PART I

The realm of theory

CHAPTER 1

Law and order

Always mistrust the law.[1]

1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

[16] See, e.g., Radcliffe-Brown (1968: 178–204).
[17] Murphy (1957: 1035). Of course, as Thucydides demonstrates with tremendous force in his analysis of civil strife in Greek cities, warfare could also increase internal strains and promote social disintegration. It could also lead to the annihilation of a society, a possibility which the functionalists never seem to think about. It may be significant that Murphy's fieldwork was carried out fifty years after intertribal warfare had ceased.
[18] Colson (1954: 414–15).
[19] Gluckman (1956: Chapter 1).
[20] See, e.g., Dennis (1976: 174–84).

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

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

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

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

[21] See, e.g., Wormald's (1983: 102) characterization of Gluckman's "revolutionary" discovery of "peace in the feud." For a rejection of Gluckman's principle for an understanding of feud in China, see Lamley (1990: 58).
[22] Black-Michaud (1975: 171). See also Boehm (1984: 202–7).
[23] Black-Michaud (1975: 87–8, 168–72).
[24] Leach, in his classic *Political Systems of Highland Burma*. References to Leach are to the 2nd edition (Boston 1965).
[25] Leach (1965: 7).