The theme of this book is the legal regulation of violence and the role of litigation in Athenian society. Using comparative anthropological and historical perspectives, David Cohen challenges traditional evolutionary and functionalist accounts of the development of legal process. Examining Athenian theories of social conflict and the rule of law, as well as actual litigation involving the regulation of violence, he emphasizes the way in which the judicial process operates in an agonistic social field. In this light, it appears that judges and litigants alike view the courts as a competitive arena where ongoing conflicts are played out, continued, and exacerbated according to a logic characteristic of feuding societies. A sustained account of Athenian litigation places this subject in a new theoretical perspective and offers a new interpretation of the social and political dimensions of legal process.

This book will be of interest to a broad audience of students and scholars in classics, history, anthropology, sociology, law, and political science.

KEY THEMES IN ANCIENT HISTORY

Law, violence, and community in classical Athens

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# LAW, VIOLENCE, AND COMMUNITY IN CLASSICAL ATHENS

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# *Preface*

This book aims to provide an account, for a broad audience, of litigation and the legal regulation of violence in Athenian society, and of their relation to democratic ideology and conceptualizations of the rule of law. While most studies of the Athenian legal process rely primarily upon analysis of statutes and institutional structures and of how they developed, I attempt to reconstruct the framework of social, ideological, and discursive practices of which the law was an integral part. In this sense the project attempts to blend the methods and insights of social history, anthropology, and historical legal sociology in portraying the role of litigation in an agonistic democratic society. This study thus departs from the conventional framework of much research in Athenian law and institutions, but I see little point in rehearsing yet again, with slight variations, well known facts with all too familiar methods.

Along the way I have profited greatly from the criticisms and advice of many friends and colleagues. Central ideas for the book were tried out at two faculty Work-in-Progress seminars at the University of Chicago School of Law, where I received helpful comments from numerous colleagues. I owe special thanks to the continuing support of Professors Dieter Simon and Dieter Nörr in providing me with access to the incomparable facilities of the Max Planck Institut für Rechtsgeschichte in Frankfurt and the Leopold Wenger Institut für antike Rechtsgeschichte in Munich, as well as for giving me the benefit of their criticisms of the project as it evolved. I would also like to thank Professors Anne-Marie Burley, Douglas Baird, Richard Posner, Wolfgang Naucke, William Miller, Carol Clover, John Comaroff, Robert Bartlett, Kenneth Dover, Keith Hopkins, Martin Ostwald, Mark Griffith, and Tony Long for reading individual chapters or related essays. Professors

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# PART I

# *The realm of theory*

CHAPTER I

# *Law and order*

Always mistrust the law.[1]

## I

Standard accounts of the history of legal institutions in Athens typically follow an evolutionary model: from an inherently unstable situation characterized by powerful aristocratic kinship groups, self-help, and weak central institutions emerges a civic legal order capable of regulating the cycles of feud and violence to which the previous instability had inevitably given rise.[2] In literature, the moment in Athens' institutional history in which this new legal order established itself is captured in Aeschylus' *Oresteia*, with its depiction of the foundation of the first Athenian homicide court, the Areopagus. This dramatic foundational event represents the historical process by which the emerging polis wrested for itself the authority to enforce a final and binding resolution of disputes among its citizens. With this, the dynamic of retaliation and feud depicted in *Agamemnon* and *Choephoroi* yields to a public order maintained by a system of laws and courts.[3] Henceforth, citizens may not pursue private vengeance for wrongs done them, but must bring their case before the representatives of the polis and submit to its judgment.[4] The principle of blood vengeance, embodied by the Erinyes, is transformed and incorporated within the new framework of civic institutions where it will help to preserve Athens from enemies within and without. Legal process triumphs over private violence.

For the purposes of this study there is no need to challenge the

[1] An *ancien régime* maxim reported by Castan (1983: 224).
[2] See Hölkeskamp (1992) for an account of this tradition.
[3] Cf. Meier (1990: 82–139).
[4] See Demosthenes 23.31–6 on the importance of the distinction between private revenge and public punishment carried out according to the law of the polis.

historical accuracy of this schematic account, though the early history of Athenian institutions is not illuminated by evidence reliable enough to justify conclusions about their ultimate origins. Nor is there a need here to take issue with orthodox interpretations of the *Oresteia*, with their optimistic confidence in the future of a legal order whose first act is to declare a confessed matricide innocent.[5] This introductory chapter examines, rather, the theoretical assumptions about legal institutions on which the kind of narrative outlined above rests. More specifically, my aim is to question the functionalist, evolutionary and positivist presuppositions implicit in such portrayals of the Athenian legal system so as to prepare the ground for an alternative account of law, conflict, and society in Athens in subsequent chapters.

Because of their reliance upon such presuppositions, traditional views not only tend to read Athenian institutions through contemporary Anglo-American conceptions of legal order, but they also lead to misapprehension of the relation of such institutions to the larger social framework of which they are a part. As Nippel, whose own work on ancient Greece and Rome is deeply theoretically and comparativistically informed, comments, "We are badly in need of comparative studies which overcome the tendency to base judgment on the standards of the nineteenth and twentieth centuries, which in fact constitute the exception in terms of universal history."[6] Yet studies of Athenian legal institutions typically start from premises which lead them to view elements of self-help, private initiative, and popular justice as "primitive," dysfunctional, or antithetical to legal order, seemingly unaware, for example, that English justice depended almost solely upon private prosecution and heavily upon lay magistrates, lay "police," and self-advocacy at criminal trials until late into the nineteenth century.[7] The "lateness" of English "development" vis-à-vis some Continental systems has little to do with stages of universal legal evolution and much to do with strong traditions of community responsibility for the administration of justice and, at the same time, deep-rooted resistance to the idea of the state assuming responsibility for prosecution, because this type of Continental

[5] For more pessimistic assessments see Cohen (1986) and Luban (1987: 312–13).
[6] Nippel (1985: 419).
[7] See, e.g., Hay and Snyder (1989b); P. King (1984); Herrup (1987); Shoemaker (1991); Wiener (1990).

arrangement was felt to endanger the rights of the individual.[8] In fourth-century Athens democratic politicians used the widespread judicial murder practiced by the Thirty Tyrants after their oligarchic coup at the end of the Peloponnesian War to epitomize the dangers of permitting any single body of men to prosecute at their discretion. On their view, private initiation of prosecutions was a cornerstone of a truly democratic society.

The starting point of this study is to follow the lead of recent work in anthropology and social history which views conflict and dispute as normal components of the life of a society and seeks to understand their role within the social realm. This point may sound obvious, but functionalist and evolutionary accounts of law in general, and of the Athenian legal system in particular, view conflict as the anomaly which the administration of justice is *designed* to eliminate.[9] Such accounts thus tend to assume that the system of justice is created and driven by a larger and constant purpose, namely, the preservation of a legal order whose function is to resolve disputes, eliminate private violence, and suppress conflict. It follows that social cohesion arises from and depends upon the imposition of order (in the form of legal rules) through the coercive force of central legal institutions.[10] As Lintott argues in the major modern treatment of violence in the classical city thus far, "The Athenian law code thus *tried* to provide a peaceful substitute, dependent on the vote of a democratic jury, for the violence which might result from a man's sense of his own worth and his resentment from being belittled ... I have no doubt that without these laws Athenian society would have been much more violent" (my emphasis).[11]

Evolutionary accounts offer historical explanations of how such equilibrium-maintaining institutions arise. They usually portray

[8] Hay and Snyder (1989b: 32–5). In Britain, public prosecution did not become the dominant mode until close to the end of the nineteenth century. Because of the considerable expense, difficulty, and risks of private prosecution, in the late eighteenth century private citizens tried to ease the burden by forming voluntary associations for the prosecution of felons. There were probably at least 600 such associations in the 1830s, and some scholars now believe there to have been many more. See Phillips (1989: 120).

[9] See Comaroff and Roberts (1981: 5).

[10] See Comaroff and Roberts (1981: 5). For Greece, see, e.g., Hölkeskamp (1992: 104–6).

[11] Lintott (1982: 174–5). Note the personification of the Athenian legal system as a purposive agent. Also, Lintott's conclusion regarding the effect of the legal regulation of violence betrays the typical positivist assumption that the law is the primary source of social control.

these institutions as representing particular "stages" on the path from the presumed chaos of an acephalous society to the harmonious order of the fully developed rule of law as embodied in modern democratic states: "Only when a permanent central authority can count on the implementation of its decrees can law, and statehood with it, be said to have been reached, and only then does there follow the further differentiation and socialization of roles which turns *thesmothetai* from lawgivers into a body of junior archons specially charged with collating and systematizing the laws."[12]

In what follows, I will argue that such interpretations provide a reductionist account of violence, conflict, dispute resolution, and social control in Athenian society. But, if functionalist and evolutionary theories fail to give a satisfactory account of social order in Athens, what sort of alternative explanation would be more adequate? Explaining the basis of social order has been the fundamental challenge of western political and legal theory since Plato and Aristotle. If I am going to deny that legal institutions exist to utilize the state's monopolization of force and dispute resolution to impose order upon society then it becomes all the more necessary to explain what prevented Athenian society from disintegrating into the chaos of feud and private violence. This is, as will appear, particularly the case at Athens, since an agonistic society would always seem to make social cohesion more problematic.

Yet Athenian democracy in the classical period, the frame of this study, displayed remarkable political stability. This contention has been much debated among historians of ancient Greece, yet comparing classical Athens with the late Roman Republic surely indicates that the kind of political and civic violence analyzed, for example, by Brunt does not play a similarly decisive role in Athens.[13] If one compares the last century or so of the Roman Republic (133–27 BC) to the last century of Athenian independence (431–338 BC), the stability of Athens and its relative freedom from factional violence and conflict are striking, despite the coup of 411 BC and the violence of the Thirty. These events stand out as the exceptions and not the rule in Athenian history from the mid fifth century. Hence, the violence of the Thirty could acquire the emblematic significance widely attributed to it by contemporaries.

[12] Runciman (1982: 360), and see also Eder (1991: 193–94) and Hölkeskamp (1992: 95).
[13] Brunt (1988).

In Rome, however, to a significant degree the period from the Gracchi to the beginnings of the Principate is a history of just such continuing conflicts, political murder, and civic violence as the Republic slowly disintegrates and shudders its way towards what becomes one-man rule. In institutional terms, Athenian democracy emerges largely unchanged from the brief reign of the Thirty and, despite the lesser external strength of Athens, it perseveres without significant upheavals until Macedonian domination. In this society where legal order was maintained through prosecution by private citizens and where self-help played a crucial role in the administration of justice, Athenians appear to have pursued their vendettas largely in politics and the courts without resorting to lethal violence. In late Republican Rome, or in Italian City States in the Renaissance, on the other hand, vendetta, factional violence, and murder seemed to have played a far more important role in civic life than in Athens, despite its less "developed" legal system.[14]

It follows, in my opinion, that the kind of political explanation appropriate for the decay of civic order in late Republican Rome is not particularly helpful for understanding fourth-century Athens. In studying the legal regulation of violence in Athens at the end of the fifth century and in the fourth, the principal focus will be neither on structural social divisions (whether called "classes," or "rich and poor") nor the maneuvering of political factions.[15] Not on the former, because apart from the historical moment of the Thirty social divisions at Athens do not result in the kind of widespread civic violence one sees at Rome and do not, despite the anxieties of Athenian political theorists, pose an acute and permanent danger to the maintenance of Athenian institutions. The question of the legal regulation of violence is not encapsulated in a political drama as it was in Rome, where the failure of Roman institutions to prevent or resolve violent conflict is a product and cause of the erosion of those institutions. Nor will this account adopt the time-honored form of a chronological narrative of the politics of factions and the struggles of individuals for political ascendancy. This is not a story of the triumph or failure of individ-

[14] On the destructive factionalism and persistence of blood feud in medieval and Renaissance Italy, see, e.g., Larner (1972: 50–71), Herlihy (1972: 129–54), Brentano (1972: 322–30).

[15] These are the terms in which much recent discussion has been cast. On factions see Strauss (1986).

uals like Alcibiades or Demosthenes to enhance their power or to steer the polis in one direction or another. Rather, the focus will be on the role of legal institutions in the dynamic interplay of social practices in an agonistic society, where rivalry, enmity, and competition are the inevitable counterpoint to community. The sources of social cohesion at Athens were manifold, and embodied in a wide range of religious, military, political, cultural, and social institutions. A full account of Athenian social order would require investigation of the way in which deme organization, religious festivals, military training and campaigning, popular political participation, and many other factors promoted or detracted from a sense of community. Such an account would be nothing less than a complete social history of classical Athens. My aim here is far more modest. I seek merely to portray the role of Athenian legal institutions in the web of centripetal and centrifugal forces which determine the contours of a political community.

In carrying out this aim, the remainder of this chapter will provide a theoretical and comparative perspective on the study of law, conflict, and society. The shortcomings of functionalist and evolutionary paradigms will be taken up in greater detail and recent attempts to construct alternative models will be considered. These efforts, in turn, will provide the theoretical orientation for the study of Athenian institutions in subsequent chapters. Chapter 2 will examine the preoccupation of Athenian political theory with stasis, the disintegration of a political community. Chapter 3 studies the solution which all major varieties of Athenian legal theory proposed to deal with this danger: the rule of law. These three chapters comprise the first part of the book, which is largely concerned with theories of law, conflict, and society. Part II moves from the realm of theory to that of institutions, ideology, and practices. Chapter 4 lays the groundwork for the remaining chapters by setting out the values of the highly agonistic society of fourth-century Athens, in particular those values of particular import for violence, conflict, and their legal regulation, such as honor, envy, and revenge. Chapter 5 shows how these values operate within the world of the courts by considering litigation as a form of feuding behavior. Building upon the theoretical insights of the introductory chapter, Chapter 5 will suggest that Athenian courts, rather than providing a forum for the resolution of disputes and avoidance of further conflict, instead furnish an arena which litigants seek out to

pursue and intensify antagonisms. Chapters 6, 7, and 8 will examine how this feuding dynamic informs three specific areas of litigation, involving physical violence, sexuality, and the family.

The conclusion examines the relation between the theory and ideology of the rule of law, as described in Chapter 3 and elsewhere, and the appropriation of the courts as a forum for the pursuit of conflict as portrayed in chapters 5–8. I will suggest that on the Athenian democratic view of the rule of law this relation may not be as problematic as it might appear from the perspective of modern conceptions. Paradoxically, what have often been viewed by modern scholars as "abuses" of Athenian legal institutions may turn out to be intimately linked to Athenian understandings of the rule of law, understandings which saw the courts not as objective discoverers of "truth," but as powerful instruments of democratic social control. As such, they played an important role in mediating the tensions and contradictions which, as in all complex societies, informed Athenian political culture.

## II

Section II of this chapter provides a grounding for the methodology employed in the rest of the book. Before examining the legal regulation of conflict in classical Athens it is appropriate to consider how one should conceptualize the role of law and conflict in society. This section first looks at traditional ways in which historians and anthropologists have characterized violent conflict and the emergence of states with legal systems which seek to suppress feud and private settlement of disputes. Here the emphasis will be upon attempts to explain the social "function" of feuding behavior and the "evolution" of central institutions designed to suppress it. Next, we will consider contemporary attempts to develop more sophisticated theories of conflict and its resolution.

For several decades in the middle of this century structural–functionalist explanations of social phenomena largely dominated Anglo-American anthropology. Functionalist theories in general viewed society as analogous to an organism, whose parts all served particular "functions" in preserving its existence in much the way in which vital organs function in the human body. Further imitating the natural sciences, they also presumed that social phenomena were the product of "laws" that could be discovered through

appropriate "scientific" methods.[16] Feud (as the most extreme form of internal conflict) and warfare became important objects of study for structural–functionalist anthropology because their "function" in maintaining the "health" of a community was far from apparent.

To a significant degree, modern legal anthropology emerged, in the work of scholars like Max Gluckman, through attempts to grapple with such problems. Two exemplary types of functionalist arguments sought to explain the widespread occurrence of the violence of feuds and wars: (1) External conflict (e.g. war, raiding, and inter-tribal feud) promotes the internal solidarity necessary for the preservation of a community. Warfare fulfills this "function" because it promotes social cohesion by "providing an occasion upon which the members of the society unite and submerge their factional differences in the vigorous pursuit of a common purpose."[17] (2) Within communities, cross-cutting ties will always ensure that internal conflicts are resolved before they escalate into generally disruptive violence, and will thus preserve societal equilibrium. In Colson's classic formulation, "This entanglement of claims leads to attempts to seek an equitable settlement in the interests of the public peace ... The Tonga and the Tallensi are very differently organized, but the same principle of cross-cutting ties appears in both societies. I suspect that it is a general principle incorporated into most societies as a mechanism for ensuring the maintenance of order."[18] In other words, both internal and external conflicts promote equilibrium and preserve and reinforce the existing order. There is always, in Gluckman's famous phrase, "peace in the feud."[19] Hence, on the functionalist account, even acephalous societies maintain order and preserve themselves without central institutions of law and the administration of justice. It is, paradoxically, the "function" of conflict itself to preserve the very order which it might appear to threaten.[20]

[16] See, e.g., Radcliffe-Brown (1968: 178–204).

[17] Murphy (1957: 1035). Of course, as Thucydides demonstrates with tremendous force in his analysis of civil strife in Greek cities, warfare could also increase internal strains and promote social disintegration. It could also lead to the annihilation of a society, a possibility which the functionalists never seem to think about. It may be significant that Murphy's fieldwork was carried out fifty years after intertribal warfare had ceased.

[18] Colson (1954: 414–15).

[19] Gluckman (1956: Chapter 1).

[20] See, e.g., Dennis (1976: 174–84).

Gluckman's famous reinterpretation of Evans-Pritchard's material on feud among the Nuer has left an apparently indelible mark on the anthropology of the feud.[21] Though later major accounts of feuding societies have begun by rejecting Gluckman's interpretation as reductionist, functionalism has usually, in the end, crept in again through the back door. For example, one of the best known and most comprehensive treatments of feud unequivocally rejects functionalism early on, but later concludes that the feud as an institutionalized mode of conflict exercises a "cohesive force" by "establishing relationships between hostile groups ... binding together a number of loosely connected parts into a coherent whole."[22] Feud thus provides "the main organizational principle" around which such societies are structured.[23]

Functionalist interpretations of conflict in general, and feud in particular, have not gone unchallenged. Indeed, Edmund Leach, one of Britain's most distinguished social anthropologists was already pointing out the shortcomings of functionalist explanations in his first major work, published in the mid-fifties:[24]

> English social anthropologists have tended to borrow their primary concepts from Durkheim rather than from either Pareto or Max Weber. Consequently they are strongly prejudiced in favour of societies which show symptoms of 'functional integration', 'social solidarity', 'cultural uniformity', 'structural equilibrium'. Such societies, which might well be regarded as moribund by historians or political scientists, are commonly looked upon by social anthropologists as healthy and ideally fortunate. Societies which display symptoms of faction and internal conflict leading to rapid change are on the other hand suspected of 'anomie' and pathological decay.[25]

Other, less theoretically oriented, anthropologists simply found the notion of functional conflict to contradict their observations in the field. Thus, Stirling, in his well known studies of Turkish villages published in the early sixties, questioned the functional explanation of feud because in the villages he studied feud was so clearly dys-

[21] See, e.g., Wormald's (1983: 102) characterization of Gluckman's "revolutionary" discovery of "peace in the feud." For a rejection of Gluckman's principle for an understanding of feud in China, see Lamley (1990: 58).

[22] Black-Michaud (1975: 171). See also Boehm (1984: 202–7).

[23] Black-Michaud (1975: 87–8, 168–72).

[24] Leach, in his classic *Political Systems of Highland Burma*. References to Leach are to the 2nd edition (Boston 1965).

[25] Leach (1965: 7).

functional. He found no mechanisms for mediation or intervention to resolve conflicts between lineages, and villagers commonly complained about their hopelessness in the face of the apparently never ending cycle of violence and revenge.[26]

Although early critics like Leach often went unheeded, in the ensuing decades functionalist theories of social action in general, and of feud and warfare in particular, endured a withering critique.[27] Feud and conflict, as the world has witnessed all too often in recent years, can serve as an incentive to violence rather than a means for its limitation,[28] and can tear societies apart from within. Further, functionalism's most basic assumptions about the "organic" nature of society have proved untenable in the light of new theoretical perspectives. Some critics have demonstrated the way in which functionalism provided an overly simplistic interpretation of social order because it assumed that social life must be rule-governed and that "normal behavior" could be identified as compliance with normative precepts. This, in turn, led to the identification of dispute as "pathological . . . a deviance, a malfunction, that the control institutions of society are essentially designed to put right."[29] Others have pointed out the way in which the theory of equilibrium postulates a static state of society and thus cannot explain social change.[30] More important for present purposes, other scholars have shown that functionalism cannot appreciate the tensions and contradictions which make social systems complex and dynamic rather than uniform and static:

> [A]ll forms of social action as well as components of social institutions have multiple and opposing consequences that stand in pervasive tension with each other. Both conflicting group interests and the simultaneous functional and dysfunctional consequences of any social pattern make institutional stability always problematic.[31]

The final section of this chapter will examine theories of law and conflict which attempt to meet the challenge of providing a more nuanced account of phenomena like feud and dispute. First, however, we must consider another variety of theories about the nature

[26] Stirling (1970: 190–2).
[27] See, e.g., Cox (1968: 191).
[28] Elster (1990: 876).
[29] Comaroff and Roberts (1981: 2). See also Hallpike (1973: 455).
[30] Keiser (1986: 489–505).
[31] Rueschemeyer (1984: 134).

of legal institutions, one which emphasizes not their static qualities but the way in which they evolve to meet social needs.

Evolutionary theories implicitly reject the equilibrium-maintaining account of functionalist representations of conflict. They posit instead that the instability caused by the endemic feuds and conflicts in acephalous societies leads to the development of central institutions.[32] Society can only be preserved if legal institutions develop for the purpose of suppressing private violence and providing a binding and final resolution of private conflicts.[33] Such interpretations typically rest upon progressive theories of historical change, according to which institutions develop in stages as the emergence of modern (western) states follows its inexorable course. Thus feud, ordeal, and private settlement of disputes yield to centralized institutions ultimately designed to promote the rule of law upon which the fully developed state must rest.[34] While Hegel saw the unfolding of the Idea of Law as playing itself out over the whole span of human history,[35] modern historians, with their typically somewhat narrower chronological focus, often see the "achievement" of decisive transition from one stage to another as taking place in their particular period. For example, Walter Eder sees the development of the modern democratic conception of the rule of law as taking place in classical Athens as the loose association of aristocratic clans gives way to the centralized state.[36] As emerging democratic institutions destroy "the social bonds and values that had previously held society together" the ensuing "atomism," which, according to Eder, is a prerequisite of democracy, jeopardizes social coherence.[37] To meet this danger of the "social chaos that democracy creates,"

> A way had to be found to maintain a state of internal peace in a society that had largely eliminated most forms of social bonds and mutual obligations. The authority that provided a new focus for identification was the

[32] See Stein (1980) on the history of the idea of legal evolution.

[33] See Richard Epstein's (1985: 9) account of how this notion forms the basis for the Lockean notion of civil society, "where the centralized control of power made it possible to resolve private disputes, once and for all, in an impartial forum, free of bias and animosity."

[34] See, e.g., Runciman (1982: 360).

[35] The central theme of his *Rechtsphilosophie*, translated as *The Philosophy of Right* (Oxford 1952).

[36] Eder (1991: 169–96).

[37] (1991: 193).

state, and the means of keeping social order was the law, given to the people by the people.[38]

Eder here appears to read Athenian democracy through the political dilemmas and ideas of (western European) modernity. Classical Athens was hardly atomistic with no social bonds or values, as is often asserted of modern western mass societies. Eder relies here upon an idealized view of the transition from aristocratic dependency to the democratic rule of law, one which sees the law as the principal instrument of social order in overcoming the centripetal impulse of the anonymity and individualism of modern societies.[39] Of course, evolutionary explanations contain a kernel of truth. Societies do change, institutions emerge and wither. The problems with evolutionary theories have to do with their teleological impetus, with their tendency to see developments as the product of an inevitable "evolution" and hence not requiring particular explanation, and with the reductionism that results when one "stage" is seen as neatly "replacing" another. Such reductionism tends to blind historians to the much messier interplay of competing values and institutions in societies where the behavior characteristic of "earlier" stages inconveniently refuses to vanish.

Consider the following decree issued by the Japanese government in 1873:

> The right to punish a murderer lies with the Government. However, since ancient times it has been customarily regarded as the duty of a son or younger brother to avenge the murder of a father or elder brother. While this is a natural expression of the deepest human feelings, it is ultimately a serious breach of the law on account of private enmity, a usurpation for private purposes of public authority ... it is therefore decreed that vengeance shall be strictly prohibited.[40]

One would not likely guess from the wording of this decree that the "usurpation" and "serious breach" of which it speaks had been officially sanctioned. Yet, the previous practice ("Kataki-uchi") had been for individuals to request official permission from the judicial authorities to seek vengeance, usually for the murder of a member of their immediate family. In doing so they received governmental support and enjoyed public admiration. For example, in

[38] (1991: 194).
[39] See also Bleicken on the emergence of the rule of law at Athens (1985: 118–20, 349–51).
[40] Mills (1976: 525).

one such case two children of the deceased waited eleven years until they were old enough to seek revenge. They then applied to the appropriate officials, who responded:

> Concerning your request that you and your brother Seitaro be given leave to track down and kill Takizawa Kyuemon, the enemy of your late father Yagobe, instructions have been issued that you be given leave as requested ... If all goes well and you succeed in killing your enemy, you must comply with the regulations and report the circumstances to the local officials ... The allotment of rice to support your family will be continued so you need have no worries to distract you from the achievement of your goal.[41]

The elder brother, Kume Kotaro, did not succeed until 1857, forty years after the murder, but only sixteen years before the decree denouncing *kataki-uchi* as a "usurpation of public authority."

What accounts for the sudden disavowal of this ancient institution of private blood vengeance?[42] Evolutionary accounts typically dismiss such phenomena as fossilized vestiges of a more "primitive" stage. But how can this explain why the institution persisted or what was its social meaning? Nineteenth-century Japan had enjoyed centralized institutions for the administration of justice for centuries, so it was not that the Japanese were not yet "advanced" enough in their legal thinking to realize that private revenge is incompatible with legal order.[43] The answer undoubtedly has to do with the massive changes ushered in by the "opening to the West" after the Meiji restoration in 1865, but the concern here is with the way in which competing or contradictory values and institutional patterns may all play an integral role in a particular legal system.[44] New developments of course occur, but they usually do not completely displace previous institutions and beliefs,

[41] Mills (1976: 526).

[42] I here distinguish between, on the one hand, institutions of blood vengeance which involve one killing in response to a previous wrong, which killing is acknowledged as ending the violence and not requiring a further response. Blood feud, on the other hand, is by its nature open-ended and is usually terminated (if at all) by the intervention of third parties.

[43] See Bartlett (1992) on the state of enmity as a legally regulated form of permissible self-help in the Middle Ages and Wilson (1988: Chapter 10) on the continuing co-existence of (unsanctioned) feud and central institutions for the administration of justice in Corsica until well into the twentieth century.

[44] For a theoretical exposition, see Leach's (1965: 8–10, 85–87, 106) pathbreaking analysis of the interplay of contradictory principles in Kachin political organization.

and the extent to which they are to be judged as representing "evolutionary progress" is, as we shall see, very much dependent upon more general underlying presuppositions about government and society.

Some modern treatments of the development of central institutions in medieval Europe have similarly rejected earlier evolutionary schemes. J. Wallace-Hadrill, for example, concluded his classic study of Frankish blood feud by arguing against simple evolutionary paradigms whereby feud yields to royal justice: "To legal historians, feud dies a slow, inevitable death, yielding to the superior equity of royal justice; chaos and bloodshed give way to good order because they must."[45] But, he claims, feud is actually a far more complex practice that by its nature is bound up with mediation and composition. Feuding parties move back and forth from strategies of settlement to threat and violence, and this dynamic continues long after the introduction of royal justice.[46]

As noted above, Athens, too, is often described as conforming to such an evolutionary course, as portrayed, according to some, in Aeschylus' *Oresteia*. As a Greek social historian puts it, with the introduction of the Draconian homicide law in the last quarter of the seventh century, homicide, "hitherto a source of blood feuds and vendettas, became a matter for resolution in a court of law."[47] While important institutional developments doubtless did take place in the archaic period, subsequent chapters will argue that they should not be seen as eliminating the private settlement of dispute or pursuit of enmity. One can also read the *Oresteia* as a monument not to the end of feud, but to its incorporation into the world of the polis.[48] The acquittal of Orestes turns more on the

[45] Wallace-Hadrill (1959: 485).

[46] Wallace-Hadrill (1959: 485–7), and see also Wickham (1986: 123): "In early medieval Italy, as elsewhere in Europe, this effectiveness [of centralized institutions] was dependent less upon the coercive power of officials, than on the preparedness of parties to accept the procedures of the court, and on their willingness to accept court judgments or to come to terms informally ..."

[47] Whitehead (1991: 149). See also Runciman (1982: 360) and Hölkeskamp (1992: 102–6).

[48] A. Epstein (1967: 240) speaking of the later European legal tradition, comments that "Kings and lawyers may not have felt the need to legislate against feud and private settlement (indeed, when they did so it was fruitless); what they could do instead was to absorb the feuding process and its analogues into their *own* institutional structures, by making these available for the conduct of conflict at all levels ... [W]e can see how the victory of the state was not the victory of its legislation, or even of its interest in and capacity for direct intervention, but of the success of its institutions in capturing the disputing processes of local élites."

political relations of the parties than on considerations of justice, and the process of reaching judgment is by no means objective or unbiased.[49] But, more importantly, disputes of the elites are henceforth subject to the judgment of public institutions. The question is whether this development is to be seen as the emergence of a new "stage" of legal order where feud vanishes and is replaced by the rule of law and the civic administration of justice which provides an impersonal, final, and binding resolution for private conflicts. Or is it, to paraphrase Clausewitz, the continuation of feud by other means?

Robert Bartlett concludes a study of enmity in medieval European legal systems by arguing that, as emerging national states were able to forbid the waging of private wars within their territories, private conflicts had to be fought primarily through litigation rather than violence.[50] This process, he shows, should not be imagined as the self-unfolding of ideals of justice, but rather as an often bloody struggle for power amongst political elites in which ordinary citizens were, as often as not, hapless victims caught between king and seigneurs. Further, royal justice sought to displace local systems of mediation and adjudication which were often far more effective in resolving disputes. Indeed, royal justice often "exacerbated disputes between individuals when local arbitration might have achieved successful reconciliation."[51] In this period, he demonstrates, local communities might see little difference between the actions of royal officials who looted, raped, and killed, and marauding seigneurs, unruly neighbors, or common bandits. This should prompt us to recognize, he adds, that, "The distinction between public and private violence was a rhetorical weapon of the monarchy as it entered, one contestant among many, an arena of conflicting powers and authorities."[52]

Recognizing that legal institutions may be shaped by political

[49] Athena casts the deciding vote, but upon her entrance has already indicated her intimate connection to the defendant's family and stake in the war which has produced this familial catastrophe. See Cohen (1986: 135–7), and cf. Luban (1987: 312–13).

[50] Bartlett (1992).

[51] (1981: 91), and see Wormald (1986: 192). This interpretation is widely accepted in recent treatments of dispute and conflict in medieval and early modern Europe.

[52] (1981: 95–6). One should not imagine that such contention between national and local authority ended in the Middle Ages. Anthropologists have described its persistence in a wide variety of European, South and Central American, and non-western communities. Herzfeld (1985: 25), for example, has shown how in Crete Glendiots use agonistic displays to mock "officialdom's claims to the absolute right of arbitration."

competition for power and domination, rather than emerging through some impersonal process of jurisprudential evolution in response to societal "needs," cautions us not to accept at face value ideological justifications for "advances" in the administration of justice.[53] Perhaps in the *Oresteia* Aeschylus, too, wanted to draw attention to the ambivalence of the "justice" of the polis, which though more "civilized" than that of the Erinyes, nonetheless reaches a dubious result for even more dubious reasons, through a decision-making process that is far from impartial and whose preordained result is underwritten by force.[54] Rather than seeing the *Oresteia* as celebrating the foundation of civic justice one can also read it as commenting on the necessarily political grounding of all civic institutions, even those which claim to rise above the realm of politics.[55] As Foucault even more pessimistically put it, "Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination."[56]

In short, evolutionary anthropological studies assume that legal institutions inevitably arose to correct the "pathological state" or "malfunctioning" which conflict represented. This correction took the form of the imposition of legal rules, compliance with which was the foundation of social order.[57] However, as the legal anthropologist Simon Roberts argues, "Recent work has shown the untenability of two widely held beliefs in the anthropology of dispute: (1) 'fighting precedes talking' in evolutionary terms and then gives way to talking at some identifiable point in social development (2) 'settlement-directed talking' is governed by rules while fighting is not."[58] Building upon such insights some recent studies in legal anthropology have tried to develop alternative theoretical perspectives for the study of law and conflict. In the concluding part of this chapter we will examine some of these efforts which may prove

[53] As Strathern (1985: 113) comments, "For the very idea that law is a societal mechanism which meets basic human needs for regulation is part of the ideology of law ..."

[54] See Cohen (1986: 134–7) on Athena's threat of Zeus's thunderbolts and the constant refrain in the second half of *Eumenides* that fear is the bulwark of an orderly state and that internal peace may be purchased through external aggression.

[55] See Meier (1990: 103–19).

[56] (1977: 51).

[57] See Comaroff and Roberts (1981: 5).

[58] (1983: 8–9).

particularly useful in providing an orientation for the study of Athenian institutions.

Wilson's recent study of *Feuding, Conflict, and Banditry in Nineteenth Century Corsica*[59] is the best modern treatment of feud. Wilson shows how in Corsica feud was carried out in the presence of a bureaucratic and centralized legal order, that, despite ongoing efforts, was unable to prevent it. Feuds were typically of very long duration, ranging from one or two decades to several centuries.[60] In such feuds there were quieter periods when the enmity was channeled into political and economic competition and conflict, but erupted again years later into murder. Peace was usually concluded by a convergence of various means, including the intervention of third parties, resort to the courts, and the negotiation of formal peace treaties outside the courts.[61] Such treaties often conflicted with the law in giving immunity to those who had committed offenses, promising that no prosecutions would follow, or even providing that the other party would assist in obtaining an acquittal in the state's homicide prosecution. Some later treaties provided that justice might take its course or permitted families to use the legal process to their own advantage, "but only by employing honest and fair means."[62]

Wilson depicts the ongoing efforts of central authorities to suppress the feud, efforts which were only successful well into the twentieth century. In another sense, however, feud is never entirely suppressed, though it may assume different forms. Feud should not be thought of as a mindless and mechanical series of killings where the individuals involved are merely instruments of a process rather than agents. As Wilson notes, whatever the immediate causes of the feud, the underlying conflict was about power and hierarchy among local elites: "Competition for control over local property and for local political power was usually, in effect, the essence of the feud."[63] The increasing development of centralized bureaucratic power induced the wealthier members of the elite to abandon blood

[59] Wilson (1988).

[60] Wilson (1988: 53) calculates that 11% of Corsican feuds lasted for over a century, 47% for 50 to 100 years, and 42% for 10 to at least 20 years. These figures underestimate the duration of feuds, he says, because of the lack of full documentation, especially for earlier periods.

[61] (1988: 248).

[62] (1988: 260–1).

[63] (1988: 56).

feuding and compete in the political arena. Thus, "Over the course of the nineteenth century, the highest stratum ceased to be directly involved in feuding and its members competed instead via patronage and the manipulation of the political and administrative system."[64]

Did feuding end? As appears above, Wilson has shown that already in earlier centuries feuds involved a variety of forms of conflict. What seems to have happened in the late nineteenth century is that Corsican elites resorted more and more to non-homicidal strategies to pursue their feuds, though physical violence of various kinds never entirely disappeared. They were also increasingly able to co-opt central institutions to serve their competitive purposes. Wilson's analysis thus shows how private means of settling disputes co-exist with central institutions, and how conflict may take a variety of forms, flowing from homicidal violence to political competition to economic warfare, and so on.[65] What this suggests is that feuding behavior should not be identified solely with blood feud, but should be seen as an enduring long-term relationship of conflict following a retaliatory logic.

Seeing feud in this light suggests that conflict should not be conceptualized as a disease-like entity which interrupts the "normal" life of a society, but rather as an integral part of it. As Epstein comments, "It is not so much that quarrels are never wholly resolved, but rather that cases have their sources in the ceaseless flow of social life, and, in turn, contribute to that flow."[66] Litigation, then, is not the imposition of a social mechanism, but a product of the parties' strategies. What takes place before the courts is not "the dispute" and its final settlement, but one moment in a continuing relationship of competition or enmity.[67] In discussing the trend towards such perspectives in legal anthropology, Roberts explains that the investigation of disputes is no longer limited "to the narrow 'slice' represented by proceedings before

[64] (1988: 417).

[65] Wilson shows that by far the most prevalent form of property crime in nineteenth-century Corsica was not theft, but deliberate damage to property. As a Subprefect in Corsica commented in 1820, "The ordinary acts of revenge carried out in the Tallano district for some time now are to destroy livestock, to throw down enclosures, to cut fruit trees and to damage vines. Everyone seeks to impoverish his antagonist" (Wilson (1988: 89)).

[66] (1967: 230).

[67] See A. Epstein (1967: 233) and Roberts (1976: passim).

courtlike agencies, but widened to include consideration of the whole ambit of conflict."[68] Institutions are no longer the central focus of inquiry but individuals and their conflicts, strategies, and motivations.

Such observations are particularly appropriate for legal systems, like that of classical Athens, which rely heavily upon the participation of private citizens. For example, Comaroff and Roberts identify two fundamental features of Tatswana law: first, since most cases are initiated by a complainant, rather than by a neutral third party, "the definition of disputes is generally determined ... by the litigants themselves. Second, notwithstanding the functionalist assumptions that continue to pervade much of legal anthropology, the parties engaged in litigation are primarily concerned to emerge victorious, not simply to ensure that conflict is resolved and that amicable relations are restored."[69] In Athens too, the non-professional, participatory nature of the administration of justice, and particularly the private initiation of criminal prosecutions, enhanced the opportunities for individuals to manipulate legal institutions to serve their private purposes. As in Athens, among the Tswana, because the onus of career management falls upon the individual, "litigation represents a public arena in which personal ambitions and competing efforts to contrive relations and rights can be expressed and legitimated."[70]

It is the virtue of such "process-oriented" approaches to dispute resolution to have provided a necessary corrective to the structural–functionalist approach which neglected the role of agency in postulating social life as strictly rule-governed. One of the most exciting developments in contemporary social theory has been the attempt to avoid the polarity of structure versus process by emphasizing the dynamic relationship between them.[71] Comaroff and Roberts, for example, argue that individuals do not mechanically follow rules that are simply imposed upon them, but a society's normative repertoire "is consistently seen both to regulate dispute

[68] Roberts (1976: 668).
[69] (1981: 30).
[70] (1981: 216).
[71] See Comaroff and Roberts (1981), Bourdieu (1977: Chapters 1–2; 1990: Chapters 3–4), and Giddens (1984).

processes and to be the object of strategic negotiation."[72] This normative repertoire does not inhabit an ideal realm independent of social action, but represents "a symbolic grammar in terms of which reality is continually constructed and managed in the course of everyday interaction and confrontation."[73] The appropriations of the normative repertoire by individuals in the course of their interactions with one another are, at the same time, the means by which the norms are reproduced and, over time, transformed.

Such an appreciation of litigation helps us to understand how in agonistic societies like classical Athens, with their typically egalitarian ideologies, a legal system which depends heavily upon private initiative may become an important means for adjusting or clarifying social and political hierarchies. Among the Hagen of New Guinea, for example, "a rhetoric of egalitarianism" defines a sphere of essentially competitive relations. In one of the most important recent studies of litigation and social control, Marilyn Strathern has shown how within this sphere dispute settlement becomes *part* of ongoing political processes which are essentially agonistic. Because settlements are seen as part of ongoing competitive relationships, "termination" of dispute cannot serve to restore relations and maintain social equilibrium. Thus, she argues, "Disputes cannot simply be set against their 'resolution'. It is not just that disputes are never finished. Rather I suggest *that the more disputes are 'settled' the more they will erupt*" (my italics).

The process of disputing and settling disputes is part of larger processes through which groups and individuals define themselves socially, display their strength, mobilize support, underpin revenge, and so on.[74] Seeing dispute resolution in this light can help us to appreciate the way in which Athenian litigation is in significant part shaped by the larger political and social enterprise of defining, contesting, and evaluating hierarchies and allegiances in an agonistic society. Litigation, it follows, must not be seen as a separate order phenomenon from the conflicts which engender it

[72] (1981: 239), and see generally Ellickson (1991). "Far from constituting an 'ideal' order, as distinct from the 'real' world, the culturally inscribed normative repertoire is constantly appropriated by the Tswana in the contrivance of social activity, just as the latter provides the context in which the value of specific *mekgwa* [norms] may be realized or transformed."

[73] (1981: 246).

[74] Strathern (1985: 124–5).

but rather as on a continuum with them.[75] It follows that when analyzing evidence like Athenian forensic orations, "litigant's talk cannot be abstracted as a commentary on acts already completed as it were – that is, not part of the acts themselves."[76]

Thus, litigation at Athens, as among the Hagen, should not be judged according to a set of independent norms, but rather as part of an ongoing process that began long before the particular trial and will, with the assistance of the trial, continue into the future. Athenian litigation, together with the injuries and animosities that fueled it and the forensic rhetoric which constituted it, should be studied as part of the agonistic process by which the parties seek publicly to define their relations to one another. Athenian legal institutions did not evolve through the operation of some evolutionary "invisible hand" to meet "societal needs." Nor did they serve as a means by which society imposed a final resolution on private disputes so as to prevent further conflict and maintain social equilibrium. Rather, they at once provided the framework for, and were *constituted and transformed* by, the competitive efforts of groups and individuals to pursue their enmities, advance their interests, and, to recall the traditional Greek definition of justice, "to help their friends and harm their enemies" (Plato, *Republic* 332d–335c).

This chapter took as its epigraph the ancien régime maxim reported by Nicole Castan, "Always mistrust the law." Why mistrust the law? Because the law, as we have seen, is not some impersonal truth-finding mechanism which "evolves" to produce "justice" from the chaos of dispute. Though the ideology of the law typically portrays it as unchanging from time immemorial and "blind" in its judgments, legal systems are the continuing creation of human beings with various, shifting, and contradictory motivations and interests, motivations and interests which range from settling disputes to exacerbating them, from using the law as an instrument of social justice to honing it as a weapon of oppression, from making peace with one's enemies to annihilating them with the help of legal institutions. Law, rather than operating in a wholly separate realm, is enmeshed in the social sphere. Courts, rather than finally resolving conflicts, may provide yet another arena where they are pur-

[75] Strathern (1985: 128).
[76] Strathern (1985: 128). She is speaking, of course, of Hagen litigants not Athenians.

sued. The law may thus both contribute to the maintenance of social order as well as help to threaten it. The next two chapters take up the efforts of Greek political theory to understand and resolve this ambivalence.

CHAPTER 2

# *Theorizing Athenian society: the problem of stability*

> During the seven days that Eurymedon stayed there with his sixty ships the Corcyraeans continued to massacre those of their own citizens whom they considered to be their enemies ... There was death in every shape and form. And, as usually happens in such situations, people went to every extreme and beyond it. There were fathers who killed their sons; men were dragged from the temples or butchered on the very altars; some were actually walled up in the temple of Dionysus and died there. So savage was the course of this civil war, and it seemed all the more so because it was one of the first ... Later, of course, practically the whole of the Hellenic world was convulsed, with rival parties in every state.
>
> (Thucydides 3.81–2)[1]

*Stasis*, the disintegration of a political community into rival warring factions, was the specter which haunted classical Greek political theory. Although Thucydides' principal focus was the war between states which convulsed the Greek world for the last thirty years of the fifth century, he also carefully analyzed the way in which the pressure of this external conflict intensified the tensions inherent within the polis and undermined the institutions responsible for maintaining social cohesion. Indeed, it is not coincidental that he traces the origins of his paradigm of stasis, the civil war in Corcyra, to the co-optation of legal institutions for the particular purposes of rival factions. On his account, the conflict begins when the oligarchic faction brings a democratic leader, Peithias, to trial on a blatantly political charge. Being acquitted, he retaliates by prosecuting five of his richest opponents for an alleged religious offense. Convicted and faced with a crushing penalty, they plead for mercy by adopting the religious status of suppliants. Far from seeing this

[1] Translations are from the Rex Warner Penguin edition with some modifications.

as an opportunity for reconciliation, Peithias uses his position as a member of the Council to persuade his colleagues to enforce the full penalty. Having nothing left to lose, the oligarchs respond by bursting into a meeting of the Council with daggers drawn and murdering Peithias and sixty others (Thucydides 3.70).

Following the escalating and inexorable retaliatory logic of feud, the conflict engulfs the whole Corcyraean community and leads to atrocities like those described in the passage quoted above. Pursuing their desire for revenge both parties further subvert the institutions which alone could serve to mediate the conflict. Thus, the democrats persuade a group of oligarchic suppliants in a temple to leave by promising them a trial: "They then condemned every one of them to death (3.81)." Generalizing on the basis of his analysis of the Corcyraean case, Thucydides argues that in civil war, "Revenge was more important than self-preservation" (3.82). Accordingly, men did not hesitate to abuse judicial institutions, betray trust, and violate oaths and pacts (3.82), seemingly unconcerned that in doing so they were destroying that very institutional fabric which makes civic life possible: "They were deterred neither by claims of justice nor by the interests of the state; their one standard was the pleasure of their own party at that particular moment, and so, either by means of condemning their enemies on an illegal vote or by violently usurping power over them, they were always ready to satisfy the hatreds of the hour" (3.82). The result, inevitably, was a situation in which the mediation and trust necessary for reconciliation were no longer available:

> Society had become divided into two hostile camps, and each side viewed the other with suspicion. As for ending this state of affairs, no guarantee could be given that would be trusted, no oath sworn that people would fear to break; everyone had come to the conclusion that it was hopeless to expect a permanent settlement and so, instead of being able to feel confident in others, they devoted their energies to providing against being injured themselves. (3.83)

For Thucydides, the "love of power, operating through greed and through rivalry for honor, was the cause of all these evils" (3.82). This quest for power, combined with a blind thirst for revenge for wrongs done, produces a murderous competition which citizens view as a zero-sum game. Such competition engulfs and ultimately dissolves the political community. Political and social

bonds are thus fragile, and when subjected to severe external pressures like war or plague, they tend to dissolve. This dissolution is prompted by human nature, which "once seriously set upon a certain course cannot be prevented from following that course by the force of law or by any other means of intimidation whatever" (3.45 and cf. 3.82 and 2.50–3). Thucydides portrays the Spartans as believing that a lifelong regime of the strictest training and discipline might provide the best protection against these natural tendencies:

> There is no need to suppose that human beings differ very much from one another; but it is true that the ones who come out on top are the ones who have been trained in the hardest school. Let us never give up this discipline which our fathers have handed down to us and which we still preserve and which has always done us good. (1.84)

In other cities, it was civic institutions which provided a bulwark to protect the city from the excesses which unrestrained human nature would otherwise produce. As the debacle in Corcyra demonstrated, however, when the courts themselves become implicated in the predations of one group against another, they can no longer serve the common interests of the community as a whole. The downward spiral into the anarchy of stasis is the apparently inevitable result.

