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Building Legal Order in Ancient Athens

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Abstract

How do democratic societies establish and maintain order in ways that are conducive to growth? Contemporary scholarship associates order, democracy, and growth with centralized rule of law institutions. In this article, we test the robustness of modern assumptions by turning to the case of ancient Athens. Democratic Athens was remarkably stable and prosperous, but the ancient city-state never developed extensively centralized rule of law institutions. Drawing on the “what-is-law” account of legal order elaborated by Hadfield and Weingast (2012), we show that Athens’ legal order relied on institutions that achieved common knowledge and incentive compatibility for enforcers in a largely decentralized system of coercion. Our approach provides fresh insights into how robust legal orders may be built in countries where centralized rule of law institutions have failed to take root.

BUILDING LEGAL ORDER IN ANCIENT ATHENS

Federica Carugati, Gillian K. Hadfield, and Barry R. Weingast*

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 democratic societies establish and maintain order in ways that are conducive to growth? Contemporary scholarship associates order, democracy, and growth with centralized rule of law institutions. In this article, we test the robustness of modern assumptions by turning to the case of ancient Athens. Democratic Athens was remarkably stable and prosperous, but the ancient city-state never developed extensively centralized rule of law institutions. Drawing on the “what-is-law” account of legal order elaborated by Hadfield and Weingast (2012), we show that Athens’ legal order relied on institutions that achieved common knowledge and incentive compatibility for enforcers in a largely decentralized system of coercion. Our approach provides fresh insights into how robust legal orders may be built in countries where centralized rule of law 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?

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Contemporary scholarship in political science, economics, and law holds that the stability of democratic social orders depends on the existence and efficient functioning of extensively centralized legal institutions. By ‘extensively centralized’ we mean public institutions that are responsible for all legal functions, including an established and recognized legal authority capable of articulating and changing rules; an organized police force to maintain order and punish wrong-doing; a system of public prosecutors to bring wrong-doers to justice; and expert judges and lawyers to secure the correct application of written legal rules to individual cases.¹

Extensively centralized legal institutions are regarded as the *sine qua non* for the establishment of the rule of law, on which economic growth and democratic stability depend.² But centralized rule of law-producing institutions capable of supporting robust legal orders have proven hard to build in developing countries, where states are weak, access is limited, and resources—both human and material—are few.³

In this article, we examine classical Athens’ distinctive approach to building legal order. Our analysis tests modern assumptions about how growth-enhancing democratic order can be achieved and sustained. By showing that democracy, prosperity, and order have not always relied on the kind of centralized rule of law institutions characteristic of the modern developed West, we offer new insights into how robust legal orders may be built in weakly centralized developing countries.

Ancient Athens was a stable, prosperous democracy for roughly 200 years. Yet, the city-state (*polis*, plur. *poleis*) never developed the full complement of modern, centralized legal institutions.

In the middle of the first millennium BC, Greece experienced the longest lasting efflorescence of the pre-modern world.⁴ From 800 to 300 BC, the Greek population grew 10-fold, while aggregate and per capita consumption rose at a

1 The scholarly focus on centralized institutions is demonstrated most concisely in the review of Rule of Law indicators in Nardulli et al. (2013).

2 Whereas the relationship between rule of law and economic development has been extensively analyzed (see e.g., Haggard and Tiede (2011) with bibliography), the relationship between rule of law and democracy has often remained implicit in both theoretical accounts (Tamanaha 2004) and development interventions. Recent discussion on the new sustainable development goals are recognizing and beginning to grapple with the linkages between the two (see, <http://www.idea.int/un/the-rule-of-law-fundamental-in-advancing-democracy.cfm>, accessed on May 22, 2015).

3 For a critical overview of attempts to build rule of law institutions in the developing world and the launch of the alternative “legal empowerment” agenda, see Golub (2003).

4 The term “efflorescence” indicates a sharp, concomitant increase in per capita economic growth and population growth. The term was coined by the American sociologist Jack Goldstone: see Goldstone (2002).

rate comparable to that experienced by Holland between the sixteenth and the nineteenth century.⁵ Greeks in 300 BC were not only richer than their predecessors in 800 BC, but also healthier and more urbanized.⁶ Finally, wealth and income were distributed more equitably across the population of Greece than in other pre-modern societies.⁷

If the Greeks were doing well, the Athenians were doing exceptionally well: throughout the period 508–322 BC, Athens was the highest performing polis in terms of “wealth, power, security, stability and cultural influence.”⁸ Athens’ outstanding performance in the prosperous Greek world was driven by the establishment of the first large-scale democratic government in recorded human history.⁹

For roughly 200 years, Athens sustained exceptional levels of prosperity and democracy in the absence of extensively 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 elaboration, application, and enforcement of legal rules depended almost exclusively on the voluntary efforts of citizens at large.

