H-Net Reviews
in the Humanities & Social Sciences

David Cohen. *Law, Violence, and Community in Classical Athens.* Cambridge, England, and New York: Cambridge University Press, 1995. xii + 214 pp. $33.99 (paper), ISBN 978-0-521-38837-5; $59.95 (cloth), ISBN 978-0-521-38167-3.

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Published on H-Law (December, 1996)

Feuding and Forensics in Athenian Litigation

From the Department of Rhetoric at the University of California, Berkeley, David Cohen, in his third book on Greek law, aims to provide an account (p. xi) "... 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." As he says (p. 196), "... this study does not fit into any clearly established field of classical or legal historical scholarship." Instead of offering a conventional work of legal history, he uses theoretical, sociological, and rhetorical approaches; and applies social history, anthropology, and "historical legal sociology" (p. xi) to portray the role of litigation in an "agonistic democratic society," and to "reconstruct the framework of social, ideological, and discursive practices of which the law was an integral part." Although part of a series that seeks a broad audience of students and teachers of antiquity, this work's terminology and analysis will challenge theoretical, legal, or classical neophytes. Readers, however, should accept the challenge–for Cohen provides a therapeutic critique of the imposition of contemporary models of law and conflict resolution, and a stimulating perspective on Athenian legal theory, court operation, and forensic orations.

In two parts, the book moves from a level of theory to a study of Athenian legal institutions, ideologies and practices. In Part I, "The Realm of Theory" (chapters 1-3), chapter 1, "Law and Order," methodologically orients the work in a sophisticated theoretical and comparativist perspective of the study of law, conflict, and society. Cohen deconstructs and rejects evolutionist, functionalist, and positivist theoretical and historical interpretations of Athenian legal practice as reductionist. He correctly cautions that Athens did not simply progress past a primitive state of internal violent conflicts to a more modern system of resolution via a central legal system. Rather, conflicts in society were as likely to bring dissolution as equilibrium, and courts were not autonomous laboratories for the disinterested pursuit of "the facts." They were theaters of persuasion and social values. Chapter 2, "Theorizing Athenian Society: The Problem of Stability," examines *stasis*–the disintegration of a political community into warring factions–as a major concern in the works of Thucydides, Plato and Aristotle. All three agree that agonistic conflict is natural and dangerous within states, that legal and political institutions can be manipulated by private interests, and that, to avoid the disintegration threatened by centifugal forces of resentment and enmity, a society must preserve its legal order from partisan entanglements. Ch. 3, "Theorizing the Athenian State: The Rule of Law," studies notions of legal order, "the rule of law." Athenian theorists and democratic politicians agreed that the stability of the state dependeded on the rule of law, but they had different ideological constructions of the rule of law. For example, Aristotle's "censorial" model (in the *Politics*) favors limiting the power of popular deliberative bodies and entrusting magistrates with broad disciplinary authority; and Plato (in the *Laws*) grounds the rule of law in processes of education and socialization, arguing that these institutions help maintain the 'fiction' of sacred, immutable, personified laws. In contrast, the democratic model upholds the notion of law as universal and equal for all, and encourages the involvement of citizens in making laws and judging cases, and the delimitation of a private sphere protected from illegitimate intrusions by the state (for example, the notorious abuses of the Thirty Tyrants).

In Part II, "The Realm of the Courts" (chapters 4-8), Cohen locates democratic understandings of the rule of law in a fourth-century Athenian social context. It was commonplace for the agonistic inclinations of the Athenians to extend from the battlefield and stadium to the assembly and the law courts, but Cohen examines this phenomenon in detail by applying his sociological model–litigation as a form of feuding behavior in an agonistic social field–to discussions of litigation and forensic rhetoric concerning the regulation of violence. Chapter

4, "Rhetoric, Litigation, and the Values of an Agonistic Society," uses Aristotle's *Rhetoric* and various orations to set out the themes of enmity, honor, envy, and revenge that are played out in the appeals made by litigants to the values of citizen jurors. Understanding such values is essential, because Athens' legal system depended on the initiative of private citizens (as litigants and jurors), legal amateurs, and not on professional jurists and state prosecutors. Hence ligitation seldom depended on statutory interpretations or the independent pursuit of truth, but rather on asssessments of character and probability (and even self-advantage). Anticipating jurors' reactions based on their values or "normative expectations," ligitants strategically used a repertoire of topics in persuasive contexts. For example, enmity, defense of honor, and revenge for a wrong were (usually) legitimate motivations for litigation, but envy and sycophancy (malicious prosecution in pursuit of financial gain) were not.

