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FEUDING OR THE RULE OF LAW?
THE NATURE OF LITIGATION IN CLASSICAL ATHENS
AN ESSAY IN LEGAL SOCIOLOGY

The Old Oligarch ([X.] 3.2-6) complains that the Athenians “handle more public and private lawsuits and judicial investigations than the rest of mankind.” Their courts tried cases involving impiety, military desertion, and a host of other crimes, examined magistrates and orphans, and dealt with matters arising from festivals such as the Dionysia, Thargelia, and Panathenaea, and from the appointment of trierarchs. Strepsiades, the debt-ridden father in Aristophanes’ *Clouds* (206-8), thought the courts were the distinguishing mark of Athens. When a student of Socrates shows him a map and points to the location of Athens, Strepsiades cannot recognize his own city because he does not see men judging cases. In the *Birds* (40-41), Peisthetairos and Euelpides have grown so tired and frustrated with incessant litigation that they decide to flee Athens and found a new city in Cloudcuckooland.

Did the Athenians perceive their litigiousness as a serious problem? Or did they simply accept the high volume of court cases as a fact of life? Did Athenian values and legal rules discourage citizens from using the legal system to pursue conflicts? Or did the Athenians possess an agonistic ethic that viewed litigation as an acceptable means of perpetuating feuds and enhancing their reputations? This essay will examine Athenian attitudes and laws about litigation, and their impact on the behavior of litigants in court. The first part will study Athenian values and their influence on Athenian attitudes toward feuding and litigation. The second part will survey the Athenian laws that aimed at restraining litigiousness. The third and final part will analyze three conflicts that gave rise to several trials, to discover how Athenian attitudes and statutes shaped the behavior of Athenian litigants.

I. In recent years it has become fashionable among certain scholars to describe Classical Athens as an agonistic society. David Cohen, in particular, has accepted this description and has argued that agonistic values were responsible for the high volume of litigation. Instead of using the courts to enforce the law, litigants viewed trials as a means of pursuing feuds maintaining honor and status. In this section I will begin by examining Cohen’s analysis of Athenian values, and then present evidence to show that the Athenians were averse to feuding in court.

Cohen explains why the Athenians were so litigious by their agonistic ethos and their obsession with honor and status. When studying the Athenian courts, Cohen believes it is most important to examine “the background of social values which participants brought to the judicial process.”¹ To discover what these values were, Cohen draws on Aristotle’s *Rhetoric*, in particular the sections on anger and envy, which somehow “reveals the mentality of an agonistic society.”² Cohen never defines the term “agonistic” or provides a set of criteria (typology) for determining whether one can classify a society as agonistic or not.³ Instead he quotes two passages from the *Rhetoric* (1382b) about fear, which refer to rivalry and competition, and concludes that “on this description of Athenian beliefs, security is not found in law or other civic institutions but in power and its accoutrements.”⁴ In this world of rivalry victory is the supreme goal; compromise is shunned. Cohen places much weight on a passage from the *Rhetoric* (1367a):

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.

In this agonistic society enmity (*echthra*) played a greater role in court than legal issues. Cohen claims “Athenian judicial orations abound with references to enmity.” Enmity was “a social state that carried with it particular consequences for the individuals, their friends and relations and the judges who heard the case” and “might be made to appear the crucial issue in the interpretation and judgment of aggressive behavior.”⁵ The courts did not act to enforce the law but served as an arena where men might compete for honor and status. “In this nominally egalitarian society in which neither titles nor offices fixed one’s ranking, the question of settling relative standing was always open.” This created a situation where “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.”⁶ As a result, “speakers often sought to establish ... that they were prosecuting because of genuine enmity.”⁷ Litigants often “advance enmity as a respectable motive for litigation,” and “enmity and revenge are consistently portrayed as honorable.”⁸

¹ Cohen (1995) 61.

² Cohen (1995) 62.

³ In his review of Cohen (1995), Christ (1996) remarks: “It is not entirely clear, however, what qualifies a society as a feuding one.” Christ also observes that Cohen (1995) 115 says “feuding litigants and malicious prosecutions pose problems for all legal systems.”

⁴ Cohen (1995) 63.

⁵ Cohen (1995) 70.

⁶ Cohen (1995) 82.

⁷ Cohen (1995) 72.

⁸ Cohen (1995) 83.

Cohen's account of Athenian values basically depends on a few brief sections from a single work by one philosopher. The philosopher is Aristotle, who was born in Stagira in Northern Greece, spent much of his time outside Attica, and, after his move to Athens, remained behind the walls of the Lyceum. Cohen also singles out the *Rhetoric* from the Aristotelian corpus and passes over the *Magna Moralia*, the *Politics*, and above all the *Nicomachean Ethics*, which often reports common opinions about moral issues. In his very different account of Greek morality, K. J. Dover drew on a much wider range of sources such as comedy, tragedy, and prose authors like Xenophon.⁹ Finally, Cohen draws most of his evidence for agonistic values from a few short chapters on anger in the *Rhetoric*, which naturally stress rivalry and honor. Taken in isolation, these chapters seem to portray Greek society as contentious and competitive; one might describe it as nasty, brutish and short on compassion. But one should bear in mind that the *Rhetoric* does not pretend to be a systematic account of Greek values; it is a *Sammlung* of commonplaces for use in different contexts. One cannot pick and choose among these platitudes to construct a reliable picture of Greek social life.