What role did Athens’ distinctive legal institutions play in fostering social order, democratic stability, and economic growth?

Classical scholars hotly debate this issue. Pointing to the disparity between Athenian and modern legal processes, some scholars attribute Athenian social order to an informal system of norms and see little impact of formal legal institutions (Hunter 1994; Cohen 1995; Ober 1989; Christ 1998; Herman 2006; Forsdyke 2012). Other scholars minimize the role played by informal norms and maintain that Athens’ legal institutions were effective in generating a regular and predictable rule of law (Harris 2006a, b, 2013; Gowder 2014).

Cutting across the polarization of this debate, Adriaan Lanni suggests that, while Athens lacked the rule of law (which she defines as the consistent and

5 Population growth measured at 0.4% per annum; aggregate consumption measured at 0.6–0.9% per annum (as compared to Holland’s 0.5%); per capita consumption measured at 0.07–0.14% per annum (as compared to Holland’s 0.2%). Morris (2004); Ober (2010, 2015) (modifying Greek per capita growth to 0.15%).

6 Health: Morris (2004, 2005); Kron (2005); Reden (2007); urbanization: Hansen (2006). Note that health and urbanization have historically been at loggerheads: Allen (2001); Scheidel (2009); Deaton (2013). Comparative health and urbanization in England and in Greece: Kron (2011).

7 Low inequality in Greece: Morris (1998, 2004); Ober (2015).

8 Ober (2008, ch. 2).

9 Ober (2008).

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 argues 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 always specify what conduct was punishable, and court decisions were unpredictable and *ad hoc*, based on an array of informal norms—about character, public service and private behavior, for example—rather than being governed exclusively by factors laid out in the written law on which charges were based (Lanni 2004, 2005, 2006, 2009, 2012).

Nonetheless, Lanni argues 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 is a nuanced treatment of how formal institutional mechanisms buttressed Athens' informal social order. However, her analysis leaves us with important puzzles unresolved.

First, Lanni argues that because conduct regulated by informal norms could influence the verdict in a formal legal action, formal verdicts increased the incentive to comply with informal norms. This presumes that jury verdicts were enforced. Since we know that punishment in classical Athens was largely delivered by ordinary citizens, we ought to ask: why would ordinary citizens act voluntarily to punish their fellow-citizens on the basis of formal verdicts?

Second, much of the value of a formal legal system derives from its ability to clarify prevailing norms or to change informal norms that become costly to social welfare as the environment evolves. This raises the question: what happens when informal norms collide with formal jury verdicts? For example, suppose you have always lived by an informal norm of solidarity with friends in their disputes with strangers and then a jury verdict is rendered against your friend and in favor of a stranger. What do you do? Do you help your friend fend off the stranger's efforts to collect on the court judgment? Or do you, as Demosthenes urged, "make [the laws] authoritative whenever anyone asks for aid . . . stand up for them . . . take the view that offenses against the law are common concerns?" That is, do you help the effort to enforce the judgment, whether actively, by helping to seize the property of your friend to which the

court has declared the stranger entitled, or passively, by not interfering with or retaliating against those who are?

The question of how norm ambiguity and norm change were managed is particularly acute in the Athenian case. 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”¹⁰ (Lanni 2009, p. 22). Moreover, Athens was a “bustling metropolis” populated by many non-Athenians who, like the sophists, introduced into Athens their own cultural norms, together with their trade (Lanni 2009, p. 22).¹¹ Effective private enforcement of informal (and formal, but often vague) rules required that individual Athenians were systematically willing to bear the costs associated with helping to enforce judicial decisions *even if* those decisions were at odds with their pre-existing or preferred views.

In this article, we draw on the theoretical “what-is-law” account of legal order elaborated by Hadfield & Weingast (2012, 2013). This framework allows us to address the fundamental question of how Athens’ legal institutions induced ordinary citizens to participate in enforcing judgments, and to continue to do so even in the face of ambiguity. Using this analytical framework, we provide a fresh perspective on the development of Athens’ formal legal institutions and an account of how such distinctive institutions fostered the establishment of a robust legal order capable of sustaining a stable and prosperous democracy.