Some modern theorists, however, have claimed that in agonistic societies competition and conflict support the social order by reaffirming community values. Bourdieu, for example, in a seminal study of honor and shame in Kabylia, argues that conflict in Kabylia takes the form of "a strictly regulated game, of an ordered competition, which, far from threatening social order, tended on the contrary to safeguard it by making it possible for the spirit of competition ... to express itself in prescribed and institutionalized form."[2] Of course, such conflicts are not as inherently stable or as rule-governed as functionalist explanations would have one believe. Thucydides shows how under external pressure the "strictly regulated game" of competition and conflict breaks down as the "rules" lose their force: "In times of peace and prosperity cities and individuals alike follow higher standards, because they are not forced into a situation where they have to do what they do not want to do.

[2] (1966: 201).

But war is a stern teacher; in depriving them of the power of easily satisfying their daily wants it brings most people's minds down to the level of actual circumstances" (3.82 and cf. 2.50–3). He makes this point with particular force when juxtaposing Pericles' praise for exemplary Athenian piety, moderation and obedience to the authority of law (2.37), with a description of the plague, which brought about a state of "unprecedented lawlessness":

> No fear of god or law of man had a restraining influence. As for the gods it seemed to be all the same whether one worshipped them or not ... As for offences against human law, no one expected to live long enough to be brought for trial. (2.53)

Conflict, then, is inherently neither self-regulating nor a mechanism to help maintain the social order. As Thucydides shows in his descriptions of stasis and the plague, if conflict between groups in society becomes generalized enough, it can lead to the disintegration of the social order, not to its preservation. This result is logical enough, for the players of the "game" do not think of it as a game which serves to preserve order, they see only the *agōn*. Hence, when conflict spreads to the point where a large enough part of the community becomes involved and society can thereby no longer exert a mediating influence (passively or actively), then the normative force of public judgments of right and wrong, honor and shame, loses its efficacy, social constraints on conflict dissolve, and the result is the chaos of unregulated violence.

Like Thucydides, Aristotle and Plato viewed the problem of stasis as the fundamental challenge to political theory. Indeed, in a sense the underlying goal of Aristotle's and Plato's political works is to analyze the causes of social disintegration so as to develop an institutional framework for social cohesion and, hence, political stability. Why did they view stasis as such an ever-present danger? After all, Athens and Sparta, the two principal models of Greek political organization, enjoyed considerable stability. Such stability, however, may appear less fragile with the benefit of hindsight than it did to contemporaries. In Athens, the oligarchic coups of 411 and 404 were not repeated, but they nonetheless cast a long shadow on fourth-century political thought. So did the purported unsteadiness of democratic decision-making as vividly portrayed by Thucydides in the Mytilenean debate, or as displayed in circumstances like the illegal execution of the Athenian generals after

the battle of Arginoussai. Moreover, as Thucydides indicates, stasis appears to have been a persistent and acute problem in many other Greek cities. Although this historical background may in part explain the centrality of the problem of social disintegration in Aristotle and Plato, it is far from the whole story. More important were their views on the nature of political community. These conceptions of political community, in turn, rested upon moral-psychological interpretations of social action which made stasis appear inevitable unless institutional means were found to inhibit it. This chapter briefly describes that moral-psychological interpretation as a prelude to the next chapter's analysis of Aristotle's and Plato's solutions to the dilemma that it posed.

Modern studies of political disintegration often focus upon the problem of factionalism. In the modern context, factionalism is understood as arising when two or more groups with competing interests threaten to push society into civil war by pursuing those interests too vigorously.[3] In studying classical Athens, however, most scholars now agree that factionalist models of competing political parties or class struggle are not particularly illuminating.[4] Plato and Aristotle, like Thucydides, do not attribute political instability to the machinations of particular political groupings, but rather to underlying moral-psychological dispositions. Human beings, they believe, are naturally competitive, and agonistic societies naturally tend towards disintegration. Although common interests bring political communities together, in most states competitive aspirations and a propensity for excess inevitably threaten to drive them apart.[5]

In *Politics*, Aristotle diagnoses at length the causes of instability in existing democratic and oligarchic states. Oligarchies and democracies, he argues, are generally distinguished by a sharp division between the many who are poor and the few who are wealthy. Such states are inherently unstable because the poor envy the wealthy and the wealthy despise the poor (1295b19–29). In such states conflict stems from the competing ideologies of equality

[3] See, e.g., Beals and Siegel (1966).

[4] Siegel and Beals (1960: 397) emphasize that factions need not be conceptualized as clearly defined groups in terms of ideology, class, or goals. They found (1960: 399) that, "the main incentive for joining a faction appeared to be hostility toward some members of the opposing faction. The only clearly stated goal of the factions was the 'bringing down' of the opposing faction." Cf. Chagnon (1990: 101–2).

[5] See de Romilly (1975: 131–82).

which produce this mutual resentment (1301a25). The democratic conception of equality maintains that all are entitled to an equal share, and the poor, when deprived of such a share envy the wealthy and resent their privileges. The oligarchic version of equality, on the other hand, maintains that those who are better (e.g., wealthier) deserve a greater share of power and influence. When denied that greater share under a democratic constitution, such individuals feel insulted by being placed on an equal footing with their inferiors. These competing notions of equality thus produce different answers to the most basic political question of who should rule. Accordingly, "whenever either side does not share in the constitution according to the fundamental assumption in each case, they resort to stasis" (1301a37). This striving for equality then, is, in general, the origin of stasis (1301b5–6; 1301b26–1302a15).

In most democratic and oligarchic states stability is always precarious because there is no institutional means to mediate between these conflicting claims. Whichever of these two extreme groups is on top conducts the government so as to maintain itself in power against the interests of their rivals (1296a22ff.). In such a state stasis and conflict are inevitable and constant, because the dominant group looks only to its own advantage. Government becomes little more than a continuous rivalry where each side regards supremacy as a prize of victory (1296b31). Aristotle thus portrays most societies as rent by such competitive struggles for ascendancy, unmoderated by any concern for the general good. As Thucydides similarly observes of Corcyra, "These parties were not formed to enjoy the benefits of the established laws, but to acquire power by overthrowing the existing regime" (3.82). Aristotle concludes that since political rule is simply an instrument for one's own advantage, "... into whatever state you go, you will find that they have got into the habit of not even wanting equality: their aim is to rule or to accept a condition of defeat" (1296b1–3).[6] Here Aristotle seems quite close to Plato's view (examined in chapter 3) that societies exist in a state of war of "every man against every other" (*Laws* 626d–e) and that existing constitutions simply reflect the dominance of whatever group has managed to seize power.

[6] Loraux (1991: 39) comments that politics itself is seen by the Greeks as separated by only a thin line from sedition.

Undergirding Aristotle's analysis of stasis is an argument about the moral-psychological grounding of human motivation. He claims that men engage in stasis because of a desire for honor and gain, or fear of their opposites, dishonor and loss (1302a32–34). It is these motivations which produce antagonisms over the achievement of "equality." He goes on to explain that he refers to honor and gain as motivations which "stimulate men to fight against each other in order to acquire them" (1302a39).[7] The desire for the social recognition of one's superiority thus lies at the core of the agonistic impulse which produces social conflict, but there is also another motivation which leads to civil strife. When men see others receiving a greater share of honor and gain than they themselves can have, envy prompts them to want to deprive the others of this advantage.[8] Envy is thus necessarily divisive, because it involves the will not to outstrip others in the race for glory or prestige, but rather merely to overthrow their relatively greater prosperity.[9] In the political arena, of course, this produces stasis. Although Aristotle enumerates other sentiments which similarly motivate individuals (e.g., hubris, fear, dominance and contempt; 1302b2), the moral psychology of stasis essentially has two prongs: that which men want either to acquire or to avoid losing (i.e., honor and gain) and envy of what others have. This explains, Aristotle claims, why men resort to stasis against those in office who display hubris and pleonexia in obtaining greater shares for themselves. In short, stasis arises when men "suffer dishonor and see others honored" (1302b5–20).

Building upon this moral-psychological analysis, Aristotle catalogues actual examples of stasis to show how the instability of oligarchies and democracies arises from the same root causes. He begins with some general examples which show how relatively trivial disputes can engulf the whole state in conflict when they involve disputes between members of the elite (1303b17–1304a16).

[7] And see also *NE* 1095a2–4. Thucydides' account of stasis also emphasizes the disruptive force of the quest for honor. He claims that Pericles' successors pursued their private *philotimia* at the expense of the city (2.65), and that during the revolution of 411, Theramenes and his associates were also motivated by private *philotimia* (8.89; and cf. 3.82 for Corcyra).

[8] See Thucydides (3.82), where in Corcyra those moderate citizens who tried to stay out of the conflict were "destroyed by both parties, either for not taking part in the struggle or from envy at the possibility that they might survive."

[9] See Foster (1972: 165–202) on envy and aggression.

For example, in Syracuse sexual rivalry among two young men from the elite led to stasis when one seduced the *eromenos* (young male beloved) of the other, who retaliated by seducing the first man's wife. The citizen body split between them in the strife that ensued. Two other cases, in Delphi and Mytilene, arose over disappointment in the negotiation of marriage alliances when one party felt dishonored by rejection. In the former case they avenged the dishonor by trumping up a charge of temple robbery against the erstwhile groom, who was then sentenced to death. In the latter instance, the disappointed father is a public official who is able to use his office to obtain revenge. Aristotle's last example also involves a prospective father-in-law who in his capacity as an official fines his future son-in-law, who evidently had expected to be protected by his relation. The young man then takes revenge, which leads to stasis (1304a15).

Aristotle concludes from these examples that stasis arises when some citizens are envious of the honors enjoyed by others or become powerful and are no longer willing to remain on terms of equality with the rest (1304a33). In all of these cases the same dynamic seems to be at work. Members of the elite see themselves as competing for honor in all spheres of life. When they are unsuccessful in their endeavors, they feel dishonored and take revenge against those who they believe have wronged them. In doing so, they do not hesitate to abuse public institutions for their private ends. The pre-existing societal tension arising from conflicting conceptions of equality ensures that these private disputes lead to public violence. Stasis is thus the seemingly inevitable result of agonistic social relations in societies which cannot successfully mediate contending claims of honor and equality.

Having set out these general principles, Aristotle turns to an analysis of the characteristic causes of stasis in democracies and oligarchies. Democracies, for example, are usually overthrown when popular leaders go too far in oppressing the wealthy, who eventually respond by overthrowing the constitution and establishing themselves in power (1304b19). The now familiar dynamic of honor and envy is at work here. The popular leaders exploit the envy of the many and their desire to impoverish the rich and pull them down to their own level. The elite, in turn, both resent the dishonor of being ruled by the poor and seek revenge for the wrongs done them. Significantly, implicit in the series of examples Aristotle

presents is the way in which leaders use civic institutions like the courts as weapons against their opponents. They bring "malicious prosecutions" and "slanderous accusations" against the wealthy, or "banish them in order to confiscate their property." These victims, "weary of the lawsuits brought against them" retaliate by overthrowing the democracy (1304b19–1305a1).[10] As in Thucydides' description of Corcyra, legal institutions cannot help to preserve society when they are manipulated to serve the interests of one faction against another.

From the institutional perspective, the law occupies a key role in the analysis of stasis. Aristotle, Plato, and Thucydides all agree that the willingness to subvert legal institutions in the service of private interests undermines the possibilities for political stability. Thus, according to Aristotle, democracies degenerate whenever the *demos* has sovereign power over the law. This sovereignty of the many enables demagogues to seize power and they "make one state into two" by their attacks on the rich.[11] For the sake of stability they ought to behave in just the opposite way and appear always to be speaking on behalf of the rich. Oligarchies should act in a similar manner towards the demos so as to create a sense of common interests (1310a2–11).[12] Most existing societies, however, follow Thrasymachus in viewing law as merely a means for furthering the interests of those in power (Plato, *Republic* 338d–339a). Litigation, then, becomes like party politics: a kind of internal warfare for the infliction of mutual injury (Plato, *Laws* 679). Thus, in existing states the law, rather than providing a means for the just resolution of disputes, serves as a weapon in the internal strife that characterizes civic life.[13] As we will see in the next chapter, Plato and Aristotle believed that a society, if it hopes to endure, must preserve the legal order from such partisan entanglements.

[10] Cf. *Politics* 1308b24–1309a32.

[11] Cf. Plato, *Republic* 422e–3b, where he refers to states as at least two states, split by stasis between rich and poor. And cf. Coser (1967: 47).

[12] Some modern historians, of course, believe that the stability of Athenian democracy rested upon just such grounds; e.g., Christ (1992: 346) and Sinclair (1988: 68, 155–6). Raaflaub (1991: 583, fn. 31), on the other hand, emphasizes the corrosive effects of "fierce competition by increasingly irresponsible means, factional strife, selfishness, arrogance, greed, and corruption, unlimited ambition," and so on, in the decline in leadership and political life after the Peloponnesian War.

[13] See *Laws* 744d, where Plato notes that a city cannot achieve concord when lawsuits are rampant.

CHAPTER 3

# *Theorizing Athenian society: the rule of law*

The previous chapter argued that Thucydides, Aristotle, and Plato regarded conflict and civil strife as occurring naturally in Greek cities. The rivalries through which political and social hierarchies are established and contested unleash the centrifugal forces of resentment, enmity, retaliation, and violence. These forces are fueled by the corrosive power of envy and the primal drive for revenge. How can these centrifugal tendencies be checked? In classical Athens political thinkers of various ideological hues all agreed that the rule of law could provide a bulwark against civil strife. As Thucydides showed how the survival of a political community required the preservation of legal institutions independent from competing factions, so too Plato and Aristotle argued that the stability of the polis depended upon the rule of law. Skeptical of radical democracy, they contrasted the rule of law of the good society with the lawlessness and license of contemporary Athens. Athenian democratic politicians, on the other hand, tirelessly reaffirmed that the rule of law was the bulwark of radical democracy, and that in non-democratic cities those who held power pursued their interests without respect for the laws and constitution. In other words, while everyone might agree that the rule of law alone could preserve a city from stasis, their respective conceptions of the rule of law were closely connected to commitments to particular ideologies of political community. This chapter examines this connection between different Athenian conceptualizations of the rule of law and the way they were deployed to support competing political theories and ideologies.

In recent years classical scholars have frequently emphasized the central role of the rule of law in the development of Athenian democracy.[1] These studies, however, have seldom addressed the

[1] See, e.g., A. H. M. Jones (1957: 50–4); Finley (1976: 1–23); Sealey (1987: chapter 7); Ostwald (1986: chapter 10); Ober (1989: 299–304).

question of just what the rule of law is (or, to put it another way, how it was conceptualized in classical Athens) and typically use the term as if its meaning were self-evident.[2] This neglect seems to rest upon unarticulated convictions that in antiquity the rule of law meant much what it does today, and that because it means the same thing to everyone it requires little elaboration. However, just as contemporary jurisprudential interpretations of "the rule of law" differ according to national legal culture, philosophical orientation, or ideological conviction, so in antiquity its meaning was far from univocal. In contemporary Anglo-American legal scholarship the importance of the rule of law is universally affirmed while there is no general agreement as to what exactly it is. Some scholars claim that it is merely a formal principle that bears no relation to substantive principles of justice or political organization, while others see it as central to the fundamental convictions of modern liberal democracy.[3] Likewise, Athenian political thinkers and politicians paid tribute to its importance while disagreeing both as to its nature, as well as to the political ends it should serve. In exploring theories of the rule of law in classical Athens, this chapter will identify three different strands of thought about the rule of law and show how they are all conceived instrumentally as means to the realization of particular ideological conceptions of the "best" and most "natural" form of political community.

The first of these appropriations of the idea of the rule of law is found in Aristotle's *Politics*.[4] It emphasizes sharp limitations on the power of popular deliberative bodies together with the entrusting of magistrates with broad disciplinary authority to maintain the civic virtue on which the preservation of constitutional government depends. For the sake of convenience, I call this the "censorial" model, after the Roman institution of the Censor who had wide-ranging discretionary power to regulate the moral life of Roman citizens. The second model is found in Plato's *Laws* and emphasizes the creation of the "fiction" of sacred, immutable, personified Laws

[2] E.g., Sealey (1987: 147), and see the more nuanced treatment by Vlastos (1981: 164–203).

[3] Compare, e.g., Raz (1977: 195–211), Dworkin (1986: 93), Posner (1990: 319–20), and Shklar (1987: 1–16). See also Walker (1988: chapter 1) for a discussion of the problems of definition.

[4] I will discuss Aristotle first because I think that his conception of the rule of law provides the clearest contrast with contemporary notions. For purposes of considering these three models, considerations of chronology, and of Plato's considerable influence on Aristotle's political ideas, are largely irrelevant.

which rule over citizens who are their slaves or servants. Plato's theory focuses upon the grounding of the rule of law in processes of education and socialization which create the conditions necessary for the maintenance of this fiction.

Both Plato and Aristotle use their theories of the rule of law as a basis for a critique of Athenian democracy as undisciplined and lawless. As indicated above, however, radical democratic ideology emphasized its foundation upon the rule of law. The final section of the chapter will examine this democratic model which rests on the notions of equality before the law and the delimitation of a private sphere protected from illegitimate or "censorial" intrusions by the state. The Aristotelian and Platonic versions, on the other hand, encompass the complete collapse of the public/private dichotomy, though Plato, contrary to current orthodoxy, emerges as less hostile, in significant ways, to democratic institutions than Aristotle. This chapter confines itself to theory and ideology, but subsequent chapters will suggest that while the radical democratic conception of the rule of law seems quite familiar in certain respects, nonetheless, in the name of democracy it provides for forms of social control that vary considerably from principles of legality often associated with contemporary notions of the rule of law. The "rule of law," far from appearing as a neutral term of universally agreed significance, marks out a contested territory intimately linked to strategies of legitimation and domination.

## I

Aristotle's account of the rule of law builds upon his analysis of the nature of political community.[5] In order to appreciate fully the role which he attributes to law in the government of the polis one must trace the roots of that role in his general theory of political associations and in certain assumptions he makes about human nature.

First, Aristotle grounds his theory in the unique capacity of human beings to form political associations (*Politics* 1253a10–18):

> Man alone of the animals possesses speech. The mere voice, it is true, can

[5] I avoid here the complex questions about the nature of the *Politics* and the relation of its parts to one another. See Schütrumpf (1980) on these issues in relation to Aristotle's treatment of the polis. Schütrumpf's interpretation differs significantly from the one offered here.

indicate pain and pleasure, and therefore is possessed by the other animals as well ... but speech is designed to indicate the advantageous and the harmful, and therefore also the right and the wrong. For it is the special property of man in distinction from the other animals that he alone has perception of good and bad and right and wrong and the other moral qualities, and it is partnership in these things that makes a household and a polis.

The capacity for discourse (*logos*), as opposed to mere voice, separates human beings from animals because it permits them to distinguish good and bad, and right and wrong. It is this common capacity, in turn, which makes human associations possible, for these associations rest upon shared moral perceptions.[6]

This capacity for shared moral perception, however, is not alone sufficient to sustain political associations. While human beings by nature possess the inclination to form political communities (1253a30), their natures are such that a community cannot endure without law (1253a32–40):

For as man is the best of animals when perfected, so he is the worst of all when sundered from law and justice ... Hence, when devoid of virtue man is the most unscrupulous and savage of animals, and the worst in regard to sexual indulgence and gluttony. On the other hand, justice, which is judgment concerning the just, is an ordering (*taxis*) of the political community.

In other words, human nature disposes human beings to form political communities, but the appetitive aspect of that nature reduces them to anarchy unless the restraining force of law operates to impose order (*taxis*).[7] The word *taxis* implies a regulation or arrangement,[8] that is an artificial order that is imposed to control that element of human nature which tends towards excess and savagery. This *taxis* is embodied in the rule of law, which institutionalizes the community's common judgments about good and

[6] Aristotle's *Rhetoric* builds upon this interpretation, for it bases the art of rhetoric on the capacity of individuals to discover and manipulate the shared moral conceptions of their community. In other words, the common human capacity for *logos* and shared moral perception makes persuasive discourse possible.

[7] Cf. 1287a15–31: "For to establish the rule of a human being is to bring in a wild beast, for desire is like a wild beast ... The rule of law, on the other hand, is the rule of intelligence without appetite." See also Nussbaum (1980: 416).

[8] See also 1287a19: law is an ordering (*taxis*).

bad, just and unjust, so as to maintain a stable political order.[9] Thus, in Aristotle's theory of political community it is only the rule of law which can make the natural community a well-ordered one as well. Left to their own devices human beings are likely to destroy the institutions which they create.

The well-ordered community, Aristotle argues, comes into being through the human capacity for judgment (*krisis*) in matters of right and wrong. This capacity for judgment is of crucial importance, for in maintaining that justice provides the *taxis* which makes the polis possible, Aristotle defines justice as the exercise of judgment in matters of right and wrong. This capacity for moral judgment, in turn, provides the basis for citizenship: citizens are defined as those who are qualified to have a share in civic judgment, i.e., the judicial function, and in holding office (1275a23–25).[10] Since the citizens' capacity for judgment about right and wrong provides the *taxis* which is the basis of the social order, then it follows, for Aristotle, that the judicial function is central to the well-ordered state. Accordingly, a political association that does not exercise this judgment over matters of virtue and wickedness is not a true state, for good government, he claims, must *necessarily* be concerned with virtue and vice (and cf. 1280b6). In other words, an essential element of what makes a polis a polis is the common capacity for moral judgment together with the political institutionalization of that judgment in the form of laws, courts, and magistrates who regulate virtue and vice. An association which refrains from such institutionalization and regulation can be neither well-ordered nor a state. For example, according to Aristotle it is in this respect that a state differs from an alliance: to be truly a state, a community must regulate, i.e. exercise judgment over, virtue (1280b–1281a). How is a political community to do this? To answer this question we must look more closely at the nature of particular forms of political community.

The foregoing considerations apply to political community in

[9] In 1287a15–31 he explains how the particular conception of justice of a political community defines who are equals (e.g., "the many" or "the few") and thus have a claim to share in ruling. The stability of the political order depends upon this exclusive community of equals accepting "to rule and be ruled in turn." Such an arrangement (*taxis*) embodies the rule of law in contrast to the rule of any one citizen.

[10] Cf. 1275b20 and 1277b33ff. where Aristotle argues that those who have to labor for a living should not, in a well-governed state, be citizens, because they do not have the leisure to participate in the offices by means of which citizens rule and are ruled.

general. But according to Aristotle different political communities will adopt different principles of organization, or constitutions. Just as the limits of citizenship will necessarily differ according to the form of constitution (1275b, 1278a), so the laws will also differ. Here Aristotle follows Plato, who maintained that there are as many types of law as of constitutions (*Laws* 714c). Accordingly, says Aristotle, though the rule of law establishes the sovereignty of the laws, the laws can be oligarchical or democratic in nature (1281a36) according to the form of the constitution (1282b5–10; 1289a13–25). What this means, then, is that as the constitution reflects the distribution of power in society, the laws follow the constitution in being shaped to serve the interests of the dominant group (1279a22ff.;1291b7–13;1296a22–b3). Thus, since the laws define how the magistrates appointed by the constitution are to govern and to punish those who transgress the law, it follows that the laws and magistrates appropriate to one form of constitution will not be appropriate to another (1289a20–25). For example, claims Aristotle, an aristocratic constitution will appoint magistrates to supervise women and children, but a democratic constitution cannot do this for it is not possible to prevent the wives of the poor from leaving the house (1300a4).[11] Because license in regard to women is harmful both to the purpose of the constitution and to the happiness of the polis, in a well-governed state the constitution must provide for magistrates for the proper discipline of women (1269b12; 1322b37ff.).[12]

Building upon his assumptions concerning human nature and the basis of political communities, Aristotle arrives here at a conception of the rule of law which, as we will see, differs sharply from radical democratic notions. Whereas most modern theorists view the rule of law as some set of principles of legality which delimit the coercive power of the state in regard to individual citizens, Aristotle largely presents it as a legal framework which legitimates the censorial power through which magistrates impose order upon society. The justification for this model arises from his claim that the anarchic tendencies inherent in human nature inevitably tend to undermine the *taxis* which the law represents. This, he believes, is

[11] See also 1323a1–7 on magistracies to control women and children in the non-democratic state.

[12] Indeed, according to Aristotle the fundamental defect of Sparta was the influence and licence of Spartan women (1269b13ff.)

particularly the case in extreme forms of democracy. In order to ensure that men agree to "rule and be ruled as justice requires" the state must therefore concern itself with virtue (1280b7). Hence, good government (*eunomia*) depends upon proper regulation of virtue and vice by magistrates so as to ensure that the rule of law is respected (1280b5–6).

The censorial role accorded such magistrates becomes even more explicit in Aristotle's discussion of the dangers of revolution. Not only must the polis regulate public life, but private life as well, for, "since men cause revolutions through their private lives, some magistracy must be set up to inspect those whose mode of living is unsuited to the constitution; unsuited to democracy in a democracy, to oligarchy in an oligarchy, and similarly for the other forms of constitution" (1308b20; cf. 1310a14). Again, the solution to the problem of potential disorder is to provide for magistrates whose disciplinary authority reaches to all aspects of the citizens' public and private lives. The vocabulary of "inspection" and "suitability" suggests the broad discretion of this censorial role. In other words, the task of such magistrates is to detect and punish behavior which does not suit the interests of those whose dominance the constitution enshrines.

It seems that at the core of Aristotle's conception of the rule of law lies a tension between the principle of the supremacy of the law as the basis of the *taxis* which orders the polis, and the broad authority granted magistrates to "implement" that order. Indeed, it seems apparent that this "implementation" is far more than that, for the scope of magistrates' activities is restricted principally by their individual judgment about appropriate and inappropriate behavior. The magistrates who control women, for example, appear not to operate on the basis of laws which delimit women's conduct, but rather through laws which merely establish magistracies with a general field of disciplinary authority. Aristotle, of course, does not recognize this tension for, from the standpoint of his conceptualization of the rule of law, broad magisterial authority and the supremacy of law fit perfectly together. Accordingly, he characterizes extreme democracies as hostile to powerful magistracies because they follow the fundamental principle that all citizens should "live as they please." Hence, they limit the power of magistrates and seek to draw all authority to the popular deliberative body (1317b12–38).

These characteristics of democratic regimes provide the focus for Aristotle's depiction of their inherent tendency towards license and lawlessness. He portrays radical democracy, such as that in Athens, as possessing two crucial defects: first, decisions of the *demos* may override the law (1292a4ff.); second, citizens may bring suits against magistrates (e.g., impeaching them for malfeasance) and these suits are judged by the *demos*. He characterizes this democratic accountability as "the overturning of all the magistracies" (1292a30, and cf. 1298a29–35). And, he continues, "It would seem to be a reasonable criticism to say that such a democracy is not constitutional government at all; for where the laws do not govern there is no constitution, as the law ought to govern all things while the magistrates control particulars, and we ought to judge this to be constitutional government" (1292a31–34).

In other words, for Aristotle, constitutional government has two components: (1) The popular assembly cannot legislate but can only pass decrees on particular issues. (2) Magistrates apply the law to particular cases and, as servants of the law, they too must be beyond interference by the assembly. Whereas under the (alleged) radical democratic conception of the rule of law, the supremacy of the laws protects citizens from overweening magistrates or other forms of illegitimate governmental intrusion, in Aristotle's view the rule of law rather protects magistrates and their broad regulatory discretion from interference by the people.[13] While democratic Athens removed prosecutorial authority from the Areopagus, relied upon ordinary citizens to prosecute public offenses, and pointed to the terror of the Thirty Tyrants as an example of what happens when the state assumes such authority, Aristotle distrusted private initiative in the administration of justice. In the name of the "rule of law" he advocated institutional arrangements to prevent popular bodies from legislating, while entrusting the promulgation and application of the law to officials who, because they came from the upper strata, could better be trusted to govern well.

The distrust of popular institutions which forms the basis for this rejection of radical democracy as inconsistent with the rule of law has its basis in Aristotle's previous analysis of political associations.

[13] In a radical democracy, according to Aristotle, it is demagogues who lead the people to overthrow the laws and magistracies (1292a7ff.). Accordingly, in the well-governed quasi-democratic polity demagogues cannot arise because magistrates from the upper property classes have principal authority for the management of the state (1292a8–11).

He portrays the natural tendency of human beings to form associations as endangered by a countervailing propensity for disorder and anarchy. Since an extreme democratic society is, according to Aristotle, a community where individuals "live as they please," the law cannot serve as an effective instrument of *taxis* to check these propensities unless it is beyond the control of popular institutions. However, since a radical democracy places the *demos* above the laws and magistrates, such *taxis* is not possible and hence extreme democracy is not a constitutional government but more like a form of tyranny (1291b30–1292a35). On the other hand, in a constitution which combines oligarchic and democratic features, each class checks the other from doing as they please. According to Aristotle this is the best democratic state, "for liberty to do as one likes cannot guard against the evil which is innate in every human being" (1319a1–2). In this passage, the notion of the natural anarchic tendencies of the human soul plays a key role in justifying *taxis* as an order which is imposed to moderate "unrestrained" democracy.[14] Rather than protecting the liberty and autonomy of citizens, here the rule of law is enshrined as the necessary bulwark *against* such liberty and autonomy.

In western political theory from antiquity to the present, assumptions about the "natural" moral state of human communities typically operate to justify the institutional reforms a theorist proposes.[15] Locke, Hobbes, and Rousseau all take a "state of nature" as their starting point, but the different assumptions they make about the moral characteristics of human beings in that state lead them to widely divergent solutions to the problem of order. For Aristotle the elaboration of the nature of political community provides a powerful theoretical tool for judging societies according to their capacity to promote virtue through laws and through the magistrates who enforce them. The dual assumptions of natural moral communities *and* natural dispositions towards anarchy provide the basis for a theory of the rule of law which defines the well-ordered state as one where magistrates maintain the *taxis* of the moral community by closely regulating the lives and mores of the citizens. Since, on Aristotle's view, existing societies (like

[14] See 1317b12, where the principle of each person living as he pleases is described by Aristotle as viewed by democrats as fundamental to the democratic constitution. See also 1319b27ff.

[15] See Nozick's (1974: 4–11) comments on the "moral background" of state of nature theory.

Athens and Sparta) are clearly defective from this perspective, we can expect his own ideal state to provide appropriate mechanisms to resolve this problem.

Accordingly, in Aristotle's incomplete sketch of the ideal state, the legislator must provide for the comprehensive regulation of the sexual and reproductive activities of citizens and the education and socialization of children (1334b29ff.). Not only are the reproductive relations of marriage closely regulated, but also extra-marital sexuality during the procreative period (for men up to 55). During this time all extra-marital sexual intercourse, whether with women or men, is prohibited in the interest of the procreative politics of the state (1335b39–1336a2). The formulation only applies to men, it being understood that women must be strictly controlled, as earlier sections of *Politics* have established.[16] Because it is so important to a political community to rear the young properly in a virtuous environment, censorial control even extends to expression. Thus, the ideal state will prohibit shameful talk (*aischrologia*, 1336b4) and unseemly written or pictorial representations (1336b14–20). For similar reasons, the state must control education, which must become a public, rather than private, activity (1337a10ff.). Carried to its logical conclusion, the initial definition of the polis as a moral community constituted by its common judgments about right and wrong leads to a vision of society where the rule of law implies the complete collapse of the public/private dichotomy in the name of the production of civic virtue. Seen from the standpoint of his treatment of the rule of law, Aristotle appears as far more hostile to democratic principles than is often thought to be the case.

## II

In his *Republic* Plato rejects the notion of the rule of law in favor of the rule of the wisest and best, the philosopher ruler. In his last dialogue, *Laws*, he explicitly abandons this principle, conceding that it cannot be implemented because only a god would possess the necessary qualities. The exercise of such virtually unlimited authority, he argues, would necessarily corrupt any mortal (713cff., 875a–d).[17] Only the rule of law, he maintains, can guarantee a

[16] E.g., 1269b12;1300a4–10.

[17] For the different scholarly positions on the relation of the two dialogues see Shiell (1991: 377–90), Laks (1990: 209–29), and Hentschke (1971: 163–83, 284–87).

stable social order, for the rule of law is based upon two principles essential for a true political community: first, no individual or group in society stands above the law, and all are equally subject to it; second, the genuine rule of law does not rest upon the coercive force of the state, but rather upon the willing acceptance of free citizens.[18]

These requirements, however, pose a dilemma for Plato. Given that the irrational part of the soul prompts individuals to follow the illusion of pleasure over the requirements of virtue, how can the legislator produce willing compliance with laws which greatly restrict individual liberty in the name of civic virtue? What will prevent the citizenry from deciding to discard some of the more irksome provisions, thus endangering the state? Plato's answer lies not in coercive magisterial discipline, as in Aristotle, but rather in a process of socialization which will lead those who have entered into the social compact to believe that the laws they once accepted cannot be altered. It is this belief that I refer to as the "fiction" of personified sovereign laws, or the capacity for "forgetting" that the rule of law ultimately depends upon the rule of men and women.[19] Plato's reliance on the subjective dimension of legal order distinguishes his conception of the rule of law from modern notions which typically emphasize the external aspect of compliance, regarding the law as a system of commands backed by threats.

At the opening of the dialogue, Clinias argues that in all existing states, "Humanity is in a state of public war of every man against every man, and private war of every man against himself" (626d–e). Plato here portrays conflict and disorder as endemic to the human condition. This formulation also attacks all existing societies as fundamentally defective and sets up the two levels at which any remedy for these defects must operate: moral psychology and institutions. This twofold approach is significant, for it implies that a genuine solution cannot merely impose order by using superior force to squelch the war of "every man against every man." Instead, it must also address the warfare within each individual, which, for Plato, involves the crucial subjective realm of the moral

[18] See Cohen (1993) for a fuller treatment of this interpretation and bibliography.

[19] "Men and women," because in Plato's ideal state (Magnesia), unlike Aristotle's, women have a significant share in the management and defense of the polis (see Cohen 1984). For standard accounts of Plato's treatment of the rule of law see Morrow (1941: 105–26) and (1960: 544–72), and Stalley (1983: 81–86).

psychological dimension of conflict. He addresses this kind of discord through his emphasis on the vital role of education in the production of that virtue, without which the rule of law cannot persist. The war of all against all, on the other hand, is the province of institutional arrangements. Plato maintains that only just institutions freely adopted can provide the framework within which citizens educated to virtue can produce civic harmony to replace the dissonance of civil strife (690d).[20] Thus, early in the dialogue Plato formulates the true task of legislation as: how, through the rule of law, to create harmony out of conflict? (627–8).

The problem of conflict forms the primary obstacle to the rule of law because, in Plato's view, in all existing societies the dominant group passes laws to serve "its own interest in the permanence of its authority" (714d).[21] In such states, if any man "contravenes these enactments the author will punish him for his violation of justice, meaning by justice these same enactments" (714d). For Plato, such rule through force, cloaked within the legitimating garb of the "rule of law," naturally produces the discord of faction which threatens to pull existing states apart from within. The "true legislator," on the other hand, legislates for the good of the entire community so as to promote that civic concord in which all citizens feel that they share in the benefits of political community.[22] In doing so, he replaces the constitutionally legitimated domination of a particular group with the rule of law, which exercises sovereignty equally over all groups in society, permitting none to dominate the others. How do the laws achieve this sovereign force, however, particularly when they cannot merely impose it?

Plato's solution to the perennial problem of balancing liberty and order derives from the treatment of education in Books I–II.[23] A substantial part of this discussion concerns education about

[20] See also 689a–d, 691a, 713a–714b, and 832c.

[21] For oligarchic advocacy of this theory of law, see Pseudo-Xenophon, *The Constitution of the Athenians* 1.9: "If it is good government [*eunomia*] you seek, you will first observe the cleverest men establishing the laws in their own interest. Then the good men will punish the bad." Cf. *Laws* 832c–d.

[22] See, e.g., 715a–b: "After battling for public office the victors appropriate the business of the state so much to themselves that no share whatever in governance falls to the vanquished ... Such societies do not possess constitutional government, nor are their enactments laws, for they are not passed in the common interest."

[23] For Plato's account of the necessity of achieving a resolution of the tension between liberty and order, see 693d–694a and 701a–e. For a recent treatment of the relationship of the theory of education to the production of consent, see Gastaldi (1984: 419–52).

pleasures and pains.[24] The importance of this subject is underscored when the Athenian claims that the pleasures and pains of communities and individuals are central to the study of legislation (636d-e, 637d). This claim at first seems puzzling to the Athenian Stranger's interlocutors, for the relation of pleasures and pains to jurisprudence is, at first, far from apparent. What emerges, however, is that law may be understood as the *institutionalized judgment* of a community about proper and improper pains and pleasures.[25] This understanding, in turn, clearly links law to education, for education inculcates in children community norms regarding pleasures and pains.[26] Thus, education leads children to obey "the rule which has been pronounced right by the law" (659d).

From this view arises Plato's position that education in virtue, that is, in the proper dispositions towards pains and pleasures, is the only possible foundation for a just society. Only the persuasion of such education can properly prepare individuals to exercise *judgment* about good and bad pleasures and pains (659d–e).[27] Further, it is such education which induces them to practice justice "willingly and without compulsion."[28] The just society relies upon education in virtue from childhood to produce "the perfect citizen, *knowing* (*epistamenon*) when to rule and when to be ruled according to justice" (643e).

The respect for the laws inculcated through proper education forms the subjective basis for the rule of law. Having established this foundation, Plato shifts back to the institutional level in considering the different theories by which political authority may be legitimated. He contrasts democracy, defined as determining who should rule through random selection, with what he calls the "supreme claim" to political authority, namely, that the ignorant should follow and the wise lead. Now, if this sounds just like the

[24] See, e.g., 634a–b, 635b–d, 644c–645c.

[25] From the *Gorgias* onward Plato links the social good to the right understanding about pleasures and pains. In the *Laws*, at the moral psychological level individuals possess within them two counselors, pleasure and pain (644c). Further, individuals possess the capacity to exercise judgment about pleasure and pain and expectations concerning them. "When such judgment takes the form of a public decision of a political community it is called law" (644d). See also 645c.

[26] 643b–644b, 644e–645c, 653c, 654d, 656d, 659d–e.

[27] See also 627e3, 654a, 669a–b, 670b–671b, 690c, 693b–d, 698b, 700a, 701d, and 832c, for the emphasis upon the role of understanding.

[28] 663e, and cf. 670b–671b. This latter passage emphasizes the role of judgment and understanding. Cf. Planinc (1991: 183–88).

*Republic*, the following sentence makes it clear that there is a fundamental difference: "It is just this non-coercive rule of law over willing citizens that is according to nature" (690c). Here the rule of law replaces the philosopher-ruler (see also 713c and 875a–d), and Plato emphasizes the lack of coercion which makes this basis of political rule "supreme" and "according to nature" (again repeatedly emphasized; 690b–c, and cf. 713d–14a).[29] Thus, in the *Laws* Plato re-interprets the *Republic*'s answer to the question of "who should rule." Here, the laws rule through the consent of willing citizens, and that consent is produced through education in civic virtue. The citizens are "ignorant" in comparison with the wisdom embodied in the laws, but it is through education that they come to understand that this wisdom justifies the sovereignty of the law. But what do phrases like "the rule of law" and "willing subjection to the law" (698b) actually mean, and how do they provide a practical solution to the problem of faction and domination?

As one would expect, Plato addresses this issue from the dual perspective of institutions and moral psychology. The institutional solution to the problem of faction and domination involves a mixed constitution arranged so as to minimize the envy and rivalry for honor which are the psychological founts of the war of all against all. Since envy arises both from domination of one group by another and from the consequences of gross inequalities in the distribution of wealth, honor, and advantages, institutional arrangements must operate to check these tendencies which would otherwise overthrow the rule of law. Accordingly, the Athenian Stranger begins his legislative efforts with the fundamental principle that a stable social order must be founded on justice in distribution. That is, escape from the difficulties which beset existing societies "must be sought in the combination of justice and freedom from avarice" (737a). Plato's sociological analysis of the primary source of disorder as gross inequalities in distribution, and his moral psychological analysis of the divisive force of envy (737b), buttress his position that "true" legislation must produce justice in distribution, defined as preventing excesses of wealth or poverty (744d–e).

In existing societies to implement this redistributive imperative would require autocratic power (739a, and see also 711a–d and

[29] See also 746a–b, 752b–c. 832c.

735d). The device of the foundation of a new society, Magnesia, enables Plato to sidestep this problem, in the same way that the state of nature operates for later theorists. For example, since a new society distributes land from scratch, it is possible to ordain that each family will possess an equal, inalienable, allotment of land (737c–8a).[30] An elaborate series of arrangements ensures not only that envy and faction will be minimized, but also that all citizens will possess sufficient means to enable them to participate in civic life.[31]

These redistributive mechanisms and institutional arrangements are designed to instantiate the rule of law by eliminating the element of domination which characterizes existing constitutional regimes. But even if they are successful, how could these mechanisms further ensure that the agonistic impulses that characterize Greek societies would not motivate some citizens to enhance their honor and position in the state, thereby setting into motion the whole cycle of envy, faction, and civic violence which such arrangements are designed to avoid?

The answer to this question rests upon Plato's conviction that true political stability comes not from coercive domination, but rather only from the inner conviction of the citizens. Thus, any state which sets up the rule of law as its ideal is doomed to fail if it relies only upon institutional arrangements to realize it. The rule of law, of course, requires these institutional arrangements, but they cannot produce the willing compliance which alone can preserve them. This preservation, instead, demands a system of socialization, and "persuasive" legislation which, ideally, produces universal acceptance of a collective fiction known as the "rule" of law.[32] This acceptance is the product of that civic virtue which operates through a *self-imposed law* (733e: *nomon heautōi taxamenon*) and awards the highest civic honors to those citizens who most perfectly embody it.

In fact, as Plato is well aware, the "Laws," though they are frequently addressed as a personified entity, do not and cannot

[30] Plato indicates at 744b that complete equality of distribution would be the best path, but notes that it is impossible. It is impossible, of course, because the citizens would not agree to such a radical change in their economic and social status. Thus, the limits of change are set not by the imagination of the legislator but rather by what the citizens are willing to accept.

[31] See Cohen (1993) for a more detailed discussion of these provisions.

[32] See Bobonich (1991).

"rule." Individuals constitute and govern the state, and these individuals can change the constitutional order of Magnesia at any time when enough of them wish to do so. For the rule of law to succeed, then, citizens must be educated to believe that they cannot make such fundamental changes because the laws are "sovereign," "sacred," "eternal," and "just." In other words, respect for the rule of law must be so deeply inculcated that it never occurs to citizens that in fact the laws are merely a mechanism that they or their predecessors have chosen to define their relations to one another; that is, a creation which exists through their will alone. The paradox of Plato's "rule of law" is that, although he repeatedly insists that the true rule of law only comes into existence through the voluntary compliance of free citizens, after they have adopted his constitutional scheme these citizens are educated so as to "forget" this.[33] Their crucial role in the foundation of Magnesia is glossed over by education in the collective fiction of "sovereign" laws, which leads them to believe that they are servants or slaves of the personified and sanctified Laws which rule above them.

Some scholars have accepted this fiction at face value, arguing that once established the law will be impossible to change.[34] Stalley, for example, relies upon Plato's injunction that after a ten year period of amendment and adjustment the laws are to become unalterable (772c). This provision, however, is itself alterable in two senses. First, it is subject to modification in the process leading to the initial adoption of the code. The Athenian Stranger presents what ideally might be enacted, acknowledging that adjustments will have to be made in actual adoption and implementation according to the inclination of the citizens. Such ideal arrangements, he says, will never be fully realized because they presuppose "a population who will not be unwilling to endure such regulations, but who will accept lifelong restrictions ... as we have proposed" (745e–6a). In proposing such legislation, he continues, they have been acting as if they were "telling dreams or fashioning a city and its inhabitants out of wax" (746a). The extent to which such a model will be adopted therefore depends upon the willingness of the citizens to submit to restrictions upon their liberty (745e–

[33] The foundation of this new society depends, not upon the imposition of law by an autocrat (710d–711e), but rather upon the acceptance of the code by those who become the original citizens of Magnesia (745e–746c, 752c–d, 832c).

[34] See, e.g., Stalley (1983: 82) and Barker (1918: 352–3), but cf. Morrow (1960: 570–1).

746a). When the unwillingness of citizens renders particular arrangements impossible to put into practice they will have to content themselves with institutions which conform as closely as possible to the character of the ideal (746c). Second, since this provision provides that all the laws are alterable for ten years, then the ten-year rule itself, like all the other rules regarding changing the law, is legally subject to alteration. The citizens could thus decide that they desire more flexible laws concerning amendment.[35] Though the legislator *advises* against any fundamental tampering with his scheme, by acknowledging the necessity for adaptation, filling of gaps, and amendment he leaves room for alteration of both substantive rules and rules regarding change.[36] Understandably, the Athenian Stranger chooses not to emphasize this flexibility and repeatedly underscores the necessity of following his guidelines.

