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## Democracy, Solidarity, and the Rule of Law: Lessons from Athens

PAUL GOWDER†

INTRODUCTION

This Article teases out the form and function of the rule of law in democratic Athens of the classical period. It defends several key claims. First, contrary to the arguments of some classicists and legal historians, particularly Adriaan Lanni and Martin Ostwald, classical Athens substantially satisfied the demands of the rule of law throughout the

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A note on citations: generally, this Article follows Bluebook format. However, the Bluebook does not prescribe a convention for citation of Ancient Greek sources. I have generally followed the convention used by classicists and cited to documents by abbreviated forms of author, title, and line number in standard form. Where my argument depends on close interpretations of original sources, I have endeavored to verify the translations from which I have worked with my own rudimentary Greek. I have also followed the conventions of historians with respect to the density of citations in historical narratives (which are less dense than is standard in law).

democratic period.<sup>1</sup> Second, Athenians saw further than many contemporary rule of law theorists: they recognized that the rule of law served the equality of mass and elite, and there was no contradiction (again contra some classicists) between the democratic power of the masses and the rule of law. Third, this connection between equality and the rule of law explains the most striking fact about Athenian legality, to wit, the otherwise puzzling effectiveness of a post-conflict amnesty after a short-lived oligarchic tyranny at the end of the fifth century B.C.E.

The reader may wonder at the fact that I propose to throw some light on the social and political problems of 2400 years ago in a law review (as opposed to, say, a journal of history or classics). Why should contemporary lawyers care? The answer is that Athens is a reflection of us today but at enough of a remove that we can understand our problems through the Athenian mirror without the distortions of contemporary controversies and political commitments. The Athenians, like us, worried about how to reconcile commitment to the rule of law and constitutionalism with democratic sovereignty.<sup>2</sup> The Athenians, like us, struggled through the problem of how to build stable democracies in the wake of civil conflict, and

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1. Here, I disagree with MARTIN OSTWALD, FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW: LAW AND POLITICS IN FIFTH-CENTURY ATHENS (1986) [hereinafter OSTWALD, POPULAR SOVEREIGNTY] and Adriaan Lanni, *Social Norms in the Courts of Ancient Athens*, 1 J. LEGAL ANALYSIS 691, 692 (2009) [hereinafter Lanni, *Social Norms*].

Note that I take what historians call a synchronic approach to the question of whether Athens had the rule of law, considering its legal system through the entire democratic period together. The alternative is a diachronic approach, considering the change in its institutions over time. This approach is warranted because, as I argue (*contra* Ostwald) in Part I, Athens had the rule of law over the entire democratic period.

2. Compare OSTWALD, POPULAR SOVEREIGNTY, *supra* note 1 (recounting Athenian struggle to reconcile these values), with LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 6 (2005); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1038-40 (2004); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1363-66 (2006) (taking sides in contemporary struggle).

they had the opportunity to learn how to do it firsthand twice in the span of a few years.<sup>3</sup> The Athenians, like us, were concerned about whether the law would protect poorer and weaker members of the community from the richer and more powerful or facilitate their exploitation.<sup>4</sup> The Athenians, like us, were worried about whether political bodies could be trusted to respect the law when it forbade the pursuit of short-term political interests.<sup>5</sup> And the Athenians, like us, weren't sure whether it is even worthwhile for political actors to trouble themselves to obey the law.<sup>6</sup> It's no surprise then that some top American legal scholars have drawn insights from Athenian law for our own. For example, Adriaan Lanni and Adrian Vermeule

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3. Compare Adriaan Lanni, *Transitional Justice in Ancient Athens: A Case Study*, 32 U. PA. J. INT'L L. 551, 552-53 (2010) [hereinafter Lanni, *Transitional Justice*] (recounting Athenian struggle with the problem), with MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1999); TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES (A. James McAdams ed., 1997) (offering accounts of the problem in contemporary states).

4. Compare DEMOSTHENES, *Against Midias*, in DEMOSTHENES §§ 219-25 (A.T. Murray trans., 1939), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0074%3Aspeech%3D21%3Asection%3D219> (forensic speech crediting the law with the power to protect the weak—discussed at length *infra*), with Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369 (1992); Morton Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977); and Catherine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1290-91 (1991) (all taking issue with that claim as applied to contemporary societies). I take up the question of the rule of law's function in protecting equality within political communities as a theoretical matter in Paul Gowder, *The Rule of Law and Equality*, 32 LAW & PHIL. 565 (2013) [hereinafter Gowder, *The Rule of Law and Equality*] and *Equal Law in an Unequal World*, 99 IOWA L. REV. (forthcoming March 2014) [hereinafter Gowder, *Equal Law in an Unequal World*].

5. Compare XENOPHON, THE LANDMARK XENOPHON'S HELLENIKA bk. 1, § 7.12 (Robert Strassler ed., John Marincola trans., 2009) (Xen. Hel. 1.7.12) (recounting story of Athenian assembly's refusal to obey the law), with Frederick Schauer, *Is Legality Political?*, 53 WM. & MARY L. REV. 481, 503-04 (2001) (asking whether American politicians take the law as giving independent reason for actions).

6. Compare PLATO, *Crito*, in COMPLETE WORKS (John Cooper ed., 1997), (arguing that disregarding the law will destroy the political community), with LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 6-10 (2012) (arguing that the American government need not obey the constitution).

have published a series of papers using Athenian constitutional design to develop arguments about how contemporary constitutions should be put together.<sup>7</sup> Lanni in particular has been prolific in drawing lessons for the contemporary world from the Athenian example, and this Article engages most closely with her work. Nor is this kind of work limited to the legal literature. In recent years, there has been a hotbed of interdisciplinary ferment centering on Athens as scholars in political science and philosophy, among other disciplines, have turned to the Greeks with increasing frequency to help us understand our own political communities at the same time as classicists and historians have turned to methods from other disciplines to help make sense of historical phenomena.<sup>8</sup>

Thus, shedding light on how the rule of law worked in classical Athens is of more than just historical interest. Examining the distinctive institutions of Athens allows us to come to a deeper understanding of how all of these ideas so often bandied about by theorists—democracy, equality, the rule of law, constitutionalism—actually work together. The Athenian example shows us that the rule of law can be compatible with very radical democracy, even in the absence of external judicial constraints. It offers lessons for the design of popular constitutionalist institutions and the rudiments of a theory of when they will be effective in holding officials to law in contemporary democracies. The success of the amnesty sheds light on the relationship between commitment to law and post-conflict reconciliation and restorative justice and gives us some clues on how states can generate that commitment. And Athens reveals that the rule of law can be an ingredient in mass solidarity against the private power of elites contrary to many,

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7. Adriaan Lanni & Adrian Vermeule, *Constitutional Design in the Ancient World*, 64 STAN. L. REV. 907, 940-43 (2012); Adrian Vermeule & Adriaan Lanni, *Precautionary Constitutionalism in Ancient Athens*, 34 CARDOZO L. REV. 893, 900-06 (2013).

8. See Josiah Ober, *What the Ancient Greeks Can Tell Us About Democracy*, ANN. REV. POLIT. SCI., 2008, at 67, 73-79 (reviewing the literature).

particularly Marxists and other left legal theorists, who have argued that the rule of law is a prop for elite power.<sup>9</sup>

Part I begins with an overview of the Athenian legal system, then argues that Athens substantially achieved the rule of law. It draws on jurisprudential ideas to argue that previous scholars who questioned the Athenian rule of law held an unduly narrow conception of what law is. It also draws on my earlier philosophical work, in which I explicate an egalitarian conception of the rule of law.<sup>10</sup>

Part II gives the evidence for the egalitarian vision of the rule of law in Athens, which I say consists in two *topoi*. First is the respect *topos*, according to which acting with respect for the laws represents respect for the democratic *polis* in virtue of the facts that (a) the laws are the distinctive possessions of the democracy, and (b) they are self-consciously *equal* laws. To disregard them is to reveal one's lack of respect for the *polis* and one's oligarchic (and thus inequalitarian) character. Second is the strength *topos*, according to which the laws are the way that the democratic polis exercises its power. According to the strength *topos*, weak members of the masses cannot stand up to strong members of the elite alone. They need the backing of the whole community, and that backing is coordinated through the law; to undermine the law is thereby to undermine the political power of the masses.

Part III focuses on a concrete historical puzzle. At the end of the fifth century, democratic Athens was taken over by two short-lived oligarchic coups. After the first of these, the oligarchy of the Four Hundred, fell, the democrats assiduously prosecuted those who had collaborated with the regime. But after the second, the infamously blood-soaked oligarchy of the Thirty Tyrants (or "the Thirty"), they enacted and obeyed an amnesty protecting most of those who were responsible for the wicked regime. We know why the amnesty was enacted (Spartan troops imposed it by force), but scholars have not come to any generally accepted

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9. See the discussion in Gowder, *Equal Law in an Unequal World*, *supra* note 4.

10. Gowder, *The Rule of Law and Equality*, *supra* note 4, at 574.

account of why it was obeyed. In Part III, I put the strength *topos* to work in explaining this mystery: the Athenian democrats had learned through the experiences of the fifth century that the strength *topos* was true and that their equal standing in the democracy depended on their faithful support of the rule of law.<sup>11</sup>

Part IV concludes the Article by redeeming the promises made in this Introduction: in it, I show the relevance of the Athenian case to the contemporary debates about, *inter alia*, the compatibility of the rule of law and democratic institutions, popular constitutionalism, and transitional justice.

## I. HOW WAS THE RULE OF LAW IMPLEMENTED IN ATHENS?

### A. *An Overview of the Athenian Legal System*

The period under consideration begins in 462. That year, the *areopagus*, an elite council of former *archons* (high magistrates), lost almost all of its legal power to the democratic council, assembly, and courts.<sup>12</sup> From then onward, the Athenian legal system revolved around those three mass institutions.<sup>13</sup> The assembly (*ekklesia*) was the

11. Note that the forensic evidence cited in Part II for the Athenian awareness of the strength *topos* comes from the period after the Thirty Tyrants, consistent with this collective learning hypothesis.

12. The *areopagus* previously had general powers of oversight with respect to magistrates and the laws (though the details are mostly unknown); after the transition of 462, it retained only the power to try murders. MOGENS H. HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES (J.A. Crook trans., 1999) [hereinafter HANSEN, THE ATHENIAN DEMOCRACY].

13. *Id.* There were also yearly magistracies, mostly selected by lot, that handled the day-to-day business. The most important of these for rule of law purposes were the Eleven, who handled the day-to-day administration of judicial business, executing confessed criminals, bringing defendants to the court, etc.—essentially serving many of the functions of modern police, magistrates, and wardens. For the details of the Eleven, see Sandra Burgess, *The Athenian Eleven: Why Eleven?*, 133 HERMES 328, 328, 334 (2005).

At various points pay was introduced (and periodically abolished by oligarchs) for service in these institutions, making them accessible to lower-class citizens. HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 12, at 188-89. Most importantly, Pericles introduced pay for jury service relatively early in the democratic period. *Id.*



chief legislative body, comprised of the entire male citizen population.<sup>14</sup> It occasionally served a judicial role.<sup>15</sup> The 500 member council (*boule*), whose members were selected by lot, set the agenda for the assembly and occasionally served a judicial function.<sup>16</sup>

The courts (*dikasteria*) were comprised of, ordinarily, between 200 and 500 jurors, carefully selected at random through an elaborate procedure.<sup>17</sup> Juries heard cases brought before them by private litigants, ordinarily in either a public suit (*graphe*) or a private suit (*dike*), though other specialized procedures existed.<sup>18</sup> The distinction between the two does not track our contemporary concepts but can be casually approximated by the difference between criminal and civil litigation.<sup>19</sup> *Graphe* suits were higher stakes for all parties—the range of punishments was broader, the prosecutor could be punished if he lost (by a large margin) or dropped the case, more time was given for speeches, and any citizen was allowed to bring a *graphe*, whereas only those personally concerned were allowed to bring a *dike*.<sup>20</sup> Nominally, magistrates presided over the courts, but their role was primarily formal.<sup>21</sup> There was nothing resembling the contemporary U.S. distinction between questions of law for judges and questions of fact for juries: the Athenian jury decided the whole dispute, and was not subject to appeal.

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14. *Id.* at 129, 150-53.

15. *Id.*

16. *Id.* at 246-48, 257-58.

17. DOUGLAS MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 40 (H.H. Scullard ed., 1978). ARISTOTLE, *The Constitution of Athens*, in *THE POLITICS AND THE CONSTITUTION OF ATHENS*, §§ 63-68 (Stephen Everson ed., 1996) (Ath. Const. 63-67) recounts the jury selection procedure in detail; it borders on the obsessive, with tokens being dispensed into boxes and matched against staves and the like in order to ensure both randomness and appropriate representation of the tribes that made up the Athenian citizenry.

18. HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 12, at 191-94.

19. This really is a loose approximation. Among other aberrations, for example, murder gave rise to a *dike*. *Id.* at 193.

20. *Id.* at 192.

21. *See id.* at 189.



Several legal procedures were of particular importance for rule of law purposes; I list them here.

- *Grapshe paranomon* was a public suit against the one who made an illegal proposal, either because the proposal was substantively illegal (such as a proposal to execute citizens without trial), or because it was offered by one not entitled to do so (i.e., if the proposer had been judicially deprived of his civic rights).<sup>22</sup> Essentially *grapshe paranomon* was a process by which the *ekklesia* could be subject to judicial review. Both oligarchic coups promptly abolished it.<sup>23</sup>

- *Eisangelia* was a denunciation made before the *ekklesia* for something resembling the modern idea of treason.<sup>24</sup> The assembly would be called upon to consider a decree against the defendant's crimes, roughly similar to an indictment in modern usage, and then either try the defendant themselves or transfer the case to a *dikasterion*.<sup>25</sup> It was often used against generals.<sup>26</sup>

- *Dokimasia* was a mandatory examination for incoming officeholders, ordinarily conducted by the *dikasterion*, to consider the fitness of a magistrate for office.<sup>27</sup> Aggrieved democrats raised the behavior of those who collaborated with the Thirty Tyrants at their *dokimasiai*.<sup>28</sup>

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22. David Cohen, *Crime, Punishment, and the Rule of Law in Classical Athens*, in *THE CAMBRIDGE COMPANION TO ANCIENT GREEK LAW* 211, 212 (Michael Gagarin & David Cohen, eds., 2005) [hereinafter Cohen, *Crime, Punishment, and the Rule of Law in Classical Athens*]. On executing citizens without trial, Cohen's discussion offers additional dimension: on his argument, the principle of no punishment without trial was the ordinary rule but was subject to special exception in extreme political necessity, as when the stability of the state or the democracy was threatened. *Id.* at 206.

23. HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 12, at 338.

24. *Eisangelia* could also be offered before the *boule*, against magistrates. *Id.* at 213.

25. *Id.* at 214.

26. *Id.* at 216.

27. *Id.* at 218-19.

28. Lanni, *Transitional Justice*, *supra* note 3, at 583-87.

- *Euthyna* was a mandatory examination of outgoing officeholders to search out any crimes committed in the course of their official duties; if the board of examiners discovered any crimes, the matter was referred to a *dikasterion*.<sup>29</sup> Members of the Thirty were required, by the terms of the amnesty, to go through *euthynai* in order to regain their civic rights.<sup>30</sup>

- *Paragraphe* was a proceeding instituted after the fall of the Thirty by which the defendant could preempt an illegal prosecution by bringing the prosecutor to trial; a prosecutor who lost was made to pay a fine.<sup>31</sup>

- *Graphe hubreos* was the prosecution for the crime of *hubris*, an ill-defined but highly important offense that included, at a minimum, physical assaults.<sup>32</sup> *Hubris* (also transliterated as *hybris*) was seen as an insult against the status of the victim, rooted in the arrogance of the malefactor.<sup>33</sup>

In 403, in the wake of the oligarchic coups and a brief civil war with the Thirty (Part III will discuss the history of these coups in detail), Athens revised its procedure for enacting legislation.<sup>34</sup> Until 403, the assembly made all the laws.<sup>35</sup> Thereafter, they established a distinction resembling that in contemporary constitutional thought between entrenched “higher laws” and ordinary legislation. The

29. HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 12, at 338.

30. Lanni, *Transitional Justice*, *supra* note 3, at 565.

31. MACDOWELL, *supra* note 17, at 214-17.

32. N.R.E. FISHER, *HYBRIS: A STUDY IN THE VALUES OF HONOUR AND SHAME IN ANCIENT GREECE 1* (1992).

33. *Id.*

[*H*]ybris is essentially the serious assault on the honor of another, which is likely to cause shame and lead to anger and attempts at revenge. *Hybris* is often, but by no means necessarily, an act of violence; it is essentially deliberate activity, and the typical motive for such infliction of dishonor is the pleasure of expressing a sense of superiority rather than compulsion, need, or desire for wealth. *Hybris* is often seen to be characteristic of of the young, and/or of the rich and/or upper classes . . . .