The what-is-law framework begins by distinguishing legal order from other forms of social order. Such a distinction depends on the existence and 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 *incentive compatible* for enforcers. The what-is-law model suggests that three components are necessary for ‘legal’ order. First,

10 Among citizens, the most notable variations occurred along the socioeconomic axis that divided the masses and the elites (Ober 1989). 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).

11 An obvious example is the debate between Socrates and Polemarchos and Thrasymachos (both of whom are non-citizens) over notions of justice in book 1 of Plato’s *Republic*.

the order is a stable equilibrium; second, there exists a unique classification system overseen by an authoritative steward; and third, the classification system displays certain attributes that improve welfare for those on whom punishment for wrongs depends in an entirely decentralized and voluntary system of coercion.

We argue that over the course of the Archaic and Classical periods (roughly from 700 to 322 BC), Athens successfully transitioned to a legal order from purely informal or “oligarchic” order in which ordinary citizens organized their norm enforcement efforts on the basis of classification schemes that combined long-standing norms with those imposed by powerful elites. In particular, we argue that, by the end of the classical period, (i) the Athenian legal system possessed a unique classification institution with an authoritative steward capable of resolving ambiguities and responding to novelty; (ii) the classification scheme was common knowledge and incentive compatible in ways that improved welfare for those on whom punishment for wrongs depended; and (iii) the institution and its rules had begun to display various legal attributes.

Based on this analysis, we provide a fresh perspective on long-standing debates over the relevance of critical aspects of Athens’ legal practice, such as the sheer volume of litigation, the court’s openness and amateurism, the use of large, representative juries, and the use of distinctive voting procedures (such as majority rule, the secret ballot, and the lack of deliberation before reaching a verdict). We argue that in their effort to build a robust, democratic legal order, the Athenians paid primary attention to stabilizing a classification institution and to building institutions that achieved common knowledge and incentive compatibility for those ordinary private individuals on whom the system relied and for whom the system was built. In particular, we consider Athenian openness as a robustness mechanism that was critical to secure incentive compatibility for punishers. We also interpret Athenian litigiousness and amateurism, the participatory nature of the legal system, and the use of distinctive voting procedures as necessary tools for building both common knowledge and the incentive compatibility of formal legal procedures.

The development of Athens’ legal institutions offers important insights for rethinking modern rule-of-law building efforts in countries that face the challenge of shifting social enforcement from longstanding norms to novel rules and institutions.

The article 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 from Hadfield & Weingast (2012, 2013). 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 and isolated world of Dark Age society. Around the eighth 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.¹² In this competitive environment, the economic expansion that began in the eighth century BC meant that each city-state had strong incentives to devise strategies to preserve and enlarge its share of goods.

This was a time of elite rule. 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 rebuke their susceptibility to bribery and corruption.¹³ Written law had not yet developed and whatever rule existed, remained within the control of the elites—be they formal magistrates or local “big men.”

Elite rule did not produce order. It led instead to internal instability, widespread social violence, and the predation of one elite group upon another. Constant vying for power threatened the stability of the social order, but it also weakened the elites themselves. To define rules that would lower the threat that they posed to one another, Greek elites turned to the power of the published word: inscribing (usually on stone) laws and prominently displaying written laws in public places, such as the central-square—or Agora.¹⁴

Archaic Athens was typical in this way: elite competition weakened the elites, threatened to compromise the polis’ internal stability, and jeopardized its chances to compete at the international level. Like in other Greek city-states, Athenian elites also turned to written law.

In the late-seventh century BC, an early lawgiver named Draco drafted the first written code of law for the city. Draco’s homicide legislation (the only extant part of his code), “institutionalized” private initiative within the nascent

12 Cf. Morris (2005).

13 Hes. *WD*. 11.

14 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). On the development of Greek law as an elite pact see Karachalios (2013).

Athenian legal system by establishing a series of procedures for the punishment of murderers. The new procedures identified the family of the victim as responsible for punishing the perpetrator, defined the procedures to be followed during and after the trial, outlined the penalties for the charge of homicide, and delineated the options for reconciliation among the parties.¹⁵ In so doing, Draco sought to remove homicide disputes from the cyclical logic of blood feuds, which fostered instability and hindered social and economic cooperation.

