

I will be presenting a draft chapter (“Enforcing Social Norms in Court”) from my current book project, *Law and Order in Classical Athens*. To give you some context, I’ve also included a brief description of the book and chapter summaries.

Many thanks,  
Adriaan Lanni

## Law and Order in Classical Athens

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### Rationale of the book

The classical Athenian “state” had almost no formal coercive apparatus to ensure order or compliance with law: there was no professional police force or public prosecutor, and nearly every step in the legal process depended on private initiative. Several scholars have also contended that Athens did not have a “rule of law” in the sense that the courts did not enforce the laws in a predictable and consistent manner. And yet Athens was a remarkably peaceful and well-ordered society by both ancient and contemporary standards. Why?

*Law and Order in Ancient Athens* draws on contemporary legal scholarship to suggest some answers. Scholars typically attribute Athens’ success to internalized norms and purely informal enforcement mechanisms. In *Policing Athens* (PUP 1994), Virginia Hunter emphasizes informal social sanctions such as gossip and private dispute resolution mechanisms such as family courts and private arbitration. Gabriel Herman’s *Morality and Behaviour in Democratic Athens* (CUP 2006) argues that small size and an internalized code of behavior requiring self-restraint and cooperation created a sense of social solidarity that fostered order and compliance with law.

In this book I will argue that law and formal legal institutions played a greater role in maintaining order than is generally acknowledged. The legal system *did* encourage compliance with law, but not through the familiar mechanism of imposing sanctions for violating statutes. The book uses contemporary research on the interaction between law, social norms, and behavior to explore the various ways in which the formal legal system fostered order. The use of character arguments in court and the frequency of legal procedures provided powerful incentives for Athenians to abide by informal social norms so that misbehavior could not be used against them later in court. The Athenian procedures for enacting and publicizing laws meant that statutes that were rarely enforced may have altered behavior, as part of what modern scholars call the expressive function of law. Court arguments were a form of moral persuasion performed before a large percentage of Athenian citizens on a daily basis, shaping and reinforcing internalized norms.

Through these examples and others, I show how formal institutions facilitated the operation of informal social control in a society that was too large and diverse to be characterized as a “face-to-face community” or “close-knit group.” I also discuss how Athens’ peculiar and indirect forms of coercion were well-suited to its values of self-government and limited state interference in private conduct. My hope is that the book will cast light on how formal legal institutions subtly influenced a citizenry legendary in its own time and today for its apparent freedom from state coercion.

## Table of Contents

### *Introduction*

*Chapter 1: Informal social control and its limits*

*Chapter 2: Pockets of effective law enforcement*

*Chapter 3: The expressive effect of statutes*

*Chapter 4: Enforcing social norms in court (draft included)*

*Chapter 5: Court argument and the internalization of norms*

*Chapter 6: Transitional justice in Athens: laws, courts, and norms*

*Conclusion*

## Summary of Chapters

### *Introduction*

The introduction will lay out the puzzle addressed in the book: how Athens achieved a high level of social order in the absence of a strong state or a rule of law. This will require establishing that Athens had a high level of social order compared to other ancient societies. While scholars disagree about how peaceful Athenian society was, even those who characterize Athens as an agonistic feuding society (e.g. David Cohen) agree that Athens displayed remarkable political stability and experienced much less violence than other ancient societies, Rome in particular. The introduction will also include a discussion of the applicability of modern legal scholarship to Athens, an overview of the Athenian legal system for non-specialist readers, and a summary of the argument of the book.

### *Chapter 1: Informal social control and its limits*

This chapter surveys what we know about how informal social control operated in practice. Some aspects of informal social control, such as the governance of the *oikos* and informal dispute resolution procedures, have attracted extensive scholarly interest. But others, particularly the operation of social sanctions, have not. What form did social sanctions take (shunning, public ridicule, exclusion from associations or business deals, etc)? Who carried them out? What were the ramifications of these sanctions for the average Athenian? This chapter draws on recent research on social influence to analyze how social sanctions operated as both a form of coercion and acculturation in classical Athens.

The chapter also argues that informal social control, though important, cannot on its own account for the high level of social order in Athens. Athens was not a face-to-face society; recent research suggests that even the demes were not as cohesive, close-knit groups as was traditionally thought.<sup>1</sup> Moreover, the average Athenian would likely have had to interact on a regular basis with men from outside the local community. A more

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<sup>1</sup> Thuc. 8.66; Dem. 47.61; Dem. 53.16; E. Cohen, *The Athenian Nation* 106 (PUP 2000); K. Vlassopoulos, "Free Spaces: Identity, Experience, and Democracy in Classical Athens" *CQ* 57.1:33-52 (2007).

complete explanation of Athens' success must look beyond purely private mechanisms for fostering order and compliance with law.

### *Chapter 2: Pockets of effective law enforcement*

This chapter begins by summarizing my view, shared by some but by no means all classicists, that Athens did not have a “rule of law” in the sense that the courts did not predictably and consistently enforce the laws. The chapter then discusses two special instances where the Athenians relied on a straightforward enforcement of laws to maintain order. First, public order offenders, including pickpockets, thieves and highway robbers were subject to arrest (in some cases with the assistance of a public official) and, if they confessed, summary execution. Second, market transactions were regulated in a variety of ways by state officials. In this way, Athens insured a minimum level of public order and economic security, making it possible for a more limited formal coercive apparatus to operate effectively in the rest of the system.

Chapters 1 and 2 thus demonstrate that in isolation neither informal social control nor the traditional Austinian mechanism of law backed by sanctions can account for Athens' high level of social order. Chapters 3-6 draw on recent research that understands “law” as the product of complex interaction between formal and informal norms and institutions to show how order was maintained in Athens.

### *Chapter 3: The expressive effect of statutes*

Recent work on Athenian law, particularly by Anglo-American scholars, tends to focus on rhetoric and procedure rather than substantive law, in part because many of these scholars believe that the courts did not predictably enforce statutes. But legal scholars have shown that a law can have a significant impact on behavior even if it is rarely enforced. A law may serve an “expressive” or “symbolic” function: it makes a statement about what the society considers acceptable and unacceptable behavior. Under some circumstances, a law can change, strengthen, or weaken the social norms surrounding a practice, and thereby indirectly influence behavior.

This chapter argues that Athenian statutes may have fostered compliance with law even though they were rarely directly enforced. The expressive function of law may have served an even more important role in ancient Athens than it does today. Because each statute was approved by thousands of citizens in the popular Assembly, Athenian laws were relatively direct, well-publicized expressions of community sentiment. This chapter also includes two detailed case studies of laws that were rarely enforced but appear to have had some effect on behavior: (1) the protection of slaves in the law forbidding *hubris*; and (2) the laws forbidding former male prostitutes from actively participating in politics.

### *Chapter 4: Enforcing social norms in court (draft included)*

This chapter argues that the formal Athenian court system played a vital role in maintaining order. I contend that the courts may have had a substantial impact on behavior

despite the ad hoc nature and inherent unpredictability of individual verdicts. Athenian court verdicts often turned on the extent to which the litigants conformed to social norms. The high volume of litigation meant that the average Athenian could anticipate being involved in a legal proceeding during which the jury would consider aspects of his character and past behavior unrelated to the legal issue in the case. As a result, the court system provided concrete incentives to conform to a host of extra-legal norms. This approach also facilitated the use of informal social sanctions by giving litigants incentives to discover and publicize their opponents' past norm violations. Moreover, the trial, conducted before hundreds of fellow citizens, functioned as a shame sanction in itself.

This peculiar approach to norm enforcement compensated for apparent weaknesses in the state system of coercion. It mitigated the effects of under-enforcement in a private prosecution system by encouraging litigants to uncover and punish their opponents' past violations. Court enforcement of extra-legal norms also permitted the Athenians to enforce a variety of social norms while maintaining the fictions of volunteerism in military and public service and of limited state interference in private conduct.

#### *Chapter 5: Court argument and the internalization of norms*

This chapter argues that Athenian court arguments, delivered before hundreds of jurors, helped maintain order by shaping and reinforcing norms. Much social scientific work has been done on persuasion—the active inculcation of norms—as a mechanism of social influence. I focus on two techniques of persuasion: (1) “framing” (strategically framing a counter-attitudinal message in a way that resonates with already accepted norms) and (2) “cuing” (encouraging a systematic examination of beliefs in an iterated, highly institutionalized environment where new information is linked to broadly shared attitudes). The chapter shows how Athenian court speeches used these techniques to persuade audiences and thereby help internalize norms.

#### *Chapter 6: Transitional justice in Athens: laws, courts, and norms*

This chapter will draw together the themes of the book through a brief examination of Athens' successful transition to democracy in 403 B.C following the oligarchic coup. I will examine the symbolic function of the amnesty forbidding prosecutions based on actions taken during the coup, how the courts nevertheless rewarded and punished litigants for their actions during the revolution in unrelated cases, and how court arguments in this period helped persuade Athenians to carry out a peaceful transition. These features of the Amnesty will be familiar to classicists; the goal of this short chapter will be to use the Amnesty to illustrate how law, court arguments, and norms interacted to maintain order in Athens.

## Chapter 4

### Enforcing Norms in Court

In this chapter we turn to the operation of the Athenian popular courts. Just as in the case of Athenian statutes, court verdicts played a vital role in maintaining order despite the absence of the operation of the rule of law. I argue that the courts may have had a substantial impact on Athenian behavior despite the ad hoc nature and inherent unpredictability and inscrutability of individual court verdicts. While the Athenian courts did not reliably and predictably enforce the laws under which cases were brought, the courts did, in the aggregate, enforce norms. Many of these norms were informal social norms, not subject to explicit legal regulation: norms relating to the treatment of friends and family and private sexual conduct, for example. Other norms enforced by the courts were the subject of statutes, but were unrelated to the charge in the case. I refer to the norms enforced by the courts as “extra-statutory norms,” meaning that they were unrelated to the statute at issue in the case in which they were raised, though some of these norms were the subject of other statutes.

The sheer volume of litigation and routine legal proceedings such as citizenship hearings meant that the average Athenian could anticipate being involved in a legal proceeding far more often than someone living in contemporary Western society, and that during this hearing the jury would very likely consider aspects of his character and past behavior unrelated to the dispute. As a result, the court system played an interesting disciplinary role, providing concrete incentives to conform to a host of social norms. Paradoxically, the aspects of Athenian court argument that seem most removed from a rule of law may actually have played the most important role in fostering order.

Athens’ unusual approach to norm enforcement adds a new twist to the academic literature that examines the relationship between social norms and informal sanctions (such as gossip or private dispute resolution) on the one hand, and formal legal rules and institutions on the other.<sup>2</sup> While much of the norms literature focuses on the choice between informal and formal norms and institutions,<sup>3</sup> in Athens informal norms were enforced *through* the formal court system.

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<sup>2</sup> e.g., *Law and Society Review* 2000; *Journal of Legal Studies* 1998; *University of Pennsylvania Law Review* 1996.

