

# Building Legal Order in Ancient Athens

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*And what is the power of the laws? Is it that, if any of you is attacked and gives a shout, they'll come running to your aid? No, they are just inscribed letters and have no ability to do that. What then is their motive power? You [the jury] are, if you secure them and make them authoritative whenever anyone asks for aid. So the laws are powerful through you and you through the laws. You must therefore stand up for them in just the same way as any individual would stand up for himself if attacked; you must take the view that offenses against the law are common concerns... (Demosthenes, *Against Meidias*, 223-225).*

## Abstract

How do societies establish and maintain internal order and stability? Contemporary scholarship associates stability, order, and growth with modern, centralized legal institutions—including formal courts, public prosecutors, and expert judges. These institutions have proven hard to establish in most developing countries. Democratic Athens in the period between 508 and 323 BC was remarkably stable and prosperous, but the polis never developed modern, centralized legal institutions. How, then, did Athens establish and maintain order and stability? In this paper, we investigate ancient Athens using the theoretically grounded “what-is-law” account of legal order elaborated by Hadfield and Weingast (HW, 2012). The model shows that achieving a stable equilibrium requires a classification institution that is a) managed by an authoritative steward capable of resolving ambiguities and responding to novelty; b) common knowledge and incentive-compatible, that is, capable of improving welfare for those on whom punishment for wrongs depended; and c) characterized by a set of legal attributes, such as generality and stability. To secure these ends, Athenian law exhibited more openness than modern legal systems, allowing litigants to discuss each other’s character traits and behavior; but it did so by sacrificing clarity and consistency. Rather than see the Athenian system as a departure from rule of law standards, we see Athenian openness as a robustness mechanism that promoted the consistency of judicial decisions with community expectations rather than the consistency of judicial decisions with one another. We put pressure on the notion (widespread in classical scholarship) that Athens’ stability relied largely on an informal system of norms. We also put pressure on the notion (widespread in the law-and-economics literature) that decentralized rule-enforcement institutions work only in small-scale, homogeneous communities. Our approach provides new insights into how a robust legal order may be successfully built in countries where modern, centralized, legal institutions have failed to take root.

## 1. Introduction

How do democratic societies establish and maintain internal order and stability in ways that are conducive to growth? Contemporary scholarship in political science, economics, and law attributes the stability of democratic social orders to the existence and efficient functioning of formal legal institutions. These

institutions include an established and recognized legal authority capable of articulating and changing rules, an organized police force to maintain order and punish wrongdoing; a system of public prosecutors to bring wrongdoers to justice; and expert judges and lawyers to secure the correct application of written legal rules to individual cases. Yet, formal, centralized legal institutions have proven hard to establish in developing countries, where states are weak, access is limited, and resources—both human and material—are few.

Athens was a stable, prosperous democracy for roughly two hundred years (from 508 to 323 BC). Yet, the ancient city-state (*polis*, plur. *poleis*) never developed the full complement of modern, centralized, legal institutions. In Athens, formal written law and courts existed, and access to these institutions was regulated by written legal procedures. However, prosecutions relied heavily on private initiative, judges were citizen-amateurs, no lawyers existed, and there was little to no centralized public enforcement of judicial decisions.

The case of classical Athens provides a window into the processes that allowed the ancient democratic polis to build and maintain a robust social order that was associated with sustained growth in state capacity and per capita consumption. Reconstructing the mechanisms whereby Athens achieved such goals may offer important insights into how robust social orders may be built in countries where modern, centralized, legal institutions have failed to take root.

How did Athens establish and maintain internal order and stability? Classical scholars hotly debate this issue. Some scholars emphasize the role of informal systems of norms and regard the processes that played out in formal

courts as hardly law-like (Herman 2006; Hunter 1994; Forsdyke, 2012; Ober 1989; Cohen, 2005; Christ, 1998). Other scholars minimize the role played by informal norms and maintain that Athens was governed by a regular and predictable rule of law (Harris, 2006a; 2006b; Gowder, 2014).

Cutting across the polarization of this debate, Adriaan Lanni suggests that, while Athens lacked the rule of law (defined as the consistent and predictable application of written rules to specific cases brought under such rules), formal courts and procedures played an important role in supporting the efficacy of an informal system of norms in a growing and complex city (Lanni 2006, 2009). Lanni maintains that Athens lacked the rule of law because prosecution depended on private initiative, the law was scattered and hard to find, rules were vague and did not specify always what conduct was punishable, and court decisions were unpredictable and *ad hoc*, based on an array of informal norms—such as character, public service and private behavior—rather than being governed exclusively by factors laid out in the law on which charges were based (Lanni 2004, 2005, 2006, 2009, 2012).

Lanni maintains that consideration of informal norms in formal courts supported the informal system of social norms via two mechanisms. First, given the frequency with which any average Athenian was involved in formal legal proceedings (as a citizen, as a magistrate, and as a private litigant), consideration of informal norms in formal court constituted a powerful incentive to abide by these norms. Moreover, consideration of informal norms in court

publicized norm violations, which helped compensate for the weaknesses of a largely private system of coercion by facilitating private enforcement.

Lanni's account insightfully explores how formal institutional mechanisms supported Athens' largely informal social order. However, her interpretation leaves us with important puzzles unresolved. First, Lanni focuses on the mechanisms that incentivized Athenians to comply with rules, but not on the mechanisms that incentivized Athenians to punish violators. Second, Lanni acknowledges that Athenian norms developed over time, but her model fails to explain how enforcement practices adapted to such changes.

Athens was a relatively small-scale, homogeneous community when compared to modern pluralistic societies. However, compared to other Greek poleis (namely, Sparta) and other pre-modern states (e.g., Persia), Athens was extremely dynamic and open, both culturally and commercially. As Lanni recognizes, "Athens had no system of public education and the sophistic revolution of the fifth century cast doubt on even the most basic cultural norms such as filial piety."<sup>1</sup> (Lanni, 2009, p. 22) Moreover, Athens was a "bustling metropolis" populated by many non-Athenians who, like the sophists, introduced in Athens their own cultural norms, together with their trade (Lanni, 2009, p. 22).<sup>2</sup>

We identify two threats to the stability of informal norms in ancient Athens: at any given point in time, individual Athenians may have held different

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<sup>1</sup> Among citizens, the most notable variations occurred along the socioeconomic axis that divided the masses and the elites (Ober, 1989; Morris, 2000). If the threats to foundational norms such as filial piety is perhaps an exaggeration - a product of the comedian Aristophanes' parody of the consequences of moral relativism as introduced in Athens by the sophists - the irony lies in the fact that sophistic doctrine and teaching were felt as a profound cultural shock in Athens - a city that prided itself on the prestige coming from its cultural openness (Thuc. 2.39).

<sup>2</sup> An obvious example is the debate between Socrates, Polemarchus and Thrasymachus (both of whom are foreigners) over notions of justice in book 1 of Plato's *Republic*.

interpretations of specific informal norms; further, in Athens, as elsewhere, norms changed over time – both as a result of shocks (e.g. the sophistic revolution), or of broader changes in socioeconomic and political conditions. Effective private enforcement of informal (and formal, but often vague) rules required that each enforcer be systematically willing to enforce judicial decisions *even if* those decisions are at odds with his or her own idiosyncratic interpretation of what constitutes accepted rules and when a violation has occurred.

Under these circumstances, the fact that individual Athenians *knew* that someone had violated a rule (via the publicity role of the formal courts) does not explain why the same individuals would put themselves in the considerably more risky position of *punishing* the violator, particularly given the potential ambiguities arising from individually held idiosyncratic notions of the content of rules and their violation.

In this paper, we draw on the theoretical “what-is-law” account of the characteristics of legal order elaborated by Hadfield and Weingast (2012, 2013) to focus more precisely on this problem of coordinating private enforcement of rules in the face of ambiguity. In doing so, we provide a more comprehensive framework for understanding the sources of Athenian stability, prosperity and growing complexity.

The what-is-law framework begins by distinguishing between legal order and other forms of social order. Such a distinction depends on the nature of the institution that classifies what is normatively acceptable conduct and what is not. First, legal order is characterized by a classification institution that is under the

control of an *authoritative steward*, an identifiable entity that provides a unique normative classification of behavior. Second, the classification is common knowledge and is capable of coordinating an equilibrium social order by incentivizing decentralized punishment conditioned on its classification.

