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Athenian Homicide Law: Case Studies

INTRODUCTION

This article was originally written for the online discussion series “Athenian Law in its Democratic Context,” organized by Adriaan Lanni and sponsored by Harvard University’s Center for Hellenic Studies. (Suggested Reading: Antiphon 1, “Against the Stepmother”; Lysias 1, “On the Murder of Eratosthenes”.)

We know of relatively few prosecutions for homicide in classical Athens and it is tempting to conclude that homicide was relatively rare, except during the brief rule of the Thirty Tyrants (404–403) when killing was rampant but legal action would have been futile. But we do have a few speeches written for plaintiffs or defendants in homicide cases, and these are some of the most interesting that survive. Like almost all offenses against individuals at this time, homicide was legally a matter of concern only to the victim’s family, whose responsibility it was to bring charges

against the accused killer. The Athenians considered their homicide laws to be special. They were the oldest of their laws, having been introduced by Draco, their first lawgiver around 620, and they designated special homicide courts with different jurors than in the ordinary courts, and special procedures as well: litigants swore especially solemn oaths and were supposed to adhere to a narrower standard of relevance in their pleadings than in other cases. The main homicide courts were the Council of the Areopagus for those accused of intentional homicide, the Palladium for those accused of unintentional or accidental homicide, and the Delphinium for those accused of homicide who argued a specific justification, such as killing a fellow-soldier in battle by mistake.

Despite these differences, however, in many respects a homicide case resembled other private suits like the assault case Ariston brought against Conon (Demosthenes 54). Each litigant pleaded his own case in two speeches, the first of which presented the main points in his accusation or defense and might be written for him by a logographer (professional speechwriter) and the second rebutting his opponents arguments. Witnesses could testify if they were male citizens; but if a litigant wanted to introduce the testimony of a slave, he had to ask his opponent to allow the slave to be interrogated under threat of torture in the presence of both parties and only if the opponent agreed (which he very rarely did) could the resulting testimony be presented officially in court. Litigants often tell the

court what a slave would have said if interrogated, but no example survives of a slave's testimony being officially introduced. When the litigants finished their two speeches, the jury voted for acquittal or conviction and the majority carried the day (a tie vote meant acquittal). The penalty for intentional homicide was death, though exile seems to have been a common outcome, and the accused was allowed to go into exile voluntarily at any time up until his second speech in court, which would then be delivered by a friend or relative in the hope of persuading the jury to vote for acquittal despite the accused's departure. For unintentional homicide the penalty was exile, probably for a specific length of time (perhaps a year). At any point the victim's family could agree to a lesser penalty, or they could even drop the charges, if they wished, though there was a strong moral obligation to avenge an intentional murder.

TWO CASE STUDIES

Two of our surviving speeches present particularly interesting pictures of the circumstances surrounding a homicide, though we must always bear in mind that any speaker's allegations may be false and are probably misleading, at the least, and that the two cases would probably look quite different to us if the opposing speeches had survived. The first is Antiphon 1, "Against the Stepmother," delivered probably between 420 and 411. In it a young man accuses his stepmother of planning the murder of her husband (his

father) by supplying poison to a servant, who then put it in his drink. The defense speech would have been delivered by one of her sons (the speaker's half-brothers) and the woman herself was probably not even present in court. The second case is Lysias 1, "On the Murder of Eratosthenes," delivered around 400. Here the speaker defends himself by admitting to the act of killing but claiming that it was legally justified because he found Eratosthenes in bed with his wife.

Despite their differences both speakers rely largely on a vivid narrative account of events leading up to the deaths. Telling stories like these is now recognized to be an important element in much litigation in the United States today, especially in cases heard by juries, but in ancient Greece, before the development of forensic science, it would have been even more important that a litigant tell a convincing story. The large amount of storytelling and its attendant rhetorical features is one reason for the generally unfavorable view many scholars have held of Athenian law, but telling a clear story is necessary if a litigant is going to present his case directly to a group of ordinary citizens in an easily understood fashion. Even in more professional legal systems like our own, much of the pleading, especially in cases without juries, is difficult if not impossible for laymen to understand. All good trial lawyers are masters at telling stories.