<sup>3</sup> See, e.g., Bernstein 1992 (describing why the diamond trade opted for private dispute resolution procedures); West 1997 (describing the relative advantages of rules and norms in the context of the governance of sumo wrestling in Japan); Ellickson 1991 (arguing that the relationship of the parties, the size of the stakes, the complexity of the dispute and the ability to externalize costs determine whether informal or formal norms are favored). Robert Cooter (1996) has suggested that in some circumstances courts should look to norms that have arisen in specialized business communities in determining fault and liability. And, of course, custom has long been a part of the common law. But Cooter’s suggestion and the use of custom are different from the Athenian approach in one crucial respect: rather than using informal norms to give content to the rules and standards provided for by law, Athenian courts enforced extra-statutory norms that were completely unrelated to the legal issue in dispute.

This chapter also argues that the Athenian courts' peculiar approach to norm enforcement compensated for apparent weaknesses in the Athenian apparatus of coercion. Courts facilitated the operation of informal sanctions by encouraging litigants to publicize their opponent's norm violations. Moreover, allegations of misbehavior made in court and adverse verdicts served as important shame sanctions in themselves, quite apart from any formal penalties meted out by the jury. The Athenian approach also compensated for difficulties in legal enforcement. The Athenians' private prosecution system resulted in systematic under-enforcement of laws, particularly "victimless" offenses and offenses committed against victims who lacked the resources to bring suit. By permitting any past norm violation to be used against a litigant at trial, the Athenian approach encouraged litigants to uncover and punish their opponents' past unprosecuted violations. Finally, court enforcement of extra-statutory norms permits a state to regulate behavior while maintaining the fiction that it is not doing so. In the Athenian context, this meant that the Athenians could enforce a variety of social norms while maintaining the fictions of voluntary devotion to military and public service<sup>4</sup> and of limited state interference in private conduct. In this way, the formal enforcement of putatively informal norms veiled some of the highly coercive aspects of Athenian society.

## II. Norms in Court

There appears to have been no rule setting forth the range and types of information and argument appropriate for popular court speeches.<sup>5</sup> Speakers were limited only by the time limit and their own sense of which arguments were likely to persuade the jury. Arguments based on extra-statutory norms appear again and again in the speeches, indicating that speechwriters believed that jurors would be influenced by such arguments. By "extra-statutory norms" I mean norms that were unrelated to the legal charge in the given case: bringing up an opponent's bribery conviction in an inheritance case, or boasting of one's public services or devotion to family in an assault case, for example. To be sure, Athenian jurors probably perceived discussion of these norms as character evidence relevant to deciding whether the defendant had committed the act charged, or whether he deserved the prescribed or suggested penalty, or both.<sup>6</sup> An Athenian litigant or juror would not perceive statutory and extra-statutory arguments as fundamentally different in character or effect.<sup>7</sup> By labeling these norms "extra-statutory" I am simply highlighting the fact that Athenian verdicts appear to have often turned not on evidence about whether the defendant's behavior had or had not met the criteria for the charge, but rather on evidence about whether one or other of the litigants had or had

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<sup>4</sup> As I explain in more detail below, both military service and liturgies were required by law, but informal norms dictated service beyond the minimum requirements, and law court speakers regularly crow about their exceptional service.

<sup>5</sup> The *Athenaion Politeia* (67.1) refers to an oath to speak to the point taken by litigants in private cases, but this oath is never mentioned in our surviving popular court speeches and if in fact it existed, it appears to have had no effect (for discussion, see Lanni 2006: 113&n.4).

<sup>6</sup> Lanni 2006: 59-64.

<sup>7</sup> However, the treatment of statutory and extra-statutory arguments in the popular courts was not entirely symmetrical: law court speakers do not explicitly urge the jurors to ignore the law in favor of other considerations; rather, they typically argue that both law and justice support their claim (Lanni 2006:72-73).

not adhered to norms unrelated to the dispute. What is important for our purposes is that the norm enforced by a verdict was often not the law under which the case was brought.

To give an idea of the content of the norms enforced by Athenian courts, I would like to briefly review six general categories of extra-statutory norms cited by Athenian litigants with particular frequency: (1) treatment of family and friends; (2) moderation in the face of conflict; (3) honesty and fair dealing in business affairs; (4) loyalty and service to the city; (5) adherence to norms of private conduct, particularly sexual mores; and (6) obedience to laws unrelated to the subject of the dispute.<sup>8</sup> Some of these norms were purely informal. Others were subject to legal regulation, but were used by speakers in cases involving unrelated statutes. For example, legal procedures were available against those who violated the law banning desertion from military service. Litigants in suits about completely unrelated matters eagerly exploit any opportunity to argue that their opponents had contravened these norms.

A quick word on methodology is in order before we take a closer look at how the six categories of extra-statutory norms arise in our surviving speeches. Since we rarely know the outcome of an Athenian case, it is impossible to say whether a particular speech was considered persuasive. Even in the few cases where we do know the outcome, the absence of reasons for the jury's verdict makes it difficult to discern which arguments swayed the jury. Kenneth Dover long ago laid out the standard approach for dealing with these difficult rhetorical sources: a litigant who wished to be successful would presumably limit himself to statements and arguments that were likely to be accepted by a jury.<sup>9</sup> Legal arguments may be self-serving, but they generally remain within the realm of plausibility. When particular types of arguments are used many times over by different speechwriters in a wide array of cases, as they are in the case of our extra-statutory norms, we can surmise that these arguments were thought to be persuasive.<sup>10</sup>

#### A. *Treatment of Family and Friends*

Perhaps the most well-entrenched norms in Athenian society related to the obligations of *philia* ("friendship"). *Philia* does not correspond to modern ideas of friendship. It encompassed a variety of relationships, including (from strongest to weakest) immediate family, kin, friend, neighbor, demesman (roughly, "fellow villager"), and even fellow-citizen, and included the reciprocal duties and obligations that accompanied each of these relations and differed according to the strength of the

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<sup>8</sup> Although discussion of these extra-statutory norms were common *topoi*, and their use was influenced to some degree by the requirements of genre and jurors' expectations, speakers did not present generalized "stock" characters and arguments. Instead, they presented highly individualized arguments based on the specific character of the parties (Lanni 2006: 46-64).

<sup>9</sup> Dover 1974: 8-14.

<sup>10</sup> There is no reason to think that the (possibly revised) published versions of our speeches are more likely to contain references to extra-statutory norms than the speeches actually delivered in court. Speechwriters published speeches to attract future clients; they may have been tempted to respond to persuasive counter-arguments that were raised in court, but they had no incentive to misrepresent the types of argumentation used. A handful of speeches in political cases were written, delivered, and presumably published by famous politicians such as Demosthenes or Aeschines. These authors may have had more of an incentive to expand on references to their good character in the written version to enhance their public reputations, but these texts do not make more use of extra-statutory argumentation than our other surviving court speeches, and in any case they represent a very small proportion of our corpus. Moreover, several sources, both legal and non-legal, comment on the tendency of Athenian court speakers to resort to extra-statutory arguments (e.g., Ar. *Vesp.* 562-570; Pl. *Apol.* 35a-b).

relational tie.<sup>11</sup> One was expected to offer assistance in times of emergency or shortage to those with whom one shared a bond of *philia*.<sup>12</sup> A few of these obligations were regulated by statute: for example, it was illegal to mistreat one's parents or grandparents by failing to provide food or housing in their old age, physically abusing them, or failing to provide them with a proper funeral.<sup>13</sup> But most of the norms relating to proper treatment of neighbors, friends, and relatives were purely informal and of a vague and general character.

The surviving court speeches include many discussions of the litigants' treatment of friends, neighbors, and relatives. Discussion of these norms appear in legal disputes of all sorts, from charges of political corruption<sup>14</sup> to inheritance disputes.<sup>15</sup> Litigants commonly describe how they dutifully took care of their female relatives<sup>16</sup> and charge that their adversary mistreated his parents or other close kin.<sup>17</sup> The prosecutor charging the defendant with being a state debtor in *Against Aristogeiton* provides a long list of the defendants' violations of these norms: he charges that Aristogeiton failed to bail his father out of prison, refused to pay for his subsequent burial, physically abused his mother, and even sold his own sister into slavery.<sup>18</sup> Similarly, speakers emphasize their generosity toward friends and neighbors and their opponents' disloyalty.<sup>19</sup> To continue with the example of *Against Aristogeiton*, the prosecutor recounts that Aristogeiton so completely and routinely flouted the norms of friendship, according to the prosecutor, that even his fellow criminals in prison voted to shun him.<sup>20</sup>

#### B. *Moderation in the Face of Conflict*

The second category of informal norms that arises in the speeches is the obligation to act in a moderate and reasonable way when faced with conflict. Gabriel Herman<sup>21</sup> and Michael Gagarin<sup>22</sup> have recently observed that Athenian litigants present themselves as abiding by an ethic of self-restraint: in several cases speakers boast that they endured multiple insults and violent injuries from their opponents without retaliating.<sup>23</sup> Speakers also charge their opponents with being litigious and emphasize that they themselves are unaccustomed to being involved in legal disputes.<sup>24</sup> This norm also arises in the context of how the litigants have conducted themselves in the course of the litigation. Speakers routinely claim that they were reluctant to litigate and would have

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<sup>11</sup> Ar. *NE* 1165a14-35; Konstan 1997:53-59; Millett 1991:110-114.

<sup>12</sup> Dem. 53.4; Lys. 1.14; Din. 2.9; Ar. *Clouds* 1214, 1322; Xen. *Mem.* II.2.12.

<sup>13</sup> Lys. 13.91; Aesch. 1.28; Dem. 24.103; *Ath. Pol.* 56.6.

<sup>14</sup> e.g., Din. 2.8, 11, 14.

<sup>15</sup> e.g., Is 5.39-40.

<sup>16</sup> e.g., Lys. 16.10; Is. 10.25.

<sup>17</sup> e.g., Dem. 24.107, 201; 25.54-5; Din.2.8; Lys. 10.1-3; Lys. 14.28; 32.9, 11-18; Is. 5.39-40; 8.41; Aesch. 1.102-4; 3.77-78.

<sup>18</sup> Dem. 25.53-55.

<sup>19</sup> Ant. 2.2, 12; Lys. 19.56; Is. 5.35, 40, 43; Lys. 6.23, 12.67; Dem. 25.26-28; 37.15; Aesch. 2.22, 55.

<sup>20</sup> Dem. 25. 61-62.

<sup>21</sup> Herman 2006:159-175, 190-202, 402-414.

<sup>22</sup> Gagarin 2002.

<sup>23</sup> E.g., Lys. 3.9: "I chose not to exact justice for these crimes rather than have the people think me to be unreasonable."

