in itself prove decisive for the verdict.[17]

[13] On "the lawmaker," see R. Thomas 1994; Farenga 2006: 267–310; and Johnstone 1999: 25–33, who argues that this fiction allowed three interpretive strategies: "nonliteral reading, reading in conformity with other laws, and reading of laws as fundamentally democratic" (26).

[14] See especially Meyer-Laurin 1965; Hansen 1974: 18, 48; Sealey 1982, 1987; Ostwald 1986: 497–524. Their case rests in general not on the language of the forensic speeches but on external facts of legal history, like the revision of the lawcode in 403–399 BCE and procedures like the *graphē paranomōn*, which tried the legality of new decrees. This position has come under a good deal of fire in recent decades, but has been reasserted in a more nuanced form by Harris 1994a: 133–37, 2000, 2004, 2006: 3–25 (and cf. xviii–xxii); Carey 1996; D. Cohen 2005. See the brief but useful discussion of the issue at Todd 1993: 298–300.

[15] Gernet 1955: 61–81; Ober 1989a: 299–304, 1989b; Todd 1993: 54–63, 299–300; Lane Fox 1994; R. Thomas 1994; D. Cohen 1995a: 52–57, 1995b; Johnstone 1999: 21–45; Allen 2000a: 174–96; Lanni 2006 (esp. 64–74).

[16] Arist. *Rhet.* 1375a–b. Carey 1996, however, shows that Aristotle's prescriptions did not always accord with forensic practice; cf. Carey 1994b; Trevett 1996.

[17] Todd 1993: 60: "Laws, like other forms of evidence, served to persuade rather than to bind an Athenian court." Cf. Gernet 1955: 67; Todd 1990b: 32; Carey 1994b: 101–02; Allen 2000a: 174–75;

This "persuasive" use of the laws often looks to modern eyes simultaneously too sweeping and too limited. In his prosecution of Leocrates, for example, Lycurgus insists upon the sanctity of "the laws" and the primacy of law as a principle, but the precise legal charge behind his case is vague and, in fact, rather suspect. The case is technically an *eisangelia*, a procedure used for impeaching individuals, generally public officials, for serious crimes against the polis, including treason.[18] Leocrates is expected to argue that the charge cannot be applied to him because he was a private citizen (59) who left Athens for purposes not of treason but of trade (55). Prosecuting him under this law is a stretch, as Lycurgus himself tacitly acknowledges when he urges the jurors to act "not just as judges (*dikastas*) of this crime but also as lawmakers" (*nomothetas*, 9). It is easy to prosecute someone who commits an act expressly prohibited by a law, he explains, "but when the law does not encompass all related offenses and call them by a single name, and when a man has committed a crime worse than any of these, he is liable under all the laws equally" (9). The bulk of his speech is therefore devoted not to proving that the defendant actually did break the specific provisions of the law against treason but to showing that Leocrates was in every respect a bad citizen. To support this claim Lycurgus quotes from the ephebic oath taken by all citizen youths and from the epitaphs of the dead at Marathon and Thermopylae; he recites extended passages from Homer, Euripides, and the poet Tyrtaeus; he has read out decrees concerning various cases of treason from the previous century and the Spartan edict on military desertion. In short, he quotes everything but the specific regulation under which he is prosecuting Leocrates. "The laws" are simultaneously fundamental in this case – one of the "greatest guardians" of democracy (3) – and in a strict sense irrelevant and insufficient. A speaker need not prove that the defendant broke a specific law in order to win his case (Lycurgus lost his by a single vote, according to Aeschines 3.252) nor can he argue a case based on the law alone.

Thus while speakers appeal to "the laws" as if they were an autonomous source of authority, those laws were in fact subject to extensive interpretation and manipulation within the speeches. Indeed, they invited such interpretation. Athenian legislation was generally procedural not substantive, so statutes would name a remedy or penalty for a crime without

Gagarin 2008: 191–92, 201–04. Bateman 1958 goes further, arguing that Lysias' representation of the laws he cites was fundamentally sophistical.

[18] On this procedure see Bonner and Smith 1930: 294–309; Harrison 1971: 50–59; Hansen 1975; Todd 1993: 113–15.

necessarily defining the crime itself.[19] The law of *hubris*, to take the most infamous example, nowhere specifies what actions constitute *hubris*. Speakers thus have to interpret the text of the law and have broad scope for doing so. From this perspective Lycurgus is not so much trying to deceive the jurors about the law on treason (although he is almost certainly doing that as well) as he is asking them to approve his interpretation of this law's meaning and application, an interpretation allowed and even required by the imprecise language of the statute.[20] The latitude for interpretation of laws was further extended by the amateurism of the Athenian legal system. Although literate individuals could consult the laws in written form – either as inscribed on stone stelai throughout the city or later gathered in the archive at the Metroön – the citizens who sat on Athens' large juries were not expected to have detailed technical knowledge of specific legal provisions.[21] What they knew (and to a large extent what we know today) about the laws they learned from the two litigants, themselves more or less amateurs, who were responsible for selecting, interpreting, and presenting the provisions relevant to their case. It was apparently illegal and punishable by death to cite a non-existent law (Dem. 26.24). Short of that, however, the laws that the jurors heard and according to which they swore to judge were heavily filtered – selectively excerpted or creatively combined, loosely interpreted and tendentiously applied – by the litigants themselves.

"The laws," then, were a privileged marker of authority in forensic oratory, but their authority is immanent and interested, not autonomous or absolute: it is, as Johnstone has stressed, the product of a litigant's

[19] Todd 1993: 65–67. Gernet 1955: 67: "En fait, les juges interprètent la loi – d'où résulte que, dans les conditions les plus défavorables à la constitution d'une jurisprudence, une certaine jurisprudence s'est tout de même constituée."

[20] As Todd 1993: 31 remarks, jurors must decide both the facts and the law in each case; cf. 61–62; Johnstone 1999: 22–25, 33, 42–45; Carey 2004: 112–13; Gagarin 2004: 19–21; Mirhady 2007. Harris, by contrast, stresses the limits on novel interpretations of the laws and notes jurors' apparent preference for "the standard meaning of legal provisions" (2000: 67). For a particularly egregious example of a self-serving reconstruction of "the laws," see Aesch. 1.6–36 and Ford 1999: 241–49; Fisher 2001: 125–64. The role of judicial hermeneutics is no less active in modern law, as Goodrich 1986: 126–67 shows.

[21] Todd 1993: 54–60 notes the practical difficulties of consulting the laws; cf. Christ 1998a: 199. Others posit that consultation was fairly common in the fourth century: Sickinger 1999: 95–96, 160–70; Gagarin 2008: 180–82. Harris 1994a: 135 argues that the frequency of jury duty – the average Athenian citizen, he conjectures, would have served as a juror once every five years and heard roughly twenty cases during his term – meant that jurors were relatively knowledgeable about the law. Cf. Hansen 1991: 186–88. Litigants often speak as though the jurors were familiar with the laws, but this is more a rhetorical appeal to the laws as a communal norm ("you all know") than a presumption of specific legal expertise.