The what-is-law model suggests that a ‘legal’ order is a stable equilibrium in which an impersonal entity—the steward—is capable of deliberating on the content of rules and of sustaining order when rules change by relying entirely on decentralized and voluntary punishment by ordinary citizens. In a well-established legal order the steward’s rules incentivize robust participation in punishment by improving welfare for those on whom punishment for wrongs depends and by maintaining certain attributes that are commonly associated with law, such as clarity and prospectivity (HW calls these ‘legal attributes’). The members of the community abide by the rules because a) they know, and know that everyone knows, the rules; and b) they have sufficient incentives to voluntarily participate in punishing violators in accordance with such rules.

We show that, over the course of the Archaic and Classical periods (roughly from 700 to 322 BC), Athens successfully transitioned from purely informal or ‘oligarchic’ order—where a classification of what is punishable and what is not is supplied organically in the community or by *super leges* elites—to a common knowledge classification institution with developing legal attributes. In particular, we show that, by the end of the classical period (ca. 350 BC), a) the Athenian legal system possessed a unique classification institution with an authoritative steward capable of resolving ambiguities and responding to novelty;

b) the classification scheme was common knowledge and provided a social order equilibrium that improved welfare for those on whom punishment for wrongs depended and c) the institution and its rules had slowly begun to display various legal attributes.

In light of the what-is-law framework, we modify Lanni's conclusions. We agree with Lanni that compliance with rules relied on the expectation of future punishment, but we contend that expectations of future punishment would effectively deter wrongful behavior only if enforcement mechanisms were incentive-compatible for punishers; absent this condition, punishment will not occur and compliance cannot reasonably be expected.

We therefore identify two mechanisms that fostered incentive-compatibility for punishers. First, while we agree with Lanni that Athenian court decisions were based on an array of formal and informal rules, we do not conclude that court decisions were unpredictable and *ad hoc*. Instead, we argue that decentralized, private enforcement of judicial decisions, particularly in the face of idiosyncratic notions of the content of rules and their violation, requires that each individual trusts that the common logic overlaps in substantial ways with his own idiosyncratic normative classification. As a result, we consider the openness of the Athenian legal system—that is, the fact that formal courts drew considerably on both formal and informal rules when reaching their decisions—as a crucial mechanism that incentivized individual participation in the collective enforcement of judicial decisions. As a corollary, we consider Athenian litigiousness—which is hard to understand if law was merely a means of buttressing a well-understood

and unambiguous informal social order—as the means whereby rules were both stable and quickly adaptable to changes.

Second, as quoted in the epigraph, Demosthenes' urging of the jury reveals that the Athenians further secured incentive-compatibility by connecting the individual responsibility to participate in the enforcement of judicial decisions (both by assisting individual litigants in enforcing judicial decisions and by not interfering with the process of enforcement) with the very fate of the polis and its system of government—that is, the democracy. Democracy, in turn, created the conditions for the existence of order based on the common logic as opposed to, say, the rule of a tyrant.

We conclude that Athens' legal order contributed to sustain the polis' stability, prosperity, and growing complexity because the legal order was common knowledge and incentive-compatible in a way that made it both stable and adaptable to endogenous and exogenous shocks.

Our investigation of the sources of legal order in ancient Athens contributes to, and expands on, the law-and-economics literature, which focuses on decentralized institutions in small, close-knit communities operating 'in the shadow of the state.' We build on this literature to document the ways in which legal order was scaled-up to the level of a relatively small and homogeneous, yet tremendously dynamic and prosperous, pre-modern state.

In particular, we emphasize two aspects of the process whereby Athens built and maintained a robust legal order. First, the openness of the Athenian legal system made it less predictable than most contemporary legal systems.

However, whereas Lanni interprets Athenian openness as a critical departure from 'rule of law' standards, we consider openness as a robustness mechanism and as the hallmark of the Athenian rule of law – a rule of law that privileged the consistency of judicial decisions with community expectations over the consistency of judicial decisions with one another.

Moreover, the development of Athenian legal institutions paid highest attention to stabilizing a classification institution and to build institutions that achieved common knowledge and incentive compatibility for ordinary private individuals. These institutions developed the practice of neutral reasoning in legal processes, even though this came at the expense of delaying the refinement of other legal attributes such as clarity and prospectivity.

The paper proceeds as follows. In section 2, we delineate the development of Athenian law and legal institutions and describe how these institutions worked in practice. In section 3, we introduce the what-is-law framework. In section 4, we apply the framework to Athens. Our conclusions follow.

## **2. The Athenian Legal System**

The Athenian legal system, like Athens itself, emerged out of the poor, isolated, egalitarian world of Dark Age society. Around the 8<sup>th</sup> century BC, the demographic and economic expansion of the Greek world ushered in a social, political, and economic revolution. Departing from the development path of other

Mediterranean societies, Greece saw the emergence of independent city-states, rather than vast, centralized empires.<sup>3</sup>

The economic expansion that began in the 8<sup>th</sup> century BC meant that each city-state had strong incentives to devise strategies to preserve and enlarge its share of goods. Within each city-state, elite competition for control of political and judicial magistracies ran high, often devolving into violence. Writing around 700 BC, the poet Hesiod dubbed judicial magistrates *dôrophagoi*, “gift-devouring,” to emphasize the lack of checks on their power.<sup>4</sup>

As a response to internal instability, and in order to control domestic violence and predatory elites, Greek city-states in the archaic period (ca. 700-480 BC) turned to law. The development of early Greek law and the concomitant practice of inscribing (usually on stone) and prominently displaying a polis’ laws in public places, such as the central-square—or Agora—progressively helped define and circumscribe the power of elite magistrates.<sup>5</sup>

Archaic Athens was a typical city-state: elite competition threatened to compromise the polis’ internal stability and thus jeopardize its chances to compete at the international level. As a response to instability, Athens also turned to law.

Around the late-7<sup>th</sup> century BC, a man named Draco promulgated the first code of law for the city of Athens. Known largely for its harshness (hence, the

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<sup>3</sup> Cf. Morris, 2005.

<sup>4</sup> Hes. WD. 11.

<sup>5</sup> The earliest legal inscriptions, from the Cretan cities of Dreros and Gortyn date to the years between 650 and 600 BC. For a brief historical overview of Athenian organs of jurisdiction in the early archaic period, see Harrison, 1971, pp 1-4. For an overview of Athenian magistracies, see Harrison, 1971, pp 4-36. On the relevance of written law, see Thomas, 2005; Gagarin, 2008. On the development of early Greek law, see Gagarin, 2005; 2008.

adjective 'draconian'), Draco's law-code was subsequently repealed, except for his legislation on homicide, which remained in force throughout the archaic and classical period.<sup>6</sup> Draco 'institutionalized' private initiative within the nascent Athenian legal system by establishing a series of procedures for the punishment of murderers that identified the competent magistrates and mobilized the family of the victim to bring a prosecution against the perpetrator. In so doing, Draco removed homicide disputes from the cyclical logic of blood feuds and vendettas that fostered instability and hindered social and economic cooperation.<sup>7</sup>

Despite the success of his homicide legislation, Draco's attempt to create legal order appears to have failed. The threat of violence did not abate. As Aristotle remarks, "The party struggle being violent and the parties remaining arrayed in opposition to one another for a long time, they jointly chose Solon in 594 BC as arbitrator and Archon ("chief magistrate"), and entrusted the government to him."<sup>8</sup>

Solon set to work elaborating a comprehensive program of political, economic, and legal reforms.<sup>9</sup> In the legal sphere, Solon introduced two notable reforms. First, Solon further institutionalized private initiative within the legal system by allowing any citizen who wished (*ho boulomenos*) to initiate a public prosecution (*graphe*) against wrongdoers.<sup>10</sup> Second, Solon introduced the

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<sup>6</sup> Roughly, from 621 to 323 BC, see [Arist.] *Ath Pol.* 7.1.

<sup>7</sup> On Draco's legislation, see Carawan, 1998.

<sup>8</sup> [Arist.] *AthPol.* 5.2

<sup>9</sup> For the purposes of this paper, a comprehensive overview of Solon's reforms is beyond our scope. In what follows, we concentrate on Solon's legal reforms. On Solon's role, see Almeida, 2003; for an overview of Solon's reforms, see Balot, 2001.