In fact, if Cohen had concentrated on the chapters about pity and mildness, a very different picture of Greek values would have emerged (Arist. *Rh.* 2.3, 8). The chapter on mildness says that men do not feel anger at men who admit wrong and feel sorry. They are also mild toward men who are humble and do not mock or insult them. Nor are men angry with men who may slight them but normally show them respect. And how about the chapter on friendship? Here Aristotle writes that men like to make friends with people "who are good-tempered and not given to carping at our errors, neither quarrelsome nor contentious for all such persons are pugnacious (*machetikoi*)" (1381a). Where are the agonistic values in these chapters?

Yet Cohen and several scholars believe that the maxim "help your friends and harm your enemies" was the Golden Rule of Greek morality. As G. Herman has observed, "This conclusion is, to begin with, the result of an unsafe generalisation. It draws on a body of evidence self-servingly selected so as to exclude the many passages (from an equally wide range of sources) that recommend an entirely contrary, peaceful, conciliatory approach to friendship and enmity."¹⁰ For example, Cleoboulos of Lindos, one of the Seven Sages, advised that "we should do a favor to a friend to bind him closer to us and to an enemy in order to make a friend of him" (Diogenes Laertius 1.91). In a speech of Lysias (9.14), a speaker says that the powerful figure Sostratus has helped him to become well-known, but he has not taken advantage of his association with him "either to avenge myself on an enemy or to serve a friend." I think it is safe to assume his statement was not aimed at alienating the judges hearing his case. Public officials in particular were expected to refrain from showing partiality. A law from Beroia in Northern Greece dated to the

⁹ Dover (1974).

¹⁰ Herman (2000) 12. Christ appears to be unaware of this essay.

second century BC includes the oath: “I shall exercise the duties of gymnasiarch, according to the law of gymnasiarchs, and when there is no provision in the law according to my judgment of what is just and moral, without favoring friends or harming enemies against the law.” Magistrates took a similar oath at Athens (Dem. 57.63). And there is Hesiod’s advice to his brother to avoid the quarrels of the agora. The man who does not have enough to eat cannot afford the luxury of strife. The man who has eaten his fill may indulge in disputes, but Hesiod urges his brother to settle their dispute and end their quarrel (*WD* 27-36).

Sophocles’ *Ajax* reveals a very different attitude toward enmity from that sketched by Cohen. In the prologue Athena shows Odysseus what the hero, blinded by madness, intends to do to his enemies. When she asks him what he will do to Odysseus, Ajax replies that he will tie him to a column and lash him until his back is red with blood (104-10). Athena asks him not to subject him to this treatment, but Ajax insists on meting out this revenge (111-13). Yet Odysseus does not feel any joy at the sight of his enemy driven mad by the goddess: “I completely pity the wretched man,” he says, “although he is my enemy, since he has fallen under the yoke of evil disaster” (121-23).¹¹ At the end of the play, Odysseus gives a speech that reveals both the limits of enmity and the existence of a higher standard of morality (1334-45):

Vindictiveness should not so govern you
 As to make you trample on justice. I too
 Found this man my enemy once, beyond the rest
 Of all my fellow soldiers, since the time
 I won Achilles’ armor. Nevertheless,
 In spite of this enmity, I cannot wish
 To pay him with dishonor, or refuse
 To recognize in him the bravest man
 Of all that came to Troy, except Achilles.
 It would be wrong to do him injury;
 In acting so, you’d not be injuring him –
 Rather the gods’ laws. It’s a foul thing to hurt
 A valiant man in death, though he was your enemy. (trans. J. M. Moore)

¹¹ In his reply Christ states “Odysseus does not so much reject the idea of doing harm to enemies as qualify it: one should not seek to harm an enemy when he is no longer a threat, namely, when he is mad (121-26) or dead (1332-45); this gives considerable latitude for doing harm to sane and living enemies.” Christ appears not have read the play carefully since he overlooks the fact that even after the death of Ajax, his half-brother Teucer, wife Tecmessa, and son Eurysaces remain “sane and living enemies” (to use Christ’s phrase). Despite their *echthra*, Odysseus proposes to put an end to the conflict and prevails over the objections of Menelaus and Agamemnon, who wish to perpetuate the feud.

Finally one should not ignore Socrates and Plato who rejected the principle that one must requite evil for evil, harm for harm.¹²