ANTIPHON 1

In Antiphon 1 the speaker's case depends almost entirely on the story he tells, for he introduces no direct evidence to support the story. He does say that he asked to have the household slaves interrogated but his half-brother refused. If interrogated (he claims), they would have confirmed that on a previous occasion the stepmother was caught trying to give his father a lethal drug and that her only defense at that time was to claim that she intended the drug as a love potion. He also refers to his father's (alleged) death-bed words, affirming the stepmother's guilt and imploring the speaker (then still a boy) to bring the wicked murderer to justice. But these arguments, together with a few other emotionally charged accusations, amount to very little, so that the case really rests on the speaker's account of the planning and carrying out of the crime (sections 14–20). The story begins – and picking the right starting point is crucial – by introducing the victim's good friend, Philoneus, who had a *pallake* – a combination of mistress and servant – whom he was intending to hire out as a prostitute, clearly a change for the worse in her situation. The stepmother made friends with this servant, telling her that she too was being wrongly treated by her husband but that she knew how both of them could regain the love of their husband or master. But she needed her help to carry out the plan she had devised. The servant readily agreed to help and they made their plans.

Some time later, we are told, Philoneus, a businessman who lived in Piraeus, the port city of Athens, invited his friend, the speaker's father, to stay with him there before embarking on a trip the next day. He could help Philoneus celebrate the sacrificial rites of Zeus Ctesius (Zeus the god of private property), and they could have dinner afterwards. Philoneus' mistress helped him carry out the sacrifice and then served the two men dinner. After dinner, while the men were pouring libations of wine to the god and uttering prayers for a safe journey, the servant slipped a drug the stepmother had given her into the men's drinking cups, hoping to regain Philoneus' affections. And thinking she was being clever, she put an extra dose in Philoneus' cup. After pouring the libations the men took up their cups and drank the poison. Philoneus died on the spot, and his friend became sick and died twenty days later. The servant was tortured and executed immediately (as a slave she would have no rights after clearly causing the death of her master). But the stepmother, the story concludes, the one who was responsible for the whole crime, still awaits her punishment. The story will only reach its proper end, the speaker makes clear, when the jury sees to it that the woman is punished and justice is done.

Scholars have generally been unimpressed by this narrative, which is not only not confirmed by any external evidence but must also be in part a product of the speaker's imagination, since he must have made up most of the details, particularly in the scene where (he alleges) his

stepmother plans the murder and enlists the servant's help. The latter may have given a general account of her involvement in the crime before being put to death, and the story of the final sacrifice and dinner could perhaps be reconstructed with reasonable accuracy. But the speaker could not have known the words and thoughts of the two women when they met alone, and does not cite any source for this information. He simply relates what happened, like the all-knowing narrator of a work of fiction. This has led some scholars to conclude that this speech is just that – a work of fiction perhaps written as a practice exercise in imitation of a speech of Antiphon. This view draws support from the fact that at one point (section 17) the stepmother is called a “Clytemnestra” – an allusion to the familiar myth in which this woman killed her husband Agamemnon when he returned home after fighting in the Trojan War. The implication is that the speaker is playing the role of Agamemnon's son, Orestes, who was widely praised for avenging his father's death by killing Clytemnestra. Other scholars have speculated that the original speech must have contained some evidence that later dropped out of the text between the time it was composed and the time of our earliest surviving manuscripts.