Thus, while the lawgiver establishes procedures to inhibit dramatic changes in the code, these "procedures" are in reality no more than persuasive devices. Just as the citizens of Magnesia can reject or amend the code initially proposed to them by the lawgiver, so they can at any time after its enactment change their mind and decide to either start again altogether or amend the existing code. This is possible in two ways. First, since Plato represents Magnesia as an experiment to which a group of citizens might decide to submit (746a–c), they can always agree collectively that they no longer desire to pursue it. This state of mind, if widely shared, would itself constitute the ultimate failure of the experiment and the "true constitutional government" based upon freedom, willing acceptance, and understanding, would cease to exist. In Magnesia, unlike the ideal city of the *Republic*, there is *no* "guardian class" to prevent them from doing so. The Athenian Stranger clearly envisages the possibility of such a failure when he enjoins the Curators of the Law to abandon the state and go into exile if the citizens change the constitution in a way that will make them unworthy (770d–e).

Second, the citizens can change the laws under certain con-

[35] At 772c the Athenian Stranger says that at the end of ten years the Guardians of the Laws will declare them to have reached perfect fulfillment and thenceforth to be immutable. They might equally well decide, or be persuaded by the citizens, that they have not yet reached that state. Again, the Athenian Stranger is only attempting to *persuade* them of the importance of stability. He can do no more.

[36] See, e.g., 769d–770b, 846c, and other passages discussed by Morrow (1960: 570–71).

ditions (which conditions, as noted above, are themselves subject to change).[37] Even after the ten-year period for adjustment has passed, when "necessity" requires it they may change the "immutable" laws, but only with the advice of the assembly, the magistrates, and the oracles (772c–d).[38] So, on the one hand, the Guardians of the Laws themselves must be legislators and not merely curators, and must fill in the many omissions in this outline of a code (770b). On the other hand, the laws are to be regarded as sacred and immutable, or at least changes are to be made only under narrowly circumscribed conditions. Rather than taking all this too literally,[39] I would suggest that Plato here expresses the ambivalence towards change found in most constitutional systems. Change is necessary for a system to survive, but if it occurs too easily or too often, it undermines the sense of eternity, sacredness, and permanence which masks the fact that foundational documents are, in reality, an expression of the will of the people who adopted them and whose respect gives them continuing legitimacy. Plato's requirement that "all the oracles" agree to any changes along with the assembly and the magistrates nicely illustrates this point. Finally, it is because Plato clearly recognizes that his vision of true constitutional government depends solely upon the disposition of the community of citizens to accept its authority that he so strongly emphasizes the need for a system of education which will develop those habits and faculties of judgment which will lead citizens to understand its value. On this understanding, says the Athenian Stranger, hangs the "salvation or ruin of a society," for in its absence the laws will be without force (715d). In the end, then, Plato's vision of the rule of law is realizable only in a society whose citizens have the courage to transform utterly both themselves and their community. In any other society, Plato argues, the "rule of law" merely serves to provide a legitimating ideology for domination.[40]

[37] See also the discussions of changing and supplementing the laws at 769d–e, 772a, 818e, 828b, 835a–b, 840e, 846b–c, 855c–d, 957a–b, 968c.

[38] Klosko (1986: 232–3) argues persuasively (with full references to the secondary literature) that this passage should be taken to apply to the laws in general.

[39] As does Stalley (1983: 82).

[40] Democracy, oligarchy, and autocracy all represent institutionalized forms of *stasis* because none of them rests upon the rule of a willing sovereign over willing subjects. Instead, all of them consist of the rule of a willing sovereign over unwilling subjects by means of some kind of force (832c).

III

The magistrates shall under no circumstances apply an unwritten law. No decree of the council or assembly shall take precedence over a law. No law shall be enacted against an individual, unless the same law applies to all Athenians.[41]

It is widely accepted that in the fourth century Athenian democratic ideology praised the rule of law as one of the cornerstones of good government. Law, says the speaker in one oration ([Demosthenes] 25.11) is universal, equal and the same for all; the rule of law "preserves every city." Or, in another typical formulation, Demosthenes boasts, "I suppose that no man living will attribute the prosperity of Athens, her liberty, her popular government, to anything rather than to the laws" (24.5). In the same oration, he goes on to say that the crucial difference between oligarchy and democracy is that, whereas oligarchs view themselves as above the law and change it retrospectively as they please to suit their interests, democracies preserve their freedom by living under the laws they have established (24.75–6). Similarly, Aeschines (1.5) elaborates at length upon the same theme:

autocracies and oligarchies are administered according to the tempers of their lords, but democracies according to the established laws ... [I]n a democracy it is the laws that guard the person of the citizen and the constitution of the state.[42]

In such formulations, the rule of law preserves the freedom of citizens from the intrusions characteristic of autocratic government. From this ideological standpoint, the oligarchical regime of the Thirty Tyrants represented the antithesis of the rule of law:

And now ... thinking they were at length free to do whatever they pleased, they put many people to death out of personal enmity, and many also for the sake of securing their property.[43]

[41] Andocides 1.87, and see 88–89. On the context of Andocides' speech and on the general issues of the revision of Athenian laws in 410–399, see above all Rhodes (1991), and cf. Robertson (1990).

[42] Dover (1968: 183) comments that, "To the Athenians ... there seemed to be a simple antithesis between the rule of law, under which issues are determined by the litigants' presentation of their cases, and arbitrary power ... in which law was overridden and issues prejudged in accordance with the interests of the powerful."

[43] Xenophon, *Hellenika* 2.3.21, and see also 2.3.43 and 2.4.1.

The lawlessness of the Thirty included illegally putting citizens to death or confiscating their property, and Lysias portrays them as breaking into and ransacking citizens' houses, pulling gold earrings out of matrons' ears, ordering executions without proper trial, abusing legal process, and generally treating free men as if they were slaves (Lysias 12.6–23,36,39–40,52,82). In contrast, after the restoration of the democracy Athenians prided themselves on having re-established the rule of law rather than having pursued private vengeance for the wrongs done under the Thirty. As Lysias (2.64) claims, the men who re-established the democracy after the Thirty replaced stasis with unity and pursued the preservation of the city rather than vengeance against their enemies.[44] Whereas Aristotle's conception of the rule of law provided for censorial magistrates to protect the state from the *demos*, the democratic formulation of the rule of law aimed to protect citizens from over-reaching by the state. This protection encompassed, on the one hand, reserving to the citizens as a whole the exclusive right to prosecute and judge public and private cases. Democratic Athens relied upon the initiative of private citizens to prosecute wrong-doing rather than a body of officials, and upon mass courts of lay citizens chosen by lot to serve as judges. On the other hand, this protection also involved limiting the power of the state to intrude upon the private sphere of citizens' lives.

This notion of a protected private sphere was often expressed through affirmation of the inviolability of the house from intrusion by officials and other citizens.[45] The Thirty served as a paradigm of anti-democratic tyranny because they trampled upon both of these facets of the rule of law. They arrogated the prerogative of prosecution and judgment to themselves in what, on the democratic view, inevitably became an orgy of official lawlessness. Thereafter the excesses of the Thirty served as a stock example of why, as Demosthenes puts it, under a democracy the laws protect citizens from the wrongdoing of officials. Such laws, he adds, must be strictly enforced because they are the bulwark of the constitution and protect it from dissolution.[46] The nature and scope of this protection, however, require further elaboration.

[44] See also Demosthenes (19.255).

[45] See, e.g., Demosthenes 18.132; 22.51–2, and Lysias 1.4, 25, 36, 38, 40; 3.6; 12.7–16, 19–20, 30.

[46] See also Demosthenes 24.193.

In one major strand of Athenian democratic ideology the liberty which is constitutive of a democratic state, and which the rule of law serves to protect, has two aspects. The first involves liberty of speech and equal participation in public affairs.[47] The second aspect of liberty finds expression in the sentiment that under the radical democracy each man lives his private life as he chooses.[48] This involves the right of each citizen to conduct his private life as he sees fit, provided he obeys the laws of the city which protect public order and regulate various aspects of men's relations with one another. Thus, Demosthenes[49] (25.25) criticizes Aristogeiton for asserting that, "in a democracy a man has a right to do and say whatever he likes as long as he does not care what reputation such conduct will bring him, and that no one will kill him at once for his wrongdoing." According to Demosthenes, Aristogeiton here ignores the central role of law as the basis of social order (25.20, 27). Aristogeiton depicts a society in which behavior is constrained only by shame and the fear of retaliation. But, Demosthenes objects, where the law does not rule men would live like wild beasts (25.20, 26).[50] In a democracy, then, liberty (e.g., "to live as one pleases") is not to be confused with licence, for the law provides the necessary framework for a free and ordered civic existence.

The characterization of Athenian democracy as permitting citizens to "live as they please" is so widespread in our sources that there is little doubt that the phrase was a political slogan used by proponents and critics alike.[51] At the level of ideology, Thucydides' version of Pericles' Funeral Oration (2.37) furnishes the classical

[47] See, e.g., Aeschines 1.4–5. For the linkage of speech to political participation see, e.g., Demosthenes' (19.184) claim that in Athens the system of government consists of speeches (*en logois*); and cf. Demosthenes 51.19–20.

[48] Hansen (1989: 11) maintains that as a constitutional concept liberty (*eleutheria*) was associated with personal freedom in the private sphere and with political participation in the public sphere. For a fuller discussion of the significance of the slogan about living as one pleases, see Cohen (1991: chapter 9).

[49] For present purposes the authorship of [Demosthenes] 25 is irrelevant and here, as in other such cases, I use his name for the sake of convenience.

[50] Cf. Lysias (2.19), who says that the Athenians believe that, whereas beasts rule by force, men should establish justice through law, persuade by reason, and submit to the sovereignty of law.

[51] Demosthenes 22.51; Lysias 25.33; Isocrates, *Panath.* 131, *Areop.* 20; Aristotle repeatedly uses this phrase as a way of characterizing democratic societies, e.g., in *Politics* 1310a30, quoting Euripides' expression of the same sentiment, and 1319a; 1316b25; 1317b10; Plato, *Republic* 557b, 560–61, 563b, *Laws* 700a; also, democracy was considered *praoteros*, which, in this context, it would not be unreasonable to translate as "more tolerant." See Cohen (1991: chapter 9) and Hansen (1989: 10).

statement of the relationship of Athenian democratic politics to tolerance in private life,

> Our constitution is called a democracy because power is in the hands not of a minority but of the whole people. When it is a question of settling private disputes, everyone is equal before the law ... And just as our political life is free and open, so is our day-to-day life in our relations with each other. We do not get in a state with our neighbor if he enjoys himself in his own way, nor do we give him black looks which, though they do no real harm, still do hurt people's feelings. We are free and tolerant in our private lives; but in public affairs we keep to the law.

The accounts of Athenian political life enumerated above are, of course, ideologically colored; they cannot be taken at face value as objective descriptions of reality. They do, however, portray an ideology which is radically at odds with the Platonic and Aristotelian conceptions discussed above. I have already indicated the nature of the difference with the view developed by Aristotle in the *Politics*. Though Plato's notion of the rule of law bears some significant resemblances to Athenian democratic conceptions, there are also crucial differences.

First, like Aristotle, Plato entirely collapses the private sphere into the public. If the rule of law is to reign successfully above the inherent tendencies towards faction and envy, it can do so only through a system of laws and education which fully occupy every area of citizens' lives. Thus, the subjective legitimacy obtained through the commitment to voluntary acceptance of the law is purchased at the price of a sphere of activity beyond the reach of the state. Accordingly, the rule of law operates paternalistically, not to protect citizens from the state, but to protect them from themselves.

Second, Plato grounds the rule of law upon a collective fiction which removes legislation and law from the realm of politics by defining them as operating above faction and domination, and by attaching to them an aura of sanctity and immutability. While Athenian ideology undoubtedly also dwelt upon the collective fictions of the "ancestral constitution" and ancient lawgivers, there are crucial differences.[52] To begin with, decisions about the nature and operation of the laws remained firmly within the realm of politics, as the frequency of popular prosecutions for introducing

[52] See Finley (1975: 34–59) on the "ancestral constitution."

unconstitutional proposals to the Assembly eloquently testifies. More importantly, whereas Plato insisted that what he recognized as a collective fiction should be taught to Magnesians as an immutable truth, Athenians appear to have been well aware of the ideological tensions inherent within their claims about the "sovereignty" of the law. Thus, in a remarkable passage, Demosthenes (21.224–25) makes his point about the importance of the rule of law precisely by "exposing" this collective fiction and, hence, by relying upon his audience's acknowledgement of the "truth" behind it:

> And what is the strength of the laws? If one of you is wronged and cries aloud will the laws run up and stand at his side to assist him? No. They are only letters [*grammata*] and incapable of such action. Wherein resides their power? In yourselves, if only you support them and make them all-powerful to help him who needs them. So the laws are strong through you and you through the laws.[53]

Thus, unlike Plato, Demosthenes could acknowledge that the strength of the Athenian democratic conception of the rule of law lay squarely in the fact that behind the collective fiction of "sovereign" laws stood the *demos* and that it was only through the commitment of the *demos* to the rule of law that this "sovereignty" had any meaning.[54] Such knowledge, on the other hand, was to be kept, if possible, from the inhabitants of Magnesia through the power of education and persuasion to preserve the "truth" of a collective fiction.

As indicated by the laws quoted at the beginning of this section, the Athenian conception of the rule of law involved principles of legality which sound quite familiar to modern ears. In postulating that the rule of law must be the bedrock of a free and democratic society, orators affirmed that the law must consist of general principles equally applied,[55] that laws should not be enacted against

[53] Weinreb (1987: 59) points out that the law cannot "rule"; it is "neither spontaneous, nor self-executing, nor immune to change; its creation, administration, and interpretation are invariably acts of human agency."

[54] See Ober's (1989: 299–304) excellent discussion of the aridity of debates about whether the people or the laws were sovereign in Athens. Ober forcefully argues that for the Athenians the "sovereignty" of the laws was never fully abstracted from its connection to the interest of the *demos*.

[55] See Demosthenes 51.11: there is no equality for all if rich and poor are not punished alike. Cf. Isocrates 20.20 and Demosthenes 15.29; 10.4; 23.86. In Demosthenes 25.16–7, the law is set out as a general principle, equal and similar for all. Cf. Demosthenes 26.13. See also Vlastos (1981), Hansen (1989: 23) and Raaflaub (1985: 115–7).

individuals,[56] that no citizen should be punished without a proper trial,[57] tried twice for the same offense,[58] or prosecuted except according to a statute,[59] and that statutes should be clear, comprehensible, and not contradict other provisions.[60] Before concluding, however, that Athenian democratic notions of the rule of law were identical to modern understandings we must seek to apprehend them in the broader context in which they were invoked, interpreted, and applied. These past three chapters have dealt largely with theoretical understandings of conflict and legal order. Part Two will turn to the less lofty world of violence, enmity, and litigation. By locating democratic understandings of the rule of law in this broader context we will better be able to see how, despite their familiarity, they served notions of legal order in some ways quite foreign to contemporary conceptions of democracy and justice.

[56] Aeschines 1.87–89; Demosthenes 23.86.
[57] See Demosthenes (39.46); Aeschines (2.77; 3.235); Isocrates (7.67; 20.11).
[58] Demosthenes 20.147.
[59] Andocides 1.87.
[60] Demosthenes 20.93–96; Aeschines 3.38–39.

PART II

# *The realm of the courts*

CHAPTER 4

# *Rhetoric, litigation, and the values of an agonistic society*

Nothing is more unfair than equality.[1]

Before turning to a consideration of Athenian litigation it is appropriate to consider the background of social values which participants brought to the judicial process. This background is particularly important in Athens because neither judges nor litigants had any formal legal training and the system as a whole relied almost entirely upon the initiative of private citizens. As subsequent chapters will show, Athenian litigation by its very nature seldom depended upon arguments about statutory interpretation or legal doctrine. It employed instead assessments of character, reputation, and probability, cast in terms which appealed to the knowledge and values which the judges, as ordinary citizens, possessed. It is beyond the scope of this study to provide a complete account of the social context of Athenian legal practice. Instead, the focus will be upon those values and beliefs of particular relevance for a study of the legal regulation of conflict. Accordingly, this chapter will begin by examining Aristotle's presentation of what the successful orator needs to know about rivalry, enmity, honor, envy, and revenge. Building upon this examination, it will then consider a number of orations where such topics play a central role in the litigants' presentation of the case. This manner of proceeding should tell us a good deal both about Athenian attitudes on such matters as well as the way in which litigants manipulated and interpreted them for their particular persuasive purposes.

## I

Aristotle's *Rhetoric* has been too often neglected as a source of evidence for Athenian values, yet by its very nature it serves as a kind

[1] Pliny, *Letters* IX.5.

of repository which provides some of our best evidence for the normative expectations of Athenian citizens.[2] In the *Rhetoric*, Aristotle catalogues the types of arguments appropriate in particular kinds of judicial cases. These are not, however, analytical categories as in the *Politics* or *Ethics*. He rather presents these arguments as descriptions of commonly held values and attitudes concerning emotions, character, virtues, etc. This catalogue aims to give the orator a stock of knowledge and topics (*topoi*), a normative repertoire, which he can manipulate to produce the desired response in his audience.[3] What he has done, Aristotle says, is to gather "the popular opinions and premises whence men derive their proofs" (1392b). In other words, effective legal rhetoric draws upon an understanding of the shared moral judgments of the audience. A speaker who has supplied himself with an accurate stock of the values and beliefs which reflect and express those shared judgments can marshal them to suit the persuasive purposes of the moment. As Aristotle says, rhetoric is merely the discovery of the means of persuasion available in a particular case. And those various means of persuasion all depend upon an ability to anticipate the moral reactions and judgments of the community from which the orator's mass audience is drawn.[4] Accordingly, Aristotle's discussion of honor, envy, revenge, and the like provides an account of what he took to be the range of Athenian attitudes on these issues.

In the course of his discussion of anger, Aristotle (1379b) claims that men respond with anger to slights committed before five classes of persons. This fivefold division of a person's relation to others reveals the mentality of an agonistic society by the way in which it classifies such relations. From this perspective, men's social world consists of (1) rivals (2) those whom they admire (3) those by whom they would like to be admired (4) those whom they respect (5) those who respect them. In other words, social relations are essentially evaluative and competitive. Men see themselves as

[2] Dover (1974) remains the best examination of the values of Athenian society. Dover's study encompasses a survey of the full range of values, though its brief treatment of the courts is excellent.

[3] So, for example, at the end of the discussion of emotions (1388b), he says that "The means of producing and destroying the various emotions in men, from which the methods of persuasion which concern them are derived, have now been stated."

[4] See *Rhetoric* 1355a. Cf. Cicero, *De Oratore* (1.12, 69).

striving to win the respect of others and judging to what extent others are worthy of their own regard. That is, they establish their own worth by monitoring their standing vis-à-vis other men. To put it another way, social relations define themselves through a politics of reputation, and the currency of that politics is honor, together with the social virtues which constitute it.[5]

Because honor is established through comparison with others it is a limited good and competition for it can take the form of a zero-sum game.[6] One man enhances his standing at the expense of those who are his rivals; his elevation involves their defeat. As Aristotle (1382b) says in his lengthy treatment of attitudes towards fear, we should fear "those who are our rivals for the same things, in so far as it is not possible for both to acquire them, for men are always contending with such persons." The discussion of fear presents a social world in which men not only conceive of themselves as competing for limited goods, but also expect their enemies and rivals ruthlessly to exploit any weakness: "And since most men are rather bad than good and the slaves of gain and cowardly in time of danger, being at the mercy of another is generally fearful ... And those who are able to ill-treat others are to be feared by those who can be so ill-treated; for as a rule men do wrong whenever they can" (1382b). How should men seek security in such a society where men's dispositions resemble those described by Hobbes as tending towards the war of all against all?

On this description of Athenian beliefs, security is not found in the law or other civic institutions, but in power and its accoutrements. In sharp contrast to the democratic notion of equality before the law this vision of society seems informed by values of hierarchy and domination. Thus, claims Aristotle, those who are very prosperous do not experience fear because they do not think they are likely to suffer anything. Such men are *hubristai*[7] and contemptu-

[5] On honor and the politics of reputation, see, e.g., Aeschines 1.129: "All men who compete for honor in public life believe that they will gain fame through a good reputation."

[6] See Cohen (1991: Chapter 7). Elster (1990: 867) notes the disagreement among anthropologists and sociologists about whether honor is, strictly speaking, a zero-sum game. In fact, he argues, honor can have many different aspects, encompassing both zero-sum and non zero-sum models: "Their common thread is that honor is an intensely interactive phenomenon, gained and lost only by direct, conflictual interaction" (1990: 868).

[7] There is no satisfactory English translation for *hubristai*. *Hubristai* are persons who characteristically commit *hubris*, that is, who engage in behavior which enhances their own feelings of superiority by deliberately humiliating others. Hubris will be dealt with extensively in Chapters 5–7.

ous and rash because of their confidence in their wealth, strength, many friends, and power (1383a). Their social position encourages them to believe that courts will not convict them for their wrongdoing. The weak, on the other hand, who are friendless, or easy to slander are largely defenceless, for they neither care to go to law, for fear of the judges, nor, if they do, can they convince them (1372b–1373a).[8] The orator, Aristotle concludes, can exploit these commonly held beliefs by making the audience "feel afraid ... by reminding them that they are likely to suffer, by reminding them that others greater than they have suffered, and showing that their equals are suffering or have suffered ..." (1383a) In a society where men see social life as a competitive struggle in which gains in honor or prestige usually come at another's expense, such arguments provide an instrument for enlisting the support of courts in one's own rivalries. Examination of forensic orations in this and the next chapter will reveal how speakers like Demosthenes exploit precisely these strategies in arguing that their own powerful enemies are men whom the *demos* should fear and punish.

If men fear their rivals, that fear is itself a mark of estimation. This fact points to an ideology of egalitarianism, or "equality in honor," which anthropologists have described as characterizing agonistic societies. This *ideal* of equality, as will be seen in subsequent chapters, typically exists in tension with values of hierarchy and domination, but nonetheless provides an egalitarian ideology for agonistic social relations. The ideology of egalitarianism embraces all those who are seen as entitled to compete for honor, those who are members of what anthropologists call "the moral community."[9] To deny to a person as a matter of principle the right to compete means denying them a full social identity as an Athenian citizen, as women, slaves, foreigners, and certain social outcasts were excluded.[10] While Athenian democracy excluded these categories of individuals, it, in principle, established a state of

[8] On Aristotle's account (1372a) men who think that they can commit injustice with impunity are those who are very experienced in affairs, able to speak well, experienced in litigation, have many friends, or are wealthy. They typically belong to the upper classes; or, if not, they have friends or accomplices who do. Thanks to these qualities they can commit wrong and escape discovery and punishment. Cf. Lysias 24.17–18.

[9] See Davis (1977: 90–9,110–25).

[10] See Xenophon, *Hiero* 7.3–4, for the classic statement that *philotimia*, the disposition to compete for honor, is what separates human beings from animals, and real men from mere human beings. On *philotimia* see above all Whitehead (1983: passim).

equality between those with the full rights of citizens. As Aristotle's treatment of equality in *Politics* indicated, however (discussed in Chapter 3), the notion of equality itself was hotly contested in Greek democratic societies. Formal political equality brought together in the political community men who according to other social, economic and political criteria were by no means equals, and who might bitterly resent imputations that they were (or were not). One of the structural contradictions of Athenian society (like other agonistic societies) turns on this tension between hierarchical and egalitarian values, a tension which, as will be seen, strongly colors the presentation of conflict to Athenian courts.[11]

Aristotle expresses this notion of equality in honor in his discussion of esteem (1384a, 1385a). Men esteem their rivals and those whose admiration they desire, and, he goes on to say, they see themselves as the rivals of those who are similar to themselves. Since honor is at stake in such rivalry, the fear of shame exerts a strong influence over one's actions. Because rivals respect one another they are particularly concerned about doing shameful things which their rival will learn about: "In a word, men feel shame before those whom they themselves respect ... similarly, when they are in rivalry with others who are similar to them; for there are many things which they either do or do not do owing to the feeling of shame which these men inspire."

Individuals, then, conduct their social relations with an eye to the normative expectations of others, expectations largely centered upon rivalry for the acquisition of honor and the avoidance of shame. Thus, Aristotle maintains (1367a) that men compete for the noble in their quest for good repute. This quest requires that when men are wronged or insulted they respond appropriately, for,

> To take vengeance on one's enemies is nobler than to come to terms with them; for to retaliate is just and that which is just is noble; and further, a courageous man ought not to allow himself to be beaten. Both victory and honor are noble. For they are desirable even when fruitless and reveal superior excellence. (1367a)

This compact passage pays eloquent tribute to a number of agonistic ideals. Competition necessarily produces enmity. Since a

[11] See Leach (1965: Chapter 1).

basic moral principle of Greek societies from Homer onward is that justice requires one to help one's friends and harm one's enemies,[12] enmity and rivalry inevitably produce mutual attempts to harm, hinder, defeat, and dishonor one's enemies. Honor is centrally at stake in such interactions. Failure to retaliate for insults or wrongs undercuts one's claims to honor, whereas successfully exacting vengeance enhances them.[13] Victory and honor are good in themselves, regardless of the consequences. Such sentiments are often expressed in maxims indicating that it is better to die with honor than to live ignobly in defeat.[14] Taking revenge, then, demonstrates the validity of one's claims to honor, while failure to do so leads to dishonor. Needless to say, such heroic imperatives are likely to coexist uneasily with the requirements of a civic legal order. How this tension is negotiated will be explored in Chapters 5 and 6.

Pursuing victory and revenge is not only noble, however, but is also pleasurable. Far from portraying it as a grim duty, Aristotle (1370b–1371a) says that revenge, like victory, brings pleasure. This is because, according to his portrayal of Athenian values, human beings by nature desire to feel superior. Victory is thus pleasant not only to those who "love victory," but to all men, for victory produces a feeling of superiority, of which all men have a greater or lesser desire. It follows from this agonistic principle of moral psychology that combative and disputatious pastimes must also be pleasant, for they offer the opportunity for victory. All sports and gambling, Aristotle explains, are pleasant in this way, for rivalry implies victory. The same principle applies in other spheres of life as well, for example, disputation in the lawcourts and eristics. In other words, for those skilled in such activity, litigation provides a competitive setting where one seeks the pleasure of victory in a way comparable to gambling, hunting, or athletic competition. Fittingly enough, a lawsuit, like an athletic and poetic

[12] See, Plato, *Republic* 332d–335c, Lysias 9.14, and the variations on this theme in, e.g., Isocrates, *To Demonicus* 26; Euripides, *Medea* 807–10. Aristotle, *Rhetoric* 1381a, articulates the related principle that friends include those who are friends of our friends and enemies of our enemies.

[13] See also 1378b on the link between insult and dishonor. Elster (1990: 872) describes how in feuding societies the norms of revenge "are mediated by the devastating feeling of shame experienced by the man who fails to avenge an insult and who is constantly reminded that he is less than a man."

[14] See, e.g., Andocides 1.57–8.

competition, is referred to as an *agōn* – a competitive struggle or contest.[15]

Revenge, however, produces pleasure not only because in bringing victory it satisfies deep-rooted agonistic impulses, but also because it is pleasant in itself. Anger, for example, is always accompanied by a certain pleasure which arises from the contemplation of revenge for a perceived slight (1378b). On Aristotle's account this anger in anticipation of revenge is "Far sweeter than honey dripping down the throat and spreading in men's hearts" (1378a, quoting *Iliad* 18.109f.).[16] This pleasure which accompanies anger causes men to dwell on the thought of revenge. In so doing they visualize their revenge and receive the same kind of pleasure as from visions in dreams (1378b).[17] In other words, vengeance is positively valued and triply motivated. Men take vengeance because they fear shame and desire to preserve and enhance their honor, as well as because of the pleasure which its contemplation and exaction bring. They also take vengeance because in such societies it is the only way to deter others from harming them. Wilson, in his study of nineteenth-century Corsica, describes the "cultural imperative" to ensure protection through deterrence by not letting any insult pass without retaliation. A man who did not retaliate was a *rimbeccu*, defined in a Corsican trial to mean "a social outcast, an object of scorn, whom anyone can insult with impunity because he lacks the courage to retaliate against such insults."[18]

Striving for honor, victory, and vengeance is noble, then, but not without qualification. In another passage (1368b), Aristotle lists the vices which are characteristic of particular types of injustice. He includes those men who pursue honor, victory, or vengeance to excess. The man who is *philotimos* is vicious in regard to honor (*timē*), the *philonikos* in regard to *nikē* (victory), the *pikros* (rancorous) in regard to *timoria* (vengeance). These are the weaknesses

[15] In his depiction of the agonistic element in Greek poetics, Griffith (1990: 188) aptly comments that, "Indeed, one of the main attractions, as well as dangers, of victory is the honor, envy, and even hatred it elicits from one's rivals."

[16] Djilas (1958: 106–7), in his classic Montenegrin autobiography, describes the thirst for vengeance as "an overpowering and consuming fire," a "breath of life one shares from the cradle with one's fellow clansmen," "the wildest and sweetest kind of drunkenness."

[17] Herzfeld (1985: 179) describes the story of a Glendiot youth's long-planned and well-executed revenge against a man who had mistreated his mother. Decades later, he told Herzfeld that this act of vengeance gave him the greatest pleasure that he ever experienced in his life.

[18] Wilson (1988: 89–90, 203–4); Hasluck (1954: 231–2).

peculiar to each of these types of men. Competing values thus set limits for agonistic impulses. Injustice, says Aristotle, involves causing harm contrary to the law, and it is in regard to each of these characteristic activities that each of these men manifests injustice. In other words, the demands of honor exist in tension with the demands of the rule of law. The normative repertoire of a society is never univocal and fully coherent, but is characterized by ambiguity and contradiction.[19] The vice of these men is that their desire for victory or honor is excessive and leads them to commit injustice in pursuit of them. The challenge for individuals who have been wronged is how to mediate between the conflicting claims of honor and the requirements of legal order. Subsequent chapters will show how difficult negotiating these claims can sometimes be.

In agonistic societies with egalitarian ideologies of honor, competition for limited goods typically leads those who have come up short to feel that they have been worsted by men who are not their betters. The result is another potent source of conflict: envy.[20] Aristotle (1386b) thus notes that while men respect rivals because they are equals and alike, it is just those who are alike (or whom they perceive as equal or alike) that men envy. Envy, on this view, is a disturbing pain which is directed against good fortune, not because someone does not deserve it, but because they are our equals and like us (see also 1387b). In other words, when someone whom we regard as an equal enjoys good fortune, we feel envy because this good fortune raises him above us; among equals another's good fortune is my misfortune and causes distress and envy.

This account of Athenian attitudes towards envy nicely encapsulates one side of the agonistic mentality: not to feel glad that one of our equals, someone who is like us, has prospered, but rather to feel pain, resentment, and envy at their good fortune, even if we know it is deserved. Those who are our equals are also our rivals, and their good fortune puts them ahead of us in honor, prestige, material goods, etc. Aristotle sums up his account of attitudes towards envy by saying that (1388a) "Men envy those who are near them in time, place, age, and reputation ... and those with whom they are

[19] See Cohen (1991: Chapters 2,3,6,7,9).

[20] See Foster (1972: 169). For Athens, see Walcot's (1978) seminal treatment of envy in Greek culture.

in rivalry, who are those just spoken of. For no man tries to rival ... those who in his own opinion, or in that of others, are either far inferior or superior to him ..." Such sentiments inform all aspects of men's social interaction, including the erotic: "And since men strive for honor with those who are competitors, or rivals in love, in short with those who aim at the same things, they are bound to feel most envious of these" (1388a).

Having shown how envy naturally arises in competitive relations, Aristotle goes on (1388a–b) to distinguish rivalry or emulation from envy. Rivalry or emulation is also a pain caused by the fact that those who resemble us have goods which we would also like to possess. This pain, unlike envy, arises not because another possesses them, but because we do not. Rivalry unaccompanied by envy is therefore virtuous, whereas envy is base. Rivalry makes one want to obtain such goods for oneself, envy makes one want to prevent another from possessing them. Thus, good men emulate those who possess friends, wealth, and offices. They (the emulous) think that such honors belong to them and that they are worthy of them. This view of life in the polis conceptualizes emulation and envy as, respectively, the noble and base aspects of the agonistic impulse. Emulation operates to the benefit of the community because it encourages men to try to outstrip one another in accomplishments and honor.[21] Envy, on the other hand, is essentially destructive because it impels men to deprive others of the honors they have obtained.[22] In practice, of course, these two strands of agonistic motivation may be much more closely intertwined than Aristotle here indicates.

In democratic societies like classical Athens, disagreement about equality may produce further disagreement about the appropriateness of rivalry, envy, and the like. In all agonistic societies a basic principle of honor provides that one does not compete with inferiors, one merely despises or disposes of them.[23] Thus, when an inferior contends with a superior the appropriate response is indignation (1387a–b), not the envy that one might feel at a successful rival. In Athens, however, political equality enabled citizens to compete with those who considered themselves superior by virtue

[21] As Demosthenes (20.108) puts it, in democracies freedom (*eleutheria*) is preserved by the competition (*hamilla*) of the virtuous for the honours of the people.

[22] See the use of this argument in Lysias 12.1–2

[23] See, e.g., Bourdieu (1966).

of birth, wealth, or social standing. Such members of social elites might feel indignation at the ambitions of a Cleon, whom they regarded as not fit to be their rival. On the other hand, ordinary Athenians might resent the arrogance of the powerful, the "*hubristai*" who felt that their power and station entitled them to license and privilege. As will be seen, the exploitation of such tensions could play a central role in litigation among the elite before popular courts. The point to note here is that attitudes towards competition are closely connected to questions of equality, hierarchy, and privilege.

## II

Athenian judicial orations abound with references to enmity. Speakers, to suit their particular purposes, typically either affirm or deny that a state of enmity existed between the parties before the particular acts which gave rise to the litigation at hand. Such references to enmity, though by no means unexpected in such contexts, should not be dismissed as superfluous verbiage. When an Athenian speaker says that he and his opponent have long been enemies or in a state of enmity (*echthroi*), he is referring to a social state that carried with it particular consequences for the individuals, their friends and relations, and the judges who heard the case. In fact, the prior existence of a state of enmity might be made to appear the crucial issue in the interpretation and judgment of aggressive or violent behavior.

In a pathbreaking article, the medieval historian Robert Bartlett has demonstrated the importance of the legal and social meanings of the category of enmity (*inimicitia*) in medieval (and Roman) law.[24] "Enmity," he writes, was "a generally recognized relationship hedged by ritual, expectation, and sanction."[25] For example, a Saxon ruling from ca. 1221 provides that, "Whoever has a manifest enmity, may harm him on Monday, Tuesday, and Wednesday ... in his person and not his property. On Thursday, Friday, Saturday, and Sunday every man shall have firm peace." The basic legal principle governing enmity is that harm inflicted in a state of enmity carries different legal consequences than harm done against

[24] Bartlett (1992). [25] Bartlett (1992).

others.[26] Enmity as a legal category provided limitations to private violence and announced to the community that individuals were "at war," so that others could appropriately order their relations to them. Though enmity was, ideally, to be publicly pronounced, it was typically inferred from behavior. Thus, the fact that someone had brought a criminal charge against another was presumptive evidence that a state of capital enmity existed between them; the same was true of prior litigation about large sums of money.[27]

In Athens, too, previous prosecutions are adduced by speakers as evidence of pre-existing enmity.[28] While enmity at Athens lacks the legislated formality that it possessed in the medieval era, the claim that litigants were at enmity was legally significant.[29] In Lysias' oration, *On the Murder of Eratosthenes*, a husband, Euphiletus, claiming that his killing of Eratosthenes was justifiable because he was an adulterer taken in the act, must argue that there was no prior enmity between them. In the opening passage of his plea he says that one of the three points that he must establish in order to prevail is that the adultery was the only source of enmity between them (1.4). He expects the prosecution to argue that because of pre-existing enmity the adultery was only a pretext for revenge. He later (1.43) tries to prove that they had not been enemies prior to the adultery, and the way he does this reveals a good deal about expectations regarding enmity in general. Euphiletus (1.44–5) enumerates the kinds of grounds by which Eratosthenes *might* have provoked enmity between them but allegedly did not in fact: (1) Eratosthenes had not subjected him to sycophantic prosecutions (2) he had not attempted to expel him from the city (also through prosecutions) (3) he had not brought any private suit against him (4) he did not know of any crimes of Euphiletus (hence fear of prosecution) (5) Euphiletus did not stand to gain financially by killing him (6) there had been no verbal abuse, drunken brawls, or other quarrels between them. This catalogue represents a kind of social typology of enmity. That is, these are the kinds of things that one at enmity would be readily acknowledged as likely to do to his

[26] Bartlett (1992).
[27] Bartlett (1992).
[28] See, e.g., the prosecutions for homicide and desertion in Demosthenes 21, discussed in Chapter 5.
[29] Enmity was a state which could be inherited. See, e.g., Lysias 22.32 (referring to the *patrikos echthros*).

enemy and they would naturally prompt a desire for violent revenge, in which case the defense of justifiable homicide would be suspect. Euphiletus' only defense against these charges is to try to prove that there was no prior enmity by eliminating all of the paradigmatic grounds for enmity which could produce lethal retaliation. Enmity, then, is a state in which harming one's enemy and retaliating for such harms is expected. Further, in pursuing enmity, individuals are expected to make use of a wide range of means other than direct violent assault. Indeed, since four of the six enumerated categories involve resort to legal process, the preferred strategy seems to have been to attempt to make the courts the instrument of one's vengeance.

Another case (Lysias 4, a prosecution for wounding with intent to kill) also turns in part on the issues of whether the parties at a certain point were still *echthroi* or had been reconciled through mediation of friends (4.1–5). Such reconciliation has a formal quality. It is typically produced through the intervention of friends and formally and publicly ends the state of enmity.[30] In another oration, Lysias (12.2) suggests that plaintiffs are expected to proclaim their motivation in prosecuting. The way in which he phrases this is to say that they are expected to explain their enmity. Thus it can be important to show that enmity did exist, or did not exist depending upon the case.[31] On the one hand enmity could show that the allegations were serious and were not brought sycophantically. On the other hand, as the next chapter will show, certain forms of private enmity might be thought inappropriate to bring before the courts.[32] Hence, speakers often sought to establish both that they were prosecuting because of genuine enmity, and that the prosecution was in the public interest because a public wrong was involved. Enmity, in rhetorical terms, was a topos, grounded in the normative expectations of the audience, to be manipulated according to the exigencies of the particular case.

Lysias' oration, *Against Theomnestus*, illustrates both how enmity

[30] See Lysias 4.5, where the speaker says that he will grant that the reconciliation did not take place, in which case "he was our enemy (*echthros*)." Later (4.11) he claims that a slave could have testified as to whether they "had reconciled or were still enemies (*echthroi*)."

[31] In Lysias 24 the speaker says that his opponent would be lying if he portrays himself as seeking revenge on an enemy (24.2). In Lysias 31, the speaker denies that he is bringing the prosecution because of private enmity (31.2).

[32] See, e.g., Lysias 3.40–3; 4.9.

proceeds by a retaliatory logic and how speakers can exploit the notion of egalitarianism in rivalry for their persuasive purposes. Theomnestus had previously been prosecuted for violating the law against addressing the Assembly after having thrown one's shield away in battle (in modern terms, deserting in the face of the enemy). He was acquitted of this capital charge and sued one of the witnesses for false testimony. The man was convicted and disenfranchised. During that trial Theomnestus accused the speaker of the present case of parricide. The speaker replied with this suit for slander. He begins his argument by saying that if he had been slandered in some other way he would not have sued, since he considers it base and overly litigious to sue for slander. One should simply ignore such insults from insignificant and worthless individuals like his opponent (10.2–3). However, because his opponent charged him with parricide it would be shameful on account of his renowned father not to take vengeance (10.3). In these first fifteen lines of the oration Lysias has brilliantly constructed the speaker's character.[33] He establishes that the litigants are not equals and that the speaker has not engaged his opponent as an equal (and, unlike his opponent, is not the slandering and litigious sort) even though he has brought this action. But for the pious duty to avenge his highly respected father he would have simply ignored him as "insignificant and worthless," that is, as beneath engaging in enmity by taking to court. He maintains the tone of superiority and contempt throughout (e.g. 10.15–16), suggesting that if the man is not a complete idiot he should leave the platform in silence so that the court would not have to give judgment against him (10.20–1). In this speech, as in others yet to be discussed, topoi of equality, status, and hierarchy are manipulated to support a particular representation of the relations and conduct of the parties. One speaker can claim, in effect, that he is not using the courts as an instrument against his rivals because his opponent is beneath rivalry and deserves to be treated like Odysseus treated Thersites. It is open, of course, to the other speaker to use other topoi relating to the same themes to present an utterly different version of the case; for example that he is a defenseless, ordinary citizen being harassed by a hubristic member of the elite, or that the motivation for pros-

[33] In classical rhetoric, one of the functions of the opening part of an oration is to establish the character of the speaker for the particular audience he addresses.

ecution is in fact entirely different and has to do with a private feud in which the complainant is trying to enlist the court. The topoi, in other words, provide a framework for the discursive construction (and performance) of the relations of the parties before the *demos*, as embodied in the mass court.

In another class of cases involving the bestowal of public distinctions, rivalry for honor and the enmity that it produces are immediately at stake. These cases provide clear insight into the agonistic values which inform Athenian social relations, as well as the way in which such values provide the fabric of forensic rhetoric.[34] Athens, like all Greek cities, had a number of institutional ways of formally honoring citizens who served or benefited the state. Athenians well realized that encouraging competition to win these honors would benefit the city as a whole. As Demosthenes puts it (20.5–6), awarding honors to some citizens encourages others to perform services for the city; awarding no one would deter anyone from seeking honor.[35] This is particularly important for a democracy, he adds later, where freedom is preserved by the competition (*hamilla*) of good men for rewards bestowed by the people (20.108).[36] Such rewards represent the admiration of one's equals rather than the generosity of a tyrant (20.24). The themes employed here by Demosthenes are familiar from the examination of Aristotle's *Rhetoric* above. The notion of the nobility of rivalry among equals represents the optimistic interpretation of agonism, but in his praise of Athens' greatness Demosthenes implicitly recognizes that such distributions of civic honors may also prove problematic: Athens' magnanimity, he claims, is demonstrated in the way in which Athenians honor rather than envy those who bring honor to the city, even though this may mean that such honors are enjoyed only by a few (20.141). In practice, as these orations attest, Athenians were often far from so magnanimous. One solution to this problem was to inhibit envy by greatly expanding the circle of those honored. Such an expedient, however, could only diminish the value of that particular currency. If too many citizens are honored in honorific decrees, for example, then such expressions

[34] I do not mean to imply that Athenians did not recognize co-operative values as well. Jameson (1990: 109) notes the tension in Athenian values: "A fiercely competitive ethic co-existed with deep engagement in the communal life of the city and public approval of co-operative virtues."

[35] On competition for honor and its benefits see Whitehead (1983) and Davies (1981: 26).

[36] See also 20.24.

lose their basic function of providing distinction, in the literal sense.[37] In a democracy, the tension between egalitarian and competitive/hierarchical impulses, alluded to here by Demosthenes, can never be fully resolved.[38] How such tensions might be mediated and negotiated, however, requires further examination.[39]

The Demosthenic oration, *On the Trierarchic Crown*, provides an eloquent illustration of the more problematic side of the public recognition of citizens. A trierarchy, involving responsibility for outfitting and maintaining a warship for the Athenian navy, was one of the most significant public duties (liturgies) which a wealthy citizen could undertake.[40] Each year, the trierarch who first had his ship ready for service received a golden crown as public recognition of his contribution. This was only one of the occasions on which the *demos* bestowed crowns to honor one of its members. Such crowns, says Demosthenes in another oration, "are symbols of excellence" (22.75). He goes on implicitly to address the way in which such hierarchical distinctions might conflict with egalitarian values. He claims first that every crown, regardless of its size, implies an equal share of honor. Having established the equality in honor of all conferees, he then (22.76) posits an identity of values and aspirations between those who receive such honors and the *demos* which bestows them. The Athenian *demos*, he says, has always coveted reputation more than wealth, and has spent all its wealth for honor.[41] In other words, those who compete for honor should be seen not as seeking to outstrip and overshadow their fellow citizens, but rather as merely embodying the values held by the citizenry as a corporate body.

This attempt to negotiate the contradiction between claims of equality and hierarchy, however, does little to account for the

[37] Aeschines (3.179–80) argues that if honors were routinely awarded men would not struggle for them because they would confer no eminence. It is, he goes on, the rarity of such distinctions, and the competition and the honor and the undying fame of victory, which lead men to run risks for their city.

[38] On the justification for hierarchical principles of authority in a radical democracy, see, e.g., Demosthenes' explanation that when a politician comes forward and claims that due to his abilities he can manage public business, then the people give him the opportunity to do so. If he succeeds he is honored and gains an advantage over the many (19.103–4). On such expectations of recompense see Davies (1981: 92–114).

[39] This topic will be addressed in Chapters 5, 6, and in the Conclusion.

[40] On competition and liturgies see Whitehead (1983) and Davies (1981: 92–114).

[41] See also Demosthenes 18.154, where he describes Athens as always competing for primacy, honor, and renown.

tensions manifested in the dispute over the trierarchic crown. Honor, as was seen above, presupposes rivalry, and the case described here arises out of the bitter conflict which that rivalry produced. The speaker received the crown upon presenting his ship for service, but other trierarchs contested this award before the Council. Arguing that he deserves the crown because he was the first to have his ship prepared, the speaker claims that his opponents will abuse the powerful position which their wealth gives them by arguing that they too deserve the crown, or at least to share it. They imply, he claims, that they are entitled to the crown as a sign of favor, not because they won it (51.16–17). Introducing the problem of egalitarianism as an attribute of democracy, in the opening passage of the oration he describes the powerful support his opponents have mustered:

> If the decree ... ordered that the crown should be given to the man having the largest number of advocates, it would be senseless for me to claim it, for Cephisodotus alone has spoken on my behalf, while a host of pleaders has spoken for my opponents. But the fact is the people appointed that the treasurer should give the crown to the one who first got his trireme ready for sea, and this I have done. (51.1–2)

To modern readers this oration might seem baffling. Why the apparent plethora of speeches about the character and lives of the competing trierarchs, when the case should simply turn on who was first?[42] Clearly, more fundamental issues are at stake. The speaker alleges that his opponents have engaged the support of orators who will advance their claims. He portrays these men as denying the equality which is the basis of Athenian democracy, saying that they think they alone have a right to speak, whereas the basis of the Athenian system of government is that all men have a share in government and the right to speak (51.19–20). These men, he continues, set themselves up above public decisions and say whom they want crowned or not crowned. This is not the way to encourage citizens to perform public duties zealously, but rather to spend their money on speakers who will make such claims for them (51.20–2). Underlying this case are the tensions inherent in the institutionalized means of channeling the competition of the wealthy into the civic institutions of a democratic society. The

[42] See, e.g., 51.3, 16–21, on the issue of character.

speaker exploits these tensions through his use of topoi drawn from the antithesis of democratic/egalitarian as opposed to anti-democratic/hierarchical values.

