LAW'S COSMOS

Recent literary-critical work in legal studies reads law as a genre of literature, noting that Western law originated as a branch of rhetoric in classical Greece and lamenting the fact that the law has lost its connection to poetic language, narrative, and imagination. But modern legal scholarship has paid little attention to the actual juridical discourse of ancient Greece. This book rectifies that neglect through an analysis of the courtroom speeches from classical Athens, texts situated precisely at the intersection between law and literature. Reading these texts for their subtle literary qualities and their sophisticated legal philosophy, it proposes that in Athens' juridical discourse literary form and legal matter are inseparable. Through its distinctive focus on the literary form of Athenian forensic oratory, *Law's Cosmos* aims to shed new light on its juridical thought, and thus to change the way classicists read forensic oratory and legal historians view Athenian law.

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LAW'S COSMOS

Juridical Discourse in Athenian Forensic Oratory

VICTORIA WOHL

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521110747

First published 2010

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
Wohl, Victoria, 1966–
Law's cosmos : juridical discourse in Athenian forensic oratory / Victoria Wohl.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-521-11074-7 (hardback)
1. Forensic oratory – Greece – Athens – History – To 1500. 2. Rhetoric, Ancient.
3. Law, Greek. I. Title.
KL4115.A75.W65 2009
340.5′38 – dc22 2009043211

ISBN 978-0-521-11074-7 Hardback

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Preface: before the law

> "I don't know this Law," said K. "All the worse for you," replied the warder.
>
> Kafka *The Trial*

Athenian law is a notorious historical dead end. Unsystematic, with no formal legal theory, no unified lawcode, no written verdicts or system of precedent, it falls off the map of Western jurisprudential history, whether common law or civil. Both as forensic practice and as jurisprudential philosophy it is "before the law" as we know it, an evolutionary oddity. The subject of this book is neither the practice nor the philosophy of Athenian law, but something between the two, the juridical discourse generated by and embedded in the courtroom speeches of the fifth and fourth centuries BCE. These texts, as I hope to show, offer complex (though not necessarily coherent) meditations on law and justice. They create and sustain a juridical world-view and a juridical world, a world not completely segregated from its surrounding cultural environment, of course, but recognizably distinct in its rules, logic, and structure. While Athens' legal practice may be deemed an irrelevant detour on the path of jurisprudential history, Athenian legal discourse, I suggest, is an important part of that history, offering an early example of a developed, if unsystematic and largely latent, body of jurisprudential thought and a self-consciously juridical relation to life.

This book is not a quest for origins although, as Derrida has remarked, that is one temptation created by the law's apparent resistance to history.[1] Instead it is the archaeology of a neglected site of legal knowledge. It aims

[1] Derrida 1992b: "To enter into relations with the law . . . is to act as if it had no history or at any rate as if it no longer depended on its historical presentation. At the same time, it is to let oneself be enticed, provoked, and hailed by the history of this non-history. It is to let oneself be tempted by the impossible: a theory of the origin of law, and therefore of its non-origin . . . " (192). I use "law" or "the law" throughout as umbrella terms that encompass juridical discourse, forensic practice, legal institutions, and the principle of legality. As context dictates I will also refer to more specific aspects of the law such as litigation, forensic procedure, the lawcode, statutory regulations, or the idea of justice.

to trace the dimensions of Athenian legal discourse in all its complexity. That complexity, it argues, lies in the specific rhetoric of the speeches in which it is embedded; thus it seeks to understand Athens' juridical discourse through close reading of selected forensic speeches. We have approximately 100 of these speeches, a tiny fraction of the total, written between roughly 420 and 320 BCE by expert speech-writers (logographers) for litigants to deliver in court. We don't know why these texts were preserved – they may have been circulated as pamphlets to humiliate a defeated opponent, vindicate an acquitted defendant, or drum up further business for the logographer – nor how much the written versions we have differ from the version delivered orally in the courtroom. We almost never have opposing speeches from the same case and seldom know the verdict. Situating a given speech within a determinate historical context is often impossible; sometimes it is impossible even to identify the author.

These uncertainties become less pressing when we approach forensic oratory not as individual texts but as a genre. In the pages that follow, I offer detailed close readings of individual speeches and interpret their specific language and thought. But in most cases, the language and thought are themselves typical. Indeed, forensic oratory is a genre made up of typicalities, as Aristotle's exhaustive list of rhetorical strategies in the *Rhetoric* illustrates. Every trope I analyze could be extensively cross-referenced (and some works on the genre are little more than such cross-references); virtually every idea could be found elsewhere. So although I will argue that the meaning of any given text emerges only when its strategies are examined in their specific rhetorical context, its very "genericness" justifies treating the canon as a genre. For this reason, I do not enter into debates over authorship; no individual author, whether we call him Demosthenes or [Demosthenes], has a full monopoly over his own language.[2] Furthermore, although there were real and significant changes in legal practice over the course of the century, the jurisprudential issues that preoccupy Athenian forensic orators and the language in which they express them remain generally consistent, so my study is synchronic not diachronic.[3] Finally, the question of how closely the published speeches reflect those given in the

[2] Where a speech is of disputed authorship, I will refer to it by its traditional attribution without weighing in on the validity of that attribution. For a theoretical justification, see Foucault 1977a. On the problem of authenticity in forensic oratory, see Dover 1968; Usher 1976; T. Cole 1991a: 115–38; Trevett 1992; Todd 2007: 26–32.