These scholars fail to appreciate the difficulty of the speaker's situation and the importance of stories like this in an age when good evidence by modern standards was often unavailable. For instance, the deaths occurred several years earlier, when the speaker, whose duty it was to bring

his father's killer to justice, was still a minor and thus not old enough to prosecute. The time lag would have made it even more difficult to discover things like who supplied the drug to the stepmother (if indeed she provided it and not the servant herself). Moreover, there can be a fine line between a love potion and a poison, and not only could no one prove which kind of drug this was, but it may, in fact, have had either effect depending on the dose given. In addition, it was not easy to provide the stepmother with a motive for the murder without ascribing to the husband some sort of conduct (such as keeping a common prostitute in the same house as his wife) that would lower the jury's opinion of him and increase sympathy for his wife. Of course, the defendant (the stepmother's son) faced the equally difficult task of presenting the husband's mistreatment of his wife in a way that aroused the jury's sympathy for her, without providing her with too good a motive for murder. The speaker solves this problem by omitting any account of the man's treatment of his wife and beginning his story only at the point where she speaks (vaguely) of her fear of losing his love. His entire focus is on her effort to enlist the servant's help in carrying out her plot. We thus understand that she has sufficient motivation to kill him, but we hear nothing of any misconduct of his.

As with all stories, the effectiveness of the this one would have depended on the intended audience, who in this case were all men over 30. Even jurors who did not think the woman meant to kill her husband might judge that any

wife who surreptitiously gave her husband a love potion was putting his life in danger and thus deserved to die, and was also secretly plotting to gain control over him, which was equally reprehensible. And in a culture where men were assumed to be the dominant parties in marriages, it would be relatively easy to convict such a woman even if she murdered his spouse with good reason. So Antiphon's story might well have won the case, whatever its deficiencies, if the other side could not come up with an effective story of their own.

LYSIAS 1

By contrast with the case against the stepmother, the story told by the speaker in Lysias 1, a farmer named Euphiletus, has usually been judged very effective, in part because Euphiletus supplies external evidence in the form of witnesses for what is often seen as the crucial question, did he in fact catch Eratosthenes in bed with his wife.

Euphiletus begins his story (sections 6–29) at a point of complete innocence, when he married a young woman who at first was the perfect wife, obedient to his every wish. After the birth of their son, he relaxed his guard and placed all his affairs in her hands, thinking their relationship was as secure as it could be. But unbeknownst to him, at his mother's funeral she was seen by a certain Eratosthenes – a professional adulterer, as he is characterized later – who seduced her. Their secret affair continued for some time

without Euphiletus having any suspicions, despite some clues that, as he later tells us, he should have spotted at the time but didn't. Then, one day he was approached by a maid-servant sent by a woman who was another victim of Eratosthenes' seductions. The woman was angry that she had been cast aside, and when she found out about Eratosthenes' new affair, she saw to it that Euphiletus learned of it. Stunned and enraged by this news, and upset with himself for not having recognized the clues sooner, Euphiletus determined to exact the full punishment stipulated by the law, which, as he sees it, allows a man to kill an adulterer caught in bed with his wife. So he confronts their maid, who has been acting as the go-between for the affair, and with threats of beating forces her to tell him the whole story and to agree to notify him the next time Eratosthenes visits his wife. Four or five days later, when Euphiletus has retired for the night, Eratosthenes enters the house. The maid then alerts Euphiletus, who goes out and rounds up several friends. They storm into the house, catching Eratosthenes *in flagrante delicto*, and Euphiletus quickly dispatches the adulterer with his sword. Justice is done.

Now, we must remember that Euphiletus is actually the defendant in this case, but he has quite successfully turned his defense speech into a speech of prosecution, so that his story is not one of justified homicide but of a crime duly punished. And at the end of his story, he has the clerk read the jury the law on which he bases this claim. Our manuscripts do not preserve the text of this law, but the

