

ROBERT J. BONNER

LAWYERS AND LITIGANTS
IN ANCIENT ATHENS

The Genesis of the Legal Profession

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INTRODUCTION

Nowhere has popular sovereignty been so completely realized in practice as in ancient Athens. The sovereign people exercised their power not merely at intervals; they actually wielded it at all times. The national assembly, composed of all citizens, debated and decided all questions of public policy. The legislative, executive, and judicial functions of government were exercised by commissions drawn from the citizen body by lot. Thus the people actually administered justice, interpreting and applying the law in each case as they saw fit. No trained jurist on the bench balked the popular will by citing inconvenient precedents. In theory, a judicial decision rendered today could be reversed in a similar case tomorrow.

Ever jealous of the expert, as democracy always is, the Athenians even tried to prevent the rise and development of a legal profession. The law required every man to plead his own case in court and permitted any man to prosecute a public offender. There were no official public prosecutors. The law did not forbid one citizen to aid another by making a plea in his behalf in court, but it did forbid the acceptance of fees for such service. No attempt, however, was made to prevent a litigant from reciting as his own a speech composed for him by an expert. Such a prohibition would have been quite futile. The attempt to prevent professionalism in the administration of justice was not altogether successful. At any

rate, the considerable number of citizens—professional prosecutors (sycophants), speech-writers, and advocates—who devoted themselves almost exclusively to prosecuting wrongdoers and aiding those who were involved in litigation rendered services to the community similar to those performed by members of the modern bar, and are entitled to be regarded as professional lawyers. These earliest representatives of an ancient and important profession have not received either from lawyers or historians the attention they deserve. Only a few studies have been devoted specifically to the Athenian legal profession. The following are the most important. Forsythe's *Hortensius, or the Advocate* (1849) is "an historical sketch of the office and functions of an advocate in Greece, Rome, France and England." In so comprehensive a work comparatively little space is given to the profession in Athens. Egger's *Si les Athéniens ont connu la profession d'avocat* is a suggestive paper of thirty pages read before L'Académie des belles-lettres in 1860. Calhoun's *Athenian Clubs in Politics and Litigation* (1913) is a comprehensive study of the political and litigious activities of these hitherto little-understood associations. *Sycophancy in Athens* (1917) by Lofberg is a detailed study of the rôle of the professional accuser. Drerup's *Aus einer alten Advocatenrepublik* (1916) deals almost exclusively with the political activities of the legal profession in Athens.

In the following pages I have tried to present a more detailed account of Athenian lawyers than was possible in such a comprehensive treatise as Forsythe's and more general than the special studies of Lofberg and Calhoun.

In the chapter on "The Attic Orators" I have emphasized the professional rather than the literary aspect of their work. The influence of some of them on Attic prose style was very great, but such matters have been adequately and abundantly treated in books that are easily accessible.¹ For my purpose it seemed better to confine my attention to their qualities as lawyers and the political activities and influence of those who took an interest in public affairs.

The professional activities of Athenian lawyers cannot be properly appreciated and understood without some knowledge of the organization of the courts and legal practice and procedure. These somewhat technical matters are disposed of in two brief chapters at the outset. English legal terminology has been used as far as possible to translate the technical terms of Attic law. These equivalents are not always accurate, but the advantage of using terms with which the reader is more or less familiar is so great that one may well risk the loss of accuracy that might be gained by using a foreign word according to the practice of continental European scholars. Occasionally the transliterated Greek word is preferable. For example, it is easier to call the members of an Athenian court "dicasts" and explain their functions than to use the word "jurors" with an explanation of the difference. In the interest of brevity and simplicity one is often tempted to resort to unqualified statements where strict accuracy would require reservations, quali-

¹ Dobson, *The Greek Orators*; Jebb, *Attic Orators from Antiphon to Isaeus*; Blass, *Attische Beredsamkeit*; Navarre, *Essai sur la Rhétorique Grecque avant Aristote*.

fications, or explanations. I can only hope that I have not yielded too much to this temptation.