As profoundly illustrated by the chariot race at the funeral games at the end of the *Iliad*, rivalries cannot be adequately mediated by such "artificial" competitions if all the participants think that they deserve to win because of who they are as opposed to what they do.[43] Individuals who feel themselves as good as, or superior to, the "winner," will simply not be content to accept the result. In the case of the trierarchs, even though the matter should have been entirely clear cut, it winds up before the Council because what is really at stake is a larger ongoing competition for honor, reputation, and supremacy in social and political hierarchies. Thus, rather than focussing on who actually prepared his ship first, all sorts of resources and arguments are brought to bear to push the result in one way or another. This speech thus reveals the tension between the egalitarian democratic ideology of Athenian institutions and the hierarchical claims which are implicit within the agonistic social framework in which those institutions are embedded. These institutions, moreover, are seen as unable to "resolve" the questions of hierarchy, as opposed to merely providing another forum where they can be expressed and contested. Naturally, there will be a "winner," who will, in the end, receive the crown. This hardly means, however, that the others will accept this result either as "just," or as resolving the competition for honor, reputation, influence, and power which brought them before the Council in the first place. Indeed, whichever way the decision falls, those who are dissatisfied will only have further grounds to desire to assert their superiority. How could it be otherwise when the decision apparently has so little do with the official criteria for victory and so much to do with the influence and status of the antagonists?[44] In such a case litigants could only take the decision to be a judgment about their honor and relative social standing.

One of the most famous Greek orations also arises out of the award of an honorific crown and ongoing relations of rivalry and

[43] See Adkins (1960: 56).

[44] One can also read this case as an example of the kind of envy which Aristotle describes as characteristic of such situations, where the desire is not merely to excel, but rather to deprive the other who has won of the honor which is "rightly" his. See Foster (1972: 175–82).

enmity. A man named Ctesiphon had proposed a motion in the Boulē that Demosthenes be rewarded with a golden crown for his service to Athens. His suggestion was adopted, but Aeschines, a long time rival of Demosthenes, indicted Ctesiphon for making an unconstitutional proposal. Though the case was nominally directed against Ctesiphon, its real target was Demosthenes, who gave what is widely regarded as his finest oration in Ctesiphon's (and his own) defense. As in the case of the Trierarchic Crown, the technical questions which ought to have been dispositive are pushed in the background by the rivalry between Demosthenes and Aeschines. The way in which Demosthenes chooses to defend himself against Aeschines' attack on his character and career provides further insight into the attitudes and expectations associated with enmity in Athens.

Demosthenes argues that the real purpose behind Aeschines' prosecution is the long-term enmity between them (18.12, 15). Aeschines, he claims, is misusing the courts by turning them into a forum for private animosities when they should serve for judging accusations of offences against the city (18.123). Aeschines' charges are, in fact, not accusation (*kakegoria*) at all, but rather personal abuse (*loidoria*). Such verbal abuse characterizes personal enmity and does not belong in the courts (18.123–6). While this long-term rivalry might be taken to imply that equality in honor spoken of above, one of Demosthenes' strategies is to deny Aeschines that equal standing as a rival and, hence, man of honor. For example, returning later to the theme of private enmity, Demosthenes says that no man of standing would expect a jury to support him in his enmity nor would he bring such a matter before the courts (18.278). This, however, is just what Aeschines is doing in seeking to deprive him of his crown out of private enmity, envy and small-mindedness (18.279).[45] Paradoxically, Demosthenes at once admits the relationship of rivalry and denies it. Both Demosthenes and Aeschines depict the other as so thoroughly scurrilous and dishonorable that to acknowledge him as a rival would seem to impugn themselves. Such attacks on the character of one's opponent are, however, characteristic of insult relationships in a wide

[45] Demosthenes characterizes himself, on the other hand, as serving only public and not private interests (18.281). A little later (18.283–4) he says that Aeschines had alleged thirteen years before that Demosthenes had prosecuted him from private enmity, but in reality it is Aeschines who is so motivated. See also (18.290–3, 306–9).

variety of cultures.[46] In such relationships the quasi-ritualized act of denigrating the standing of one's opponent as not within the community of rivals for honor is at the same time an affirmation of that standing. One does not duel, verbally or otherwise, with those genuinely beneath contempt.

The pattern of insults which characterizes Icelandic insult exchanges, for example, appears strikingly similar to Athenian oratorical invective.[47] On Carol Clover's account, the elements of insult exchanges typically include a "blend of insult, competitive boasting, and curse."[48] They employ an "emphatic I/you contrast ... in the matching of personal histories and the exposure of dubious or shameful deeds."[49] The accusations typically include cowardice, failure in important military or political tasks, domestic and sexual indulgence, failure to exact vengeance or support kinsmen, and sexual perversion, such as passive homosexuality.[50] These, of course, are very much like the categories typically employed by Athenian orators to besmirch the reputation of the opposing party while vaunting their own deeds. While Icelandic or Turkish insult exchanges, like those in Greek drama, take the form of a chain of insults and rejoinders, the exigencies of Athenian forensic oratory lent them a narrative form as part of the two opposing speeches. Such exchanges, as will be seen here and in subsequent chapters, are nonetheless a semi-formalized form of invective that is a part of the very relationship of rivalry which it attempts to deny.

In accordance with the categories described by Clover, Aeschines resorts to the full oratorical panoply of insults and accusations against Demosthenes. He portrays him as having failed and betrayed his kin and friends (3.51–2, 77–8), dishonored himself by failing to retaliate after being publicly struck in the face (3.52–3, 212), engaged in illicit sexual conduct including passive homosexuality (3.162, 174), squandered his patrimony and generally engaged in extravagant and debauched behavior (3.173), proved a coward in battle (3.175–6), committed various acts of impiety (3.106ff.), sprung from questionable origins on the maternal side (3.171–2),

[46] See especially Clover's (1979, 1980, 1986, 1993), and Dundes, Leach, and Ozok (1970).
[47] See also G. Miller (1994) on similar patterns in Biblical insult exchanges.
[48] Clover (1980: 466). All three elements abound in Athenian judicial orations.
[49] Clover (1980: 466).
[50] Clover (1993: 373).

dishonored the city through his servile flattery (3.76), and produced a whole series of major military and political failures which the bulk of the oration describes in detail. While Demosthenes, as noted above, denies that Aeschines is honorable enough to be his rival, he nonetheless invokes the principle of retaliation in kind for insults (18.124, 126) and responds with his own barrage of abuse.

Demosthenes begins by setting up his response in terms of the "I/you contrast" of the antagonists' personal histories. He asks the court to judge him by comparing his character, birth, family, and life with Aeschines'. He tells them that if they think he is a better man and of better origin then they should reject Aeschines' accusations (18.10–11). When he systematically compares his own life with that of Aeschines (18.256ff.), he emphasizes his respectable origins, his higher social station, his proper education, and his wealth which allowed him to avoid disreputable occupations (see also 18.113–14). Turning to personal invective, Demosthenes trots out the familiar topoi: Aeschines is of servile origin, his mother was a prostitute, he received no education, he, like his father, earned his living through servile and dishonorable means (18.258–62), etc. In general, he portrays Aeschines as so low that his attack on Demosthenes should not be viewed as part of the normal course of a feud between equals, but rather a scurrilous attack on an important public figure of high birth by someone who should be punished for such effrontery.

One of the most striking features of Demosthenes' argument is its blatant anti-egalitarian stance. Demosthenes adopts the position of the aristocrat who has assumed his rightful position as a leader in society looking down on and ridiculing someone of obscure origin who has dared to compete for leadership.[51] The strategy of denying Aeschines equality of honor is clear enough, but what does this tell us about the relationship which Demosthenes thought he was establishing with his audience by implicitly setting himself above them as well?[52] Why does he not fear that the audience will

[51] See also (18.265) his summary of the argument which includes a schematic comparison of their lives: one of poverty, obscurity, and ambition beyond one's station, the other of privilege, wealth, etc. Demosthenes (18.268) also emphasizes the way in which he has repeatedly helped those beneath him through private charity (while saying that he is too modest to mention such deeds).

[52] The purely rhetorical nature of this stance will become even clearer in the examination of Demosthenes 21 in Chapter 5. There Demosthenes (at times) portrays himself as one of the *demos* oppressed by wealthy and powerful bullies like his opponent.

identify themselves with Aeschines and resent these arrogant imprecations? One part of the answer to these questions doubtless has to do with the fact that the case fundamentally rests upon a claim of extraordinary distinction. Demosthenes' main strategy is to demonstrate his worthiness to receive the crown commemorating his life of service to Athens (18.266) and Aeschines' unworthiness to question the honorific decree of the polis. To accomplish this he must unequivocally demonstrate his entitlements to honor: birth, wealth, power, and civic service. Demosthenes' success in this case indicates that the Athenian audience was prepared to accept such anti-egalitarian claims from those whom they acknowledged as worthy of such honor.

Late in the oration, Demosthenes describes political activity as a contest in which a man of standing has the opportunity to excel and show his worth. He characterizes Aeschines as simply outside of this competition, saying that Aeschines placed neither first, second, third, fourth, fifth, sixth, or anywhere at all (18.310, and cf. 317–19). Aeschines has failed because he benefited the city neither through the policies he has advocated nor through his private munificence (18.311–14). On the other hand, in this competition of public service which was open to all, Demosthenes' speeches and advice were victorious (18.320). Having established his own success and Aeschines' failure, he can then explain (for his own benefit) Aeschines' true motivation in bringing this suit: envy (18.315; and cf. 207–9). He tells the judges that rather than openly competing by advancing policies for the good of the polis, Aeschines and his cohorts waited until things went wrong and then attacked Demosthenes and harmed the city (18.320). This argument builds upon the topoi described by Aristotle according to which the rivalry of equals is virtuous (and a civic benefit) while envy is base and destructive. Aeschines' character is such that he wants to deprive others of honor so as to reduce them to his own level.[53]

William Miller notes that in medieval Iceland, "The culture of honor meant the prospect of violence inhered in virtually every social interaction between free men . . ."[54] He explains how seating

[53] See also 18.279. Aeschines, of course, also makes the same accusation of envy against Demosthenes (3.22, 54, 139), on which see Walcot (1978: 69).

[54] Miller (1993: 85).

arrangements at feasts were a typical cause of violence because in this culture without formal titles or official hierarchies, feasts "provided one of the few occasions ... where relative ranking was clearly visible."[55] In Athens holding public office did little to indicate standing because nearly all officials were chosen by lot. Further, especially after the death of Pericles, democratic egalitarian ideology encouraged those of undistinguished birth to enter the rivalry for influence and prestige. As Aristophanes inveighed, the son of a sausage seller might become, for better or for worse, the leading man in political affairs. What were, then, the rituals and occasions upon which hierarchies necessarily became fixed and visible, as in the order of seating precedence in Iceland? The rivalry attending the award of honorific crowns gave rise to litigation precisely because it was a highly public occasion on which relative worth was evaluated by the *demos*. For similar reasons, choral competitions were also a locus for rivalry and violence, as the next chapter will show. Further, as the orations just discussed have indicated, litigation itself was seen as an event whose outcome hinged on and expressed a social judgment of the parties. In this nominally egalitarian society, in which neither titles nor offices fixed one's ranking, the question of settling relative standing, of clarifying hierarchies of honor among rivals, was always open. Eschewing, for the most part, direct homicidal violence, the courts were a natural arena for such contests, and the rhetoric of enmity, envy, and invective was the primary instrument with which they were waged.

Such rhetoric was not limited to the narrow circle of men like Demosthenes and Aeschines. An oration of Lysias involving an invalid pensioner employs the same topoi used by Demosthenes on his own behalf. From the very beginning of the oration, Lysias accuses his opponent of bringing the action (for unlawfully receiving an invalid's pension) on account of envy (24.1–2).[56] He further argues that his opponent will falsely claim that he brings the prosecution out of enmity so as to get revenge (24.2), but in fact it is only out of envy because the speaker is a better citizen (24.3). In other words, Lysias resorts to the same antithesis between enmity and envy as employed by Demosthenes. The desire for revenge

[55] Miller (1993: 85–6). [56] See Walcot (1978: 67–8).

apparently would be seen by the judges as a legitimate reason for prosecuting, so the speaker must deny that this is the case. Mean-spirited envy, on the other hand, reflects badly upon the accuser's character and indicates that the suit is unreliable (24.2–5).[57] Denying his opponent's accusation that he possesses considerable means, he concludes the oration by saying that if they find in his (the speaker's) favor, his defeated opponent will learn not to plot against those who are weaker, but rather to prevail over his equals (24.27).

The actual merits of the case are no longer ascertainable, but what is more important is the way in which the arguments from enmity, equality, and revenge, reflect the normative expectations which Lysias anticipated the judges to bring to bear in their verdict. He presents enmity and revenge here as legitimate motivations for litigation, whereas envy implies that the accuser's claims cannot be trusted. Of course, in other orations enmity itself will be advanced as a reason to question the credibility of one of the parties. Be this as it may, enmity and revenge are consistently portrayed as honorable when opposed to the shamefulness of envy. As Demosthenes puts it, one ought not to envy even a wealthy man who has acquired what he has without wrongdoing (20.24).[58] For the *demos*, he claims, no reproach would be worse than having acted out of envy, because envy is the sign of a vicious nature (20.139–40; see also 20.165).

While litigants portray envy as base, they advance vengeance as a respectable motivation for litigation. For example, Lysias, in his oration *Against Agoratus*, appeals to the duty of vengeance from the first sentence. Because Agoratus' acts of informing led to the deaths of the speaker's brother-in-law and many others, it is therefore just and pious for him, and for the city, to seek vengeance (13.3, 48), and they will feel pleasure in condemning him to death (13.4). The speaker attempts to engage the sympathies of his audience by recounting in detail how before he died the victim enjoined his friends and relations to take vengeance. The victim, he continues, also told his wife, who he thought was pregnant, to bear a son and

[57] Implicit here is the maxim that private enmity produces public good, because enemies seek out each other's wrongdoing.

[58] See also Demosthenes 42.22–3, arguing that one should not feel envy towards the wealthy because of the financial burdens they must bear on behalf of the state. See Dover (1968: 49).

raise him to avenge his father (13.41–2, 92). This notion of vengeance as a sacred duty enduring through time is typical of feuding societies, where male children are raised to avenge deceased fathers or brothers.[59]

In Athens, as will be further seen in subsequent chapters, the homicidal violence of blood feud appears, for the most part, to have been displaced into other arenas. The form which vengeance takes in *Against Agoratus* is not the shedding of blood, but prosecution for a capital offense. Indeed, the notion of vengeance as a moral duty and requirement of honor is also frequently used to justify prosecutions in cases where no blood has been shed. For example, in *Against Androtion*, Demosthenes characterizes his opponent as a man who brings lawsuits to harass his enemies. He charged Demosthenes with parricide and then prosecuted his uncle with an action for impiety for associating with him (22.2). Demosthenes successfully defended these charges and characterizes his appearance here in Euctemon's lawsuit against Androtion as his revenge for this wrongful prosecution. Demosthenes describes himself as a man who avenges wrongs done to him and tells the court that he "will endeavor to avenge himself both on this occasion and on all others" (22.3).[60] Thus, while Androtion's habit of bringing groundless suits out of private enmity or for political gain is base, using the courts as a vehicle for vengeance is an acceptable means of satisfying the imperatives of honor. Of course, those who are characterized as bringing trumped up prosecutions to annoy their enemies would in all likelihood justify themselves by appealing to the same topoi which Demosthenes adduces: vengeance for serious wrongs. Indeed, in the present case Androtion argues that it is actually retaliation for his tax collecting activities that has motivated this suit (22.49–51, 59–61). Demosthenes responds to this defense with another familiar topos: Androtion is not hated for his

[59] Mothers, in such societies, often keep a blood encrusted article of clothing which they show to the child as he is growing up to remind him of his duty. In Antiphon 1, the plaintiff's father enjoined him on his deathbed not to allow his murderers to escape (1.1). He later comments that those who are dying from foul play summon their friends and relatives and charge them to take vengeance (1.29).

[60] Aeschines, as was seen above, castigates Demosthenes for not taking vengeance for insulting behavior by Meidias (3.52–53, 212). As will appear in Chapter 5, Demosthenes' characterization of his disposition towards vengeance is much more equivocal in his speech against Meidias than in his tirade against Androtion.

tax collecting, but rather for his overweening and abusive behavior to citizens (22.60, 68).

The foregoing discussion of attitudes towards enmity, envy, honor, and vengeance has heavily emphasized the way in which these concepts are strategically employed in persuasive contexts. Athenian values do not constitute a rigid code, pellucid in structure and meaning and mechanically applied. Rather, their unsystematic nature enabled those skilled in rhetoric to guide the manipulation and interpretation of norms in light of the normative expectations of the community so as to put one's case and one's character in the best possible light. As Elster comments on the ambiguities inherent in the "norms of revenge," a wide range of responses was typically open to antagonists, but the limits of those responses were defined by the normative expectations of the community to whom they had to "sell" their choices of action.[61] The ambivalence, incoherence, and ambiguity of the norms, however, meant that those limits were broad indeed and offered "considerable scope for skill, choice, manipulation, and interpretation."[62] As Herzfeld says of the duty of vengeance among the Cretan Glendiots, while everyone acknowledges the moral imperatives of vengeance, they also understand that these imperatives are negotiated and interpreted as each particular situation requires. A Glendiot can thus "choose between violence and restraint, between verbal and physical defense of the patrigroup, between public bombast and private diplomacy. He may decide to represent a wounding as intentional, to accept it as an accident, or to treat the question of intention as irrelevant to the attribution of responsibility."[63] Athenian judicial orations, it follows, should not be read as repositories of moral verities about enmity, vengeance, and the like, but rather as a record of the ongoing discursive construction of those values through the interpretative and manipulative practices of forensic rhetoric.

These rhetorical practices should be understood as quintessentially public acts by which individuals invite judgment through their attempts to establish a particular social biography. Gilsenan explains how in "status honor" societies like Lebanon, "... status

[61] Elster (1990: 870).

[62] Elster (1990: 870). He aptly comments that, "In some contexts, following the lodestar of outcome-oriented rationality is easy compared to finding one's way in the jungle of norms."

[63] Herzfeld (1985: 82).

is negotiated in behavior that emphasizes visibility and making claims in the public domain about one's acts and biography."[64] Such biographies are negotiated in what Gilsenan calls "situations of ultimate reference within which and in light of which men transact their socially significant selves." This notion may prove of value in the case studies to be examined in Chapters 5–8. A situation of ultimate reference occurs when the community defines a situation as such that honor and reputation are at stake, for example, serious insults or attacks on family honor.

Gilsenan's conceptual framework is useful because it emphasizes the way in which individuals respond to such situations through public discursive and performative constructions of their character and behavior. If one does not respond to an insult, blow, or killing with immediate retaliation, the only course is to seek to influence the public definition of the situation and of one's self to avoid dishonor and disgrace (a strategy which Demosthenes will be seen to employ in his lawsuit against Meidias, discussed in Chapter 5). Individuals must seek to take advantage of the ambiguities and interpretative possibilities offered by norms of honor in such a way as to further their own interests while satisfying the public demands of honor in situations which "pose critical challenges of violence and shame."[65] Chapters 5 and 6 will examine a group of orations as such "critical challenges" in which a public definition of one's status is at stake. Drawing upon this chapter's discussion of the rhetorical topoi appropriate to such situations, these chapters will explore the strategies which litigants adopt to deal with such challenges in the context of the law courts where litigants are literally "exposed" to public judgment.

[64] Gilsenan (1976: 200). [65] Gilsenan (1976: 211).

CHAPTER 5

# *Litigation as feud*

> Nothing makes a state so strong and stable as organizing it in such a way that the agitation of the hatreds which excite it has a means of expressing itself provided for by the laws.[1]

Chapter 4 discussed the role which enmity, revenge, envy, and honor played in the appeals which Athenian litigants made to the values of the mass courts of untrained citizen-judges. It suggested that while the chain reaction of homicidal violence which characterizes blood feud does not appear to be an organizing principle of conflict in classical Athens, the social values associated with enmity and honor bear significant similarities to those of feuding societies. Most of the scholarly literature on feud has focussed on blood feud, but anthropologists have acknowledged that the social dynamic of feud may operate through other forms of insulting or injurious behavior.[2] Further, historical studies of feuding societies have shown that as centralized judicial and political institutions become powerful enough to limit homicidal retaliation for wrongs significantly, rather than suppressing the impetus to feud these institutions themselves become a new arena where such conflicts are played out.[3]

In examining the social context of Athenian litigation, this chapter suggests that much litigation should be viewed as a form of feuding behavior, and that it was acknowledged as such by Athenian judges and litigants. As a result, assumptions about the function of courts as displacing feud by providing an institutionalized mechanism for the final resolution of disputes and about the nature of the judicial process as aiming at the discovery of "truth"

[1] Machiavelli, *Discourses* 1.7.
[2] Pospisil (1971: 4–5).
[3] Wilson (1988: Chapter 10).

will be seen to be largely out of place at Athens. This is neither to say that litigation was no more than feud, nor that Athenians were unaware of the values associated with the rule of law. However, the ideology of the rule of law was just that: an ideology of equality, impartiality, and justice which existed in tension with countervailing values about the political and social meaning of conflict and judgment. Exploring this tension will illuminate both some of the more notorious features of Athenian legal practice as well as the nature of the judicial process itself. The chapter will begin with a brief review of some aspects of feuding behavior and then move to consideration of a series of Athenian legal disputes.

## I

A feud involves an institutionalized relationship of hostility between two individuals or groups. Once begun, feud follows its peculiar social logic through a series of aggressive acts which may or may not end in settlement. Anthropologists often note that "feuds resemble games,"[4] because feuding typically follows a course of move and counter-move according to a complex set of rules which participants generally take pains to follow (or at least take pains to appear to follow). The principal objective of this game is honor.[5] In highly agonistic societies the honor and prestige gained through the feud provide the basis for claims to leadership in the community: "... [T]he reason for indulging in feuding relations is not so much the desire to inflict a loss ... as to use this victory to enhance individual and group prestige within the home community and in the eyes of the world ... Feuding relations may thus be seen as the raw material which provides the foundations of internal political hierarchy ..."[6]

While blood feud involves a series of killings, one in response to the other, the rule-oriented dynamic of feuding behavior is not limited to such cases. Bourdieu's classic discussion of honor in Kabylia, for example, shows how insult relationships follow the patterns associated with feud. In Kabylia, insulting behavior is considered as a challenge which requires a response. This response,

[4] Black-Michaud (1975: 26).
[5] Black-Michaud (1975: 178–207).
[6] (1975: 26–7).

in turn, serves as a new challenge, and the process continues either until one of the parties is no longer able to respond or until mediation ends the conflict. A challenge initiates a competition for honor which presupposes an ideal equality in honor, though, in fact, one party may be stronger, wealthier, or more powerful than the other.[7] Thus, to challenge or to reply to someone who is either of marginal status or so much weaker that the relationship cannot be regarded as competitive is to diminish one's stature in the eyes of the community.

In other words, Bourdieu argues, a challenge to someone's honor initiates a game played in conformity with rules, as interpreted and manipulated by the participants in light of community expectations. To choose not to reply to the insult may have different meanings: "The man who from pusillanimity or weakness, evades or renounces the possibility of riposting, chooses to some extent to be the author of his own dishonor and shame, which are then irremediable."[8] However, non-reply may also involve a deliberate refusal to reply because one does not recognize the challenger as a person of honor with whom one can compete. Such a non-reply, of course, relies upon community acceptance of the act as such. Inevitably, then, "victory" involves persuading the community that one is, in fact, the party who has played better the game of honor. Such persuasion relies upon the interpretation and manipulation of the "normative repertoire" of values, beliefs, and expectations which collectively constitute the "rules" informing the game. Thus, "The sentiment of honor is lived out openly before other people. *Nif* [honor] is above all the action of defending, cost what it may, a certain public image of oneself."[9]

The performative dynamics of competition for honor thus respond to the pressure of opinion. While in blood feud one's very life may be at stake, in non-homicidal forms of feud one wagers one's honor, reputation, and social existence. In short, the result of such competition reflects a public judgment of all one is as a man, and the challenge is to perform discursively a social identity which the community will validate over the claims and aspirations of one's opponents. Given the inseparability of social competition and poli-

[7] Bourdieu (1966: 197).
[8] (1966: 205).
[9] (1966: 208–9).

tics in small scale communities, the broader implications of such "private" conflicts are apparent.

## II

This section examines in some detail a lawsuit which Demosthenes brought against one of his enemies, Meidias, for slapping him during a festival. This complex case may serve as a kind of paradigm for the notion of litigation as feud advanced above. The modern predisposition is to regard such a suit as a single transaction, a dispute which it is the task of the courts to resolve.[10] From this perspective, all matters not directly related to this transaction are irrelevant and beyond the purview of the court. In Athenian terms, however, this suit can only be understood as one part of a much larger matrix of transactions, transactions shaped by the dynamic of feud. Thus, rather than beginning with the suit against Meidias itself, it is necessary to go back to the origin of the broader conflict of which it is a part. Rather than examining the particular conduct of Demosthenes and Meidias which is the ostensible subject of the suit in an effort to determine who was in the "right" or who was in the "wrong," one should instead uncover the dynamic of competitive conflict of which both of their behaviors are an expression. In short, rather than thinking in terms of a "just resolution" of the dispute one should think instead of how the game of honor is being played and the social consequences of the result.

The dispute between Demosthenes and Meidias begins long before the slap which produces this particular lawsuit. It begins with Demosthenes' efforts to recover his patrimony, efforts which led, in a manner typical of feuding behavior, to a series of actions and responses which drew in a larger group of kin and friends in support of the original antagonists.[11] Whether Demosthenes was unjustly deprived of his inheritance or not is impossible at this remove to say, but what matters is that Demosthenes persuaded the court that such was the case. This success, however, did not lead either to a resolution of the dispute, or to Demosthenes' receipt of the money due him. To our sense of justice and legal process this may seem scandalous. In the agonistic society of classical Athens,

[10] See MacDowell (1990: 8).
[11] See Kiefer (1972: 59).

however, the chain of conflict and litigation which it initiated would have seemed entirely natural.

Even before his first suit against Aphobus, one of his guardians, had come to trial, Demosthenes' opponents had responded with a countermove. According to Demosthenes (28.17–18), they had a third party, Thrasylochus, bring an *antidosis* against him as a way of deflecting his suit against them. The *antidosis* was a special kind of suit used to mediate conflict about who should bear the burden of public service. This suit confronted Demosthenes with the choice of either accepting the burden that had been assigned to Thrasylochus (a trierarchy) or submitting to an exchange of their total estates. Demosthenes (28.17–18) claims that though poorer than Thrasylochus he accepted the trierarchy out of fear that in transferring his estate he would lose his right of legal action on which the lawsuit was based. The countermove was thus quite effective for it imposed upon Demosthenes a considerable financial burden which, he claims, made it more difficult to pursue his attempts to recover his inheritance. Thus, the public legal process of the *antidosis*, designed to mediate conflict about sharing public burdens, is here used for personal ends as a riposte to Demosthenes' challenge.

After Demosthenes had received a favorable judgment in this first suit, Aphobus replies again, and on two fronts. First, he brings a lawsuit for false testimony against one of the witnesses who had given evidence on Demosthenes' behalf. This, of course, is an indirect way of attacking the adverse judgment.[12] Second, according to Demosthenes, Aphobus takes steps to avoid the judgment rendered against him. He transfers property to two third parties (Aesius and Onetor), ruins the house recovered by Demosthenes, and takes up residence outside of Athens.

In short, Aphobus again uses legal process as a weapon against his opponent, and also successfully blocks the execution of the adverse judgment. Further, through the operation of the principle of solidarity, on both sides more parties are drawn into the conflict. Appropriately, Demosthenes offers a general sociological interpretation of the way in which social bonds and divisions affect legal process. In defending his witness against Aphobus' charge of false testimony, he claims (29.22) that none of the grounds which produce false testimony were present in this case. Those who give

[12] Demosthenes 29.2–3.

false testimony, he claims, are led to do so either by bribes (because of their poverty), or by friendship, or by enmity for one of the parties. If the basic moral principle of this agonistic society is that right consists in helping one's friends and harming one's enemies, then the institutional adjudication of conflict is not seen as a realm independent of this principle.

In the next round of the expanding struggle Demosthenes responds to Aphobus' two-pronged countermove. First he tries to take possession of a farm Aphobus had transferred to his brother-in-law, Onetor. Onetor violently drives him off, so Demosthenes brings another suit to eject him. As usual, the court is confronted with conflicting factual allegations which it has little means of resolving. Onetor claims that he is the rightful owner because the land had been mortgaged to him as security for the dowry of his sister (Aphobus' wife). When his sister had been divorced and the dowry not returned, he legally took possession. Demosthenes argues that the divorce was contrived, and that the whole scheme had been cooked up to make it impossible for him to enforce his judgment.

We do not know the outcome of this suit, nor, with one major exception, the further progression of the feud of which it is a part. Tradition has it that Demosthenes succeeded in recovering very little of his patrimony, but this is hardly relevant. Instead, five points deserve underscoring: first, Demosthenes' attempt to recover his patrimony leads to a series of challenges and ripostes which operates according to a dynamic characteristic of the feuding behavior described above; second, in this "feud" legal judgments are by no means binding, nor do they serve to terminate or resolve the conflict; third, both parties to the dispute employ the legal process as a weapon by which to pursue their conflict. This tactic only serves to intensify the enmity between the parties; fourth, as in feuding societies, there is a tendency for the conflict to broaden as the principle of solidarity draws in third parties. At Athens litigation serves as an important means by which this process occurs; fifth, in arguing their cases, litigants employ the techniques described by Bourdieu, Herzfeld, and Gilsenan to bring public judgment on their side. That is, they manipulate the normative expectations of the community to convince the public (the Athenian court) that they "deserve," as *persons*, to prevail. Thus, forensic orations inevitably employ rhetorical topoi which focus

upon the reputation and general conduct of the parties rather than upon the legal issues technically germane to the matter at hand. Though the modern predisposition is to dismiss such claims as irrelevant and misleading, on Athenian terms they are as relevant as the factual conflict on which the suit is technically based. As will be seen, all of these elements play important roles in the one other lawsuit (of which we know) to which Demosthenes' attempt to recover his patrimony gave rise.

When, in the initial exchange, Thrasylochus challenged Demosthenes to an exchange of property, Thrasylochus' brother, Meidias, assisted him in this attempt. In retaliation, Demosthenes sued Meidias for the first time, giving rise to another feuding relationship which lasted for many years and whose history is memorialized in Demosthenes' *Against Meidias*.[13] Though this speech presents only one side of the conflict, it depicts clearly enough the agonistic social framework within which the legal process operated. Moreover, *Against Meidias* is particularly interesting because it makes manifest the tension between Athenian egalitarian ideology and the internal logic of an agonistic society which judges individuals and social relations in terms of hierarchies of honor and domination.

According to Demosthenes (21.8), while he was serving as a chorus leader in the competition (*agōn*) of choruses in the festival of the Dionysia, Meidias waged a kind of guerrilla warfare against him. The alleged acts of sabotage included bribery, harassment of various kinds, destroying the gold paraphernalia used in the festival, coercion, and physical violence. This aggression culminated in Meidias publicly striking Demosthenes during the actual procession. Demosthenes' oration was written to be delivered in the prosecution for this blow. A short discussion of this long and complex oration cannot do justice to the wealth of material it contains. There are, however, a number of important aspects of Demosthenes' rhetorical strategies which merit particular attention. These strategies anticipate reactions by the court to certain aspects of the case and, as such, reveal Demosthenes' view of the normative expectations of the community which would judge him.

First, Demosthenes, beginning with the first sentence, sounds the note of *hubris*, the humiliating insult to honor to which he claims he

[13] On this oration see Ober (1989: 205ff.), and P. Wilson (1992).

has been subjected.[14] In claiming to be a victim of hubris, however, he tacitly admits that he has been dishonored and that only successful retaliation can redeem him.[15] If the trial were merely an adjudication of the facts so as to determine whether or not Meidias struck Demosthenes during the festival this tacit admission would only strengthen Demosthenes' position. However, since this, to our minds, central issue takes up only a small part of the oration, and since another social logic, that of honor, humiliation, and revenge, is operative here, such an admission is not without its hazards. Accordingly, Demosthenes, at the very outset, acknowledges this dilemma when he tells the court (21.6–7) that *he* is now the defendant, since he has as yet obtained no redress for Meidias' act of hubris.[16] In fact, to use Gilsenan's (1976: 200) phrase, though formally the plaintiff, Demosthenes himself faces the challenge of a "situation of ultimate reference," where he must defend and construe his behavior in such a way as to conform to the social identity, the claims of honor, status, and prestige, which he asks the court to affirm.

Demosthenes argues that although he did not avenge this dishonor by direct retaliation this failure should not be held against him. This argument anticipates two points: The first is that if he did not retaliate the insult could not have been so bad. The second is that if the insult was as outrageous as he claims, what kind of man would not have retaliated immediately instead of waiting for the future and unpredictable deliberations of a court? Demosthenes anticipates this logic in his discussion of provocation (21.72f.), where he says that the tone, look, or gesture with which the blow is struck is what makes the insult unbearable for one unused to such treatment. That is, the man who is not provoked is the man who accepts being treated like a slave, a man without honor. Accordingly, Demosthenes must walk a thin line. He argues that he sym-

[14] Hubris encompasses any conduct which deliberately humiliates or insults another (see Chapter 7). Meidias' behavior closely matches Aristotle's definition of hubris as inflicting a harm which causes disgrace for the sheer pleasure of doing so through the affirmation of one's superiority (*Rhetoric* 1374a13, 1378b20ff.; see also *NE* 1149b23). For an overview of treatments of hubris in *Against Meidias*, see P. Wilson (1992: 164–72).

[15] Isocrates (20.5) explains that when a free man is struck, what is terrible is not the injury which blows cause, but the indignity and dishonor. He says that it is appropriate for free men to be enraged to seek the greatest revenge. He tells the court, "I have come to make him pay."

[16] Cf. 21.46, where Demosthenes claims that to a free person there is absolutely nothing more unbearable than an act of hubris.

pathizes with those who take immediate vengeance themselves (he cannot deny this ethic of honor), but he claims that he was fortunately *sophrōn* (self-restrained) enough to master this impulse. He thus seeks to portray (21.74) himself not as a passive victim (hence, humiliated, dishonored), but as a man of honor who keenly felt the insult, but whose strong character and high regard for the rule of law enabled him to restrain himself.[17]

Our concern is not assessing whether this argument is right or wrong, but rather recognizing that Demosthenes thought it was the best argument which a man in his rather awkward situation could make to explain his behavior in light of the social identity he defends. On his view, the values of his audience were such that the imperatives of honor and revenge could not be ignored, but rather had to be re-interpreted in the light of (on his view) "higher" civic imperatives. Thus, he concludes this argument by claiming that the court should set a *precedent* so that *in the future* those who suffer hubris should not "punish" the offender in hot blood, but should leave this to the court. His appeal to setting a precedent indicates that he cannot portray *his* conduct as unequivocally adhering to current normative expectations about revenge and honor. Further, his argument leaves another question unanswered. In a society in which competition for honor is so prominent, why should the courts interfere in such competition? Demosthenes' attempt to answer this question is one of the major themes of the oration.

Demosthenes introduces this topic in the opening passage, where he portrays Meidias' (21.7ff.) act of hubris as an offense against the whole citizenry and not a mere act of private enmity. Public interest, he claims (21.7), requires that men like Meidias not be permitted to act with such impunity. Later in his speech, he returns to this theme, and the argument of Meidias which he thinks it necessary to anticipate at great length indicates which expectations of his audience he fears. Meidias, claims Demosthenes (21.29), will argue that the two of them are "at war," and that for this reason the court should not deliver him into the hands of his enemy. Demosthenes emphasizes over and over again that to punish a transgressor of public order is not to deliver that transgressor over to his private enemy for vengeance (21.29–35). Clearly, the implicit argument which this long passage is designed to counter is that

[17] See Herzfeld (1985: 75–6) on the rhetoric of honor and restraint.

since the litigants are enemies, Demosthenes' public suit is merely a maneuver in a private feud and, thus, any penalty would be inflicted on behalf of one party. The amount of time he devotes to countering this argument seems to indicate the resonance he feared that it might find with the values and expectations of his audience.

Demosthenes' main response is, as indicated above, that this wrong is a public, and not a purely private, matter. However, Demosthenes (21.36ff.) also fears that Meidias will argue that the frequency of such conduct indicates that it is a routine part of social life. That is, Meidias might persuade the court that in an agonistic society competition for honor naturally involves such aggressive conduct and entails such risks. Therefore, Demosthenes' lawsuit would just represent another move in this game. Since Demosthenes himself has stated that he must win this suit or be covered with shame for not avenging an insult, in a sense he has left himself open to such an argument. This is another of the tensions which underlie his position.

Moreover, Meidias could not only assert that such acts are part of Athenian social life in general, but could also maintain that they are particularly associated with overtly competitive contexts like the *agōn* of choral competition. Accordingly, Demosthenes again devotes a substantial section of the oration to countering this possible claim. In a long section he has to concede that the competition of chorusmasters is particularly keen.[18] Driven by a love of emulation, they struggle against one another and exhaust their resources in their quest for victory and honor (21.59, 61).[19] He admits that in such contexts rivalry and hostility are to be expected and in the past have often led to hostile behavior and harassment. This is somewhat excusable, he allows, when a chorusmaster is overwhelmed by his desire to prevail (21.66). It is eloquent testimony to the strength of agonistic values at Athens that Demosthenes feels compelled to concede so much. All that is left for him to argue (21.62–9) is that no one ever went so far as Meidias, who deserves to be punished for going beyond the bounds of "acceptable" rivalry. He admits that in an earlier period Alcibiades had struck another chorusmaster, but argues that this was only permissible because the present law regulating hostility between

[18] See Whitehead (1986: 234).
[19] On *philonikia* see Strauss (1986: 33).

chorusmasters had not yet been passed.[20] But, he concludes (21.66–8), it would be unjust to condone such extreme behavior as that practiced by Meidias, especially because this would allow the rich and powerful to take advantage of their position.[21] Since such competitions typically take place between the well-to-do this argument hardly seems decisive, but does serve to reinforce Demosthenes' ongoing use of topoi appealing to resentment against the rich.

This comment, then, is one of Demosthenes' many appeals to the egalitarian ideology with which he seeks to gain the support of the court. The entire passage (21.58–77) details the rivalries of Athenian social life over honor, prestige, leadership, and, ultimately, power. Nothing Demosthenes says denies the predominance of this agonistic ethic and the rivalry it produces. He can only argue that Meidias did not play according to the rules of the game when he transgressed what Demosthenes claims were the prescribed limits of competitive hostility. Accordingly, aggression is viewed as a natural and acceptable means for establishing social hierarchies, though social institutions seek to mediate that aggression in ways that limit the kinds of violence that competition spawns.

A final element contributes to the rhetorical strategy sketched above. Demosthenes explicitly acknowledges that of crucial importance to the case are the character and reputation of the parties. As discussed above, honor depends upon the community's assessment of one's character and upon the way in which one's actions are interpreted and justified before the court of public opinion. Similarly, Demosthenes (21.136) acknowledges that defendants typically ask the court, "Does anyone of you know me to be capable of this? Who among you has seen me do such things?" On the other hand, he claims, Meidias is known by all for his wrongdoing and violence.[22] In addition to such explicit statements, Demosthenes' whole speech testifies to the fact that the reputation of each of them is at least as important as the factual question of whether or not Meidias slapped Demosthenes at a festival. Accordingly, a good

[20] 21.147. The very fact of the perceived need to regulate this competitive violence seems to support the assertion of the normality of such conduct in the choral competitions.

[21] Meidias, claims Demosthenes, should have "put himself on equal terms" and competed with a rival chorus by spending money and not by using actual physical violence.

[22] See, e.g., 21.137.

deal of the speech goes to painting Meidias' reputation as darkly as possible and portraying himself as a man of superior standing. Such appeals should not be dismissed as attempts to "mislead" the court through irrelevant arguments, for they involve essential aspects of social conflict, hierarchy, and legal process at Athens.

Accordingly, the middle part of the oration (21.78ff.) focusses upon the history of Demosthenes' feud with Meidias and a catalogue of Meidias' crimes against other Athenians. Like the insult exchanges discussed in Chapter 4, Demosthenes' diatribe employs familiar topoi to besmirch Meidias' character. Seen from a different perspective, it also serves to support the argument that the present lawsuit is but one move in a long series of hostile encounters. Appropriately, Demosthenes goes back to his initial encounter with Meidias, who burst into his house with Thrasylochus to challenge him to accept the trierarchy, insulting both Demosthenes and his female relatives.[23] Demosthenes responds by bringing a lawsuit for slander against Meidias. Meidias does not deign to appear, but Demosthenes is neither able to enforce his judgment nor to win a suit for ejectment, which Meidias is able, for eight years, to block by abusing the legal process.[24] Meidias retaliates by bribing a third party to bring a lawsuit for military desertion against Demosthenes (while Demosthenes claims that Meidias himself deserted his post three times). Next, he tries to have Demosthenes prosecuted for a murder he did not commit, and denounces him during a political audit. Further (21.139), Meidias attacks others associated with Demosthenes, while he has a whole gang of supporters ready to fight or bear false witness for him.

All this, argues Demosthenes, Meidias can do because the wealthy have great advantages in such feuds. He can hire others to subvert justice. His wealth is widely feared, because it enables him to intimidate, coerce, and harm innocent citizens with impunity (21.96, 138, 140). Such a state of affairs, Demosthenes concludes (21.207), violates the egalitarian principles cherished at Athens, for in a democracy one citizen should not be so powerful that his hubristic actions find support, while others equally guilty but with fewer resources are punished. Here, Demosthenes combines the

[23] The fact that the men insult and humiliate Demosthenes in the women's presence heightens the outrage.

[24] Among other things, Demosthenes claims, Meidias has the arbitrator of the suit disenfranchised.

attack on Meidias' character and reputation with his argument about the egalitarianism necessary for a democracy to protect all its citizens (21.112, 123). His conclusion emphasizes that ordinary Athenians will only be secure if the law protects them against the hubristic rich (21.221ff.).

However, at the same time that Demosthenes embraces this egalitarian ideal, he also employs an argument that cuts against it. On the one hand, he has depicted himself as a fellow victim of the hubristic rich (e.g., 21.112, 123–7, 219–25). On the other hand, he explicitly appeals to Athenian normative expectations which embody anti-egalitarian values. Thus, as part of his "emphatic I/you contrast ... in the matching of personal histories,"[25] he includes a long comparison of their respective public benefactions (21.151–74). This, of course, aims to establish that he should prevail in the present suit because he has used his wealth to provide more benefits for the state than has Meidias. In other words, he acknowledges his participation in the competition for honor, prestige, and leadership based upon wealth and public service, and claims that he has come out far ahead of Meidias.[26] The argument implicitly accepts that those who use their wealth to benefit the *demos* deserve special treatment, the only question being which party deserves it more.[27] While he has taken pains to portray himself as one of the many victims of the hubristic, here he advances claims to pre-eminence as a participant in the *agōn* of Athenian political life.

According to Aeschines (3.52), Demosthenes never delivered this speech. His failure to prosecute Meidias' insult permitted Aeschines publicly to reproach him for "selling the insult to his honor (*hubris*) for 30 minae" in exchange for dropping the suit.[28] We know nothing of the circumstances attending Demosthenes' decision, the consequences it had for his reputation, or the strategies he devised to deal with those consequences. The obvious

[25] Clover (1980: 466).

[26] The fact that this argument is cloaked as an anticipation of what Meidias might argue in no way diminishes the force of the point.

[27] On the expectation that public benefactions will be rewarded with gratitude in the courts, see Davies (1981: 92–3).

[28] Aeschines' formulation suggests the way in which hubris demands retaliation. See Plato's depiction of such values in *Gorgias* (486a), where the kind of man who cannot defend himself effectively in court can be dishonored and stripped of his property by his enemies. Such a man, "you can slap in the face and not have to pay for it."

tensions within the oration may reflect the perceived difficulty of his own position, despite Meidias' seemingly undeniable technical guilt. But Meidias' "guilt," that is the brute fact of the slap itself, is not the focus of Demosthenes' argument. Rather, Demosthenes found himself in the difficult position of having at once to assert that he, as a member of the leisured class, deserved to prevail by virtue of his greater merit and public benefactions, while at the same time explaining why he did not play by the rules of rivalry and give as good as he got, rather than seeking the help of the court like some ordinary citizen who could not hope to stand up to a wealthy bully. Despite its rhetorical extravagances, Demosthenes' speech cannot cover over this basic contradiction in the social identity which it tries to construct.[29]

Herzfeld explains that among the Cretan Glendiots stealing sheep is the way in which a man demonstrates his honor and thus protects his own flocks and demonstrates his worth as an ally.[30] Not only must a man be prepared to steal, but "A theft must always be avenged if the victim expects to be taken seriously. So must an insult, which may indeed be a probe to test a prospective victim's willpower."[31] Meidias' slap is another kind of test, a brilliantly calculated move by a man confident in his power, who seems to have assessed correctly the likely reaction of his enemy. Because he failed to retaliate, Demosthenes must portray the slap as the act of a man out of control, but we should not be blinded by the indignation which Demosthenes tries to arouse on his own behalf.[32] By getting away with slapping him in public during the festival, Meidias succeeded in placing Demosthenes in a no-win situation, as is evidenced by the obvious squirming in his oration and, perhaps, by his willingness to settle. But despite the thirty

[29] Leach (1965: 10) describes how in Kachin society individuals may find themselves confronted with the demands of two contradictory esteem systems, one based on hierarchical/aristocratic, the other on egalitarian/democratic, values. Thus, "action which is meritorious according to Shan [hierarchical] ideas may be rated as humiliating according to the *gumlao* [egalitarian] code. The best way for an individual to gain esteem in any particular situation is therefore seldom clear." Demosthenes is confronted with a similar dilemma in trying to negotiate the competing demands of honor and of the rule of law.