<sup>10</sup> The distinction between 'public' and 'private' cases in Athenian law is a complex one. For the purposes of this paper, we consider 'public cases' those that can be brought by anyone who wished (lit. *ho boulomenos*) and we refer to such cases as '*graphai*' (sing. *graphe*). For a

people's court (*dikasterion*), a tribunal that heard appeals against the judgments of elite judicial magistrates.<sup>11</sup>

From the archaic to the classical (480-323 BC) period, the power of the Solonian popular courts steadily increased, progressively eroding the power of elite judicial magistrates.<sup>12</sup> The introduction of a democratic political system in the aftermath of the Athenian revolution of 508 BC accelerated this process.<sup>13</sup>

In the mid-5<sup>th</sup> century, the introduction of pay for jurors allowed the average Athenian citizen to participate in the polis' judicial machine.<sup>14</sup> At the same time, the process of lawmaking, which in the archaic period was often associated with individual figures, such as Solon and Draco, came into the hands of the Athenian Assembly (*Ekklesia*) – a gathering of ca. 6,000 adult male citizens meeting 40 times a year to deliberate over the most important public matters, including passing laws and decrees.<sup>15</sup>

Enacted by the Assembly through majority rule and by show of hands, Athenian laws underwent a rather haphazard development that created, as

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more detailed discussion of the distinction between public and private cases, their terminology, and the role of *ho boulomenos*, see Harrison, 1971, pp. 74ff.; MacDowell, 1978, p. 53ff.; Todd, 1993, pp. 98ff.

<sup>11</sup> On whether Solon's court heard appeals or tried cases in the first instance see Karachalios, pp. 255-9 and note 531

<sup>12</sup> In pre-Solonian times, Athens, like other Greek poleis, was ruled by elite magistrates ([Arist]. *AthPol.* 3). At the end of their term in office, the archons would serve for life in the Council of the Areopagus. Archons continued to be elected in Athens through the archaic and the classical period, though their individual powers steadily decreased until they became largely vestigial. The council of the Areopagus, instead, continued to play an important role down to the mid-5<sup>th</sup> century when the democratic leaders Ephialtes and Pericles deprived the institution of most of its powers ([Arist]. *AthPol.* 8, 27).

<sup>13</sup> On the Athenian revolution, see Ober, 1996.

<sup>14</sup> As Hansen remarks, "Judgment in Athens was not given by a professional judge but by a jury of several hundred persons." (Hansen, 1999, p. 180). We employ the term 'jurors' to identify these persons. We discuss the role and composition of Athenian juries more fully below.

<sup>15</sup> In the 5<sup>th</sup> century, there was no distinction between laws and decrees: the terms were therefore employed as synonyms. In the 4<sup>th</sup> century, the Athenians introduced an important distinction between laws and decrees. We discuss this distinction more fully below.

Stephen Todd has put it, “a very considerable confusion over the nature and authority of the laws of Athens.”<sup>16</sup> Throughout the 5<sup>th</sup> century, no comprehensive, and internally coherent law-code was available to litigants and jurors who wished to use the city’s laws to defend themselves or prosecute others in court.<sup>17</sup> At the same time, the lack of checks on the unbridled legislative and judicial power of the people came under increased scrutiny when military failures and economic crises put unprecedented pressure on Athens’ democratic institutions.<sup>18</sup>

In response to a decade of war-led instability (413-403 BC) that saw the establishment of two oligarchic regimes, and after a major defeat in a 27-year-long war (431-404 BC) that drained the polis’ resources, the Athenians once again turned to law for guidance on how to reestablish a stable and prosperous polis.

First, the Athenians embarked on a process of revision and scrutiny of the city’s laws. The laws that had been passed in the previous centuries (or at least a conspicuous selection of them) were collected, revised, reauthorized and published.<sup>19</sup> Second, the Athenians passed a series of reforms whereby Athens

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<sup>16</sup> Todd, 1996, p. 107.

<sup>17</sup> As James Sickinger remarks, in his study of Athenian public documents and archives, “Prior to the last decade of the fifth century, the preservation of Athenian documents and records had been haphazard and unsystematic; the Boule may have kept some records in its meeting place, the Bouleuterion, but most state documents were scattered around the city at the offices of different magistrates and published on a variety of media.” See Sickinger, 1999, p. 62 and note 2.

<sup>18</sup> Thuc. 8.1. Ober (1998, ch. 2) interprets Thucydides’ history as reconstructing the political collapse of Athens and documenting the role that the unchallenged demos played in the collapse. See Carugati, 2015 ch. 3.

<sup>19</sup> The collection encompassed legislation enacted since Solon (see e.g. Shear, p. 84 and note 55), but it by no means made up a complete code (see Carawan, chs. 8 and 10). At the same time, thanks to this process, a conspicuous body of Athenian laws became available for consultation in the building known as the Metroon which, located in the Agora, functioned as a central archive (see Sickinger, 1999, ch. 4). Other laws remained scattered around the city: inscribed on stone *stelai*, they were sometimes conveniently located in front of the courts that administered them (see, Shear, 2013, ch. 3, esp. pp. 89-96).

acquired a) a formal distinction between laws (*nomoi*) and decrees (*psephismata*); b) a new legislative institution in the form of boards of *nomothetai* (lit. lawmakers) that joined the Assembly as legislative organs; and c) new procedures to regulate the introduction and amendment of laws.<sup>20</sup>

As a result of these changes, the Athenians rationalized their body of laws and introduced powerful institutional checks on the previously unrestrained power of the Assembly to make law. On the one hand, they scrutinized old laws for internal consistency, established procedures to secure the conformity of new laws with old laws, and made both old and new laws (more) available for consultation. On the other hand, the Athenians regulated the legislative process by establishing a new legislative institution (the *nomothetai*) as a check on the Assembly and by regulating the power of the new institution through written procedures to be followed in the matter of legislation.

The last major development in Athenian law dates to the middle of the 4<sup>th</sup> century, when new courts were set up to hear cases arising from maritime commercial disputes. Little is known about the Athenian *dikai emporikai* (lit. commercial suits), including the reason for their establishment, the configuration of the court's jurisdiction, and the composition of the jurors who heard the cases.<sup>21</sup> However, the extant evidence suggests that these cases were

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<sup>20</sup> Other measures included a hierarchy between laws and decrees whereby no decree could prevail over a written law; a rule that prohibited magistrates from using unwritten laws, and a bar on laws *ad personam*. Cf. Andoc. 1.87. On the new legislative procedures see Dem. 24.20-3; Dem. 24.33 and 20.89-94; Aeschin. 3.38-40. Scholarly treatments of the late 5<sup>th</sup> century legal reforms include Harrison, 1955; Robertson 1990; Rhodes, 1991; Carawan 2002. On 4<sup>th</sup> century Athenian *nomothesia* see Mac Dowell, 1975; Hansen, 1985; 1999; Pierart, 2000; Rhodes, 2003; Canevaro, 2013.

<sup>21</sup> Classical scholars agree that the establishment of commercial cases was a response to the financial crisis of the 350s, although they disagree on the specific objectives: for Lanni

exceptional for several reasons. First, both citizens and non-citizens had standing in these courts; second, they featured expedited procedures;<sup>22</sup> finally, special measures were devised to enforce court judgments, including detention (both before and after the hearing), and pre-trial bail.

In the mid-4<sup>th</sup> century, the Athenian legal system served a commercial metropolis of ca. 250,000 people and a vibrant market that sustained Athens' population and constituted the center of Aegean and Eastern Mediterranean maritime trade. For over 150 years, democratic institutions proved compatible with, and fostered Athens' exceptional economic performance within the Greek ecology.<sup>23</sup>

Yet, Athenian law and legal institutions differed considerably from their modern, centralized counterparts. Athens' formal legal system featured amateur judges and private litigants.<sup>24</sup> The legal process, from summons to enforcement, relied on private initiative.<sup>25</sup> Most strikingly, Athens lacked any form of systematic

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(2006, pp. 150-2) and Isager and Hansen (1975, [cite]) the *dikai emporikai* extended legal privileges to merchants for the purpose of attracting them to Piraeus and Athens; for Cohen (1973, pp. 65-9) the commercial courts were established to secure the Athenian grain supply. As to the issue of the composition of the jury, scholars disagree. For Cohen, *dikai emporikai* were heard by a special class of merchants; for Lanni, they were heard by the Athenian popular courts. The debates over jurisdiction revolve around two issues: a) whether a written contract was required, and b) whether the courts heard only maritime matters involving commerce to or from Athens. Cf. Harris, 2005, pp. 300-1

<sup>22</sup> *Dikai emporikai* are known as *dikai emmenoi* (monthly suits) but the exact meaning of 'emmenos' as applied to these cases is debated, see Cohen, 1973, pp. 12-58; Harris, 2005, p. 301 and note 59.