The materials for the chapters on "The Judiciary" and "Practice and Procedure" have been drawn mainly from such standard works as the section on "Law" by Wyse in Whibley, *Companion to Greek Studies*; Gilbert, *Griechische Staatsalterthuemer* (quoted from the translation of Brooks and Nicklin); and Lipsius, *Das Attische Recht*. For the justification of views contrary to those found in these books I have referred to my own publications and to those of my former students who are working in this field: Dr. G. M. Calhoun, University of California; Dr. J. O. Lofberg, Washington and Lee University; Dr. H. G. Robertson, University of Toronto; and Dr. Gertrude Smith, University of Chicago.

Believing that the Athenians are the best interpreters of their own institutions, I have quoted freely from the orators and other contemporary writers.² Where opposing views were available I have given both in order that the reader may form his own opinion. Unfortunately, however, where democracy and its institutions are under discussion the indictments outnumber the apologies. This is natural. Men who were interested in the practical problems of democracy had as a rule neither the inclination nor the capacity to deal with armchair

² The following versions have been used: Aeschines (Adams, Loeb Classical Library); Aristophanes (translations are either based upon, or quoted from, Rogers); Aristotle, *Polity of the Athenians* (Kenyon), *Politics* (Jowett), *Rhetoric* (anonymous); Demosthenes (Kennedy); Plato (Jowett); Plutarch, *Lives* (Clough, Everymans Library); Thucydides (Smith, Loeb Classical Library, and Jowett); Xenophon (Dakyns).

critics. It was not to be expected that there should be many cultured men like Pericles to champion the cause of democracy or great writers like Thucydides to report them.³

In the discussion of such topics as "The Character of Athenian Courts" and "Athenian Litigiousness" I have tried neither to magnify the virtues nor to minimize the faults of the Athenian judicial system. In setting forth in some detail the differences between the Athenian system and our own my purpose is not to apportion praise or blame, but rather to facilitate the understanding of an unfamiliar system. It is not easy to pass a fair judgment on an ancient institution. Standards of excellence in government are relative, not absolute. In estimating the achievements of Athens in working out a satisfactory judicial system comparisons should be made not only with modern accomplishments in the field but also with those of her neighbors and with her own earlier practice.

What lessons the experience of the most famous of ancient democracies in the administration of justice may have for the greatest of modern democracies I leave the reader to determine. Doubtless both the advocates and the opponents of trial by jury will find support for their respective views.

The book is intended primarily for the reader who desires to acquaint himself with an important and at-

³ Thucydides ii. 35 ff. reports the oration of Pericles delivered at the obsequies of those who fell in the first year of the Peloponnesian War (431-404 B.C.). This speech is an encomium on Athenian democracy.

tractive phase of Athenian public life and for the lawyer who is interested in the history of his profession. But the needs of the students of Athenian forensic oratory have not been neglected. In fact, for a number of years the material in the chapters on "The Judiciary," "Practice and Procedure," and "Forensic Oratory" has been used in my classes reading the Attic orators.

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ROBERT J. BONNER

UNIVERSITY OF CHICAGO
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CHAPTER I

THE ATTIC ORATORS

The Athenians claimed the credit of being the first to establish regular processes of law, a claim which Cicero seems inclined to admit. The administration of justice in Athens was mainly conducted by amateurs. In the fifth and fourth centuries magistrates selected by lot held preliminary hearings and presided over the trials before popular courts. The requirement that each litigant should conduct his own case with such assistance as relatives and friends could render was not so unreasonable in a community where all citizens participated in the deliberations of the sovereign assembly and were free to address their fellow-citizens on all public questions. In such conditions the proportion of citizens who could speak in public was much larger than in a modern community. But when about the middle of the fifth century the theory of rhetoric was developed and systematically taught, those who had the inclination and the means to acquire the "art of persuasion," as the Greeks called oratory, had an immense advantage over their untrained opponents in the law courts. As a consequence, expert rhetoricians began to compose speeches for clients to be recited in court as their own. Many orations of these speech-writers were published. An effective speech was a good professional advertisement for an ambitious speech-writer. About sixty orators are known to