[30] Herzfeld (1985: 167–83). See Axelrod (1984) on rational choice analysis of feuding relations.

[31] Herzfeld (1985: 175), and cf. Gilsenan (1976: 200).

[32] MacDowell (1990: 8), for example, can see no reason for the slap and suggests that Meidias may just have lost his temper from seeing a man he didn't like strutting around.

minae, clearly Meidias, who could easily afford the settlement, emerged as the victor in this round of their ongoing feud.

Regardless of why Demosthenes decided not to prosecute, the result supports the claim made above that litigation at Athens has as much to do with pursuing conflict as it does with resolving disputes. Further, the Athenian legal system and the criteria by which it was anticipated that its courts would render judgment also express this agonistic social framework. The orations examined above portray Demosthenes engaged, for a significant portion of his adult life, in a series of feuding relationships. While the legal order may have served to impose certain limits upon such conflicts (principally involving the use of deadly force) it seems to have done little more. Demosthenes for many years waged a series of battles with his opponents, each a part of the larger ongoing relationship of conflict and competition. Each party in these battles used the legal system as a means of harassing, attacking, or intimidating his opponent in a series of challenges and responses driven by the dynamic of an agonistic ethos. This is not, of course to deny that the legal system played an important role in the preservation of public order. Rather, my point is to emphasize that at the same time it also provided opportunities for the expression, extension, and exacerbation of social conflicts which threatened that order. Further, such practices should not be dismissed as an aberration, or a "misuse" of legal process. Indeed, central structural features of the Athenian legal system rendered it a perfect tool to be manipulated by individuals interested not in resolving disputes but in pursuing their own agonistic goals. Played out in the competitive arena of the courts, Athenian litigiousness should thus not be seen as "dysfunctional," or somehow "deviant," but rather as a societal *and institutional* expression of fundamental social values. The next section will discuss a group of other cases which can shed further light on the relation of these values to Athenian legal process.

## III

Demosthenes' attempts to recover his patrimony indicate how initiating a single lawsuit can lead to many years of enmity and litigation, drawing in numerous other parties and involving matters totally unrelated to the initial case. This is a pattern typical of feuding societies, in which litigiousness becomes another form of

institutionalized aggression.[33] Athenians were well aware of their litigious disposition, as Aristophanes indicates when a character in *Clouds* (207–8) cannot believe that a spot marked on a map is Athens because he can see no law courts in session. This awareness of the propensity to use the courts as an instrument against one's rivals leads to a perceived need to justify one's motivation in bringing suit. Chapter 4 briefly considered the way in which the topos of revenge provided such a justification, and we are now in a better position to see the larger context in which this topos operated. Revenge, it will be seen, forms one pole in a rhetorical antithesis between illegitimate and legitimate resort to the courts in the pursuit of enmity.

The Demosthenic oration, *Apollodorus against Nicostratus* (53), employs this antithesis in the first sentence of the speech, when Apollodorus says that he is not a sycophant, but brings the prosecution because he was wronged and thinks it necessary to seek revenge.[34] The antithesis of sycophancy and revenge appears widely and plays off of the notion that sycophancy involves bringing actions for financial gain where one's personal interests are not at stake, whereas honor *requires* a man to seek revenge. The fact that Apollodorus is using the courts to seek revenge for personal wrongs is presented as entirely appropriate; there is no need to argue for it.[35] In addition to indicating that the suit is legitimate and properly motivated, such claims also help to establish the character of the speaker as a man of honor who avenges wrongs done to him.

In *Apollodorus against Nicostratus*, Apollodorus (53.1–2) says that if he had asked a friend to bring suit for him, then his opponents would have argued that he was a sycophant and his claim of enmity a lie, because if it were true he would have sued in his own name (cf. Demosthenes 55.1–2). Again, this presupposes that pursuit of revenge justifies litigating, but that one must pursue revenge directly in one's own person to avoid the appearance of sycophancy. In other words, the good man seeks revenge in the courts by staking his honor on the outcome (and in certain actions running the risk of a substantial fine if he does not obtain one-fifth of the votes). Some men, on the other hand, shamefully use proxies to avoid direct

[33] See Wilson (1988: Chapters 3,10); Leach (1961: 40–1).

[34] On sycophancy see the recent debate between Harvey (1990) and Osborne (1990), and see also Christ (1992).

[35] See also Demosthenes 55.1–2, and Hansen (1991: 195).

engagement and to further their private schemes, probably involving pecuniary gain. Thus, Apollodorus claims that he seeks vengeance and not financial gain, and supports this claim by offering to relinquish to the state the three-quarters of the property due him, for to him (as a man of honor) it is sufficient to exact vengeance (53.2–3).

Apollodorus characterizes Nicostratus as successfully pursuing his enmity by abusing the legal system for private ends (53.14). His explanation reveals that the present suit is part of an ongoing feud in which the courts have served as the central arena. Apollodorus alleges that he and Nicostratus had been close friends, but the friendship turned to enmity when Nicostratus betrayed him. The wrongs of Nicostratus for which Apollodorus seeks revenge include co-operating with enemies of Apollodorus in their lawsuit, wrongfully entering Apollodorus on the list of public debtors, falsifying documents as part of a wrongful execution of judgment against him, and attempting to trick him into committing hubris against a free boy so that they could prosecute him on a capital charge (53.14–16). Finally, when Apollodorus responds by pursuing legal process to overturn these wrongful judgments, his enemies resort to physical violence and try to throw him into a rock quarry (53.17). So according to this chronicle, Nicostratus pursues his feud with Apollodorus through four acts of legal abuse, followed by outright physical assault as a final measure. It is such abuse of legal process that Apollodorus uses to qualify Nicostratus as a sycophant, while portraying himself as legitimately resorting to the courts to obtain protection and revenge for these grievous wrongs.

Litigants, well aware of the common tactic of branding one's opponent as a sycophant, often try to establish their own honorable character by claiming that they tried to avoid coming to court by settling. Such speakers use attempts at settlement to indicate their desire to avoid litigation, buttressing their claim that they are justly seeking revenge, and thus shifting the blame onto their opponents.[36] For example, in another Demosthenic speech (48.1–3) the speaker trots out these topoi, claiming that only the magnitude of the wrong done to him has compelled him to come to court despite his reluctance to litigate. He argues (48.2) that he would have been

[36] For speakers denying that they are litigious or affirming that their opponents are so, see Demosthenes 22.4; 23.106; 24.1, 6; 34.1; 39.1; 40.5, 12, 16, 32, 54. Aeschines 1.1; Lysias 7.1; 12.3; 19.55; 32.1–2.

ashamed of litigating if he had not been wronged and had not been ready to submit the matter to mutual friends for mediation. His opponent, on the other hand, has refused mediation (48.8), and this refusal to submit to the judgment of friends and relatives who know the true facts should be taken to indicate that his testimony is false (48.40). Similarly, another speaker (Demosthenes 30.1) says that he has "tried every possible method in order to come to terms with the defendant, so as to avoid using the courts, and I come here as a last resort."[37] Paradoxically, in this extremely litigious society where lawsuits are recognized as a central feature of agonistic social relations, maintaining that one shuns such activity is seen as a viable tactic for establishing character and credibility. Claims of willingness to submit to mediation are used as indicia of such a disposition.

The problem with such claims is that the topoi on which they rest are readily available to manipulation by either party, and the normal course of rivalry would be likely to furnish sufficient "facts" to make such arguments plausible. As Antiphon says (5.61), if you owe someone an ill turn the sensible thing is to prosecute the man for a capital offense and have the court kill him for you. Making use of the same argument in his defense, Andocides (1.1–2) begins his speech by claiming that his enemies want to use the law to kill him and appealing to the jurors to uphold justice and not let perjurers have an innocent man put to death (1.7, 30; cf. Lysias 9.22). Even those wrongs which seem factually straightforward are subject to the same kinds of rhetorical manipulation. In numerous orations speakers accuse their opponents of having wounded themselves so as to be able to bring a fraudulent prosecution against their enemy (e.g., Demosthenes 40.32). Others combine the accusation of the self-inflicted wound with the topos of sycophantic prosecution. Thus, Aeschines (3.212, and cf. 3.51) tells the court that his opponent "has such contempt for your concern for honor that ten thousand times he has gashed his own ... head ... and made money by bringing charges of wounding with intent to kill."[38]

The problem here is that speakers take advantage of the difficulty of sorting out such claims in a legal system like that of classical Athens where there were neither a public prosecutor nor

[37] See also Demosthenes 58.6, 8, 32; Isocrates 18.7–10.
[38] Cf. Aeschines 2.93; Andocides 1.1–2; Demosthenes 59.9–10.

professional judges. In an agonistic society where prosecution is only by private initiative, where everyone knows that individuals seek revenge and pursue feuding relations through the courts, where there is no cross-examination of witnesses or expert evaluation of evidence, where the trial is of extremely limited duration and confined to two opposing speeches, where the available means of proof of factual claims are in any event extremely limited, and where the principle of solidarity means that witnesses are generally expected to lie for the side on whose behalf they testify (see below), litigants have wide scope to create a factual context to explain the enmity they share with their opponent in a way which suits their needs. In doing so they are constrained only by the limits of probability and public knowledge, two central forms of argument in forensic rhetoric. In short, when courts are faced with cases where both opponents manipulate the same topoi to justify their cause, how can the judges decide whether this is, in fact, a case of legitimate revenge for wrong done, a sycophantic prosecution for financial gain, or a trumped up charge in the tit-for-tat of feuding relations?

Another oration included in the Demosthenic corpus, *Against Theocrines*, well illustrates the difficulty of assessing such claims about the motivation and legitimacy of litigation. In the opening passage of the speech the speaker tries to establish an honorable motive for bringing the prosecution by saying that his purpose is to take vengeance against Theocrines for the wrong that Theocrines did to the speaker's father (58.1–2; and cf. 58.58–9). The speaker seeks to enlist the judges as his co-workers in retaliation, and he makes it clear that he is seeking vengeance in a legal, public way, through the mediation of the *demos* rather than through private violence.[39] He underscores his honorable motivations (58.3) by repeating that he is "engaging in this contest" to come to the aid of his father as well as to rid the *demos* of a sycophant.

Having established himself as someone who respects the legal process, he devotes much of the opening section of the oration to attacking Theocrines as one who subverts it. He explains (58.4) that he had trusted in the assistance of others in the suit, because he relied upon their enmity to Theocrines as a sufficient motivation to

[39] The basis of the suit is an accusation that Theocrines illegally brought indictments while a state debtor.

testify. That is, in preparing his case he rounded up the support of Theocrines' enemies, according to the basic principle of agonistic societies that the enemy of my enemy is my friend. They now refuse to testify, however, because they have allegedly been paid off by Theocrines. He compounds this charge of abuse of process (58.7, 42–8) by claiming that Theocrines interfered with his ability to prove this allegation by bribing and threatening the witnesses. Among other things, he also claims (58.28–9, 32–3) that Theocrines accepted payment to drop various prosecutions, saying that he has witnesses who will testify that they too paid him off. In other words, Theocrines is a man who never pursues prosecutions for honorable motives, but only sues when there is money to gain.

One again finds here the fundamental distinction between using the courts to avenge a wrong, which is honorable, and using the courts for financial gain, or for pursuing a feud by trumped up charges, which is dishonorable. How can Theocrines defend himself against this avalanche of charges? Unfortunately the tactics he actually adopted remain unknown to us. However, the arguments which the speaker anticipates (or pretends to anticipate) that Theocrines will make confirm that the underlying problem in such a situation is that both sides tend to argue that the other party is bringing a malicious prosecution because of private enmity, etc. That is, the speaker here expects that Theocrines will turn the argument of sycophancy around and argue that all these stories are lies, and that the real reason for the suit is that the speaker is in cahoots with Demosthenes and is bringing the suit so that Theocrines will be unable to pursue his legitimate prosecution of Demosthenes and his cronies. Theocrines, he says (58.22–3, 34), will allege that the present action is just part of a plot against him by his enemies who are seeking to stop his political prosecutions on behalf of the *demos*.

The speaker counters (58.39–43) that he, in fact, is the real victim of a cabal, and that Theocrines and Demosthenes only appear to be enemies. Their enmity, he asserts, is merely a game they play so as to deceive the public. In reality they are allies, otherwise Demosthenes would have been willing to testify against Theocrines on behalf of the speaker. Clearly at least one (and probably both) of the litigants is lying. How could the Athenian court, forced to rely solely upon the presentation of the facts and issues adopted by the litigants, within the extremely limited time

frame and scope of a trial, and with the limited and unreliable means of proof available, resolve such conflicting claims except on the basis of a general judgment about their reputation, character, and status as citizens?[40]

The problems facing judges in evaluating the respective claims of the litigants were exacerbated by the role of witnesses in the trial. As will be seen, Athenians had very different expectations of witnesses than those prevalent in contemporary western legal systems. The role of witnesses at Athens is shaped by agonistic values in ways familiar to students of litigation in feuding societies and reveals a good deal about the nature of Athenian legal process.

Athenian orations abound with specific accusations of false testimony and with comments about the frequency of this practice (see, e.g., Andocides 1.7). Perjury is seen as arising from a variety of motives. According to Demosthenes (29.22–3) there are three reasons why men give false testimony: bribes under the pressure of poverty, friendship, and enmity towards the opposite party. The first of these grounds is straightforward enough. According to the topos which Demosthenes employs elsewhere (44.3), wealth enables litigants to provide themselves with many witnesses. Numerous other sources similarly attest to the practice of buying false testimony (see, e.g., Demosthenes 19.216; 21.112, 139; 29.28; Xenophon, *Mem.* 4.4.11; Isocrates 18.52–57; Lysias 19.7). The other two grounds of Demosthenes' explanation arise from the by now familiar principles of agonistic societies. According to Demosthenes it is simply to be expected that enmity is taken to justify perjury and that the principle of solidarity requires that friends share in both the enmity and the lies which it spawns.

Demosthenes' assessment should not surprise us once we see beyond the modern ideology of the objectivity of the trial and the vital role of impartial witnesses in the judicial quest for truth. Litigation in societies where courts serve as a forum for the pursuit of feuds tends to be co-opted by feuding values, for the courts do not operate autonomously from the social sphere. This is particularly the case in societies like Athens where there is no public prosecutor, no professional judiciary, and few procedural or evi-

[40] This problem is not, of course, limited to classical Athens. Herrup (1987: 14), for example, in her important study of the administration of justice in seventeenth-century England, comments that, "Legal subtleties were out of place in criminal trials because the overriding issue was the character of the accused."

dentiary doctrines dedicated to assist in ensuring the veracity of testimony. But even in societies with a firmly established professional judiciary, legal process is ultimately what the litigants make of it. For example, Wilson shows how, despite the best efforts of the French magistrates, nineteenth-century Corsican litigants succeeded in imposing their values on the trials through which they pursued the vendetta.[41] In this world, "False testimony was commonplace and was motivated ... by family and party loyalty, by fear of reprisals ... or by wish to damage one's enemies."[42]

Corsicans were well aware of these practices, but judged them by different standards than those employed by the French judges and administrators. As a contemporary observed, "telling lies in court was not really regarded as lying by the people of Bastelica."[43] This was only to be expected where witnesses did not see themselves as part of an institutionalized search for justice, but rather as members of a family, or friends of one of the parties, with vital interests at stake. Thus, the public prosecutor commented on a case in 1820 that the witnesses, "'lied for the defense or for the prosecution with no other motive than their hatred or their affection for the defendant and in fulfillment of their reciprocal duties as patrons and clients.'"[44]

The results of such practices could be baffling. As anyone knows who has read through the corpus of Athenian courtroom speeches, both parties claim to have a phalanx of witnesses ready to testify to totally different versions of the "facts." In Corsica, too, it was commonplace for the parties to produce witnesses with completely contradictory accounts of events. What seemed surprising to the French judges, however, was easily comprehensible to even the most untutored participant. When, in 1841, a magistrate asked a thirteen-year-old boy why his testimony contradicted that previously offered, he replied, "They are lying, which is natural enough; what would you do, sir, if someone had killed your cousin?"[45]

[41] Wilson (1988: 269): "While French officials sought to implant a system of impartial justice ... Corsicans succeeded in adapting the formal framework of that system to the requirements of family and clan rivalries."

[42] Wilson (1988: 276). See also E. Cohen (1972: 9–10); Synge (1979: 64).

[43] Wilson (1988: 277).

[44] Wilson (1988: 277).

[45] Wilson (1988: 277). See Hay (1989b: 362–3) on the widespread use of perjured testimony in malicious prosecutions in early modern Britain and the attitudes towards the legal system which informed such conduct. See also Paley (1989: 312–13, 338).

As seen above, at Athens it was common that actions for false testimony followed in the aftermath of other litigation as a means of revenge or collateral attack. In Corsica, where prosecution was controlled by the state rather than the citizens, one homicide case came before the Assize Court three times because of the contradictions in testimony, and five witnesses were convicted of perjury.[46] The president of the Assize Court commented in 1844 that many witnesses lied, "in order to satisfy a desire for vengeance which they had been unable or unwilling to achieve by force or violence, and who cleverly fabricated evidence against defendants whom they wanted to injure or destroy, hoping thus to make the court the involuntary accomplice of their passionate hatreds."[47] The judges thus realized the uses to which their courtrooms were being put, but try as they might, there was little they could do against it.

An oration by Lysias reveals how expectations about witnesses are reflected in rhetorical topoi pertaining to credibility. The case involves an accusation that the speaker committed a serious offense by rooting up a sacred olive tree on his property. In the very first sentence the speaker introduces the theme of sycophancy, saying that he had thought that his quiet life would make him immune from litigation and malicious prosecutions (7.1, and cf. 7.39–40). He attempts to support his allegation of malicious prosecution by arguing (7.19) that if the charge were well founded, the plaintiff would have summoned as witnesses the defendant's neighbors with whom he is in a state of enmity. Calling such witnesses, he continues (7.20), would have been the way both to achieve vengeance against an enemy and to prove that he is not a sycophant. The speaker anticipates (7.21, 22), however, that the plaintiff will counter this argument by resorting to the topos described above, claiming that no one will testify against the defendant because of his wealth and influence. To resolve this conundrum, he suggests (7.30–32) that the judges should disregard the accusation of his enemies and instead look at his conduct as a citizen including his many benefactions to the state. In other words, since the judges will otherwise have to rely upon competing arguments from probability they can compensate for their inability to establish the facts of the case by judging the general life and character of the litigants.

[46] Wilson (1988: 277).

[47] Wilson (1988: 278). Recall here Antiphon and Andocides on the courts as instruments of mortal vengeance.

Aeschines makes a similar argument in *Against Timarchus*, expatiating on the justification for basing verdicts on general reputation. He attempts to negotiate the expectation that witnesses will lie by saying (1.47–48) that he has not had to call his own friends or his opponent's enemies, nor even those who know neither party, but rather the friends of his opponent. His statements reveal that it is witnesses from the first two categories who are normally employed, and that their testimony is naturally suspect. In recent studies of Athenian witnesses scholars have suggested that witnesses serve to demonstrate the extent of support which the litigants enjoy, enhance their credibility through testifying to their character, and locate them in their context of friends and family.[48] While there is doubtless some truth to this, the co-speakers (usually prominent friends, relatives, or associates) called to speak directly in support of the litigants far better serve this function.[49] Instead, as Wilson shows in Corsica, witnesses are there to tell whatever needs to be told to support you. In other words, they speak to tell (and embellish) the truth if they can, but to lie without hesitation if they must. That this is what is involved rather than a mere "situating"[50] of the litigants is shown by the fact that litigants, as we have seen, ask their opponents' enemies to testify for them. These witnesses are not part of the litigants' supportive web of kin and friends, but the solidarity of shared enmity prompts them to denounce their enemy.

It is not surprising, then, that Timarchus advises the judges to rely upon their own knowledge of the lives, deeds, and character of the litigants.[51] Against Timarchus, he argues, they may serve as both judges *and* witnesses (1.89, 92–3). He justifies the basis of this judicial embodiment of the politics of reputation by explaining (1.127–8) that reputation based upon common knowledge (*phemē*) spreads on its own motion throughout the city, and through it private deeds become public knowledge. Citing Euripides, Aeschines concludes (1.152–4) that verdicts should be reached not

[48] See Humphreys (1985: 316–24) and Todd (1990b: 23–31).

[49] Such speakers also participate according to the principle of solidarity in enmity. See, e.g., Demosthenes 21.205: "As for those who will speak in support of him, they do so, I swear, not so much wishing to oblige him as to abuse me on account of their private enmity."

[50] Humphreys (1985: 316–24).

[51] On the role of personal knowledge and reputation see Humphreys (1985: 350) and Strauss (1986: 32).

on the basis of what witnesses say but rather by assessing a man's life, his habits and associations: "I have already judged many disputes and have listened to witnesses competing against one another with conflicting accounts of the same event. Like any sensible man I determine the truth by looking at a man's nature and his life."[52] This is a self-serving argument for Aeschines, but it surely appeals to widely held convictions. Witnesses are known to lie; they are not impartial observers, but in Euripides' words, competitors, who testify in support of the party that calls them. On the other hand, a man's deeds and associations are (at least in principle) known to the community in which he lives and are thought to reveal his true character.

It was mentioned above that suits for false testimony often followed in the wake of other litigation. In one such suit (Demosthenes' *Against Stephanus*), part of an ongoing feud of inheritance litigation, Apollodorus, having lost his earlier actions, pursues the conflict by suing Stephanus for false testimony given in a previous trial (Demosthenes 36). Apollodorus portrays (45.37–8) a world of fraudulent litigation in which *everyone* fabricates testimony and documents: "Why did one group of witnesses testify to these facts and another group to those? As I explained before, they divided the fraud." How can courts evaluate testimony in such a case, especially when there are no technical means for the verification of documents? Apollodorus comes up with a rather unsatisfactory answer to this question when he asserts (45.52) that it is absurd, when all have given false testimony, to argue about who has acted worse, rather than requiring each to demonstrate that he told the truth. A defendant in such a case, he continues, is not to be acquitted by showing that the other party did more terrible things, but by establishing his own veracity. Of course, how is the court to do this if everyone is lying? Apollodorus tacitly admits the impossibility of meeting his suggested criterion when he immediately contradicts himself. Having just told the court that when all witnesses appear to be lying there is no point in letting the litigants squabble over who has perpetrated the more reprehensible fraud, in the next sentence he does just that: "Now, men of Athens, let me show you the thing for which more than anything else this fellow Stephanus deserves death. It is an awful thing to bear false witness against

[52] Euripides, *Phoenix*, Fr. 812 Nauck².

anyone, but far more awful . . . to bear false witness against those of your own blood."

Edmund Leach has described a rural society in Sri Lanka where "Litigation might be described as a favorite village sport . . . Perjury by witnesses is widespread and obvious."[53] This naturally makes it difficult for the judges of Pul Eliya to know how to decide cases. At a loss to reach a decision on the merits, Leach reports, magistrates frequently resort to ordeal or some other expedient. It is not surprising, then, that litigants do not expect to settle their disputes through the judicial process. Litigation in Pul Eliya, and perhaps in most highly litigious societies, does not serve as a means of resolving conflict, but "is simply one among many possible ways of making things awkward for one's opponents."[54] In Athens also, participants seem to have made very different assumptions about the purposes of the judicial process than those familiar to contemporary societies (at least ideally). Litigation was a performance in which the social and political stakes often overshadowed the legal issues.[55] As Cartledge rightly comments, Athenian elites sought *timē* (honor) in the *agōn* of litigation, and the verdict of the jury "served as a public measure of the relative *timē* of the opposing litigants."[56] Rather than, in desperation, resorting to ordeal to decide cases, Athenian judges seem to have weighed arguments, typically expressed in the form of the insult-exchanges described above, which served to contest or validate comparative claims about honor and precedence. In evaluating such performances, such discursive constructions of public selves, judges were perhaps far more likely to rely upon appeals to reputation than to the contradictory "truths" sworn to by litigants and witnesses. In the judicial contests of a feuding society it would be naive to expect any less.

While litigants were expected to use the courtroom drama to pursue their interests, the judges, as the embodiment of the *demos*, were expected to consider their own as well. As was seen above, in *Against Meidias* Demosthenes employed topoi of wealth, egalitarian-

[53] Leach (1961: 40–1).

[54] Leach (1961: 43). Ingram (1977: 117, 125–7) argues that in seventeenth-century Wiltshire mediation was practiced in the community as a way of keeping cases out of the courts because litigation was more likely to exacerbate the conflict than to contribute to its resolution. Cf. Wormald (1986: 192) and Miller (1990: 271–99).

[55] See Dover (1968: 171).

[56] Cartledge (1990b: 55).

ism, and advantage to persuade the judges that condemning Meidias would be to their benefit both collectively and as individual citizens. Such appeals to the court to decide according to justice *and* to their own interests are commonplace in the forensic corpus. This line of argument meshes perfectly with the disposition to judge cases based upon assessments of the lives and character of the litigants, because such assessments are largely aimed at establishing claims concerning who is the better citizen and has provided more services (and done less harm) to the state. Thus, having explained why Meidias should be condemned so that ordinary citizens like the judges will have less to fear from the hubristic rich, Demosthenes goes on to employ the commonplace claim that he has used his wealth more to the benefit of the city than has Meidias, and that he will continue to do so in the future. Aeschines, in a similar vein, tells the court that the Athenians enact laws looking both to justice and to advantage. The judges, he reasons, should do the same in the courts (1.178–9; and cf. Isocrates 20.17–18).

As was seen in *Against Meidias*, tropes related to the antithesis of rich and poor are manipulated for the persuasive requirements of the moment. In *Against Lochites*, Isocrates (20.19) too employs another variation on this antithesis, when he asks the judges not to take into account that his client is poor, because it is not just to give a lesser vengeance to ordinary men than to the well known. He inveighs against the privileges of the rich, because in a democracy all citizens should have equal rights. All citizens, he says, risk their lives fighting for the democracy but in voting the wealthy count more (20.20). Demosthenes also appeals to the judges to be angry that poor men are punished when the rich go free, for wealthy wrongdoers deserve punishment more than poor ones. The wealthy, he claims (45.67), act from hubris, pleonexia, and shameful greed, seeking to make their factions more powerful than the law. What is actually in the city's interest, however, is that the weak should be able to get redress for wrongs suffered from the wealthy (45.67).

Why should a speaker addressing a democratic court in a society proud of its egalitarian ideology, composed largely of judges not belonging to the wealthier strata, have to appeal to them not to mete out special treatment to the rich?[57] While Isocrates (8.127–

[57] See Raaflaub's (1991: 581) account of what he terms the inherent contradiction in the political consciousness of the "average lower-class citizen" of Athens.

31; 15.142) might complain that the judges' envy induced them to impoverish the wealthy, there seems little doubt that litigants' *timē* (honor), expressed through their claims of past, present, and future benefactions, carried considerable weight.[58] Moreover, although speakers like Demosthenes might attempt, when it suited their purposes, to portray themselves as ordinary citizens, the litigation represented in the extant corpus largely involves conflicts among individuals of at least moderate resources rather than between the poor and the rich. As the orators often note, the resources of the wealthy made it unlikely that genuine "ordinary" citizens could hope to do judicial battle against them.

In short, then, while litigants used the courts to pursue their feuds, judges appear to have been no less aware that their own interests were also at stake. In the Demosthenic oration *Against Aristogeiton*, the speaker (25.37) accuses the defendant of sycophancy in having accepted money to bring seven indictments against him. The speaker anticipates, however, that the judges may believe that the charges are true, but nonetheless conclude that Aristogeiton is politically useful to the city and so should be acquitted. Tellingly, his response is not to argue that such considerations are irrelevant to the defendant's guilt, but rather to try to persuade them that Aristogeiton is not in fact useful. Employing the same logic, the speaker in Lysias 21 tells the judges that, "If you do as I urge you, you will both give a just verdict and choose what profits you (21.12)."[59] To underscore his standing to make such claims the speaker (21.22) reminds the court of their interest in his status, claiming that in competing for honor he has spent his patrimony "*on you.*"

Such arguments offend contemporary judicial notions of disinterestedness and fairness, but those notions stem from conceptualizations of law, politics, and society quite alien to classical Athens and, as the smattering of comparative material adduced above indicates, to many other societies as well. On the other hand, as Chapter 3 indicated, Athenians were proud of their attachment to principles of legality very much like our own. The crucial difference, then, does not have to do with an Athenian failure to articu-

[58] See Lysias 25.12–13 for one of the more blatant statements of this point. See also Ober (1989: 226–33) and Davies (1981: 92–115).

[59] Cf. Aristophanes, *Knights* (1217–33).

late a coherent conception of the rule of law. Rather, it lies in the modern ideological predilection to view those principles as exercising absolute sovereignty in a distinct and autonomous judicial sphere, a sphere insulated from the play of politics, social standing, wealth, and competing interests. This ideology, of course, has been challenged by successive generations of legal realists, marxists, critical legal studies scholars, and other critics as a mask for various forms of domination and exploitation. In thinking about litigation in classical Athens, however, we should not adopt a similar pattern of explanation and content ourselves, as most scholars have done, with saying that the Athenians were too corrupt or too unsteady to live up to their ideals. We must recognize instead that those familiar ideals formed only one part of the Athenian ideology of law. Athenians articulated principles of legality, but at the same time conceived of the courts as operating *within* a matrix of political and social forces rather than isolated from them. On the Athenian view, reaching a "just result" in a particular case meant considering the full play of those forces as portrayed in the rhetorical performances of the litigants, performances which aimed at demonstrating the congruence of the interests of the litigants with those of the *demos*.

## IV

Litigation as feud at Athens may seem strange to modern sensibilities, but feuding litigants and malicious prosecutions pose problems for all legal systems. A recent article in the Wall Street Journal reported the tale of a man who had bankrupted a (well-to-do) family by filing seventeen lawsuits and "endless motions" against them in both federal and state courts over a period of eight years.[60] Although numerous judges acknowledged that he was clearly a vexatious litigant, their hands were bound by the fact that the vexatious litigant statute required that at least five final judgments have been entered against the person in question. Although his victims had prevailed in two suits, the amount of time (to say nothing of money) it takes to get to trial in overcrowded urban jurisdictions meant that the man would be able to continue to plague them for some time. To their relief, however, another one of his enemies put a stop to his career with a bullet through the heart.

[60] WSJ, 22 April 1991, page 1.

Recent studies of litigation in early modern England have shown the way in which the participatory nature of the legal system made it an open field for those interested in using the courts as an instrument in inter-personal conflicts. Sharpe, for example, has documented the increase in litigiousness in the sixteenth century "as lawsuits became more fashionable than personal violence."[61] This trend increased into the seventeenth century, when, "launching suits on slight or malicious grounds, with an intention to further a feud, was a national problem."[62] Aristogeiton's seven suits against one person seem a puny attempt at sycophancy compared to William Powell, a Welsh vicar, who in the 1630's in the course of a feud with one of his parishioners commenced twenty-six suits against him over six years, involving him in legal action in seven courts ranging from the local Consistory to the King's Bench.[63] Sharpe concludes that, "The widespread evidence of malicious and vexatious litigation in this period ... reminds us that the law could be used as a weapon to further a feud, and that decision in a lawsuit was no guarantee of future harmony between erstwhile litigants."[64]

In addition to those who used the courts in pursuit of a feud with a particular person, early modern England, like classical Athens, harbored a class of persons who made their living through malicious prosecution. Ingram, for example, has shown that, "A striking feature of early seventeenth-century Wiltshire society was the existence of professional racketeers and extortioners spawned by the machinery of the law."[65] Studies like Ingram's of malicious prosecution and vexatious litigation suggest that sycophancy is perhaps inevitable in any legal system which is highly complex, offering a multiplicity of actions and venues, totally reliant upon private initiative, with weak institutional constraints upon litigants, and relatively inexpensive for participants. In Athens, the lack of professional judges or a professional bureaucracy for the administration of justice meant that there was no institution committed, as in Corsica, to exercising a countervailing influence. At Athens, the legal process was what ordinary citizens made of it,

[61] Sharpe (1983a: 168).
[62] Sharpe (1983a: 169).
[63] Sharpe (1983a: 168).
[64] Sharpe (1983a: 177).
[65] Ingram (1977: 134), and cf. Paley (1989).

no more and no less. But before condemning its "primitiveness" or "corruption" according to modern criteria of legality, we should attempt to understand it in Athenian terms rather than assuming that they either didn't know better or lacked the "hardness of will"[66] to implement more exalted notions.

In societies with formal legal systems, the criminal law represents the most powerful official mechanism for exercising coercive force over individual citizens. The decision of who controls that system and who has access to it derives from much more fundamental principles of political organization. States like classical Athens or early modern England which rely upon citizens to initiate and pursue criminal prosecutions do so not because they have not "advanced" far enough on some evolutionary scale to turn these responsibilities over to a state apparatus, but because underlying convictions make them hesitate to relinquish this important power. Speaking of early modern England, Hay argues that, "[P]eople from all social classes turned to the criminal law, its terror and its stigma to further personal conflicts," and to make its coercive force "serve their private purposes of revenge, protection, or profit."[67] Contemporaries recognized such abuses, but the judicial system of England, like that of Athens, depended upon private initiative, and the willingness of plaintiffs to incur often considerable costs. Such a system, Hay claims, could not afford to discourage such actions with further risks or obstacles. More importantly, Englishmen preferred the acknowledged imperfections of their system to what they perceived as the tyranny of the continental centralized control of the administration of justice. Athenians, too, regarded the popular courts, with all their problems, as the bulwark which protected their democracy and distinguished it from other systems of government.

In Athens, despite the fine for not receiving one-fifth of the vote in certain actions and the penalties for sycophancy, litigation remained relatively inexpensive and accessible, and thus open to a wide variety of uses. In the essentially participatory democratic society of classical Athens the legal system was also participatory and was heavily stamped by the agonistic values of the social field within which it operated. This was unavoidable. These values,

[66] Fisher (1990: 136).
[67] Hay (1989a: 344).

together with the characteristics noted above, helped to make Athens a highly litigious society and to make the courts a central arena for the expression, pursuit, and mediation of conflict. The ideology of the Athenian courts encompasses democratic principles of legality familiar to us, as well as other principles which seem to run counter to modern notions: that judgments should both be just and reflect the interests of the *demos*; that the parties should be judged only according to the law but that their usefulness to the state should be heavily weighted; that all should be equal before the law, but the services of the wealthy to the state should count in their favor.

On the other hand, in a democratic society with judicial institutions such as these, litigation and prosecution for crime inevitably arise out of the play of private interests, the competition for wealth, status, hierarchy, and power. These individuals come to the courts not in pursuit of abstract justice (or many at least do not), but rather out of enmity and rivalry, to obtain revenge or to pursue their conflicts, even to death. This means that they place the court in the position of mediating enmities, rivalries, and conflicting claims of the propertied strata of society, claims which often inevitably impinge upon the public interest, regardless of the matter at hand. Litigation is informed by the dynamic of feud in that parties to conflicts appropriate the courts to their own ends rather than finding a final settlement of differences before them. On the other hand, though the feud may not be terminated by the intervention of the court, the court's judgment does mediate the competing claims to social estimation, influence, and leadership precisely because it does not reflect purely a judgment of the case, but also, and more fundamentally, a judgment of the persons as citizens, of their lives, their families, their allies and friends. As Cartledge rightly notes, "... an Athenian People's Court (*dikasterion*) was not only a juridical and a theatrical space, but also and essentially a politically defined arena."[68] In a society like classical Athens, litigation, feud, and politics were, in a broad sense, inseparable.

[68] Cartledge (1990b: 42). Cf. Sinclair (1988: 160–75).

CHAPTER 6

# *Violence and litigation*

Chapter 5 set out a framework for comprehending Athenian litigation as feud and for viewing the process of judicial judgment as operating within an agonistic social field. Of course, not all lawsuits and prosecutions at Athens fit this pattern. It is not possible, in any event, to generalize about "typical" litigants or "typical" trials because we lack the quantitative evidence which alone could permit us to say how representative are the cases preserved in the corpus. One can assert, however, that the characterization of Athenian litigation developed in Chapter 5 reflects a very substantial part of that corpus. In support of this assertion, the next three chapters will apply the notion of litigation as feud to three particular areas of legal relations. The present chapter will examine cases involving the laws regulating assault and wounding, while Chapters 7 and 8 will take up disputes over inheritance and sexual wrongdoing.

The first case involves an action for damages based on an allegation of assault and injuries arising from a severe beating. The case is known because Demosthenes wrote the oration for the well-to-do young man, Ariston, who claims to be the victim of this violence. This remarkable speech displays the full range of topoi elaborated in Chapter 5 and illustrates the way in which orators drew upon this repertoire in appealing to the normative expectations of their audience. It, like the other cases to be examined here, also provides a vivid illustration of the role which physical violence might play in feuding relations and the way in which such violence might be brought before and represented to the courts. We cannot know how accurately Demosthenes portrays these events. We cannot even check them against his opponent's version. This makes little difference, however, for the value of the speech for our

purposes resides precisely in the chosen modes of rhetorical representation of that violence. For it is this act of rhetorical representation which removes the case from the realm of the merely particular and discursively reconstructs it in terms of general societal expectations. The use of topoi, and the twin rhetorical necessities of maintaining plausibility and arguing the case largely through appeals to probability, obscure the actual events from our view, as they did from the view of the Athenian judges as well, since they had to make their decision based solely upon distorted representations of the action conveyed in two opposing speeches. On the other hand, in obscuring the "truth" of what actually happened between Ariston and Conon, Demosthenes reveals what a mass Athenian audience expected such a feud to appear like. From our standpoint, examining the nature of such expectations is far more important than, as scholars have often done, trying at this remove to determine what actually happened or which party had the "better case."[1]

The first word of the speech is "*hubristheis*" (54.1): "I have suffered hubris." Although the action is a private suit for damages for assault, rather than a prosecution on the far more weighty charge of hubris, Demosthenes here follows a strategy similar to the one he employed in *Against Meidias*. As in that oration he repeatedly invokes the emotional resonance of hubris, the insult to honor which Athenians found serious enough to make a capital offense. In modern legal classifications an assault resulting in grave injuries is a far more important infringement of public order than an act of humiliation, however deliberate. In Athens, however, as Demosthenes makes plain, hubristic treatment of a free person is the more intolerable form of violence, even if that violence is largely symbolic. As he says of Meidias' slap (21.46), "For nothing, nothing in the world, men of Athens, is more unbearable than hubris, nor is there anything which more deserves your anger."[2]

But if hubris is such a powerful tool in marshalling the support of the judges for one's quest for revenge, why is Ariston only suing for assault? Though we cannot know what actually determined his strategy, the way in which he represents his choice to the judges reveals a good deal about the nature of the participatory Athenian

[1] See, e.g., Wolff (1968: 16–17) and Gagarin (1989).
[2] See also Isocrates 20.5.

legal process. After being assaulted, Ariston (54.1) had the choice (he says) whether to prosecute by summary arrest under the statute against cloaksnatchers (for *lopodusia*), or by bringing a prosecution for hubris, or a suit for damages for assault. The first of these options falls under a statutory rubric providing for summary arrest and execution for a special class of wrongdoers (*kakourgoi*).[3] Cloaksnatchers, like nocturnal thieves and cutpurses, are subject to this law, and since Conon and his party had stripped the victim and taken his clothes, Ariston alleges that this capital procedure applied. Whether or not such is the case, the repeated (though technically irrelevant) references to this offense enable Ariston to group Conon with the lowest class of criminals. However, since the appropriate moment for summary arrest had passed, the real fact which Ariston must explain is why, having accused Conon of hubris with his very first words, he declined to prosecute on this charge. It is to such an explanation that he immediately turns.

Portraying himself as a modest, respectful, and sensible young man, Ariston says (54.1) that upon recovering from his injuries he consulted his friends and relatives as to how to proceed. They advised him (54.1) on two grounds to content himself with suing for damages for the assault. They told him not to undertake business which he might not be able to carry off, and not to prosecute in a way excessive for one of his age. What accounts for this advice?

To begin with, one should note the obvious point that the participatory nature of the Athenian legal system produces this situation of choice. It is a commonplace of modern scholarship of Greek law that Athenian law, in contrast to modern legal systems, is characterized by a multiplicity of actions. This is not entirely accurate, however, for the salient feature at Athens is not that there are more possible actions but rather that it is up to the victim (or other citizens) which actions to choose. In the United States today, criminal defendants tend to be charged with a wide array of multiple offenses arising out of single acts, but by prosecutorial strategy. In addition, victims can sue for civil damages, alleging multiple causes of action based upon alternative theories of recovery. In Athens, however, individual citizens decided whether or not to pursue criminal prosecutions, and if so, of what nature. The real difference, then, is not multiplicity of actions, but rather the ab-

[3] See Cohen (1983: Chapter 3).

sence of a governmental prosecutorial entity and the total reliance on individual initiative.[4]

The decision about whether and how to prosecute was, as the advice which Ariston received indicates, a strategic decision left to private citizens. But why should a litigant prefer one course over another? In modern settings, prosecutors or litigants might prefer a particular path because of the relative requirements of proof under different statutes. In Athens, however, the decision would largely have turned upon an assessment of the relative resources and social standing of the litigants.[5] Ariston's relatives counseled him not to take on a larger task than he could manage. As Demosthenes' attempts to recover his inheritance demonstrated, litigation involved far more than preparing a case for presentation to the court. What Ariston's *philoi* advised was that he did not have the resources to prevail over Conon in the kind of conflict which a capital prosecution would produce. The underlying assumption seems to be that a mere action for simple damages would not entail the kind of all-out warfare which a far more serious charge would be likely to generate.

The second prong of their advice was that only the action for damages was appropriate for someone of his age. The sentiment that a serious prosecution like that for hubris would be beyond his years presumably arises because acting as a citizen prosecutor in a capital case was an assertion of who one was. To act not only as a private victim, but also on behalf of the city against a fellow citizen, particularly one of standing, required the kind of social identity which Ariston portrays himself as not having yet established. This points up again the fundamental difference between Athenian and modern conceptions of the trial, involving whether the focus of judgment is on the act or on the persons. At Athens the trial was conceptualized not as a forum for judging competing versions of a *transaction* completed in the past, but rather as an *agōn* between two *persons*, where the outcome was determined by all the social resources (status, friends, allies, wealth, symbolic capital, etc.) which each could bring to bear.

[4] Note that Athens also did not enjoy the multiplicity of courts which characterized, for example, early modern England. William Powell, the vexatious litigant discussed in Chapter 5, brought his twenty-six actions in seven different courts. See Sharpe (1983a: 168).

[5] Cf. Osborne (1985a).

In light of the evident disparity between Ariston and Conon, Demosthenes chose to construct for Ariston a social identity which emphasized his modesty, moderation, and caution, an identity in keeping with his status as a humiliated, dishonored victim who came to court rather than taking matters into his own hands. He thus emphasizes (54.1–2) that he would have liked to prosecute on a capital charge, but he followed his relatives' advice, and tempered his desire for revenge. He thus adopts a version of the strategy employed by Demosthenes in *Against Meidias* to preserve his honor after not retaliating directly for the insult: Ariston claims that he seeks revenge, and as a man of honor *desires* full revenge, but he is a modest and good citizen who respects the laws and is not overweening (54.1–2; cf. 54.24).

Having established his character in implicit contrast to his hubristic opponents, Ariston can then turn to an appropriate representation of the events which brought him before the court. As one would expect, he does not begin with the beating with which he charges Conon, but rather with the feuding relation which preceded it. He makes it clear that the assault can only be understood in the broader context of this ongoing enmity. The enmity began two years before when a group of trainee soldiers were on garrison duty. Ariston was camped near the sons of Conon. They, he alleges (54.3–4), unlike the others on duty there, were perpetually drunk and rowdy. He emphasizes their heavy drinking repeatedly, both to blacken their character and also to lend plausibility to his account, because, as will appear, intoxication is seen as typically associated with certain kinds of violence.

The sons of Conon first vented their aggression against Ariston's slaves in a paradigmatic escalation of hubris (54.4). First they insulted them, then beat them, and finally poured excrement upon them. Rather than responding in kind, Ariston and his companions went to the general, who rebuked the culprits. These men retaliated against Ariston, first insulting him, then beginning to beat him, whereupon the fight was broken up by the general (54.3–5). He concludes his account of these events by claiming (54.5–6) that the general stopped the brawl before he or his companions either suffered *or did* any irreparable harm. Though it is clear that he was getting the worst of it, he is thus careful to portray himself as more than a passive victim like his slaves (5–6). To establish this willingness to give as good as he got is perhaps particularly important

since he directly avenged neither the insult to himself from the mistreatment of his slaves, nor the later assault which led to the suit.

After returning to Athens, Ariston and the sons of Conon were in a state of enmity, or feud (54.6). He swears (54.6–7) that he had no intention of prosecuting them for their insults and assault, for he thought it wiser to ignore what had happened and avoid them in the future. Here he seeks to establish himself as a reluctant litigant, not someone who immediately drags his enemies before the courts in pursuit of vengeance. His alleged forbearance accomplished little, for shortly thereafter he claims that he was far more severely beaten and abused by the defendants. Ariston, of course, portrays this second attack as occurring without any provocation, though he later acknowledges that Conon will present a very different version of the facts. On his account, though, the violence simply results from the enmity which these unrestrained *hubristai* felt against him.

The trouble starts when one of Conon's sons, passing by in a drunken stupor (again), sees Ariston and a companion, Phanostratus, in the agora. The son returns to where his father and friends are engaged in heavy drinking, and the whole troupe proceeds back to the agora.[6] They come upon Ariston and Phanostratus and immediately assault them, stripping Ariston of his cloak, pushing him in the mud, and beating him about the head and face. Ariston describes (54.9) one particular act of abuse in detail, and characterizes it as a sign of Conon's hubris. Standing over Ariston's naked, besmeared, and prostrate body, Conon began to crow, "mimicking fighting cocks that have won a battle," and, urged on by the shouts of his companions, flapped his elbows against his sides like wings.[7] Ariston is carried home naked and battered, and he repeatedly emphasizes (54.9–13, 20) the seriousness of his injuries, calling witnesses and introducing the deposition of his doctor to testify that he nearly died.

[6] (54.7, and cf. 54.25). As will be seen in ensuing discussions of other cases, drinking is seen as an activity which typically unleashes the violent tendencies of those hubristically disposed. Allegations of drunkenness lend plausibility to the narrative because the judges are expected to associate drinking with such hubristic behavior. See Aristotle, *Politics* 1274b21; Ps.-Arist. *Econ.* 1344a36. Wilson (1988: 94–9) comments on the number of feuds which begin with insults in wineshops and notes that the Corsicans denote a certain type of quarrel as arising from the drinking bouts of young men.