<sup>24</sup> e.g., Dem. 54.24.

preferred to settle the dispute amicably or through arbitration, and allege that the suit only reached the trial court because of their opponent's stubbornness or aggressiveness.<sup>25</sup>

C. *Honesty and Fair Dealing in Business Affairs*

A third category of extra-statutory norms is honesty and fair dealing in business relationships. Speakers frequently bring up their general reputations for fair dealing and good business practices quite apart from the details of the deal in question with the expectation that this evidence will influence jurors. To cite just one example, the speaker in Demosthenes 37, a case involving a series of mining contracts, expresses fear that his case will be prejudiced by his opponent's arguments that he is a money-lender and therefore presumptively dishonest, and presents witness testimony "regarding what sort of person I am toward men who lend money on bond and toward those in need."<sup>26</sup> The fact that litigants were expected to speak for themselves in court may have provided valuable demeanor evidence to help the jury evaluate all types of character arguments, but particularly those involving honesty and fair dealing.<sup>27</sup>

D. *Loyalty and Service to the City*

Litigants' claims of loyalty and public service are perhaps the most interesting for our purposes because they provide the most blatant example of discussion of norms unrelated to the legal charge in the case. The epilogue of many of our forensic speeches includes a list of the speaker's (and his family's) services to the city and criticisms of his opponent for insufficient or deficient public service.<sup>28</sup> As several scholars have pointed out, litigants were sometimes quite forthright about their expectation that the jury will find for them out of gratitude (*charis*) for their public services.<sup>29</sup> Typical is the rhetoric used by a defendant in a public corruption case. He lists various public dramatic competitions that he sponsored and describes his naval exploits during the Peloponnesian War. He then suggests that the evidence of his public-spiritedness should determine the verdict: "having put myself in danger defending you and completed so many services for the city, I am not seeking a reward like other men do, but simply that I not be deprived of my own property [through this suit]".<sup>30</sup>

The norms relating to public service took several forms. Most prominent in the speeches is the importance of performing liturgies, which involved paying for either a festival event, such as a tragic drama, or equipping a navy ship for a year.<sup>31</sup> Performance of liturgies was a legal requirement for wealthy citizens. A man seeking to avoid serving

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<sup>25</sup>Dem. 21.74; 27.1; 29.58; 30.2; 40.1-2; 41.14-15; 42.11-12; 44.31-2; 47.81; 48.2,40; 54.24; Lyc. 1.16; Lys. 3.3; 9.7; Is. 5.28-30; for discussion see Hunter 1994:57; Dover 1994:187-192. One litigant claims that he was willing to accept a settlement that was less than fair to avoid litigation: "we agreed [to a settlement], not because we were ignorant of what was just in light of the contract, but because we thought that we should compromise a bit and yield so that we not be thought litigious." (Dem. 56.14). Demosthenes 57 offers an example of the speaker's contrasting his own restraint in pursuing his claim with his opponent's violent and inappropriate use of self-help (Lanni 2006:49).

<sup>26</sup> Dem. 37.52-54. Other examples: Dem. 35.1, 17-25; 36.55-58; 45.68; 49.1-2; Is. 5.40.

<sup>27</sup> In fact, speechwriters attempted to write their speeches in a way that helped the speaker make a positive impression on the jury through the use of *ethos* and dramatic characterization (Carey 1994:34-43).

<sup>28</sup> e.g., Ant. 5.74; Andoc. 1.141-149; Lys. 6.46; 7.31; 16.18; 18.2; 20.23; 25.12; Is. 4.27; 5.36; 7.37-41; Dem. 21.161-162; 25.78; 54.44.

<sup>29</sup> Christ 2006:172-181; Johnstone 1999:100-108; Ober 1989:226-230; Whitehead 1983.

<sup>30</sup> Lys. 21.11.

<sup>31</sup> Christ 2006:146-55; Gabrielsen 1994; Sinclair 1988:54-64.

could seek one of several statutory exemptions,<sup>32</sup> and could even bring a suit arguing that another, wealthier, citizen should perform in his stead.<sup>33</sup> Although liturgies were legally required, there was some flexibility in which liturgies to perform (some were much more expensive than others), how often to participate, and how much money to spend. Informal norms encouraged citizens to go beyond the minimum requirement; litigants listing their public services tend to focus on high-priced liturgies such as the triarchy, suggest that their service has entailed significant financial sacrifice, and emphasize that they performed liturgies many times, implying that they volunteered to perform extra services.<sup>34</sup> Litigants also attack their opponents for shirking liturgies or the taxes periodically assessed from the rich, or for performing their liturgies in a cheap or shoddy manner.<sup>35</sup>

While the norms surrounding liturgies and taxes applied only to wealthy litigants, all citizens could boast about (or be attacked regarding) their approach to military service. Laws prohibited draft dodging, deserting the ranks, and other forms of cowardice,<sup>36</sup> but these laws were rarely enforced through lawsuits.<sup>37</sup> Extra-statutory norms relating to military service, on the other hand, abound in our court cases. Speakers routinely boast of their (and their family's) longstanding and courageous service in the military, and charge their opponents with draft evasion and cowardice.<sup>38</sup>

Loyalty to the democracy was another extra-statutory norm discussed in court cases. Athens suffered two short-lived oligarchic revolutions in 411 and 404 B.C.<sup>39</sup> Following the restoration of the democracy in 403 B.C., an amnesty was passed to protect citizens who had participated in the oligarchy.<sup>40</sup> Lawsuits based on actions taken prior to the restoration of the democracy were prohibited, with two exceptions: certain high officials were exempted from the amnesty, and suits alleging murder committed with one's own hands could go forward.<sup>41</sup> Although the amnesty prohibited prosecutions based on participation in the oligarchy, a citizen's actions during the city's political upheavals could help or hurt him in lawsuits arising out of unrelated matters. In the years following the revolutions, litigants regularly advertise their longstanding democratic sympathies and describe how they were forced into exile or otherwise harmed by the oligarchic

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<sup>32</sup> For example, there were limits on how often a citizen could be called to perform certain liturgies (Dem. 50.9; Ath. Pol. 56.3; Is. 7.38; for discussion, see Christ 2006:151-153).

<sup>33</sup> Under the *antidosis* procedure, a man called to perform a liturgy could challenge an allegedly wealthier man to choose between carrying out the liturgy or exchanging his property with the challenger. If the man refused both options, the case would be brought to court to decide which should perform the liturgy (MacDowell 1993:161-164).

<sup>34</sup> E.g., Lys. 21.1-5, 25; Lyc. 1.139-40; Lys. 3.47-8; Is. 4.27-29; 5.41-46; 7.37-41; Lys. 18.21,24-5; 19.56-57. Lys. 19.9; 21.1-5; Dem. 38.26; 50.7. Christ 2006: 172-76 provides examples of speakers describing the extra financial burden liturgies had placed on them); Christ 2006:200-204 discusses how speakers sought to represent themselves as voluntarily performing public services.

<sup>35</sup> Lys. 1.27-28; 6.46, 21.20; 26.21; 36.26; Is. 5.45; Dem. 21.154; 54.44; 42.22; Aesch. 1.101.

<sup>36</sup> Lys. 14.5; Aesch. 3.175-176; Christ 2006:118-124; Hamel 1998.

<sup>37</sup> Christ 2006:63, 133.

<sup>38</sup> Attacks on opponents for draft evasion: Lys. 6.46; 21.26; 30.26; Isoc. 18.47-48; Is. 4.27-29; 5.46; Dem. 54.44; Boasts of hoplite service: Lys. 16.13; Is. 7.41; Aesch. 2.167-169.

<sup>39</sup> Hansen 1999:40-43.

<sup>40</sup> Ath. Pol. 39; Wolpert 2002:29-47.

<sup>41</sup> Ath. Pol. 39; Wolpert 2002:29-47.

revolts, and suggest that their opponents participated in the oligarchic revolutions or supported the oligarchic regime.<sup>42</sup>

E. *Norms of Private Conduct*

The frequent use of attacks on an opponents' private conduct is another of the more striking aspects of Athenian forensic oratory. We will see in Part V that the legal regulation of sexual activity appears to have been limited to behavior that was perceived to threaten public order. Yet litigants regularly charge their opponents with sexual deviance of all sorts.<sup>43</sup> Litigants also criticize their opponents for everything from extravagance,<sup>44</sup> poor money management,<sup>45</sup> and drunkenness<sup>46</sup> to walking quickly and talking loudly,<sup>47</sup> and cite their own moderation and private virtue.<sup>48</sup> Aeschines' personal attacks on Timarchus when prosecuting him under a law forbidding former male prostitutes from speaking in the Assembly is particularly memorable: he charges that Timarchus squandered his family estate and "was a slave to the most shameful pleasures, fish-eating, extravagant dining, girl-pipers and escort-girls, dicing, and the other activities none of which ought to get the better of any man who is well-born and free."<sup>49</sup> The relevance of "private" conduct in court extended to members of litigants' household. Litigants occasionally charge the female members of their opponent's *oikos* with violations of extra-statutory norms in an effort to influence the verdict.<sup>50</sup>

F. *Legal Norms Unrelated to the Charge*

Legal norms other than the statute under which the case was brought are also frequently discussed by law court speakers. Litigants regularly emphasize their own clean records and describe any prior crimes and/or convictions of their opponents.<sup>51</sup> Discussions of past crimes are not limited to charges similar to the case at hand; any prior violation of the law by a litigant or his ancestors could be used against him. For example, when Alcibiades the Younger, the son of the famous general, was charged with deserting the ranks, his prosecutor provides a long list of his past crimes, including adultery and attempted murder, and recounts the treasonous behavior of his father. He then states, "In response to these acts it is fitting both for you and for future jurors to take vengeance on whomever of these men [i.e., the members of Alcibiades' family] whom you catch."<sup>52</sup> A litigant could help his case by exposing any bad acts or crimes committed by his opponent against anyone else in the past, even if the past act was completely unrelated to the current dispute. Similarly, anytime a litigant walked into court, he could wind up defending himself for any act he had committed in the past. The prosecutor in *Against*

<sup>42</sup> e.g. Lys. 13.90; 18.10; 24.24;25.15; 26.5; 28.12; 30.15; for discussion see Wolpert 2002:100-119.

<sup>43</sup> e.g., Aesch. 2.151; 3.238; And. 1.100, 124-27; Lys. 13.66; 14.25-26; Is. 6.18-21; 8.44; Dem. 36.45.

<sup>44</sup> Dem. 21.133-34, 158; 36.45; 38.27; Aesch. 1.95-100; Din. 1.36.

<sup>45</sup> Lys. 14.27; Aesch. 1.97-105; Din. 1.36; Is. 5.43.

<sup>46</sup> Lys. 3.5-9; 24.25-29; 30.2; Dem. 38.27.

<sup>47</sup> Dem. 37. 52.

<sup>48</sup> Lys. 5.2; Andoc. 1.144-145; Isoc. 16.22-24; Is. 10.25.