[3] See Ober 1989a: 36–37, Christ 1998a: 6 for justification of a synchronic approach to the corpus. Diachronic surveys of Greek law are offered by Ostwald 1969 and 1986; de Romilly 1971. See also Gernet's study of "prelaw" (Gernet 1917, 1981a and b, followed by Foucault 1994: 16–32), and Farenga's analysis of the cognitive developments leading to the jury trial (Farenga 2006, esp. 262–345).

courtroom is irrelevant to my purposes: as long as those speeches are the product of a classical Athenian imagination, they fall within the purview of Athenian juridical discourse.[4]

This book examines that discourse within the genre of forensic oratory. Sometimes it will speak as if the two – juridical discourse and forensic oratory – are interchangeable, but they are not. Forensic oratory is a seminal part of Athenian juridical discourse but isn't coterminous with it. A full study of the discourse of Athenian law would include discussion of those legal statutes that can be reconstructed from inscriptions and other sources. I engage with such statutes in the same way the orators do – obliquely and with my own argumentative goals in view – but in doing so I rely heavily on the work of others and do not pretend to offer original solutions to any of the complex technical problems surrounding Athenian law as an institution.[5] Likewise, discourse should properly encompass practice – procedural options and alternate modes of dispute settlement, para-legal action like arbitration, the physical experience and performance of the trial – but I treat such topics only when they become issues within a specific forensic speech.[6] In focusing on the forensic *logos*, I necessarily overlook much about the forensic *ergon*, but it is part of my argument that the *logos* is the essence of the *ergon* in Athenian law.

On the other end of the spectrum, I engage only infrequently with Athenian legal philosophy such as Plato's *Laws* and Aristotle's *Rhetoric*, *Politics*, or *Nicomachean Ethics*. These texts have much to teach us about ancient law and constitute an important part of Athenian discourse on law, but they offer a very different jurisprudential philosophy than the indigenous theories that emerge out of legal practice. For one thing, these philosophers attempt to systematize and totalize a legal discourse that is

[4] On preservation and publication of the texts see Dover 1968: 148–74; Humphreys 1985b: 318–21; Todd 1990a: 165–67; Worthington 1991, 1994: 115–18, 1996; Trevett 1992: 50–76; Johnstone 1999: 142 n. 63; Edwards 2000; Lavency 2007. Worthington goes the furthest in arguing for the extensive revision of the speeches for publication. I don't find his stylistic arguments persuasive, but the issue is probably not resolvable.

[5] Of the scholarship on technical aspects of Athenian law I have found most helpful Harrison 1968, 1971; MacDowell 1978; Gagarin 1981; Osborne 1985; Hansen 1974, 1975, 1976; Carey 1996 and 1998; Carawan 1998; and especially Todd 1993, which reconstructs the logic of Athenian law from the institutional structure of its practice. Superb discussions of the law can also be found in the commentaries on specific orations, especially Wyse 1904; Carey and Reid 1985; Edwards and Usher 1985; Carey 1989; MacDowell 1962, 1990; Gagarin 1997. For a survey of earlier work see Todd and Millett 1990.

[6] Humphreys 1985a: 251–57 stresses the interrelation in legal discourse between theory and practice, speech and action; see also Humphreys 1988; Ober 2005, esp. 408–11; and more generally Goodrich 1987: 125–212; Kahn 1999: 86–90. On procedure, see especially Hansen 1974, 1975, 1976; Osborne 1985; Boegehold 1991; Scafuro 1997.

essentially dynamic and asystematic, and in the process they translate it into a foreign language. Aristotle's *Rhetoric*, for instance, offers an abstract taxonomy of legal arguments that is interesting in itself but utterly fails to convey the subtle and creative ways in which such arguments function within a real forensic speech.[7] My focus is instead on legal oratory's own theorizations of its practice, philosophies that are both implicit within and complicit with a particular forensic argument and cannot be translated from the courtroom to the academy without significant loss of meaning. That said, however, there is no absolute line between the philosophers of law and the forensic speakers, and the two should better be imagined as part of a continuum between theory and practice in which forensic oratory (written if not in fact rewritten) would already stand at some distance from pure practice. Chapter 3 examines a text that falls somewhere in the middle of that continuum, Antiphon's *Tetralogies*. Abstract legal arguments staged (rather unconvincingly) as model trials, these cases offer a mimetic theorization of Athenian forensic practice within its own terms, a philosophy in the courtroom.

