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Response to Edward Cohen

This paper exemplifies a valuable direction for the history of ancient Greek law. Cohen demonstrates a mastery of the legal issues, but he does not treat law as a separate realm that can or should be studied in and of itself. Rather, he views Athenian law as a factor in the broader context of "private" social relations, political power, and conflicting ideologies. The law, for Cohen, is not an independent entity, not a fixed set of rules "given" to the society by a lawmaker. Rather Cohen sees law as product of, and simultaneously an instrument of, ongoing social and political mediation. Cohen's paper reminds us that many diverse interests were represented among the populations of citizens and non-citizens that coexisted in the polis of Athens during the fourth century B.C. These interests often came into conflict; and Athenian law and legal practice evolved as various interests were successfully advanced or were overridden by other interests. The legal adaptations and "silences" that Cohen describes are quite remarkable, given the ideology of citizenship on which the democratic state was founded. And the implications of Athenian willingness to make these changes has considerable significance well outside the field of legal studies.

In the cases Cohen considers, the public realm of the law—the democratic realm of collective enactment and implementation by the politai—was used in part to facilitate relations within the supposedly private realm of the oikos, for example, property-holding and marriage. Moreover, the persons and oikoi involved in the cases under review were, in political terms, marginal. The law of Athens was, of course, made by the citizens: adult males, who were overwhelmingly native-born, most of whom were not particularly well-off, many (perhaps most) of whom were peasant agriculturalists. The key dramatis personae of the cases Cohen brings to our attention fit none of these categories; some are women, among the men a few were naturalized citizens, others were metics or slaves. All of the major parties to these legal disputes were members of Athens' wealthy elite.

A relatively coherent, if complex and not fully rational political ideology underlay Athenian processes of public decision making, including nomothesia and the judgments of dikastai. This ideology was very aware of social and political distinctions between classes of persons and (if the collected speeches of the Attic orators are any guide) Athenian ideology did not much favor the sort of people involved in the cases Cohen discusses. As is most clearly demonstrated by Demosthenes 21, rich people, even rich citizens, were regarded as potential objects of suspicion by ordinary Athenian citizens, as were all those residents of Athens who were not born of native Athenian stock. Slaves were popularly regarded as liars, cheaters, and natural enemies of the Athenian public order. Athenian ideology and the position of rich men: J. Ober, Mass and Elite in Democratic
of Athenian women is more complex, in that they participated in the maintenance of the citizen body in various ways. As Cohen points out, they were essential in the first instance for the biological reproduction of the citizenry, but they also educated young citizens and engaged in constant social intercourse (and discussed political matters) with husbands and relatives, and performed essential economic roles. Yet overtly public speech and decision-making, including speaking and serving as a dikastes in the lawcourt, was ordinarily the unique preserve and privilege of the male citizen.

The Athenian citizen clearly defined himself—at least in part—as a member of a political body, and his membership allowed him (perhaps encouraged him) to contrast himself to all those residents of Attica who were denied citizenship. In order to regulate tensions between status and wealth distinctions within the citizen body, it was necessary that the citizenry be able to view itself collectively as a homogeneous entity that held itself apart from (and above) all those residents of Attica who were not sharers in the political community. This should mean that that any blurring of the legal boundaries which separated metic from citizen, free from slave, male from female, could potentially threaten the collective self-definition of the Athenian people—which would in turn entail a threat to the democratic political order as a whole. And thus we might expect that the ideological role of citizen-made and citizen-administered Athenian law would be to reinforce citizen solidarity against all “others.” But, as Cohen shows, this was not invariably the case.

Why, we must ask, were the Athenians willing to accommodate the interests of metics, slaves, and women by making changes and allowing “silences” in their own beloved legal system? Why should the Athenians have engaged in the socially hazardous blurring of legal boundaries between citizens and all others? Why should law-making citizens care about legal privileges for people not regarded as equals in the political realm, were also equally and individually accountable for what they did and said in their roles as citizens (e.g. subject to euthunai for actions performed as magistrates, to indictment by graphe paranomoi for proposals made in Assembly). Those residents of Attica who did not have access to political rights may have been wealthier, cleverer, and so on than ordinary citizens, but their superiority in any given social sphere was balanced (in Athenian ideology) by their exclusion from the world in which adult men stood together on an equal footing, as responsible political agents. Because of various sorts of kyria relationship, metics, women, and slaves remained in dependent positions vis-à-vis the politai—and were ordinarily represented, when necessary, in public by members of the political body. But if Cohen is right, the Athenians broached the equality-responsibility linkage by granting certain metics and slaves limited equality in legal standing.