Despite the success of Draco's homicide legislation (which was retained down to the fourth century), his attempt to create stability in Athens failed. Economic divisions worsened and 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, [the Athenians] jointly chose Solon in 594 BC as arbitrator and Archon [i.e., chief magistrate] and entrusted the government to him."¹⁶

Solon set to work elaborating a comprehensive program of political, economic, and legal reforms.¹⁷ In the legal sphere, Solon introduced two notable reforms. First, Solon took Draco's concept of institutionalized private initiative for the prosecution of murder and expanded it to a wide-range of offenses, allowing any citizen who wished (*ho boulomenos*) to initiate a public prosecution (*graphe*) against wrongdoers.¹⁸ Second, Solon introduced the institution of the people's court (*dikasterion*) to hear appeals against the judgments of elite judicial magistrates.¹⁹

From the archaic (700–480 BC) to the classical (480–323 BC) period, the power of the Solonian popular courts steadily increased, progressively eroding the power of elite judicial magistrates.²⁰ The introduction of a democratic

15 Stroud (1968); Carawan (1998); Gagarin (1981, 2008).

16 [Arist]. *AthPol.* 5.2

17 For the purposes of this article, 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); on Solon's reforms, see Blok & Lardinois (2006).

18 The distinction between 'public' and "private" cases in Athenian law is a complex one. For the purposes of this article, we consider "public cases" those that can be brought by anyone who wished (lit. *ho boulomenos*), not only a directly injured party, and we refer to such cases as "*graphai*" (sing. *graphe*). For a 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).

19 On whether Solon's court heard appeals or tried cases in the first instance see Karachalios (2013, pp. 255–259) and note 531. At the time of Solon, jurors in the new court were probably still men of wealth, and not ordinary citizens.

20 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.

political system in the aftermath of the Athenian revolution of 508 BC accelerated this process by shifting decision-making power from elite magistracies to popular institutions.²¹

By the mid-fifth century, the process of erosion of elite power had reached its apex. The introduction of pay for jurors allowed the average Athenian citizen to participate in the polis' judicial machine.²² At the same time, the process of lawmaking, which in the archaic period was generally 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 forty times a year to deliberate over the most important public matters, including passing laws and decrees.²³

Enacted by the Assembly through majority rule and by show of hands, Athenian laws underwent a rather haphazard development that created, as Stephen Todd has put it, “a very considerable confusion over the nature and authority of the laws of Athens.”²⁴ Throughout the fifth 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.²⁵ At the same time, the lack of checks on the unbridled legislative and judicial power of the people

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-5th century, when the democratic leaders Ephialtes and Pericles deprived the institution of most of its powers ([Arist]. *AthPol.* 8, 27).

- 21 On the Athenian revolution, see Ober (1996). For the purposes of this article, we do not delve into the complex issue of the relationship between the Assembly, Athens' primary decision-making institution, and its agenda-setting committee, the Boule. On the Boule's functions see Hansen (1999, ch. 10). On the Boule's role as information-gathering institution, see Ober (2008, ch. 4). For a detailed, technical account of the Boule's history and development, see Rhodes (1972). On the relationship between the Boule and the Assembly, see Carugati & Weingast (forthcoming, c).
- 22 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 composition of Athenian juries more fully below.
- 23 In the fifth century, there was no distinction between laws and decrees: the terms were therefore employed as synonyms. In the fourth century, the Athenians introduced an important distinction between laws and decrees. We discuss this distinction more fully below.
- 24 Todd (1996, p. 107).
- 25 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).

came under increased scrutiny when military failures and economic crises put unprecedented pressure on Athens' democratic institutions.²⁶

In response to a decade of political instability and economic decline at the end of the fifth century, the Athenians once again refined their legal institutions in an effort 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.²⁷ Second, the Athenians passed a series of reforms whereby Athens acquired: (i) a formal distinction between laws (*nomoi*) and decrees (*psephismata*); (ii) a new legislative institution in the form of boards of *nomothetai* (lit. lawmakers) that joined the Assembly as legislative organs; and (iii) new procedures to regulate the introduction and amendment of laws.²⁸

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 fourth century, when new courts were set up to hear cases arising from maritime commercial disputes. Little is known about the Athenian *dikai emporikai* (lit.

26 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. On the military and economic roots of Athens' political crisis at the end of the 5th century see Carugati (2015, ch. 3).

27 The collection encompassed legislation enacted since Solon (see e.g., Shear 2011, p. 84 and note 55), but it by no means made up a complete code (see Carawan 2013, 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. Located in the Agora, the Metroon functioned as a central archive (see Sickinger (1999, ch. 4)). Other laws remained scattered around the city: inscribed on stone slabs, they were sometimes conveniently located in front of the courts that administered them (see, Shear (2011, ch. 3, esp. pp. 89–96)).