us by name, but practically all the extant orations have been transmitted as the work of ten men, the so-called "Canon of the Ten Orators," or the "Decade of the Orators." Contemporary interest in these speeches was due to their practical value as models for litigants, lawyers, and students of rhetoric. But later scholars and critics became interested in them because of the material they furnished for the study of the development of Attic prose style. And so they selected ten typical orators for study. The earliest record of the list is the *Lives of the Ten Orators*, wrongly attributed to Plutarch, the great biographer of antiquity, and included in his miscellaneous works. The *Lives of the Ten Orators* are now cited as the work of Pseudo-Plutarch. They were composed in the first century A.D., but it seems probable that the list was drawn up in the second century B.C. by a scholar at Pergamum,¹ a center of learning that rivaled the famous Museum of Alexandria.

The immediate effect of this selection was to fix attention almost exclusively on these orators and insure the preservation and transmission of their works. Ancient critics like Dionysius of Halicarnassus in the first century B.C. were familiar with many more orations than we now possess, but many of them were even then regarded as spurious. In the Demosthenic *corpus* there are a number of speeches that admittedly do not belong to Demosthenes, but they are contemporary productions and valuable documents even if they do not reach the standard of literary excellence set by Demosthenes. The vicissitudes of the speeches of Hyperides, one of the ora-

¹ Brzoska, *De Canone Oratorum Atticorum*.

tors of the Canon, are unusually interesting. Up to the middle of the nineteenth century only a few fragments were known. It was generally supposed that a manuscript edition of his works existed in Budapest when the library was destroyed by the Turks in 1526. During the last half of the nineteenth century six orations in more or less complete condition have appeared among Egyptian papyri. One of these papyri belonging to the second century B.C. is among the earliest extant manuscripts of a classical author.

Others besides literary critics studied the orators and explained technical matters and words and phrases not generally understood in the Graeco-Roman world. Harpocration in the first or second century A.D. published a lexicon of words and phrases in the *Ten Orators*. A section of the word lists of Pollux, arranged according to subject matter, is devoted to legal terminology. On the margins of many manuscripts of classical authors appear notes and comments drawn from sources no longer extant and accessible. These unknown scholars to whose industry we owe so much are collectively denominated the "scholiast." These ancient lexicographers, grammarians, scholiasts, and handbook-makers drew considerable material from Aristotle's *Constitution of Athens*, which contains an exceedingly valuable treatment of the history and organization of the Athenian judiciary, known only in the form of quotations until the complete work was recovered from Egypt and published in 1891.

The ancient rhetoricians divided oratory into three main divisions: epideictic, deliberative, and forensic.

Deliberative oratory was addressed to the people in the general assembly. Forensic oratory was delivered in the law courts. These two types are sometimes classified as "political oratory" because they are both concerned with the business of government. The Romans used the term "civil oratory" to denote this type. Epideictic or display oratory included all other kinds of orations. Chief among them were those delivered on the occasion of festivals or public rites such as the Olympic games and state funerals for those who had fallen in battle. All kinds of moral discourses were included. Over seventeen hundred speeches attributed to the ten orators were known in antiquity, but only one hundred and thirty are extant. Of these, one hundred and five belong to the forensic class.

The Attic orators fall naturally into two groups: first, the predecessors of Demosthenes (425-350), Antiphon, Andocides, Lysias, Isaeus, and Isocrates; second, Demosthenes and his contemporaries (350-300), Aeschines, Lycurgus, Hyperides, and Dinarchus. Isocrates, who lived to be ninety-seven years of age, belongs to both periods.