<sup>49</sup> Aesch. 1.42. trans. Fisher 2001. On fish-eating as paradigmatic gluttonous behavior, see Fisher 2001: 174-175; Davidson 1998: 3-35.

<sup>50</sup> Dem. 25.26 (past crime committed by mother); Is. 6.49-50 (religious morality); Dem. 40.50 (extravagance). Discussion of women is much more common in attempts to raise doubts about an opponent's citizenship status (e.g. Aesch. 2.78; for discussion see Hunter 1994:111-115).

<sup>51</sup> e.g. Aesch. 1.59; 2.93; Din. 2.9ff; Lys. 6.21-32; 13.64, 67; 18.14; Is. 4.28; 8.41; Dem. 21.19-23; 25.60-63; 34.36.

<sup>52</sup> Lys. 14.30-31.

*Aristogeiton*, for example, explicitly argues that the jury should convict in part on the basis of the defendant's past crimes, stating that he deserves the death penalty "on the basis of both his whole life and the things he has done now."<sup>53</sup> Interestingly, even bad acts committed against slaves, such as the cases of *hubris* described in the previous chapter, could be used to taint a litigant in court.<sup>54</sup>

What I hope I've shown so far is that the extent to which a litigant had conformed to a wide variety of extra-statutory norms could influence his legal case. In essence, a litigant's conduct over the course of his entire life was deemed relevant to the jurors' decision. I've argued elsewhere that the Athenians' broad approach to relevance in the popular courts reflected a conscious choice to embrace discretionary, individualized justice rather than a rule of law.<sup>55</sup> That is, the prominence of extra-statutory norms in the court speeches reflects a distinctive Athenian notion of procedural and substantive justice. The balance of this article attempts to trace how this peculiar Athenian arrangement operated in practice to help maintain order in Athens.

### III. Enforcing Norms, not Statutes

What role did extra-statutory norms play in Athenian verdicts? And what, if any, effect did the discussion of these norms in court have on Athenian social life? In this Part, I argue that the consideration of extra-statutory norms in the courts created powerful incentives to abide by these norms. In this way, Athenian courts used a much more direct mechanism to enforce extra-statutory norms than modern courts.

#### A. *Unpredictable Outcomes, Predictable Arguments*

We have seen that litigants treated statutes as a form of evidence rather than a decisive guide to a verdict. Some speakers made sophisticated legal arguments, but others did not discuss the requirements of the statute under which the case was brought. We have also seen that litigants regularly employed a variety of extra-statutory arguments in their court speeches. We do not have any explicit evidence about how jurors viewed their role, but the surviving speeches suggest that neither extra-statutory nor statutory arguments categorically took precedence in Athenian courts. Litigants could make very different choices about what types of evidence to include and emphasize in their speeches. The dispute over whether to award Demosthenes' an honorary crown, one of the few cases in which the speeches on both sides survive, illustrates the lack of consensus on the relative importance of statutory and extra-statutory argumentation. Aeschines, who failed to win even one-fifth of the jurors' votes, opens his speech with a long discussion of the relevant laws,<sup>56</sup> while Demosthenes focuses on extra-statutory norms and responds to these legal arguments in a mere nine sections, shunted off to an inconspicuous part of his speech.<sup>57</sup> Such a situation, in which the jurors are presented with two contrasting views of "the case," each of which employs a radically different balance between legal and extra-statutory argumentation, suggests that neither form of argumentation was considered

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<sup>53</sup> Din. 2.11.

<sup>54</sup> Dem. 19.196-198; Aesch. 2.4; Dem. 54.3.

<sup>55</sup> Lanni 2006.

<sup>56</sup> Aesch. 3.8-48. Aeschines does also provide extensive discussion of Demosthenes' character.

<sup>57</sup> Dem. 18.111-120. For discussion of which orator had the better legal case, compare Gwatkin 1957 with Harris 1994:141. Gagarin 2008 makes an intriguing argument that what mattered in public cases was the indictment, not the statute, and that therefore the discussion of Demosthenes' character was a "legal" argument in Athenian terms. Even if this is correct, my point that the two speakers have very different conceptions of which issues are most central still stands.

decisive or even superior to the other. How much credit to give the various legal and extra-statutory arguments was itself in dispute in each case.

Similarly, multiple extra-statutory norms were often implicated in an Athenian case. The speaker in one inheritance suit, for example, charges his opponent<sup>58</sup> with violating several extra-statutory norms: he was a reluctant and stingy participant in liturgies, cheated and failed to support his relatives, committed incest with his mother, and failed to repay debts to friends.<sup>59</sup> The speaker, by contrast, boasts of his ancestors' public services, including triarchies and prize-winning choruses, and lists the people in his family who died defending Athens in war.<sup>60</sup> The opposing speech does not survive; doubtless it also appealed to some combination of legal and extra-statutory norms. While it was not hard to anticipate how the jury might have reacted to each of these arguments in isolation, it was much less clear how a jury would weigh the multiple competing norms in any particular case. There was no consensus on a hierarchy of norms in Athenian society. This is most evident in Attic tragedy. Tragic dramas often dramatize a conflict of norms—to name the most famous example, duty to the family versus duty to the state in the *Antigone*—with no clear moral resolution. In the law courts, too, the jury was often presented with conflicting norms and left to decide on a case-by-case basis which arguments to credit.

Individual Athenian court verdicts were thus the result of many individual jurors' complicated weighing of a variety of factors, both statutory and extra-statutory. This form of ad hoc, multi-factored decisionmaking meant that the courts rarely enforced the statute under which the case was brought in a straightforward or predictable manner. Because multiple statutory and extra-statutory norms were at play in most cases, the expressive meaning of an Athenian verdict was often unclear. Any decision could be interpreted in various ways, depending on which legal or extra-statutory norm one thought played the most important role in the jury's decision. Most importantly, the formal rules embodied in statutes provided little guidance on how a suit under the law would be resolved, and therefore created a relatively weak direct incentive to comply with the law. This was particularly true where the potential benefits of violating the law in a particular case were high.<sup>61</sup>

But it is important to distinguish here between predictability of outcomes as opposed to predictability of arguments. While it may have been difficult to anticipate the ultimate verdict in an individual case, there was no question that adherence or non-adherence to particular extra-statutory norms would tend to help or hurt one's case, to a far greater degree than in society today. Ordinary Athenians as well as professional speechwriters were likely to be very familiar with the types of arguments used in the law courts. Not only did citizens serve on juries by the hundreds, but the courts were a form of public entertainment, frequently drawing spectators for ordinary as well as high-profile trials.<sup>62</sup> Ordinary Athenians were aware that litigants who adhered to these well-known extra-statutory norms or whose opponent flouted them would in a position to argue that

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<sup>58</sup> Dicaeogenes is not technically the legal opponent in the case, but is the opponent in interest.

<sup>59</sup> Is. 5.34-40.

<sup>60</sup> Is. 5.40-44.

<sup>61</sup> In the contemporary context, Ellickson 1991 argues that high stakes are one factor that influences whether parties use formal or informal means of dispute resolution.

<sup>62</sup> Lanni 1997.

these considerations should trump the legal issues raised in any dispute. To cite just one example, a litigant states: “I have before now seen defendants who were convicted by the facts themselves, and who were not able to show that they were not guilty, who were able to escape on account of their moderate and respectable lifestyles, others on account of the good deeds and liturgies of their ancestors, and other such things, leading the jurors to pity and compassion.”<sup>63</sup> Since extra-statutory norms could become an issue in any suit, regardless of its subject matter, Athenian court verdicts, in the aggregate, had the effect of enforcing these extra-statutory norms.

B. *Creating Incentives to Conform to Extra-Statutory Norms*

A decision based on a litigant’s conformity to informal norms had effects that reached beyond the case at hand. The likelihood that an Athenian might find himself involved in a legal proceeding in the future meant that the legal system created incentives to conform to extra-statutory norms for later use in court. Despite being ad hoc and unpredictable, court verdicts thus may have had a profound influence on Athenian social life. Athenian courts may have played a disciplinary role, enforcing not the statutes under which cases were brought, but a host of well-known extra-statutory norms.

The prospect of being involved in some form of legal action where one’s past adherence to social norms might be of assistance was substantial. There was a great deal of litigation in Athens. The courts were in session about 200 days a year, and were capable of hearing anywhere from four to as many as 40 cases a day, depending on the type of case.<sup>64</sup> Thucydides tells us that foreigners called the Athenians *philodikoi* (“lovers of litigation”),<sup>65</sup> and Athenian litigiousness is a common joke in Aristophanes’ comedies.<sup>66</sup> The high frequency of Athenian litigation provides the premise for two of Aristophanes’ plays: the characters in the *Birds* establish a new city in the sky in large part to avoid the excessive litigation of Athens; and the protagonist of the *Wasps* is an old man addicted to jury service. The fact that private cases were suspended at various times in the fourth century due to lack of funds to pay juries also suggests a large caseload.<sup>67</sup>

Classicists disagree about whether ordinary Athenians were regular law court speakers or whether the courts were dominated by an elite “litigating class.”<sup>68</sup> Certainty on this point is impossible. But in my view Victor Bers has convincingly argued that ordinary Athenians did litigate with some regularity.<sup>69</sup> The poor greatly outnumbered the wealthy in Athens.<sup>70</sup> It is hard to account for the high caseload if litigation was limited to members of the elite.<sup>71</sup> If we assume that the courts typically heard an average of only ten cases per court day, one-fourth of their capacity, then roughly 4,000 litigants, drawn

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<sup>63</sup> Dem. 25.76.

<sup>64</sup> Hansen 1999:186-187 estimates that the court met between 175 and 225 days a year; that *dikai* worth less than 1,000 drachma could be completed in under an hour; and that up to four courts might be in session on any given day. Of course, the courts likely did not hear cases at their full capacity every day they were in session.

<sup>65</sup> 1.77.

<sup>66</sup> Ar. *Peace*, 505; *Clouds*, 206-208; *Wasps* passim; *Birds*. 35-45.

<sup>67</sup> Dem. 39.17; 45.4.

<sup>68</sup> Bers (forthcoming) is particularly persuasive on this point; see also Rhodes 1998:145. For the argument that the elite dominated litigation, see Christ 1998:32-33.

<sup>69</sup> Bers (forthcoming).

<sup>70</sup> Davies 1981:35.