same law is preserved in another speech, Demosthenes 23 (section 53). It reads, “if a man kill another unintentionally in an athletic contest, or overcoming him in a fight on the highway, or unwittingly in battle, or in intercourse with his wife [literally, ‘on top of his wife’ – MG], or mother, or sister, or daughter, or concubine kept for procreation of legitimate children, he shall not go into exile as a manslayer on that account.” This is clearly an old law, for its language is archaic, and it quite likely formed part of Draco’s original homicide law. There is some doubt, however, whether in practice the law was ever meant to imply that one should intentionally seek to catch an adulterer in the act so that one can kill him with impunity, and it seems likely that by the end of the fifth century such an act would have been frowned upon, even if it were permitted according to the letter of the law. Be that as it may, Euphiletus cites the law as if it were a statement of the punishment lawfully required for Eratosthenes’ crime of adultery. And he calls his friends as witnesses to testify first that he did in fact catch Eratosthenes in the act, and second that he did not notify them ahead of time, which would have been evidence that he set up the whole episode to entrap Eratosthenes.

Of course, Eratosthenes’ relatives saw the whole case quite differently. They prosecuted Euphiletus for homicide and apparently argued both that Eratosthenes had not, in fact, been caught in bed with Euphiletus’ wife, and that the whole episode was a set up and amounted to entrapment. We do not know how effective a story they could tell to

support these claims, but they would not have been able to present much evidence, since Euphiletus' friends would have only confirmed his story and he would certainly not let them talk to his wife or question the maid who acted as a go-between. (They may have asked that the maid be interrogated under torture but Euphiletus would have refused, leaving them to argue, like the speaker in Antiphon 1, that his refusal was evidence of his guilt.) So the relatives would have been left mainly with arguments about the general likelihood of events, and most scholars conclude that Euphiletus almost certainly won the case.

However, despite the effectiveness of his arguments and in particular of the story he tells, or perhaps because of it, some scholars have suspected (as they have in the case of Antiphon 1) that this speech is also a fictitious literary exercise rather than a genuine speech written for an actual case. The story of crime and punishment is, of course, a well known one, and adultery is a common feature of Greek myths and literature, especially in the comedies that were regularly staged in Athens. One scholar [John R Porter, "Adultery by the Book: Lysias 1 (On the Murder of Eratosthenes) and Comic Diegesis," (*Echos du Monde Classique*) 40 (1997) 421–53] has recently analyzed "the subtle fashion in which [Euphiletus'] speech exploits the motifs of the stereotypical adultery tale in achieving both its charm as a narrative and its effectiveness as a rhetorical appeal," and he concludes that the story "has been molded by an author well versed in the conventions of comic adul-

tery narratives,” and that these “performative features of the text” are an indication that Lysias 1 may be an elaborate fiction written as a literary exercise not for actual delivery in court.

Now, it is true, of course, that Euphiletus’ story, like that told in Antiphon 1, draws on stereotypical characters and story elements. But those who study storytelling have shown that all stories, whatever their degree of truth, achieve their effectiveness in part by their use of well known (i.e. stereotypical) characters and story patterns. Crime and punishment is more often a story told by the prosecution, as in Antiphon 1, where the storyteller stops at a point just before the end, when only the jury’s verdict of guilty is needed to bring the story to its proper conclusion. But Lysias 1 shows that the same plot line can be used by the defense. In both cases, as in most cases in any legal system, the other side would have told a different story. They might have drawn on different stereotypical characters types or used the same types in different ways. But if they were to present an effective case, they must have constructed a plausible story and this would almost certainly have required that they use elements with which their audience was very familiar. The fact that we can find mythical or literary elements in these stories does not mean either that they are literary exercises, or that as court speeches they are fictitious tales. It simply means that their authors (like any good litigating attorney today) knew something of the art of storytelling and have done their job well.

OTHER EXAMPLES

Besides these two cases, which in different ways both concern women, speeches survive from several other homicide cases. These include two defense speeches, one for a man accused of murder after another man mysteriously disappeared one night from a boat anchored in a harbor during a storm and his body was never found (Antiphon 5), and the other for a man accused of unintentionally killing a boy who was given a drink, perhaps intended as cough medicine, that accidentally caused his death while he was part of a chorus of boys being trained under the general supervision of the accused (Antiphon 6); we also have two speeches for the prosecution in cases where the speaker accuses a member of the Thirty Tyrants (Lysias 12) or a servant of theirs (Lysias 13) of ordering or otherwise being responsible for the death of one of the victims of the Thirty.