<sup>23</sup> Ober, 2008.

<sup>24</sup> On the lack of expertise in the Athenian legal system see Hanssen and Fleck, 2012. On the role of the supporting speakers, see Rubinstein, 2000; on the role of professional speechwriters, see Bers, 2009.

<sup>25</sup> Hunter, 1994 ch. 5.

public enforcement of laws, such as public prosecutors, or an organized police force.<sup>26</sup>

If disputes arose, among Athenian citizens or between citizens and non-citizens, how were they settled? In what follows, we illustrate the Athenian process of litigation through a thought experiment.<sup>27</sup>

Consider an adult male citizen whom we call Nomion.<sup>28</sup> Nomion recently bought a slave from his neighbor, a resident alien, not knowing that the slave carried a substantial debt.<sup>29</sup> The sale of the slave was regulated by a contract that did not mention the debt, but stated (in fine print) that Nomion was to assume responsibility for any debt previously contracted by the slave. Now imagine that Athens had a law that prohibited lying in the Agora (the marketplace, where the sale occurred) and that another law required the seller to disclose any physical defects in the sale of a slave, and a third law stating that any agreement made between two parties is binding (*kurios*).

If Nomion wants legal recourse for what he perceives as wrongful conduct, he has a series of options: he can prosecute the man who sold him the slave (whom we shall call 'the seller') through the formal legal system, or he can turn to

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<sup>26</sup> Athens did employ small groups of individuals who performed various police functions, but the polis lacked an organized police force capable of providing and maintaining social order (Hunter, 1994, pp. 143-9). Similarly, even if a number of magistrates were responsible for prosecuting crimes that fell under their jurisdiction, private individuals initiated most public (and all private) cases (MacDowell, 1978, p. 62).

<sup>27</sup> Our thought experiment requires a great deal of simplification. For an in depth description of the functioning of Athenian law and courts see Harrison, 1968-71; MacDowell, 1978; Todd, 1993.

<sup>28</sup> The thought experiment that follows is adapted from the Athenian orator Hyperides' speech against Athenogenes (Hyp. 3).

<sup>29</sup> With some exceptions (which we will not discuss here but see Lanni 2009, p. 6) most litigation was restricted to adult male citizens. On the composition of Athenian litigants, see Bers, 2009. Modifying the *communis opinio* that conceives of Athenian law-courts as the battleground of the elite, Bers argues that, given the volume of litigation in Athens, litigants were likely drawn from the elites as well as from the masses.

more informal dispute resolution mechanisms.<sup>30</sup> Let us assume that Nomion chooses the formal legal system.

To prosecute in a formal (i.e. popular) court, Nomion must consult the city's laws to figure out what kind of action he can bring against the seller.<sup>31</sup> As we already noted, in the 4<sup>th</sup> century laws were more readily available than in the 5<sup>th</sup>. However, finding the relevant laws still required a good deal of effort, so Nomion turns to friends and neighbors for help. After consulting the relevant laws, Nomion and his advisors settle on a course of action: Nomion will bring a private suit for damages (*dike blabes*) against the seller.

After determining which magistrate deals with private cases of damages, Nomion must summon the seller to appear before the relevant magistrate on an agreed day (Nomion will serve the notice to the defendant himself) and deposit a written charge to the magistrate.<sup>32</sup> The written charge will allege violations of the rules against lying in the Agora and the failure to disclose defects in the sale of a slave.

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<sup>30</sup> In this paper, we are concerned with the formal courts. However, note that a series of alternative dispute resolution mechanisms were available, from private arbitration to informal self-help and other extra-judicial, 'popular' forms of redress, which remained part and parcel of the Athenian approach to law and order throughout the classical period (see Hunter, 1994, Cohen, 1991; 1995, Forsdyke, 2012).

<sup>31</sup> Athenian law displayed what scholars term open texture: for most actions, litigants would be able to choose among a series of procedures. The choice involved a cost-benefit analysis whereby the prosecutor ought to weight the risk of losing over the advantages of winning. The nature of the action and the identity of the litigants play crucial roles in this decision. For open texture in Athens see Harris, 2000; 2004.

<sup>32</sup> For further information about this stage, known as *prosklesis* or summons, cf. Harrison, 1971, pp. 85-94, and <http://referenceworks.brillonline.com/entries/brill-s-new-pauly/prosklesis-e1010880>. For the purposes of this paper we skip the intervening step between the summons and the trial, that is, the preliminary hearing, or *anakrasis*. For a detailed discussion of the *anakrasis*, see [http://www.stoa.org/projects/demos/article\\_law\\_glossary?page=4&greekEncoding](http://www.stoa.org/projects/demos/article_law_glossary?page=4&greekEncoding). See also Harrison, 1971, pp. 94-105, Hansen, 1999, p. 196-203.

As the day of the trial approaches, Nomion collects evidence to support his case, including the contract, the laws that the seller has broken and witnesses to support his story.<sup>33</sup> Again, Nomion may only turn to family and friends for help; no Athenian magistrates or legal experts (e.g., lawyers) are available to guide Nomion's investigation. Moreover, given the absence of a police force, Nomion must also ensure that both his opponent and his witnesses show up in court on the day of the trial.

Nomion's next task is to present his case in a court of law. This involves preparing and delivering a speech before a panel of jurors.<sup>34</sup> What did an Athenian court look like? And what would Nomion have said to persuade the jurors that he is an innocent victim of the seller's dishonesty and therefore deserves compensation?

Athenian popular courts looked nothing like modern courts. Entering the law-court on the day of the trial, litigants faced from a minimum of 201 to a maximum of 6000 jurors.<sup>35</sup> The number of jurors depended on the nature of the issue at stake: in the 4<sup>th</sup> century, "private lawsuits were judged by a panel of 201 if the sum at issue was less than 1000 drachmas, or 401 if it was more, and

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<sup>33</sup> For a full discussion of the types of evidence see Harrison, 1971, pp. 133-153.

<sup>34</sup> At this stage, Nomion can hire the services of a professional speechwriter, though Nomion himself will deliver the speech in court.

<sup>35</sup> Given the opportunity costs of large juries, a very large jury speaks to a lack of confidence in rule-based reasoning. The numbers and random selection, secret ballots, and lack of deliberation all suggest that public prosecutions face a very real risk of partisan decisions that needed to be protected against. In the 4th century, the selection of jurors was regulated by a complex mechanism. For the purposes of this paper, we do not delve into details. However, it is important to mention that the system aimed at avoiding corruption and ensuring fairness. Therefore, each panel of jurors was selected by lot on the day of the trial to which the panel was assigned. Moreover, jurors were selected among 6,000 candidates who, at the beginning of the year, had sworn the juror's oath (Heliastic oath). The 6,000 jurors, if not each panel, were representative of the Athenian population as a whole. For a detailed discussion of qualifications, selection procedures and composition of Athenian jurors, see Hansen, 1999, p. 181-9. We will come back to discuss the relevance of these procedures more fully below.

public prosecutions were usually judged by a panel of 501; but the most important political cases (...) were sometimes judged by a jury of several panels of 500 put together.”<sup>36</sup> Given the nature of Nomion’s case—a private prosecution for damages involving the sale of a slave—Nomion will probably face 401 jurors.<sup>37</sup>

In the course of his speech, Nomion will not limit himself to citing the relevant laws (e.g. the prohibition to lie in the Agora and the requirement to disclose slaves’ physical defects<sup>38</sup>) and calling witnesses to support the facts as he reconstructs them. A conspicuous part of his speech is likely to be devoted to the seller’s character. For example, Nomion will say that the seller, a businessman and an *Egyptian*, is a cheat and cannot be trusted; that when he (Nomion) attempted to amicably solve the dispute out of court, the seller proved unheeding and when passers-by urged Nomion to arrest the seller as a thief, Nomion chose instead to follow less confrontational means to settle the dispute. Nomion might also suggest that letting the seller go scot-free will doom the city of Athens, his market, and each and every one of its citizens to abject poverty.