<sup>71</sup> Bers forthcoming.

mostly from the citizen body of 30,000, would appear in court in an average year.<sup>72</sup> Despite the elite bias of our surviving speeches, two speeches appear to have been delivered by poor men.<sup>73</sup> Moreover, discussions of litigation in the comedies of Aristophanes seem to suggest that litigation was not limited to the wealthy (Bers forthcoming).<sup>74</sup>

But even if it is true that only a small proportion of Athenians wound up litigating *dikai* or *graphai* to trial, the average Athenian still faced a high likelihood of being involved in some form of legal proceeding in which extra-statutory norms might play a role. Very small claims—roughly equivalent to 4 to 10 days’ wages for a laborer—were heard and adjudicated by magistrates.<sup>75</sup> These magistrates were not legal experts. Like most Athenian officials, they were chosen by lot for one-year terms. There is no reason to think that arguments based on extra-statutory norms would have any less influence in small claims adjudication than they did in the courts. In the fourth century, in an attempt to take some of the burden off the courts, private claims above the small claims limit were sent to mandatory but non-binding public arbitration prior to trial.<sup>76</sup> All men were required to become public arbitrators once they retired from military service,<sup>77</sup> which suggests that the number of suits that reached at least this preliminary stage was very high. Extra-statutory norms presumably played a role in these arbitrations just as in the courts. In fact, Aristotle in the *Rhetoric* suggests that arbitrators were *less* bound by the law and *more* influenced by notions of fairness than jurors in the courts.<sup>78</sup>

In addition to lawsuits arising from disputes, every male citizen was subject to an examination before a public body at which their character might become an issue. At the age of eighteen each boy was presented to his deme (roughly, “village”) assembly for a vote on whether to register him as a citizen.<sup>79</sup> Periodically, worries that aliens had infiltrated the rolls led the city to order the demes to re-qualify each citizen by vote.<sup>80</sup> Presumably many of these votes were pro forma, but personal enemies of a candidate or his family could make trouble.<sup>81</sup> A candidate who was denied or stripped of citizenship had the option of appealing to a court for a final decision.<sup>82</sup> The formal criteria for citizenship were age and parentage,<sup>83</sup> neither of which was easy to prove definitively in

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<sup>72</sup>Hansen 1999:186-187. Ten cases per day for 200 court days per year and two litigants per case yields 4,000 litigants.

<sup>73</sup> Isoc. 20.19; Lys. 24.1. Some have questioned the authenticity of Lysias 24 (for discussion, see Todd 2000b:253-254). While it is true that prosecutors may have had little to gain financially by bringing private cases against poor men, many Athenian litigants appear to have been motivated by interests other than money, such as revenge, and of course in most public cases any fines collected went to the state in any case (on the motivation of Athenian litigants, see Christ 1998: 34-36, 118-159).

<sup>74</sup> To give just one example, there is a reference in the *Wasps* to Philocleon, the poor juror, having brought lawsuits in the past.

<sup>75</sup> Bers forthcoming; Todd 1993:128.

<sup>76</sup> Todd 1993:187.

<sup>77</sup> *Ath.Pol.* 53.5.

<sup>78</sup> *Ar. Rhet.* 1374b. Scafuro 1997:137 points out that arbitrations, unlike court speeches, had no time limit, and notes that “we are not likely to insist that arbitral procedures required a stricter adherence to lawful criteria than cases presented before a *dikasterion*.”

<sup>79</sup> Todd 1993:179-181.

<sup>80</sup> Todd 1993:180.

<sup>81</sup> e.g., *Dem.* 57. For discussion, see E. Cohen 2002:69-80.

<sup>82</sup> Todd 1998:180-181; Harrison 1998:207-208.

<sup>83</sup> Todd 1993:180-181.

an age without detailed record-keeping.<sup>84</sup> Moreover, our one surviving case involving disputed citizenship indicates that at both the deme and court level adherence to extra-statutory norms could influence one's case: the speaker recounts how he was voted honors while serving as a demarch, lists ancestors who had died fighting for the city, and suggests that his opponent's business practices were notorious.<sup>85</sup>

All magistrates also faced a public scrutiny before taking office (*dokimasia*) and an accounting when leaving office (*euthyna*).<sup>86</sup> The *dokimasia* procedure for the various magistrates differed somewhat. It seems that archons (the most powerful magistrates) faced a double scrutiny, first in the Council and then by a popular court, while Council members faced a scrutiny by the Council with the possibility of appeal to a court, and all other magistrates were subject simply to a public hearing in court.<sup>87</sup> The requirements of the *dokimasia* invited discussion of the candidate's adherence to extra-statutory norms: according to the *Constitution of the Athenians*, a candidate was expected to put on evidence showing not only that he was a citizen, but also that he treated his parents well, paid his taxes, and had performed military service.<sup>88</sup> As has often been pointed out, our surviving *dokimasia* speeches indicate that these procedures typically went far beyond establishing the formal requirements of office.<sup>89</sup> For example, the defendant in a *dokimasia* states that he intends "to render an account of [his] whole life," and proceeds to describe his generosity with his siblings, his disdain for dice and drinking, the fact that he had never been named in a lawsuit, and his bravery in military service on several campaigns.<sup>90</sup> All magistrates were also subject to a public accounting as they left office. As part of this procedure, any citizen could present a written complaint to an official about a departing magistrate's conduct in office; if the official thought that the charge was legitimate, the case was referred to court.<sup>91</sup>

The high likelihood that an Athenian would find himself involved in a public hearing where his adherence to extra-statutory norms might matter becomes clear when we realize that most citizens held public office at some point in their lives. There was in the range of 1200 officials,<sup>92</sup> out of a total adult male citizen population of perhaps 30,000,<sup>93</sup> many of whom were chosen by lot for only one-year terms. Hansen has estimated that with respect to service on the Council alone, "over a third of all citizens over eighteen, and about two thirds of all citizens over forty, became councillors, some of them twice."<sup>94</sup> The speaker in *Against Eubulides*, the citizenship case mentioned earlier, illustrates how often a seemingly ordinary Athenian might find his character the subject of public scrutiny: in addition to his registration as a citizen at 18, he also faced a deme

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<sup>84</sup> Scafuro 1994.

<sup>85</sup> Dem. 57.11,33,36-38, 63-65.

<sup>86</sup> Todd 1993:126, 285-289; Harrison 1998: 200-210.

<sup>87</sup> *Ath. Pol.* 45.3; 55.2-4; Rhodes 1981:615-617; Harrison 1998:200-203.

<sup>88</sup> *Ath. Pol.* 55.3. Like the citizenship enrollment procedure, most of these hearings were probably routine.

<sup>89</sup> Rhodes 1981:472; MacDowell 1993:168; Hunter 1994:106-109.

<sup>90</sup> Lys. 16.9-21.

<sup>91</sup> MacDowell 1993:171.

<sup>92</sup> Hansen 1999:341.

<sup>93</sup> Hansen 1999:90-93.

<sup>94</sup> Hansen 1999:249.

and court hearing about his citizenship when his deme revised its rolls, and a *dokimasia* when he was chosen by lot for a priestly office.<sup>95</sup>

It therefore seems fair to say that the average Athenian could anticipate that he might find himself involved in legal proceedings during which his character might become an issue, whether they took the form of trials in a private or public lawsuit or other legal procedures such as a small claims hearings, arbitrations, citizenship registration, or public scrutiny and accounting of magistrates. As a result, he had strong incentives to adhere (and to insure that members of his *oikos* adhered) to well-known social norms so that he could point to these facts to help support his case. Similarly, any opponent or accuser in these proceedings could use his failure to abide by these and other norms against him. It is important to emphasize that the incentives to conform were all the greater because litigants were not limited to violations of extra-statutory norms that were related in some way to the subject matter of the suit or that were committed against the opposing party. Any bad act against any party, however unrelated, could be used against a man in any future case. And a litigant could call upon any good act to help bail him out of any sort of legal trouble.

Did this system simply create incentives for litigants to lie about their opponents' and their own character and past record in court without actually affecting behavior? There were several mechanisms to limit these types of misrepresentations in court. Witnesses who affirmed a litigant's statements could be prosecuted for providing false testimony; a third such conviction led to loss of citizenship.<sup>96</sup> A litigant who wanted to advance baseless claims would have to find witnesses who were willing to put themselves at serious risk to help his case. Moreover, juries numbered in the hundreds, increasing the chances that someone on the jury or among the spectators would be familiar with the litigants' reputations and past actions. One litigant, for example, assumes that at least some of the jurors and spectators will be familiar with his opponent's previous conviction: "these facts are widely acknowledged, as those who served as jurors at that time and many of the spectators know well."<sup>97</sup> Litigants regularly ask jurors and spectators to interrupt their opponents by shouting out when they made controversial claims; in fact, the Athenians had a term for this phenomenon, *thorubos*.<sup>98</sup> Aeschines recounts an incident where his opponent in a treason case tried to falsely accuse him of having committed hubris against a woman, but the jury shouted him down on account of his good reputation. He adds, "I think that this is my reward for having lived a moderate life."<sup>99</sup> One speaker suggests that the potential for mischaracterization and exaggeration by opponents may have provided an even greater incentive to lead a life beyond reproach: "For the decent man's life should be so clean that it does not even allow the suspicion of blameworthy conduct."<sup>100</sup>

One might also wonder why there was so much litigation in Athens if the accumulation of incentives I describe led to a well-ordered society. The Athenians appear to have been an extremely litigious people by modern standards. Bringing a lawsuit could

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<sup>95</sup> Dem. 57.62.

<sup>96</sup> MacDowell 1993:244-245.

<sup>97</sup> Dem. 30.32; for discussion of knowledgeable spectators watching trials see Lanni 1997:188.

<sup>98</sup> Lanni 1997; Bers 1985.

<sup>99</sup> Aesch. 2.4-5.

<sup>100</sup> Aesch. 1.48, trans. Carey 2000.

enhance one's public reputation and jump-start a political career, and even for non-elites the courts provided a forum for status-competition; some prosecutions may have been motivated as much by these concerns as by a feeling that a serious breach of the peace or injury had occurred.<sup>101</sup> It is also true that litigation was, in comparison to modern standards, extraordinarily cheap and easy. We see a similar pattern of extreme litigiousness in many societies where the right and practical access to legal process, particularly legal process against one's social and economic superiors, is relatively new.<sup>102</sup> But this litigiousness does not necessarily reflect a lack of social order: a high level of both litigation and order characterized the New England colonies, for example.<sup>103</sup> A pessimistic interpretation might be that the members of these societies had not yet figured out how rarely litigation results in satisfaction.

At first blush it might seem far-fetched to think that Athenians would alter their behavior in anticipation that it might sway a future court in their favor. But at least with respect to the performance of public services such as liturgies, litigants could be quite explicit that they were motivated to perform services in part because they thought it might help them in future lawsuits. In fact, the notion that one performs public service with the expectation of receiving *charis* ("gratitude") from the jurors is a common topos in our surviving court speeches.<sup>104</sup> One speaker, for example, lists his public services (four triarchies, service in four naval battles, and contributions to several war levies) and then baldly states that he performed public service for use in later court cases: "I spent more than was required by the city in order that I might be thought better of by you, so that if I happened to suffer any misfortune I would be in a better position to defend myself in court."<sup>105</sup> Litigants don't make similar statements about their adherence to the other categories of social norms, but that is not surprising. While a litigant might admit without too much shame his hope that generosity to the state would be repaid down the line, a litigant would have to be more circumspect in recasting his honesty or his fidelity to friends in terms of ulterior motives, because in such instances the ulterior motive was antithetical to the norm itself.