Nor does *echthra* figure so prominently in the forensic speeches of the Attic orators as Cohen alleges. In fact, one accuser, the politician Lycurgus, states that personal hostility has nothing to do with his prosecution of Leocrates: “it is the duty of the just citizen not to bring to public trial for the sake of private quarrels people who have done the city no harm, but to regard those who have broken the law as his own enemies and to view crimes that affect the common welfare as providing public grounds for his enmity against them” (Lyc. *Leocr.* 6). The term *echthra* does occur in several forensic orations of Demosthenes, but it is entirely absent in the following speeches: 27, 28, 30, 31, 32, 34, 35, 38, 41, 42, 43, 44, 46, 47, 48, 50, 51, 52, 55, 56 or twenty out of forty-two. In 23 *Against Aristocrates* the accuser says he is not bringing his charge out of enmity (23.1) and asks the judges not to decide on the basis of *echthra* (23.97). In the two speeches *Against Aristogeiton* (25.32, 48, 66, 82; 26.10) the accuser uses the term *echthros* to describe an enemy of the city, of the gods, and of good men, but not a personal enemy of the speaker. In the third speech *Against Aphobus* Demosthenes talks about witnesses who might be enemies of the defendant (Dem. 29.22-24), but he does not use the term *echthra* to describe his relationship with him. In his first speech *Against Boeotus* (Dem. 39.11) Mantiheus only mentions the possibility of future enmity. In Dem. 44.59 the speaker says people who produce false affidavits are the enemies of all. In Dem. 45.65, 79 the speaker denounces someone as the common enemy of mankind and of the gods, not as his own foe. This means that in twenty-seven speeches out of forty-two (roughly two-thirds), the speaker does not describe the relationship between him and his opponent as *echthra* (enmity).

In fact, Demosthenes in his speech *On the Crown* criticizes Aeschines for bringing his charge for no other reason than personal enmity (18.12, 15). He draws a contrast between insults made by enemies and the penalties provided by the laws (18.123). Since Aeschines has brought his charge because of enmity, it is without substance (18.143). The good citizen is not motivated by personal enmity or anger (18.278), but Aeschines pursues his private enmity, the mark of the pusillanimous man (18.278-79). If Aeschines were acting justly, he would not harm the public interest to satisfy his enmity (18.293). These remarks convey a deep suspicion of enmity as a motive for litigation.

Several scholars have noted how prosecutors in public suits sometimes admit that the defendant is a personal enemy, but one should not generalize from a few isolated cases.¹³ On the contrary, L. Rubinstein has demonstrated that very few prosecutions resulted from private enmity:

¹² See G. Vlastos (1991).

¹³ D. Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* (Princeton 2000) 39 makes this mistake, which undermines much of her argument

Of the twenty-eight preserved prosecution speeches, fifteen do not cite personal enmity toward the defendant as a motive at all, while thirteen mention previous conflicts between prosecutors and defendants. However, of these thirteen only three prosecutors state that their feelings of hostility originate from their dealings with the defendants outside the political sphere. Of the remaining ten prosecutors, eight state explicitly that their previous conflicts with the defendants were firmly rooted in the political sphere (sometimes brought about by public actions initiated by the defendants against themselves), while two avoid specifying the nature of their hostile relationship altogether.¹⁴

In short, Cohen's account of Athenian values is based on an extremely small number of sources. So far we have seen that there is no reason to believe that agonistic values ruled Athenian social life or that enmity provided the normal motivation for initiating legal action. Far from favoring prolonged litigation, Athenian values discouraged men from using the courts to pursue feuds with each other. One litigant (Dem. 41.1) says it is better to accept a disadvantageous settlement than to go to court. Ariston in the speech *Against Conon* (Dem. 54.24) says: "If we chose not to bring an action under the laws concerning violence, that can reasonably be regarded as showing that we are *apragmon* and *metrios*, but not as showing him in any better light." The metic Dareius, who brought an action against Dionysodorus for a debt, did not want to appear litigious (*philodikos*) (Dem. 56.14): "We agreed to this, not because we were unaware of our rights under the contract, but because we thought we should accept a disadvantageous settlement in order not to be thought litigious (*philodikos*)."¹⁵

Instead of boasting about victories in court, litigants often seek to win the judges' good will by saying that they have never been in court before. Aeschines (1.1) begins his speech *Against Timarchos*: "Never before have I brought a public charge against any man or given him trouble at his audit; no, I have in my opinion shown restraint in this regard." A client of Isaeus (1.1) begins his speech by stating that he has never been in court even to listen to a case. Isocrates in his *Antidosis* (15.38) claims that "no one has seen me in meeting-places nor at preliminary hearings, nor in the courts, nor before the public arbitrators, but I have kept away from these things more completely than any other citizen." The defendant in Lysias' speech *On the Property of Aristophanes* (19.55) says that although he lives near the agora, he has never been seen around the courts. Aeschines (3.194) recalls how

about the role of anger in forensic oratory. ("Extant evidence reveals that the Athenians typically prosecuted only in cases where they were in fact victims or personally involved in the matter of the trial." Cf. 35.)

¹⁴ Rubinstein (2000) 179-80.

¹⁵ Cf. Lysias 10.2: "Nor would I have proceeded against him if he had said anything else actionable about me, because I regard prosecution as not befitting a free man and as excessively *philodikos*."

Aristophon was proud of winning 75 acquittals when tried on the charge of passing illegal decrees, but finds his boasting misguided. More admirable in his opinion is Cephalus, who was never indicted once on this charge. For this reason plaintiffs and prosecutors often appear reluctant to bring cases and claim their opponents have forced them to go to court (cf. Isaeus 2.1). As G. Herman has rightly observed:

The arguments put forward by the litigants show that they hoped, quite consistently, to enlist the dikasts' support by parading themselves not as vindictive, violent, explosive machos but as moderate citizens. This they did by imputing feuding characteristics to their opponents (hence the abundance of aggressive motives in the speeches) and gentle characteristics (self-restraint, meekness, a low-key sense of honour and a total lack of any explosive or aggressive disposition, for example) to themselves. In other words, they expected to sway their mass audiences by distancing themselves as much as possible from any suggestion that their actions might have been structured by feuding, violence, or vengeance. This must mean that feuding, violence and vengeance were behavioural patterns of which the dikasts, and hence the Athenian civic population in general, strongly disapproved.¹⁶

II. But were all these statements just rhetoric? When a litigant expressed his reluctance to go to court, was this merely a pose aimed at winning the court's sympathy? Or did the Athenians attempt to put the values expressed by these litigants into practice by enacting and enforcing measures to discourage frivolous litigation and the abuse of the legal system? There can be no question that the Athenians were not only aware of the problem of litigiousness but also tried to do something about it. The Athenian lawcode contained several measures aimed at reducing the volume of litigation.