Antiphon² (480-411 B.C.) was the chief leader of the oligarchs who overthrew democracy in 411 B.C. Thucydides says:

The man who devised the method by which the whole matter was brought to this issue and who had for the longest time devoted himself to the problem was Antiphon, a man inferior to none of the Athenians of his own day in force of character and one who had proved himself most able both to form a plan and to set forth his conclusions in speech; and although he did not come before the

² For an account of the trial of Antiphon see p. 244. In the case of most of the orators only approximate dates can be given.

assembly or willingly take part in any public contest, but was under suspicion with the people on account of his reputation for cleverness, yet he was the one man most able to help any who were involved in contests either in the court or before the assembly, in case they sought his advice.

Thucydides mentions the brilliancy of his defense when he was tried for treason on the overthrow of the Four Hundred.

Antiphon was reputed to be the "inventor and founder of the political style of oratory." The statement of Thucydides shows that he was active in both the deliberative and the forensic branches of political oratory. Moreover, he not only wrote speeches for his clients but also gave them advice. In relating the further progress of the plot against democracy Thucydides says: "The people and the senate were still none the less convened; but they discussed nothing that was not approved by the conspirators; nay, not only were the speakers from this party but what should be said had been previously considered by them." There is no doubt that Antiphon played an important part in outlining and composing speeches for the oligarchic orators. At least one ancient critic attributes deliberative speeches to him. And there is no occasion on which he could have had greater opportunities for aiding men "involved in contests before the assembly."

All of Antiphon's published orations were forensic. It is a matter of accident that his extant orations, consisting of twelve practice speeches, grouped in three tetralogies with two speeches on either side, and three speeches composed for clients, all deal with homicide.

Of his other nineteen orations of which we have titles and fragments none deals with homicide. They deal with a variety of cases, but there is some indication that among his clients were men of oligarchic sympathies who were engaged in a more or less systematic attack on democratic politicians in the courts with a view to discrediting democracy. This would furnish some explanation of Thucydides' statement that Antiphon had for a long time devoted himself to the problem of the revolution. It was not unusual for political plotters to pave the way for their schemes by means of prosecutions in the courts. Ephialtes' attack on the Areopagus in 462, which resulted in depriving that ancient conservative council of its political powers and most of its judicial functions, was preceded by attacks on individual Areopagites. The revolutionists of 411 B.C. apparently followed the same practice, and Antiphon furnished the speeches for the prosecutors. One of Antiphon's extant speeches is a defense of a *choregus*³ charged with homicide. A member of a boys' chorus being trained at his expense for a public festival died as the result of taking some medicine for sore throat. Relatives of the boy were induced to bring the charge, it was claimed, to disqualify the *choregus* for prosecuting some officials whom he had charged with misappropriating public funds. On the first occasion the charge of homicide was not pushed and the *choregus* secured the conviction of the defendants. The

³ It was the duty of the *choregus* to "collect, maintain, instruct, and equip one of the many choruses needed for the dramatic and musical and orchestric competitions at the great festivals" (Whibley, *Companion to Greek Studies*, p. 408). Cf. p. 101.

same tactics were resorted to on a later occasion when the *choregus* was engaged in a similar prosecution of dishonest officials. This time the homicide case was brought to trial. Antiphon composed the speech in defense of the *choregus*. Among the lost orations is one against Philinus which in all probability is the speech delivered by the *choregus* in his prosecution of Philinus on the charge of appropriating public funds. Other fragments indicate that Antiphon also participated in the prosecution of Athenian overseas officials by composing speeches for the prosecutors. In at least two cases Antiphon acted as counsel for communities that sought redress in the matter of the tribute levied on them. His championship of the subject states of the empire extended to the defense of individuals charged with crimes which, though committed overseas, were tried in Athens. The Herodes murder trial is a good example of this phase of Antiphon's activities. Euxitheus, a native of Mytilene, was charged with the murder of Herodes, an Athenian resident in the island. The father of the defendant was a man of means, and belonged to the class which was usually opposed to Athenian rule. When a member of this class appeared before an Athenian tribunal he was not always sure of fair treatment, if allegations made in this case and some jests of Aristophanes may be trusted. The political aspect of the trial is found in the fact that Euxitheus, knowing of Antiphon's political views and sympathies with the subject states, sought his assistance. These activities of Antiphon taken together have the appearance of more or less deliberate hostility to the democratic administration at home and

abroad and active sympathy with the grievances of the subject states.