34. See OSTWALD, *POPULAR SOVEREIGNTY*, *supra* note 1, at 520-24.

35. HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 12, at 150-52.

former were just denoted laws (*nomoi*) and were to be enacted only pursuant to an elaborate procedure spanning several institutions, including newly created boards of lawmakers (*nomothetai*).<sup>36</sup> The latter were called decrees (*psaphismata*) and could be enacted by the assembly acting alone but were not permitted to contradict *nomoi*.<sup>37</sup>

### B. *The Dual Function of the Rule of Law in Athens*

Elsewhere, I have argued that the rule of law consists in three requirements:

Regularity: Officials are reliably constrained to use the state's coercive power only when authorized by good faith and reasonable interpretations of preexisting, reasonably specific, legal rules.

Publicity: The rules on which officials rely to authorize coercion are available for citizens to learn; officials give an explanation, on reasonable demand, of their application of the rules to authorize coercion in individual cases; and officials offer citizens who are the objects of state coercion the opportunity to make arguments about the application of legal rules to their circumstances.

Generality: Neither the rules under which officials exercise coercion nor officials' use of discretion under those rules make irrelevant distinctions between citizens; a distinction is irrelevant if it is not justifiable by public reasons, in Rawls's sense, to all concerned.<sup>38</sup>

As recounted in detail by Ober, the story of democratic Athens is one of a gradual shift in political power from a class of aristocratic elites to the citizenry as a whole.<sup>39</sup> Many aristocrats were dissatisfied with these developments.<sup>40</sup> Throughout the democratic period there was the fear that the aristocrats would seize power.<sup>41</sup> And this fear was justified since they did so twice, establishing the oligarchies

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36. *Id.* at 152-53; OSTWALD, POPULAR SOVEREIGNTY, *supra* note 1, at 520.

37. HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 12, at 150-52.

38. Gowder, *The Rule of Law and Equality*, *supra* note 4, at 566.

39. JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS 53-103 (1989) [hereinafter OBER, MASS AND ELITE].

40. *See id.*

41. *See id.*

of 411 and 404 and ruling (as will be recounted below) with little regard to legal niceties.<sup>42</sup>

We can only understand the rule of law in Athens with regard to this ever-present threat of oligarchic tyranny. A major function of the rule of law was to guard against the danger that elites would capture the state (and then abuse their newly-acquired official power) or subvert legal constraints on their wealth and power within the democracy.

At the same time, Athens had actual officials to control. In Athens, there was no separate official class, but there were official institutions, particularly the *boule*, *ekklesia*, and *dikasteria*, and magistracies like the Eleven, through which ordinary citizens could put on official roles. The Athenian rule of law should be judged by how well it controlled both the abuse of public power by ordinary citizens while they were participating in official institutions and the abuse of private power or seizure of public power by elite oligarchs-in-potentia.

I'll argue, in the following sections, that the Athenian legal system successfully kept both kinds of power more-or-less in control.

### C. *The Athenian Rule of Law*

The Athenians certainly claimed that their legal system met the standards that today would be called "the rule of law." One catalogue of these claims runs as follows:

[O]rators affirmed that the law must consist of general principles equally applied, that laws should not be enacted against individuals, that no citizen should be punished without a proper trial, tried twice for the same offense, or prosecuted except according to a statute, and that statutes should be clear, comprehensible, and not contradict other provisions.<sup>43</sup>

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42. *See id.* at 94-95.

43. DAVID COHEN, *LAW, VIOLENCE AND COMMUNITY IN CLASSICAL ATHENS* 56-57 (1995) [hereinafter COHEN, *LAW, VIOLENCE AND COMMUNITY IN CLASSICAL ATHENS*]. The prohibition against double jeopardy can be found across several of Demosthenes' speeches. *See* Thomas Clark Loening, *The Reconciliation*

Perhaps the most straightforward declaration of the rule of law at the time comes from Andocides. He describes the legal reforms enacted after the overthrow of the Thirty Tyrants as the following:

In no circumstances shall magistrates enforce a law which has not been inscribed. No decree, whether of the Council or Assembly, shall override a law. No law shall be directed against an individual without applying to all citizens alike, unless an Assembly of six thousand so resolve by secret ballot.<sup>44</sup>

In this section, I will compare what we know about the Athenian legal system to the conception of the rule of law I have already developed; together we can see whether Andocides and the other orators are to be believed.

### 1. Regularity

It is difficult to confidently assess the extent to which democratic Athens satisfied the principle of regularity. However, the existing evidence offers some support for the proposition that it did.

There are several prominent cases where the citizens occupying Athenian legal institutions seem to have disregarded the law: most notable among these is the trial of the generals (discussed at length below). But their very prominence suggests that they were exceptional circumstances, deviances from the ordinary lawful business of governance. For example, Xenophon emphasized the regret and recriminations that followed shortly after the trial of the generals.<sup>45</sup> And even Pseudo-Xenophon, an aristocratic critic of the democracy, had to acknowledge in the *Constitution of the Athenians* that “there are some who have been unjustly disenfranchised but very few indeed” and that “[i]t is from failing to be a just magistrate or failing

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*Agreement of 493/402 B.C. in Athens: Its Content and Application*, 53 HERMES 1, 133 (1987).

44. ANDOCIDES, *On the Mysteries*, in MINOR ATTIC ORATORS IN TWO VOLUMES § 1.87 (K.J. Maidment trans., 1968), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0018%3Aspeech%3D1%3Asection%3D87> (Andoc. 1.87).

45. XENOPHON, *supra* note 5, at bk. 1 § 7.35 (Xen. Hel. 1.7.35).

to say or do what is right that people are disenfranchised at Athens.”<sup>46</sup>

Moreover, Athens’ institutional structure likely made it very difficult for those citizens who held magistracies under the democracy to abuse their power. Most officials only held office for a year and were forbidden from holding the same office (except generalships) twice.<sup>47</sup> Moreover, after leaving office, each official was subject to a *euthyna* at which accusations of misconduct could be heard and referred for prosecution.<sup>48</sup> This probably greatly narrowed the scope for illegal uses of official coercion: an official who wished to seriously abuse his office would have been subject to trial no less than a year from the act and would no longer have his official powers to protect him. With such short time-scales, even a magistrate who discounted the future very heavily would have reason to fear punishment for his crimes.

Perhaps the most striking evidence for the regularity of the Athenian legal system is the post-civil war amnesty. After the Thirty Tyrants were removed, the vast majority of those implicated were granted amnesty for all of their crimes under the oligarchy.<sup>49</sup> Despite the incentives democrats must have had for revenge as well as to remove those who had proven their disloyalty, the amnesty was successfully upheld.<sup>50</sup> The democratic *boule* went so far as to violate the rule of law in *maintaining* it, summarily executing one citizen for attempting self-help vengeance.<sup>51</sup> The democrats even enacted a new judicial procedure, *paragraphe*, in order to prevent illegal prosecutions.<sup>52</sup> In Part III, I will explain this surprising resilience; for present purposes it is enough to note it.

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46. PSEUDO-XENOPHON, *The Constitution of the Athenians*, in VII SCRIPTA MINORA §§ 3.12-3.13 (E.C. Marchant ed., G.W. Boerstock trans. 1968) (§§ 3.12-3.13).

47. HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 12, at 230.

48. *Id.* at 338.

49. *See generally* Lanni, *Transitional Justice*, *supra* note 3.

50. *See id.* at 552-53.

51. *Id.* at 568.

52. HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 12, at 196.

Also to be considered under the rubric of regularity is the extent to which the legal system succeeded in avoiding the danger, mentioned above, of oligarchic coups. The elites were mostly prevented from seizing control of the state with the exception of the two fifth-century oligarchies, and I will argue in Part III that both of these oligarchies were occasioned by exogenous shocks—extraordinary military losses that the democracy could not withstand—although flaws in the legal system may have facilitated them. And both oligarchies were quickly overthrown.

With respect to the abuse of elite power short of coup, there is also evidence that the legal system worked. The crime of *hubris* is often associated with aggressive display of superiority by the wealthy.<sup>53</sup> The extent to which this law actually restrained such violence is not clear, but there is at least evidence that *hubris* cases were sometimes brought, that in ordinary assault cases the accusation of *hubris* was also raised, and that threats to bring *hubris* prosecutions were sometimes made.<sup>54</sup> Carawan argues that the *graphe paranomon* served a similar function as *hubris*—preventing the powerful from abusing their power against the common interest, in this case by enacting illegal decrees.<sup>55</sup> These provisions offer us at least some reason to believe that the legal system as a whole contributed to regulating the potential for elites' day-to-day abuse of wealth and status.<sup>56</sup>

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53. See FISHER, *supra* note 32, at 1; JOSIAH OBER, *ATHENIAN LEGACIES: ESSAYS ON THE POLITICS OF GOING ON TOGETHER* 113-16 (2005).

54. See FISHER, *supra* note 32, at 38-43.

55. Edwin Carawan, *The Trial of the Arginousai Generals and the Dawn of Judicial Review*, 10 DIKE 19, 43-46 (2007) (It.).

56. See Lanni, *Social Norms*, *supra* note 1, at 693-94, and sources cited therein, suggesting that the legal system as a whole was good at restraining private violence, getting elites to pay their taxes, etc. However, as Lanni notes, there is some debate about the extent to which private violence was actually restrained. *Id.* at 693. See also Anastassios Karayiannis & Aristides N. Hatzis, *Morality, Social Norms and the Rule of Law as Transaction Cost-Saving Devices: The Case of Ancient Athens*, 33 EUR. J.L. & ECON. 621, 636-39 (2012), who allege that Athens' legal system was also effective in serving functions such as protecting property rights and enforcing contracts. Martha Taylor, *Implicating the Demos: A Reading of Thucydides on the Rise of the Four Hundred*, 122 J. HELLENIC STUD. 91, 100 (2002), points out that the assassination of Androcles and other killings leading up to the oligarchy of the



One worry leading to a potential objection with respect to regularity in Athens arises from the extent of the discretion juries had to convict defendants. While the jurors were required to take an oath to follow the law, some scholars have argued that extra-legal evidence was often taken into consideration such that jurors often did not act as if they were bound to convict or acquit defendants on legal grounds alone.<sup>57</sup> I am not equipped to intervene on the debate about the actual amount of discretion juries exercised, but I will submit that even if juries exceeded the written law, it does not necessarily follow that their decision-making power was sufficiently unconstrained to violate regularity.

Thus, although scholars such as Lanni argue that the Athenians disregarded the rule of law because juries made rulings on the basis of informal norms,<sup>58</sup> that does not warrant the conclusion that the Athenian legal system was

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400 were “the first known political murders in Athens since the assassination of Ephialtes” (that is, in about a fifty year period—a record comparable to those of modern rule of law states).

57. On the juror’s oath, see Edward Harris, *The Rule of Law in Athenian Democracy: Reflections on the Judicial Oath*, 9 *ETICA & POLITICA*, no.1, 2007, at 55, 67-72, who argues that jurors did not consider non-legal evidence except in fixing penalties. Some, such as Dennis Maio, *Politeia and Adjudication in Fourth-Century B.C. Athens*, 28 *AM. J. JURIS*. 16, 40-44 (1983), argue that the juries followed the law when it existed and exercised something like policymaking power in the gaps. COHEN, *LAW, VIOLENCE AND COMMUNITY IN CLASSICAL ATHENS*, *supra* note 43 is often cited for the suggestion that the law courts simply ruled on political disputes or feuds and that the precise legal charges brought were not material to jury decisions (see, e.g., ADRIAAN LANNI, *LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS* 41 (2006) [hereinafter LANNI, *LAW AND JUSTICE*]), though I have some difficulty discerning such an extreme position in his argument. Lanni argues that Athens had a broad notion of relevance that included extra-legal evidence when consistent with justice. See LANNI, *LAW AND JUSTICE*, *supra*, *passim*. Christopher Carey, *Nomos in Attic Rhetoric and Oratory*, 116 *J. HELLENIC STUD.* 33, 36 (1996), suggests that there was a strong Hellenic norm limiting the extent to which law could just be disregarded. See also Alastair Blanshard, *What Counts as the Demos? Some Notes on the Relationship Between the Jury and ‘The People’ in Classical Athens*, 55 *PHOENIX* 28 (2004); Christopher Carey, *Legal Space in Classical Athens*, 41 *GREECE & ROME* 172 (1994); James Cronin, *The Athenian Juror and Emotional Pleas*, 34 *CLASSICAL J.* 471 (1939).

58. Lanni, *Social Norms*, *supra* note 1, at 692-94.

irregular. Lanni was able to discern six clear categories of social norms enforced in the Athenian courts;<sup>59</sup> the mere fact that she can identify them is evidence that they were determinate enough to provide limits on the discretionary coercive power of juries.<sup>60</sup> Here, the immense size of the juries may have helped: no individual juror or small group of jurors could have punished a litigant for idiosyncratic reasons absent some generally acceptable reason (i.e., rooted in the written law or a strong social norm) to bring along enough votes. Moreover, as Lanni points out elsewhere, the Athenian courts were conducted in a glare of publicity, and this helped hold jurors accountable to the opinion of the community.<sup>61</sup>

Lanni's work thus warrants the conclusion not that the Athenian juries ignored the law, but that the law in Athens included both written enactments of the assembly and those unwritten social norms that were widely accepted about citizens' public and private conduct.<sup>62</sup> In support of this

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59. *Id.* at 700-07.

60. Moreover, rule of law skeptics such as Lanni have offered no evidence that litigants asked juries to ignore the law in favor of social norms; it is striking that the extant forensic speeches pair appeals to social norms with appeals to law and accuse their opponents of violating both. Norms seem to function as a complement rather than a substitute for laws.

61. Adriaan Lanni, *Publicity and the Courts of Classical Athens*, 24 *YALE J.L. & HUMAN.* 119, 120-29 (2012). Of course, being accountable to the community and accountable to the law are not the same thing; in times of political uproar, this may have meant pressure from the rest of the public to ignore the law rather than to uphold it (thus the common supposition that judicial independence has something to do with the rule of law).

62. Consistent with this approach, Rosalind Thomas, *Written in Stone? Liberty, Equality, Orality and the Codification of Law*, *BULL. INST. CLASSICAL STUD.*, Dec. 1995, at 59, 64-66, suggests that the distinction between written laws and unwritten laws or binding customs only developed toward the end of the fifth century and became politically significant primarily because the Thirty manipulated the unwritten laws for their own advantage. *Cf.* Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 *NW. U. L. REV.* 719 (2006) (defending a conception of law that is sensitive to changing definitions of the relevant community within a society). My argument here can be reframed in Adler's terms as a call to attend to the practices of the populace as a whole as enforced in the courts to define the content of Athenian law, rather than just the population acting in a legislative capacity in the assembly. *See also* JOSIAH OBER, *DEMOCRACY AND KNOWLEDGE:*

interpretation, note that Thucydides' rendition of Pericles' funeral oration credits Athens with both written and unwritten laws, and Aristotle's *Politics* makes clear that both categories count as law.<sup>63</sup> The Athenian legal practice may have been similar to that of modern common-law states, which incorporate social custom into the law and still comply with the rule of law.<sup>64</sup> Indeed, even the very word *nomos*, which meant law, also meant custom.<sup>65</sup>

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INNOVATION AND LEARNING IN CLASSICAL ATHENS 190-91 (2008) [hereinafter OBER, DEMOCRACY AND KNOWLEDGE] (arguing that Athenian jurors had "[a] shared repertoire of common knowledge, along with a common commitment to democratic values," such that they "would often align in more or less predictable ways" even in the face of formal legal ambiguity).

63. THUCYDIDES, THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR, bk. 2, § 2.37 (Robert B. Strassler ed., Richard Crawley trans., 1996) (Thuc. 2.37). I thank Dan-El Padilla Peralta for drawing this to my attention. For Aristotle, see ARISTOTLE, *The Politics, in THE POLITICS AND THE CONSTITUTION OF ATHENS*, §§ 3.16, 1287b6-7 & 6.5, 1319b40-41 (Stephen Everson ed., 1996) (*Politics* 3.16, 1287b6-7 & 6.5, 1319b.40-1).

64. In Britain, it has long been argued that the common law is rooted in the custom of the community. A review of Blackstone's comments on the matter and their contemporary influence is in David Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339, 344-46 (2002). Similarly, U.S. common law torts often require findings about what a reasonable person in the community would have done, and U.S. contract law often looks to industry and community norms to supply terms not found in written contracts. See, e.g., U.C.C. § 1-303. Richard Epstein, *The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992), reviews the history of the incorporation of customs into the U.S. common law of tort. See generally F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* (1982), which argues that the common law is superior, from the standpoint of the rule of law, to legislative enactments in virtue of the fact that the common law is discovered and evolved from community norms rather than decreed by someone's will. Like so many twentieth century arguments, this was anticipated by the Greeks: Aristotle declared that "a man may be a safer ruler than the written law, but not safer than the customary law." ARISTOTLE, *The Politics, supra* note 63, § 3.16, 1287b6-7 (*Politics* 3.17, 1297b6-7).

65. See generally HENRY GEORGE LIDDELL & ROBERT SCOTT, *GREEK-ENGLISH LEXICON* 1180 (9th ed. 1996).

## 2. Publicity

The principle of publicity requires citizens have access to adequate information about the law and an opportunity to defend their interests in fair judicial processes. As far as can be determined, Athens satisfied the publicity principle quite well.