28 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* (Andoc. 1.87). The new legislative procedures are described in Dem. 24.20-3; Dem. 24.33 and 20.89-94; Aeschin. 3.38-40. Scholarly treatments of the late fifth century legal reforms include Harrison (1955); Robertson (1990); Rhodes (1991); Carawan (2002). On fourth-century Athenian *nomothesia* see Mac Dowell (1975); Hansen (1985, 1999); Pierart (2000); Rhodes (2003); Canevaro (2013).

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.²⁹ However, the extant evidence suggests that these cases were exceptional for several reasons. First, both citizens and non-citizens had standing in these courts; second, they featured expedited procedures;³⁰ finally, special measures were devised to enforce court judgments, including detention (both before and after the hearing), and pre-trial bail.

In the mid-fourth century, the Athenian legal system served a commercial metropolis of ca. 250,000 people and a vibrant market that sustained Athens' population and was the center of Aegean and Eastern Mediterranean maritime trade. For almost 200 years, democratic institutions proved compatible with, and fostered Athens' exceptional economic performance within the Greek ecology.³¹

Yet, Athenian law and legal institutions differed considerably from their modern, centralized counterparts. Athens' formal legal system featured amateur judges and private litigants.³² The legal process, from summons to enforcement, relied on private initiative.³³ Most strikingly, Athens lacked any form of systematic public enforcement of laws, such as public prosecutors, or an organized police force.³⁴

29 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 (2006, pp. 150–152) and Isager & Hansen (1975, pp. 84–87) the *dikai emporikai* extended legal privileges to merchants for the purpose of attracting them to Piraeus and Athens; for Cohen (1973, pp. 65–69) 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, the *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. 300–301).

30 *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).

31 Ober (2008).

32 On the lack of expertise in the Athenian legal system see Fleck and Hanssen (2012). On the role of the supporting speakers, see Rubinstein (2000); on the role of professional speechwriters, see Bers (2009).

33 Hunter (1994, ch. 5).

34 Athens did employ small groups of individuals who performed various police functions, but the polis lacked an organized police force (Hunter (1994, pp. 143–149)). 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)). *Contra* Harris (2007b, 2013, ch. 1).

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.³⁵

Consider an adult male citizen whom we call Nomios, living in the Athens of the mid-fourth century.³⁶ Suppose that Nomios buys a slave from his neighbor, a resident alien from Egypt, not knowing that the slave carries a substantial debt.³⁷ The contract of sale for the slave does not mention the debt, but states (in boilerplate, to which Nomios pays no attention) that Nomios is to assume responsibility for any debt previously contracted by the slave. Imagine that Athens has a law that prohibits lying (fraud) in the Agora (the marketplace, where the sale occurred), another law that requires a 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 Nomios wants recourse for what he perceives as wrongful conduct, what can he do? He has a few options. He could turn to informal dispute resolution mechanisms. Nomios could, for example, spread the word around town (i.e., through gossip) that the seller is a dishonest trader or take it upon himself and his friends to teach the seller a lesson (i.e., by bullying him around); Nomios and the seller could also agree to submit the dispute to private arbitration.³⁸ Or Nomios could prosecute the seller through the formal legal system. Let us suppose that the informal options fail or seem inadequate, so Nomios turns to the formal legal system.

To prosecute in a formal court, Nomios must consult the city's laws to figure out what kind of action he can bring against the seller.³⁹ As we already noted, in

35 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).

36 The thought experiment that follows is adapted from the Athenian orator Hyperides' speech *Against Athenogenes* (Hyp. 3).

37 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. Cf. Carugati (2015, ch. 4).

38 In Athens, 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, esp. ch.2); Cohen (1991, 1995); Forsdyke (2012)).

39 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 weighted the risks 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 an in depth discussion of open texture in Athens, see Harris (2000, 2004).

the fourth-century laws were more readily available than in the fifth century. However, even in the fourth century, finding the relevant laws still required a good deal of effort. In the absence of professional lawyers, Nomios will therefore have to turn to friends and neighbors for help. Suppose that after consulting the relevant laws, Nomios and his advisors settle on a course of action: Nomios will bring a private suit for damages (*dike blabes*) against the seller. To bring this suit, Nomios will have to determine which magistrate deals with private cases of damages. Then he will have to summon the seller to appear before the relevant magistrate on an agreed day (Nomios will have to serve the notice to the defendant himself) and deposit a written charge to the magistrate.⁴⁰ 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.