Of course, this is only anecdotal evidence that this mechanism of enforcing extra-statutory norms through the legal system influenced behavior. We can no more prove that Athenians obeyed extra-statutory norms in part because of their enforcement through the legal system than we can say, in the absence of hard data, that any modern statute's sanctions actually cause compliance. We simply don't have enough data to say for certain whether any compliance with these extra-statutory norms should be attributed to the mechanism of norm enforcement described here as opposed to informal social sanctions, internalized value systems, or, for those norms that were also the subject of legal regulation, direct legal sanctions.

It is likely that all these mechanisms played an important role in compliance. But the system of private prosecution may have made formal legal sanctions less certain, and

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<sup>101</sup> Like Christ (1998:34-36), I believe that prestige was an important, but not the only, motivation for litigation.

<sup>102</sup> Mann 1987; Stern 1993; Taylor 1979; Borah 1983.

<sup>103</sup> Mann 1987:19; Zuckerman 1970:48-50; Nelson 1975:1-10.

<sup>104</sup> Christ 2006:172-181; Johnstone 1999:100-108; Ober 1989:226-230; Whitehead 1983.

<sup>105</sup> Lys. 25.13. Another example: the speaker in *Lysias, For Polystratus* explains his motivation for public service: "the reason we treated you well was not to receive money, but so that if we were ever in trouble, you would grant our request for acquittal as a fitting reward." (Lys. 20.31, trans. Todd 200b).

therefore less effective, than they are in many other societies. And these norms may not have been as deeply internalized by all citizens as one might expect in such a small, relatively homogenous society. Athens had no system of public education, and the sophistic revolution of the fifth century cast doubt on even the most basic cultural norms such as filial piety. For example, the scene in Aristophanes' *Clouds* in which a son beats his father and defends his actions at length on the basis of doctrines he learned in Socrates' "reflectory" is certainly exaggerated,<sup>106</sup> but must contain a kernel of truth for the joke to work. Conversely, cooperative norms of honesty, fair dealing, and moderation in the face of conflict appear to have been of recent vintage, part of the transition from a tribal Homeric society to a polis community: in the Homeric poems (particularly in the figure of Odysseus), trickery, lying, and relentless pursuit of advantage were celebrated, and it has been pointed out that the term *aischron* (disgraceful) began to be regularly associated with deception only in the late fifth century.<sup>107</sup>

Moreover, there may have been some situations where social norms were likely to be enforced through the court, but not through informal sanctions. The possibility of finding oneself in serious legal trouble might provide incentives to avoid minor norm violations even though the potential social sanction was low. Athenians appear to have thought that it was worth a lot to be able to claim in court that they had an unblemished record.<sup>108</sup> Litigants also appear to have feared the impression created by a slew of minor infractions, none of which individually was sufficient to incur serious social sanctions.<sup>109</sup> It is impossible to quantify what percentage of compliance with extra-statutory norms can be traced to court practice. But the added incentives generated by court enforcement of norms taken together with litigants' statements that they performed public service in order to improve their chances in court suggest that court enforcement of extra-statutory norms may well have had a significant impact on behavior. It therefore seems plausible to suppose that the Athenian courts played a disciplinary role not by enforcing formal legal rules, but by enforcing extra-statutory norms.

### C. *Norm Enforcement, Ancient and Modern*

Does anything akin to Athenian-style norm enforcement occur in modern courts? All but the most hard-line of legal formalists would admit that modern courts do at times enforce extra-statutory norms, in the sense that these norms play a role in the resolution of some cases, particularly cases heard by juries.<sup>110</sup> But when modern courts enforce

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<sup>106</sup> Ar. *Clouds* 1303-1475.

<sup>107</sup> Adkins 1975:172.

<sup>108</sup> Litigants regularly make a point of noting that they have never wronged anyone or been prosecuted (e.g. Lys. 5.3; 12.4; 16.10; 21.19; 24.24-6; Andoc. 1.147; Dem. 36.57; 37.56; 54.16).

<sup>109</sup> As several of the examples described in Part III demonstrate, litigants commonly list a long slew of norm violations committed by their opponent (e.g., Dem. 25.53-55; Aesch. 1.42). The impression these passages create is that the speaker hopes to paint a general negative picture of his opponent with multiple charges. This strategy is consistent with Aristotle's discussion in the *Rhetoric* (1.15) of the use of *ethos* in court speeches.

<sup>110</sup> e.g. Burns 1999:20-30; Frug 1988. But for the most part in modern courts extra-statutory norms can only trump legal ones surreptitiously while the Athenians openly recognized extra-statutory norms as legitimate factors in court verdicts (Burns 1999:36). In a few limited cases, such as sentencing, and particularly capital sentencing, modern courts do explicitly permit consideration of a party's adherence or non-adherence to a wide range of norms as part of the legal framework for deciding the case (see, e.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Capital sentencing jury must be permitted to consider as a mitigating factor any aspect of a defendant's character or record)).

extra-statutory norms this process does not, for the most part, affect behavior in the same way that Athenian law seems to have done. Few modern individuals would alter their behavior toward their family for their entire adult lives in the hope that it would help them in any legal dispute over an inheritance that might arise in the future. With the exception of some classes of repeat litigants or individuals who can anticipate or are in the midst of litigation,<sup>111</sup> the likelihood of being involved in litigation in the future is not high enough to justify changing behavior based on extra-statutory norms that might or might not affect litigation. This is all the more true because, unlike in Athens, adherence to extra-statutory norms that are perceived to be completely unrelated to the dispute are less likely to play a role. Being involved in a local charity, for example, might help in a criminal sentencing hearing<sup>112</sup> but would likely be much less helpful for a litigant in a family inheritance dispute.

If modern court decisions enforcing extra-statutory norms affect behavior prospectively, they do so primarily through the expressive function of law, a more indirect mechanism than the Athenian approach. Modern courts rarely give individuals concrete incentives to alter their behavior with regard to extra-statutory norms in direct anticipation of litigation. Rather, when a modern court enforces extra-statutory norms in a high-profile case the decision communicates a message about community norms that may then filter down through the culture to affect behavior. For example, a highly-publicized unsuccessful rape prosecution may communicate a message that the community believes that provocatively-dressed women “deserve” to be raped, and this message may indirectly alter how women dress.<sup>113</sup>

Athenian courts also served an expressive function. Court speakers regularly discuss examples of what they consider to be proper and improper behavior.<sup>114</sup> And the Athenian jury was permitted through its verdict to make a public statement about whether the litigants had abided by the community’s values, regardless of the result suggested by a strict reading of the statute, will, or contract at issue. But because a jury’s verdict could turn on any of a number of specific legal or extra-statutory factors raised in the case, the jury’s ability to express a clear and precise moral statement was limited. The trial of Socrates is a good example. Although the jury’s overall condemnation of Socrates was well-known, his precise crime and exactly what the jury thought of him is unclear (and seems to have been unclear even at the time).<sup>115</sup> To be sure, Athenian court verdicts

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<sup>111</sup> For example, high profile, large corporations who routinely find themselves the subject of lawsuits might find it worthwhile to enhance the company’s public image for fear of bias in court (Haddad 2001 discusses Bill Gates’s offer of computers to poor schools in the face of antitrust action). Similarly, individuals under investigation for white collar crimes might attempt to improve their image in anticipation of criminal litigation and sentencing (Reeves 2006 describes Richard Scrushy’s increased religious activities when a fraud case was brought against him, and Eichenwald 1990 discusses Michael Milken’s charitable work in connection with sentencing on SEC-related criminal charges). In addition, individuals who are likely to be subject to a court’s power for a prolonged period of time, for example individuals in bankruptcy, those subject to a court-ordered shared custody arrangement, and those whose children have been removed from their homes by social services, have incentives to conform to extra-legal norms to win favor with the court.

<sup>112</sup> Eichenwald 1990.

<sup>113</sup> Kennedy 1993:136-138, 162-175.

<sup>114</sup> As we will explore in Chapter 5, court speeches also have served an important role in creating, shaping, and disseminating community norms through persuasion.

<sup>115</sup> Millett 2005.

served an expressive function.<sup>116</sup> But the primary means through which the Athenian courts enforced extra-statutory norms may have been by providing concrete incentives in anticipation of litigation, a more direct mechanism than the expressive approach familiar in modern courts.

#### IV. The Advantages of Athenian-style Norm Enforcement

The approach of enforcing extra-statutory norms through formal court processes was particularly well-suited to the Athenian context: that is, court enforcement of extra-statutory norms helped Athenian society function more smoothly, and more in keeping with Athenian values, than might have been the case if these norms had been reduced to statutes that were strictly enforced. This is not a normative argument. I make no claims with respect to whether the Athenian system helped to produce “efficient” norms. And, of course, from a modern perspective the conflict between the Athenian approach and contemporary rule-of-law values is hardly attractive. When I say that the Athenian approach was “effective,” I mean simply that it was likely to produce incentives for Athenians to comply with the norms that the Athenians sought to enforce. The Athenian approach of enforcing informal norms in court compensated for deficiencies in the operation of both informal social control and formal legal enforcement. Athenian trials facilitated informal enforcement of norms by publicizing norm violations and by serving as shaming ceremonies. The Athenian approach also compensated for problems in law enforcement stemming from a private prosecution system. A third advantage was that by permitting courts to enforce norms while appearing not to do so, the system bolstered the democratic ideal of a limited state.

It is also important to emphasize that by noting the advantages of the Athenian approach to norm enforcement I am not providing a functionalist analysis. That is, I am not arguing that the legal system developed as it did because it served these useful functions in the Athenian context. I have argued elsewhere that the Athenians’ loose approach to relevance and legal argument and the resulting ad hoc nature of popular court verdicts were based primarily in two ingrained cultural values: (1) a normative belief in contextualized and individualized justice and (2) a democratic commitment to wide jury discretion.<sup>117</sup> The enforcement of extra-statutory norms through the courts was in my view the natural byproduct of a legal system that permitted and encouraged consideration of facts and arguments unrelated to the specific requirements of the statute under which the suit was brought.<sup>118</sup> My argument here is that the Athenian mode of norm enforcement, though rooted in cultural values, had several advantageous effects. To borrow the terms used by Ian Morris to distinguish between “humanistic” and “social

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<sup>116</sup> In a related vein, the choice to publicly display lists of certain types of convicted offenders—notably traitors—was intended, if we can rely on Lycurgus’ interpretation, to leave a “lasting example of the Athenians’ attitude toward traitors.” Lyc. 1.117-119. For discussion, see Ober 2008:186-190.

<sup>117</sup> Lanni 2006.