Citizens were given extensive opportunities to participate in the legal process. Any citizen could initiate legal action before the popular courts for injuries to himself as well as for crimes against the state; the latter category could even include suits brought to remedy wrongs committed against third parties.<sup>66</sup> In addition, officials were held to account after the expiration of their terms in routine judicial procedures (*euthynai*) to which ordinary citizens had access,<sup>67</sup> as well as a special procedure (*eisangelia*) to challenge a magistrate's actions while still in office.<sup>68</sup> There was even a legal procedure (*graphe paranomon*) available to citizens to challenge unlawful decrees of the Assembly.<sup>69</sup>

Once legal process was invoked against a citizen, there was ample opportunity to mount a full defense. The seriousness with which a defendant's right to put up a defense was taken can be seen by the outrage Xenophon reports at the failure of the Assembly to respect that right in the illegal trial of the generals (discussed at length at the end of Part II). There were also protections against frivolous or extortionate litigation: in many types of procedure, prosecutors who failed to get a fifth of the votes or who abandoned the cases after bringing them were subject to

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66. S.C. TODD, *THE SHAPE OF ATHENIAN LAW* 100 (1993).

67. *Id.* at 112-13; *see also* OSTWALD, *POPULAR SOVEREIGNTY*, *supra* note 1, at 53-55.

68. TODD, *supra* note 66, at 113-15; *see generally* MOGENS HANSEN, *EISANGELIA: THE SOVEREIGNTY OF THE PEOPLE'S COURT IN ATHENS IN THE FOURTH CENTURY B.C. AND THE IMPEACHMENT OF GENERALS AND POLITICIANS* (1975).

69. *See* MOGENS HANSEN, *THE SOVEREIGNTY OF THE PEOPLE'S COURT IN ATHENS IN THE FOURTH CENTURY B.C. AND THE PUBLIC ACTION AGAINST UNCONSTITUTIONAL PROPOSALS* 14 (1974) [hereinafter HANSEN, *SOVEREIGNTY*]; *see also* MACDOWELL, *supra* note 17, at 50-52.

fine.<sup>70</sup> For illegal prosecutions, defendants could bring their own preemptive suit (*paragraphe*), victory in which led to a penalty for the prosecutor and the barring of the original litigation.<sup>71</sup>

Information about the content of the law was more or less readily available depending on the time under consideration. In 410, an attempt was made to collect the many uncodified laws and publish them in one place; in 404 the code was inscribed on a wall, and in 399 the final post-oligarchical revision of the laws was completed.<sup>72</sup> Around the same period, a centralized location was created for paper copies of the laws.<sup>73</sup> Until that period, laws were published essentially wherever it seemed appropriate, and it may have been difficult for ordinary Athenians to know the laws that applied.<sup>74</sup> The change from scattered and hard-to-discover laws to a centralized law code was a clear improvement from the standpoint of publicity.<sup>75</sup> Generally however, even before the reforms, Athens' small population, its cultural and religious homogeneity, the public nature of its procedures, and the extent of citizen participation in juries all give us good reason to suppose that ordinary citizens were familiar, in their capacities as citizens, with the law that they enforced in their capacities as jurors.

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70. MACDOWELL, *supra* note 17, at 64.

71. *Id.* at 214-17.

72. HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 12, at 162-63.

73. MACDOWELL, *supra* note 17, at 48.

74. *See id.* at 45-46. This worry is ameliorated somewhat if Lanni, *Social Norms*, *supra* note 1, is right that the Athenian courts enforced a great deal of unwritten social norms, since those norms, to be norms at all (let alone to be willingly enforced by mass randomly-selected juries) must have been widely known (and accepted).

75. Andrea Nightingale, *Plato's Lawcode in Context: Rule by Written Law in Athens and Magnesia*, 49 CLASSICAL Q. 100, 107-12 (1999) argues that ordinary Athenians did not in fact have substantial legal knowledge. If true, that nonetheless does not directly threaten the conclusion that Athens comported with the principle of publicity so long as knowledge of the laws was available (fairly cheaply) to those citizens who cared; compare Athens here, again, to modern societies—the IRS code does not offend against the rule of law because citizens do not have it memorized, so long as it is relatively easy for citizens to learn their obligations and rights when they need to do so.

### 3. Generality

The law in Athens was not general. Athens manifestly failed to comport with the principle of generality with respect to women, foreigners, and slaves, each of which was a subordinate legal class with dramatically inferior rights.<sup>76</sup> However, the rule of law is a continuum not a binary,<sup>77</sup> and Athens did manage to achieve substantial strides toward generality along the dimension of socioeconomic class.<sup>78</sup>

Eligibility for membership in all political institutions was determined by citizenship, a hereditary status held by all people whose parents were both Athenian citizens (although citizenship could be lost by judicial process). All male citizens ordinarily had equal legal rights relating to, e.g., property ownership, protection from violence, etc., as well as equal rights to participate in the assembly and in the courts both as litigants and jurors.<sup>79</sup> Metics (resident foreigners), women, and slaves had lesser legal rights, though none were completely devoid of rights.<sup>80</sup>

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76. Sparta actually did better than Athens along one dimension of generality: Spartan women had more economic and other rights than Athenian women. See Robert Fleck & F. Andrew Hanssen, "Rulers Ruled by Women": An Economic Analysis of the Rise and Fall of Women's Rights in Ancient Sparta, 10 ECON. GOVERNANCE 221, 222 (2009).

77. See Gowder, *The Rule of Law and Equality*, *supra* note 4, at 566 n.3, for more on the possibility of partial satisfaction of rule of law ideals.

78. RAPHAEL SEALEY, *THE ATHENIAN REPUBLIC: DEMOCRACY OR THE RULE OF LAW?* 51 (1987), makes the intriguing suggestion that the post-Thirty law reforms were "a protracted and careful series of attempts to bring about the rule of law, that is, to ensure that the law should be the same for everyone." Although that claim is closely in line with the thesis of this paper, Sealey does not offer much evidence for it. His primary ground for that claim seems to be a distinction made by Aristotle, in which laws are general while decrees relate to particular cases. See *id.* However, that is not very strong evidence absent some reason to believe that Aristotle was referring to the law-decree distinction enacted into law after the Thirty and that the people of Athens conceived of the distinction the same way that he did.

79. *Id.* at 23. Exceptions to this were in assignment to branches of the military service and mandatory "liturgies" (contributions to the military and to festivals) for the rich. For liturgies, see Martin Ostwald, *Public Expense: Whose Obligation? Athens 600-454 B.C.E.*, 139 PROC. AM. PHIL. SOC'Y 368, 370 (1995). On military assignments, see *id.* at 377-78.

80. See generally MACDOWELL, *supra* note 17, at 67-85.



Fundamental to the idea of Athenian democracy was *isonomia*, or political equality through legal equality.<sup>81</sup> Part II contains a detailed discussion of *isonomia*, but for present purposes it's worth noting only that orators routinely raised the ideology of class equality under law in their arguments, usually to urge the punishment of their rich opponents on the same terms as the poor would be punished. Even the diversity of legal procedures by which citizens could resolve their disputes was thought to accommodate class equality, allowing poorer and more vulnerable citizens to choose procedures that subjected them to less danger, though at the cost of being able to deploy less severe punishments. This balanced the need to deter frivolous litigation with the need to guarantee equal access to justice.<sup>82</sup>

Even with respect to slaves, Athens did better than its peer cities. Sparta, to take the most striking contrast, went so far as to subject *helots* to a minimum number of blows per year to remind them of their inferiority.<sup>83</sup> In Athens, they were protected from private violence, and at least one oligarchic aristocrat decried this as establishing a wholly inappropriate equality between citizen and slave:

Now amongst the slaves and metics at Athens there is the greatest uncontrolled wantonness; you can't hit them there, and a slave will not stand aside for you. I shall point out why this is their native practice: if it were customary for a slave (or metic or freedman) to be struck by one who is free, you would often hit an Athenian citizen by mistake on the assumption that he was a slave. For the people there are no better dressed than the slaves and metics, nor are they any more handsome. If anyone is also startled by the fact that they let the slaves live luxuriously there and some of them sumptuously, it would be clear that even this they do for a reason. For where there is naval power, it is necessary from financial considerations to be slaves to the slaves in order to take a portion of their earnings, and it is then necessary to let them go free. And where there are rich slaves, it is no longer profitable in such a place for my slave to fear you. In

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81. See *infra* Part II for discussion and references.

82. For the details and a discussion of a passage where Demosthenes explains this idea, see Robin Osborne, *Law in Action in Classical Athens*, 105 J. HELLENIC STUD. 40, 40-42 (1985).

83. Michael Vickers, *Alcibiades at Sparta: Aristophanes Birds*, 45 CLASSICAL Q. 339, 348 (1995).



Sparta my slave would fear you; but if your slave fears me, there will be the chance that he will give over his money so as not to have to worry anymore. For this reason we have set up equality between slaves and free men, and between metics and citizens.<sup>84</sup>

Note that, according to Pseudo-Xenophon, slaves were not only protected from private violence, but this protection actually was reflected in the day-to-day social relations between citizens and slaves: having no fear of violence, slaves were not obliged to behave deferentially toward citizens by “stand[ing] aside.”<sup>85</sup> This is a special case of a general feature of the legal control of violence, namely that it protects those who might otherwise be subjected to it from being driven by terror to express their subordinate status through submissive behavior, and it prevents those who might wield it from expressing their superior status through *hubris*. By those lights, Athens came quite far (for its time) in extending the protections of law even to slaves.<sup>86</sup>

## II. EQUALITY AND THE ATHENIAN RULE OF LAW

In this Part, I argue that numerous sources from Athens reflect an understanding of the rule of law such that faithful enforcement of the laws will protect the power and status of the masses against the inegalitarian ambitions of the elites, that is, the rule of law was the guardian of political equality.

First, I demonstrate the respect *topos*. On the respect *topos*, to break the law is to reveal one’s character as an oligarch, one who has an arrogant (hubristic) disdain for the masses as expressed in their distinctively democratic laws. To punish such oligarchs is to protect ordinary people from their hubris as well as to protect the democracy from their urge to overthrow it. Even when citizens ignore the law in

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84. PSEUDO-XENOPHON, *supra* note 46, at 479-81 (§§ 1.6-1.13). The Greek text here uses *isegoria* as the term for the equality in question “between slaves and free men”—an exaggeration, since that term that usually means something like political/democratic equality—see *infra* Part II for further discussion.

85. PSEUDO-XENOPHON, *supra* note 46, at 479-81 (§§ 1.6-1.13).

86. For further discussion of *hubris* and terror and their relationship to the rule of law, see Gowder, *The Rule of Law and Equality*, *supra* note 4, at 585-98.

their private lives, this is seen as evidence of their oligarchic character and contempt for the masses.

Next, I demonstrate the strength *topos*. On the strength *topos*, to defend the law is to defend the democracy itself. Each individual citizen (particularly, each non-elite citizen) in the democracy is made strong when the laws are enforced and weak when they are not; conversely, the laws are strong when citizens defend them and are weak when they do not. When the laws are strong, nobody need live in fear because the laws give the masses the tools to protect themselves against the elites.

The first section offers the evidence; the second addresses some objections to this Part as well as to Part I.

Before moving into the section proper however, a linguistic note is in order. Several words can be translated as “equality” in the Athenian corpus, but the most significant is *isonomia*. There has been some debate among classicists about what the term means. According to Vlastos, *isonomia* captured the relationship between legal and political equality.<sup>87</sup> He contrasts the idea of “equality before the law” and “equality maintained through law” and argues that *isonomia* meant the latter and in particular that the laws “should be equal in the wholly different sense of defining the equal share of all the citizens in the control of the state.”<sup>88</sup> Ober suggests that *isonomia* could have meant “equality of participation in making the decisions (laws) that will maintain and promote equality and that will bind all citizens equally.”<sup>89</sup> Ostwald interprets *isonomia* as meaning political equality or “equality of rights and power.”<sup>90</sup> For Ostwald, too, political and legal equality are two sides of the same coin in *isonomia*: “[W]hat is

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87. See Gregory Vlastos, *Isonomia*, 74 AM. J. PHILOLOGY 337, 356-61 (1953).

88. *Id.* at 350-52.

89. OBER, MASS AND ELITE, *supra* note 39, at 75.

90. MARTIN OSTWALD, NOMOS AND THE BEGINNINGS OF THE ATHENIAN DEMOCRACY 153-54 (1969) [hereinafter OSTWALD, NOMOS]. Elsewhere, OSTWALD, POPULAR SOVEREIGNTY, *supra* note 1, at 27, suggests that *isonomia* meant “political equality between the ruling magistrates, who formulate political decisions, and the Council and Assembly, which approve or disapprove them.”

recognized as valid and binding is so regarded by and for all classes of society.”<sup>91</sup> By contrast, Hansen distinguishes the rule of law and equality under law from *isonomia*.<sup>92</sup> According to Hansen, “equality before the law” is “sometimes overlooked by historians, or only briefly described, perhaps because no slogan was coined for it as in the case of *isegoria* and *isonomia*.”<sup>93</sup> For Hansen, *isonomia* only meant political equality, i.e., to participate in democratic governance.<sup>94</sup>

The classics literature has developed some of the themes in this section via an interpretation of the concept of *isonomia*. Particularly, Rosivach elucidates the relationship of political equality to hubristic disrespect.<sup>95</sup> On Rosivach’s account, in Athens *isonomia* was understood as the opposite of tyranny. The tyrant, qua feared figure in Athenian political culture, is guilty of *hubris* in virtue of his status-

91. OSTWALD, *NOMOS*, *supra* note 90, at 159.

92. HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 12, at 84.

93. *Id.* *Isegoria* is a particular term for political equality as a democratic citizen, i.e., having an equal voice in the decisions of the city. *See generally* LIDDELL & SCOTT, *supra* note 65, at 836 (1996) (entry under ἰσηγορέομαι). There can also be found *isokratia*, equal power, used by Herodotus in contrast to tyranny. *See* HERODOTUS, *THE LANDMARK HERODOTUS: THE HISTORIES* 406 (Robert B. Strassler ed., Andrea L. Purvis trans., Pantheon Books 2007) (Herod. § 5.92); *see also* Paul Cartledge, *Comparatively Equal*, in *DEMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN* 178 (Josiah Ober & Charles Hedrick eds., 1996) (both collecting other terms for various sorts of equality); Kurt Raaflaub, *Athens: Equalities, Inequalities*, in *DEMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN* 140 (Josiah Ober & Charles Hedrick eds., 1996) [hereinafter Raaflaub, *Athens: Equalities, Inequalities*].

94. HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 12, at 81-82. Vincent Rosivach, *The Tyrant in Athenian Democracy*, 30 *QUADERNI URBINATI DI CULTURA CLASSICA*, 1988, at 43, 47-51 (It.), has a similar view but argues that *isonomia* just meant political equality among those entitled to participate, which could include, for example, just oligarchs. FRIEDRICK VON HAYEK, *THE CONSTITUTION OF LIBERTY* 164-65 (1960), actually seems to have held the opposite view—that *isonomia* just meant the rule of law, not political equality. Judging by the weight of contemporary philological opinion, Hayek was simply mistaken.

95. *See* Rosivach, *supra* note 94, at 44-48.

grabbing seizure of power.<sup>96</sup> He can get away with further *hubris*—with acts of violence in his regime that offend against the dignity of ordinary citizens—just because he is above the law and not subject to judicial control.<sup>97</sup> Of course, such a tyrant could be oligarchic, at least after 399, when the term began to be applied to the regime of the Thirty, and tyranny became to be identified less with one-person rule than with undemocratic rule.<sup>98</sup> Lewis finds similar ideas as far back as Solon. Lewis argues that Solon established the superiority of law over personal whim in Athens just to solve the problem of widespread *hubris* that led Athenians to forcibly take one another as slaves.<sup>99</sup>

In reviewing the evidence presented below, we should keep in mind the connection between these three ideas: political equality; legal equality; and the avoidance of *hubris*.

#### A. *A Catalogue of Athenian Evidence*

I offer evidence from contemporaneous forensic speeches, theatre, historians, and philosophers for the relationship between the rule of law and equality. Classical scholars generally accept that forensic speeches are good evidence for Athenian political beliefs. The standard argument is that the speeches, being meant to convince a mass jury, would reflect arguments that talented orators

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96. “When the tyrant denies the equality of all citizens by taking the government into his own hands alone, he puts himself on a higher plane, as it were, and by treating as inferiors those who are by rights his equals he is guilty of *hybris*.” *Id.* at 53.

97. “Thus the tyrant too, seen as an *hybristes*, violently mistreats and demeans his fellow citizens and goes unpunished for it because—another political element—the acts of the tyrant are not subject to the judicial review of his fellow citizens as the acts of Athenian magistrates normally are.” *Id.* at 54.

98. *See id.* at 43, 56-57; *see also* KURT RAAFLAUB, THE DISCOVERY OF FREEDOM IN ANCIENT GREECE 94-96 (2004); Raaflaub, *Athens: Equalities, Inequalities*, *supra* note 93, at 144-45 (arguing that *isonomia* shifted in meaning, first expressing equality of aristocrats as against tyrants and only later mass democracy).