Prosecution speeches in general make more use of a narrative than defense speeches, since in order to accuse someone of a crime, one must usually recount the events of the crime first. But the defense speeches also rely on stories, though both tell a rather abbreviated story of the central event (the alleged killing). In Antiphon 5, the speaker builds a complex case based on a story of prosecutorial misconduct that begins with their treatment of him, which violated many long accepted rules of homicide prosecutions: they did not file the regular charge

of homicide against him (a *dike phonou*) but used a different procedure (*apagoge*) normally used against common criminals like muggers (*kakourgoi*). He then concentrates especially on the way in which they interrogated a slave in violation of all the rules, without his consent (as the accused) and without him present, in order to induce the slave to incriminate him; then they put the slave to death, so he could never reveal the truth. These two examples of misconduct, together with several others that are mentioned more briefly, prove that the accused has been framed by *sykophantai* (“malicious prosecutors”) who are only interested in making money by bringing charges (or threatening to bring charges) against innocent people.

In somewhat similar fashion, the *choregus* or chorus trainer in Antiphon 6 devotes much of his defense speech to questioning the motives of the prosecution. His story is that the prosecutor, who was the victim’s brother, had no intention of bringing charges against him, but he was paid to do so by his (the defendant’s) political enemies. The *choregus* had recently indicted these enemies of his on a public charge of misconduct in office, but he would have to drop this case if he was accused of homicide, since anyone accused of homicide had to keep away from public and sacred places in Athens, including the law courts. However, when the magistrate in charge, the Basileus, refused to accept the case (since too little time remained in his one-year term in office), the *choregus* proceeded to prosecute his enemies and won a conviction. He then, with the help

of mutual friends, reached an informal settlement with his friends, so that when the new Basileus took office, he was not immediately charged with homicide. But more than a month later, after the *choregus* had brought new charges against his enemies, they again paid the victim's brother to bring a charge of homicide, even though until then he had been quite friendly with the *choregus*. This story, like the previous one, is intended to show that the prosecutor does not really think the accused is guilty of homicide but is bringing the case for other motives.

The defendants in these two cases follow a time-honored strategy: turn the jury's attention away from the specific details of the crime by telling a story about the prosecution's ulterior motives in bringing the case and misconduct in handling it. The same strategy was pursued in one of the most famous cases in the US in recent years, the trial of O.J. Simpson for homicide. The prosecution directed its efforts at carefully building a case based on specific evidence of the crime, such as a footprint found at the scene and blood that was matched to Simpson's by its DNA. Numerous scientific tests and expert witnesses were introduced to support these arguments. The defense, however, followed the same general strategy as Antiphon's two defendants: they told a story about the prosecution that drew the jury's attention away from the validity of DNA tests and matching footprints and focused it instead on the issue of racism in the Los Angeles police department. Racism (they argued) supplied the ulterior motive leading the police

to accuse Simpson (a black man) in the first place and to mishandle and tamper with the evidence so as to frame him. Although the prosecution tried to refute this story, they never fully succeeded in turning the jury's attention back to their story of the crime, and Simpson was acquitted primarily because the defense succeeded in keeping their issue – racism in the police department – in the jury's mind rather than the prosecution's issue – the chain of scientific evidence linking Simpson to the crime.

CONCLUSION

Now, I am not trying to argue that the Athenians dealt with homicide cases in exactly the same way as we do today. Many cases today are decided almost entirely on scientific evidence, though as we develop ever more precise methods of testing evidence, we are continually reminded that the scientific methods thought to be conclusive in the past have at times resulted in false convictions. Nonetheless, we rely much more than the Athenians on hard evidence. In Athens, unless a killer was caught in the act or seen by eye witnesses, or confessed to the crime, one could only make a case based on circumstantial evidence, in particular motive and opportunity. Thus stories tend to have a more prominent role in Athenian homicide cases than they do today; in Athens more depended on the litigant's effectiveness as a speaker who could tell a plausible story with believable characters.