1) The Athenians recognized the principle of *res iudicata*, namely, the tenet that once a court has rendered its decision, that decision was binding and could not be altered or revisited (Dem. 20.147; Dem. 38.16; Dem. 40.39-43). If the courts permitted litigants to bring the same issue to court again, it would have been impossible for the successful litigant to enforce his judgment or for the courts to resolve a single dispute.

2) The laws of Athens encouraged out-of-court settlements by recognizing such agreements as legally binding (Dem. 36.25; 37.1). If a litigant brought a suit that had already been settled by private arbitration or by agreement, the defendant could bring a *paragraphe* action to stop the case from going forward. By contrast, *pacta*

¹⁶ Herman (2000) 18. In his reply Christ claims that Athens was an agonistic society but only provides a list of contests to make his point. A list is not an argument. Later he contradicts himself by stressing "the conspicuous invocation of 'quiet' or 'cooperative' virtues in forensic oratory" and the fact that "Athenian courts ... might even reward those who sought to reduce rather than escalate conflict." For a similar view see Christ (1998) 160-92. If agonistic values prevailed in Athens, why according to Christ did they have so little effect on the decisions of judges in court?

nuda in Roman Law, that is agreements that extinguished an *obligatio*, could provide a defense (*exceptio*) but not give rise to an action (*nuda pactio obligationem non parit sed parit exceptionem*).¹⁷ The Athenians thus gave the defendant charged in a dispute that was already resolved by mutual consent an advantage that did not exist in Roman Law.

3) For many types of private cases there existed restrictions that required litigants to bring their actions before a certain date (Dem. 36.27; 38.17).¹⁸

4) The courts also required payment of fees called *prytaneia* by the plaintiff and defendant to discourage frivolous litigation in private cases. If the amount in dispute was more than 1,000 drachmas, each litigant paid thirty drachmas each. If the amount was less than 1,000 drachmas, but more than 100, each paid three drachmas. After the trial the loser reimbursed the winner for his fee.¹⁹ In some private suits the unsuccessful plaintiff had to pay a fine of one-sixth of the amount claimed.²⁰ In cases where someone claimed that a person being held as a slave was actually free but failed to prove his case, he had to pay the owner of the slave 500 drachmas and in addition pay a fine of an equal amount to the treasury ([Dem.] 58.19-20).

5) Although Athenian law did not in most cases require those who brought a public suit to pay court fees, there was a serious penalty for bringing frivolous charges. If the prosecutor did not gain at least one-fifth of the votes, he lost his right to bring any public charges at all in the future and was subject to a fine of 1,000 drachmas.²¹ According to Theophrastus (fr. 4b Szegedy-Maszak):

Ἀθήνησιν οὖν ἐν τοῖς δημοσίοις ἀγῶσιν, ἐὰν μὴ μεταλάβῃ τις τὸ πέμπτον μέρος, χιλίας ἀποτίνει καὶ ἔτι πρόσσεστί τις ἀτιμία οἶον τὸ ἐξεῖναι μῆτε γράψασθαι παρανόμον μῆτε φαίνειν μῆτε ἐφηγεῖσθαι.²²

At Athens in public cases, if someone does not gain a share of one-fifth (of the votes), he owes a fine of 1,000 drachmas and in addition he loses certain rights such as the ability to bring a *graphe* or a *phasis* or an *ephegesis* against an illegal action.

These penalties also applied when a prosecutor brought a public charge, then failed to bring the case to trial. This was a drastic step, far more drastic than the approach taken by the English courts in the eighteenth century. In this period there

¹⁷ On *pacta nuda* see Nicholas (1962) 191-92. During the discussion after my paper, G. Thür claimed that the *homologia* "hat nichts zu tun mit *pacta*." I would reply by drawing attention to a statement made by P. Kussmaul (1969) 34: "Die ὁμολογία ... sind wahrscheinlich *pacta*, welche ein bestehendes Rechtsverhältnis abändern oder einen Streit darüber beenden."

¹⁸ Harrison (1971) 116-20.

¹⁹ For the *prytaneia*, see Pollux 8.38 with Harrison (1971) 92-94.

²⁰ On the *epobolia* see Harrison (1971) 181-85.

²¹ For discussion of this penalty see Harris (1999).

²² Similar information can be found in Pollux 8.52-53. Riske proposed emending *παρανόμον* to *παρανόμων* and was followed by Harrison, (1971) 83, note 2 and MacDowell (1990) 327. The emendation is unnecessary and vulnerable to several objections. See Harris (1992) 79.

existed a tort of malicious prosecution and prosecutions for perjury and for malicious indictment, but these charges were difficult to prove and were rarely brought.²³ By contrast, the Athenian penalty was swift and severe.