After Nomion has spoken, the seller will be allotted the same amount of time to deliver his own speech, in the course of which he too will discuss the contract, relevant laws and call witnesses, in addition to slandering his opponent on multiple grounds (e.g. the seller may allege that, in his youth, Nomion was a

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<sup>36</sup> Hansen, 1999, p. 187. Note that one Attic drachma corresponded to a day’s wage for a soldier or unskilled laborer (Ober, 2010).

<sup>37</sup> As we explain more fully below, we assume that the price of the slave was 500dr. and that between the purchase of the slave and the trial Nomion had to pay an additional 1000dr. to cover parts of the debts the slave carried.

<sup>38</sup> For example, Nomion may argue that the disclosure clause aims at protecting the buyer’s interests, which the absence of debts associated with the slave would also cause.

prostitute who maltreated his parents, a rabble-rouser, a lawless drunk and, worst of all, a niggardly fellow).<sup>39</sup>

After having heard both speeches, the 401 jurors will vote, by secret ballot and without deliberation, for one of the two litigants. Their judgment, obtained by simple majority rule, is final.

Let us assume that the jurors vote in favor of Nomion, innocent victim of the seller's cunning. Private suits for damages require the guilty defendant to pay "twice the value of the damage caused."<sup>40</sup> Let us further assume that Nomion paid 500dr. for the slave, but during the time between the purchase and the trial Nomion was also forced to pay off a portion of the debt that the slave had incurred while it belonged to the seller. Let us fix this additional amount at 1000dr. Nomion's victory in the trial thus means that the seller owes Nomion 3000dr.

We mentioned earlier that, in the absence of a police force, Nomion was responsible to make sure that the seller would not abscond before the trial. The absence of a police force also complicates the enforcement of the jurors' verdicts: in order to exact his due, Nomion must proceed to seize the money. The seller, however, refuses to pay. What can Nomion do to retrieve his due? Not much.

Nomion can ask the magistrate of his deme of residence (the *demarch*) to escort him to the seller's home. However, the extant evidence suggest that the

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<sup>39</sup> Cf. Lanni's discussion of extra-statutory norms in sections 3 and 5 (see also Lanni, 2009, pp. 10-15)

<sup>40</sup> Thur, 2006 available at <http://referenceworks.brillonline.com/entries/brill-s-new-pauly/blasbes-dike-e218120>.

mere presence of the *demarch* carries little weight.<sup>41</sup> The only option Nomion has to act within the confines of the law requires him to bring another private suit, this time a suit for ejection (*dike exoules*). Nomion then has to go through the costly process of bringing a lawsuit all over again, prove “first, that he already had legal authority to take possession; secondly, that the defendant had sent him away (*exagein*) when he attempted to do so.”<sup>42</sup>

Let us assume that the jury in the *dike exoules* rules, again, for Nomion. With two judgments in his favor, Nomion returns to confront the seller. However, the lack of public officials to execute judgments of this sort meant that “[t]he *dike exoules* was a procedure for authorizing self-help, for permitting a man to use force to recover his property when peaceful methods had failed.”<sup>43</sup>

As we noted earlier, Nomion may again call upon the *demarch* for assistance. Nomion can also turn to family members and friends for help, but so can the seller. For example, we may suppose that the seller’s own family and friends, or some of the litigants’ neighbors (both citizens and non-citizens), may try to interfere with Nomion’s seizure of assets. Under these circumstances, effective enforcement of judicial decisions requires that not only the litigants, but also their family members, friends, neighbors and bystanders be willing to ‘enable’ Nomion’s seizure, either by helping Nomion obtain his due or, at the very least, by not interfering with the enforcement process.

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<sup>41</sup> The *demarch* is a sort of ‘mayor’ in Athens smallest administrative unit, i.e. the deme. In the classical period, Attica was divided in ca. 139 demes. For a discussion of the role of the *demarch* in the execution of judgments, see Hunter, 1994, pp. 142-3; Harrison, 1971, pp. 189-90.

<sup>42</sup> MacDowell, 1978, p. 153.

<sup>43</sup> *Ibid.* p. 154.

Private enforcement of judicial decisions involved a good deal of risk for the individual enforcers and for the community as a whole. How did the Athenians incentivize private enforcement of judicial decisions, while avoiding the explosion of violence?

In order to answer this question, in the remainder of the paper, we present the what-is-law framework (section 3) and subsequently apply the framework to the Athenian legal system (section 4).

### **3. What is Law? A Coordination Account of the Characteristics of Legal Order**

Legal theorists often identify law with modern legal institutions that implement the law, including an official articulation of the law in precedents (the common law) or codes (the civil law), legal role specialists/experts (layers, public prosecutors, impartial judges), and enforcement through public coercion. Indeed, many theorists define law as a set of public rules enforced by the power of the state.<sup>44</sup>

We eschew this approach for several reasons. First, it denies the possibility that some societies provided law through a different set of institutions than those of modern legal systems. Second, the identification of law with modern legal institutions implies a teleological argument; namely, that modern legal institutions of the developed West are the mature and highest form of legal institutions, all others legal systems being partly or wholly imperfect and inadequate.

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<sup>44</sup> Ellickson's (1991) classic work on "order without law" relies on this definition. More generally, economists and positive political theorists have generally not explored this question systematically, though Benson (1989b), Dixit (2003), and Kornhauser (2004) are exceptions.

We develop a different interpretation of law based on the what-is-law model developed by Hadfield and Weingast (2012; see also Hadfield and Weingast 2013, 2014). We divorce the definition of law from the means of its enforcement. All legal systems must provide mechanisms to enforce rules, but we put pressure on the widespread notion that a centralized public authority endowed with effective coercive power is the only means to achieve such a goal.

Max Weber defined legal order as order based in part by a “coercive apparatus” that imposes punishment in reaction to the violation of a rule or norm. Weber characterized the coercive apparatus as “one or more persons whose special task it is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purposes of norm enforcement.” (Weber 1978, p. 313) Recognizing that “a consociation specifically dedicated to the purpose of ‘legal coercion’ . . . has not always been the monopoly of the political community” (p. 317), Weber allows for the possibility that law may exist in environments that lack a strongly centralized state; and that a society may possess a legal order that co-exists with the state but that is not enforced by the state.

We approach the problem of identifying law without presuming state enforcement by first placing law within a broader framework that allows us to distinguish among different types of social order (Kornhauser 2004). All human societies display various forms and degrees of social order – that is, behavior that is patterned in identifiable ways. For example, people shake hands or bow when they meet; they pay their bills; they stand an appropriate distance apart

when speaking to a stranger. But not all forms of order can be properly called legal.

The what-is-law model suggests that a properly legal, as opposed to social (culture), order should possess the following necessary characteristics.

1. **Behavior is patterned on a *normative classification*, that is, the orderliness of behavior is with reference to a designation of some behaviors as normatively acceptable and others as not.**
2. **The content of the normative classification is capable of being deliberately chosen, articulated and adapted by an identifiable actor or entity.**<sup>45</sup>

Like organic social order, legal order displays the first characteristic. But unlike organic social order, a legal order is capable of deliberate efforts to articulate and, importantly, to adapt the content of norms. The capacity to adjust the content of norms, and thereby to induce a change in equilibrium behavior, fosters social welfare by creating the potential for policy: that is, deliberate and informed adaptation to changes in circumstances or knowledge. Both Hart (1961) and Fuller (1964), leading legal theorists of the 20<sup>th</sup> century, identify the capacity to coordinate more effective adaptation to diverse environments and populations as a distinguishing feature of law. Cultural change, in contrast, often takes a long time to emerge and is difficult to direct or even coax in desired directions. As a legal order adapts to new circumstances, the official classification of behavior changes. An effective legal order is capable of doing so rapidly. We expect, for example, greater and quicker success in getting people to stop smoking in public places if we pass a law against it than if we (only) pursue public education or

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<sup>45</sup> Note that we are not making the reverse claim: that any social order that possesses the following characteristics is legal; nor are we claiming that these characteristics are sufficient to identify an order as legal. Again, many dictatorships create order with these two characteristics.

shaming efforts.