For this reason many litigants hired an expert speech-writer (*logographos*), whose task was to create a story that not only was effective but that also fit the character of the speaker for whom it was written. Antiphon, who invented the art of logography (probably around 430), was the first of these professional speechwriters and had a very successful career for two decades (he died in 411). But Lysias took the art to greater heights, both in developing a simple narrative style that gave his stories a strong aura of truth and in adapting the arguments in each case to the personality of the litigant (or to the persona he wanted the litigant to assume). Lysias 1 is one of the best examples of this. The speech gives Euphiletus the attributes of a rustic, unsophisticated farmer, rather slow-witted (as he tells us, he missed some obvious clues to what was happening), but quick to anger when he learns that his own and his family's honor have been injured. A person like Euphiletus does not seem intelligent enough to contrive and carry out a plan to entrap Eratosthenes, but he would be just the sort who would be so incensed at the thought of someone seducing his wife and sleeping with her right in his own house – and even when he himself was home asleep in the other bedroom! – that he would immediately, without thinking (but after gathering witnesses, of course), seek to avenge this insult to his honor. The whole story is intuitively plausible and it is indeed hard to imagine that the other side could have devised an equally effective story to support their case.

In general, then, Athenian homicide cases are more dependent on effective story telling and character portrayal than are cases today, though the difference is more one of degree than of kind, and all trial attorneys today understand the continuing importance of these two features, especially (but not only) in jury trials. But differences in kind can have important effects, especially on people's perceptions of and attitudes toward the law. Although trial lawyers today understand the importance of storytelling and character portrayal, most people today think of these elements as largely outside the proper purview of the law, which they think of as autonomous, objective, and even scientific. Our legal system gives a large role to judges, who are seen as the protectors and enforcers of this objective legal autonomy. Even judges, of course, can be swayed by extra-legal factors, as has become especially clear in the number of sharply divided opinions handed down recently by US appeals courts, including the Supreme Court. But despite such evidence, we still want to think of our legal system as insulated from rhetorical, political, religious, ideological and other non-legal elements, and the general reaction to the acquittal of O.J. Simpson was thus a sense of outrage and widespread condemnation, focused especially on the alleged irrelevancy of the defense's story of racism. Indeed, the question of relevance exemplifies the tensions in our system: we want to treat the question of relevance as an objective one and we leave it to judges to decide, though

there is often no clear objective criterion for deciding this question.

Though they may not have put it in writing, the Athenians also had a rule of relevancy that was stricter for homicide cases than for others, as litigants sometimes remind the jury. Like us, they acknowledged the importance of their laws and their legal system, and especially in homicide cases they stressed that the verdict should be rendered only on the facts of the case – was the accused guilty or innocent? But the different material conditions of their day and the common lack of hard evidence of any sort, meant that they had to rely more on circumstantial evidence and could not enforce such strict standards as we try (at least) to enforce. The question of relevancy was left to each litigant to decide for himself, with only the jury's verdict as the ultimate judge of whether he had violated the rule. Standards of proof could not be as rigorous as our "beyond reasonable doubt" or it would have been impossible to convict anyone of homicide except those who confessed to it. There was no authoritative statement of a standard of proof in Athenian cases, but juries seem to have relied on a standard that was rather similar to the "preponderance of evidence" standard that we commonly use in civil cases. And of course with 200 or more jurors, a unanimous verdict would have been virtually impossible to obtain in any case, and it was perhaps not unreasonable to make verdicts the result of a majority decision.

Athenian homicide law was thus less rigorous than our own in many ways, and people's expectations differed accordingly. But despite these differences, the Athenian legal system, particularly with regard to homicide, shared the same general goals and used many of the same methods as our own law.



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