6) Finally there was a *graphe sykphantias*, which appears to have been aimed mainly at accusers who brought false charges for the sole purpose of extorting money from defendants ([Dem.] 58.12-13).

III. These measures reveal that the Athenians were serious about discouraging litigants from using the courts to pursue personal feuds by bringing cases without merit. But what effect did these laws have on the behavior of actual litigants? Were they successful in reducing the amount of litigation? Or did litigants merely pay lip service to popular attitudes about litigiousness and attempt to flout the laws aimed at preventing it? Is Cohen correct when he asserts “much litigation should be viewed as feuding behavior.”?²⁴ To answer these questions, I shall examine three sets of long-term conflicts between Athenians that led to disputes in court.

Before examining these conflicts, however, it is necessary to examine the term “feud.” Several historians and anthropologists have provided definitions of the term. Wallace-Hadrill’s definition is broad and inclusive:

We may call it first, the threat of hostility between kins, then, the state of hostility between them, and finally the satisfaction of their differences and a settlement on terms acceptable to both. The threat, the state and the settlement of that hostility constitute feud but do not necessarily mean bloodshed.²⁵

Heusler came up with a similar definition, but added that feuds could involve lawsuits and arbitration instead of violence.²⁶ Drawing on the work of Black-Michaud and Nadel, W. I. Miller has drawn up a list of the basic features that characterize most feuds, the first two of which are:

1. Feud is a relationship [hostile] between two groups.
2. Unlike ad hoc revenge killing that can be an individual matter, feuding involves groups that can be recruited by any number of principles, among which kinship, vicinage, household, or clientage are most usual.

Cohen by contrast does not attempt to define the term “feud” but states that it “involves an institutionalized relationship of hostility between two individuals or groups.”²⁷ This description is so broad and vague that it could be applied to any

²³ See Harris (1999) 139-40. In his reply, Christ claims “Athenians could have taken much more drastic steps to curtail legal excess and abuse.” Christ does not say what these steps might have been. He also ignores the contrast with the English approach in the eighteenth century, which shows the Athenian approach was in fact rather stringent.

²⁴ Cohen (1995) 87.

²⁵ Wallace-Hadrill (1962) 122.

²⁶ Heusler (1911) 38.

²⁷ Cohen (1995) 87. To judge from his reply, Christ appears not to have read any of the scholarly literature about feuds and therefore repeats Cohen’s mistake of applying the label to conflicts between individuals.

prolonged conflict in any society. What is significant for our purposes, however, is that there is a general consensus among historians and social scientists that feuding *always* involves hostility between groups. To my knowledge, no scholar includes conflicts between individuals under this rubric as Cohen does.

The first conflict to be examined is the one between Mantitheus and Boeotus. Mantitheus was the son of Mantias (Dem. 39, 40). Mantitheus claimed that Boeotus, who was not raised in his father's household, brought a suit against Mantias claiming that Mantias was his father and that he was treating his son in a terrible way and preventing him from becoming a citizen. The reason for the action was probably that Boeotus was approaching (or had reached) the age of majority and needed Mantias to acknowledge paternity so that he could prove he had two Athenian parents and was thus entitled to citizenship. Mantitheus claims disingenuously that his father was reluctant to go to court because he was afraid someone he had offended during his political career would try to retaliate against him (3). Naturally he passes over in silence the possibility that Mantias did not want to go to court because he knew that the facts were against him. Instead he tried to resolve the dispute out of court by challenging Boeotus's mother Plangon to swear an oath that Boeotus was not his son. The plaintiff claims that she had agreed to deny his paternity on oath in exchange for a sum of money. When the parties met to make the challenge, Plangon double-crossed Mantias and swore that Boeotus was in fact his son (4).

This outcome gave Mantias little choice but to enroll Boeotus as a member of his phratry, but he died before he could enroll Boeotus as a member of his deme (4). As a result, Boeotus had himself enrolled in the deme but under the name Mantitheus (5). The plaintiff provides no evidence for the existence of any agreement between Plangon and his father to prove his allegations about the oath, and the story is clearly designed to undermine her credibility. The witnesses he calls testify only about the way that he and his brothers were enrolled (6). His wording is slightly vague, but seems to indicate that they corroborated his statement that Boeotus was enrolled under this name in the phratry, but under the name Mantitheus in the deme.

Since Boeotus and his brother were enrolled in their father's phratry, Mantias must have recognized them as his *gnesioi* sons, which enabled them each to gain one-third of their father's estate. Mantitheus claims he agreed to let them have two thirds of the estate, which was all his own (6). What is significant however is the way Mantitheus chooses to portray himself – he expects the court to approve his decision not to contest the inheritance in court. The only charge he brought against Boeotus was a rather flimsy one for damages for using the name Mantitheus, a suit which he appears to have lost (Dem. 39).²⁸

Years later another dispute arose over part of the inheritance. Mantitheus says that his mother was given to his father with a dowry of one talent (Dem. 40.6-7). After his father died, Mantitheus demanded that this amount be set apart from the rest

²⁸ For an analysis of the case and the reason why it failed see Harris (2000a) 57-59.

of the estate (Dem. 40.14). Not to be outdone, Boeotus and his brother Pamphilus also claimed their mother had been given a dowry of 100 minai for her marriage to Mantitheus (Dem. 40.20). Despite their quarrel, however, Mantitheus and his brothers did not contest the main division of the property nor did Mantitheus challenge their right to inherit (Dem. 40.2, 14).