99. *See generally* John Lewis, *Slavery and Lawlessness in Solonian Athens*, 7 DIKE 19 (2004) (It.).

and politicians would expect that jury to accept, so we can reliably use them to approximate mass opinion.<sup>100</sup> Matters are less clear with the theater, history, and philosophy. Theatrical performances at least would have been given in order to win popular support and prizes at festivals, so a similar argument could apply, albeit with lower stakes than forensic speeches (since nobody was executed for putting on a bad play). Philosophers' arguments and historians' explanations of events of course need be nothing more than the opinions of the individuals writing. Consequently, we should take the forensic speeches offered below as the strongest evidence and the other materials as somewhat weaker.

1. Forensic Evidence for the Athenian Equality Thesis

**a. The Respect Topos.** The first sort of forensic evidence for the egalitarian meaning of the rule of law in Athens is in a series of passages associating lawbreaking with oligarchic character. On this recurrent theme, lawbreaking was an indication that the lawbreaker aspired to be an oligarch, that is, superior to the rest of the population. His arrogance and lawlessness on an individual basis was taken to suggest that, given the chance, he'd carry those habits over into arrogant and lawless political power. This claim was sometimes elaborated by the notion that the populace had good reason to fear the lawbreaker.

Thus Isocrates, in *Against Lochites*, argues that Lochites should be punished for assaulting a fellow citizen (the crime of *hubris*) because his crime reveals his oligarchic character.<sup>101</sup> To punish him, Isocrates argues, is to protect the public against those who still wish to overthrow the democracy.<sup>102</sup>

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100. See Lanni, *Social Norms*, *supra* note 1, at 701.

101. See ISOCRATES, *Against Lochites*, in ISOCRATES IN 3 VOLUMES §§ 20.7, 20.11 (George Norlin, Ph.D., LL.D., trans., 1980), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0144%3Aspeech%3D20%3Asection%3D10> (Isoc. 20.7, 20.11).

102. *Id.* § 20.10 (Isoc. 20.10).

Similarly, Demosthenes, in *On the False Embassy*,<sup>103</sup> equates being superior to the laws to being superior to the people and distinguishes between the acceptable greatness and power that a politician might achieve in the popular assembly and the unacceptable greatness and power that might be achieved in (that is, over) the courts; equality before the law is “the democratic principle.”<sup>104</sup> Demosthenes warns that Aeschines is in danger of becoming superior to the courts in this undemocratic fashion if the jury fails to convict him “merely because this man or that so desires.”<sup>105</sup>

Later in the speech, the oligarchic connection to all of this becomes clearer: having “perpetrated wrongs without number,” Aeschines wishes to set himself up as an oligarch.<sup>106</sup> It’s striking that in this latter passage Demosthenes credits Aeschines’ law-breaking behavior for his turn toward oligarchic sentiments. There was a more natural supposition available to him: Demosthenes had been accusing Aeschines of taking Philip of Macedon’s bribes; why didn’t Demosthenes complete that theme and accuse him of becoming an oligarch because of his increase in wealth? The supposition seems to be that losing respect for the laws and losing respect for the democracy, and thus the equality of mass and elite, go together.<sup>107</sup>

Thucydides echoes these ideas (noted here, although not a forensic speech, for purposes of continuity). The masses

103. See DEMOSTHENES, *ON THE FALSE EMBASSY* §§ 19.296-97 (C.A. Vince & J.H. Vince trans., 1926), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0072%3Aspeech%3D19%3Asection%3D97> (Dem. 19.296-7).

104. *Id.* § 19.296 (Dem. 19.296).

105. *Id.* (Dem. 19.296).

106. *Id.* §§ 19.313-19.314 (Dem. 19.313-19.314).

107. See PLATO, *Crito*, *supra* note 6, § 53b-c (*Crito* 53b-c). There, Socrates points out that by fleeing, he’ll justify the jury’s sentence on him, “for anyone who destroys the laws could easily be thought to corrupt the young and the ignorant.” *Id.* In light of the oft-alleged supposition that Socrates was executed for his role in teaching the oligarchs that became the Thirty (although this is controversial, see T.H. Irwin, *Socrates and Athenian Democracy*, 18 PHIL. & PUB. AFF. 184, 186-88 (1989)), we might take this as Plato’s affirmation that being seen to violate the laws would make more credible the idea that Socrates had something to do with the oligarchy.



feared Alcibiades, he says, because of his lawlessness: “Alarmed at the greatness of the license in his own life and habits, and at the ambition which he showed in all things whatsoever that he undertook, the mass of the people marked him as an aspirant to the tyranny and became his enemies.”<sup>108</sup> That is, the rich and powerful, when they ignore the laws in their personal lives, are seen as tending toward oligarchic or tyrannical sentiments and consequently inspire fear in the populace.<sup>109</sup>

Indeed, this was a common refrain about Alcibiades. Andocides expresses shock that Alcibiades is seen as a supporter of democracy, “that form of government which more than any other would seem to make equality its end,” and cites as evidence for the contrary position Alcibiades’ flouting of the laws in his private life as well as his use of force to defend himself against the laws when called to account for his private profligacy.<sup>110</sup>

Finally, Isocrates, again in *Against Lochites*, directly recognizes the relationship between equality under law and social status.<sup>111</sup> He argues that the damages for *hubris* should be the same for a poor plaintiff as a rich plaintiff on the grounds that to treat them differently would amount to claiming that the poor have inferior civic status.<sup>112</sup> To do so would “teach the young men to have contempt for the mass of citizens.”<sup>113</sup> We can read this claim one of two ways. First,

108. THUCYDIDES, *supra* note 63, at bk. 6, § 15.4 (1910) (Thuc. 6.15.4).

109. Here, I cannot fail to mention Plato’s connection between individual license and tyranny: the tyrannical character is “maddened by his desires and erotic loves.” Plato, *Republic*, in PLATO: COMPLETE WORKS bk. IX, § 578a (John M. Cooper ed. 1997) (Plato Rep. IX.578a).

110. ANDOCIDES, *Against Alcibiades*, in MINOR ATTIC ORATORS IN 2 VOLUMES § 4.13 (K. J. Maidment, trans., 1968), <http://www.perseus.tufts.edu/hopper/text?doc=Andoc.+4+13&fromdoc=Perseus%3Atext%3A1999.01.0018> (Andoc. 4.13). For “equality,” Andocides uses *koinotes*, usually translated as “community” or “in common.” See LIDDEL & SCOTT, *supra* note 64, at 969.

111. ISOCRATES, *supra* note 101, § 20.19, <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0144%3Aspeech%3D20%3Asection%3D19> (Isoc. 20.19).

112. *Id.* (Isoc. 20.19).

113. *Id.* § 20.21. (Isoc. 20.21). Demosthenes makes a similar claim: “[I]f a poor man through stress of need commits a fault, is he to be liable to the severest



failing to enforce the law might lead the young (elite) men to have contempt for the masses just in virtue of the latter's having de facto inferior legal rights—that is, the inferior legal status of the masses might induce the elites to see the masses as inferior. Alternatively, failing to enforce the law against hubris might encourage young (elite) men to commit *hubris* since they won't be punished, and thus encourage the young elites to express a preexisting contempt for the masses, which they might otherwise fear to express. Either way, the failure of the law against *hubris* encourages unequal status between mass and elite.

**b. The Strength Topos.** The second repeated theme in the forensic orations is that defending the law amounts to defending the power of the democracy and consequently, the individual strength and security of each citizen. According to Demosthenes in *Against Meidias*, the faithful enforcement of the law against *hubris*, particularly against rich men like Meidias, allows citizens to live in security against casual violence and insult regardless of how powerful their hubristic enemies are.<sup>114</sup> The relationship is reciprocal: the faithful enforcement of the laws by the masses makes the laws strong, and the laws, in turn, make each individual member of the masses strong against the depredations of the powerful.<sup>115</sup>

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penalties, while, if a rich man does the same thing through shameful love of gain, is he to win pardon? Where, then, is equality for all and popular government, if you decide matters in this way?" DEMOSTHENES, *On the Trierarchic Crown*, in DEMOSTHENES § 51.11 (Norman W. DeWitt & Norman J. DeWitt trans., 1926), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0072%3Aspeech%3D19%3Asection%3D97> (Dem. 51.11).

114. See DEMOSTHENES, *Against Midias*, in DEMOSTHENES §§ 21.219-21.225 (A.T. Murray, Ph. D., LL.D., trans. 1939), <http://www.perseus.tufts.edu/hopper/text?doc=Dem.+21+219&fromdoc=Perseus%3Atext%3A1999.01.0074> (Dem. 21.219-21.225).

115. See *id.*; see also David Cohen, *Crime, Punishment, and the Rule of Law in Classical Athens*, *supra* note 22, at 218-19. Cohen reads Demosthenes to argue that the jury's enforcement of the laws "regardless of the wealth or status of the defendant" is what prevents ordinary citizens from having to live in fear. In Cohen's words: "All of this reflects an understanding of criminal law and the rule of law as the bulwark of society by which impunity for any person because of their status undermines the law which is the protection of everyone. Only punishment of those who act with impunity can preserve that order." *Id.* at 219.

The strength *topos* helps fill out Andocides' account of why Alcibiades is such a threat to the community: when Alcibiades wanted a painting, he threatened the painter with imprisonment unless he did the work.<sup>116</sup> He then carried out this threat, treating the painter "like any acknowledged slave,"<sup>117</sup> and when the polis failed to punish him for this, it "increased thereby the awe and fear in which [Alcibiades] is held."<sup>118</sup> Andocides then goes on to relate still another story in which Alcibiades beat up a competing chorus-leader and the judges ruled in his favor out of fear.<sup>119</sup> And why all this fear? Well, according to Andocides: "The blame lies with you. You refuse to punish insolence [*hubris*]."<sup>120</sup> That is, Alcibiades' past *hubris* and his demonstrated ability to get away with it allows him to intimidate his fellow citizens into letting him get away with more *hubris* in the future. The jurors have failed to uphold the laws; consequently, the laws have lost their power to bind Alcibiades, and each citizen is now in danger from Alcibiades' *hubris*.<sup>121</sup> (Andocides' argument fits particularly well with the strategic account laid out at the end of this Article, in which the Athenian rule of law depended on citizens consistently signaling their willingness to enforce the law in the courts.)

Aeschines, at the beginning of *Against Ctesiphon*, claims that the difference between a tyranny or oligarchy and a democracy is that the first two are ruled by the arbitrary will of the rulers, while the latter is ruled by the law (not, as one might otherwise suspect, the arbitrary will of the masses).<sup>122</sup> Consequently, absent enforcement of the

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116. ANDOCIDES, *supra* note 44, § 4.17 (Andoc. 4.17).

117. *Id.* (Andoc. 4.17).

118. *Id.* § 4.18 (Andoc. 4.18).

119. *Id.* §§ 4.20-4.21 (Andoc. 4.20-21).

120. *Id.* § 4.21 (Andoc. 4.21).

121. *Id.* § 4.24 (Andoc. 4.24).

122. See AESCHINES, *Against Ctesiphon*, in THE SPEECHES OF AESCHINES § 3.6 (Charles Darwin Adams, Ph.D., trans., 1919), <http://www.perseus.tufts.edu/hopper/text?doc=Aeschin.+3+6&fromdoc=Perseus%3Atext%3A1999.01.0002> (Aes. 3.6).

law against illegal motions (*graphe paranomon*), the democracy is under threat—no law, no democracy. Thus, he equates ruling according to the law to serving in battle: each is necessary to defend the *polis*.<sup>123</sup>

Toward the end of the same speech, he argues that the power of the individual citizen in a democracy depends on the faithful enforcement of the laws and to let lawbreakers off is to deliver that power into the hands of the scofflaw *rhetor*.<sup>124</sup> He goes on to suggest that politicians who would create oligarchy first must make themselves immune to law (“stronger than the courts”) and that this was the pattern displayed by the Thirty.<sup>125</sup> Since both oligarchic revolutions in fifth-century Athens started off by abolishing the *graphe paranomon* in order to shield their actions from the courts, this claim stood on solid ground.

Aeschines makes a similar claim in another speech, *Against Timarchus*, where he again says that democracies are distinct from oligarchies and autocracies in that democracies are ruled by the law and further claims that the laws provide security to the citizens and the state, while oligarchs and tyrants must defend themselves by force of arms.<sup>126</sup> He then again urges the jury to follow the laws because they have a government “based upon equality and law,” and their strength depends on the vigilant enforcement of the laws.<sup>127</sup>

123. See *id.* § 3.7 (Aes. 3.7).

124. *Id.* §§ 3.234-3.235 (Aes. 3.234-235). A *rhetor* was a professional orator seen with suspicion for his manipulative powers. See generally Jeffrey Arthurs, *The Term Rhetor in Fifth- and Fourth-Century B.C.E. Greek Texts*, RHETORIC SOC'Y Q., Summer/Fall 1994, at 1, 4-5, 8-9 (1994). On Aeschines' pejorative use of the term in *Against Ctesiphon*, see *id.* at 6.

125. AESCHINES, *Against Ctesiphon*, *supra* note 122, § 3.235 (Aes. 3.235).

126. AESCHINES, *Against Timarchus*, in AESCHINES §§ 1.4-1.5 (Charles Darwin Adams, Ph.D., trans. 1919), <http://www.perseus.tufts.edu/hopper/text;jsessionid=9FF9E3F50EA5E08E54D9D2070C4CFB62?doc=Perseus%3Atext%3A1999.01.0002%3Aspeech%3D1%3Asection%3D4> (Aes. 1.4-1.5). Again, Plato is in accord, pointing out that the tyrant is surrounded by enemies whom he must continually fight. PLATO, *Republic*, *supra* note 109, at IX.579 (Plato Rep. IX.579).

127. AESCHINES, *Against Timarchus*, *supra* note 126, §§ 1.4-1.5 (Aes. 1.4-1.5). See the discussion in HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 12, at 74.

## 2. Evidence From Poets, Philosophers, and Historians

There are non-forensic sources that also attest to the relationship between the rule of law and equality. The most interesting evidence comes from Aristotle. In the *Politics*, he argues that “the law courts [are] an institution favoring the people” and that Solon “established popular power by opening membership in the law courts to all.”<sup>128</sup> Ostwald further elaborates this passage and similar passages in the *Constitution of the Athenians* to argue that a) Solon’s creation of jurisdiction in the popular courts and b) his allowing anyone to bring a *graphe* regardless of individual injury together gave the public a check on the arbitrary use of power by elites.<sup>129</sup> That is, by making the courts widely participatory, they became more reliable in enforcing the laws against the elite and reinforcing the strength of the masses.<sup>130</sup>

Elsewhere in the *Politics*, Aristotle claims that the rule of law is necessary for those who are equals.<sup>131</sup> The argument proceeds as follows. He first claims that equal participation in government is the appropriate form of rule for people who are naturally equal.<sup>132</sup> Next, he argues (in what seems to be an inference from the previous claim) that giving (discretionary) power to magistrates is inconsistent with the equality of all citizens and consequently that the magistrates should be nothing more than “guardians and ministers of the law”; for if the law rules, no individual rules.

Thucydides agrees with Aristotle. He tells us that democracy is the state of affairs in which all are legal equals. In his version of Pericles’ funeral speech, we learn

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128. OSTWALD, POPULAR SOVEREIGNTY, *supra* note 1, at 5 (translating Aristotle’s *Politics*, §§ 2.12, 1273b.35-1274a.5).

129. *See id.* at 5-15.

130. *See id.*

131. *See* ARISTOTLE, *The Politics, in Aristotle: THE POLITICS AND THE CONSTITUTION OF ATHENS* bk. 3.16, § 1287a.9-24 (Stephen Everson ed., 1996).

132. *Id.* § 1298b.9-14, 19-20.

that Athens is a democracy in part because “[i]n private disputes all are equal before the law.”<sup>133</sup>

Euripides suggests that written laws, by enabling the weak to resist oppression by the strong, create legal and political equality:

Naught is more hostile to a city than a despot; where he is, there are first no laws common to all, but one man is tyrant, in whose keeping and in his alone the law resides, and in that case equality is at an end. But when the laws are written down, rich and poor alike have equal justice, and it is open to the weaker to use the same language to the prosperous when he is reviled by him, and the weaker prevails over the stronger if he have justice on his side. Freedom’s mark is also seen in this: “Who hath wholesome counsel to declare unto the state?” And he who chooses to do so gains renown, while he, who hath no wish, remains silent. What greater equality can there be in a city?<sup>134</sup>

Pseudo-Xenophon transposes the strength and respect *topoi* to the relationship not between elite and mass citizens, but between citizens and slaves. In the passage from *Constitution of the Athenians* which I have set out above, he says that in Athens, unlike in Sparta, slaves are given equality in virtue of their immunity to casual violence from citizens; consequently, slaves have no need to fear

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133. HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 12, at 73 (translating Thucydides’ funeral speech for Perikles § 2.37). Thucydides also transposes something like the strength *topos* to the realm of international affairs, putting in a speech of Cleon the claim that a city is stronger in international competition when its politicians subordinate their own cleverness to stable laws. See THUCYDIDES, *supra* note 63, at bk. 3, § 3.37 (Robert B. Strassler ed., Richard Crawley trans., 1996) (Thuc. 3.37).