As the day of the trial approaches, Nomios will need to collect evidence to support his case, including the contract, the laws that the seller has broken and witnesses to support his story.⁴¹ Again, Nomios will only be able to turn to family and friends for help; no Athenian magistrates or legal experts were available to guide Nomios's investigation. Moreover, in the absence of a police force, Nomios may also need the assistance of others to ensure that both his opponent and his witnesses show up in court on the day of the trial.

Nomios'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.⁴² What did an Athenian court look like? And what might Nomios say 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 a minimum of 201 and a maximum of 6,000 jurors drawn by lot from among the adult male citizenry.⁴³ The number of jurors depended on the nature of the issue at stake: in the fourth century, private suits required 201–401 judges (depending on the sum of money

40 For further information about this stage, known as *prosklesis* or summons, cf. Harrison (1971, pp. 85–94). For the purposes of this article we skip the intervening step between the summons and the trial—that is, the preliminary hearing, or *anakrisis*. For a detailed discussion of *anakrisis*, see Harrison (1971, pp. 94–105); Hansen (1999, pp. 196–203).

41 For a full discussion of the types of evidence, see Harrison (1971, pp. 133–153).

42 At this stage, Nomios can (if he has enough money) hire the services of a professional speechwriter, though Nomios himself will deliver the speech in court.

43 Selection procedures operated through complex mechanisms the description of which goes beyond the scope of this article. Suffice it to say that juries were representative of the adult (over 30 years of age) male citizen population and that selection procedures aimed at avoiding corruption and ensuring fairness. For a detailed discussion of qualifications, selection procedures and composition of Athenian juries, see Hansen (1999, pp. 181–189); Carugati (2015, ch. 4).

involved in the dispute), while public cases were usually judged by larger panels.⁴⁴ Given the nature of Nomios's case—a private prosecution for damages involving the sale of a slave—Nomios will probably face 401 jurors.⁴⁵

In the course of his speech, Nomios 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 defects⁴⁶) 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, Nomios could say that the seller, a businessman and an *Egyptian*, is a cheat and cannot be trusted; that when he (Nomios) attempted to amicably solve the dispute out of court, the seller proved unheeding; and that when passers-by urged Nomios to arrest the seller as a thief, Nomios chose instead to follow less confrontational means to settle the dispute. Nomios 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 Nomios 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, Nomios was a prostitute who maltreated his parents, a rabble-rouser, a lawless drunk and, worst of all, miserly.)⁴⁷

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, will be final.

Let us assume that the jurors vote in favor of Nomios. What might Nomios hope to obtain from that verdict? Private suits for damages required the guilty

44 According to Hansen (1999, p. 187) "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 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." Note that one Attic drachma corresponded to a day's wage for a soldier or unskilled laborer (Ober (2010)).

45 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 Nomios had to pay an additional 1000dr. to cover parts of the debts the slave carried. On slave prices, see Xen. *Mem.* 2.5.2 (for unskilled slaves), and Dem. 27.9 (for skilled slaves). On slave prices in the Greco-Roman world, see Scheidel (2005).

46 For example, Nomios may argue that the disclosure clause aims at protecting the buyer's interests.

47 These hypothetical arguments are based on Lanni's list of social norms frequently enforced by the court. The list includes norms concerning "treatment of family and friends; moderation in the face of conflict; honesty and fair dealing in business affairs; loyalty and service to the city; adherence to norms of private conduct, particularly sexual mores; and obedience to laws." Cf. Lanni (2009, p. 9).

defendant to pay “twice the value of the damage caused.”⁴⁸ Suppose that Nomios paid 500dr. for the slave, but during the time between the purchase and the trial Nomios was also forced to pay off a portion of the debt that the slave had incurred while he belonged to the seller. Let us fix this additional amount at 1,000dr. Nomios’ victory in the trial thus means that the seller owes Nomios 3,000dr.

How does Nomios collect on the judgment he has won? We mentioned earlier that, in the absence of a police force, Nomios 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 collect his damages, Nomios must first approach the seller and demand that he satisfy the judgment. But suppose the seller refuses to pay. Nomios can ask the magistrate of his deme of residence (the *demarch*) to escort him to the seller’s home and repeat the request for payment. However, the extant evidence suggests that the mere presence of the *demarch* carried little weight.⁴⁹ Then what?