Drawing on the what-is-law model, we consider an environment with two key features: First, the environment includes institutions that are capable of deliberately choosing a normative classification of conduct; and second, actors face an incentive system sufficiently robust that they generally choose behavior that the classification designates as acceptable (we will say “not wrongful”).

The model relies on two key assumptions. First, the institution that supplies the normative classification does not impose penalties for wrongful behavior. As a result, we model an environment, like those in which human communities have lived for millennia, that relies solely on decentralized enforcement efforts for punishment of behavior classified as wrongful by the classification institution. Specifically we look at a form of collective punishment whereby effective penalties rely on independent and simultaneous decisions made by individual (non-official) actors to punish a wrongdoer.<sup>46</sup>

A second assumption in our model is that individual judgments about what constitutes wrongful behavior are the product of what we call an *idiosyncratic logic* employed by each potential punisher. By idiosyncratic we mean that the potential punisher’s reasoning is likely to differ from that of others and that this logic is generally inaccessible to others. This assumption captures an important

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<sup>46</sup> There is a burgeoning literature in behavioral economics and evolutionary game theory that considers the role of this type of punishment in generating cooperation. This literature sometimes refers to such punishment as “altruistic punishment” because punishers do not receive a direct material benefit for engaging in costly punishment. Fehr & Gächter (2002) show that people in laboratory settings are frequently willing to engage in such conduct; Henrich et al (2010) demonstrate this for several populations around the world. Boyd, Gintis & Bowles (2010) model the role of such a punishment strategy in the evolution of cooperation. Basu (2000) expressly considers the coordination of the actions of official enforcers. This literature is discussed in more depth in Hadfield & Weingast (2012).

and economically valuable form of heterogeneity, arising, *inter alia*, from the division of labor and specialization: the potential punishers (and beneficiaries of a stable system of rules) may be in different countries or industries; they may employ different production methods; they may organize their relationships and contracts with others in different ways. People may also have different ethnicities or religions. Social welfare in this economy is higher if rule violations can be deterred.

Is it possible to secure an equilibrium in which wrongdoing, according to the classification of an identifiable institution, is effectively deterred by this form of collective, decentralized, punishment in the context of a relevant degree of ambiguity but without resort to a centralized, state-based source of coercion?

In the absence of a centralized third-party institution capable of punishing rule violations, effective deterrence requires coordinating collective but decentralized punishment in response to particular actions. But because each potential punisher has an idiosyncratic logic for assessing wrongfulness, none are able to determine unilaterally when to punish in response to possible rule violations. The punishers therefore need a coordination device that tells them when and how to punish. Second, because punishment is individually costly, punishers need an incentive to participate in punishment. Note that, unlike recent models of the law and social norms literature, as well as some recent legal philosophy literature (e.g., Myerson 2006), this game is not a pure coordination game: coordination alone provides an insufficient incentive to participate; and,

alone, coordination on rules may create order, but in and of itself it does not imply a legal order.

Hadfield and Weingast (2012) show that there exists an equilibrium in a repeated game in which an institution supplying a publicly accessible normative classification system—what we call a *common logic*—resolves the coordination and incentive problems and secures deterrence of actions that are deemed wrongful by the common logic. Thus the equilibrium satisfies the minimal criteria we suggest are necessary (but not sufficient) to reasonably identify social order as legal order.

Moreover, Hadfield and Weingast (2012) show that the equilibrium is characterized by attributes that are frequently identified as marking the existence of law by legal theorists, such as Fuller (1964), Raz (1977) and Waldron (2008).<sup>47</sup>

These attributes are:

- **Generality:** *rules are stated in ways that are applicable to a generalized set of actions and individuals, rather than specific conduct by specific individuals*
- **Publicity:** everyone affected by the rules can learn about them.
- **Feasibility:** it must be possible for people to choose to avoid the actions that are subject to penalty.
- **Clarity and non-contradiction:** the rules can be easily and consistently interpreted.
- **Stability:** the rules today will also be tomorrow's rules so that people can make long-term plans without having to worry about sudden changes in the rules.
- **Prospectivity and congruence:** the rules are known in advance so that people can condition their behavior of the rules; and adjudication of violations of the rules is consistent with the rules as set out in advance.

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<sup>47</sup> These theorists disagree about whether all of these attributes are required to properly identify a system as legal, as opposed to one that displays the normatively desirable characteristics of the rule of law. We do not distinguish between these claims here. See Hadfield & Weingast (2012) for more discussion.

- ***Impersonal, neutral, independent reasoning***: the interpretation of the rules doesn't depend on the identity of the interpreter so that the application of rules to possible circumstances is independent and neutral.

These attributes are often analyzed by legal philosophers as implied by the idea that people living in a legal order look to the law to guide their behavior. Hence, to be effective, law must have characteristics that facilitate compliance. The Hadfield and Weingast (2012) model requires that compliance be feasible. However, their model also requires that decentralized punishment behavior be coordinated and incentivized. This issue sheds a different light on some of the conventional attributes—clarity, for example, is important not only so that people can conform with the rules but also so that people can guide their punishment behavior. The coordination and incentive constraints, however, also bring to the fore attributes that legal philosophical accounts deemphasize or overlook:

- ***Common knowledge***: the common logic, used to classify conduct as punishable or not, is common knowledge, meaning that everyone knows that everyone else knows the rules.
- ***Uniqueness***: there is a single common logic applicable to given circumstances.
- ***(Qualified) universality***: the set of rules addresses at least some of the interests of all of those who play an important role in enforcing the rules.
- ***Openness***: the application of the common logic to particular circumstances is open to new and possibly private information and reasoning supplied by those affected by the rules.
- ***Authoritative stewardship***: there is an authoritative steward that, as a matter of common knowledge, is treated by all to be the final word on resolving ambiguities in classification.

These attributes promote coordination and incentive compatibility in a system that relies on decentralized collective punishment.<sup>48</sup> As we will argue, these attributes play an especially important role in the initial building of legal order. Our analysis of the Athenian case, in fact, suggests these attributes – together with publicity and impersonal, neutral and independent reasoning – are more critical at the foundational stage of transition to legal order than the more refined attributes such as clarity, stability and prospectivity, used to identify law in traditional legal theory.

The what-is-law approach to law has several implications. Consider the coordination problem. The common logic serves as a coordinating device by providing a publicly accessible, clear and unique classification of conduct based on impersonal reasoning and either general rules or generalizable categories. Potential punishers can determine the classification of conduct by reference to the common logic, even as novel circumstances arise (where novel circumstances often arise in the context of increasing diversity, complexity, growing division of labor, and economic growth). The common logic reaches a unique classification for most circumstances; thus punishers receive the same signal about whether to punish or not. Moreover, the classification is common knowledge. Hence, contingent on each potential punisher having concluded that the other punishers who are needed to make punishment effective also have an incentive to punish, all punishers can predict that if they punish, the others will too. Furthermore, it is common knowledge that the potential wrongdoer can also

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<sup>48</sup> For a complete analysis of these attributes and their relationship to the equilibrium we describe, see Hadfield & Weingast (2012).

access the common logic, implement the same impersonal reasoning, and make this prediction. The punishers can therefore predict that the potential wrongdoer will avoid conduct that triggers collective punishment.

A key feature of the common logic helps to ensure that the logic can perform this coordination role. We refer to this as *authoritative stewardship*. By this we mean that there is a single identifiable institution whose responsibility is to resolve any ambiguity or uncertainty about the classification reached by the common logic. The steward also helps adapt the common logic to changing circumstances. This institution serves to ensure both uniqueness and common knowledge of uniqueness. Suppose the conduct in question is particularly novel or complex, requiring the elaboration of a general principle in the context of previously unseen facts. For the common logic to continue to perform its role in coordinating punishment, it must be that all agents are known to treat the steward as the authoritative and final means of resolving ambiguity in the logic.

Other features of the common logic help to resolve the incentive compatibility problem of participation in collective punishment. In this model, the incentive to participate is that it secures the benefits of the coordinated equilibrium in which rule violations are deterred. This benefit is enjoyed by an individual only if the common logic classifies as wrongful conduct that which the agent judges, according to its idiosyncratic logic, to be undesirable. The concordance between the common and the idiosyncratic logic need not be perfect, but the two logics must be sufficiently convergent that the agent is better off in the coordinated equilibrium with some deterrence than in the uncoordinated

equilibrium with none. By participating in punishment activity, an individual agent signals to the other agents that the common logic that coordinates deterrence is or continues to be sufficiently convergent with its own idiosyncratic logic to make continued coordination valuable (HW 2012).