Finally, my book is not a survey of Athenian attitudes toward the law. The Athenians thought and talked often about law outside the *dikastēria* (courtrooms) and a number of scholars have productively explored the lines of convergence between the courts and, for example, the comic and tragic stage.[8] Plays like Sophocles' *Antigone*, Aristophanes' *Wasps*, and the comedies of Menander are a vital part of Athenian juridical thought and an important counterpoint to the discussions within the courts. The boundaries between law and literature are permeable, of course, and like all discursive boundaries are products of the discourse itself as it negotiates its relation to and autonomy from other modes of cultural expression. I examine forensic oratory in isolation not because I believe it existed in isolation – obviously it did not – but because I wish to define and describe this one genre of Athenian legal thought in its own discursive specificity. To this end, though with a keen sense of the road not taken, I have set deliberately circumscribed parameters on my study: tempting as it is to follow all the paths that lead from the *dikastēria* to the dramatic stage, the philosophers' academy, or the streets and houses where juridical thought

[7] The discontinuities between philosophy and forensic oratory are well discussed by Mossé 1987; Humphreys 1988: 477–78; Carey 1994a, 1996; D. Cohen 1995a: 34–57, 1995b; Nightingale 1999; Allen 2000a: 183–90, 245–91.

[8] Dover 1974: 23–33; Ober and Strauss 1990; Bers 1994; Porter 1997; Scafuro 1997; Christ 1998a; Allen 2000a; Hesk 2000; Omitowoju 2002: 137–233; Lape 2004; Wohl 2009, Wohl (in press). See also de Romilly 1971 and Havelock 1978, who trace the evolution of notions of law and justice in a broad array of Greek philosophical and literary texts.

was enacted in everyday life, I have decided to stay within the confines of the courts. In part this decision was practical – one book cannot do everything and those that try risk doing it all superficially – but largely it was methodological, as I hoped to bring into sharp relief a genre of writing and thought that can too easily fade into the background of Athens' broader cultural and political landscape, and to examine that genre not primarily in its emerging distinction from other modes of thought (though that, too, is a tempting project) but in its internal processes of self-structuring. Forensic oratory was "a node within a network," to be sure, but my focus here is the node, and I leave it to others to trace the network.[9]

Even inside these parameters, with a corpus and a topic as large as this one is especially aware of one's limitations. There are many texts I would have liked to include but couldn't; there are others I wish I could have treated more fully. Readers who make it to the end may be relieved to hear that two chapters were cut along the way. I suppose to this extent I know how Kafka's "man from the country" felt, sitting abjectly before the law, and I'm glad not to be sitting there until I die. But in a more positive form, that sense of incompleteness is part of what I hope to convey with this book: there are more forensic speeches than you realized, and more to say about them than you thought.

*

Writing this book has often felt like a trial, and I am indebted to all those who have provided advocacy, counsel, and aid during the process. Ryan Balot, Karen Bassi, Matt Christ, and Erik Gunderson offered me insightful comments on all or part of the manuscript: I very much appreciate their encouragement and their generosity with their time. The detailed comments of Michael Gagarin and Simon Goldhill, the two referees for Cambridge University Press, improved the manuscript in myriad ways, large and small: I could not have asked for more expert or more open-minded readers. Marie-Pierre Krück and Ariel Vernon provided indispensable research assistance in the final stages and saved me from many embarrassing errors. I am also thankful to the audiences who heard parts of the project in oral form and gave me helpful feedback and to the students in my ancient law seminars at the Ohio State University and University of Toronto, whose interest (and, occasionally, skepticism) pushed me to

[9] Foucault 1972: 23. Cf. Humphreys 1985a: 251. These same methodological considerations have also led me to include very little comparative material. While I engage throughout with legal theories based on modern law, and to that extent am always weighing Athenian law against the contemporary assumptions behind these theories, I do not undertake sustained comparison between Athenian legal thought and modern jurisprudence.

refine my arguments. Earlier versions of parts of Chapters 4 and 5 were published in article form as, respectively, "Time on Trial," *parallax* 9.4 (2003, 98–106) and "Rhetoric of the Athenian Citizen," in E. Gunderson, ed. *The Cambridge Companion to Ancient Rhetoric* (2009, 162–77). Generous material support was provided by the Elizabeth and J. Richardson Dilworth Fellowship (which sponsored a productive and enjoyable year at the Institute for Advanced Study), the Virginia Hull Award for Research in the Humanities and a Faculty Professional Leave from the Ohio State University, the Connaught Start-up Fund at the University of Toronto, and the Social Sciences and Humanities Research Council of Canada. Generous moral support was given by my parents and sister; by my friends Sandra Macpherson and Luke Wilson, who first got me interested in legal studies; and especially by Erik Gunderson, who like Kafka's K has, through no fault of his own, lived for many years under the shadow of the law. I am grateful to him not only for his patience and encouragement, for countless discussions and rereadings, but also for the exemplary paradigm of his own work on Roman rhetoric, which has taught me how to appreciate and read Greek oratory. Finally, I would like to acknowledge my intellectual debt to two scholars who died just as I was beginning this project, Nicole Loraux and Jacques Derrida. I was not fortunate enough to know either personally, but their influence will, I hope, be felt in the pages that follow.