If the seller refuses to pay up voluntarily, Nomios could try to take what is owed him by force, and he could try to encourage his family, friends and neighbors to help him in doing so. But the verdict in the case does not by itself authorize the use of force and both Nomios and those he might call upon for help will rightly worry that resorting to force will expose him to retaliation—and perhaps even charges of theft or assault. The only option available to Nomios, if he wishes to remain within the bounds of the law, is to bring another private suit, this time a suit for ejection (*dike exoules*). In this suit he would have to 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.”⁵⁰ If he is successful, Nomios would then be authorized to take what is owed him by force if necessary, for “[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.”⁵¹

Suppose that Nomios brings a suit for ejection and the jury in the *dike exoules* rules, again, for Nomios. Nomios returns to confront the seller. This time, however, Nomios can reassure family, friends and neighbors who are helping

48 Thür, Gerhard (Graz). “Blabes dike.” Brill’s New Pauly. Antiquity volumes edited by: Hubert Cancik and, Helmuth Schneider. Brill Online, 2015. Reference. Stanford University. <http://referenceworks.brillonline.com/entries/brill-s-new-pauly/blabes-dike-e218120>, accessed 17 June 2015.

49 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. 142–143); Harrison (1971, pp. 189–190).

50 MacDowell (1978, p. 153).

51 MacDowell (1978, p. 154).

him collect that their use of force is authorized by law. The seller, by contrast, who may also turn to family, friends and neighbors to help him resist Nomios's seizure of his assets, cannot take or offer the same comfort.

Will Nomios be successful in collecting compensation for the harms done to him by the seller? The answer ultimately turns on how a wide array of Athenians, citizens and non-citizens alike, choose to behave. Will Nomios' friends and neighbors be willing to help him forcibly seize assets or threaten to withhold future trade with the seller if he does not pay what he owes? Will others help the seller resist seizure? Or will they choose not to interfere?

For a great variety of offenses, jury verdicts were enforced in Athens if and only if individual Athenians chose voluntarily to participate in the collective effort of enforcing jury verdicts. For some, participating in enforcement meant bearing the cost of lending physical aid to a successful litigant seeking to collect. For others, participation meant foregoing valuable trading or social relations. For others still, it meant not lending aid, even to a friend, neighbor or family member, who sought to resist or retaliate authorized efforts to collect on a judgment.

Under these circumstances, we need to ask: why did individual Athenians bear the risks and costs, personal and financial, involved in enforcing the judgments of the popular courts? And why did they choose to condition their decisions about when to enforce (whether actively or passively) on jury verdicts even when, as must have happened with some frequency, those verdicts collided with longstanding norms?

In order to answer these questions, in the remainder of the article, we turn to the what-is-law framework.

3. WHAT IS LAW? A COORDINATION ACCOUNT OF THE CHARACTERISTICS OF LEGAL ORDER

Legal theorists often equate law with the modern legal institutions that implement the law, including legislatures that generate statutes and codes, regulatory agencies that write regulations, state-run courts that generate judgments and (in common law systems) binding precedents, legal role specialists/experts (lawyers, public prosecutors, impartial judges) and professional police with the power to seize people and property to carry out court orders. Indeed, many theorists define law as a set of public rules enforced by the power of the state.⁵²

52 Ellickson's (1991) classic work on "order without law" relies on this definition. More generally, economists and positive political theorists have generally not explored systematically the question of what constitutes law, though Benson (1989), Dixit (2004), Kornhauser (2004), and Milgrom, North, and Weingast (1990) are exceptions.

But as Hadfield & Weingast (2013, 2015) demonstrate, this approach is weak both on empirical and theoretical grounds. Empirically, many examples of settings exist that seem to enjoy recognizably legal order where a centralized enforcement apparatus is missing. These examples include medieval Iceland, merchant trade in medieval Europe, California during the Gold Rush, the international trade governed by the World Trade Organization (WTO), and—as we argue in this article—Classical Athens. Theoretically, an approach that equates legal order with the presence of an effective centralized enforcement authority limits our ability to develop reasonable policy guidance about how to build the rule of law where governments are weak, corrupt, or absent. Such an approach requires us to ignore what history has to teach us about the development of legal order in the absence of powerful centralized governments.