Offering slaves the right to present legal testimony is especially surprising when one considers that Athenian slaves ordinarily were allowed (if one may use the term) to bear witness in court only when tortured. Torture of slave witnesses fits well enough with what I have characterized as normal Athenian ideology: since they were viewed as “natural” enemies of the Athenian political order, it could be supposed that slaves desired to harm that order by speech (as well as by action). Because no slave would voluntarily help a regime that kept him enslaved, physical coercion—application of torture—was the only way slaves could be forced to benefit the regime (i.e. by revealing the truth about events in a legal proceeding). The acceptance of uncoerced legal testimony of slaves threatens the entire Athenian ideology of the interrelationship between responsibility, group interest, coercion, and truthful speech.

Cohen’s paper forces us to confront another issue of interpretation: What was an
Athenian bank, in the view of Athenian ideology and Athenian law? Two possible answers are intertwined in Cohen’s paper. First, a bank may be seen simply as personal property—a liquid asset like any other form of moveable goods (e.g., furniture or coined money). As ordinary property the bank could be kept, sold, or broken up and redistributed for the good of an oikos, and/or for the good of the polis. In this first view, how the property was used remained primarily a matter for the personal judgment of the owner; although he might take into account how his use of his property would affect the view the Athenian citizenry held of him.3

The second view of a Bank is as a business corporation—an entity recognized by all concerned parties as having an operational existence in some sense independent of its current owner. In some cultures, a bank may be allowed to mimic the legal role of the person—in modern American law, for example, a business corporation can be treated in certain respects as the legal equivalent of an individual. Athenian law obviously never went that far. But might the Athenian bank nevertheless be viewed by all parties concerned—the owner, his relatives, the jurors (standing in the place of the politai)—as an entity that was expected to continue in existence and operation beyond the lifetime of its current owner? And might the jurors, to go one step further, consider the survival of the bank a political matter, an issue of public concern? If a bank is a business/entity, rather than just another form of disposable property, it is conceivable that the bank’s interest transcends the narrow interest of the current owner and his oikos. And consequently, the politai might have a collective concern with how a bank was disposed of after its owner’s death.

Cohen points out that Athenian law in the early fourth century “did not recognize businesses as autonomous juridical persons.” But elsewhere he hints that Athenian banks might be regarded as business entities, stating that owners “sought to preserve their businesses by installing highly regarded slaves as their successors.” Note: “preserve their businesses” not just “preserve the wealth of their oikoi.” The question is this: did Athenian law (and Athenian ideology) tend to blur the simple-property perspective in the direction of the business/entity perspective? If so, why?

These complexities come to a point in Cohen’s discussion of the marriages of widows of deceased bank owners. Athenian civic ideology seems starkly challenged, and the discourse of Athenian law thrown abruptly out of kilter, in the circumstance in which the free, naturalized, Athenian-citizen wife of a deceased banker marries the slave-manager of the bank and thus effectively turns over control of the bank to him. Cohen argues that this pattern was actually a norm, occurring “routinely” and “frequently.”

There may be some question as to whether the surviving texts fully support routine, frequent transfers of this nature. The relevant evidence for the practice comes from Athenian legal rhetoric, a notoriously slippery source for reconstructing the realities of social or legal practice. There is always a danger of conflating social reality and rhetoric based on ideological presuppositions. A case in point is the speaker’s portrayal of Archippe’s knowledge of the bank’s affairs (Dem. 36.14). The jurors did not, in all probability, know whether or not Archippe actually possessed this sort of knowledge; the issue is whether they would be likely to assume, and whether they would be right in assuming, that bankers’ wives generally knew a lot about bank workings. Was this sort of case common enough for the extent of bankers’ wives’ access to the details of their family businesses to become a matter of common knowledge in Athens? The comment (Dem. 36.29) that “anyone could cite many examples” of bank-slaves being freed and assigned control of bank and widow by the testamentary wishes of the owner, might be read as an example of what I have elsewhere called the “we all know” topos, a rhetorical ploy that attempts to shame ignorant jurors into silence. But on the whole, I think that Cohen’s argument does hold together. At least it is safe to say that the arguments from probability made by Phormion’s supporter in Dem. 36 did not hurt his case—which Phormion won, as we know (for once) from Dem. 45.4

If Cohen is correct, and it was relatively common for Athenian banker-widows—free women and the former wives of (naturalized) citizens—to marry slave-managers, this is another case of transgressing aspects of normal Athenian ideology. It would be a violent transgression indeed if the women involved were native-born “autochthonous” Athenians. Archippe was certainly not Athenian by birthright. Cohen suggests, following Whitehead, that the wives of naturalized citizens were accorded a sort of “Janus-like” status, on which the law was essentially silent, a status that combined features of both citizenship and non-citizenship. But this blurry status is, in itself, innovative. Athenian ideology and law were notoriously touchy about marriages of citizens and non-citizens. According to the law cited in Dem. 59.16, any non-citizen convicted of cohabiting with a citizen woman would forfeit both his property and his freedom. In the case of bankers’ widows, insofar as they were even partially “citizens” (and we must keep in mind that Archippe was the mother of two sons who married, and produced children by, native Athenian women: see Davies, APF 11672—thus her bloodline was comingle with that of the autochthones) we have the very inverse of the legal norm: rather than losing property and being sold as a slave, the slave-foreigner in question, by marrying a citizen woman, gains a substantial property and the status of free man. One might assume that a naturalized family would develop and encourage amnesia about its servile origins—which must also, on some level have been embarrassing to the Athenian autochthones themselves. But the testamentary marriage of Archippe to Phormion the slave brought the issue of servile origins to the fore. We must assume, then, that there was a compelling reason for Pasion and his fellow Athenians to have countenanced the union of Phormion and Archippe.