The resolution of the incentive problem thus requires that each individual be able to assess the value of future coordination under the common logic, that is, to determine how often the common logic will classify as wrongful conduct a behavior that the individual judges to be wrongful. As with the coordination problem, this requires a clear, accessible reasoning scheme that is impersonal in the sense that its classification does not depend on the identity of the individual who is implementing the reasoning. The common logic must be universal in the qualified sense that it includes rules that benefit all those who are necessary to make collective punishment effective. To allow necessary punishers to assess how the common logic might be of benefit to them, the common logic will have to consist of general principles that each individual can elaborate on the basis of his or her private information about the nature of the facts and circumstances that would be relevant if the individual suffered a wrong. It is also likely, in a complex world, that the common logic will possess open processes for elaborating general principles, allowing agents who object to conduct as wrongful to introduce privately known facts and idiosyncratic reasoning about why those facts should result in a finding of wrongfulness under the common logic. With such openness, a system can achieve higher levels of convergence between idiosyncratic and common logic and hence is more likely to be adopted and remain stable over

time. Finally, the common logic must be stable for a period of time sufficient to allow punishers to recoup their upfront investments in costly punishment to signal participation.

This approach yields an important implication: a system of social norms is not a legal system. Social norms typically lack the last condition, an authoritative steward with the power to alter the rules in a deliberate manner. As a corollary, many systems commonly labeled as social norms are in fact legal system because they embody a form of authoritative steward.

The what-is-law model provides a framework for understanding the nature of legal order in environments that differ from modern nation-states with their highly elaborated systems of rules and centralized enforcement mechanisms. In the model, the deterrence of wrongful behavior is supported exclusively by decentralized collective punishment; yet, the equilibrium is likely to possess attractive normative characteristics frequently associated with the rule of law.<sup>49</sup> Because these legal attributes help establish an equilibrium legal order in the absence of centralized coercive force, we can therefore analyze the extent to which a particular historical setting lacking centralized coercion displays these attributes. We expect that the efficacy and robustness of an effort to secure legal order on the basis of decentralized enforcement alone will be correlated with the presence of the legal attributes we identify.

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<sup>49</sup> Kornhauser (2004) suggests that a social-scientific concept of law would treat law as a term of commendation for a governance structure.

## 4. Building Legal Order in Ancient Athens

Between the 7<sup>th</sup> and the 4<sup>th</sup> century BC, Athens successfully transitioned from an informal social order where rules were imposed by powerful *super leges* elites, to a legal order where an impersonal authoritative steward deliberately chose, articulated, and adapted rules that defined wrongful behavior and its punishment.<sup>50</sup>

As we discussed in section 2, legislation and adjudication were progressively removed from the hands of single individuals or small groups—including elite magistrates and archaic legislators, whose role as ‘lawgivers’ and ‘judges’ depended on birth or wealth privileges. By the end of the 5<sup>th</sup> century, lawmaking and judgment were the province of large, representative portions of the community, who gathered in impersonal popular institutions—such as the Assembly, boards of lawmakers (*nomothetai*, introduced in the early 4<sup>th</sup> century), and law-courts.

We term these institutions ‘impersonal’ because membership did not depend on the identity of the individual, or on his relative standing vis-à-vis other members of the community. As Plato snidely (and famously) remarked, “when they [i.e. the Athenians] have to deliberate on something connected with the administration of the State [that is, in the Assembly], the man who rises to advise them on this may equally well be a smith, a shoemaker, a merchant, a sea-

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<sup>50</sup> We are not interested here in discussing the causes of these changes. As we show in section 2, a series of socio-economic and political factors contributed to setting Greece on a path of decentralized authority and Athens on a path of extraordinary success in the competitive Greek ecology. Cf. section 2 for additional references and bibliography.

captain, a rich man, a poor man, of good family or of none.”<sup>51</sup> Admittedly, impersonality was not universal, in that the Athenians did not extend participation beyond the adult male citizenry. Yet, compared to other pre-modern (and many modern) societies, the Athenians extended participation rights to an unprecedented degree – and one rarely matched before the 20<sup>th</sup> century.<sup>52</sup>

We speak of large, representative portions of the community to highlight an important feature of Athenian decision-making institutions: the Assembly seated 6,000 adult male citizens, while the process of *nomothesia* and the law-courts featured hundreds of citizens selected by lot (*nomothesia*) or by complex, random selection procedures (the law-courts) aimed at avoiding corruption and ensuring fairness. In these bodies, decisions were made by simple majority rule, and voting took place either by show of hands (in the Assembly) or by secret ballot (in the law courts).

The size and composition of these institutional bodies contributed to fostering common knowledge about the content of rules and about the punishment that attended violators. Moreover, voting rules helped limit the degree to which citizens’ idiosyncratic logics would significantly depart from the ‘community mean.’<sup>53</sup> In other words, the features of Athenian legislative and juridical institutions suggest that ‘homogeneity’ with respect to law and punishment was less a product of shared cultural norms and more a result of

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<sup>51</sup> Plato, *Prot.* 319c-d.

<sup>52</sup> In the 4<sup>th</sup> century, participation in terms of access to legal (not political) institutions was further extended to non-citizens, including foreign merchants and slaves, notably in the commercial maritime suits known as *dikai emporikai*. Cf. section 2.

<sup>53</sup> Carugati and Weingast (forthcoming) show that large bodies and majority rule required litigants to direct their arguments toward the ‘median juror’ in order to win their case. Procedural rules that set hefty fines for litigants who failed to win one-fifth of the votes confirm the importance of ‘median’ community expectations.

institutional design that fostered the formation and diffusion of common knowledge among law-makers and law-enforcers. Finally, the public nature of Athenian legislation and adjudication, carried out in public places (such as the central market-place, the Agora) and in the presence of numerous bystanders and passers-by, further contributed to achieving common knowledge by spreading information about laws and punishments to other members of the citizens body and, we may reasonably infer, to Athenian residents beyond the citizen body, including e.g., foreigners, slaves and women.

Yet, saying that the Athenian normative classification was common knowledge—that is, saying that all or most Athenians were aware of the rules—does not mean that all or most Athenians consistently abided by such rules or that, faced with acts of wrongdoing, they would willingly help punish the perpetrators.

As Lanni insightfully pointed out, an important mechanism that secured compliance with community rules (both laws and norms) as established by the authoritative steward was the frequency with which the average Athenian could expect to find himself in court, as a citizen, as a magistrate of the polis, and as a private litigant. Court enforcement of both laws and norms—including a litigant's character, public service and private behavior—meant that when the average Athenian showed up in court, his entire life would be subject to scrutiny. As a result, the frequency of court appearances paired with court enforcement of both formal laws and informal norms, provided powerful incentives to comply with both norms and laws.

Lanni's model helps us understand the incentive structure that fostered compliance with rules. However, compliance depends on enforcement and if the Athenians thought that no punishment awaited the rule-breaker, they would have had little incentive to comply with any rule, be they norms or laws, regardless of how frequently they ended up in court. How, then, was compliance-through-deterrence sustained?

As we document in section 2, as Athens transitioned from a social to a legal order in the archaic and classical periods, the practice of punishing wrongdoers was removed from the costly, cyclical logic of personal blood feuds and vendettas and institutionalized within the emergent legal system. Beginning with Draco's legislation on homicide and culminating with Solon's extension of the right to bring public prosecutions to 'anyone who wishes' (*ho boulomenos*), early lawgivers established procedures and (at least in the case of Solon) courts to resolve disputes and limit the likelihood that personal clashes would lead to collective violence.<sup>54</sup>

Notably, however, the institutionalization of punishment was and remained partial: as the case of Nomion shows, although written rules and procedures were developed to distinguish authorized from unauthorized punishment, punishers were individual citizens (and non-citizens), not state officials. How did the Athenians incentivize private enforcement of judicial decisions, while avoiding recurrent explosions of violence?

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<sup>54</sup> Both Draco's legislation and the Solonian principle allowing private initiative in public prosecutions withstood a bout of tyranny and a democratic revolution and remained features of Athenian law and legal practice down to the late 4<sup>th</sup> century.