Mantitheus won his suit for the dowry against Boeotus when it was heard by the arbitrator, and Boeotus did not appeal the judgment (17). When his own suit against Mantitheus came before the arbitrator, Boeotus failed to show up so the arbitrator ruled against him (Dem. 40.17). In this case too Boeotus chose not to take the case before a popular court (Dem. 40.3, 31). His only way of evading the judgment was to argue that the plaintiff should have listed Mantitheus, his real name, as the defendant, not Boeotus. This led to another trial, which occurred about eleven years after the death of Mantitheus (Dem. 40.18). We do not know the outcome of this trial.

Several aspects of this conflict are significant. First, once Mantitheus yielded to the claims made by his half-brothers to their father's estate, he did not attempt to challenge the basic division of the inheritance during the rest of the conflict. Although the conflict continued, the solution to this dispute remained untouched and fixed. Here the principle of *res iudicata* held firm. Second, several of the actors in this family drama avoided going to court at important points. When Boeotus threatened to bring an action against his father Mantias, the latter agreed to resolve the issue by an oath challenge. When this did not turn out as he hoped, he abided by the result and did not pursue the matter in court. Later after Boeotus lost his two suits before the arbitrator, he did not elect to appeal the judgments to a court. Moreover each brother attempts to portray himself as a reluctant litigant. Mantitheus claims his brother has forced him to go to court (Dem. 40.2-3), while Boeotus asserts he is not someone who likes to make trouble (*apragmon*) or to go to trial (*ou philodikos*). Third, these events took place over the course of more than eleven years (Dem. 40.18). During this time there were the following disputes: 1) the *dike blabes* brought by Mantitheus against Boeotus before the arbitrator, 2) the appeal to the popular court brought by Mantitheus, 3) the suit for the recovery of his mother's dowry brought by Mantitheus before the arbitrator, 4) the suit brought by Boeotus before the arbitrator to recover his mother's dowry, 5) the suit to recover his mother's dowry brought by Mantitheus against Boeotus under the name Mantitheus before the popular court, 6) a charge of intentional wounding brought before the Areopagus by Boeotus against Mantitheus (Dem. 40.32), 7) a suit to recover a debt allegedly paid to Mantias by the people of Mytilene brought by Boeotus against Mantitheus (Dem. 40.36). That makes a total of seven cases heard before an arbitrator or a court – just one week of litigation, during more than eleven years. Fourth, this conflict does not appear to have escalated as often happens with feuds. After Boeotus brought a serious charge against his brother, Mantitheus did not retaliate by bringing an equally serious charge. In addition, the conflict did not

expand to draw in other kin and friends; it occurred within a family, not between two families. In short, this conflict did not produce all that much litigation, and several times the participants chose not to pursue every legal option at their disposal. It certainly does not resemble the feuding behavior one finds in Medieval Iceland, or between the Montagues and Capulets in Shakespeare's *Romeo and Juliet*.²⁹ In this case Athenian values and legal measures worked together to ensure that disputes, once settled, were not continued and that conflict was kept at a peaceful and acceptable level.

One of Cohen's main pieces of evidence for his view of Athenian litigation as feuding is Demosthenes' conflicts with his guardian Aphobus and Meidias. Cohen believes that "Demosthenes engaged for a significant portion of his adult life, in a series of feuding relationships." These battles lasted "for many years."³⁰

The basic facts of the conflict are as follows: Demosthenes' father died when he was about eight, leaving him and his sister orphans and his mother a widow. The terms of his will appointed Aphobus, Therippides, and Demophon as guardians and granted them certain legacies (Dem. 27.13-15; 29.45). These men then mismanaged the estate for ten years until Demosthenes reached the age of majority at eighteen. At this point they turned over only a fraction of the original value of the estate so Demosthenes brought an action against Aphobus to recover what he could. Before the suit came to trial, Thrasylochus challenged Demosthenes to an *antidosis* (Dem. 28.17). Demosthenes claims that this was a ruse concocted by Aphobus to force him to exchange his property with Thrasylochus and thus drop his claims in regard to his father's estate. But Demosthenes parried this maneuver by accepting the liturgy despite the strain it placed on his resources. Demosthenes then won an award of ten talents against Aphobus. Aphobus tried to overturn the judgment by bringing a *dike pseudomartyrion* against one of Demosthenes' witnesses, but this suit failed (Dem. 29). As part of his effort to collect his award, Demosthenes attempted to seize a house and an estate belonging to Aphobus, but the latter claimed that the property belonged to his father-in-law Onetor. Aphobus's story was that he had pledged the property as security for the dowry of Onetor's daughter; now that they had divorced, Onetor had taken the security to recover the value of the dowry. Demosthenes argued that the dowry had never been paid and that the divorce was a sham (Dem. 30). We do not know the outcome of this suit, but Demosthenes was able to reclaim enough of his property so as to be in a position to undertake several liturgies in the following years.³¹

Cohen claims "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

²⁹ I owe this point to Lin Foxhall.