134. EURIPIDES, *The Suppliants*, in THE COMPLETE GREEK DRAMA: ALL THE EXTANT TRAGEDIES OF AESCHYLUS, SOPHOCLES AND EURIPIDES, AND THE COMEDIES OF ARISTOPHANES AND MENANDER, IN A VARIETY OF TRANSLATIONS §§429-43 (Whitney J. Oates & Eugene O’Neill, Jr. eds., E.P. Coleridge trans., 1938) <http://www.perseus.tufts.edu/hopper/text?doc=Eur.+Supp.+429&fromdoc=Perseus%3Atext%3A1999.01.0122> (Eur. Supp. 429-443). In the last line, Euripides uses the comparative adjective form of *isos*, the general term for equality, which does not have any particular political or legal connotation, in contrast to *isegoria*, referring to political equality, and *isonomia*, discussed *infra* at Part II, referring to legal equality. “Equal justice” is δίκην ἴσην, which could also be translated as “equal rights.” Note that the use of the word “reviled” in the given translation is too strong: the Greek is κακῶς, which would translate better as “mistreated.”

citizens.<sup>135</sup> That is, because citizens cannot commit *hubris* against slaves, slaves are not subject to terror. Moreover, because slaves are not subject to terror, they do not “stand aside for”—behave submissively toward, performatively affirm their lower status toward—citizens.<sup>136</sup>

Plato, in *Crito*, repeats a version of the strength *topos*. Socrates imagines the laws criticizing him on the grounds that to disobey the laws is to destroy them and in turn to destroy the city: “Or do you think it possible for a city not to be destroyed if the verdicts of its courts have no force but are nullified and set at naught by private individuals?”<sup>137</sup>

In Herodotus, Otanes, one of the conspirators in the revolt against the Magi, echoes the respect *topos*.<sup>138</sup> Monarchs became “outrageously arrogant” and “insolent,” and this hubris was a consequence of their unconstrained power: “Even the best of men, if placed in this position of power, would lose his normal mental balance, for arrogance will grow within him.”<sup>139</sup> Otanes, like Pseudo-Xenophon, also suggests that the failure of the rule of law will give the weak reason to performatively affirm their lower status with subservient behavior: “[I]f you admire him to a moderate degree, he is vexed that he is not being treated with sufficient deference, but if you treat him subserviently, then he becomes annoyed by your obsequiousness.”<sup>140</sup> He closes with a contrast between monarchy, characterized by lawlessness, and democracy, characterized by equality:

And the worst of all his traits is that he overturns ancestral customs; he uses brute force on women, and he kills men without trial. The rule of the majority, however, not only has the most beautiful and powerful name of all, equality [*isonomia*], but in

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135. PSEUDO-XENOPHON, *supra* note 46, at 479-87 (§§ 1.6-1.20).

136. *See id.* (§§ 1.6-1.20).

137. PLATO, *Crito*, *supra* note 6, § 50a-b (*Crito* 50a-b).

138. *See* HERODOTUS, *supra* note 93, § 3.80 (Herod. 3.80).

139. *Id.* (Herod. 3.80).

140. *Id.* (Herod. 3.80).



practice, the majority does not act at all like a monarch. . . . [I]t holds all of these officials accountable to an audit[.]<sup>141</sup>

B. *But Is the Rule of Law Really Consistent with Egalitarian Democracy?*

The Athenian orators evidently thought (or wanted the masses to think) that the rule of law was an integral part of the power of the masses and thus of democratic equality. But they may have been mistaken. In particular, there's a well-known tension between radical sorts of democracy characterized by the supremacy of popular or representative legislative institutions and the rule of law: what happens if the legislature uses its supreme power to rule by decree? This is not just a problem for the ancient Athenian *ekklesia*, but also for the contemporary British parliament. The United Kingdom, today, is widely recognized as a rule of law state, but how is this to be reconciled with the doctrine of parliamentary supremacy?<sup>142</sup> The standard answer for the British case is Dicey's: Parliament is constrained by strong constitutional norms, or "conventions"; even though it has the nominal legal power to overthrow the law, these norms provide a political check preventing it from doing so.<sup>143</sup> Does Dicey's argument also apply to Athens?

In this subsection, I will suggest that it does by way of addressing two objections to this section as well as the first. Each objection centers on the notion that the democratic assembly exercised such broad powers that it was inconsistent with the rule of law. Both thus pose a threat to the argument of Part I as well as of Part II. As to Part I, they suggest that Athens did not, in fact, have the rule of law. As to Part II, they suggest that even if Athenians thought the rule of law was related to democratic equality, in fact, democratic equality as they conceived of it (as

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141. *Id.* § 3.80.5-6 (Herod. 3.80.5-6).

142. See, e.g., Jeffrey Goldsworthy, *Homogenizing Constitutions*, 23 OXFORD J. LEGAL STUD. 483, 483-505 (2003).

143. ALBERT DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 292-304 (8th ed., LibertyClassics 1982) (1915).



political equality, instantiated in strong mass legislative institutions) was inconsistent with the rule of law.

The first, which I will call “the conceptual objection,” asserts that the broad legislative discretion of the Assembly until the post-Thirty reforms was inconsistent with the rule of law. The second, which I will call the “practical objection,” asserts that the assembly and courts did in fact ignore the constraints of rule of law by exercising unconstrained power and were enabled to do so by their radical democratic structure.

### 1. The Conceptual Objection: Constitutionalism as the Rule of Law

The first objection to the notion that Athens satisfied the rule of law, at least until 403, is suggested by Ostwald’s characterization of the “principle of popular sovereignty” as a contrast to the “principle of the sovereignty of the law.”<sup>144</sup> On this account, Athens was under the “sovereignty of law” only after the post-Thirty reforms to the legislative process forbade the Assembly from ruling by decree and required new laws to pass an elaborate process of scrutiny by boards of independent lawmakers as well as the courts.<sup>145</sup>

Accepting this dichotomy seems to commit Ostwald to the proposition that “the sovereignty of law”—which I take to mean something equivalent to the rule of law—requires denying a legislative body like the *ekklesia* full control over the law. But that proposition is an error.

To see why, we should make a distinction between the rule of law (or “the sovereignty of law”) and a related concept that currently goes by the name “constitutionalism.” For political scientists and theorists, a major function of constitutions is to permit political/legal actors to coordinate on widely shared values and, by doing so, promote political stability in the face of pluralism by lowering the stakes of day-to-day politics—entrenching some basic values into a

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144. OSTWALD, POPULAR SOVEREIGNTY *supra* note 1, at 497.

145. *Id.*

fundamental law code that is more difficult to change than day-to-day legislation.<sup>146</sup>

The changes in Athens after the Thirty nicely fit that conception of constitutionalism. By constitutionalizing the basic laws of Athens identified with the ancestral laws of Solon and Draco (two of the heroic lawgivers of the Athenian demos), Athens entrenched the fundamental values of the democracy.<sup>147</sup> Its doing so immediately on the heels of devastating internal conflict that had been riddled with radical changes to the law—multiple redefinitions of citizenship and reallocations of political power (recounted in detail in Part III)—suggests that the purpose was in fact to lower the stakes of politics, that is, to make it more difficult for the *polis* to make the sorts of fundamental changes in political organization that contributed to political conflict and supported oligarchic tyranny.<sup>148</sup>

But these constitutional changes bear no direct relationship to the rule of law. In a stable political community, the rule of law can exist with or without constitutional entrenchment. This is just Dicey's point: as long as the people are motivated to conform to the law, the mere fact that some of it is not entrenched will not keep them from doing so. And the converse is also true: no matter how entrenched the constitution is, coordinated action by some section of the population (e.g., a sufficient supermajority to change the constitution) can toss aside the laws, or those in control of military force can just ignore the laws no matter what those laws say about how they are to

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146. See Russell Hardin, *Constitutionalism*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 289, 289 (Barry Weingast & Donald Wittman eds., 2008).; William Eskridge, *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1281 (2004).

147. On the identification of the law code of 403 with the ancestral laws, see M.I. FINLEY, THE USE AND ABUSE OF HISTORY 39-40 (1975).

148. Some contemporaneous recognition of this function of entrenched law can be found in PLATO, *Laws*, in PLATO: COMPLETE WORKS bk. IV, § 715 (John Cooper ed., 1997), which cautions against competition for office on the grounds that in such societies “the winners take over the affairs of state so completely that they totally deny the losers and the losers’ descendants any share of power,” leading to a cycle of retribution that can be resolved by selecting officials who are “best at obeying the established laws.”

be changed. Constitutionalism and the rule of law are distinct concepts. In fact, logically the rule of law is necessary for constitutionalism, not the other way around. The rules that provide for things like supermajorities to amend the constitution are themselves legal rules and will only be obeyed if the rule of law is respected in a state.

Consequently, contra Ostwald, I argue that Athens had “the sovereignty of law” long before it adopted a practice of constitutional entrenchment. While several of the post-Thirty law reforms did improve matters from a rule of law standpoint, depriving the assembly of absolute legislative power was not necessary for the rule of law.<sup>149</sup>

## 2. The Practical Objection: Arbitrary Democracy and the Trial of the Generals

While there is significant evidence that the laws were respected and that there was a strong norm of ruling the state under law, the assembly was also seen (at least by radical Athenian democrats) as supreme and possessing, in principle, the capacity to rule by decree.<sup>150</sup> In fact, sometimes the assembly did so. The most prominent example of its law-ignoring rule by decree is the infamous trial of the Arginusae generals.<sup>151</sup>

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149. On the reforms that did promote the rule of law, OSTWALD, POPULAR SOVEREIGNTY *supra* note 1, at 523, notes that the reformers forbade both magistrates enforcing unwritten law (the scope of this provision is unclear) and the enactment of laws targeting particular individuals. As noted in Part I, the codification and publication of the written laws was also an improvement from the rule of law standpoint.

150. COHEN, LAW, VIOLENCE AND COMMUNITY IN CLASSICAL ATHENS, *supra* note 43, at 40-41, nicely expresses this tension through a discussion of Aristotle’s worries, on rule of law grounds, about radical democracy. See also John Lewis, *Constitution and Fundamental Law: The Lesson of Classical Athens*, 28 SOC. PHIL. & POL’Y 25, 28 (2001), which argues that before the post-Thirty reforms, the assembly increasingly disregarded legal restrictions on its own behavior.

151. There are three other classic examples of miscarriages of Athenian justice. The first is the trial of Socrates. The second is the hysteria, with various punishments meted out, before the Sicilian expedition when various people were believed to have profaned the mysteries and/or mutilated statues of Hermes. See James F. McGlew, *Politics on the Margins: The Athenian “Hetaireiai” in 415 B.C.*, 48 HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE 1, 4 (1999) (Ger.). The

Xenophon is the standard source for these matters. I begin with some background. Eight generals together won a naval victory at Arginusae; in the process some ships were disabled.<sup>152</sup> The generals gave orders for the rescue of the crew on the disabled ships but were prevented by a storm from actually rescuing them.<sup>153</sup> On their return to Athens, several were put on trial in the assembly for that failure.<sup>154</sup> According to Xenophon, they were given very little opportunity to put up a defense.<sup>155</sup> Perhaps most infamously, one citizen by the name of Euryptolemus attempted to indict the prosecutor (presumably by *graphe paranomon*) for his illegal proposal to try and execute the generals by summary action of the assembly; Euryptolemus was shouted down with cries that “it was a terrible thing if someone prevented the people from doing whatever they wished.”<sup>156</sup> Making matters worse, the assembly loudly supported another citizen’s threat to prosecute Euryptolemus along with the generals.<sup>157</sup> The assembly then illegally sentenced all of the generals to death on a single vote.<sup>158</sup>

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third is the stoning of a Council member and his family for proposing to put a Persian peace proposal before the assembly. See HERODOTUS, *supra* note 93, § 9.5 (Herod. 9.5). The argument I make in this section covers those cases too. With the exception of the trial of Socrates, all were the acts of a citizenry swept up in wartime hysteria. Moreover, there is reason to doubt that the trial of Socrates was even illegal; certainly Plato portrays the conviction as in accordance with the laws in the *Crito*; otherwise Socrates would not have been betraying the laws by fleeing.

152. XENOPHON, *supra* note 5, at bk. 1, § 6.34-38 (Xen. Hel. 1.6.34-38).

153. *Id.* (Xen. Hel. 1.6.34-38).

154. *Id.* § 1.7.1-7 (Xen. Hel. 1.7.1-7).

155. *See id.* (Xen. Hel. 1.7.1-7).

156. *Id.* § 1.7.12 (Xen. Hel. 1.7.12).

157. *Id.* (Xen. Hel. 1.7.12).

158. But see Darrel Colson, *On Appealing to Athenian Law to Justify Socrates’ Disobedience*, 19 *APERION: J. ANCIENT PHIL. & SCI.* 133, 143-46 (1985). Colson denies, contra what appears to be a prior consensus to the contrary (see sources cited therein), that the trial of the generals was illegal. The debate is immaterial for present purposes. Either the trial was illegal, or the *ekklesia* had and exercised the legal power to execute people *en masse* as a kangaroo court. Both are extremely worrisome from the rule of law standpoint.

This highlights the evident dangers of radical democracy for the rule of law. It also calls into question the closeness of the relationship between the rule of law and equality in Athens: if the Athenians understood equality to consist in radical democratic institutions, and if those institutions posed a threat to the rule of law, it may be that the rule of law in Athens was a barrier to the full enjoyment of equality as understood by the Athenian people. Or it may be that equality was a barrier to the rule of law. Either way, *isonomia*, political and legal equality together, starts to seem like a contradiction in terms.

Yet this tension is easy to overstate. First, the trial of the generals was an extraordinary and aberrant incident.<sup>159</sup> Accordingly, Xenophon reports that the *polis* experienced an immediate regret for the rash decision and punished those who incited it.<sup>160</sup>

Second, there is evidence that the Athenians recognized that their political equality depended on some legal restraints on the assembly, and that the democracy *in fact* required such restraints. As Hansen shows, in the fourth century, it was widely accepted that the *graphe paranomon* was necessary for democracy and, consistent with this belief, both of the fifth century oligarchical coups were accompanied or preceded by an abolition of the *graphe paranomon*.<sup>161</sup> On Hansen's account, radical democrats saw an unfettered assembly as the appropriate locus of political equality; moderate democrats found this in the popular courts and their law-enforcing role.<sup>162</sup> On the moderate

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159. See Jennifer Roberts, *Arginusae Once Again*, 71 CLASSICAL WORLD 107, 107-108 (1977). Luca Asmonti, *The Arginusae Trial, the Changing Role of Strategoi and the Relationship between Demos and Military Leadership in Late-Fifth Century Athens*, BULL. INST. CLASSICAL STUD., Dec. 2006, at 1, 2-3, gives other references for the standard account of the trial as an exceptional incident, though Asmonti argues, somewhat in opposition, that the trial actually reflected broader political worries about the distribution of power in Athenian society.

160. XENOPHON, *supra* note 5, § 1.7.35 (Xen. Hel. 1.7.35).

161. HANSEN, SOVEREIGNTY, *supra* note 69, at 55-61.

162. Hansen's account of the relationship between the *ekklesia* and the *dikasterion* is controversial. He cites the relevant sources (and defends himself) in Mogens Hansen, *The Concepts of Demos, Ekklesia, and Dikasterion in Classical Athens*, 50 GREEK, ROMAN, & BYZANTINE STUD. 499 (2010). By way of

democratic position, legal restraints on the assembly's power are not only compatible with, but necessary for, political equality as democracy.<sup>163</sup>

### III. THE STRENGTH TOPOS AND THE AMNESTY

In the last Part, I argued that the Athenians recognized the equality-promoting function of the rule of law. In this Part, I show that this can contribute to an explanation of the success of the post-Thirty amnesty. In the first Section, I review the history of the struggle between the oligarchic and the democratic party at the end of the fifth century. In the second Section, I develop the argument.

#### A. *The Struggle Between Oligarchs and Democrats, a Strategic Overview*

The Athenian democracy collapsed twice at the close of the fifth century. In both cases, it was replaced by an oligarchy that promptly ignored legal rules on a wide scale. Strikingly, both collapses immediately followed an exogenous military shock.

The first happened right after Athens' notoriously ill-advised invasion of Sicily.<sup>164</sup> After the military adventure collapsed, Alcibiades, from exile, attempted to provoke an oligarchic coup. Conspiring with Alcibiades, Peisander

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caveat, as Hansen notes the priority of *dikasterion* over *ekkleisia* that he identifies may be a particularly fourth-century (that is, post-Thirty and post-legislative reform) phenomenon. *Id.* at 525-26.

163. Demosthenes explicitly said the two were compatible, and that the assembly could and did restrain itself: "the civic body of Athens, although it has supreme authority over all things in the state, and it is in its power to do whatsoever it pleases, yet regarded the gift of Athenian citizenship as so honorable and so sacred a thing that it enacted in its own restraint laws to which it must conform." DEMOSTHENES, *Apollodorus Against Neaera*, in DEMOSTHENES § 59.88 (Norman W. DeWitt & Norman J. DeWitt trans., 1949) (Dem. 59.88), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0080%3Aspeech%3D59%3Asection%3D88>.