3 As recent studies of the political function of the charis obligation have shown, the view of the citizenry could be of great relevance when an individual became involved in a legal proceeding. See Ober, supra n.1, 226-30, with literature cited.

4 See now Cohen’s defense of the argument from probability approach in CPh 85 (1990) 177-90.
The speaker of Dem. 36 is aware of the tension, and he deals with it explicitly at 36.30, in a passage Cohen quite rightly calls to our attention. The speaker claims that native-born citizens would never prefer wealth (πληθος χρήματον) to honorable descent, but points out that those who received citizenship as a reward for successful money-making and for "owning more than other people" must guard their sources of revenue by whatever means necessary. The passage implies that hyper-vigilant resource-guarding on the part of naturalized families was regarded as proper by the members of the families themselves—whose political status depended upon their wealth—and by the Athenian jurors. In the case before us, the logic of resource-guarding entailed Archippe's marriage to the slave Phormion. But this was not for the benefit of the oikos alone: the speaker underlines the material good that Phormion, as an astute bank manager, has been able to do for the heirs of Pasion (that is, for Pasion's oikos), for "many" individual Athenians, and for the Athenian state (36.49-59). Here, the public good of the polis and the private good of the individual oikos become completely intertwined. While Athenians may have desired to keep public and private as distinct spheres, in fact their own economic and financial systems made this separation of public and private a practical impossibility.

The passages cited above from Dem. 36 point to a plausible explanation for why the interests of polis and oikos alike were supposed by the politai to lie in allowing what appears on the surface to be a series of affronts to normal Athenian socio-political norms and to the coherence of Athenian legal discourse. The existence of banks as stable, revenue-generating, business entities was thought to be good for Athens, and banks were run by metics, slaves, and women. The Athenians recognized that they gained materially (both in liturgies and taxes and in maintaining credit liquidity: Oem. 36.57) from the specialized banking knowledge owned—more or less uniquely—by legally marginalized persons. Faced with the choice between maintaining strict ideological and legal consistency and gaining individual and collective material advantages, the Athenians chose the latter; and their ideology and law were adjusted accordingly.

This may seem a sordid exchange when viewed from a strictly political perspective, but the results of Athenian ideological and legal flexibility were substantial in both material and social terms. Easing of socio-political mobility integrated the interests of natives, naturalized citizens, and the wealthy metics who were candidates for future naturalization. It allowed the society to benefit from the managerial talents and special knowledge of certain women. It encouraged displays of private charity and public generosity from the first-generation bankers themselves (e.g. Phormion), as well as from second-generation naturalized citizens like Apollodorus, whose feverish philotimia was fueled at least in part by the obligation of charis that he owed to the politai for including his father (and thus himself) among their ranks (e.g. Dem. 45.82, 85).

Cohen's exploration of the legal status of banking families helps to explain one aspect of the long-term viability of the democratic Athenian state. And it should contribute to the ongoing debate over whether studying the democratic polis can offer anything to modern theoretical discussions of law and democracy. If the Athenians (albeit for somewhat mercenary reasons) were willing to adjust their law to accommodate the interests of certain non-citizens, then the ideology of the polis cannot be fully explained in the terms of exclusion.

A key break in the facade of exclusivity may have been the rise of a concept of agency, which Cohen suggests developed relatively easily in Athenian law "precisely because it had not developed rigorous systems of judicial requirements for the creation of obligations." Athenian law remained a very flexible instrument in practice—it was applied according to mass juries' collective perceptions of the character and interests of the parties to disputes and the long-term interests of both oikos and polis. One might go so far as to suggest that Athenian law's long-term social utility lay in its non-universalistic character—in the fact that, at least in comparison to other legal systems, relatively few matters in Athens were so rigorously defined by legal enactment that they could not be liberally reinterpreted by the various residents of Attica (citizens and others) who made use of the law. Democratic Athens never developed (nor allowed there to develop) an arcane legal language, or a specialized and institutionalized elite whose unique right it was to make and to interpret the law. In Athens, the law (with its silences) remained a tool of social and political mediation—rather than the comprehensive "master discourse" that lawyers in other societies (e.g. Rome and the United States) have sought to make of it.

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5 Thus I cannot fully agree with Cohen's claim that "the household, as a focus of Athenian private living, took form and identity from its contrast with the public world of the community."