[7] Wilson (1988: 92) comments that in feuding relations "... the corollary of maintaining one's own honour intact was the attempt to damage that of one's competitors, and the humiliation of enemies was often almost ritually demonstrative."

Conon's triumphant behavior perfectly illustrates the hubris which Aristotle (*Rhetoric* 1378b–79a, 1390b) attributes to wealthy men anxious to demonstrate their superiority.[8] His mimicry of a fighting cock in a victory dance captures the agonistic element of such hubristic behavior: this was not just a drunken brawl, but an act deliberately designed to humiliate and subordinate. There is a sexual element to this subordination as well, though it is not treated as such by the plaintiff for obvious reasons. Beating a free man symbolically reduces him to the status of a slave.[9] Expressing that physical domination sexually implies that he is a passive object of one's masculine potency and aggression and thus has no more claim to honor than a slave, prostitute, or *kinaidos* (a man who habitually adopts a passive homosexual role).[10] Ariston thus cannot explicitly address the sexual humiliation to which he was subjected, but it is implicit in his description. He states that they stripped him (54.8, 20, 32), befouled him with mud, leapt upon him, and split open his lips with their blows. The sexual dimension of their aggression also appears from the insults with which they regaled him, insults so vile, he says, that he cannot repeat them in court. Finally, to complete the humiliation, after Conon had performed the fighting cock's victory dance over him he had to be carried home naked (54.9) because they had left with his garments. These are violent and highly charged symbolic acts of degradation, defilement (mud/excrement) and domination. Ariston's subsequent summary references (54.20, 32) to what he suffered as the passive object of aggression could also well encompass sexual humiliation: "when I was dragged and stripped and subjected to hubris" and "when I was beaten and stripped and suffered all the other forms of hubris to which I was subjected." Though Ariston cannot describe it as such, Conon's behavior recalls the way in which mock or actual homosexual rape encompasses that form of domination by which the dishonor of the vanquished is expressed in the loss of that sexual identity upon which a man's honor is

[8] See also Lysias 24.15–8 for a discussion of hubris as characteristic of wealthy young men.

[9] See Saller (1991) on attitudes towards whipping.

[10] See Cohen (1991: Chapter 7) for references and secondary literature. Dundes, Leach, and Ozkok (1970) brilliantly show how Turkish boys' insult exchanges embody this same dynamic, for their goal is to reduce the other to the passive receptacle of one's "phallic" verbal thrusts by coming up with an insult which leaves the victim helplessly at a loss for words.

based.[11] No wonder Ariston must take pains to appear moderate and meek.

Ariston's description pulls out all the stops to win the sympathy of the jurors and turn them against his overbearing opponents.[12] The way in which he anticipates Conon's defense, however, reveals that he supposes his opponent will rely not only on a different version of the facts, but will also appeal to a different set of normative expectations about feud and violence. Ariston anticipates (54.13–4) that Conon will try to gain the indulgence of the judges by portraying the whole matter as a series of high spirited pranks, a matter for laughter and mockery, not litigation. He will argue, Ariston claims, that such behavior is typical of young men from well-to-do families. They belong to groups which engage in such sport or play and give themselves names charged with aggressive sexuality like *ithuphalloi* (lit., "erect penises").[13] Such young men frequently become involved in violent brawls, for example when they compete for the favors of hetairai (54.14).[14] Such behavior, Conon will allegedly conclude, is characteristic of young men, and Ariston belongs to just such a group of hubristic drunks who compete for prostitutes' favors (54.14). Ariston, however, has displayed harshness and vindictiveness in bringing a lawsuit over such sport (54.16). Conon would in actuality be likely to put it even more bluntly, arguing that *real* men regard such violence as a private matter, the kind of thing which happens all the time (54.42) to those who engage in the kind of activities in which Ariston does.

Ariston expresses his indignation at such an accusation and asserts an identity cast in terms of the countervailing values of the moderate man (54.16–17, 24) who has "never been seen by anyone drinking or committing hubris."[15] Clearly, there are here at play competing notions of what self-assertion, manliness, honor, and being a good citizen require. There is a fundamental disagreement

[11] An Athenian vase painting eloquently makes this connection when it depicts a defeated Persian soldier bent over in front of an Athenian soldier who approaches him from behind with erect phallus (see Schauenburg [1975]). Dundes (1975: 188–9) describes the way in which gangs of young men from the victorious team in the Palio of Siena subject the losers to, often violent, mock homosexual rape. See also Brandes (1981: 232–3).

[12] He cannot deny that he has been dishonored, so he must rely on pathos to arouse their sympathy. Note also his statement that he will be further humiliated if he loses (54.43, *pros-hubristheis*).

[13] This allegation makes the sexual dimension of the assault even clearer.

[14] See Wilson (1988: 111–2).

[15] 54.16. See also Lysias, 16.11–2; 21.18.

as well over what role the law should have in regulating certain kinds of violence. In Ariston's view men should take such matters to court rather than fighting them out themselves, and he defends his own action saying (54.16) that he is merely taking vengeance according to the laws. Conon, on the other hand, will allegedly criticize him for seeking legal penalties for acts of violence and aggression which are a normal part of young men's rivalries (54.16, 42). On this view the judges' proper response to a man in Ariston's plight is not to help him to a vengeance he is not manly enough to obtain for himself but to laugh at his humiliation (54.13–4).

As a defense for not retaliating in kind, Ariston articulates a rationale for the legal regulation of violence. Significantly, the fact that he must justify to a court of law prosecuting a violent assault testifies to the strength of the contrary expectations about the proper attitude towards the violence and rivalries of young men. The laws and courts, Ariston explains (54.18–9), exist to prevent the escalation of violence so typical of feuding societies[16] and to provide redress for those who find themselves the weaker party. Thus, he continues, actions for abusive language exist so that when men exchange insults this might not lead to blows. Likewise, a man who is assaulted but is too weak to retaliate in kind should not seek revenge by using a weapon, but rather wait for the requital established by the statute. "And," he continues, "there are prosecutions for wounding, so that those who are wounded do not become murderers. The least serious, verbal abuse, looks ahead to the final and most terrible, so that murder will not take place, and so that men are not step by step led on from abusive language to blows, from blows to wounds, and from wounds to death, but that the penalty for each of these should be in the laws, rather than be judged by the anger and will of the party involved."[17]

As in *Against Meidias*, this explanation of the rule of law as opposed to self-help operates to justify the position of the plaintiff, revealing that this, to us obvious and unimpeachable, position needs to be defended. Indeed, it is remarkable that a litigant should have to *argue* to judges that the law aims to limit the private exercise of violence so as to prevent murder and blood feud. Having made this point at some length, Demosthenes feels the need to return

[16] See Wilson (1988: 93–9).
[17] See also Isocrates 20.8.

again (54.20) to Conon's anticipated argument, now mischaracterizing it in such a way that it can be rejected out of hand. He claims that Conon will say that the group to which his son belongs, the Ithyphalli, in pursuing their erotic affairs strike and strangle whom they please. However, he continues, such violence and serious injury like that visited upon Ariston (which he again pathetically recapitulates) is not a laughing matter. The fact that he needs to admonish the court again that they should not laugh at his misfortune reveals that he fears that this is precisely what is likely to happen. That is, he knows that some judges will be disposed to think that whether or not it is illegal, such violence is not the proper business of the courts and should be dealt with by the parties themselves according to the norms of feud and honor.

Conon's actual argument will, of course, not be that young men like his son can strangle and assault anyone whom they please, but rather that in young men's drunken revelry and sexual rivalry such brawls are part of the fun and should be tolerated and regarded with amusement.[18] Ariston admits as much, when he goes on to say that though he personally deplores such activities, perhaps some allowance should be made for hubris committed as youthful folly. It is striking that he feels compelled to concede this much, though he quickly adds (54.21–2) that Conon is far too old to be permitted such an excuse. In short, Demosthenes' portrayal plays off of opposing sets of co-operative as opposed to agonistic values. He presents Ariston as moderate (16–7, 24, 37), in contrast to the *philapechthemosunē* – the love of making enemies, or disposition to feud – of his opponents. His task, and the manifest difficulties in the oration demonstrate that it is not an easy one, is to characterize those agonistic values in such a way that they may be plausibly connected to that kind of insensate violence and lawlessness which the judges will feel threatens the security of ordinary citizens (54.22–5).[19] The tensions implicit in this argument illuminate the way in which attitudes towards legal process are shaped by principles of the rule of law as well as by countervailing agonistic values.

[18] Ariston's repeated references to sexual rivalry may be taken to suggest that Conon will claim that the fighting was not unprovoked but arose out of competition for a courtesan.

[19] Wolff (1968: 16–18) comments on these difficulties, but attributes them to the issue of who struck the first blow. As will appear below, however, in cases of this sort each side always claims that the other struck first and produces eyewitnesses to support the claim.

Having more or less exhausted this strategy for dealing with Conon's anticipated defense, Ariston switches tack to another set of topoi elaborated in Chapter 5. That is, he tries to subvert Conon's case by arguing that it will rely upon perjured testimony. He begins by saying that since the facts are all against Conon, Conon's only defense can be to resort to witnesses who are prepared to lie under oath. He then names (54.31–2) the three witnesses who testified at the arbitration that they were returning from dinner with Conon when they saw Ariston and the son of Conon fighting, and that Conon did not strike Ariston. Appealing to common knowledge of reputation, Ariston tries to undercut this testimony by saying that the jury will know what sort of witnesses these are when he reads their names. He then lists four witnesses of his own who testified that they saw Conon himself beating him. These witnesses, he suggests, are reliable because they had no previous acquaintance with him (that is, they are not friends who could be expected to lie on his behalf). Conon, of course, is hardly likely to concur in this conventional characterization of the witnesses.

How are the judges to reconcile these two incompatible versions of the "facts," both supported by purported eyewitnesses whose credibility can hardly be assessed since the judges will only hear their deposed statements and will have no opportunity to see them subjected to cross-examination? Ariston's proposed solution will hardly serve the purpose, but it does cast light on general expectations about witnesses. False testimony, he maintains (54.33), is to be expected of friends, and particularly of men like these who are Conon's drinking partners. He portrays (54.35) their attitude towards testifying in words which recall the response of the Corsican boy quoted in Chapter 5: "Are we not to testify for one another? Is not that what companions and *philoi* do for one another? ... Do some people say they saw him beaten? We will testify that he wasn't even touched by you. That his cloak was stripped off? We will testify that they had done this first to you. That his lip has been sewn up? We will say that your head or something else has been broken." Ariston can, of course, claim that his witnesses are different (54.32–6), but Conon will undoubtedly invoke the same topoi on his own behalf. Indeed, Ariston's own words indicate the ritualistic quality of testimony, without giving any reliable criteria for telling when such is not the case.

Within the narrow temporal, technical, and procedural limi-

tations of an Athenian trial, the judges, confronted with two feuding parties who each allege, supported by numerous witnesses and a factual narrative cast in terms of probability, that the other provoked the fight and struck first, could rely on little other than a general assessment of the character and standing of the parties and a calculation of what result will best serve an amalgam of justice and the interests of the *demos*. Appropriately, Ariston closes his oration by appealing to both of these points. First, building upon his previous arguments about the danger represented by hubristic men like Conon, he asks the judges (54.43) to consider whether it is in the interests of *each* of them (i.e., as individual private citizens) that men can commit assaults and hubris with impunity.[20] If they acquit him there will be more such men, if they find him guilty, fewer. Finally, he closes (54.44) by recalling his family's benefactions to the city and contrasts them with Conon's lack of civic service. With these words Ariston's contribution to the performative ritual of insult-exchange is complete. The judges will next have heard Conon's manipulation of the same topoi to create his own representation of their mutual enmity. Will Athenian judges, given no opportunity to deliberate before reaching a verdict, have invested as much ingenuity as modern scholars in trying to unravel this tissue of pathos, facts, fabrications, distortions, half-truths, probabilities, commonplaces, and boldfaced lies, to determine what "really" happened?[21] I think that we will misunderstand a great deal about the judicial process at Athens if we believe that they did.

We turn now to three other orations involving allegations of assault and wounding. Although they involve very different forms of legal action, all three bear structural and rhetorical similarities to *Against Conon*. A brief review of these speeches suggests that physical violence was indeed an expected feature of certain kinds of enmity and that rhetorical representations of that violence tended to rely upon paradigmatic appeals to those expectations. These cases all involve, in one form or another, the same nexus of wealth, hubris, sexual rivalry, drinking, and violence which characterizes *Against Conon*. However, since two of the speeches are only partially preserved they do display a more limited range of topoi.

[20] In *Against Lochites* (20.5), Isocrates employs the same argument. He concludes (20.17–18) that it is only sensible for judges to give a verdict which both is just and will serve their own interests.

[21] For an entire book devoted to such an enterprise see Gagarin (1989).

An oration by Lysias, *Against Simon*, was delivered before the Areopagus, a court which heard only cases of homicide and wounding with intent to kill. This court had the reputation of confining itself far more to the facts of the case than did the mass popular courts, and the surviving speeches delivered there do display a narrower rhetorical range.[22] *Against Simon* involves an assault, which the plaintiff chooses to pursue before the Areopagus, rather than through an action for damages. That more complex relations between the parties are involved than this single transaction appears from the fact that the prosecution was not brought until four years after the incident (3.19, 39). In *Against Conon* there was a two-year interval between the assault and the trial, which may also indicate that more was involved in his interaction with Conon and his sons than Ariston is prepared to admit. The decision about whether and when to go to court would have depended upon a variety of circumstances, unknown to us, which influenced the ongoing relations of the parties.

In *Against Simon*, the defendant tries to make much of this delay, arguing that the real reason for the prosecution cannot be the alleged injury, since Simon only brought the prosecution after learning that the defendant had lost an antidosis suit (a challenge to an exchange of property).[23] According to the defendant (3.19), Simon took advantage of the weakness that he thought this loss represented and brought the present prosecution. This account presupposes that the trial is a product of a long-term relationship of enmity and was viewed by both parties as a test, as it were, of relative social strength at a particular moment rather than a simple determination of whether or not a dangerous act of violence had taken place. It is relevant in this connection that the defendant acknowledges this larger frame of reference when he refers to himself (3.10–11) as one who strives for honor in the city. For a plaintiff, then, initiation of litigation involves a strategic decision about the advisability of submitting oneself, and not just the defendant, to the judgment of the community. Recall here Ariston's plea that he will be dishonored/humiliated yet again if the judges find against him.

[22] See, e.g., Lysias 3.42 for an acknowledgement of the restrictions on the type of arguments that can be made.

[23] See 3.39 for his argument that anyone who really desired vengeance would have acted immediately.

Beginning, as expected, with events that long precede the actual assault, the defendant characterizes (3.3–5) his altercation with Simon as arising out of ongoing sexual rivalry over a Plataean boy. He explains (3.3–4) that, although *he* was in reality the victim of aggression, he had not himself brought an earlier prosecution because of his feelings of shame at his infatuation with the boy. He attempts to counter any negative implications this infatuation might have for the court's assessment of his character by portraying himself (3.4–5) as moderate and self-restrained in his courtship of the boy. His opponent, he claims, was unrestrained in his lust and hubristically and illegally took what he wanted from the boy by force. In other words, Lysias here contrasts the respective characters of the parties through the same antithesis of moderation vs hubris (with the same connection of sexual aggression and physical violence) as Demosthenes employed in *Against Conon*.[24] This antithesis, first introduced in the opening section of the oration runs through the narrative of the ensuing events.

Not only did Simon allegedly act with violence and hubris against the boy, but he also displayed the same traits against the defendant and his family. The accusations are paradigmatic: Simon came to his house at night, drunk and looking for him and the boy, who weren't there. He broke down the doors and searched the house, even entering the women's rooms, scandalizing these respectable women, "whose lives," in a spectacular hyperbole, "were so well ordered that they were ashamed to be seen even by their male kinsmen" (3.6–7, 23, 29).[25] These intrusions upon the speaker's house and women are already a major assault on his honor and are meant to illustrate Simon's utterly depraved character. Simon next found out where he was dining, went there, called him outside and assaulted him, throwing stones and even wounding one of his friends (3.7–8). At this point the judges will be wondering why he did not prosecute these very serious wrongs, so he explains in terms which also cast light upon Ariston's timidity in pursuing Conon.

[24] Aeschines also describes homoerotic rivalry and the violence it spawns in *Against Timarchus* (55–67, 134–6). As in Lysias' and Demosthenes' descriptions, sexual rivalry naturally goes together with excessive consumption of alcohol, breaking into houses, humiliating abuse and physical violence, and brawling.

[25] Recall Meidias' similar misdeeds. On the rhetorical uses of the purported "sequestration" of women to demonstrate their respectability, see Cohen (1991: Chapter 6); and see G. Miller (1994: 12) on the sexual signification of battering down doors in such contexts.

On his account, he did not then prosecute Simon because he was ashamed that some citizens would think him foolish for engaging in such affairs, and because he knew that many others would ridicule him for what he suffered (3.9–10).[26] That is, he would have been made a laughing stock if he had publicized having experienced this humiliation and having done nothing to retaliate.[27] As in *Against Conon*, a man who suffered certain kinds of insults might expect to be laughed at and mocked for his unrequited humiliation.[28] Here, however, the speaker advances an explanation for this disposition (though an unconvincing and self-serving one) as arising from the agonistic nature of social life at Athens. The men who would deride him, he claims, envy those who have ambitions to succeed in the city. That is, because he has fared well in competition for civic status, some men will envy him his success and welcome an opportunity to revel in his humiliation. This argument about what "some men" might have hypothetically felt is, of course, merely a thinly disguised attempt to deflect the same amused reaction which, in *Against Conon*, Ariston also feared.

The speaker's subsequent actions are no less likely to arouse ridicule, though he portrays them as evidence of his moderation and avoidance of violence. After this violent confrontation with Simon, he says, he decided that it would be better to reside abroad with the boy. This is a neutral way of saying that he ran away and only came back when he thought it was safe (3.10–11, and cf. 3.32 where he says he left to avoid fighting). Like Ariston's strategy of avoidance, his too fails and when he returns he almost immediately finds himself the victim of a second purported assault. This occurs when Simon and his friends, again drunk, learn that he has returned and attack him and the boy. He and the boy manage to run away separately (he puts it even more delicately than this since this again doesn't speak too well for his courage), though he portrays his conduct as a prudent retreat.

At this point a contradiction appears in the competing accounts

[26] Note, however, that he later argues that Simon's cause cannot be genuine because anyone who had lost a boy or suffered a beating, would, in their rage, immediately seek vengeance (3.39), whereas Simon waited four years.

[27] Later in the oration he adds that he kept silent to avoid becoming an object of gossip/scandal (3.31).

[28] Aristotle (*Rhetoric* 1373a35) aptly comments that some wrongs the victims are ashamed to disclose, such as acts of hubris against their women or sons.

(as both portrayed by the one speaker). It is at the time of this first encounter that Simon says the defendant assaulted him and wounded him in the head. The speaker, however, denies that there was at that point any physical violence at all, since he and the boy managed to run away beforehand (3.13–14). Of course, both sides present witnesses to support their claims. Later, says the speaker, while he was making good his escape, Simon and his friends found the boy in a shop. They dragged him out as he called bystanders as witnesses to their violence. The defendant, who observed this violence, portrays himself as now finding his manly courage, for he says (3.17) that shame prevented him from allowing them to subject the boy to such lawless and violent hubris. When he protested (3.18–19), Simon's group began to beat him as well, and a general brawl ensued in which, he maintains, all parties were injured in the head.[29] No one can have taken the matter too seriously, he argues, since afterwards the other men with Simon apologized to him and in the four years since no one charged him with anything (3.19–20). Clearly, the judges will be confronted with totally incompatible versions of what happened, both supported by numerous eyewitnesses.

After completing the narrative of events and using it as the basis for a number of arguments from probability, Lysias brings the speech around to the same strategy which Demosthenes anticipated that Conon would use in his defense. It is wrong, he says (3.39–40), to prosecute and to seek to expel someone from the city because they were rivals over a boy. That is, such violence is typical of these kinds of rivalries and neither belongs before the courts nor merits such severe penalties.[30] Perhaps Ariston (in Dem. 54) chose to bring an action which involved only minor penalties because he anticipated encountering precisely this sentiment on the part of the judges.

Lysias proceeds to develop this theme in a manner appropriate to pleading before the Areopagus by linking it to the statutory requirement of a specific intent to kill. He argues that the intent of the statute is to focus upon those wrongdoers who have made their best effort to kill and therefore deserve such severe punishment as

[29] This and the use of any kind of weapon are tokens of the intent to kill required by the Areopagitic action.

[30] See also Aeschines (1.55–67, 134–6).

exile; in other words men who are, morally speaking, as guilty as murderers.[31] He then argues (3.42–3) that it would be wrong to apply such a severe punishment to those cases where, though there is wounding, such a penalty is inappropriate because the disposition to murder is absent. Such cases all involve violence that arises in agonistic contexts: (1) rivalry and intoxication (2) contests (3) insults or verbal abuse (4) fighting over courtesans. These, then, are typical cases where violence is seen as naturally erupting. Such violence should not be taken too seriously, he argues, because it results from the impulse of the moment and is thus not genuinely homicidal. In other words, in a highly agonistic society like Athens feuding, sexual rivalry, and insulting behavior are part of social life and inevitably escalate into brawls. Such violence is essentially different from that displayed in premeditated murderous assaults and should not receive the same treatment. Accordingly, certain kinds of non-homicidal violence should be regarded as outside the sphere of public concern and not criminal in nature. As befits the requirements of pleading before the Areopagus, Lysias here casts this argument about the commonplace nature of such violence and its inappropriateness for litigation in terms of an interpretation of the intent required by the statute. Of course, a countervailing topos is ready at hand for the plaintiff, for as Ariston argues in *Against Conon*, the very purpose of such laws is to prevent that typical escalation of agonistic violence from insults to blows to homicide.

Another speech of Lysias written for a case of wounding brought before the Areopagus displays similar features to *Against Simon*. However, since only a small section survives, a full comparison is not possible.[32] This speaker also claims that he and his opponent had been in a state of enmity. As evidence for their enmity he alleges that they had been involved in an antidosis, but that this, and all other matters in dispute, had been resolved through the mediation of friends. Rivalry for a woman appears to have been an underlying cause of this conflict, and the negotiated settlement

[31] He also argues that the Areopagus has interpreted the law this way many times before. This supports the view that whereas the Areopagus exercized its sacred jurisdiction over homicide through a more rigorous attempt to apply the law to the facts of the case, the popular courts focussed upon other bases of judgment. The more rigorous procedures of the Areopagus also would have given the judges a better opportunity for making an informed judgment.

[32] Since the narrative is missing we lack the richness of presentation of the events and their background which this section typically provides.

provided that the two men would share her (4.1–2).[33] His opponent apparently (4.4–5) denies that they were reconciled, and maintains that the speaker was his enemy (*echthros*).[34] When the speaker went to the plaintiff's house a fight ensued, leading to the present action. The fault for this violence is, of course, in dispute. The speaker claims that he was invited to the house, but the plaintiff claims that he came unbidden (hence aggressively, since they were feuding). This question of the motivation of the visit is clearly crucial to the case, and an oration of Demosthenes more fully illustrates the role which this issue might play in assigning blame. The speaker there explains (47.19) why he paid a visit in order to demonstrate that his opponent must have struck the first blow. He argues that since he had no previous dealings with him he could only have been visiting him in the course of his official duties. To "prove" this he enumerates (47.19) a typology of interaction: he and the defendant, he alleges, had not participated in any business transactions, or revels, or erotic associations, or drinking bouts. These, he says, might have led him to seek out the defendant under the influence of passion or because he sought revenge after having been bested in a quarrel. In other words, such relations will be acknowledged by the judges as paradigmatic causes of violence and hence may be used to support arguments from probability.

In Lysias' case, all these elements of pre-existing enmity, financial dealings, sex, and drinking are present. The speaker admits (4.7–8) that he had been drinking and carousing with boys and flute girls prior to the visit, but claims that he only defended himself against the plaintiff who was in a state over the woman and had also been drinking. In short, the parties apparently agree that the elements of sexual rivalry, alcohol, and pre-existing enmity had produced the violence, but they disagree as to every other significant issue: was the woman a slave or free, was the speaker invited or not, had their enmity been reconciled, and, of course, who struck the first blow. As one would expect from *Against Conon* and *Against Simon*, one of the defendant's main arguments is that even if such violence did take place it does not belong before the courts. The defendant thus alleges that his opponent is just using the pros-

[33] The parties also disagree as to whether she is a slave or free.

[34] See also 4.11 where the issue is framed as whether they had been reconciled or were still enemies (*echthroi*).

ecution to pursue their feud and to get the woman for himself. He also (4.9) argues that his opponent is not ashamed to call a black eye a wound for the sake of a prostitute. That is, the judges should regard such bruises as a normal part of such rivalries over prostitutes, matters which do not merit the attention of the Areopagus. The judges, he concludes, should not allow his opponents to drive him into exile on account of their private enmity.[35]

The last speech is another fragment from an oration by Lysias (*Against Teisis*), quoted in a much later treatise on the Athenian orators.[36] The fragment contains only the narrative of events as recounted by the victim's companion. The tale begins, as in *Against Conon*, with the pre-existing enmity which produced the later hubris and assault. Two young men, Archippus and Teisis, are in the palaestra and "a quarrel develops which leads to gibes and responses and enmity and insults." It appears that the insults may have pertained to Teisis' paederastic relation with his guardian, though this is not certain. If this is the case, it would help to explain the nature of the abuse with which Teisis later retaliates. Teisis then reports Archippus' insults to his guardian/lover. The latter allegedly advises Teisis to entrap Archippus by feigning reconciliation, but watching out for an opportunity to catch him alone. Teisis allegedly follows this advice and resumes friendly relations. On the occasion of a festival he invites Archippus and his companion to dine. They refuse, whereupon he invites them to a drinking party. They agree and return later that night. Invited to enter, they are seized by Teisis and his friends. They throw the friend out of the house, and bind Archippus to a pillar, whereupon Teisis whips him and locks him up in a room. "And", the speaker continues, "it was not sufficient for him to do this wrong alone, but emulating the basest young men in the city, and recently having acquired his patrimony and affecting to be young and rich, when it was already day he bid his friends to whip him, having bound him to the pillar." From the portrayal of the aftermath of the whipping it appears that Teisis advances a completely different version of the events. He claims he was dining with friends when Archippus came, unbidden and intoxicated, and broke open the door. Entering the house he insulted him and others and their women. Doubt-

[35] Isocrates anticipates a similar defense in *Against Lochites* (20.5).
[36] Dionysius, *Demosthenes* 11; Lysias F. 232 Scheibe = F.75 Thalheim.

less, his drinking companions will support his version of the story. Archippus' kin, on the other hand, in order to win witnesses and sympathy for their cause, carried his bloodied body to the marketplace to display to as many people as possible before taking him to a doctor.

Despite its fragmentary nature this text displays a number of typical elements of feuding relations. Enmity arises (allegedly) from serious insults, probably having to do with Teisis' passive sexual receptiveness to his guardian (what led to this hostile confrontation we do not know). These insults produce a state of enmity and a desire for revenge. Teisis adopts a posture of reconciliation so as to obtain an opportunity for revenge. There are two contradictory versions of what happens next, and both fit the common paradigms. Archippus maintains that he, believing the reconciliation to be genuine, accepts an invitation and is whipped like a slave.[37] He portrays Teisis as young, newly rich, and given to drinking bouts, three paradigmatic elements of the hubristic man. Teisis, on the other hand, apparently will claim that Archippus was the one who desired revenge for some insult. Seeking his revenge he came drunk and unbidden, forced his way into the house, and insulted Teisis, Antimachus, and their women (the inclusion of the latter indicating the sexual nature of the insults). The constellation of drunken forcible entry into a man's house and insults to the women of the family is also paradigmatic hubris, as appears from *Against Meidias* and *Against Simon*. Both sides dispose over witnesses who support their version of the events.

The cases considered here (and Chapter 5) represent the bulk of the available evidence for non-homicidal assault. None of the acts of violence which form the basis of these suits arises from a chance encounter or criminal venture. All are an expression and exacerbation of pre-existing enmity, one incident in an ongoing agonistic relation. That is, all of them are part of the dynamic of insult and revenge which characterizes feuding behavior. In all of them where we know (or have a representation of) the defendant's strategy we find the argument that such insults, rivalries, revenges, and

[37] See the similar incident involving a wealthy public slave, described by Aeschines (1.54–65). There sexual rivalry also leads to a drunken nocturnal intrusion and whipping. Demosthenes (21.180) states that hitting an enemy with a whip is hubris because it treats a free man like a slave. See also [Xenophon], *Athenian Constitution* 1.10 and Aristophanes, *Wasps* 1303.

violence are characteristic activities of certain kinds of men, and that such violence is simply a normal part of enmity and rivalry. All the defendants both deny that they were the aggressor and also maintain that in any event such feuds do not belong before the courts.[38] All the speeches also testify to the operation of the principle of solidarity whereby friends and relatives are drawn into the conflict as both participants and supporters/witnesses.

In all of these cases, then, the courtroom drama is actually but one act in a larger play. The courts appear here less as fulfilling a "police" function in punishing "criminals" who violate public order and more as an instrument for the pursuit of feuding relations (or at least so the defendants argue) or a forum for mediating conflicting claims to social precedence. In a way this is not surprising, because unlike Conon, genuine cloaksnatchers, footpads, and thugs would not have been likely either to find themselves in such a courtroom setting, or to engage the services of a Demosthenes or a Lysias on their behalf. Rather, they would more likely have been subjected to the summary procedures and punishments of the Eleven. True "criminality," the violence of those who made their living through theft, robbery, kidnapping, and the like, only fleetingly appears in our sources through occasional references to peripheral events. The orations studied here deal not so much with "law enforcement" or the suppression of violent criminality in the modern sense, but with the pursuit and mediation of feuding relations. If Wilson's study of the role of the courts in a feuding society is relevant here, it indicates that citizen prosecutors in such circumstances would have come to court not for "justice," but to enlist, despite the best efforts to the contrary of judges and magistrates, the legitimate violence of the law in a countermove against their enemies. On the interpretation advanced above, Athenian judges were in no better position than their Corsican counterparts to prevent the infusion of the legal sphere with norms and goals of an agonistic culture. Indeed, the argument here is that unlike the "alien" French judges assigned to Corsica they participated in that culture. The substance and style of Athenian forensic rhetoric are inexplicable if they did not.

Accusations of violence, then, provided rich opportunities for

[38] Except that in *Against Teisis* we do not have the usual section of the oration anticipating the other party's arguments.

those disposed to pursue enmity or profit in the courts. Defendants' accusations that their opponents are too ready to turn any fracas into a capital offense may be self-serving, but such appeals would be pointless if judges were not ready to believe that some forms of agonistic violence did not threaten public order and that plaintiffs exaggerated their injuries for revenge or other motives. In Aristophanes' *Clouds* (493), Strepsiades says that if someone hits him he immediately looks for witnesses and then files suit. In a Demosthenic oration (40.32), the speaker goes a step further, and claims that after their disagreement, which he admits included abuse and blows, his opponent inflicted a wound upon himself so as to be able to prosecute him before the Areopagus and exile him from the city. Aeschines goes still further, and accuses enemies of wounding themselves so as to extort money through the threat of similar prosecutions (2.93; 3.51, 212). Whether or not such particular charges are true, the plausible use of such topoi implies that judges acknowledge that such malicious litigation takes place. In a legal system totally reliant upon private initiative, the few bars to such use of the courts could not effectively restrain such behavior.

These cases portray wealthy Athenians as engaged in various kinds of rivalry and aggressive behavior which competing norms might label either as "honor-enhancing rivalry" or "hubristic excess," depending upon the context and point of view. The social type represented by the rhetorical portrayals of men like Meidias, Conon, or Alcibiades would have been well known to Athenian judges, as Aristotle's summary of the close connection between wealth, status, and hubris indicates. Such behavior is commonplace in agonistic societies where the public display of prepotent masculinity through prowess in activities like drinking, fighting, insulting/boasting, sexual rivalry, and athletic contests, buttresses claims to honor, status, and influence.[39]

David Herlihy has shown how in Renaissance Florence, wealth, and particularly new wealth, was seen as disposing citizens to pride, insubordination, and violence (in Greek terms, hubris).[40] Herlihy also argues that wealthy young men played a very prominent role in Florentine violence.[41] He accounts for this by noting

[39] See, e.g., Gilmore (1987: 126–53).
[40] Herlihy (1972: 137).
[41] (1972: 140–5).

that wealthy young men were especially volatile because they often did not marry until their thirties (girls were married at about fifteen). They were thus free from the responsibilities of managing a household and supporting a family, and many of them had no guiding paternal influence because of the demographic effects of late marriage. Late marriage for men was also the norm in classical Athens, and the opportunities for leisure and excess which wealthy young men exploited are parodied in comedy and lambasted in forensic oratory, which depicts them as ever ready to batter down doors in their drunken pursuit of erotic fulfillment, revenge, or both.[42]

Lysias (24.15–18) also claims that hubris is a characteristic of the young, strong, and wealthy.[43] The wealthy, he says, who commit hubris buy their way out of danger, the young are granted indulgence (as *Against Conon* suggests), and the strong can commit hubris with impunity (as Meidias seems to have done). Orators, as seen above, attempt to fan popular resentment against the overweening arrogance of the hubristic rich, portraying, as Lysias puts it (24.15–18), the weak as unable either to defend themselves or successfully to commit hubris themselves. Aristotle (*Rhetoric* 1383a) also maintains that the wealth, strength, many friends, and power of the wealthy make them hubristic because they do not fear repercussions for their conduct. The wealthy are hubristic, he adds later (1390b), but the new rich are particularly so, and in their unrestrained state are likely to assault others and engage in sexual predation (i.e., as ways of asserting the status they want to be recognized as having). These are just the sorts of expectations about the likely behavior of the arrogant rich which Demosthenes and Lysias exploit to blacken the character of their opponents. Speechwriters and orators were able to employ these topoi because such feuds involving sexual rivalries and drunken brawling were widely associated with particular social groups. These men, and, according to the orations discussed above, particularly those who were unsuccessful in these rivalries, also paraded their enmities before the Athenian judges in their attempts to avenge dishonor or outmaneuver an enemy. In this legal sphere, where the Athenian ideology

[42] See also, Aristotle, *Rhetoric* 1389a.

[43] Cf. Antiphon, *Tetralogies* 4.d.2, who denies that hubris is solely the province of the young. Some young men, he says, are self-controlled, some old men are hubristic when drunk. The denial itself, however, testifies to the prevalence of the stereotype.

of the rule of law saw the courts as dispensing impartial justice and suppressing private violence, feud and the agonistic quest for domination and honor map out the social framework within which judges and litigants both played their assigned roles. It is only against such a background of values that one can make sense of the cases reviewed here and in Chapter 5. After exploring, in Chapters 7 and 8, two further fields of legal relations, the Conclusion will pursue further reflections on the implications of this characterization of Athenian trials for our understanding of the wider political and social role of the courts.

CHAPTER 7

# Hubris *and the legal regulation of sexual violence*

Hubris has recurred as a theme throughout the past three chapters. Its employment in orations like *Against Meidias* and *Against Conon* has indicated its intimate connection to the nexus of honor, insult, humiliation, and revenge. Although we do not know how often cases for hubris were brought, the wealth of rhetorical uses to which speakers put this emotionally laden concept indicates that it loomed large in the Athenian consciousness. Offenses against honor are no longer an important part of modern legal culture, but in agonistic societies like Greece or Rome honor was the basis of social identity, and hubris and *iniuria* were important legal categories. Indeed, Aristotle (*Pol.* 1267b39) reports that Hippodamus' theory of law embraced only three categories, death, damage, and hubris, because he considered these the only three things about which men litigate. In the cases discussed in Chapter 6, hubris chiefly occurred in contexts of insults involving physical violence and verbal abuse, though in a number of cases it appeared to be aimed at sexual honor as well. This was the case with violent intrusions into the house and into the presence of the female members of the family (*Against Meidias*, *Against Simon*), with sexual insults against female family members (*Against Teisis*), with coercive sexual intercourse (*Against Simon*), and with physical violence involving a degradation of the sexual integrity appropriate to a citizen (*Against Conon*).

Recent scholarship has in general focussed upon the role of hubris in regulating the kind of insulting physical abuse represented by Meidias' slap.[1] Some scholars have, however, recognized that the concept of hubris encompassed some forms of sexual violence.[2] Though they mention in passing the possible appli-

[1] In particular, see MacDowell (1976); Gagarin (1979); Fisher (1976, 1979, 1990).
[2] E.g., Gagarin (1979: 230), MacDowell (1976: 25).

cation of hubris to cases of rape in particular, such discussions have not gone further in exploring the nature of the concept of hubris as it relates to the regulation of sexual misconduct (particularly in homoerotic contexts). This chapter will sketch the wide range of sexual conduct which Athenians saw as potentially involving hubris. It will argue that we should not confuse the sexual side of the action for hubris with the modern law of rape, for although it included rape, its nature and focus were different and its scope broader. The case study method employed in the last two chapters cannot serve here, for we do not possess suitable orations from prosecutions for hubris. Instead, the evidence will have to be stitched together from a variety of sources. The first section of the chapter will introduce the evidence concerning the range of reference that the word hubris might have in the sexual sphere. The second will focus upon hubris and the legal regulation of certain forms of illegitimate sexuality.

## I

It is appropriate to begin with the broad range of sexual reference associated with hubris, and the centrality of sexual connotation in ordinary Athenian usage of the term. As will be seen below, establishing the patterns of ordinary usage will prove important in assessing the scope of legal regulation.

In the principal fifth- and fourth-century Athenian prose authors, most usages of the word hubris and its cognates refer in a general way to some unspecified kind of wrongful, insulting, insolent, or excessive behavior.[3] We have seen, for example, that in Demosthenes (e.g., 21.98, 159, 211) and other authors it is a commonplace that wealth produces hubris, but the claim does not focus upon a specific kind of conduct.[4] Such usages appear to stigmatize in a general way hubristic conduct as wrongful, excessive, degrading, abusive, or insolent. Since other scholars have provided exhaustive descriptions of the range of usage of hubris, there is no need to multiply such examples.[5]

[3] I draw here upon the more detailed analysis in Cohen (1991).

[4] When it does, it often indicates that wealth produces a propensity for physical and sexual abuse. See, e.g., Aristotle, *Rhetoric* 1391a19 (adultery and assaults).

[5] See Fisher (1976, 1979) and MacDowell (1976).

Leaving aside such general applications of the term, from the standpoint of Athenian law two particular categories of usage are of particular relevance: physical assault against free persons, and conduct related to sexual violence, sexual aggression, or to violations of sexual honor. Hubris and its cognates are used far more frequently to describe each of these categories of behavior than any other specific types of acts. In other words, these two categories are clearly the most prominent types of characterizations of particular misconduct as hubristic. Since previous chapters have dealt with the cases of hubris as involving physical assault, we may turn now to its relation to the assessment of sexual behavior.

What kinds of conduct are referred to as hubristic in sexual contexts? Though references to rape of women or children constitute the most frequent category, individuals also characterize as hubris a wide range of behavior connected in one way or another to sexual aggression and sexual honor. From the philosophical perspective, the conceptual link between hubris and sexuality appears clear. For Aristotle, hubris, unlike anger, involves conduct engaged in for the pleasure it brings (*Rhetoric* 1378b20ff.).[6] Thus, unrestraint arising from desire involves hubris, while unrestraint arising from anger does not (*NE* 1149b20).[7] Accordingly, monarchs, tyrants, and the wealthy, who are freest to act with deliberate unrestraint, are the most likely to engage in hubristic action (*Politics* 1313a14). Aristotle's subsequent discussion of tyrants and monarchs in *Politics* makes clear what kinds of unrestraint he has in mind.

In a lengthy passage Aristotle advises rulers to avoid two kinds of hubris: corporal punishment of free men and sexual abuse of boys and girls (*Politics* 1315a15–28). These should be shunned because they will likely provoke attempts at revenge by the outraged families.[8] Hubris here clearly refers to sexual intercourse gained through a relation of power, for Aristotle advises the tyrant to appear to be acting under passion (cf. *Politics* 1311b19). This would presumably ameliorate the appearance of hubris, and hence might placate the guardians of these youths who would otherwise take revenge (1315a27–8). The connection to sexual honor and shame appears even more explicitly when Aristotle further advises the

[6] See also *NE* 1149b23 on the connection of pleasure and hubris, and *Rhetoric* 1374a13.
[7] See also *Rhetoric* 1391a19.
[8] See also Demosthenes 17.4.

ruler to make good such dishonors by granting public honors to the victims.

It is important to note here that there is no suggestion that this hubris must *necessarily* be accomplished by actual *physical* violence or assault. Whereas rape in ancient legal systems has traditionally required actual force, here, whether physical violence is used seems largely irrelevant.[9] The point is that the hubristic tyrant exploits his relation of domination to gain his pleasure at the expense of the dishonored boy or girl. However, if he creates the appearance of acting under passion, though the same implicit coercion might be involved, the attribution of hubris is attenuated. If, for Aristotle, the underlying motivation of hubristic behavior is the affirmation of one's superiority by intentionally disgracing or humiliating another person (*Rhetoric* 1378b20, 1374a13), one arena in which the powerful seek such affirmation is in sexual relations. If the sexual relation arises from an act of power, rather than passion, then it necessarily merely expresses a relation of domination where the boy or girl submits to hubris and to the disgrace it entails.[10] Aristotle clearly intends these remarks to extend beyond his immediate discussion of the sexual exploitation of minors, for in *Politics* (1311b19) he describes a man who regards himself as an object of hubris because he comes to believe that he submitted to someone who was not motivated by passion.[11]

Another important point that emerges from Aristotle's discussion concerns the normative weight that attaches to hubristic sexual conduct. As discussed in previous chapters, in societies where honor and shame are dominant social values, any act which dishonors a family requires vengeance to erase the stain. As seen in Chapter 2, Aristotle believed that hubris represented a major cause of civic disturbance in monarchies. The examples he gives in *Politics* (1311a37ff.) show that sexual offenses against the women or chil-

[9] In modern systems this traditional requirement was moderated to include the actual threat of imminent force. The more recent trend is to encompass more subtle forms of coercion.

[10] See also Xenophon's (*Hiero* 1.27–37) description of the dilemma of the tyrant who can demand the erotic favors he desires but wants them to be freely given.

[11] Cf. *Politics* 1311b2 and 1315a24. The same point arises in other contexts, and helps to explain what it is about passion that eliminates the hubristic quality of the conduct, namely the absence of the intent to assert oneself through the infliction of harm, humiliation, or disgrace. This intentional quality is nicely illustrated in Xenophon, *Anabasis* 5.5.16, where the men are said to take provisions not from hubris but from necessity. See also Thucydides 4.98.5.

dren of a family were one of the prominent forms that such stasis-producing hubris might take.[12] Isocrates (e.g. *Nicocles* 36.5) expresses the same sentiment when he claims that men are particularly outraged by hubris to their women and children, and that this has been the cause of many civil disturbances and the overthrow of many rulers.[13] Hubristic sexual aggression appears here as a transgression of social norms which dishonors its victims and their relations, and which gives rise to retaliatory or punitive responses which can escalate into full blood feud and engulf an entire community.

While I argued above that Aristotle's description of the monarch's or tyrant's hubristic sexual transactions did not conceptually require actual physical violence, there are numerous passages which use hubris and its cognates to refer to rape.[14] On the other hand, Plato's law of rape (*Laws* 874c4) uses the passive tense of *hubrizein* to describe what the rape victim has suffered at the hands of the assailant, who may be killed with impunity. The statutory language suggests that hubris involves the intentional sexual dishonoring of the victim, and not necessarily the physical violence used to accomplish it. This statutory language also seems to indicate that it is necessary to spell out that not all hubristic sexual transactions constitute rape, only those acts of intercourse accomplished by actual violence.

Indeed, contrary to conventional views, hubris can describe a wide range of heterosexual and homoerotic conduct which may either involve an element of coercion, or may be consensual. Some passages include both heterosexual and homoerotic conduct and make no reference to coercion. Thus, in Plato's *Symposium* (181c4) chaste Aphrodite is described as untinged by hubris, unlike the unchaste kind where men love women and boys for their bodies.[15] This passage may involve a peculiarly Platonic formulation, but

[12] Most of the examples refer to behavior involving sexual honor: one involves the sister of Harmodius, another an insult to the homosexual favorite of the Corinthian tyrant Periander (the favorite is asked if he is pregnant), others have to do with adultery and homoerotic relationships. See also *NE* 1115a 22.

[13] See also Demosthenes 17.4; Aristotle *NE* 1115a2.

[14] See, Isocrates, *Paneg.* 114.3, *Arch.* 36.6, *Epis.* 102; Thucydides 8.74.3, 8.86.3; Hyperides, *Funeral Speech* 8.14, 12.31, 12.35; Demosthenes 19.309; 23.56; Dinarchus, *Demosthenes* 19.6, and cf. 23.7ff.; Herodotus 3.80, 4.114; Aristotle, *NE* 1115a23, *Rhetoric* 1314b, 1315a15–20, 1373a35; Lysias 29.98.

[15] At 188a7 the unchaste kind of love is explicitly referred to as hubristic.

the notion is a general one. Aristotle, for example (*Rhetoric* 1373a35), mentions that some wrongs the victims are ashamed to disclose, such as acts of hubris against their women or sons.[16] Here rape, or adultery, or consensual homosexual anal intercourse (in the case of boys) could all be meant. Indeed, from the standpoint of sexual honor, both rape and adultery against one's wife stain a man's reputation (though to differing degrees).[17] Both constitute hubris against the woman and her husband, despite the fact that the woman consents to one and not to the other. In Lysias' *On the Murder of Eratosthenes*, for example, the aggrieved husband repeatedly refers to the hubris of the adulterer.[18] Since an adulterer, through his hubristic act, damages the honor of the husband, an appropriate form of revenge which stops short of murder is to humiliate him sexually. Thus, Xenophon (*Mem.* 2.1.5) states that the adulterer, if apprehended, will be subjected to hubris. If Aristophanes' (*Clouds* 1083) reference to the conduct described by the verb *rhaphanizein* (anal insertion of a large white radish) refers to a type of mistreatment to which adulterers were sometimes subjected by outraged husbands, then the specifically sexual humiliation implied by Xenophon's reference to hubris is clear enough.[19] Other retaliatory acts of sexual abuse motivated by wounded sexual honor also refer to such abuse as hubris. Xenophon (*Cyr.* 5.2.28), for instance, says that a ruler committed an act of hubris when he castrated a man who had insulted him by praising the beauty of his concubine. Similarly, Aristotle (Fr. 611.132 Rose) labels a ruler as a *hubristēs* because he has a man castrated and forces him to eat his testicles.