164. The account in this paragraph and the next two is drawn, unless otherwise noted, from a combination of OSTWALD, POPULAR SOVEREIGNTY, *supra* note 1, at 339-395; Mabel Lang, *Revolution of the 400: Chronology and Constitutions*, 88 AM. J. PHILOLOGY 176 (1967); and THUCYDIDES, *supra* note 63.



convinced the Assembly to accept unspecified restrictions on the electoral franchise, negotiate with Alcibiades for his potential recall, and appoint a commission (the *syngrapheis*) to investigate the state of the city. This, on his argument, would convince the Persian king to lend financial support to the continued prosecution of the war against Sparta, the Sicilian adventure having put the city into serious financial straits. Peisander went off to talk to Alcibiades, and, on the way out, encouraged existing oligarchic clubs to work toward a coup. Obliging, the clubs began a campaign of terror and intimidation, carrying out several assassinations including at least one democrat prominent enough for Thucydides to describe him as “the chief leader of the people.”<sup>165</sup>

According to Thucydides, this campaign of terror worked: fear of hidden conspirators inhibited democrats from speaking up at the assembly or trusting one another enough to carry out collective action.<sup>166</sup> The *syngrapheis* came back and proposed the abolition of the *graphe paranomon* and the transfer of authority into the hands of five thousand citizens. Meanwhile, Peisander returned and claimed that the Persians demanded a still smaller oligarchy (actually, he knew that Persian support was not forthcoming), then proposed the Four Hundred. The assembly was intimidated into compliance, and the Four Hundred took office, drove out the democratic council by force, and assumed power.

Perhaps predictably, the Four Hundred promptly began to ignore the rule of law. According to Thucydides, they “ruled the city by force; putting to death some men though not many, whom they thought it convenient to remove, and imprisoning and banishing others.”<sup>167</sup>

The Four Hundred didn’t last long. They had a big problem: the Athenian navy was at Samos, and it was “dominated by the lower classes.”<sup>168</sup> In order to shore up

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165. THUCYDIDES, *supra* note 63, at bk. 8, § 8.65 (Thuc. 8.65).

166. *Id.* § 8.66 (Thuc. 8.66).

167. *Id.* § 8.70 (Thuc. 8.70).

168. OSTWALD, POPULAR SOVEREIGNTY, *supra* note 1, at 387.



their position, they repeatedly tried negotiating with Sparta and also re-endorsed their earlier promise to extend citizenship to five thousand citizens.<sup>169</sup> The promise was not enough to satisfy the mass opposition, and the Spartans, rightly mistrusting the stability of the regime, preferred to take advantage of the chaos and launch an invasion rather than make a deal with the oligarchs.<sup>170</sup> With a Spartan fleet at the door, the oligarchy promptly collapsed, being first replaced by the promised rule of five thousand then, shortly thereafter, the full-fledged democracy as before.<sup>171</sup> Under the restored popular government, a number of the oligarchs were tried and convicted of treason and subverting the democracy.<sup>172</sup>

The Thirty, despite its extensive overlapping personnel with the Four Hundred, originated and operated very differently.<sup>173</sup> It started with the final Athenian defeat in the Peloponnesian war. The Spartan general Lysander entered the city and accepted a surrender agreement with the following terms: (a) Athens would return to its “ancestral constitution”; (b) the walls connecting the city to the harbor would be torn down; (c) the size of Athens’ navy would be dramatically reduced; and (d) Athens would become an ally (that is, client state) of Sparta.<sup>174</sup> The democrats delayed tearing down the walls; this gave the oligarchic party an excuse to call Lysander back, who used that treaty violation as a pretext to install the Thirty.<sup>175</sup>

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169. *Id.* at 387, 390-95.

170. THUCYDIDES, *supra* note 63, at bk., 8, § 8.71 (Thuc. 8.71).

171. OSTWALD, POPULAR SOVEREIGNTY, *supra* note 1, at 395-97.

172. *Id.* at 403-05.

173. On the overlapping personnel, see *id.* at 404, 460-61, 466. This is important for the argument later, where I offer an explanation of the different behavior of the Four Hundred and the Thirty. Because they were composed of many of the same people, we can safely reject the notion that the Thirty behaved worse just because they were more wicked. See *infra* Part III.B.

174. OSTWALD, POPULAR SOVEREIGNTY, *supra* note 1, at 460-96; PETER KRENTZ, THE THIRTY AT ATHENS 42 (1982).

175. There is some debate about whether the Thirty were initially appointed to rule, or just to compile the laws. See KRENTZ, *supra* note 174, at 50. The question makes no difference for the argument in this paper.

The Thirty quickly went bad. They started by surrounding themselves with whip-bearing guards (always a bad sign).<sup>176</sup> They reallocated the function of the people's courts to a puppet council whom the Thirty had appointed.<sup>177</sup> They carved out 3000 elites to remain full-fledged citizens, and enacted a law permitting the Thirty to kill any of the rest at will.<sup>178</sup> They disarmed the non-3000 and forbade them from remaining in the city limits.<sup>179</sup> They stole a lot of property.<sup>180</sup> The Thirty are generally credited with about 1500 murders.<sup>181</sup>

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176. *Id.* at 39.

177. *Id.* at 76.

178. *Id.*

179. *Id.*

180. There's some dispute about the extent of the property they stole. *Id.* at 81-87. Krentz suggests that the property expropriations of the Thirty were overstated and that they may not have engaged in expropriations on a larger scale than the democracy did. *Id.* at 80-81. However, Krentz's argument is unconvincing. Elsewhere (*id.* at 105) he suggests that the expropriations of the Thirty were on a large enough scale to raise serious problems of accounting in the reconciliation settlement. *See id.* at 105-06. And certainly the Thirty's *throwing everyone but the 3000 out of the city* suggests that they must have done something with the in-town property of those evicted—an expropriation of stunning scale all on its own. *See* Lanni, *Transitional Justice*, *supra* note 3, at 561. Plus: what did they do with the property of the people they murdered?

Moreover, Krentz is not clear on the level of expropriation to be attributed to the democracy. While he seems to credit accounts of the democracy expropriating property through the courts, it seems implausible to attribute this to the democracy as a matter of policy. After all, the juries were the same people who comprised the assembly, so if they needed money for the state, why could they not have just voted more liturgies? More likely, alleged property expropriations under the democracy would have been the work of *sycophants*—nuisance litigants out for private gain. However, the aristocratic complaint of sycophancy was often exaggerated. *See* generally MATTHEW CHRIST, *THE LITIGIOUS ATHENIAN* (1998), who suggests that the discourse of sycophancy was a rhetorical site for debate about the proper uses of the courts as well as a pretext for aristocrats to eliminate their opponents, as under the Thirty). Osborne, *supra* note 82, at 44-48, argues that there is little evidence that those legal proceedings in which the prosecutor was rewarded gave much occasion for sycophantic exploitation.

181. This is a number confirmed by both Aristotle and Aeschines. ARISTOTLE, *The Constitution of Athens*, *supra* note 17, § 35.4 (Ath. Const. 35.4); AESCHINES, *Against Ctesiphon*, *supra* note 121, § 3.235 (Aes. 3.235).

Thrasybulus, an exiled Athenian general, led a revolution against the Thirty.<sup>182</sup> In response, the Thirty called for Spartan aid—first, to have a garrison in Athens, which they received, and then for relief troops after Thrasybulus started winning military victories against the garrison.<sup>183</sup> The Spartan king commanding the relief troops, however, grew tired of the trouble and imposed a peace on the warring parties.<sup>184</sup>

The terms of the peace, in summary, were as follows: all of the oligarchs except the actual Thirty (and a couple of other small, irrelevant groups) were to be given amnesty for all their crimes except personal murders.<sup>185</sup> The Thirty themselves were to be subjected to *euthynai*, with a small thumb on the scale in their favor (the jurors were limited to property owners), and would be rehabilitated after accepting whatever punishment the court imposed.<sup>186</sup> At least one member of the Thirty passed this examination, and returned to citizen life.<sup>187</sup> Unsold expropriated property was to be returned to its rightful owners.<sup>188</sup> And those oligarchs who wished to do so were to be allowed to exile themselves to Eleusis instead.<sup>189</sup> The amnesty was, on the whole, obeyed.<sup>190</sup>

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182. See Krentz, *supra* note 173, at 70.

183. *Id.* at 89-92.

184. *Id.* at 87-101.

185. See *id.* at 103 (quoting ARISTOTLE, *The Constitution of Athens*, *supra* note 17, § 39).

186. *Id.* at 107.

187. *Id.* at 105.

188. *Id.*

189. *Id.*

190. KRENTZ, *supra* note 173, at 120, notes that “no prosecutors are known to have violated the amnesty successfully.” There is, however, some dispute about whether the oligarchs or the democrats started the conflict, shortly after the peace agreement, that led to the reconquest of Eleusis and the killing of the generals who were there. See *id.* at 120-21. Moreover, Lanni, *Transitional Justice*, *supra* note 3, at 568, suggests that there is at least one known case where a prosecutor managed to use novel legal tactics to get around the amnesty, though she agrees that in general it was respected.

### B. *Strategic Constraints and Regime Character*

Strikingly, the Four Hundred, according to Thucydides, extrajudicially killed “not many” people.<sup>191</sup> Taylor has argued that the role of violence and terror in their coming to power has also been exaggerated.<sup>192</sup> Even at their most dramatic moment, when they threw out the democratic council by force of arms, they took the trouble to pay the councilors for the remainder of their terms.<sup>193</sup> Compared to the Thirty, the rule of the Four Hundred seems to have been characterized by a remarkable restraint in the murder, robbery, imprisoning, and exiling departments.<sup>194</sup>

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191. DONALD KAGAN, *THE FALL OF THE ATHENIAN EMPIRE* 163 n.15 (1987) suggests that “there is no reason to think that the exiles and imprisonments were widespread” either. However, Andrew Gallia, *The Republication of Draco’s Law on Homicide*, 54 *CLASSICAL Q.* 451, 457 n.32 (2004), claims that Thucydides understated the crimes of the Four Hundred. On the opposite extreme, John David Lewis, *Constitution and Fundamental Law: The Lesson of Classical Athens*, 28 *SOC. PHIL. & POL’Y*, no.1, 2011 at 25, 32, claims the Four Hundred “governed non-violently.” If nothing else, we can confidently say that the regime of the Four Hundred was less blood-soaked than that of the Thirty (not a terribly impressive achievement, all things considered).

192. See Taylor, *supra* note 56, at 93-98. On her account, the Athenian masses mostly quietly accepted the Four Hundred at first. See *id.*; see also Rex Stern, *The Thirty at Athens in the Summer of 404*, 57 *PHOENIX* 18, 32 (2003), who suggests that fraud—the false promise that they would hand over power to a broader oligarchy of five thousand—had more to do with their accession than force. (The false promise of Persian support cannot have hurt.)

193. THUCYDIDES, *supra* note 63, at bk. 8, § 8.69 (Thuc. 8.69).

194. I infer the relative mildness of the Four Hundred also from the charges against them at their subsequent trials. OSTWALD, *POPULAR SOVEREIGNTY*, *supra* note 1, at 401-04 lists a number of trials, all of which appear to be for treason or subverting the democracy but not for murder. This would be surprising, were the Four Hundred guilty of a significant number of murders. The Athenians attached religious importance to the pollution incurred by murders. See Margaret Visser, *Vengeance and Pollution in Classical Athens*, 45 *J. HIST. IDEAS* 193, 193 (1984); Daniel Blickman, *The Myth of Ixion and Pollution for Homicide in Archaic Greece*, 81 *CLASSICAL J.* 193, 193 (1986). This suggests that they would not have just ignored murders committed by the Four Hundred. By way of contrast, in the post-Thirty amnesty we know that the democrats explicitly reserved the right to try murderers as such. See Lanni, *Transitional Justice*, *supra* note 3, at 567.

A similar inference is available from Aristotle’s comparative silence. He mentions no crimes of the Four Hundred but recounts 1500 murders, motivated

These facts can be explained with reference to the strategic circumstances in which each oligarchy came to power and fit nicely into an overall account of the rule of law in Athens rooted in the notion, suggested above, that part of its role was to protect against oligarchic takeover. I propose, that is, that we imagine the power of the oligarchs lying in potentia throughout the democratic period. At all times they desired to take the rule of law away from the masses and rule by terror. Under ordinary conditions, however, the balance of power in Athens prevented them from achieving their ambitions. It was particularly important that the backbone of Athens' military power, the navy, was controlled by the lower classes. Only when exogenous shocks shifted the balance of power in the favor of the elites could they overcome the masses and abolish the rule of law.<sup>195</sup>

At the time of the Four Hundred, the balance of power had *temporarily* shifted due to the defeat at Sicily. The Athenians were in dire military straits and hence were desperate to agree to anything that promised them the potential of Persian assistance. The oligarchs, thanks to disparate information which allowed them to credibly hold out the prospect of Persian support, could convince the masses to go along with their rule. However, the long-term balance of power within the city had not changed, and the Persian support was illusory, so oligarchic rule was unstable. Consequently, the Four Hundred could not act too tyrannically—hence their removal of political rights from the masses while refraining from widespread killings, imprisonings, etc.—unless and until the hoped-for Spartan support arrived to change the local balance of power on a more permanent basis.

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by politics and greed, from the Thirty. ARISTOTLE, *The Constitution of Athens*, *supra* note 17, §§ 30-33, 35 (Ath. Const. 30-33, 35). It gets worse: as I read Aristotle, this was *before* “the savagery and wickedness of their regime increased considerably,” so they might actually have committed substantially more than 1500 murders. *See id.* § 37 (Ath. Const. 37).

195. On balance of power explanation, drawn from international relations theory, *see generally* EMERSON M. S. NIOU, PETER C. ORDESHOOK, & GREGORY F. ROSE, *THE BALANCE OF POWER: STABILITY IN INTERNATIONAL SYSTEMS* (1989).

By contrast, the Thirty arrived in the wake of a much more significant shift in the balance of power. The Spartans had won the war, and the power of the masses was broken. Particularly, it should be noted, the Athenians were required by the terms of the peace to dismantle their navy down to twelve ships.<sup>196</sup> This would have destroyed the main power base of the democrats, the lower-class sailors. Moreover, the Thirty had been installed by Spartan military might and had every reason to believe that continued Spartan support would be forthcoming. Indeed, only after that support was unexpectedly withdrawn did they lose.<sup>197</sup> Being more confident in their superior position, the Thirty were free to carry out their desires on a broader scale. Thus, the widespread killings, expropriations, etc.

This strategic approach also offers an obvious explanation for why the Thirty, but not the Four Hundred, received the benefit of an amnesty. Absent strategic considerations, one would expect it to be the other way around: the Four Hundred were less brutal than the Thirty and comprised personnel who, if rehabilitated, could have been useful in continuing the war with Sparta. However, the Thirty, unlike the Four Hundred, had the support of a Spartan army and the plausible threat of future Spartan support. Strategic factors seem to have carried the day.

### C. *The Puzzle of the Amnesty*

Still unexplained is the fact that the democrats *obeyed* the amnesty after overthrowing the Thirty. Intuitively, this is puzzling. After the Four Hundred, the democrats showed no hesitation about punishing those implicated in the oligarchy. While the amnesty was enacted under the pressure of the Spartan army, that army eventually departed—why did the democrats, dominating the assembly

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196. XENOPHON, *supra* note 5, § 2.2.20 (Xen. Hel. 2.2.20).

197. To illustrate—the Spartan king who imposed the peace was put on trial when he returned home and almost lost. KRENTZ, *supra* note 174, at 110. From this, we can safely infer that imposing the peace rather than crushing the rebellious democrats was an alteration (that is, violation) of the overall Spartan policy, and hence would have come as a surprise to the Thirty.



and courts, not promptly repudiate the amnesty, then execute the oligarchs (with or without trial)?<sup>198</sup>

Two strategic hypotheses come immediately to mind, but neither is convincing. First, the democrats may have feared the return of Sparta to protect their oligarchic political allies. However, Athens began defying Sparta again shortly thereafter: the Corinthian war began in 395, less than ten years after the Thirty were deposed, and Athens was allied with Thebes against Sparta.<sup>199</sup> Executing a few oligarchs doubtless would have annoyed the Spartans less than going to war against them did.<sup>200</sup>

Second, the establishment of an oligarchic state-in-exile in Eleusis may have been meant to provide the oligarchic party with enough resources to credibly threaten retaliation should the amnesty be violated. However, oligarchic Eleusis did not last very long: it was swiftly reconquered and reintegrated into Athens proper.<sup>201</sup>

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198. The problem becomes even more compelling if we accept the argument, from Edwin Carawan, *Amnesty and Accountings for the Thirty*, 56 CLASSICAL Q. 57 (2006) [hereinafter Carawan, *Amnesty and Accountings*], that the provision giving the Thirty themselves amnesty if they passed their *euthynai* was enacted by a decree of the assembly *after* the original reconciliation agreement. Why would the assembly do this?

199. On the Corinthian War and the Athenian politics surrounding it, see generally Jennifer Tolbert Roberts, *The Athenian Conservatives and the Impeachment Trials of the Corinthian War*, 108 HERMES 100 (1980).