Antiphon's reputation for rhetorical skill and subtlety aroused so much popular prejudice against him that his open advocacy of a cause would have been more harmful than helpful. Consequently, as Thucydides points out, he refrained from speaking in public. This is surprising in view of the fact that no less able orators such as Demosthenes and Hyperides were not looked upon with suspicion because of their superior oratorical abilities. The explanation is in part due to the novelty of the art of rhetoric in Antiphon's time and in part to the current belief that Antiphon employed it to defeat the ends of justice to his own profit. He was ridiculed on the comic stage for being avaricious and for making profit out of the predicament of trembling defendants. People were distrustful of an art which according to popular belief could "make the worse appear the better reason." His practice speeches—the *Tetralogies*—in particular, as Jebb remarks, exhibit "great facility in fighting a cause that could hardly be defended on any broad ground by raising in succession a number of more or less fine points."

Andocides (440–380? B.C.) was an aristocrat whose family had for three generations been active in public life. In 415 B.C., while Andocides was still in his twenties, the famous mutilation of the tutelary statues of Hermes that were to be found everywhere throughout the city occurred. Great excitement ensued which was intensified when it transpired that the Eleusinian mysteries sacred to the divinities Demeter and Persephone

and much revered in Athens had been travestied in private houses. The gross impiety of these acts was all the more serious in the eyes of the Athenians because the great expedition to Syracuse was on the eve of sailing. Andocides and some of his relatives were suspected of complicity in the Hermes affair and imprisoned. Under promise of immunity he confessed to a guilty knowledge of, if not actual participation in, the sacrilege, and implicated a few others. He was released, but a decree of Isotimides banishing from market and temples those who on their own confession were guilty of impiety was held to involve him. Rather than submit to such a curtailment of his liberty he left the city. After a successful career as merchant and adventurer in many lands he did Athens a service in 411 B.C. by furnishing her with much-needed oar-spars which he was able to secure by reason of his connections with the king of Macedonia. Returning to the city expecting to be hailed as a public benefactor and relieved from his disabilities, he was thrown into prison by the Four Hundred who had in the meantime succeeded in subverting the democracy. On the overthrow of the oligarchs he was released and again went abroad. Owing to his interests in Cyprus, he was able to obtain a permit for the export of grain to Athens during a period of scarcity. Relying upon this service, he appealed to the courts in 410 B.C. for release from his disabilities, but without success. Under the general amnesty which followed the overthrow of the Thirty Tyrants in 403 he returned to the city and participated actively in public affairs. But in 399 his enemies revived the case against him by charging him with impiety for

participating in the Eleusinian mysteries from which they claimed he was excluded by the decree of Isotimides. Instead of entering a demurrer that he was protected by the amnesty, he rebutted the charge and at the same time urged the court to abide by the terms of the amnesty which had been so salutary in its effects. Indeed, three of his five accusers, Cephisius, Meletus, and Epicares, would themselves be liable to prosecution if the amnesty were suspended or disregarded. Andocides was supported by Anytus and Cephalus, prominent politicians, as well as by advocates chosen by his tribe. It is interesting to observe that two of the men engaged in this case—Meletus and Anytus—were in all probability the accusers of Socrates. This time Andocides was acquitted. In 390 he was a member of a peace embassy sent to Sparta, and a speech of his is extant supporting in the assembly the terms offered by Sparta on that occasion.