Other kinds of heterosexual conduct are also characterized as involving hubris. The thrust of such descriptions emphasizes the sexual insult and dishonor which such hubris involves. Thus, Aristotle (Fr. 556.14 Rose) describes drunken young men who burst in upon a father and his two marriageable daughters and commit hubris against them. In response the community takes up

[16] Aeschines (1.107) makes the same point.

[17] See Cohen (1991: Chapters 5 and 6).

[18] Lysias 1.4, 17, 25.

[19] See also Isaeus 8.44 on the dangers of adultery. Such mistreatment was, of course, extrajudicial, constituting an extravagant and expressive form of self-help designed symbolically to subordinate the adulterer, thus reversing the relation of dishonor that the adulterous act had established. It must indeed be emphasized that this is not a form of legal *punishment*, as MacDowell (1978: 124) claims, but of private violence.

arms against them and stasis results. The description of this act as hubristic does not make clear whether the men raped the girls or merely mistreated them and their father in some other way. In either event, like the drunken intruders in *Against Simon*, they insult the sexual honor of the family, and any such acts may presumably fall within the scope of the concept of hubris.[20] Likewise, in an oration of Demosthenes (48.55) the women of a family are described as suffering hubris when their brother's mistress appears in public decked out with the jewels and regalia that he has given her. Here there is no violence at all, and the hubristic quality of the act involves its damage to the family's reputation. Significantly, it is the women of the family who are characterized as the specific victims of the hubris, for the egregious conduct besmirches the sexual honor/virtue which it is their duty to embody, the men's duty to guard. Similarly, Alcibiades (Andocides 4, *Alcibiades*, 14–15, 29) is said to have committed hubris against his wife by dishonoring her through bringing other women into the house.[21]

Another oration of Demosthenes also demonstrates the way in which insults to the sexual honor of a family could be described as hubris even where there is no hint of violence. In one of the few known actual prosecutions for hubris, a man prosecutes his stepfather, a former slave, for marrying the man's mother (at the behest of the deceased father; Demosthenes 45.4, and see also 45.80 and 36.30). The accusation of hubris in such a case is presumably based upon the notion that a marriage which implicitly involves an honorable woman submitting sexually to a former slave is degrading. Since sexual insults to a mother directly affect her son as well, the accusation of hubris encompasses him as a victim.

In homoerotic contexts hubristic conduct includes similar gradations of violent, coercive, and consensual behavior. The discussion of rape and sexual coercion by tyrants above referred to women and boys as the victims. Perhaps more interesting, however, are the discussions of hubris in consensual homoerotic relations. To begin with, boys may suffer hubris. Thus, claims Aristotle (*NE* 1148b29–30), men "subjected to hubris in childhood" (i.e., submitting to the passive role in anal intercourse) may

[20] See Lysias 3.6.

[21] Whether such accusations are true is, of course, irrelevant. The point concerns rather the normative expectations by which the author expects such exploits to be judged.

acquire a permanent disposition towards intercourse with men. This attribution of hubris does not arise merely because the victim is a child. For example, when accusing Androtion of selling his favors, Demosthenes (22.58) says that Androtion suffered hubristic and abusive behavior from those men who did not love him but could pay his price. This passage seems to employ a similar distinction to that articulated by Aristotle when he advises tyrants to feign passion when subjecting others to their will so as to diminish the appearance of hubris. In the case of Androtion, it is not that he does not consent when he sells his favors. Rather, because the sexual transaction is not based upon any sort of mutual attachment, the active partner, for his own gratification, subjects Androtion to behavior which demeans and dishonors. Further, not only does the passive partner submit to this act of hubris, in some passages he is described as through this submission committing an act of hubris against himself (Aeschines, 1.185; cf. 1.29, 108).

Qualification of homoerotic intercourse as involving hubris does not only arise in the contexts just described. Though Demosthenes' reference to Androtion suggests that the intercourse involved hubris because it was for pay and not for love, other passages do not make this distinction. Xenophon, for example (*Mem.* 2.1.30), says that using men as women constitutes hubris against them. The same passage refers to the sexual partners as lovers/friends (*philoi*), so the basis of the attribution of hubris cannot arise from any mercenary quality of the relationship. Rather, for Xenophon it is the fact that a man assumes the passive sexual role appropriate to a woman or slave which renders the conduct of the active partner who demands such submission hubristic. Here the description of the act as hubris arises from the view that a man is always dishonored by adopting a submissive sexual role. Plato, of course, famously refers to such a switch in sexual roles as unnatural (*Phaedrus* 250e5, *para phusin*, and cf. *Laws* 836e, 841d, and cf. 837c). Though Plato's description of such relations as "against nature" is often dismissed as idiosyncratic, Aeschines also describes Timarchus as having wronged his body with the transgressions of a woman. In doing so, claims Aeschines (1.185), he has committed hubris against himself "against nature" (*para phusin*). In the sexual sphere, then, hubris may also characterize the act of the person who demands the submission which dishonors. As a passage in Plato's *Symposium* puts it, the *erastēs* (older, active male partner)

who desires the body of the *eromenos* (younger, passive male partner) is driven by a hubristic love, the lover who is attracted to the soul of his beloved is motivated by a love "untinged by hubris" (183a6–186c4, 188a7, and cf. *Laws* 837c5). In such a case the "victim" is the passive object who "suffers hubris" and, hence, is dishonored. Cultural judgments as to the active partner clearly varied. While to Plato or Xenophon such hubris indicated base moral character, to others it simply demonstrated a man's aggressive masculinity.[22] Orators like Demosthenes confronted and exploited precisely such ambivalences about hubristic behavior in the cases discussed in Chapter 5 and 6.

In sum, Athenian authors use the vocabulary of hubris to reproach a wide range of homoerotic conduct. This conduct includes both consensual and non-consensual relations, and is applied both to boys and to men. Most importantly, it is used, in certain situations, to characterize both the behavior of the passive *and* the active partner. This, as will be seen, is particularly significant because it is often claimed that the only social reprobation directed at homoerotic activities focussed upon the person who adopted a passive role unworthy of a free citizen.

## II

This section considers the legal implications of the foregoing discussion of the ways in which sexual conduct may be described as hubristic. Since it is acknowledged that the prosecution for hubris was appropriate in cases of violent rape, the discussion will focus on more problematic applications of the law. It must be remembered, however, that whereas the modern law of rape applies only to coerced sexual relations, adultery, rape, and seduction all would have fallen within the purview of the law of hubris because they all involve insults to the honor of the family to which the woman belongs. Though Athenians distinguished rape and adultery according to the criterion of the consent of the woman, because of the narrow limits on the right of women to dispose of their sexual capacities, for purposes of the laws of hubris and of justifiable homicide this distinction was irrelevant and the consent of the men

[22] This may be true whether the "conquest" is a boy, a married woman, or a prized prostitute. It is the success in what is regarded as rivalry which enhances a man's honor.

to whom a woman was related was the crucial fact.[23] The law of hubris, as will be seen, offered opportunities for the regulation of a wide variety of both consensual and non-consensual heterosexual and homoerotic sexual conduct. How often litigants took advantage of such opportunities we do not know.[24]

Before addressing these issues directly, however, a preliminary question requires clarification. This question concerns the nature of the limitations placed upon the kinds of misconduct that might be prosecuted as hubris.

Contemporary legal systems typically rely upon technical definitions of offenses to determine whether a particular act constitutes rape, theft, arson, etc. In many modern systems of criminal law this definition consists of certain "elements of the offense" which, in cases where any one of them is not present, operate to exclude conduct as falling outside the statutory definition. In Athenian law, as in Roman, Biblical, and Assyrian law, and, indeed, most legal systems before the 20th century, statutes normally provide no such technical definitions.[25] The law of hubris, for example, merely defined itself self-referentially: "If anyone commits an act of hubris against a child, a woman, or a man, whether free or slave ..."[26] But what was an act of hubris? In attempting to cope with this question Athenian law was constrained by institutional arrangements which sharply restricted the possibility of providing a definitive answer.

Whereas in many other ancient legal systems jurists, scribes, priests, or judges might authoritatively resolve such questions, either in individual cases or through articulating general definitions, Athenian law left the task of deciding whether or not particular conduct fell within the statute solely to mass courts of untrained lay judges assigned by lot to particular cases.[27] Since the judges were bound only by the statute and not by any authoritative

[23] See Cohen (1991: Chapter 5) on the relation of the law of justifiable homicide to rape and adultery.

[24] See Fisher's (1990: 133) apt criticism of the conventional view that prosecutions for hubris were rarely brought.

[25] There are, of course, exceptions; most often the law of homicide which, as at Athens, specifies requisite mental states.

[26] Quoted in Demosthenes 21.47. See MacDowell (1990: 263) on the grounds for accepting the law of hubris preserved in Demosthenes 21.47 as genuine, as opposed to the version inserted at Aeschines 1.15.

[27] Again, the exception is homicide, heard by the Areopagus.

commentary, precedent, or interpretation, in an individual case a person might be convicted of hubris if that particular body of citizens collectively thought, without discussing the matter amongst themselves, that what the accused had done was, in fact, hubristic. In other words, the kinds of linguistic and normative categories which the previous section described would have constituted the normative repertoire upon which individual judges drew in reaching a verdict. The point to be emphasized is that in Athenian law hubris was defined by the normative expectations of those randomly selected citizens who represented the polis on a given day. The democratic, participatory nature of the Athenian legal system ensured that the substantive meaning of the statutes was embodied in the dispositions of the *demos* through its randomly chosen representatives. As we have seen in preceding chapters, Athenian orators played upon the ambiguity of concepts like hubris and upon the multivalence of the normative expectations of their audience in attempting to convince them that in this particular case the defendant did or did not deserve to be condemned.

The result of this situation is that unless we know of specific cases where a person accused of hubris was actually convicted we can not definitively say whether or not particular kinds of conduct were viewed as violating the statute. On the other hand, we similarly have no fixed criteria by which to exclude definitively almost any attested linguistic attribution of hubris. After all, in the Athenian system, if on a given day an effective speaker was capable of swaying the court against a particular defendant for whatever reason, then this defendant's conduct constituted hubris. On the other hand, certain kinds of conduct can probably be seen as constituting "standard cases" which were essentially unproblematic. Abusive and humiliating public assaults and rape (whether heterosexual or homosexual) would in all likelihood fall into this category. However, because we know of so few actual convictions for hubris it is difficult to go much beyond this with any certainty.

The little we do know about cases in the sexual sphere is, however, suggestive. Dinarchus (*Dem.* 23.7), for example, enumerates three cases where sexual wrongdoers were punished by death. As he tells the court,

> You are the people who for crimes far smaller than those Demosthenes committed have inflicted on men severe and irrevocable penalties. It was

you who killed Menon the miller, because he kept a free boy from Pellene in his mill. You punished with death Themistius of Aphidna because he committed hubris against the Rhodian lyremaker at the Eleusinian festival and Euthymachus because he put the Olynthian girl in a brothel.

In the description of only one of these cases does he explicitly mention the crime as hubris, but the context indicates that all three cases fell into this category and involved some kind of sexual transgression.[28] Particularly telling is Dinarchus' comparison of these three wrongdoers with Demosthenes who, he alleges, caused Theban women and children to be distributed among the barbarians' tents, an act which (19.6) he explicitly refers to as hubris committed against "free bodies." The three cases all apparently involved non-consensual conduct. The first two cases may have involved straightforward rape or some other form of sexual abuse, but in the absence of more information we cannot say a great deal about them. The third clearly involves the dishonoring of a free Greek woman by treating her as a slave in subjecting her to prostitution. These cases indicate, then, that prosecutions for hubris led to capital convictions in cases involving sexual misconduct extending beyond violent rape.

A more striking instance involves the case mentioned above, where a son prosecuted the family's former slave for marrying his (the son's) mother. In the absence of a reference to an actual prosecution one might have been tempted to dismiss such an instance as an extended usage arising out of the rhetorical imperative of blackening one's opponent's character. If the reference to it is accurate, this prosecution testifies to the way in which the Athenian law of hubris could encompass conduct demeaning to sexual honor but devoid of either violence or coercion. In this respect, as in others, the action for hubris is reminiscent of the Roman action for *iniuria*, where even following a respectable woman in the street was held to meet the requirements of the offense.

The foregoing discussion raises a number of important issues concerning how the law of hubris, and the normative categories which constituted it, may have served to regulate various kinds of sexual misconduct. The first of these involves the relationship of hubris to adultery and seduction. As noted above, Lysias repeat-

[28] See also Demosthenes 19.309, which recounts how free Olynthian women and children were brought to Athens "*eph' hubrei*," and that they were subjected to hubris.

edly refers to the adulterer as having committed hubris against the husband. Surely, adultery provides a far clearer case of deliberate insult to sexual honor than does the misalliance with a former slave which Demosthenes refers to. We know almost nothing of the treatment of seduction in Athens, and we also possess no references to actual prosecutions (*graphai*) brought for adultery.[29] There may be a number of reasons for this. First, we possess knowledge of relatively few criminal prosecutions, so one cannot speak at all about relative frequency of prosecution of different offenses.[30] Further, as noted above, Aristotle and Aeschines refer to hubris as the kind of wrong which some men prefer to hide rather than publicly disclose their shame. While some men may have preferred quiet humiliation others may have also elected more direct forms of revenge as a way of repairing dishonor. This latter possibility is not surprising since Athenian law preserved, and Athenian society accepted, a very significant degree of self-help. Finally, however, the action for hubris may have served as a convenient "catchall" category for prosecuting offenses against sexual honor. This suggestion, however, must remain purely speculative.

In the realm of homoerotic misconduct a number of other issues emerge. These concern first the role of the law of hubris in regulating sexual misconduct among adult males, and second its implications in paederastic relationships.

Recent scholarship has often maintained that no normative or legal sanctions were ever leveled against the active partner in homoerotic relations, or against the passive partner unless he engaged in the conduct for pay.[31] While Aeschines' oration *Against Timarchus* explicitly states that the statute regarding prostitution punishes the man who purchases the sexual favors of a male Athenian citizen, the general legal situation regarding homosexual prostitution at Athens is not relevant here. Instead, it is another aspect of this oration which must concern us, namely its relation to the law of hubris.

Aeschines repeatedly refers to Timarchus as submitting to hubris against his own body (e.g., 1.116). This usage is consonant with

[29] Harris' (1990) recent treatment of adultery and seduction misapprehends the rhetorical strategy behind Lysias' comparison of them.

[30] For example, no prosecution for theft has been preserved but one can hardly conclude on this basis that there were few thieves at Athens.

[31] See, e.g., Foucault's (1985: 192) influential formulation.

those passages from Xenophon and Aristotle cited above which also characterize the passive partner as submitting to or suffering hubris. This usage by Aeschines is significant because it implies that sexually using a free man in the passive role is hubris, that is that the active partner commits hubris by remunerating the citizen-prostitute. Clearly, if the passive partner "submits to" or "suffers" hubris, then the active partner must be the agent who commits the hubristic act. A later passage in *Against Timarchus* (1.163) confirms this view when it describes the conduct of the active man as an act of hubris against the passive free Athenian. One might, of course, argue that this characterization arises from the financial nature of the transaction, but the passage does not seem to emphasize this aspect. Rather, what Aeschines repeatedly underscores, and what he seems to expect to incense his audience so that they will condemn Timarchus, is his description of what the citizen hired for sexual services is expected to *do* (i.e., play a passive role in anal and perhaps oral intercourse). For Aeschines it is not just "sex for pay," but the very nature of the sexual services rendered which is unworthy of a citizen. Hence, it is hubris to place a citizen in that demeaning role. Later (1.188), Aeschines again characterizes Timarchus as having trafficked in the hubris of his body, explaining that he submits to that hubristic sexual treatment which other men abhor. Thus, Timarchus is a man who has wronged a man's body with the transgressions of a woman (1.185). Again, the emphasis here is not simply upon selling sexual services but upon the nature of those services. Performing them is in itself to dishonor oneself by submitting to hubris: the man who exacts such services, accordingly, commits hubris by demeaning a citizen by treating him as only a woman or slave should be treated. This judgment is repeated in several passages.[32] Although we know of no such actions there appears to be no reason why a man could not be prosecuted for hubris who paid an Athenian citizen for sexual services.[33]

The law of hubris may have represented another normative parameter of social control in regard to paederastic relations in par-

[32] See, 1.55, 87, 163; cf. 1.29, 108. See also Plato, *Phaedrus* 254e2, 250e5 for similar characterizations of hubristic intercourse.

[33] See, e.g., Plato, *Phaedrus* (232c–d) on the role of money in paederastic relations. And cf. Aristophanes (*Plutus* 153–159) on the hypocrisy of not regarding "gifts" as a form of payment.

ticular. A widely accepted view of Athenian paederasty maintains that there was no *legal* prohibition against unremunerated consensual sexual intercourse in which an adult took the active role and an Athenian youth played the passive partner.[34] Some scholars have gone further and maintained that there was also absolutely no *social* sanction directed at such behavior provided that the relationship was not perceived as mercenary or promiscuous. Such discussions, however, overlook an important aspect of paederastic intercourse. This aspect arises from the potentially problematic nature of the consent by which the younger partner permits the older man to use him sexually.[35]

In Athenian law, as in most other ancient and modern legal systems, young males of an age to attract paederastic courtship, that is, conventionally, before the growth of the first beard, are legal minors. That is, they are incapable of entering into legal transactions, and are in principle completely subject to the authority of their fathers. In the absence of paternal authority their affairs are managed by a guardian until they come of age. Further, most legal systems carry over this legal incapacity into the sphere of sexuality regulated by the criminal law, viewing children below a certain age as incapable of consenting to sexual intercourse or entering into marriage without their father's consent.

This incapacity for legal consent renders as rape what might otherwise have been seduction. Modern legal systems have clearly defined such occurrences as an independent offense: statutory rape. Whereas ordinary rape is constituted by intercourse against the will of the victim, in statutory rape consent is irrelevant to the definition of the offense. Statutory rape is defined solely by the age of the minor and the fact of intercourse. We have no evidence of a special statutory rape provision at Athens, but the problem must nonetheless have presented itself as it would in any system of criminal law where a man defends himself against an accusation of raping a child by claiming that the child consented. I would suggest that at Athens the law of hubris, *whose language explicitly includes children within its scope*, provided one of the principal means of regulating such situations. As seen above, the law of hubris would have applied to adultery even though that act presumes the consent

[34] See generally Halperin (1990: Chapters 3, 5) and Winkler (1990: Chapter 2).

[35] This formulation refers to the Athenian view of such relations, which portrays the active partner alone as deriving sexual satisfaction from the transaction.

of the woman. While in general the consent of men, unlike that of women, is legally effective, male minors cannot consent to legal transactions. Given the social prominence of paederasty at Athens it would make perfect sense for the law of hubris to have dealt with the problems treated in modern systems under the rubric of statutory rape. A consideration of the circumstances of paederastic intercourse supports this view.

While Athenian girls seem to have been closely supervised by their families in a way which would tend to diminish their vulnerability to seducers or rapists, the same is not the case with boys.[36] Indeed, attractive boys might find themselves the object of considerable male attention and rivalry from an early age. While strict laws protected them at school and parents provided tutors, conventionally depicted as armed with wooden staffs, to ward off predatory males, there were clearly ample other opportunities for courtship and seduction.[37] The question which the foregoing discussion of statutory rape raises is, "How old did an Athenian boy have to be so as to render his consent effective?" Clearly, it seems unlikely that an Athenian prosecuted for hubris for the rape of, say, a ten-year-old *eromenos* would have had great success with the plea that the boy consented. On the other hand, a boy of sixteen or seventeen, while still legally a minor, might have been seen to be in a different position so that judges might consider his consent to negate an accusation of rape. Surely, however, when blithely stating that there was absolutely no legal prohibition against unremunerated consensual intercourse between an adult male and a younger male partner, one must remember that at some age the consent of the boy would be viewed as nugatory and the law of hubris would apply with full force. Exactly what that age was we cannot say, but Aeschines acknowledges the existence of such a category when, in *Against Timarchus* (139), he indicates that a young boy cannot give meaningful consent. Therefore, he continues, the lawgiver imposed chastity upon the older lover until the boy comes of age.

[36] As anthropological evidence indicates, this was probably less true in rural settings. Hence, Biblical and Assyrian law distinguish between rape in the town and rape in the fields, where the woman's outcry cannot be heard. Menander, of course, indicates the exceptional possibilities which religious festivals represented, on which see Brown (1990: 533–4).

[37] See Dover (1978: Chapter 2) and Cohen (1991: Chapter 7).

This discussion of the age of consent has centered upon the notion of statutory rape. The law of hubris, however, adds another dimension to this discussion, for, as was seen above, it includes not only rape but consensual sexual transactions as well. In other words, when prosecuting a man for dishonoring a youth by sexually using him "as a woman" (to use Aeschines' and Xenophon's category) the fact of the degrading behavior and not the consent could be viewed as primary. This is clearly indicated by the foregoing discussion of consensual hubristic relations. Moreover, in cases where the victim was well below the age of legal consent, his acquiescence would probably have been even more insignificant. That is, in a prosecution brought by the boy's father for the damage to the boy's reputation and honor, the boy's consent would no more negate the hubristic quality of the sexual intercourse than did the consent of Timarchus to the degrading conduct which men were thought necessarily to have demanded of him, or the acquiescence of the wife of Euphiletus to the adulterous advances of Eratosthenes. An additional advantage of prosecuting for hubris would have been that the actual fact of consummated intercourse might not need to be proved. Recall, for example, the case cited by Dinarchus (*Dem.* 23.7) where a man was condemned to death for having shut a free boy up in a mill.[38] Hubris, unlike the offense of rape, required only the demonstration of intentionally insulting or degrading conduct which fell within the categories acknowledged as such by the community.

A man accused of such hubris might, following Aristotle, plead that he acted by reason of genuine passion and not out of the kinds of aggressive impulses which characterize hubris, but such claims might be rather problematic to prove. Presumably, the younger the *eromenos* the more difficult it would have been to construct a valid defense to the aggrieved father's accusation. At the same time, however, there would be powerful disincentives to bringing such prosecutions which would publicize the dishonor of one's son. Of course, in the absence of actual prosecutions (except for the case of hubris against the boy referred to by Dinarchus) much of this discussion must remain speculative, but the following points do seem to support the notion that families could prosecute for hubris men who sexually compromised their minor male children:

[38] See also the alleged incident reported by Aeschines (1.43).

1. Using a free male (adult or minor) in a passive role for certain kinds of sexual services (particularly anal or oral sexual intercourse) constitutes hubris.
2. Other kinds of conduct, like holding a boy under one's control, constitute hubris because of the natural inferences about the sexual services which such a situation is seen as implying.[39]
3. Aeschines indicates the inability of boys to give legal consent to sexual intercourse.
4. The law of hubris does not operate in such a way that consent necessarily negates the hubristic quality of the act. Whether the passive partner "submits" or is coerced, hubristic behavior still dishonors him.

In sum, the law of hubris was constituted by a complex normative repertoire encompassing a variety of forms of aggressive sexual conduct which degrades, dishonors, or insults the victim. As such, there was no *legal* barrier at Athens to prosecuting *erastai* for sexual conduct which might dishonor *eromenoi*, or adulterers for the disgrace to both the wife and, hence, to her husband. Particularly given the lack of emphasis in the law of hubris upon consent in general, as well as the problematic nature of consent of boys in particular, it seems unjustified to conclude that Athenian law provided no sanction for consummated intercourse between free men and boys so long as that intercourse was not coerced or purchased. Indeed, the whole thrust of the above discussion has been to show that normative judgments of hubristic sexual conduct operate largely independently of these categories. How these laws were used, of course, is another matter, and one of which we know very little. Pausanias' account of the ambiguity of Athenian attitudes towards homoeroticism in Plato's *Symposium*, and Aeschines' convoluted explication of Athenian laws on paederasty in *Against Timarchus*, testify eloquently to the complexity and contradictions which characterized legal and social norms in this area. There was also clearly a wide range of contemporary opinion on exactly what

[39] Similarly, according to Campbell (1964: 129–31), when a Sarakatsani man elopes with a woman against the family's will the mere fact that she has spent a night under his dominion destroys her honor (unless they subsequently marry). The community assumes intercourse to have taken place regardless of what the couple might say. In Athens seeing a boy enter a man's house at night, or seeing the boy alone at night in a lonely place, similarly affects the boy's reputation. See, e.g., Aeschines 1.75, 90, and the full discussion in Cohen (1991: Chapters 6, 7).

sorts of acts, circumstances, and relationships constituted hubris in the homoerotic sphere. Orators, of course, took advantage of such cultural ambivalences and ambiguities in framing their arguments according to the rhetorical needs of the moment. Any account of hubris and the legal regulation of Athenian paederasty and sexual aggression must do justice to this normative complexity rather than reducing it to a few simple formulas about permissible and impermissible behavior.

## III

In concluding, it is appropriate to draw attention to some of the broader social aspects of the law of hubris which have run through the investigations of the past three chapters. Hubris, it has appeared, is a legal category which makes sense only in an agonistic society where the values of honor and shame, and the moral imperatives to which they give rise, play a central role. Lysias' oration, *On the Murder of Eratosthenes*, and Demosthenes' response to Meidias' flagrant insult provide striking examples of the different kinds of conduct which such moral imperatives might inspire. Campbell's study of the way in which such values operate in a highly agonistic society is instructive. He summarizes the situations in which honor is typically violated as those involving violent or homicidal aggression, insults, and adultery, seduction, rape, or broken betrothal. Honor, he concludes, is a condition of integrity, of being "untouched" by this kind of attack. The integrity of a family and its social status is recognized when others take care not to offend their honor in such ways. If they do commit an outrage against a family, the offense must be answered at once, and with violence, if its reputation is to survive.[40]

The categories of conduct violating honor which Campbell enumerates aptly encompass the kinds of acts which most frequently are characterized as constituting hubris at Athens: physical violence, verbal aggression, and sexual dishonor. Further, Campbell's account of the appropriate response to such conduct precisely describes the way in which the cuckolded husband in *Against Eratosthenes* responds. At Athens, the legitimacy of such a response was enshrined in the law of justifiable homicide and other

[40] Campbell (1964: 268–9); Ginat (1987: Chapter 7); Keiser (1986: 500–1).

statutes, as was the right to retaliate with violence against an assault which one did not provoke by striking the first blow, or to kill a thief taken in the act.[41] Unlike the acephalous society of the Sarakatsani, however, Athenian institutions also limited the right of self-help to statutory exceptions to the laws proscribing violence, and provided other outlets for the satisfaction of injured honor and pursuit of social and political rivalries. Rather than using the law for the absolute suppression of private violence, Athenian society set aside certain domains (e.g., the protection of the house from thieves and adulterers) where private lethal violence was deemed legal, but also incorporated litigation into its agonistic framework as an alternative, and considerably less risky, channel for the imperatives of honor. As the many stories of assault and hubristic behavior recounted in the Athenian orators make clear, some citizens chose physical retaliation, some the courts, probably depending upon their relative resources, social position, and interests, as well as upon their individual characters. As a legal category, the prosecution for hubris must appear bizarre unless one views it as the institutionalized mediation of this agonistic realm of conflict, covering just the range of insults to honor which anthropologists describe as provoking blood feud or blood revenge in agonistic societies.

[41] Casey (1983: 206–8) shows how in early modern Andalusia despite the legal permissibility of killing the adulterer, and despite the ideal norm of honor which required that one always do so, in practice such killings came to be regarded as inappropriate.

CHAPTER 8

# *Litigation and the family*

Violent assaults and humiliating insults were not the only kinds of conflicts leading to feuding relations which expressed themselves through litigation. While not all family quarrels may have led to long-term bitter enmity, the extant Athenian inheritance cases indicate that private law litigation between kin followed essentially the same dynamic as the cases discussed in Chapters 4–6. That is, in the family sphere litigation provided an agonistic arena for the ongoing pursuit of conflict rather than furnishing a binding mechanism for the final resolution of disputes. Further, following the argument developed in Chapters 5 and 6, this chapter suggests that litigants in family disputes were well aware of the structural features of Athenian litigation that made it difficult for courts to discover the "truth" of allegations about kinship and testamentary relations. In many of the extant cases litigants exploited this difficulty in creating, in practice, a system that worked much more effectively to prolong familial conflict than to reach "just" and conclusive results. In this context as well litigation was shaped by the participatory nature of the Athenian legal system, that is, by the agonistic values of citizen litigants and judges rather than by the principled imperatives of an autonomous legal order. Inheritance cases, particularly where there were no surviving adult male children, operated like a contest open to all in which no result was final because participants were always able to challenge prior results when they felt the moment opportune. In this competition litigants were not so much constrained by fixed kinship structures and mechanically applied legal rules as confronted with a situation which invited them to construct, interpret, and manipulate kinship relations according to the rhetorical needs of the moment.

A Demosthenic oration (39, *Against Boeotus* I) records the attempts of a man named Mantitheus to prevent his alleged half-brother,

Boeotus, from assuming the patrimonial name (Mantitheus) properly held by the eldest son. Like litigants in other contexts, Mantitheus begins (39.1–2) by explaining how he has been compelled to come to court. He has not brought the suit from love of litigation, he claims (39.1), but because of his long standing relations of enmity with Boeotus. He represents Boeotus, on the other hand, as an unscrupulous malicious litigant who, supported by a gang of sycophants, had sued Mantitheus' father (Mantias) alleging that he was being deprived of his patrimony as a legitimate son (39.2–3). Mantitheus says that he is forced to admit that although his father denied the claim of paternity, he feared to oppose Boeotus in court lest those who had been injured by him in public life would take this opportunity for revenge by appearing against him (39.3). In other words, the lawsuit would have given his enemies an opportunity, even if they had no immediate relation to issues involved in this suit, to testify against him. Whether or not his explanation of his father's behavior is true, the speaker uses this rhetorical topos in the expectation that the judges will acknowledge that a man's enemies would be eager to support his opponent in intra-familial litigation. Mantias, the speaker continues, made a monetary settlement, but Boeotus' mother broke the terms of the agreement and by her fraud was able to force Mantias to register Boeotus as his son. Against this background, the speaker appeals to the principles of honor and revenge to explain his motivation in litigating. He asserts (39.6) that this wrongdoing made it both necessary and just for him to go to court to prevent Mantitheus from wronging him further. Acknowledging that in principle it is not right to fight with kin, he argues that in this case yielding would bring him dishonor and a reputation for cowardice, literally "unmanliness" (*anandria* 39.6). In other words, he justifies litigating by resorting to the same stock of claims concerning wrongdoing, revenge, honor, and reputation found in other contexts where feud is pursued through litigation.

From a modern perspective it might seem rather straightforward to clarify who had received and been registered under the name of Mantitheus. However, because Athens in the fourth century remained to a significant extent an oral culture, the matter turns out to be rather problematic. While some written documentation is in use, the courts rely upon the oral testimony of friends, relatives, and other supporters to establish the genuineness of documents and the veracity of claims based upon them. As Aristotle notes (*Rhetoric*

1372b–73a), those who are friendless avoid litigation because they cannot persuade the judges.

In *Against Boeotus* I one of the problems facing the judges is that both parties produce the testimony of purported eyewitnesses to support contradictory versions of the facts. Further, since there is no possibility of cross-examining witnesses before the judges, assessing their credibility necessarily remains problematic.[1] This is especially true through most of the fourth century, when judges merely heard witnesses' written statements read aloud and thus also had no opportunity to evaluate their demeanor and self-presentation. Mantitheus introduces testimony which purports to show that his father was an Athenian citizen who had lawfully married the legitimate daughter of another Athenian citizen. He gave his first son by her, the speaker, the name of Mantitheus, formally recognized him as such at the naming festival on the tenth day after birth, and entered him as such on the lists of his phratry. Mantitheus and his family have used this name during his whole life. When Mantitheus reached eighteen, he was entered under this name as a member of his deme. Finally, Mantitheus, during his father's lifetime, had legally married an Athenian under this name. Under Athenian legal and social norms his claim thus seems solidly grounded.

As the previous arbitration revealed, however, Boeotus produced other witnesses who testified that *he* (Boeotus) was in fact the first son named and registered by Mantias as Mantitheus (39.22). These witnesses also testified that they had attended the tenth day festival which Mantias gave for *him* (Boeotus) and at which his father gave him the name of Mantitheus. Mantitheus, of course, denies that his father ever married Boeotus' mother or considered himself Boeotus' father, and denies that this celebration ever took place. He does admit that his father, having been tricked into doing so, registered Boeotus, but under that name and not as Mantitheus. In support of these denials, however, all Mantitheus can do is claim that (1) Boeotus' witnesses are lying and are unreliable because they were not real intimates of his father, and (2) argue from probability about what Mantias would have been likely to do under the circumstances. He also alleges (39.25–26) that Boeotus has

[1] Both speakers, of course, will attack the character and credibility of the other party's witnesses and accuse them of sycophancy, lying, etc.

initiated many other suits against him, "proving" his character as a sycophant rather than a legitimate litigant. Despite these arguments and the support of numerous witnesses, however, the court apparently believed Boeotus' arguments about the legitimacy of his birth and the priority of his registration under the name of Mantitheus, for they found in his favor.

It would be understandable if such situations produced a healthy skepticism about the usefulness of the testimony of witnesses in establishing the "facts" of the case. Indeed, other cases, as will be seen, comment directly on the acknowledgement of the unreliability of "eyewitness" testimony. The question in such cases appears not to be whether anyone is lying, for the operative assumption seems to be that testimony (like wills) is regularly fabricated. Instead, the court is faced with the task of trying to recognize the kernels of truth contained in the exaggerations, lies, tall tales, and invective with which they are confronted. Whether Mantitheus or Boeotus actually deserved the name they sought remains unknown, but it is clear their feud continued long after this initial decision.

Eleven years later Mantitheus and Boeotus appear in court again, now contesting the apportionment of that part of the estate represented by Mantitheus' mother's dowry.[2] Mantitheus claims (40.1–3) that they have been fighting over this matter since the previous suit, and although he has repeatedly tried to reach a settlement, he now finds himself compelled to come to court again. He again employs the vocabulary of enmity to explain how the wrongs he has suffered at the hands of his unscrupulous enemy who calls him "brother" have forced him to litigate (40.5).

This second oration ([Demosthenes] 40, *Against Boeotus* II) seems to assume that the case will in significant part turn on a judgment about who is really the vexatious litigant in these lawsuits that have been going on for so long, rather than on the legal issues around which the action technically revolves. The major thrust of the speaker's (Mantitheus') argument is to demonstrate that his opponents have prolonged the conflict and refused to settle the matter.

[2] We know nothing about the content or outcomes of the several other suits which Mantitheus claims (39.25–6) were going on between them.

This argument is complicated by the fact that his opponents accepted the judgment of the public arbitrator in (one of) their suits against the speaker. So he must redouble his efforts to establish his character as blameless and shift all the fault to them. Since the judges will apparently consider readiness to arbitrate or settle as relevant to the issue of character and motivation, Mantitheus must portray himself as amenable to arbitration and settlement even though, again, his opponent offered to submit the dispute to private arbitration which would have avoided litigation.[3] Hence, he repeatedly emphasizes Boeotus' sycophancy and love of enmity and litigation. His trump card in this portrayal, he seems to think, is Boeotus' purported plot to have the Areopagus exile Mantitheus on a charge of wounding with intent to kill. Thus, Mantitheus asks (40.32) the judges not to consider Boeotus, on account of his amenability to arbitration, a peaceful man who does not love litigation; he is in fact a schemer and the worst kind of criminal (40.34). Conspiring with his cronies he plotted to have Mantitheus banished from the city by contriving a quarrel which, by design, led to insults and then to blows. Boeotus then cut his own head so as to be able to accuse Mantitheus before the Areopagus (40.32). In support of his allegations he produces (40.33) the deposition of a doctor who testified to the Areopagus that Boeotus asked him to cut his head. To prevent the court from taking Boeotus' willingness to accept arbitration as evidence of non-litigiousness, Mantitheus thus recounts shocking tales of malicious prosecution and false testimony (cf. 40.34–37).

In short, this intrafamilial feud was still going strong after more than twelve years, and the conflict had been played out in at least one brawl and in a variety of negotiations, mediations, lawsuits, arbitrations, and criminal prosecutions. The oration acknowledges that the judges will not look favorably upon this, and one of the central issues on which the case will apparently turn has nothing to do with the mother's dowry, but rather with who deserves the blame for the ongoing conflict. From the standpoint of Athenian litigants, however, given the relatively low cost of litigation, if one had the leisure, and chose suits which did not entail substantial

[3] On mediation and arbitration see most recently Hunter (1994: 55–67).

risk, there was little disincentive from repeatedly dragging one's enemies into court. In an intrafamilial feud such as this, the courts serve as a natural venue for the enmity to play itself out. Claims of honor and revenge can be satisfied at relatively little risk (in comparison with murder), and as long as the underlying hatred and the social logic of enmity persist, it is difficult to see how a final resolution can be achieved or the matter kept out of the courts, at least until the parties are dead. Even then, as other disputes over patrimonies show, the matter is often carried over into litigation in subsequent generations.

A case memorialized in an oration of Isaeus (4, *On the Estate of Nicostratus*) further demonstrates the difficulties in establishing basic facts of identity and kinship. When a mercenary soldier named Nicostratus died while serving away from Athens he left no direct descendants. According to the oration many parties came forward to contest the estate, but in the end only two were left, both backed by a group of supporters. The first claimant, Chariades, a friend of the deceased, claims to have been adopted under a will he has produced. He also presents witnesses who testify to the genuineness of the will. The other parties in this case are two young men, backed by their relatives, who claim to be first cousins of the deceased. They claim that Nicostratus died intestate, that the will is a forgery, and that Chariades' witnesses have testified falsely because they are his friends. Chariades himself, on the other hand, asserts that his opponents' claims are entirely fraudulent because they are neither cousins nor related, in fact, in any way to the deceased. He alleges that the deceased was not the man the cousins claim (Nicostratus son of Thrasymachus) but another Nicostratus (son of Smicrus). Both sides, of course, produce witnesses to support their contradictory versions of the identity and genealogy of Nicostratus.

In addition to "eyewitness" testimony, both parties also resort to arguments from probability. Isaeus, however, while himself employing such arguments also calls to the attention of the court their unreliability: when Nicostratus died, the speaker asks (4.7–8), how many men did not put on mourning pretending to be related to him? Such behavior – mourning, attendance at funerals, weddings, and festivals, and so on – provides the basis for standard arguments in inheritance cases. The speaker here suggests that prospective

contestants take advantage of the conventional nature of such expectations in laying the groundwork for their claims.[4] As will be discussed below, such behavior also seems to reflect a society where kinship ties beyond the immediate family were ambiguous, manipulable, and hence open to interpretation and construction.[5]

Cases like that of the estate of Nicostratus, where no adult direct descendants were ready to defend their right to their patrimony, seem to have represented an open invitation to those ready to construct fictive genealogies or exaggerate the closeness of existing kin relations.[6] Thus, when the time came to claim Nicostratus' estate a swarm of pretenders seems to have appeared. According to the speaker, apart from himself and Chariades, Demosthenes claimed to be Nicostratus' nephew, another man appeared with a boy whom he claimed to be the son of Nicostratus, another claimed to be a friend to whom the deceased had left all his property, and at least two other men claimed that they also had various interests in Nicostratus' property. The speaker alleges that at first Chariades also produced a boy whom he claimed to be the son of Nicostratus but later abandoned that claim.[7] Given the seemingly commonplace nature of such estate hunting, complete with false children, lying witnesses, fictive genealogies, forged wills, and fraudulent adoptions, Athenians seem to have regarded such inheritance litigation as an *agōn* much like a game of chance: you come forward with a perhaps unlikely or totally fraudulent case, but you rely upon the difficulty of clarifying such cases and the clout of your supporters, and hope that the wheel of fortune stops on your number. Unlike normal contests, however, this victory by no means implies that the case is closed. Perhaps in tacit recognition of the unreliability of such judgments, the inheritance may be contested by any other claimant during the rest of the "victor's" life-

[4] They furnish themselves with arguments from probability such as, "Would I have attended the funeral and bitterly mourned the deceased if I were a total stranger as my opponent alleges?" They also anticipate the common form of argument likely to be made by their prospective opponents: "Why, if he was so close to the deceased, did he not attend X or Y?"

[5] See Saller (1993).

[6] The case of Mantitheus and Boeotus, however, shows how lengthy litigation could result even where there were direct descendants.

[7] Whether these particular allegations are true or not is irrelevant. Isaeus' argument presupposes that Athenian judges recognized that such behavior took place.

time (and beyond).[8] Isaeus recognizes the problematic nature of this process, when, referring to the cousins' many competitors, he says (4.22) that such claimants

> consider that if they prevail they will possess the property of others, but if they fail the risk is small. For some men are always prepared to give false testimony, and those who attempt to refute it confront the unknown.

Because of these problems, Isaeus says (4.11–12), it would be better for claimants to estates to be fined the full value of the estate if they fail, for this would prevent men from inventing such fictions. But, he continues, because the present laws give the right to anyone who wishes to make any claim against any estate, the court must carefully weigh the evidence to sort out the false claims. He then makes a striking argument, about how the judges should execute this evaluation, an argument very much at odds with contemporary attitudes about the relative value of different types of evidence. In weighing the evidence, he asserts (4.12–13), it would be better for the judges to give more weight to circumstantial evidence and probabilities than to the testimony of eyewitnesses because,

> ... in the case of wills how might someone recognize that someone is not telling the truth, unless there are particularly great divergences in the evidence, for the person who is the subject of the testimony is dead, the relatives are ignorant of the facts, and it is not at all clear how the evidence may be refuted?

Of course, his argument is self-serving in that it aims at discrediting the witnesses who have testified to the will (see also 4.13–14).[9] It gains its persuasive force, however, from the underlying dilemma in such cases, which involves the difficulty for the court in establishing the basic genealogical or testamentary facts, given that witnesses will lie for all the parties and that in this society genealogy ultimately depends not upon official public records and written documents but upon oral testimony from relatives and

[8] Once an inheritance had been awarded the case could be reopened throughout the lifetime of the victorious claimant and for up to five years after his death (Isaeus 3.58; and see Todd [1993: 229]). There were also other means of collateral attack on such judgments.

[9] On Isaeus' characterization of the ignorance of the relatives, see Wilson (1988: 179), who says that in Corsica witnesses often expressed uncertainty about the precise nature or closeness of their kinship relations. Saller (1993) suggests that such uncertainty may arise from the common use of ambiguous and flexible kinship categories.

friends. Thus, as Isaeus points out, not only can fraudulent claims be readily advanced, but it is also extremely difficult to refute such claims because they rest upon the same kinds of testimony and arguments as genuine ones.

The speaker may try to argue (4.16–17) that claims of kinship do not depend upon witnesses, but of course they do, for as in the present case the other side can always contest the claim of kinship, or its degree, or assert their own better right. In such cases only the testimony of those who knew the deceased and attended naming festivals, weddings, funerals, registrations, and the like can hope to establish the validity of such claims.[10] All such witnesses, however, are necessarily connected to the parties and, as noted in previous chapters, appear as participants rather than disinterested observers. The speaker himself in the end tacitly acknowledges that there is no way around the central role of witnesses, for after his lengthy argument explaining why they should not be taken into account he proceeds to rely upon them himself: he argues (4.26) that the two cousins have themselves produced witnesses who testified that they are, in fact, cousins of the deceased, that they never quarreled with him, that they performed his funeral, that Chariades was never a friend of the deceased, and that the allegation of a business relation between Chariades and the deceased is a fiction.

How can the court discern the truth in such situations with so few means to do so?[11] Isaeus concludes his oration by offering the judges an alternative ground for their decision. He compares the characters of the opponents and argues that the cousins also deserve to win on this basis. He claims (4.27–8) that it is better for the estate to be given to them because they, like their father, are honorable citizens who have resided at Athens and served and provided benefactions for the state. Chariades, on the other hand (4.29–30), was arrested as a common thief but escaped and stayed away from Athens for seventeen years and only returned when Nicostratus died. He has never served the state or performed any public benefaction. A cynical interpretation of this closing strategy would be to view it as suggesting to the judges that, since everyone

[10] See Humphreys (1986: 63) on the crucial supporting role of witnesses and the shifting of support in family alliances.

[11] Some of the other structural impediments to thorough evaluation of the evidence and arguments were discussed above in Chapters 5 and 6.

may be lying and it is difficult or impossible to tell what is the truth and what abstract justice requires, they might as well give the estate to those who are most likely to use it to their (i.e., the judges'/*demos*') benefit. In the final result, the case (on Isaeus' view) should turn not on who has the better legal right to the inheritance but on who is able to convince (with the help of their friends and relatives who serve as witnesses and co-speakers) the judges that they will better serve the interests of the *demos*.[12]

The problems bedeviling the litigation over the estate of Nicostratus are not idiosyncratic. Of course, extant orations represent problematic cases, but these issues of establishing identity, kinship, and the authenticity of wills and adoptions appear again and again in the extant corpus. For example, *On the Estate of Dicaeogenes* (Isaeus 5) provides a baffling commentary on the unreliability of wills. Dicaeogenes died with no issue but with four married sisters who are his nearest kin. Another more distant relation produces a will which adopts him as Dicaeogenes' son, and heir to one-third of the estate. The estate is accordingly divided. Twelve years later the same man apparently produces *another* will which bequeaths the whole estate to him. He prevails and dispossesses the sisters of their two-thirds. The speaker attributes this victory to the false testimony of the witnesses with whom the man had allied himself. As the dispute continues, alliances within the family shift and there are various actions for perjury some of which apparently result in convictions (5.15–17). Ten years later the children of the sisters have reached maturity and one brings an action for perjury against one of the witnesses to the genuineness of the second will. This leads to extensive further deals, alliances, and litigation, in the course of which the adoptee agrees to return two thirds of the estate. He does not do so, however, and litigation resumes. In the present case, the speaker devotes a substantial part of the oration (5.34–47) to arguing, in great detail, that the adoptee is a worthless citizen who has squandered his wealth rather than using it to benefit the city. Their part of the family, on the other hand, has distinguished itself through benefactions to the state. Perhaps such extensive appeals on this point were felt to be necess-

[12] See also Isaeus 6.61. In Demosthenes 44.7–8, the speaker claims that in inheritance cases judgment should be based upon justice and generosity, even if this goes against what the laws say.

ary since the adoptee had previously been victorious in two previous suits against this branch of the family and the speaker felt it opportune to offer the judges another criterion for deciding the case in their favor.