200. Lanni, *Transitional Justice*, *supra* note 3, at 573, agrees.

201. See Carawan, *Amnesty and Accountings*, *supra* note 198, at 68-69 for what little is known of the details of the reconquest. BARRY STRAUSS, ATHENS AFTER THE PELOPONNESIAN WAR: CLASS, FACTION AND POLICY 403-386 BC, at 114 (1986), suggests that the democrats might have taken revenge on the oligarchs had the *thetes* (lower-class citizens who served in the navy) not been seriously weakened by losses in the Peloponnesian War. However, the weakness of the *thetes* cannot explain the *demos*' restraint. Both the victory over the oligarchic enclave at Eleusis and the successful resistance of the men of the Piraeus against the Thirty, even supported by a Spartan garrison, suggest that it would have been common knowledge that the democrats had enough military force to impose their will on the oligarchs. Moreover, the Thirty had just murdered at least five percent of the population; in doing so, they must have made enemies across the social spectrum.



Recently, David Teegarden has offered a provocative new strategic explanation of the success of the amnesty.<sup>202</sup> He suggests that the actual oath taken to uphold the amnesty made it possible for the community to avoid private violence against former oligarchic collaborators because it generated common knowledge of, in his words, citizens' "(at least apparent[ ]) credible commitment" not to retaliate against collaborators.<sup>203</sup> By doing so, it gave individual Athenians who might otherwise want to retaliate some reason to think that their fellow citizens would not support them.<sup>204</sup> Since retaliating against collaborators was individually risky, they would not be willing to do so if they believed they would be unable to count on the support of their fellows.<sup>205</sup>

Teegarden's argument doesn't get us quite there, for two reasons. First, it is not clear what he means by an "at least apparent" credible commitment. Generally, mere costless words cannot establish a credible commitment; instead, they often are nothing more than "cheap talk" which do not change the underlying strategic dynamics of a situation.<sup>206</sup> In the Athenian context, the cheap talk interpretation of the oath seems most plausible. The amnesty and oath were imposed at swordpoint by the Spartan army.<sup>207</sup> Under such circumstances, vindictive democrats would have had little reason to believe that the oath represented their fellow citizens' true intentions or preferences.<sup>208</sup>

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202. David Teegarden, *The Oath of Demophantos, Revolutionary Mobilization, and the Preservation of the Athenian Democracy*, 81 *HESPERIA* 433 (2012).

203. *Id.* at 460.

204. *Id.*

205. *Id.*

206. For an introductory explanation of the game theoretic concept of cheap talk, and why it usually does not facilitate credible commitment, see David A. Siegel & Joseph K. Young, *Simulating Terrorism: Credible Commitment, Costly Signaling, and Strategic Behavior*, 42 *PS: POL. SCI. & POL.* 765, 766 (2009).

207. See Lanni, *Transitional Justice*, *supra* note 3, at 563.

208. There may be a stronger case for the signaling value of oaths not imposed at swordpoint, and where the content of the oaths are likely to match, rather than contradict, commitments the oath-takers presumably have. See, e.g., OBER, *DEMOCRACY AND KNOWLEDGE* *supra* note 62, at 176-79 (arguing that oaths to

Second, Teegarden's explanation doesn't answer the whole puzzle about the success of the amnesty. If he can solve the cheap talk problem (and he may be able to), it would explain the absence of private self-help violence, and it might explain the absence of *graphe* prosecutions against former collaborators (since those prosecutions were risky: a prosecutor who lost by a sufficiently large margin was punished). But it cannot explain why citizens would not bring *dike* prosecutions, and it cannot explain why, once a prosecution (*graphe* or *dike*) was initiated, the jury would not vote to convict. Neither bringing a *dike* nor voting to convict would be risky or costly in any obvious fashion, so a citizen need not have been able to rely on the support of his fellow citizens in order to do so. Similarly, Teegarden's explanation cannot explain why the council extrajudicially executed a private citizen for violating the amnesty. Again, failing to do so would not have been risky or costly for individual council members.

Facing these puzzles, the traditional explanation for the success of the Amnesty has been non-strategic. Ostwald summarizes classical opinion as varying between "the patriotism of the Athenians as a whole" and "the forbearance and decency" of the democrats.<sup>209</sup> To a political

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defend the *polis* were effective ways of creating common knowledge of that commitment among soldiers).

209. OSTWALD, POPULAR SOVEREIGNTY, *supra* note 1, at 500-01. GABRIEL HERMAN, MORALITY AND BEHAVIOUR IN DEMOCRATIC ATHENS: A SOCIAL HISTORY 396-410 (2006), offers a fascinating gloss on the "forbearance and decency" explanation. He suggests that Athenians collectively endorsed a general moral principle that Herman names, with reference to a computer strategy in Axelrod's iterated prisoner's dilemma experiment, "tit for two tats." *Id.* at 399-402. On the "tit for two tats" principle, an Athenian was obliged to suffer two or more injuries from a malefactor before retaliating. *See id.* at 398-410. Herman offers evidence from a wide variety of sources, including forensic speeches, philosophy, tragedies, specific legal requirements, and other public acts for the general acceptance of the "tit for two tats" ideal and claims that the success of the amnesty was just one manifestation of this moral principle in action. *See id.* However, even if Herman is right about the general endorsement of this moral principle, the oligarchs under the Thirty had committed many, many more than two "tats." A moral standard that commands forgiving 1500 murders is far more demanding than any for which Herman offers evidence. Moreover, Herman's account has trouble accommodating three important facts about the amnesty. First, it fails to explain why the Athenians bothered to enact the amnesty into

scientist, this is unsatisfactory: it stretches credulity to believe that the democrats refrained from punishing a blood-soaked oligarchy out of the goodness of their hearts.<sup>210</sup>

The most plausible explanation in the existing literature is Lanni's, which comprises four elements.<sup>211</sup> First, she argues that there was a post-war process of whitewashing in the courts that focused blame for the tyranny on the Thirty themselves rather than on their many collaborators. On her account, litigants adopted this strategy on an individual basis, presumably because it would be most palatable to the jurors—many of whom would have been collaborators themselves. Despite that history of collaboration, Lanni points out that the forensic speeches often addressed the jurors as if each member had been a part of the resistance. The ultimate effect of this strategy was to construct a false “collective memory” in which most ordinary citizens were innocent of crimes under the Thirty.

Second, Lanni notes that litigants often used the amnesty as an example to illustrate the mild and virtuous democratic character of the Athenian people. Consequently, she argues, the Athenians came to collectively identify as the sort of people who offer amnesty to their enemies, and to

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law and swear an oath to it, rather than letting their moral commitment stand on its own. Second, it is inconsistent with the fact that the Athenian democrats did retaliate (in the courts) against the less grievous crimes of the Four Hundred only a few years beforehand. Third, it is inconsistent with the fact that the democrats in fact retaliated against oligarchic collaborators, just not in ways forbidden by the amnesty, at least twice. The cavalry was a military role occupied in Athens by relatively wealthy citizens, and whose members largely supported the Thirty. The democrats retaliated against them, first, by cutting their pay in order to raise the pay of the lower-class archers, and second, by deliberately sending three hundred of them off to die in a foreign war. On these two incidents, see generally ANDREW WOLPERT, REMEMBERING DEFEAT: CIVIL WAR AND CIVIC MEMORY IN ANCIENT ATHENS 45-46 (2001); Loening, *supra* note 43, at 117-19.

210. Moreover, the “forbearance and decency” argument also ignores the retaliation against the cavalry, which did not violate the amnesty, but hardly indicated a desire to forgive and forget. OBER, MASS AND ELITE, *supra* note 39, at 99.

211. See generally Lanni, *Transitional Justice*, *supra* note 3. The material in this paragraph and the next four summarize her argument in that article.

become motivated to continue doing so. This part of Lanni's explanation is less convincing, for she offers no reason that litigants should have chosen this particular piece of flattery. Particularly, those interested in prosecuting oligarchs would have had good reason to offer a counter-narrative, perhaps identifying the Athenian democracy as a collective wise enough to punish its enemies. The cultural raw material was available for such arguments, in the form of the traditional ethic of helping one's friends and harming one's enemies.<sup>212</sup>

Third, Lanni points out that the amnesty contained a "safety valve" for individual cases: because crimes under the Thirty could be raised as character evidence in unrelated cases and in *dokimasiai* for incoming magistrates, limited-scope accountability was allowed. This satisfied some of the desire for revenge before it could spill over into a movement for broad-brush retaliation.

Finally, Lanni suggests that Athens' participatory political institutions may have, by forcing former oligarchs and democrats to work together, given them reason to repair their relationship after the oligarchy. However, this element of her explanation is also fairly weak, for it disregards the fact that Athens had participatory institutions since well before the first oligarchic coup: if working together had not kept the oligarchs from doing their best to eliminate the democrats, why should it have kept the democrats from doing the same to the oligarchs, when power finally settled in their hands?

Lanni's account is partially convincing. But the material given thus far allows us to supplement it with an additional explanatory factor. The development of the law through and after the time of the oligarchic revolutions is consistent with the increasing recognition of the importance of law for the stability of the democratic state, which I demonstrated in Part II as the strength *topos*. The law reforms of the post-conflict period suggest that the consciousness shown in the evidence for the strength *topos* was growing at that time.

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212. On the role of helping friends and harming enemies in the politics of fifth- and fourth-century Athens, see Lynette Mitchell & P.J. Rhodes, *Friends and Enemies in Athenian Politics*, 43 GREECE & ROME 11 (1996).

An effort had already begun to collect and codify the laws at the time of the Four Hundred. After the Thirty, as noted, the democrats further strengthened their legal system by creating the quasi-constitutional difference between laws and decrees, requiring all acts of the assembly to be scrutinized against the existing law code and the like.

Moreover, as David Cohen cogently argues, the Thirty came to stand for grievous violations of the law in Athenian political culture.<sup>213</sup> Democratic politicians, by contrast, laid claim to institutions of the rule of law in order to “bind the community together in opposition to its oligarchic opponents who sought to undermine its institutions to create *stasis*.”<sup>214</sup> (*Stasis* was the state of factional conflict in a city.) The institutions of the democracy, including those legal institutions that the Thirty disregarded, became, on Cohen’s account, identified with the democracy in part because the democracy identified itself in opposition to the Thirty, and the Thirty saliently disregarded the laws. This can be seen as a version of the respect *topos*.

I submit then, that the democratic obedience to the amnesty reflected a developing respect for the law, *as such*, among the Athenian people. The Athenians came to identify the law with the democracy and the equality that it represented (collectively, as *isonomia*) at the same time as they came to the belief that careful compliance with the laws was necessary to their political strength and stability.<sup>215</sup>

And the Athenians were correct to see it that way. The law could preserve the strength of each individual Athenian even in the face of overweening elite power by coordinating resistance to elite hubris as well as to outright threats to undermine democratic institutions. Athenians essentially were in a game theoretic coordination equilibrium in which

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213. David Cohen, *The Rhetoric of Justice: Strategies of Reconciliation and Revenge in the Restoration of Athenian Democracy in 403 BC*, 42 EUR. J. SOC. 335, 348-49 (2001).

214. *Id.* at 349.

215. Plato captures this sentiment nicely in the *Laws* § 715d, suggesting that where the government is not subordinate to the laws, “the collapse of the state, in my [the Athenian stranger’s] view, is not far off.”

each knew that his fellow citizens would resist any illegal acts; this gave non-elite citizens the ability to rely on the law, embodied by their fellow citizens on the jury, to defend them from the elites. However, for the law to serve this function, each citizen must know that his fellow citizens would enforce the law. Since disregarding the amnesty would indicate jurors' willingness to throw aside the law in favor of political expediency, it would have vitiated this coordination function: no longer could citizens trust in the strength of the law to defend themselves from oligarchic hubris. And this is why Hansen's moderate democrats were correct to see the jury, rather than the assembly, as the chief institution of democracy.<sup>216</sup>

To anticipate an objection: Athenians had to rely on law to serve this function, rather than simply sharing a commitment to resist oligarchic acts, legal or illegal, because of the potential for uncertainty as to whether any given act posed oligarchic dangers. Frequently in the forensic speeches we see elites accusing one another of oligarchic sentiments and identifying themselves with the masses; this suggests that both sides of a legal dispute could often be plausibly characterized as oligarchic.<sup>217</sup> But if someone were caught breaking the law, this could serve as an objective sign that the malefactor held an inadequate

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216. ARISTOTLE, *The Politics*, *supra* note 63, at bk. 2.8, § 1269a.14-22 (*Pol.* 2.8, 1269a.14-22) emphasizes the importance of a habit of complying with stable law, arguing that the law "has no power to command obedience except that of habit, which can only be given by time." While, for Aristotle, this was likely meant to be an implication of his general account of the importance of habit-formation in moral character, see generally Amelie Rorty, *Plato and Aristotle on Belief, Habit, and Akrasia*, 7 *AM. PHIL. Q.* 50, 55-60 (1970); Richard McKeon, *Aristotle's Conception of Moral and Political Philosophy*, 51 *ETHICS* 253 (1941), we might add to it the strategic idea that the reason it requires time and habit for law to command obedience is because consistent behavior consistent with the law, in the courts at least, is necessary in order to signal to the public that the law will be enforced. See also RAAFLAUB, *THE DISCOVERY OF FREEDOM IN ANCIENT GREECE*, *supra* note 98, at 233-35 (arguing based on evidence from Herodotus, Thucydides, and Euripides that "[r]espect for *nomos* made it possible to defend the community's freedom from," *inter alia*, "attacks by authoritarian opponents").

217. See, e.g., *supra* Part II.A.1.a.



regard for the democracy.<sup>218</sup> Moreover, a jury verdict could serve as a consensus signal of guilt on which citizens could rely to coordinate their opposition to an overweening potential oligarch. If a majority of a large and socially representative jury working in the glare of publicity were willing to condemn someone, each individual in the city could infer that the community at large would be similarly willing.<sup>219</sup> Thus, the law allowed citizens to infer oligarchic threats from a verdict and provided common knowledge that each democratically-inclined citizen would be willing to resist that threat: it was the vital keystone for civic trust.<sup>220</sup>

In the terms of contemporary jurisprudence, the Athenians took the internal point of view on the laws in virtue of their strength-preserving function. And this suggests that they could have treated the enactment of the amnesty into law as a reason *in itself* to comply with it in their official capacities as magistrates, jurors, prosecutors, and assemblymen.<sup>221</sup> If this is right, then Lanni is exactly

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218. Again, Plato's association in the *Crito* of obedience to the law with filial loyalty to the *polis* is instructive. PLATO, *Crito*, *supra* note 6, §§ 50c-51c (*Crito* 50c-51c).

219. The number of votes for each side was public in addition to the bare fact of the outcome facilitating the public use of jury verdicts as a signal of the level of social commitment. OBER, *DEMOCRACY AND KNOWLEDGE*, *supra* note 62, at 193.

220. There is a large body of material in political science that provides the theoretical framework underlying this argument. For the strategic analysis establishing that lawbreaking can be used as a signal to coordinate resistance to the powerful in this fashion, especially see Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997) and Gillian K. Hadfield & Barry R. Weingast, *What Is Law? A Coordination Model of the Characteristics of Legal Order*, 4 J. LEGAL ANALYSIS 471 (2012). For a similar application of this theoretical framework to explain the power of the U.S. Supreme Court, see David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009).

221. It would seriously undermine my argument if it were the case, as Loening, *supra* note 43, at 29 suggests, that the reconciliation agreement including the amnesty never had the status of law. However, his argument for this proposition appears to rest on the same sort of error noted above with respect to Lanni's claim that judicial enforcement of social norms counted against the rule of law in Athens, that is, the inappropriate limitation of the notion of "law" to provisions that have been the object of particular procedures of formal legislative enactment. Contra Loening, the introduction of procedures like *paragraphe* to enforce the amnesty, the creation and use of formal



wrong when she says that “the absence of the rule of law is a feature of the system rather than a bug” for promoting Athenian reconciliation after the Thirty.<sup>222</sup> On the contrary, the Athenian rule of law, rooted as it was in citizens’ recognition that official obedience to law was a precondition of an equal state, was a vital part of the success of the amnesty.

Contrast the account in this section with James M. Quillin’s decision-theoretic explanation for the success of the amnesty.<sup>223</sup> On Quillin’s account, jurors considering whether to convict faced the risk that false convictions could lead the polis into costly *stasis*. Defendants repeatedly claimed that convicting them would generate disloyalty, and thereby *stasis*, by causing similarly situated citizens to experience themselves as disadvantaged by the democratic justice system.<sup>224</sup> On the defense narrative, those who expected to be treated unjustly in the courts would be driven, by fear and self-interest, to leave and/or plot against the state.<sup>225</sup> Prosecutors, for their part, claimed that the defendants had innate oligarchic tendencies, and that punishing them, rather than letting them commit their crimes with impunity, would make *stasis* less likely.<sup>226</sup> Quillin suggests that the defense argument was simply more convincing.<sup>227</sup>

The problem with Quillin’s argument is that it proves too much: if true, we would expect to see not just that the amnesty was successfully enforced, but that accusations of *hubris* and other characteristically oligarchic offenses

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bureaucratic processes to implement other provisions of the reconciliation agreement (e.g., resettlement provisions, noted by Loening, *id.* at 37, 68), litigants frequently invoking the amnesty in forensic speeches, and the fact that the council thought it had the authority to summarily execute a violator of the amnesty all suggest that it served as law in every sense that matters.