<sup>118</sup> This is not to deny the possibility that the effectiveness of Athenian legal practices in maintaining order contributed to the persistence of Athenian legal institutions. But we have no direct evidence that this is the case, and process-oriented anthropological studies have demonstrated that societies can reach a successful equilibrium in the absence of social order (e.g. Roberts 1976; Comaroff & Roberts 1981; Bourdieu 1977; for an excellent discussion of trends in legal anthropology as they relate to classical Athens, see Cohen 1995: 1-24).

scientific” approaches, this paper aims to help us “understand” Athenian legal culture rather than to “explain” it.<sup>119</sup>

Given the Athenian context, enforcing extra-statutory norms through the courts was preferable to using formal rules to enforce these norms in court. The Athenian approach was preferable to a conventional rule-of-law approach because it promoted order and compliance with norms while preserving the Athenian attachment to discretionary and popular justice. In the context of a private prosecution system with sporadic enforcement, the Athenian approach may even have been more effective at fostering compliance with norms than if the Athenians had attempted to enforce these norms through formal rules.

A. *Facilitating Informal Sanctions*

What was the relationship between the phenomenon of norm enforcement I am describing and the conventional mechanism of informal norm enforcement-- social sanctions? The courts complemented, rather than supplanted, social sanctions. As discussed in chapter 1, Athens was not a face-to-face society; the urban center was a bustling metropolis, and even members of the smallest rural demes would be forced to interact with men they didn't know on frequent trips to the city.<sup>120</sup> Information about norm violations would not always become known to potential business partners or the small group of neighbors and fellow demesmen who were in a position to enforce social sanctions. The courts may have assisted informal norm enforcement by improving information flow.<sup>121</sup> Court arguments based on violations of extra-statutory norms resulted not only in formal sanctions for norm violations through court verdicts. The courts gave litigants incentives to ferret out their opponents' norm violations, and court speeches publicized these violations, making it more likely that other citizens in small village communities would impose informal social sanctions.<sup>122</sup>

The Athenian courts were the ideal institution for publicizing allegations and findings of wrongdoing. Not only were hundreds of jurors present at every case, but court cases were a major form of public entertainment. Cases involving prominent citizens naturally drew the largest crowds.<sup>123</sup> But the courts were intermingled with market stalls in the agora, and we hear of casual spectators listening to ordinary cases as they went about their business in the agora.<sup>124</sup> Litigants regularly assume that the community at large will be aware of court verdicts.<sup>125</sup> It seems likely that news of allegations made during a court case would find its way back to a litigant's deme community, resulting in informal sanctions. In this respect, allegations of misconduct made in court could affect the reputation of the victorious litigant as well as his less fortunate opponent. Aeschines states, for example, that even if he wins his suit he will consider his life not worth living

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<sup>119</sup> Morris 2002:8.

<sup>120</sup> Osborne 1985b; Harris 2002:72-74; Ober 2008b:74. Theophrastus' *agroikos* (“country man”), for example, goes to the city to shop and get his hair cut. Hansen 1999 also discusses evidence that Athenians regularly walked long distances from the countryside to attend assembly, choruses, festivals, etc.

<sup>121</sup> cf. Milgrom, North, & Weingast, who argue that medieval institutions played a role in facilitating information flow about merchants' trustworthiness.

<sup>122</sup> Hunter 1994:117.

<sup>123</sup> Aesch. 3.56; Plu. Dem. 5.1; Lanni 1997:184.

<sup>124</sup> e.g., Eubulus *fr.* 74 K-A; Plu. *Mor.* 580d-f; Lanni 1997:184.

<sup>125</sup> Andoc. 1.105; Din. 1.22; Lys. 1.36.

if anyone in the jury is convinced by his opponent's extra-statutory accusation that he had committed *hubris* against a woman.<sup>126</sup>

The Athenian trial itself was also in some sense a form of shaming ceremony. Litigants were forced to represent themselves in court, personally presenting their case (and their character) to the assembled jurors. The experience of having one's character publicly attacked or losing a vote of hundreds of one's fellow citizens must have been extremely humbling for seasoned orators, let alone ordinary Athenians. The announcement of the verdict would insure that the losing party suffered some punishment for his violation of legal and extra-statutory norms, whether or not the victorious litigant managed to collect on the judgment rendered by the court. Indeed, even the very fact of an accusation was thought to bring shame: Demosthenes alleges that his enemy Meidias convinced someone to bring charges against Demosthenes for military desertion even though he had no evidence and had no intention of proceeding to trial, because the notice of the charge in the agora would hurt Demosthenes' reputation.<sup>127</sup> The collateral shame sanctions that accompanied being charged and convicted in an Athenian court supplemented any formal legal sanctions meted out by the jury.

B. *Compensating for Sporadic Legal Enforcement*

The second advantage of the Athenian approach arises from its peculiar quality that permitted a litigant to raise any norm violations his opponent had committed in the past against any person, however unrelated to the subject of the suit at hand. The Athenian approach compensated for difficulties of enforcement stemming from a private prosecution system by encouraging litigants to uncover and sanction their opponents' past violations.

The absence of public prosecutors<sup>128</sup> appears to have resulted in spotty enforcement. This was particularly true in the case of "victimless" offenses, such as draft-dodging, cowardice, tax and liturgy avoidance, and a number of other public laws. Social norms relating to sexual and other private conduct were also for the most part victimless, and would have suffered from similar enforcement difficulties if the Athenians had attempted to regulate these activities through formal legal rules. Victimless offenses were generally pursued through public suits (*graphai*) brought by volunteer prosecutors. In most public suits, the state rather than the prosecutor collected any fines from the defendant.<sup>129</sup> Moreover, if the prosecutor failed to win at least one-fifth of the votes at trial he was fined a substantial amount and barred from bringing public suits in the future.<sup>130</sup> Given the uncertainty of Athenian jury verdicts, this penalty must have served as a significant deterrent to prosecution. It seems that victimless crimes were prosecuted somewhat randomly, according to whether a personal enemy of the defendant or a man trying to make a public name for himself was willing to initiate a public suit despite the financial risks involved.<sup>131</sup> The Athenians were clearly worried about uneven enforcement of public laws and took steps to encourage prosecutions in certain types of

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<sup>126</sup> Aesch. 2.5.

<sup>127</sup> Dem. 21.103.

<sup>128</sup> There were a few exceptions: a board of public advocates prosecuted officials at *euthunai* and "special prosecutors" were appointed in high salience political cases (Todd 1993:92).

<sup>129</sup> MacDowell 1993:257. In some special procedures, such as *phasis* and *apographe*, the prosecutor was entitled to a portion of the fine collected (MacDowell 1993:257).

<sup>130</sup> Harris 1999.

<sup>131</sup> on the motivations of public prosecutors, see Osborne 1985a; Christ 1998:118-159.

case: for example, the penalty for failing to win one-fifth of the votes was lifted for various public suits alleging misconduct by public officials,<sup>132</sup> and successful prosecutors in suits recovering state property (*apographe*) or exposing individuals who were falsely representing themselves as citizens stood to collect a portion of the judgment.<sup>133</sup>

Prosecutions were likely sporadic even where there was a clear injured party with an incentive to sue to enforce the law. Where an individual violated a law ordinarily redressed by a public suit, for example *hubris* (roughly, “assault accompanied by insult”) or false arrest, the victim might be deterred from bringing suit because he, like any prosecutor in a public case, risked penalties and did not stand to gain financially from the verdict. In both private and public cases, victims with considerably less money and social clout than their opponent were particularly likely to avoid litigation. A richer party had several advantages in court: he could afford a better speechwriter, would be likely to be a better public speaker by virtue of his education, and would have performed more public services.<sup>134</sup> Moreover, even if a “little guy” prevailed in court, the absence of state mechanisms for enforcement of judgments<sup>135</sup> meant that a verdict might mean little if he didn’t have a group of friends to help him claim his due. Even a man as well-connected as Demosthenes could have trouble getting justice: he describes how he was unable to collect from Meidias even after he won both the original court case and an ejection suit.<sup>136</sup>

For all these reasons, there appears to have been systematic under-enforcement of Athenian statutes through suits brought under those statutes.<sup>137</sup> And the prosecutions that did occur may have been irregular and unpredictable, stemming from factors like political or personal rivalries that were not related to the seriousness or visibility of the infraction. The Athenian approach of enforcing extra-statutory norms in court helped compensate for the under-enforcement of the laws. A litigant could attack his opponent for any norm violation committed against anyone in the past, no matter how unrelated to the issue in dispute. This system gave litigants incentives to investigate their opponents and uncover any past violations of legal or extra-statutory norms.<sup>138</sup> For this reason, Athenians could not blithely commit victimless crimes or injure those who might be powerless to sue them; these offenses could come back to haunt them if they ever found themselves in a court or other public hearing in the future.

Demosthenes 47 offers an example of how the use of extra-statutory norms could offer retribution for crimes committed against those who were effectively unprotected by law. The speaker attacks his opponent for collecting on a judgment by violently seizing his property when he was not home rather than going with the speaker to the bank to get

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<sup>132</sup> Christ 1998:134-138.

<sup>133</sup> Christ 1998:138.

<sup>134</sup> Christ 1998:33.

<sup>135</sup> Todd 1993:144-145.

<sup>136</sup> Dem. 21.81.

<sup>137</sup> Of course, we have no idea what percentage of offenses were actually prosecuted. But the serious risks associated with bringing a public case as a volunteer prosecutor must have deterred some prosecutions of known offenders, particularly with respect to victimless crimes. And the fact that the Athenians took steps to encourage prosecutions in cases involving public corruption and failure to pay a state debt suggest that the Athenians thought under-enforcement was a real problem. Our surviving speeches also suggest that bribery of public officials was particularly problematic (Karayiannis & Hatzis 2008:15).