The speaker in *On the Estate of Philoctemon* (Isaeus 6) adopts a similar strategy. This case involves problems of establishing the basic facts of kinship, adoption, and identity: whether a nephew was in fact adopted, whether the deceased made a will, whether the claimant's mother was in fact Euctemon's (the father of the deceased) second wife or merely a slave prostitute, whether the children produced were in fact his and not another man's (a freedman named Dion).[13] The speaker, perhaps in recognition of certain weaknesses in his case against the purportedly illegitimate sons, offers the judges a deal. He asks the judges not to envy his family's wealth, as their opponent urges them to do, but to recognize how they use it for the good of the city (6.60–1). He details their many public services and says that if he receives the estate "he will hold it in trust *for you* [i.e. the judges/*demos*], accomplishing all the assigned public services as he now does and still more. If, on the other hand, his opponents receive it they will squander it and plot against others" (6.61).

If these cases indicate the uncertainty surrounding inheritance litigation, some litigants devised other strategies to cope with such problems. In another case of Isaeus (8, *On the Estate of Ciron*) the speaker raises the question of how grandchildren can prove their relationship to the deceased. To answer this question for the judges (and, thus, to provide a foundation for his own argument) he discusses the characteristic problems of evidence and proof. Since he is a grandchild of the deceased it will naturally be difficult to find living witnesses for some crucial events. Accordingly, for what he calls "events long past" he will introduce reports and what witnesses have heard; that is, hearsay. For events within recent memory he will rely upon witnesses who know what happened and, echoing the skepticism about witnesses noted above, "proofs which are even better than witnesses" (8.6; see also 29). If he can provide such a criterion for the judges, he will have succeeded in escaping

[13] Both sides agree that Euctemon introduced them into his deme. The speaker alleges, however, that this never should have occurred because they were illegitimate and the sons of another man.

the dilemma posed when, as in this case, both sides produce witnesses with contradictory genealogical stories.[14]

What are these proofs "better than witnesses"? In answering this question the speaker again poses a rhetorical question (8.9–11), asking how can he prove that his version of the genealogy is correct given the accusations of falsehood being leveled by his opponent. He says that the reliable way he found was to challenge his opponent to deliver for testimony under torture slaves who belonged to the household at the relevant time. He claims (8.11) that although his opponent will assert the reliability of *his* witnesses, he nonetheless refused to surrender the slaves. This *proves* that his opponent's witnesses testify falsely (8.11–14, 28–9). He seeks to buttress this "proof" by arguing at some length (8.12–13) that testimony given under torture is more reliable because the judges know that regular witnesses lie whereas witnesses under torture always tell the truth.[15] Apart from the vexed question of Athenian attitudes towards testimony under torture, the speaker's questionable logic has hardly provided the promised "proof" which is "better than witnesses." The important point for present purposes is rather the underlying assumption that witnesses are inherently unreliable, together with the recognition that they are nonetheless indispensable.

The other crux of the case hinges on a dispute as to whether, even if their mother was legitimate, the grandchildren deserve to inherit. The speaker relies upon the principle that descendants are closer than collaterals, whereas the other side (apparently) argues that under the inheritance statute a brother's son takes precedence over a daughter's son.[16] The speaker argues (8.30–4) that the law favors descendants (grandchildren) over collaterals (nephews) and also that it would not be just for his opponent to get the inheritance when it is the grandchildren who had the legal duty and burden of

[14] The speaker's opponents claim that his mother was not a citizen and not a legitimate daughter of the deceased. The putative grandchildren argue she must be legitimate because she was elected by her demeswomen to participate in the Thesmophoria. They also argue that their grandfather gave a wedding feast for their mother which he would not have done had she been illegitimate since he would have kept the wedding secret (8.14–20).

[15] Athenian citizens could not be subjected to testifying under torture, which was normally reserved for slaves. For the most interesting recent interpretation of Athenian law on this matter see du Bois (1991: 35–62).

[16] Humphreys (1986: 58) argues that estates go to direct descendants and only then to brothers and their descendants.

caring for the deceased. To support his argument he goes through a basic lesson in genealogy: who he asks, would be closer to the deceased, his daughter or his brother? Clearly the daughter, for the one is a descendant, the other a collateral relation. Next, the children of the daughter or the brother? Clearly, her children, for she is a descendant and the brother a collateral, so if they come before the brother they must also come before the brother's son. He elaborates and reiterates this argument at considerable length.

It might strike a modern reader as odd that a *litigant* should feel compelled to instruct the *judges* in an inheritance case as to the most elementary principles of kinship and of inheritance law. There seem to be two underlying problems here. The first has to do with the fact that these judges have neither any specialized knowledge of inheritance and kinship matters nor training in the law. They rely entirely upon the litigants to present the (for their purposes) appropriate statutes to the court and to characterize the kinship relations. Since they can also not discuss the case amongst themselves before voting, there is also no possibility collectively to assess competing interpretations or for those who might know more to educate the others.

The second problem arises because both sides appear to be trying to exploit an ambiguity in the statute.[17] It is telling that the speaker presents the law as if the meaning of the statute were completely clear, but does not directly discuss the relevant provision. The ambiguity involves whether, when a man dies intestate and without sons, only his daughter inherits before collaterals or his daughter and her descendants. If the text preserved in Demosthenes 43.51 is accurate, then the matter is ambiguous because although *only* "female children" are mentioned it may be that it is understood that their descendants step into their shoes. The same statute offers another example of what David Daube has called "the self-understood in legal history," for although it is clearly the law that male children take precedence in cases of intestacy, this statute does not mention them.[18] This ambiguity is fundamental enough that it could only persist in a participatory legal system like that of Athens, where neither judges nor litigants

[17] The text of the statute is not given here, but has been appended to [Demosthenes] 43.51. There is controversy about the authenticity and accuracy of this statute, though parts of it are quoted or paraphrased in this and other orations.

[18] See Daube (1973: 126–34).

are professional jurists. In other legal systems statutes are also sometimes fraught with ambiguity, but a question as basic to inheritance law as the respective rights of a brother's son as opposed to a daughter's son would have long since been authoritatively clarified.

In Athens, however, there was no mechanism for authoritative clarification other than new legislation. For this reason, and because judges were chosen at random from the lay citizenry for each particular case, the controlling interpretation was what a particular group of judges, as individuals,[19] thought on a particular day. Their interpretation, moreover, would have rested largely upon their lay views about kinship. For this reason the speaker claims that it is also self-evident that according to Athenian values descendants are closer than collaterals. However, obviously neither the legal rules nor those societal attitudes about kinship were unequivocal enough to forestall argument about which relatives should be regarded as closer and why. The speaker here takes the judges step by step through the basic principles of kinship because those principles are open to manipulation and to competing constructions. To support *his* construction the speaker appeals not only to the inheritance statute (8.30–2) but also to societal values and to the statute punishing neglect of parents. Interestingly, he presents that statute as if it involved a similar ambiguity (although he has not conceded that the inheritance statute is ambiguous). This law enjoins citizens to provide for their "parents," meaning, he says, by "parents" their mother, father, grandmother, and grandfather (8.32). Perhaps this is a way to suggest, without acknowledging the ambiguity which he wants to deny, that "parents" is understood to include grandparents in the same way that in the inheritance statute "female children" should be understood to include grandchildren.

The point here is that Athenian inheritance cases should not be treated as the product of a system where clear and rigid rules of kinship are authoritatively interpreted and mechanically applied. If that were the case, the extremely simplistic extended discussions of the basic principles of kinship found in this and other orations

[19] Since the judges were not permitted to deliberate before voting, the decision was in this sense individual rather than arrived at through a collective process like that followed by modern juries or panels of judges.

would be not only unnecessary but also jarringly out of place. They are not out of place in Athenian courts, however, because to a significant degree the relative claims of kin are open to interpretation and manipulation before lay courts which share the litigants' values and are neither trained nor inclined to resolve definitional problems and to decide cases by rigidly applying statutory rules to the facts at hand.

This conclusion would not be surprising if legal and social historians had not traditionally approached kinship with very different assumptions. Following a scholarly tradition that goes back to Maine's work on ancient law on the one hand, and to structural-functional social anthropology on the other, kinship has often been viewed as an objective order which structures social relations and determines behavior.[20] Recent developments in anthropology, however, following Leach's seminal work in this area, have increasingly challenged this model, based upon what Bourdieu refers to as the fallacy of "objectivism."[21] This alternative perspective instead emphasizes kinship categories as flexible social constructions that are interpreted and manipulated by individuals to suit their particular purposes in concrete circumstances. Leach, for example, has shown that among the Burmese Kachin, while genealogies play an important role in establishing political hierarchies, because of the strategic manipulation of genealogy to suit particular interests, "There is no *correct* version."[22] In such struggles over leadership, rival factions, like litigants in Athenian inheritance cases, devote "great ingenuity ... to garbling the evidence on this crucial matter."[23] In a similar vein, Chagnon has explained how Yanomami continually reclassify kin in accordance with particular marriage strategies. For example, ineligible females are reclassified into cross-cousin categories when the "appropriate" partners are thought not suitable.[24] In other words, claims about kinship are arguments put forward to justify, excuse, or explain behavior. They are shaped by societal values and the rhetorical and strategic purposes to which they are intended to be

[20] See Bourdieu (1977: Chapter 1) and Saller (1993).
[21] Bourdieu (1977: 1–28).
[22] (1965: 127–9).
[23] Leach (1965: 164).
[24] Chagnon (1990: 96–7). Chagnon further notes that such reclassifications are subject to negotiation and dispute.

put. As Bloch argues, "Kinship terms do not denote kinship roles; rather they are part of the process of defining a role relation between speaker and hearer . . ."[25]

Such a rhetorical approach to kinship can help make sense of the otherwise perplexing characteristics of Athenian inheritance litigation.[26] Thus, when a litigant claims that according to a statute a person is unequivocally outside the prescribed circle of those entitled to inherit (Isaeus 11.9–10), we should view this as an argument shaped to advance his own case rather than as the objective statement of a dispositive rule. In this instance, the man's opponent won despite the supposedly manifest statutory exclusion.

In a similar vein, much scholarly ink has been spilled in discussions of orations like Isaeus' *On the Estate of Hagnias* and [Demosthenes'] *Against Macartatus* on the precise meaning of the word *anepsios* (generally, cousin) in the Athenian inheritance law and whether or not it includes the children of second cousins, or stops at children of first cousins.[27] The argument here suggests that there is, quite simply, no answer to this question, for such questions presuppose that the word had a rigidly fixed meaning and that an authoritative "true" technical definition existed. But how could it have? Where would the authoritative definition have been found? In democratic Athens such cases turned not on technical definitions but on the common understandings of the ordinary citizens entrusted with the task of judgment. While terms like "mother" or "son" might be reasonably clear, kinship terms denoting more remote relations like "cousin" might be ambiguous and indeterminate (as the ordinary usage of the word "cousin" in our own culture indicates). The speaker in *Against Macartatus* might declare (43.52) that because Theopompus was so far removed from the deceased (Hagnias) he unequivocally could not legally inherit

[25] (1971: 80).

[26] In speaking of Rome, which had a far more clearly and elaborately articulated legal conceptualization of kinship categories than anything found in Athens, Saller (1993) concludes, "The evidence suggests that Roman kinship of historical times is better understood in terms of individuals making choices among a peculiar, changing set of alternatives and manipulating a vague, elastic kinship terminology than in terms of a general structure constituted of precisely defined kinship roles." See also Humphreys (1986: 90).

[27] See Todd (1993: 217–21) for a review of the various positions. The two cases involve the same estate, with *Against Macartatus* re-litigating the issues of *On the Estate of Hagnias* in the next generation.

under the statute, but two courts had previously judged otherwise and awarded him the estate.[28]

Not only did the Athenian legal system have no means to establish and apply such technical definitions, but *anepsios* is precisely the kind of kinship term which lends itself to the sort of interpretation and manipulation which underlies the many years of litigation in this case.[29] How far the range of the word *anepsios* extended depended not upon the technical formulation of jurists (who did not exist at Athens) but rather upon how persuasive particular individuals in particular legal/rhetorical contexts could make their claims about what it meant in that case. This, in turn, would depend upon the complex, unsystematic, and often contradictory beliefs and normative expectations of the group of judges representing the *demos* on that day. Scholars try to resolve the contradictions and ambiguities which run through the corpus of inheritance cases into a neat set of unambiguous principles which represent "the law," that is, the "rule" established by the statute. But at Athens, as elsewhere, the law was more complex than this and was embodied in the patterns of interpretation, application, and manipulation of these rules and terms in actual cases, and in the life of the society from which the judges and litigants were drawn.

As has been emphasized in previous chapters, the democratic (in the Athenian sense), participatory nature of the Athenian legal system meant that "the law" was, for better and for worse, expressed through the actions of ordinary citizens and, hence, was necessarily informed by the values, expectations, and interests which they brought to their respective roles in the judicial process as judges, witnesses, co-speakers, and litigants. The rhetorical extravagances of the Athenian inheritance orations reveal a conception of legal process quite unlike modern models emphasizing the determinative authority of a formal structure of written rules applied to the facts of particular cases in an effort to uncover, for the benefit of impartial decisionmakers, the "truth" of past events.

[28] The speaker claims (43.11) that he was not angered by these previous decisions because he considered it likely that the court would be deceived. By this he apparently means that the kind of deceit (fictitious genealogies, lying witnesses, etc.) practiced by his opponents is so common that one can only think it likely that the lay judges will be duped.

[29] Todd (1993: 217) notes the uncertainty of the boundary of the kin entitled to inherit under the statute.

It cannot be underscored strongly enough that, in principle, in an Athenian trial all the untutored judges knew about the facts of the case, *and*, to a very significant extent the applicable laws, was what the two contesting litigants chose to tell them. In that process of selecting the "available means of persuasion" litigants used the statutes as they used the other material which they represented, interpreted, manipulated, concealed, and lied about to suit the needs of the moment. If the content of the extant orations (and of Aristotle's *Rhetoric*) bears any relation to the actual process by which individual judges determined their votes, the law of inheritance at Athens was shaped and applied not by the reasoned application of general rules to particular cases but by the assessment of total competitive rhetorical performances which aimed at convincing the judges to consider a wide range of factors (wealth, friends and family, public service, character and reputation, previous actions, etc.) of which the formal legal rules were but one. As suggested above, given the structural impediments to establishing with certainty the most basic facts upon which such a reasoned application of rules would operate, it is not surprising that judges who watched these agonistic displays looked to other criteria in deciding which result would serve both justice (very broadly defined) and the interests of the city.

# *Conclusion: litigation, democracy and the courts*

The preceding chapters have sketched an account of Athenian legal practice which departs from most traditional theoretical and historical understandings of the nature and development of the judicial process. Rather than viewing litigation as encompassed within and defined by an autonomous judicial sphere, this account seeks to anchor the conceptualization of litigation in the broader context of agonistic social practices and a field of values organized around notions of honor, competition, hierarchy, and equality. In methodology the approach has been two-pronged. First, I have read Athenian litigation against a variety of contemporary attempts to theorize the judicial process. This theoretical perspective is largely the task of Part I, which also examines in some detail Athenian theoretical accounts of law, conflict, and society. Using such a theoretical approach to frame a study of violence, conflict, and litigation in Athens is important not only because it helps us better to understand the Athenian material. Rather, it has also been a fundamental aim of this study to use the Athenian material as the basis of a critique of certain modern theoretical positions discussed in Chapter 1 and to provide support for the alternative perspective advanced there. Social history should aim, in my view, not merely at expanding our understanding of the past, but also at engaging the theoretical concerns of the present through which, implicitly or explicitly, such understandings are *necessarily* shaped.

The second methodological prong involves the comparative method. I should emphasize for those familiar with my study of law, sexuality, and society in Athens that in this present work I do not rely on a model drawn from Mediterranean anthropology.[1] Considerations of space and the goals of this series precluded the

[1] Cohen (1991: Chapter 3).

kind of discussion necessary for the construction of any kind of model in the formal sense. Instead, I have employed a wide variety of anthropological studies of societies as diverse as those of Highland New Guinea, Sri Lanka, Highland Burma, Sub-Saharan Africa, as well as examples from the Mediterranean region. I have done so not because these societies resemble classical Athens in size, organization, institutional structure, technological development, and so on. Rather, I have used them for their fundamental theoretical insights (e.g., Strathern, Comaroff and Roberts, Leach) as well as for particular points about conflict, adjudication, competition, or violence which seem well suited to illuminate the Athenian material. Such examples are thus used, following established comparative practice, for their explanatory power, not because, say, Baruya society is, as a whole, like classical Athens.

Part I thus provides a theoretical backdrop for the next five chapters by presenting alternative accounts of the relation of legal process and the rule of law to the problem of private violence and internal conflict. In particular, I take issue with evolutionary and functionalist accounts of the development of legal institutions at Athens and elsewhere and show how some recent anthropological and historical research has provided the basis for an alternative understanding of legal institutions as subsumed within a field of social forces in which legal ideologies of truth, objectivity, and the binding resolution of disputes for the suppression of conflict and violence are but one vector among many. Turning to the rule of law, Chapter 3 shows that while the major Athenian theoretical understandings of law all saw the rule of law as the solution to the problem of competition, conflict, and violence, their accounts of the nature of the rule of law and its relation to political institutions differed in central ways. The rule of law thus appears not as a series of principles independent of the realm of politics, but itself as an ideological construct shaped to suit the needs of particular conceptualizations of law, politics and society. This, in turn, provides the basis for appreciating the role which arguments about the rule of law play in the orations discussed in Part II, as well as for understanding the role which a distinctly radically democratic vision of the rule of the law could play within the Athenian polity.

The bulk of Part II aims to support, explore, and refine the theoretical argument advanced in Part I. It does so by an examination of a wide variety of conflicts and forms of violence brought

before Athenian courts. As a preliminary to this examination, Chapter 4 describes the web of values and normative expectations which litigants and judges brought to the judicial process. This backdrop of values, it is shown, provides the normative repertoire through which litigants frame their arguments and seek to manipulate the judgment of the court. Chapter 5 advances a theory of litigation as feud which claims that the essentially agonistic values described in Chapter 4 shape the way in which Athenians apprehended what a trial was all about. The legal relations embodied in a lawsuit or prosecution, it is argued, are seen as being to a significant degree merely an extension of long-term competitive and feuding relations between the parties. The court, rather than providing an arena for the objective determination of who is in the "right" or in the "wrong" in the abstract sense defined by legal rules, merely provides another resource for enmity to draw upon, another arena where conflict may be pursued, where violence and revenge may be legally sanctioned. This is the understanding not merely of the litigants, but also of the judges, who, as this and subsequent chapters show, appear to reach judgment on the basis of values and expectations fundamentally alien to the contemporary ideology of judicial process and the rule of law. Having set out this theory, Chapters 6, 7, and 8 show how it operates in three legal fields: actions for violent assault, sexual violence, and inheritance litigation.

The remainder of this concluding chapter steps back from the struggles of particular cases to consider some implications of the view of litigation that these individual studies have developed for an understanding of law and society at Athens. Preceding chapters have suggested that certain features of Athenian litigation existed in tension with democratic principles of the rule of law. On the one hand, democratically minded Athenians condemned retrospective legislation, the application of unwritten laws, and laws aimed at individuals, because such practices ignored principles of legality central to the rule of law. Similarly, they criticized the Thirty Tyrants for having violated the rule of law by arresting men according to their personal whims and putting them to death without a trial. Andocides (1.80–91, 140) portrays the aftermath of the Thirty as a re-establishment of the legal order through a noble refusal to live by the law of private revenge and an affirmation of the rule of law. The thrust of such criticisms of the tyranny of the

Thirty is that only activities clearly defined through generally applicable written statutes as affecting the public interest are punishable by the state. The rule of law protects other conduct from public interference. Judges swear to apply these statutes and do not look beyond the facts of the case in adjudicating disputes. As Aeschines (3.6–7, 233) puts it, the rule of law makes the ordinary citizen sovereign and serves as the bulwark of democracy. No one, he says (3.235), has ever tried to overthrow the democracy until he has become more powerful than the courts.

On the other hand, other features of the administration of justice seemed to be motivated by countervailing values. As seen in Chapters 4–8, speakers repeatedly ask the courts to decide cases based upon the civic merits of the litigants rather than by applying the law to the particular transaction on which the suit is based, as their oath required. Speakers often acknowledge this problem, admonishing judges to vote according to the law, but later in the same oration themselves claim social precedence because of their superior character and public benefactions. In an oration of Lysias (30.1, 26–8), the speaker begins by asserting that many defendants who appear guilty are acquitted because they detail the virtues of their ancestors and their own benefactions to the state. Rather than drawing from this premise the conclusion that such matters should be excluded, he argues instead that since the courts accept such arguments based upon public service, then they should also be persuaded by the accuser's account of the previous wrongdoing of the defendant and should not listen to the friends, relatives, and men of affairs who will plead on his behalf. Looking at the corpus of surviving orations as a whole, it seems hard to deny that Athenians viewed such social and moral assessments as an inevitable and natural part of the process of litigation and judgment. Having recognized this tension between the rule of law strictly construed and judgment based upon social rather than statutory criteria, Athenians also developed an ideological rationale by which this tension could be mediated.

This rationale had to do with a very strong identification of the law with the *demos* and its institutions and interests.[2] As Aeschines (3.233) somewhat paradoxically claims, in a democracy the ordinary citizen rules like a king because of the law and his vote. Ps.-

[2] See Ober (1989: 299–304).

Demosthenes (42.18) also portrays the identity of the laws, the courts, and *demos*: "You know the law, O judges, for you promulgated it." The presumption of this identity of the legal order and the *demos* provides the basis for arguments which go beyond the paradigm of the rule of law as involving the application of legal rules to the facts of particular transactions. Recall the speaker in an oration of Isaeus who tells the court that if he is awarded his patrimony by the judges he will hold it in trust for the *demos* and spend it for their benefit. Similarly, in Lysias (21.22) a speaker advises the judges that in pursuing honor he has spent his patrimony "on you." Rather than dismissing these pleas as transparent attempts at bribery (which they nonetheless are), we should also examine the ideological presuppositions which enable the same speaker to claim, however conventionally, that, "If you do as I urge you, you will both give a just verdict and choose what profits you" (21.12; and cf. Aristophanes, *Knights* 1217–33).

Aeschines (3.196), for example, complains that the democratic constitution and the laws are subverted when influential men come into court and plead on behalf of the defendant and use their influence to have him acquitted. On the other hand, in the same oration (3.260) he implicitly acknowledges that the identity of law and the *demos* makes arguments of justice and the interests of the *demos* intersect, when he closes his speech by bidding the judges to vote for "what is just and benefits the city." That is, the speech recognizes no contradiction between voting according to the laws and voting according to civic interests (i.e., the interests of the *demos*).

Acknowledging this unity clarifies why in Athens the courts could serve so well as a place to resolve questions of social and political hierarchy without a sense of abusing the legal process. In such cases, in a direct and sometimes final way, judges evaluate not just a particular action of their leading citizens, but their lives and careers as a whole. Both sides bring their supporters to bear and the result inevitably involves a comparative expression and judgment of the relative worth and standing of the litigants. When those on trial are leading politicians the *demos* can decide, even retrospectively as in Aeschines' prosecution of Demosthenes, whom they ultimately honor and respect and whose importance and leadership they acknowledge.

According to the tradition, Aeschines was so humiliated by his

overwhelming defeat in the prosecution of Demosthenes that he left Athens permanently. It will be recalled that Demosthenes himself says that in his prosecution of Meidias he is also the defendant, and, in a much more mundane case (Dem. 54), Ariston says that he will be further dishonored if he loses in his prosecution against Conon. In an Athenian trial, then, the plaintiff is also the accused, in the sense that the defendant will always put the plaintiff's life, character, and reputation at stake as well. This is why in Athens even a criminal trial is an *agōn* in a way which it cannot be in a prosecutorial system where the state itself presents the case against the defendant. At the core of the Athenian judicial *agōn* is the comparative judgment of the parties as citizens and social beings, not according to the statutory norms (which are often hardly discussed), but according to the normative expectations of the community. The friends, relatives, and allies who support a speaker are thus not peripheral to the process of judgment, as they would be in a modern western trial, but an integral part of what the *agōn* is all about. Hence, it should come as no surprise that they were expected to lie when supporting their party as witnesses rather than to help the court in unraveling the "truth."

Rather than regarding this feature of legal ideology and practice as tangential to an understanding of Athenian legal institutions I would argue that it is in fact a fundamental structural characteristic which arises from the most basic notions of the nature of law and its relation to a democratic society. Moreover, this characteristic distinguishes the Athenian view of the rule of law from modern conceptions to which, in other ways, it may seem so similar.

At Athens, the will to litigate implies the will to submit oneself to the judgment of the community, a judgment not just of one's role in a certain transaction, but also of one's social position and identity. This is, of course, what *philotimia*, the competitive pursuit of honor, is all about; and as we have seen, in Athens the courts furnished an important venue for this pursuit. Indeed, to pursue honor is not merely to submit to judgment, but to invite it; or even, like Alcibiades as portrayed by Thucydides (6.16.1–3), to revel in it. This doubtless constitutes part of the attraction, for those competitively disposed, of the considerable risks of litigation. To desire honor is to desire the constant assessment of a public self which one continually constructs, represents, and performs in anticipation of such assessments; it implies a submission to the observation and

evaluation of the community in comparison with one's peers. This is part of the egalitarian ideal of a community of honor where one wins the respect and envy of one's peers through outstripping one's rivals.[3] As was seen in Chapters 4 and 5, the competition for honor is based upon a notion of equality in honor at the same time that the point of the competition is to establish one's superiority as the *primus inter pares*.[4] This central tension between equality and hierarchy in the culture of honor is nicely expressed in Alcibiades' speech in Book VI of Thucydides, where Alcibiades simultaneously says that he has no equals and that it is especially his equals who envy and dislike him.

The paradox of democratic Athens is that in this ideologically egalitarian society those with the greatest claims to honor, the elites competing amongst themselves for wealth, power, and influence, submitted, in the Assembly and the courts, to the judgment of those with far lesser claims.[5] This role of the *demos* was seen as crucial to the equilibrium of the democracy. As Aeschines argues (3.23), democracy requires that honor (*philotimia*) be granted by the people, not appropriated for themselves by the powerful. Hence, accusing Demosthenes of improperly receiving the public honor of a golden crown he inveighs, "Do not seize honor; do not grab the ballots from the hands of the judges . . ." Later he also explains that the law regarding crowning ensures that the designee receives honor only from the *demos*. According to Aeschines, then, the tension between equality and hierarchy must be negotiated by granting distinctions which set some citizens above the rest, but by also keeping the decision about honor and hierarchies in the hands of the people as embodied in popular institutions like the courts (see also 3.20, 42–3, 47, 183–8). As Demosthenes puts it (20.108), in democracies freedom is preserved by the competition of the virtuous for the honors of the people.

[3] Hansen (1989: 24) rightly characterizes honorific decrees as "the glue of the democracy." See also Christ (1992: 346).

[4] Strathern (1985: 119–20) notes that among the Hagen of New Guinea, "a rhetoric of egalitarianism" defines a sphere of essentially competitive relations whose aim is to establish hierarchies. Equality, then, becomes a kind of fiction, a way of thinking about public life.

[5] Raaflaub (1991: 581) emphasizes the inherent contradiction in the political consciousness of the "average lower-class citizen" of Athens: "he was proud of the achievement of his polis and he identified with democracy; he claimed political equality with, but remained socially inferior to, his noble and wealthy fellow citizens; and he resented it that he was criticized and not taken seriously by the 'better ones.'"

The courts were seen by Athenians as providing a forum for the *demos* to occupy the crucial role of dispensing honor by judging the rivalries and conflicts of leading citizens. Dover has rightly noted the "inseparability of private feuds from political rivalries fought out in the law courts with a mustering of influential individuals on either side."[6] But the feuding mentality, as the cases examined in preceding chapters have indicated, extends beyond the narrow circle of those who actively competed for leading political roles. For litigation, as we have seen, involved the opportunity to take revenge for wrongs, to display and validate one's claims to status, and to contest one's claims to honor with those of one's rivals. The lure of litigation for those Athenians who were drawn to the arena of the courts was the gamble of submission to judgment, a clear, excruciatingly public judgment with no qualifications, explanations, or hedging. As the speakers invite the judges to compare their lives, they open themselves to a formal and ritualized form of the kind of public scrutiny and evaluation which operates in informal ways through the politics of reputation in so many societies. Athens institutionalized this process, and did so in such a way as to make it the preserve of the *demos*. The informal social control of gossip and reputation, though still vibrantly present and socially contiguous with the judgments of the courts, supplemented a radically democratic mode of social control in which the people as a whole (symbolically at least) directly dispensed a judgment which in this context could claim, as so many orations put it, to serve at once both justice and their interests. This was the social, political, and juridical meaning of the democratic rule of law which many Athenian orators and politicians proudly proclaimed as the distinctive foundation of their *politeia*.

This conception of legal process, however, is even more fundamentally rooted in the very notion of what law is in a democratic society. To explain this somewhat extravagant claim, let us begin with the most widely known Athenian legal case: the prosecution of Socrates. The indictment against Socrates appears to have included, as one of its three principal charges, the allegation that Socrates corrupted the Athenian youth. The language of this charge seems reminiscent of Aristotle's and Isocrates' criticisms of

[6] (1968: 50).

the license of democratic culture, and the verb *diaphtheirein* (to seduce or corrupt), which the indictment applies to Socrates, frequently has a connotation of sexual excess and wrongdoing. Indeed, it is the verb commonly used to describe the sexual seduction which "ruins" a woman or boy. For present purposes, the question which the indictment raises concerns how the charge of impiety as "seducing/corrupting the youth" could have been valid in a society which saw itself as profoundly committed to the principle of the rule of law. After all, the statute under which Socrates was prosecuted says nothing about "corruption" of the youth, or corruption of anyone else for that matter, nor is there an implicit linguistic connection between impiety and seduction/corruption. The law merely provided certain penalties for any act of *asebeia* (impiety), so it is far from clear from the face of the statute that "corruption/seduction" falls within its scope as the rule of law would require.

But what was *asebeia*? This, of course, is the crux of the matter. As stressed above, Athenian statutes provided no definition of the offenses they prohibited. Athens, as we have seen, had no institutions which could provide an authoritative definition of offenses. Whereas most centralized legal systems regard the resolution of such questions of statutory interpretation or definition as the exclusive preserve of some elite group of specialists, Athens chose not to follow this path because it would have taken a crucial element of power away from the people. It was certainly not the case that no one was "advanced" enough in their legal thinking to address this issue. Aristotle, in his *Rhetoric* (1374a), argues that technical definitions are required. How else, he asks, can one decide a case where a man accused of *hierosulia* (theft of sacred property) agrees that he stole the property, but denies that the act constituted *hierosulia* because the property was not consecrated? Or, in Socrates' case, how could the Athenian court decide whether or not "corrupting the youth" fell within the purview of the law of *asebeia*?

To begin with, it is worth noting that nowhere does Socrates make the argument which would seem most obvious to a modern defense attorney: that "corruption of the youth" did not, as a matter of principle, fall within the definitional requirements of the offense. That is, Socrates may deny that he corrupted the youth, but he does not deny that corrupting the youth constituted

*asebeia*.[7] He did not exclude this claim because it was inaccurate, but rather because it did not fit into the patterns of Athenian legal argument. That is, since the statute provided absolutely no definition, on any particular day it was left to the mass court of untrained lay judges to decide the meaning of such broad and elastic terms.

The modern western conception of the rule of law views the criminal legal process as proceeding on the basis of narrow definitions of offenses and a determination of whether the facts of a particular case present all the elements of that definition. Athenian practice, on the other hand, seems to have proceeded on the basis of statutes which set out general categories of wrongdoing, and a determination on the basis of unexamined communal normative expectations of whether or not the defendant was the kind of person envisaged by the statute. In other words, rather than turning on definitional distinctions, the Athenian cases turned more upon collective judgments about whether the act was right or wrong, and, hence, whether the accused was good or bad. In Athens, then, the definitional issue necessarily collapsed into a more general moral assessment of the quality of both the act *and* the actor.[8] This conflation of the *conduct* which allegedly violated a statute with a general evaluation of the *persons* involved violates not only contemporary notions of the rule of law, but also those principles of legality proposed as binding by the Athenians. However, rather than dismissing such contradictions as "excesses" of popular justice, we should instead regard them as the product of a fundamental tension within the Athenian legal process, a tension central to the very notion of law in a radical democracy.

For example, when Demosthenes prosecuted Meidias for slapping him at the festival, he appears to have anticipated that the case would *not* turn on whether or not Meidias committed the act of which he was accused, nor on whether or not that act constituted a violation of the statute. Rather, the issue which Demosthenes principally addresses is whether or not that act clearly violating the statute should or should not be punishable, based upon consideration of a whole variety of other factors concerning the defendants

[7] I speak of "Socrates" here for the sake of convenience. For my purposes it is irrelevant whether or not he actually spoke the words attributed to him by Plato and Xenophon.

[8] This argument applies to the class of cases which would have been the subject of a trial as opposed to summary procedures, which raise still different problems.

and their relations to each other and to the community (including who has provided the most benefits to the city). He thus anticipates that judgment will focus upon the social and moral meaning of Meidias' act more than upon its legal significance. Thus, the bulk of Demosthenes' argument addresses the question of which party, based upon a full evaluation of their representations of their moral, social, and political identities, deserves to prevail. As we have seen this situation is by no means idiosyncratic, but appears throughout extant Athenian litigation. Aristotle's (*Rhetoric* 1372b–1373a) discussion of the crucial role of influence, wealth, and friends/supporters in litigation presupposes that to a significant degree it was one's social identity and reputation in general, and not the evaluation of the particular act at issue, which was dispositive for Athenian courts.

This account of the nature of the Athenian trial finds further support in Aristotle's treatment of judicial rhetoric. Previous chapters have shown the way in which forensic arguments are built around the topoi which, as Aristotle emphasizes, give the orator a stock of commonly held values, beliefs, and expectations, a normative repertoire, which he can manipulate to suit the persuasive purposes of the moment. In other words, legal rhetoric is made possible through an understanding of the shared moral judgments on which the political community is based.

This rhetorical nature of Athenian litigation made it ideal as a democratic mechanism for social control and the clarification of social and political hierarchies precisely *because* the courts did not reach decisions purely through the interpretation of legal norms and principles and their application to a particular transaction. Rather, Athenian courts, as they responded to the speakers' competing attempts to frame the case within a particular characterization of the community's normative repertoire, appear to have rendered judgment in regard to representations about the totality of the transaction of which that particular act was a part. This process by its very nature focussed upon judgments about the political, social and moral context of the relations of the parties and, therefore, upon what sort of person each of the parties was. On this view, much of the judicial rhetoric which has been too readily dismissed as "irrelevant" or a "perversion of legal process" is in reality central to the process of judgment as the Athenians conceived it.

Indeed, it is only from the point of view of modern ideologies of the rule of law, the nature of the trial, and principles of legality that these matters appear wholly extraneous. This is not to say that the Athenian commitment to the rule of law was hollow. Indeed, it precluded precisely that kind of censorial discipline through magistracies which Aristotle advocated. The radical democratic notion of the rule of law meant that in principle no individuals, whether magistrates or ordinary citizens, were above the law. It also meant, however, that the rule of law was inextricably connected to the court's perception of the interests of the *demos*.

Prosecutions for offenses against statutes were brought before the *demos* in their capacity as lay judges, and they reached judgment by considering whether or not the accused had violated the communal sense of right and wrong whose contours were only vaguely sketched out by the written statutes. Forensic rhetoric operated to construe the actions of the parties one way or the other in relation to these communal norms. Thus, within the parameters of the democratic rule of law which prohibited arbitrary executive action and legal immunity for the powerful (in theory), the Athenian courts arrived at decisions in such a way as to make them a powerful vehicle for the articulation and expression of shared moral, social, and political judgments. As such, they provided a very powerful "democratic" mechanism for social control and for the regulation of competition among those vying for power, wealth, and influence. In this way, the mass courts, drawn in significant part from the lower social strata, played a crucial role in the establishment and validation of social and political hierarchies among the elites.

In short, the *demos*, in deciding on a case-by-case basis whether an individual citizen should be punished under a particular statutory rubric, could exercise a "censorial" power that was the democratic analogue to the magisterial authority which Aristotle thought a well-ordered society required. From this standpoint it is quite intelligible that there was no objection to including a charge of "corrupting the young" in a prosecution for impiety despite the fact that the statute on impiety in no way suggested that such behavior fell within its scope. Indeed, it was precisely through this kind of legal process, rather than through the imprecision of legislation, that the Athenian polis could articulate the collective judgments about right and wrong which, in Aristotle's view, made it a

political community. Plato and Aristotle both maintained that in any society the law will be crafted to suit the form of constitution there prevalent. As was seen, in their construction of ideal states both of these theorists advanced a notion of the rule of law adapted to fit their vision of true constitutional government. The Athenian democracy of the fourth century was no different in deploying a version of the rule of law to suit its own needs as well.

The mediating role of the *demos* in judging the disputes of the elite may have played an important role in the stability of the Athenian democracy because it integrated the interests of "mass and elite."[9] Though Aristotle considered Athens to be an "extreme" form of government and hence unstable, these features made Athens a *de facto* mixed system of government. Aristotle's judgment of Athenian instability arises from his propensity to look at the formal structures by which power was distributed rather than social practices of government. In the Athenian courts the judges concede the right of individuals to special claims and status, to hierarchy within egalitarianism, but at the same time they reserve to themselves the sole right to judge those competing claims. The leisure class did largely monopolize leadership, but they also accepted the judgment not only of their policies by the Assembly, but also of their honor, status, and reputation by the courts. Thus, though the brute fact of hierarchy asserted itself in political and social life, it was constantly mediated by the popular institutions which bore the weight of ultimate judgment. In short, no one was shut out at democratic Athens, no one, of course, except women, slaves, and metics (foreign residents), who were totally excluded from participation in the political community. The sense of cohesion which these fundamental principles of inclusion *and* exclusion produced should not be underestimated. If the mass of Athenians had rigorously carried over into social life the egalitarian political values which they loved to praise, things might have been otherwise. But democratic fourth-century Athens remained a city where the values of most citizens ensured that respect for social hierarchies of wealth, honor, and status made it inevitable that the social and economic elite could compete for political and military leadership and, hence, for the honors which they thought were their due.[10] It was this *de facto*

[9] See Ober (1989: Chapters 5, 7).
[10] See Connor (1971: 29, 144–5, 159) and Davies (1981).

mixed system, along with the many other rituals and institutions which promoted a sense of community, which helped to ensure the high degree of stability which democratic Athens enjoyed when compared to most of its neighbors or to late Republican Rome.

Keith Hopkins has emphasized the way in which central political institutions could also operate as rituals which reinforced identity and promoted integration.[11] In Athens, members of the elite carried out their competition in a public judicial ritual whose rules were determined by the *demos*, and in doing so they rhetorically, and literally, enacted their submission to the citizenry as a corporate unity. This is not to suggest a functionalist interpretation of litigation. Litigation, as was seen above, often provided an arena for the expression, exacerbation, and continuance of conflict. Thus, to a significant degree the Athenian courts "failed" in suppressing private conflict by providing binding and final resolutions of disputes. By their very nature they could not do so, for whereas disputes over particular transactions might be finally resolved, the feuds and rivalries played out before the courts were by their nature ongoing.

Litigation at Athens was shaped by its participatory nature which enmeshed it in the web of social practices. In an agonistic society conflict is not a pathological dysfunction that institutions can expunge, but a central feature of social life. Litigation should be seen not as separate and removed from the realm of conflict, but rather as *part* of the process of conflict itself.[12] Litigants often use the courts to pursue conflict, not to terminate it. As has been seen, in defining their dispute for the court they employ their rhetorical performances to express and validate a certain characterization of their competitive relations and their respective social identities. In providing a forum for them to do so the courts played a socially and politically vital role in demonstrating and embodying the authority of the *demos* as the ultimate arbiter of conflicts, and hence, of the competition for honor, wealth, and status which produced them. This arrangement, in turn, made it possible to see the courts' judgments not as violations of the rule of law which they were sworn to uphold, but rather as an amalgam of justice and interest

[11] (1991: 484–8).
[12] See Strathern (1985: 122–3).

essential to maintaining the democratic legal order. As expressed through the judgments of the popular courts, this conception of the rule of law served as a powerful force for the preservation of a democratic society.

# *Bibliographical essay*

Unlike, for example, a book on Thucydides or the Peloponnesian War, this study does not fit into any clearly established field of classical or legal historical scholarship. Historians of Greek law have not investigated the place of law in the broader agonistic context of Athenian society, and have paid relatively little attention to litigation as a social practice. Further, since they generally assume that by the classical era Athens had long before made the "transition" to another "stage" of legal development, marked by the displacement of blood feud by the rule of law and strong central institutions, they have spent little time considering to what degree the new system was a product of precisely those values that its emergence supposedly suppressed. Traditional classical and legal historical scholarship on ancient Athens tends to be quite positivistically oriented, concerned far more with describing the origins and parameters of institutions, procedures, and statutes than with examining the way they were shaped by, or the place they found in, the life of the society. Lipsius, though a work of the nineteenth century, remains the most authoritative "handbook" of Athenian law, but does not take up the kinds of issues examined here. Todd (1993) is also useful for general orientation. Historical legal sociological investigations of "law and society" at Athens are still quite rare. Apart from Gernet (1955), Humphreys has made important recent efforts in this direction on particular issues (e.g. 1985, 1986), as has Hunter (1994), but Garner (*Law and Society in Classical Athens*, London 1987), for example, addresses this topic only in his title. In other words there is little ongoing social historical study of the legal regulation of violence and conflict at Athens within which this book might find its place. There has also been little reflection on the relation of such problems to Athenian ideological and theoretical conceptualization of the rule of law and the nature of legal order. Lintott (1982) and Gehrke (1985) focus upon *civic violence* from the political perspective, but do not address the issues taken up in this book. Accordingly, the most helpful way to structure this bibliographical essay would appear to be by examining the relevant literature for each chapter.

Chapter 1. This chapter provides a theoretical critique of two kinds of accounts of legal institutions and the legal regulation of violence and feud:

functional theories and evolutionary theories. For a critique of evolutionary accounts of Greek legal institutions see Cohen (1989). For the classic formulation of the functionalist paradigm, see Radcliffe-Brown (1968) for functionalism in general and Gluckman (1956: Chapter 1) for feud in particular. For a critique of functionalist approaches to violence and feud, and a lucid account of the literature on feud in general, the best starting point is probably Elster (1990). Wilson's (1988) study of feud in Corsica is now by far the most important theoretical, historical, and sociological treatment of the subject. Chapter 1 also furnishes an account of recent developments in anthropology and social theory which provide a more illuminating theoretical perspective for studying the relation of legal norms to social practices in this area. The best general introduction to the topic is Comaroff and Roberts (1981), and Strathern (1985) and Ellickson (1991) should also be consulted. Social historians of medieval and early modern Europe have, in the past twenty years, opened up new perspectives on the study of violence, law, and criminality. Here the reader should start with the pathbreaking essays in *Albion's Fatal Tree* (Hay 1975) and move on to Bartlett (1981), Sharpe (1983a), and the useful collection edited by Bossy (1983).

Chapter 2. For conventional treatments of stasis see Lintott (1982) and Gehrke (1985).

Chapter 3. See Ostwald (1986) for the standard account of the rule of law at Athens. My interpretation of both Aristotle and Plato differs significantly from conventional views. For Aristotle see the useful collection of Keyt and Miller (1991) and the detailed study by Schütrumpf (1980). For Plato, the best full treatment of the *Laws* remains Morrow (1960). The best recent treatment of freedom and persuasion in the *Laws* is Bobonich (1991), and see Saunders (1991) on Plato's penal theory. For Athenian democratic ideology and its relation to law and the courts, the best starting point is Ober (1989).

Chapter 4. As indicated above there has been no systematic large scale study of the social values and practices reflected in Athenian litigation, and particularly not in regard to the issues taken up here: revenge, enmity, honor, etc. The leading work on Greek popular morality remains Dover (1974), and his discussions of the lawcourts are particularly acute (e.g. 288–94). See also Humphreys (1985) and Osborne (1985a). On the competitive struggle for honor Whitehead (1983) is excellent, and Davies' (1981) and Sinclair's (1988) treatments of the topic are also quite valuable. Walcot's (1978) study of envy stands alone. For comparative studies of agonistic societies see Herzfeld (1985), Brandes (1980), and Gilmore (1987), and for social historical accounts of the values which informed litigation in early modern European cultures, see Kagan (1981, 1983), Hanawalt (1977), Ingram (1977), and Hay and Snyder (1989b).

Chapters 5–6. On Demosthenes' *Against Meidias* see P. Wilson (1992) and the bibliography cited there. On hubris in this case, see Fisher (1990).

The best general study of social control in Athens is Hunter (1994). On sycophancy see the debate between Harvey (1990) and Osborne (1990). For the relationship between the law and the social practices associated with feud, see Wilson (1988) (particularly Chapter 10) and Hasluck (1954). W. Miller's (1990) study of the legal regulation of violence in medieval Iceland is uniquely brilliant in its amalgam of legal scholarship, theoretical rigor, and social historical insight. See also Posner's (1988) interesting treatment of revenge. For insult relationships see Bourdieu (1966), Clover (1979, 1980, 1986, 1993) and Dundes, Leach, and Ozok (1970).

Chapter 7. See Fisher (1990) and MacDowell (1976) on hubris in general. Fisher's book on hubris (1992) appeared too late for me to consult it. On the sexual aspects of hubris see Dover (1978) and Halperin (1990: Chapter 5). For comparative studies of gender, sexuality and aggression see Brandes (1980), Gregor (1985), and Godelier (1986).

Chapter 8. The standard work on Isaeus' inheritance orations remains Wyse (1904), though the perspective is very different from that of this study. The best study of kinship in the Athenian law is Humphreys (1986). For a study of central aspects of Athenian inheritance law, see Schaps (1979). For comparative discussions of the social meaning of kinship, see Saller (1993) on Rome and Bloch (1971) and Bourdieu (1977: Chapter 1).

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