The what-is-law perspective suggests that the Athenian system provided two mechanisms to incentivize decentralized punishment. First, the openness of Athenian legal system to familiar, established norms helped satisfy the incentive compatibility constraint by creating a substantial overlap between the common logic and citizens' (and to some extent non-citizens') own idiosyncratic normative classifications. Lanni suggests that the multiplicity of informal norms and formal laws that were at play in any given court case made individual verdicts unpredictable and ad hoc, thus defying rule of law standards. In contrast, we suggest that openness was a crucial factor that helped establish the courts as an authoritative steward capable of resolving ambiguities, integrating written laws and unwritten norms, and ultimately, finally, and definitively deciding in each case how to classify behavior *in ways that were largely consistent with individual expectations and uniquely adaptable to changes in those expectations.*

Our perspective helps make sense of the extensive nature of common knowledge in the Athenian legal system, and explain how a system that legalized self-help successfully deterred violence. Consider again the illustration of Nomion. When Nomion goes to the demarch for help collecting on the money damages that he is owed, the seller, the demarch and everyone who might participate in the collection effort knows that everyone else knows that the collection effort is backed by the jury's ruling. Nomion's seizure of the seller's property authorized by the judgment is acceptable conduct; the demarch's help in seizing that amount is acceptable conduct; anyone's effort to take more than the authorized amount is not acceptable conduct; retaliation by the seller or his friends and supporters is

unacceptable conduct. These judgments hold *even if* the seller, his family and friends and some of his neighbors think that the jury was wrong, that the contract was binding (*kurios*) and that Nomion should have read the fine print; even if it used to be the case, just a few years ago, that breach of contract was punished by revenge killing; even if the jury just last week heard a similar case and reached a different conclusion.

Given the challenges to the stability of informal norms we discussed in the introduction (namely, individuals' idiosyncratic logics and the fact that rules change over time) the average citizen looked, and expected others to look, to the jury and its rulings for guidance in deciding when and how to participate in punishing fellow citizens. So long as the jury was not seen as an organ of the elite and powerful with the capacity for arbitrary rule but rather as an organ of the people, consistency was less important than securing both the status of the jury as the authoritative steward of the common logic and the role of citizens (as litigants, magistrates and private individuals) as making, respecting, and enforcing those decisions. In this perspective, it would have mattered less how particular decisions were reached or how consistent they were with prior ones.

If our interpretation of openness is on the right track, we still need to explain on what grounds the average citizen could trust that the jury's decisions would substantially overlap with his own. Institutional design and procedural rules mattered: as we mentioned above, large, representative jury panels, and random selection, as well as lack of deliberation and the secret ballot helped prevent elite capture of judicial bodies.

The second mechanism that helped ensure incentive compatibility in private enforcement of judicial decisions is best exemplified by Demosthenes' appeal, which we quoted in the epigraph.

According to Demosthenes, the laws,

are just inscribed letters and have no ability to [come to the help of citizens]. What then is their motive power? You [the jury] are, if you secure them and make them authoritative whenever anyone asks for aid. So the laws are powerful through you and you through the laws. You must therefore stand up for them in just the same way as any individual would stand up for himself if attacked; you must take the view that *offenses against the law are common concerns*.<sup>55</sup>

Paralleling the what-is-law logic discussed in section 3, Demosthenes explains that the written laws 'have no ability' to protect litigants. The laws will not come to a litigant's aid; rather, citizens must take it upon themselves to apply and enforce them. Only then, the laws shall be powerful for the citizens and the citizens shall be powerful through the laws.

In Demosthenes' words, failure to punish wrongdoers according to judicial decisions based on statutes and norms undermines the whole democratic structure that sustains the role of the courts as organs of the people. The welfare of the community and of each of his members is thus intertwined with individual participation in applying and enforcing both laws and norms.

Demosthenes' appeal to individual participation to protect the community through the application and enforcement of rules, both laws and norms, finds further illustration in the wording of the juror's oath, which each Athenian juror swore at the beginning of each year, pledging to,

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<sup>55</sup> Dem. 21. 223-225.

vote *in accordance to the laws and decrees* of the Athenian people (...); to vote about matters pertaining to the charge (...); to listen to both the accuser(s) and defendant(s) equally (...) to vote or judge *with one's most fair judgment*.<sup>56</sup>

The juror's oath required individual participation in the application of community rules—both 'the laws and decrees of the Athenian people' and normative expectations consistent with the jurors' 'most fair judgment.' In this context, we suggest that the secret ballot and the lack of discussion and deliberation before the jury reached a verdict helped limit individual discretion by directing the jurors' reasoning away from their own idiosyncratic logics and toward a community mean. In a society uniquely aware that the exercise of collective authority is liable to be driven by politics, personal loyalties and private feuds, allowing the jurors to sit around and talk about how to vote may well have interfered with the development of the idea of neutral and impersonal rule-based reasoning. Moreover, public deliberation would have allowed elites and other 'interest groups' to identify (and punish) an individual juror for failing to vote with them. The Athenian system therefore fostered each individual juror's ability to decide without being told by others and without being observed by others.

The openness of the system to informal norms, the practice of secret ballot and the lack of discussion came at a cost in terms of clarity, coherence and congruence between rules as announced and rules as applied. In the course of the 4<sup>th</sup> century, considerable efforts were made to clarify, rationalize and make available a consistent body of written rules on which to base judicial decisions. Old laws were scrutinized and published; a new legislative institution was introduced to check the previously unrestrained power of the Assembly; new

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<sup>56</sup> Quoted in Harris, 2006b, p. 159-60

procedures were created to protect old legislation and to regulate legal change and adaptation; a new archive was built to collect and make publicly accessible legal and other documents; and new courts were established to quickly address the increasing demands of a growing market. Yet, as Lanni suggests, the Athenian system failed to develop many of the attributes that modern legal systems associate with the rule of law.

Striving to build legal order out of informal social order and ‘tyrannical’ rule by powerful elites, the Athenian system placed primary emphasis on securing, other fundamental features of a legal order, even at the price of living with less clarity of rules and reasoning than we now associate with established rule of law: first, the status of its lawmaking institutions and the juries as an authoritative steward—a unique entity capable of classifying behavior as wrongful or not; second, incentives for citizens to condition their own judgments about what is punishable on the classifications provided by the authoritative steward rather than on personal, tribal, political or other judgments; and third, establishing as a norm for jurors serving as officials of the authoritative steward that judgments should be based not on “enmity or favor”, on idiosyncratic classification schemes, but rather exclusively on the law—meaning by “the law” the full set of rules, written and unwritten, that the Athenian institutions recognized as subject to the oversight of the authoritative steward.

## 5. Conclusions

We ask in this paper, how did Athens establish and maintain order and stability in ways that were conducive to growth? Relying on the “what-is-law”

account of legal order elaborated by Hadfield and Weingast (2012), we argue that Athens possessed many of the elements of a properly legal system, such as a publicly accessible, clear and unique normative classification of behavior and an authoritative steward capable of articulating and adapting rules.

In Athens, centralized institutions coordinated decentralized enforcement mechanisms by a) elaborating and publicizing decisions as common knowledge about wrongful behavior and its punishment, b) incentivizing decentralized punishment by fostering individual trust in the system and by linking individual participation to the survival of the political community.

We conclude that Athens' legal order contributed to the polis' stability, prosperity, and growing complexity because the legal order was common knowledge and incentive-compatible in a way that made it both stable and adaptable to endogenous and exogenous shocks.

Contrary to the expectations of modern political science, economics and law, the case of ancient Athens shows that building formal, centralized legal institution has not historically been the only path toward the establishment of a robust legal order. The development of legal order in ancient Athens suggests that a) modern, formal legal institutions are neither necessary nor sufficient to the establishment and sustainability of internal order, rule of law, and stability and b) more attention needs to be directed toward the mechanisms whereby decentralized, impersonal institutions may support the development of modern, rule of law, legal institutions.

In this paper, we address this gap and suggest that building legal order in weakly centralized developing states may depend less on strengthening formal legal institutions and more on creating and supporting decentralized, impersonal institutions that produce and publicize common knowledge about rightful and wrongful behavior and that provide incentives to follow rules and punish wrongdoing. We also suggests that a functioning legal system requires more than 'building' formal courts; it must also focus on critical role of formal institutions in aligning decentralized enforcement mechanisms and in laying out criteria (i.e. attributes) to be followed when enforcing judicial decisions.

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