<sup>138</sup> Demosthenes tells us, for example, that in preparing for his prosecution of Meidias he collected examples of Meidias’ wrongful acts against others for use in his suit (Dem. 21.23).

the money.<sup>139</sup> He offers an extended, poignant account of how his opponent violently pried a cup from the hands of his faithful, elderly former nurse, beating her so badly that she died from her wounds.<sup>140</sup> He describes how he sought legal advice and learned that because the nurse was neither his relative nor a slave (she had been freed but returned to his household in her old age) he did not have standing to bring homicide charges.<sup>141</sup> But the prominence of this incident in the case suggests that although the defendant could not formally be punished for homicide the allegations regarding treatment of the nurse would be incorporated in the jury's judgment.<sup>142</sup>

The surviving speeches offer other examples. One litigant states that his father is afraid to come into court to support him because the father is afraid that if he does someone will confront him with allegations of past wrongs he may have committed against them during his public life.<sup>143</sup> Demosthenes is quite explicit about how consideration of unrelated crimes can compensate for problems of under-enforcement in the Athenian system. He lists the many people Meidias has wronged in the past, noting that most of them did not bring suit because they lacked the money, or the speaking ability, or were intimidated by Meidias.<sup>144</sup> He then urges the jury to punish Meidias for these unprosecuted crimes: "for if a man is so powerful that he can commit acts of this sort and deprive each one of you of exacting justice from him, now that he is securely in our power, he should be punished in common by all of us as an enemy of the state."<sup>145</sup> The speaker in Lysias 30 expresses a similar sentiment: "since [the defendant] has not paid the penalty for his crimes individually, you must exact satisfaction now for all of them collectively."<sup>146</sup>

It is of course true that the Athenian approach also decreased the incentives to obey statutory law because even clear-cut violations of law might result in acquittals on extra-statutory grounds. It is impossible to quantify the gains and losses in compliance that would result from choosing either the Athenian or a rule-of-law system. But given the problems of under-enforcement produced by the private prosecution system, particularly in the case of victimless offenses and offenses committed against victims who lacked the resources to sue, it seems likely that making any bad act fair game in any case would increase the chances of punishment (and thus the incentives to comply) more than a conventional rule-of-law approach. In any case, from the Athenian perspective their approach had the distinct advantage of fostering compliance while also promoting the Athenian commitment to individualized and popular justice.<sup>147</sup>

So much for cases where the legal or extra-statutory norm violation had not been raised in a previous lawsuit. But the Athenian system also created redundancy in the system. In essence, litigants could be sanctioned again and again for the same legal or extra-statutory norm violation in every future lawsuit. Did this approach lead to over-

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<sup>139</sup> Dem. 47.52ff.

<sup>140</sup> Dem. 47.52-61.

<sup>141</sup> Dem. 47.68-70.

<sup>142</sup> For a discussion of the central place of the death of the nurse in the argumentation of this speech, see Wohl (forthcoming).

<sup>143</sup> Dem. 39.3.

<sup>144</sup> Dem. 21.141.

<sup>145</sup> Dem. 21.142.

<sup>146</sup> Lys. 30.6, trans. Todd.

<sup>147</sup> Lanni 2006.

enforcement? Not necessarily, because evidence of an individual norm violation did not mean that the litigant automatically lost his case. The jury considered the violation as part of a broader evaluation of the litigant's conduct over his entire life; each past violation continued to be relevant to this exercise in every subsequent evaluation of the litigant's character. For the same reason, with the exception of particularly heinous crimes, the system did not undermine itself by creating a class of outlaws who had little incentive to comply once they had developed a reputation as a norm violator that might be used against them in court. Because any particular norm violation was just one factor among many considered by the jury, Athenians with prior records had incentives to rehabilitate themselves by demonstrating adherence to statutory and extra-statutory norms.<sup>148</sup> In this way, the enforcement of extra-statutory norms in Athenian courts was much more nuanced than those informal social sanctioning systems that rely on the relatively crude measure of temporary or permanent exclusion from the group for all violations.<sup>149</sup>

Perhaps most important, the Athenian approach did not set up a system whereby those with good character and public service had no incentives to obey the law. As I've described in detail elsewhere,<sup>150</sup> jurors considered extra-statutory argumentation as part of their evaluation of what was a just and fair result, given the particular circumstances of the case and the character of the parties. In other words, the jury was not simply trying to determine and reward the litigant with the better character. Rather, jurors considered issues such as character and past acts as a way to help determine what the litigants deserved in the context of the dispute before them.<sup>151</sup> The litigants' character was extremely important, but having good character references would be unlikely to save a litigant from conviction in a dispute where he had clearly acted unfairly, and evidence of one piece of misconduct would be unlikely to doom the case of a litigant who was clearly in the right. We have several references to successful prosecutions brought against prominent citizens who had performed public services.<sup>152</sup> Given the stark economic differences between the liturgical class and the average juror, jurors were probably particularly sensitive to making sure that wealthy citizens could not place themselves above the law by virtue of their public services.

### C. *Maintaining the Fiction of a Limited State*

The Athenian approach to norm enforcement also promoted compliance with norms relating to private conduct and public service while maintaining the fiction of a limited state. By enforcing extra-statutory norms rather than formal rules relating to personal conduct and public service, the Athenians were able to maintain the fictions of an unregulated private sphere and of a city and military supported by patriotism and volunteerism rather than coercion.

Athenian democratic ideology included the notion that the state did not interfere with private conduct that did not impinge on the state's interests.<sup>153</sup> The locus classicus of this ideal is Thucydides' account of Pericles' funeral oration:

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<sup>148</sup> e.g., Lys. 31.24.

<sup>149</sup> For example, Bernstein 1996 and Milgrom, North, & Weingast 1990 describe systems using the informal sanction of exclusion. But many informal systems do use a gradation of sanctions (Ellickson 1991:213-219).

<sup>150</sup> Lanni 2006:41-74.

<sup>151</sup> Lanni 2006:59-64.

<sup>152</sup> e.g., Dem. 34.50, 59.72-86; Din. 1.13; 3.17.

<sup>153</sup> Cohen 1991:229 provides examples, including Dem. 22.51; Lys. 25.33; Ar. *Pol.* 1320a30.

There is no exclusiveness in our public life, and in our private business we are not suspicious of one another, nor angry with our neighbor if he does what he likes. We do not put on sour looks at him which, though harmless, are not pleasant. While we are thus unconstrained in our private business, a spirit of reverence pervades our public acts; we are prevented from doing wrong by respect for the authorities and for the laws.<sup>154</sup>

Scholars have interpreted such statements, along with Athenian legal practice, as evidence of a “private sphere” of conduct free from legal regulation.<sup>155</sup> These scholars have pointed out that in Athens there was no morals legislation as such; legislation was limited to activity that harmed a specific victim or affected the state’s interest.<sup>156</sup> Thus there was no provision to prosecute an adulterer in the courts because Athenian law “did not aim at regulating adultery as a form of sexual misconduct.”<sup>157</sup> Rather, the law sought to regulate adultery “as a source of public violence and disorder” by addressing only a limited situation: what options were available to a man who caught an adulterer in the act.<sup>158</sup> Similarly, the law generally permitted homosexuality and prostitution. In fact, prostitution was subject to state taxes and the state condoned the practice by treating contracts for sexual services just like any other enforceable contract.<sup>159</sup> But several laws protected young boys from homosexual advances by older men.<sup>160</sup> And a citizen who had been a prostitute was not permitted to speak in the Assembly, apparently on the theory that such a man was morally unworthy of democratic leadership.<sup>161</sup> For the Athenians, limited state interference in private conduct was one of the primary characteristics of a democracy.<sup>162</sup>

We have seen that the state, through the law courts, *did* play a role in enforcing norms relating to private conduct. The courts played a disciplinary role, providing incentives for Athenians to comply with sexual and other norms of private conduct. But the fact that these norms were not expressed in statutes and were not the formal basis for lawsuits permitted the Athenians to maintain the fiction, central to their democratic ideology, that they enjoyed freedom in their private lives. At the same time, the legal system did in practice help to foster adherence to norms of private conduct by creating incentives to comply beyond those provided through traditional informal sanctioning mechanisms.

Another central tenet of Athenian democratic ideology was that its citizens served the state out of patriotism rather than coercion. The Athenian victory over the much more numerous Persians was often put down to the superiority of free men fighting for their homeland over a force made up, in Euripides’ words, of “all slaves but one.”<sup>163</sup> The Athenians also compared their approach of exhorting citizens to virtue through education

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<sup>154</sup> Thuc. 2.39.

<sup>155</sup> Cohen 1991; Wallace 1997.

<sup>156</sup> Cohen 1991; Wallace 1997.

<sup>157</sup> Cohen 1991:124.

<sup>158</sup> Cohen 1991:124.

<sup>159</sup> Aesch. 1.119, 160-161; Lys. 3.22-26; Aesch. 1.160-161; Cohen 2000, 2007.

<sup>160</sup> If a relative or guardian hired out a boy as a prostitute, both the relative/guardian and the customer could be prosecuted under a *graphê* (Aesch. 1.13-14). A separate law provided that acting as a pimp for a free boy was punishable by death (Aesch. 1.14). For a discussion of this topic, see Cohen 1991:176.

<sup>161</sup> Aesch. 1.19-20, 28-32; Dover 1989:19-31; MacDowell 2000; Cohen 1991:175-86; Fisher 2001:36-52.

<sup>162</sup> Thuc. 2.39; Dem. 25.25. Ar. *Pol.* 1310a30; Pl. *Rep.* 557b, 560-1, 565b, *Laws* 700a; Cohen 1991:124.

<sup>163</sup> Eur. *Helen* 276.

to that of the Spartans, who attempted to force its citizens to be brave and public-spirited through strict regulations, only to find them “running away from the law as boys from a father, because they have not been educated by persuasion but by force.”<sup>164</sup> Christ has detailed the Athenian “preference for persuasion over compulsion” in promoting good citizenship.<sup>165</sup> He notes that although legal procedures existed for prosecuting draft-dodging and avoidance of liturgies and taxes, such prosecutions were relatively rare.<sup>166</sup> Athens did not actively try to encourage these prosecutions by, for example, providing for a state prosecutor<sup>167</sup> or relaxing the risks borne by volunteer prosecutors because “compulsion to serve the city was potentially in conflict with ideals of personal freedom . . . . [.] Athenians were apparently uncomfortable with the rigid exercise of public authority against private individuals.”<sup>168</sup>

Just as in the case of norms of private conduct, the courts did enforce norms relating to military and public service. But because these norms were extra-statutory and rarely served as the legal basis for lawsuits, the Athenians could tell themselves that discussion of these norms in court may have served to persuade and educate citizens, but did not constitute coercion. The Athenian approach of enforcing extra-statutory norms through the courts created state sanctions for violations of public service norms, while at the same time permitting the Athenians to maintain the fiction that Athenians fought for and served the state out of patriotism.

#### V. Conclusions

It is fashionable among historians and legal scholars to emphasize the limits of courts’ and law’s ability to influence behavior. An Athenian court appears at first glance to have been an even weaker player in its milieu than its modern counterpart—highly unpredictable and prey to distracting stories about the litigants’ morality and “private” lives. But this system must have been capable of producing anxiety about the potential consequences of any violation of the community’s norms. This state of affairs is frightening to anyone brought up in a Western culture of individual rights and the rule of law. But it must have been central to the operation of a society (and, for a time, an empire) that depended to a large degree on voluntary compliance with onerous norms of personal conduct—the norms of courage, sacrifice, public service, participation in self-governance, and obedience to law celebrated in Thucydides’ presentation of Pericles’ funeral oration.<sup>169</sup>

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<sup>164</sup> Pl. *Rep.* 548a-b, trans. Christ 2006; for discussion see Christ 2006:42-43.

<sup>165</sup> Christ 2006: 42–43, 62–64.

<sup>166</sup> Christ 2006: 40-45, 62-64.

<sup>167</sup> Appointed state prosecutors were used in high profile political cases and in *euthunai* (Todd 1993:92).

<sup>168</sup> Christ 2006: 62–63.

<sup>169</sup> Thuc. 2.37-40.

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