³⁰ Cohen (1995) 101.

³¹ See Davies (1971) 135-36 (three more trierarchies between 360 and 352).

case.”³² To put it mildly, this is somewhat of an exaggeration. Demosthenes only brought one suit against Aphobus and one suit against Onetor. Aphobus brought one suit against one of Demosthenes’ witnesses, and Thrasylochus challenged Demosthenes to one *antidosis*, which never went to court because Demosthenes undertook the liturgy. Demosthenes (30.15-17) says he came of age and demanded the accounts for his property in the archonship of Polyzelus (367/6) and brought his action against Aphobus in the archonship of Timocrates (364/3). There is no reason to believe that the other cases occurred long after the original suit; all together they may not have taken longer than a year.

Far from showing how Athenians used the courts to pursue feuds, Demosthenes’ disputes with his guardians show the limited range of options available to the person who wished to contest a judgment. Aphobus challenged the original decision Demosthenes won before the arbitrator, then attempted to fight the judgment rendered by the court by means of a *dike pseudomarturion* (Dem. 29). When this too failed, he had run out of ways to overturn the judgment and tried to hide his assets to prevent Demosthenes from collecting the money awarded to him. By contrast, the modern lawyer has many more ways to challenge a court judgment or a judge’s order. For instance, the *Rules Governing Civil Practice for the State of New Jersey* 4:49-2 provide that:

Except as otherwise provided by R. 1: 13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.

This opens the door for a wide range of challenges based on a variety of procedural, substantive, and evidentiary grounds. In death penalty cases the appeals process can drag on for years. There was nothing similar in Classical Athens.

According to Cohen, Demosthenes’ conflict with Meidias represented another stage in this same conflict. Cohen points to Demosthenes’ allegation in his speech against him in 346 (Dem. 21.78-80) that Meidias and Thrasylochus broke into his house after the latter made his *antidosis* challenge. There are two problems with this argument. First, one of the main characteristics of a feud is that it involves not individuals, but groups.³³ Demosthenes names several associates of Meidias who have helped him in the past or will plead for him at his trial, but none of these individuals figure in the earlier dispute with his guardians.³⁴ Second, the version of

³² Cohen (1995) 101.

³³ See Miller (1990) 180.

³⁴ Demosthenes predicts that the following will support Meidias or have supported him in the past: Polyzelus (36-38), Euctemon (103, 139), Cratinus (132), Polyectus (139), Timocrates (139), Eubulus (206-7), Philippides (208, 215), Mnesarchides

the dispute with Thrasylochus which Demosthenes gave in 346 is rather different from the one he gave in 364/3, eighteen years earlier. In the first version, Demosthenes (28.17) says that Thrasylochus challenged him to an *antidosis*, but Demosthenes barred him from his property (ἀπέκλεισα) because he wanted to obtain a *diadikasia*. With his case against Aphobus about to go to trial, however, Demosthenes preferred to perform the liturgy instead of getting tied up in more litigation. In the later version Demosthenes (21.78-80) changes his story considerably. Here Thrasylochus, now joined by Meidias, invades Demosthenes' property, tears off the doors of the rooms, uses foul language in front of his sister, and insults him and his mother. Rather than accept the liturgy, Demosthenes pays his opponents twenty *mnai*, which they use to hire out the trierarchy. The two versions are quite different and cannot be reconciled.³⁵ What is striking is that Meidias is absent from the first version and that the second version adds violence and verbal abuse missing from the first. It is difficult to resist the conclusion that Demosthenes has deliberately altered important details in the later version, delivered eighteen years after the incident, to make it suitable for inclusion in his *chronique scandaleuse* of Meidias' life. The only piece of evidence for Cohen's twenty-year feud turns out to be no evidence at all. Demosthenes' quarrel with Meidias apparently began around 348 and was resolved by the trial or settlement in 346.³⁶ When Aeschines (3.52) alludes to Meidias' punch in 330, it is significant that he does not mention any further incidents in this quarrel. If there was a feud between the two men that lasted after 346, one must ask why Aeschines, who dug up every piece of dirt he could find against Demosthenes in 330, failed to exploit it to his opponent's detriment at the trial of Ctesiphon.

The final conflict I will examine is the one between Aeschines and Demosthenes. The conflict began in 346 after Athens' second embassy to Philip. Aeschines and Demosthenes had major differences over foreign policy after the conclusion of the Peace of Philocrates. Aeschines encouraged Philip to intervene in Central Greece and free the Boeotian cities from Thebes; Demosthenes viewed this proposal as dangerous and irresponsible.³⁷ At Aeschines' *euthynai* for the second embassy, therefore, Demosthenes and Timarchus (not a family relation) brought a charge of violating the public trust while on an embassy and in particular accused him of taking bribes in return for acting against Athenian interests.³⁸ Later that same

(208, 215), Diotimus (208), Neoptolemus (215), and Blepaeus (215). None of these men figure in Demosthenes' dispute with his guardians.

³⁵ I do not understand how MacDowell (1990) 297 can state: "Although the two accounts ... give different details, there is no inconsistency between them and no reason to regard either as inaccurate."