222. Lanni, *Transitional Justice*, *supra* note 1, at 589.

223. James M. Quillin, *Achieving Amnesty: The Role of Events, Institutions, and Ideas*, 132 *TRANSACTIONS AM. PHILOLOGICAL ASS’N* 71, 71-77 (2002).

224. *See id.* at 89-91, 97-101.

225. *See id.*

226. *See id.* at 92-101.

227. *See id.*

against members of the elite should disproportionately fail in general regardless of whether the behavior complained of was covered within the amnesty. Quillin is obliged to predict, for example, that *hubris* prosecutions for behavior committed well after the fall of the Thirty should fail.

To resolve this problem, Quillin needs some account of why the amnesty was special. He offers no such account, but the material he cites as comprising the defense narrative noted above provides the raw material for one. Both Andocides and Isocrates raise the unique importance of the amnesty and the oath in their defenses. Andocides: “your vote will decide for the general public whether they ought to have faith in your laws, pay off the sykophants, or flee from the city[.]” Isocrates: “[i]s it not correct to fear that if the oaths are obliterated we will be placed back into the very same situation in consequence of which we were forced to make treaties?”<sup>228</sup>

The danger that Andocides and Isocrates point to is, *pace* Quillin, not simply that falsely convicted oligarchs will be forced by fear to lead the community into *stasis*. It is that convicting them would undermine the city’s legal institutions as a whole in virtue of the fact that doing so would require violating the laws and the oath of amnesty. If those in the elite class could not trust the fundamental democratic commitment to obey the law, they could not trust that they would be treated equally and consequently would have no choice but to plot against the *polis*. Elites as well as masses needed to trust in the laws.

Put differently, the difference between cases covered by the amnesty and cases not covered by the amnesty was just that regardless of the disputed fact of the matter as to whether the accused was guilty of oligarchic crimes, it could

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228. *Id.* at 89 (quoting Andocides and Isocrates). Lysias also raises the fear that if the Athenians disregarded the amnesty it would lead to widespread disloyalty. LYSIAS, *On a Charge of Overthrowing the Democracy*, in LYSIAS bk. 25, § 23-24 (Lys. 25.23-24). But the speech in question was at a *dokimasia*, which could not lead to penalties beyond disqualification for office and to which the amnesty didn’t apply, so the worry about breaking the amnesty does not seem to mean much. In fact, the jury would not have been doing anything illegal by disqualifying the speaker from office.

be beyond dispute that the conviction of even a guilty defendant for crimes committed under the Thirty was a betrayal of the law. Defendants in amnesty cases could reasonably argue that a polis that will ignore the law is one that its potential victims rightly fear and resist. Quillin's argument works only when modified by the realization that, as they entered the fourth century, the Athenians began to take official obedience to the law in their capacities as jurors to be valuable independently of their short-term political desires.

In short, the democrats exactly recognized Sir Thomas More's worry, in *A Man for All Seasons*, that should they chop down all the laws to get at the oligarchic devil, there would be nowhere for them to hide when the oligarchs turned around and went after them.<sup>229</sup> If any doubt remains on this point, consider that though we often credit Bolt with that particular insight, it actually comes from none other than Thucydides himself:

Indeed men too often take upon themselves in the prosecution of their revenge to set the example of doing away with those general laws to which all alike can look for salvation in adversity, instead of allowing them to subsist against the day of danger when their aid may be required.<sup>230</sup>

For this reason, the democratic masses in Athens were concerned to preserve the Athenian rule of law, and were willing even to sacrifice their revenge against the Thirty Tyrants to do it. Athens had the rule of law and it was vitally important for the equality between mass and elite in the democracy.

#### D. *Did the Athenians Learn from Experience?*

There some reason to believe that the strength *topos* and its invocation in defense of the amnesty reflected the Athenian democrats' experience in the periods leading up to the two oligarchic coups. The material given thus far suggests the hypothesis that previous failures of the rule of

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229. ROBERT BOLT, *A MAN FOR ALL SEASONS* 66 (1962).

230. THUCYDIDES, *supra* note 63, at bk. 3, § 3.84 (Thuc. 3.84).

law may have contributed to the initial success of both coups.

It is striking that the two major collapses of the democracy happened not only after major military defeats, but also after major lapses of the rule of law. At the beginning of the Sicilian expedition which precipitated the coup of the Four Hundred, there was a mass hysteria over allegations that some citizens had mutilated *herms*—public statues of the god Hermes—and profaned the Eleusinian mysteries.<sup>231</sup> These were seen as the acts of an organized oligarchic conspiracy against the democracy.<sup>232</sup> The investigation and prosecution were carried out in precipitous fashion, and many citizens were executed or fled into exile on very scanty (and later discredited) evidence.<sup>233</sup> Alcibiades defected to Sparta to escape execution—a flight that may have contributed to the disaster in Sicily since he was to be one of the generals on that expedition and certainly contributed to the later coup since he conspired to bring it about from Sparta.<sup>234</sup>

Similarly, the coup of the Thirty was preceded by the trial of the Arginusae generals, about which see Part II. These correlations may result from causation: if the affair of the Herms/Mysteries and the trial of the generals sufficiently undermined citizens' confidence in their fellows' willingness to follow the law under exigent circumstances, that may have contributed to their failure to do so at the time of the coups.<sup>235</sup>

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231. OSTWALD, *POPULAR SOVEREIGNTY*, *supra* note 1, at 323.

232. *Id.*

233. THUCYDIDES, *supra* note 63, at bk. 6, § 6.60 (Thuc. 6.60); ANDOKIDES, *supra* note 44, §§ 1.11-70 (And. 1.11-70).

234. *See generally*, McGlew, *supra* note 151, on the affair of the Herms/Mysteries. WILLIAM D. FURLEY, *ANDOKIDES AND THE HERMS: A STUDY OF CRISIS IN FIFTH-CENTURY ATHENIAN RELIGION* (1996) is the most comprehensive account of which I'm aware of this affair.

235. Teegarden, *supra* note 202, thus has the wrong answer, but the right question, viz., how could the Athenians have credibly signaled to one another their willingness to enforce the law?

This hypothesis draws some support from Thucydides' description of how the terror tactics leading up to the coup of the Four Hundred worked:

People were afraid when they saw their numbers, and no one now dared to speak in opposition to them. If anyone did venture to do so, some appropriate method was soon found for having him killed, and no one tried to investigate such crimes or take action against those suspected of them. Instead the people kept quiet . . . . They imagined that the revolutionary party was much bigger than it really was, and they lost all confidence in themselves, being unable to find out the facts because of the size of the city and because they had insufficient knowledge of each other . . . . Throughout the democratic party people approached each other suspiciously, everyone thinking that the next man had something to do with what was going on.<sup>236</sup>

That is, on Thucydides' account, the rise of the Four Hundred was attributable in large part to the decline of civic trust among the Athenians, and that decline in civic trust made them unable to use the legal system to put a stop to oligarchic threats. This fits nicely into the causal hypothesis I've suggested above: perhaps the Athenians ceased to trust their legal system (at least in part) because they recognized that their fellow citizens could not be relied upon to enforce the law in times of crisis, and that recognition was in turn based (at least in part) on their shameful behavior four years before in the affair of the Herms/Mysteries.

Moreover, Thucydides seems to be suggesting a broader decline in civic trust—not just that citizens failed to trust the legal system, but that they failed to trust one another in general. Contemporary empirical evidence exists to support the hypothesis that such a broader decline in civic trust, or “social capital,” could be due to the flaws of the legal system: a recent study suggests that regions that had impartial and reliable legal institutions through the nineteenth century show greater social capital even today.<sup>237</sup> Thucydides

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236. Taylor, *supra* note 56, at 100-01 (translating Thucydides § 8.66).

237. Johannes C. Buggle, *Law and Social Capital: Evidence from the Code Napoleon in Germany* (SOEPpapers on Multidisciplinary Panel Data Research, Working Paper No. 566, 2013), available at [http://www.diw.de/documents/publikationen/73/diw\\_01.c.424945.de/diw\\_sp0566.pdf](http://www.diw.de/documents/publikationen/73/diw_01.c.424945.de/diw_sp0566.pdf).

appears to be describing the contrapositive of that effect: with the failure of the legal system, the Athenian democrats lost the social capital that could have helped them collectively resist the Four Hundred.

Contemporaneous sources support my supposition with respect to the rise of the Thirty Tyrants. On Xenophon's account, one of the first acts of the Thirty was to summarily execute those who were alleged to be "sycophants"—the equivalent of modern professional frivolous litigators, the Athenian ambulance chaser.<sup>238</sup> This first bloodletting met with universal approval.<sup>239</sup> Regardless of whether sycophants were actually a problem, Xenophon clearly expected his readers to believe that the Athenian public thought the legal system was being routinely abused. Moreover, sycophants could not pose a problem for the functioning of the legal system in isolation: a sycophant could not expect to profit, even by extracting an extortionate settlement, without a reasonable probability that a jury would ignore the law and be swept away by demagogic arguments.

At least one scholar has further suggested that the alleged sycophantic problem at the time of the Thirty arose out of attempts to retaliate against those who were attached to the Four Hundred.<sup>240</sup> According to Ivan Jordović, sycophants operated by bringing litigation against innocent aristocrats to target them in a widespread "settling of scores" with the Four Hundred (presumably by falsely accusing those innocents of being part of the conspiracy).<sup>241</sup> Jordović has some support in Lysias, one of whose clients (for Lysias' speeches were written for the use of others) suggests that after the fall of the Four Hundred, demagogues "persuaded [the people] to condemn some people to death without trial, to confiscate unjustly the

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238. See generally CHRIST, *supra* note 180.

239. XENOPHON, *supra* note 5, § 2.3.12 (Xen. Hel. 2.3.12). The actual prevalence of sycophants in Athens is a subject of some dispute. See CHRIST, *supra* note 180, at 63-67.

240. See Ivan Jordović, *Critias and Democracy*, 39 *BALCANICA* 33, 34-36 (2009).

241. *Id.* at 136.



property of many more, and to expel others and deprive them of citizen rights” and goes on to say that this “reduced the city to civil strife and very great disaster.”<sup>242</sup> On Lysias’ client’s account, “oligarchy has twice been established because of those who were sycophants under the democracy.”<sup>243</sup> If Jordović and Lysias’ client are right, the zeal for retaliation after the first oligarchy indirectly helped bring about the second oligarchy by undermining citizens’ confidence in the legal system and winning public support for the first round of tyrannical executions.<sup>244</sup>

No surprise then, that the strength *topos* began to get a grip in the public legal and political culture of Athens after the fall of the Thirty. Perhaps the success of the amnesty came about because the democrats learned from their prior mistakes.<sup>245</sup>

#### IV. CONCLUSION: HOW CAN WE LEARN FROM ATHENS?

The Athenian rule of law offers many potential lessons for contemporary legal theorists.

First, consider the popular constitutionalist literature. Athens is the historical high point of popular constitutionalism in the sense given by contemporary scholars: the sovereign *polis* directly exercised judicial as well as legislative authority. If we conceive of the *dikasterion* as exercising judicial review, particularly

242. LYSIAS, *supra* note 228, § 25.25-26 (Lys. 25.25-26).

243. *Id.* § 25.27 (Lys. 25.27).

244. Asmonti, *supra* note 159, argues that the execution of the generals too was a move by the democrats against elites who were seen as a potential oligarchic threat.

245. In further support of the tentative hypothesis that the failures of the rule of law contributed to the two oligarchic coups, note that the Athenian polis suffered similar disasters in 430-27 (a major plague), 355 (defeat in the Social War), and 338 (after the crushing defeat by Macedon at the battle of Chaeronea), yet these disasters didn’t go hand-in-hand with major failures of the law, and, after them, Athenian democracy did not collapse. See THUCYDIDES, *supra* note 63, at bks. 2,3 §§ 2.47-54, 3.87 (Thuc. 2.47-54, 3.87); HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 12; SPENCER C. TUCKER, BATTLES THAT CHANGED HISTORY: AN ENCYCLOPEDIA OF WORLD CONFLICT 32-34 (2010). I thank Josiah Ober for bringing this point to my attention.

through the *graphe paranomon*, then the strength *topos* is a transposition of the notion of judicial restraint into a popular constitutional framework. When exercising their legal power after the amnesty, the people did not simply interpret the laws in whatever fashion would suit their short-term preferences. To the contrary, they interpreted the law in a way consistent with the long-term stability of the legal system and thus the continuation of their own power. And they did so by obeying the law, as such: by sacrificing their desires to achieve particular policy ends (the removal of oligarchs) to the commands of the positive law (the amnesty).

The strategic incentives that forced the Athenian democrats to exercise popular judicial restraint are not identical to those faced by citizens in the contemporary United States. Unlike Athens, the American democracy is not facing an existential threat from within; there is no need for ordinary citizens to use the law to coordinate their own power to resist some group of elites intent on subverting the constitution. However, there is an analogous risk—that executive officials might not obey the law. They might, for example, ignore the procedural protections of the criminal law to strike out against individual citizens or small groups of citizens when it is expedient to do so, and the executive thinks those individuals or groups can be isolated from the public at large (*Korematsu*<sup>246</sup> stands as the grim example).

Facing the threat of executive lawlessness, we can conceive of the strategic structure of popular constitutionalism as essentially the same as that given by Barry Weingast and Gillian Hadfield.<sup>247</sup> Lone citizens are defenseless against an overbearing executive, but together they have the capacity to resist. The function of the law, here, is to provide the terms on which citizens can coordinate to resist executive abuses against some of their members. In game theoretic terms, this (thanks to the folk

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246. *Korematsu v. United States*, 323 U.S. 214 (1944).

247. Weingast *supra* note 220; Hadfield & Weingast, *supra* note 220.

theorem)<sup>248</sup> gives rise to a repeated-game equilibrium even if doing so is costly for those citizens who are not immediately being targeted by the executive.

“Even if doing so is costly” is the key idea here. Citizens who are not being targeted by the executive may have to pay some kind of cost in order to defend those citizens who are being targeted. Sometimes that cost comes in the form of direct pressure from the executive. Sometimes however, it comes in the form of deviations from their own preferences. For example, a non-Japanese-American citizen in World War II may have individually preferred to have Japanese-Americans interned. Respect for the rule of law however would require such a citizen, when operating in popular constitutionalist mode, to swallow his personal discomfort and join his fellows in resisting the illegal executive action. Where the law is distinct from the aggregated preferences of citizens who are ruling on it, and the citizens nonetheless rule in accordance with the law, they signal to one another that they value compliance with the law more than their own private political preferences (at least sometimes), and thus can more readily be counted on to enforce the law in the future. This, in turn, permits them to coordinate to defend one another should some of their number be placed in the position of the Japanese-Americans tomorrow. The law signals to citizens when they must swallow their individual preferences, and citizens in turn signal their willingness to do so by collectively enforcing the law.

This lends some support to the normative position of the popular constitutionalists. If citizens’ ability to protect themselves from overbearing officials depends on their willingness to sacrifice their personal and political preferences to good-faith interpretations of the law, then it undermines the majority tyranny critique of popular constitutionalism. (It may simply not be in the majority’s long-term interests to act tyrannically.) More interestingly, it suggests that the public as a whole may actually be better at enforcing the constitution than professional judges, because judges do not have similar incentives to incur a cost

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248. See JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* 268-79 (1994).

to signal their own willingness to enforce the law—judges are members of the official elite and are less likely to need coordinated defense from one another against officialdom than are members of the public as a whole. Consequently, the consequences to judges of overriding the law in the pursuit of their private preferences may actually be lower than the consequences to citizens. (But this is all very tentative, and requires much more theoretical development to state with any confidence, even as a hypothesis.)

Finally, if people, for purely strategic reasons, are compelled to respect the constitution in their judicial or quasi-judicial roles, this participation may train them to do so in their roles as ordinary citizens and voters as well, and consequently lead to greater respect for the law and for individual rights in general. As John Stuart Mill said, democracy can be “a school of public spirit”—but not necessarily for the reasons he thought.<sup>249</sup> Rather, democracy makes citizens public-spirited when combined with legal institutions that demand they respect the law in order to maintain their solidarity against elites with imperfectly aligned incentives.

The points given with respect to popular constitutionalism apply as well to the case of transitional justice. The material in Part III can help us navigate contemporary post-conflict situations. Respect for the rule of law appears to be important to maintaining the stability of new democracies after conflict, because it helps the masses to coordinate to resist the return of their recent oppressors. This has direct relevance to recent cases of transitional justice, some of which (like Chile’s) have featured amnesties for former dictators.<sup>250</sup> The Athenian example gives these contemporary political communities some reason to respect those amnesties.

Finally, and perhaps most importantly, the Athenian example shows us that democracy and the rule of law can be

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249. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 54 (Curran V. Shields ed., Bobbs-Merrill Co. 1958) (1861).

250. See generally John Duggard, *Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?* 12 *LEIDEN J. INT’L L.* 1001 (1999).

compatible. The rule of law need not be seen as a compromise of popular sovereignty, but as a necessary component of it, a tool that enables the people to resist threats to their democratic political community.