Chapter 5, "Litigation as Feud," shows how agonistic values operated in the courts, by interpreting litigation (for example, Demosthenes' *Against Meidias*) as feuding behavior. Chapters 6-8 examine how this feuding dynamic informs litigation involving physical violence (non-homicidal assault), sexual wrongdoing (intentional sexual insult), and intra-familial conflicts over inheritance. Notable here is an argument that the law of *hubris*, which concerned the aggressive use of power and insults upon honor, allowed regulation (p. 152) "of a wide variety of consensual and non-consensual heterosexual and homoerotic sexual conduct." In all the cases discussed the litigants competitively and strategically offered rhetorical representations of themselves, and, Cohen argues, the jurors viewed the courts as an agonistic field, according to the parameters of acceptable feuding behavior.

Citing comparative examples from early modern England to Burma, but especially following Wilson's study of nineteenth-century Corsica, Cohen sees feuding not as a primitive stage or a pathological threat, but as an integral part of normal social life. Feuding can coexist with a central legal order, and it can assume different forms, from homicidal violence to competition in the political arena (p. 20): "… 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." When Athens developed central political and judicial institutions that limited blood feuding (homicidal retaliation) feuding behavior continued in other forms (for example, physical assault, verbal or sexual insults), like a game with rules, moves and countermoves, or a competition with objectives of honor, reputation and social existence. Feuding even came to co-opt the courts, which rivals used as agonistic arenas not to resolve, but to pursue and intensify their conflicts. To a degree, Cohen "sets up" his argument by establishing a theoretical model of feuding and then applying it to certain settings and sources that were inherently (ant)agonistic, adversarial, and rhetorically charged. He limits his scope to the last century of Athenian independence, 431-338 BC, and he moves from theorists preoccupied with conflict to actual forensic speeches which naturally seek to oppugn the reputation of opponents. Nevertheless, as conceptualized and applied, his argument for litigation as feud is detailed, nuanced, and persuasive.

"Conclusion: Litigation, Democracy and the Courts" tries to bring together Parts I and II through a broader conceptualization of the paradoxical relation between the theory and the ideology of the rule of law (cf. chap. 3) and the appropriation of the courts as forums for the pursuit of conflict (cf. chaps. 5-8). Cohen sees the (pp. 184-86) "… tension between the rule of law strictly construed and judgment based upon social rather than statutory criteria" as a "fundamental structural characteristic" of the nature of law in Athenian democratic society. While the democratic theory of the rule of law favored universal and equally applicable written laws, in the actual administration of justice jurors made social and moral assessments, judging cases via the civic merits of citizens and not just the application of laws to acts. To mediate this "tension" between legal ideology and practice, between statutes and agonistic values, and between equality and hierarchy in the culture of honor, Athens developed an ideological rationale based on the identification of law and legal order with the *demos*, and its institutions and interests. By this ideology, them equilibrium of democracy rested on the willingness of Athenians to judge and to be judged by their fellow citizens not just in terms of legal statute, but in terms of social merit and honor. The *demos* itself mediated between the legal process and the social and political hierarchy, between legal order and civic interest, between the evaluations of both the actions and the persons of the litigants. As Cohen wrote earlier (pp. 116-17), "At Athens, the legal process was what ordinary citizens made of it, no more and no less."

This work will fare well in the court of scholarly opinion, and the verdict will be favorable if perhaps not unanimous. Some may see some circularity or redundancy in the work, but few jurors will be unimpressed by Cohen's presentation of arguments and evidence. Cohen makes a strong case for viewing litigation as feuding behavior in the broader context of an agonistic and democratic society.

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Citation: Donald G. Kyle. Review of Cohen, David, *Law, Violence, and Community in Classical Athens.* H-Law, H-Net Reviews. December, 1996.
URL: http://www.h-net.org/reviews/showrev.php?id=733

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