³⁶ It is more likely that Demosthenes brought the case to court and that Meidias had to pay a small fine. Plutarch (*Demosthenes* 12) says that Demosthenes and Meidias settled out of court, but this evidence is not reliable. See Harris (1989).

³⁷ On the second embassy to Philip see Harris (1995) 78-89 with the sources cited there.

³⁸ See Harris (1995) 95-96 with the sources cited there.

year, Aeschines struck back at Timarchus by charging that he was partially *atimos* because he had been a male prostitute and squandered his inheritance and thereby had no right to bring a public charge. Aeschines won this case, and Timarchus lost his citizen rights.³⁹ This victory appeared to keep Demosthenes at bay for a while; his opponent did not work up the courage to bring his suit to court until 343 when Philip's increasing power and influence caused the Athenians to doubt the wisdom of the Peace of Philocrates. Encouraged by the conviction of Philocrates himself, Demosthenes finally prosecuted Aeschines, but lost by a narrow margin.⁴⁰ In the following years, Aeschines and Demosthenes continued to disagree about policy toward Philip, but Aeschines did not attempt to retaliate until 336, two years after the Athenian defeat at Chaeronea. Instead of attacking Demosthenes directly, however, he brought a *graphe paranomon* against Ctesiphon, who had passed an honorary decree for his rival. It then took Aeschines six years before he felt confident enough to bring his case against Ctesiphon to trial.⁴¹ The most likely explanation for the delay is that he was waiting to discover the outcome of Alexander's campaign against the Persian king.⁴² The result was a complete fiasco: Aeschines failed to win one-fifth of the votes and thus lost his right to bring any public charges at all.⁴³ The ancient biographies of Aeschines give different accounts of his activities during his last years, but contemporary sources are notably silent about him after 330. If Aeschines had remained politically active, he would certainly have attacked Demosthenes during the Harpalus scandal in 324-23 as other prominent leaders did. His absence from all our accounts of that affair (Dinarchus 1-3), when combined with the evidence of the ancient biographers, is strong evidence in favor of concluding that his defeat in 330 ended his political career. This demonstrates that the penalty for frivolous prosecutions was a harsh penalty and had devastating implications for a prosecutor's career.⁴⁴

The conflict between Aeschines and Demosthenes is one of the longest in the annals of Athenian politics, yet it produced very little litigation. There was only one direct confrontation, the prosecution of Aeschines by Demosthenes in 343. Aeschines' other cases were against Demosthenes' political associates Timarchus and Ctesiphon. There is no indication that the conflict ever expanded to include other

³⁹ For the prosecution see Harris (1995) 101-6 with the sources cited there.

⁴⁰ For Demosthenes' prosecution of Aeschines see Harris (1995) 116-18 with the sources cited there.

⁴¹ For the dates of the indictment and the trial see Wankel (1976) 13-37.

⁴² See Harris (1995) 141-42, 173-74.

⁴³ Harris (1995) 148.

⁴⁴ All of the prosecutors who incurred this penalty seem to have disappeared from political life: Tisis of Agryle (Hyper. Eux. 34), Euctemon (Dem. 21.103), Lycinus (Aeschin. 2.14; 3.62), Diondas (Dem. 18.222). *Pace* Christ, this demonstrates that the penalty for frivolous prosecutions was rather effective.

family members, relations or dependents.⁴⁵ Even after Aeschines won acquittal in 343, he did not attempt to escalate the conflict by bringing another public charge against Demosthenes. Quite the opposite, he attacked an ally of Demosthenes on a less serious charge. But what is most striking about this conflict is the conspicuous reluctance of the two men to bring their cases to court. Demosthenes waited three years between initiating his case at the *euthynai* in 346 and bringing it to trial in 343; Aeschines passed up the chance to prosecute Demosthenes after the disastrous defeat at Chaeronea, brought a charge against Ctesiphon in 336, then delayed for six years. Over sixteen years the two men faced each other in court only three times! The attitudes against litigiousness and the laws aimed at discouraging feuding in court appear to have acted as a strong deterrent for these two politicians.⁴⁶

If this analysis of Athenian attitudes toward litigation is correct, we are still left with a problem: what accounts for the large volume of litigation in Athens that Aristophanes and the Old Oligarch were complaining about? According to the editors' instructions, I have already exceeded my word limit so the answer to that question will have to be the subject of another essay.

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⁴⁵ When Demosthenes arrested Antiphon as a spy, Aeschines objected to the arrest on legal grounds (Dem. 18.132-33); there is no indication that Aeschines defended Antiphon because he was a relative or close friend. Demosthenes also arrested Anaxinus of Oreus and had him tortured (Aeschin. 3.223-25; Dem. 18.137). Aeschines' objections to the torture rested on legal grounds.

⁴⁶ The evidence of these three conflicts provides ample refutation of Christ's claim that the "the pursuit of enemies – personal or political – through the legal process was a real possibility and probably a common phenomenon," an assertion that rests on nothing more than his own *ipse dixit*. For criticism of Christ's general approach to the courts see Harris (2000b). Finally, Christ claims that "there is a great deal in forensic oratory that has little to do with law *per se*" and there is a "considerable body of material" concerning "the role of character and public service," but he presents no evidence at all to support this sweeping point. As P. J. Rhodes (2004) has shown, *pace* Christ the forensic orations in fact contain very little about character and public service that is not relevant to the legal charge at issue.

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