Andocides was neither a rhetorician nor a professional speech-writer. He had the regular education of an Athenian of the better class. Rhetoric was included, but he made no special study of the subject. He was well acquainted with the Hellenic world from Syracuse to the Hellespont and from Macedonia to Cyprus. He had dealings with kings and tyrants including Archelaus of Macedonia from whom he secured a timber concession, Evagoras of Cyprus from whom he obtained a permit to export grain to Athens, Dionysius of Syracuse and the king of the Citians. He was possessed of a wide experience in human nature, was shrewd and successful in business, quickwitted and resourceful in difficulties. He

had besides a natural aptitude for oratory. It was no hardship to require a man like Andocides to plead his own case in court. Andocides was not a stylist like the other orators in the Canon. He was an amateur among experts. His inclusion in the list was perhaps due in part to the interest aroused by his natural eloquence and in part to the important events which he narrated.

Lysias (450-380 B.C.) was the son of a Syracusan. Consequently, though born in Athens, he was not an Athenian citizen. The family was on intimate terms with both Pericles and Plato. The scene of Plato's *Republic* is laid in the house of Polemarchus, the brother of Lysias. The two brothers migrated to Thurii, a Greek colony in Italy. After the Athenian defeat at Syracuse in 413 there was a reaction throughout Magna Graecia, as Hellenic Italy and Sicily were called, against all Athenian sympathizers. Lysias and his brother returned to Athens in 412 and engaged in the manufacture of shields. It proved to be a lucrative business, and their wealth attracted the cupidity of the Thirty Tyrants. Lysias managed to escape after being arrested, but his brother was put to death. On the restoration of democracy a bill was passed granting to him and other aliens citizenship as a reward for their services in the counter revolution. But, owing to a technical flaw, the bill was declared illegal and Lysias remained an alien.

Stripped of his fortune by the Thirty Tyrants, he turned to speech-writing as a profession. It seems that in his earlier years he had indulged a taste for rhetoric in an amateurish and dilettante way. It is said that during his sojourn in Thurii he studied with Tisias, the fa-

mous pupil of Corax, the originator of formal rhetoric. Over four hundred speeches were credited to him in antiquity; thirty forensic speeches have been preserved. They deal with a wide variety of cases. Only one was delivered by himself. On the overthrow of the Thirty Tyrants he prosecuted Eratosthenes, a member of the moderate section of the tyrants, who elected to stand his audit under the terms of the amnesty which granted that privilege to the Thirty Tyrants and some of their subordinates. Lysias made a special point of the judicial murder of his brother. It is not unlikely that his experience in this case encouraged him to embark on speech-writing as a career. Although Lysias being an alien could not personally intervene in politics, he nevertheless like Antiphon played a part behind the scenes. Dionysius of Halicarnassus quotes from what purports to be a deliberative speech written by Lysias for a client who participated in a debate on a proposed law to restrict the franchise to landholders. The proposal would have disfranchised some five thousand citizens. A more plausible theory⁴ regarding this fragment is that it was a political pamphlet published in the form of a speech before the assembly. Lysias cleverly puts this defense of radical democracy in the mouth of a landholder who, being unaffected by the proposal, had no personal interest in the bill. The sentiments expressed in the pamphlet are quite consonant with the tenor of the speech against Eratosthenes. Speeches composed for other clients exhibit similar radical democratic tendencies.

Little or nothing is known about the life of Isaeus

⁴Drerup, *Aus einer alten Advocatenrepublik*, p. 22.

W. S. Ferguson, "Lawyers and Litigants in Ancient Athens. Robert J. Bonner ," *Classical Philology* 23, no. 1 (Jan., 1928): 72-73. <https://doi.org/10.1086/360984>. MOST READ. Of all published articles, the following were the most read within the past 12 months. Carthage and Rome: Introduction. Feeney. The Pupula Duplex and Other Tokens of an "Evil Eye" in the Light of Ophthalmology. McDaniel. The Omen of Sneezing.