We adopt a different understanding of law based on the what-is-law model developed by Hadfield & Weingast (2012). The what-is-law approach divorces the definition of law from the means of its enforcement and focuses instead on the means by which decentralized collective enforcement is coordinated and made effective.⁵³

To understand this approach, we begin with the following observation: All human societies are organized on the basis of normative rules of behavior. Rules include the proper way to dress, to respond to the needs of family members, to speak to social superiors or inferiors, to make use of public resources. In the absence of governments with the power to enforce these rules centrally, the rules are enforced socially. Violators are criticized or mocked, shunned or excluded, and sometimes set upon with violent means.⁵⁴ These punishments are decentralized, in that they depend on the willingness of individuals to voluntarily participate in the effort of punishment. They are also often, even predominantly, collective, meaning that the efficacy of the punishment depends on the participation of multiple individuals acting together. Sometimes the collective nature of the punishment is obvious: a buyer's boycott of a seller is not effective if other buyers are still willing to purchase; seizing the assets of someone with strength or power may require a group effort. In other cases the collective nature of punishment is subtle: an individual may possess the strength and

53 Our emphasis on decentralization does not deny that in many cases centralized enforcement of legal rules plays an important role. But the framework does not presume that legal order cannot exist without centralized enforcement. By examining the conditions necessary to support decentralized enforcement, the what-is-law approach suggests the conditions under which centralized enforcement is necessary or likely to emerge.

54 For example, Wiessner (2005) finds that, among the ju'Hoansi bushmen of the Kalahari, norm enforcement very rarely escalates to violent means; the vast majority takes the form of group criticism and mocking. See Wiessner's bibliography for additional references.

means for acting alone to seize the assets of another, but success might depend on the willingness of others not to interfere in the effort.

Although the efficacy of decentralized collective enforcement is a puzzle to economists—who emphasize the danger of free-riding on the punishment efforts of others—the fact remains that throughout human history and still today, substantial degrees of normative social order are achieved by relying exclusively on decentralized enforcement.

The first question that the what-is-law approach asks is therefore the following: what distinguishes legal order from other forms of normative social order?⁵⁵

Hadfield & Weingast (2012, 2015) answer that question by focusing on the source of the normative assessment of what behavior is punishable and what is not. A legal order, they propose, exists within a subset of normative social orders, namely those in which normative classification is supplied by an institution that is capable of deliberately choosing, articulating, and adapting rules of behavior. Organic social order—what many think of as “culture”—depends on emergent classification: what is acceptable and what is not is a product of repeated interactions, and classification does not lend itself to deliberate intervention or adaptation.⁵⁶ In a legal order, a recognizable entity—a legislature, a court, a body of legal professionals—possesses the capacity to change the pattern of behavior by deliberate classification: eliminating ambiguity, introducing classification where there previously was none, or changing an existing classification.⁵⁷

The presence of a classification institution that is capable of deliberate articulation and adaptation of norms, then, is the key distinguishing feature of a legal order where there is no centralized enforcement apparatus. In order for the institution’s rules to be enforced, individuals have to (i) be willing to participate

55 There is also social order that is non-normative. For example, all societies display a pattern in which most people use their right hand to perform many tasks. This is largely a function of biology and not of normative rules. In some cases, however, the biological inclination to use the right hand is supplemented by normative rules that classify the use of the right hand as a matter of politeness or purity—people are punished for failure to use the right hand. *Fessler and Navarrete (2003)* call this normative moralization of a prevailing pattern of behavior.

56 Both *Hart (1961)* and *Fuller (1964)*, identify the capacity to coordinate more effective adaptation to diverse environments and populations as a distinguishing feature of law.

57 Not all normative social orders are legal orders, even if they possess an entity that is capable of deliberate articulation and control of the content of rules. For example, a dictator may have the capacity to be an authoritative steward. But dictators rarely produce legal order. The absence of constraints on the power of the dictator allows him to act arbitrarily, which typically leads to the failure of several legal attributes, such as stability and generality, and hence undermines voluntary (uncoerced) participation in enforcement efforts.

in costly enforcement efforts and (ii) coordinate those efforts so that they are all punishing according to the same normative classification.

Hadfield & Weingast (2012) show that achieving an equilibrium in which the behaviors classified as punishable by an identifiable institution are effectively punished by decentralized collective punishment requires that the institution possess several attributes. Some of these attributes are frequently identified as marking the existence of law by legal theorists, such as Fuller (1964), Raz (1977), and Waldron (2008).⁵⁸ For example, both conventional accounts of law and the Hadfield and Weingast account identify the importance of attributes such as generality, publicity, feasibility, clarity and non-contradiction, stability, prospectivity, and congruence between rules as promulgated and rules as enforced.

Legal philosophers, however, generate their lists of the attributes of law by focusing on the problem of compliance. Rules must be public, prospective, feasible and clear, for example, so that people can look to the rules to decide what actions to take in order to comply with the law.

The what-is-law model also requires that compliance be feasible. But by focusing on the problem of incentivizing and coordinating decentralized punishment, the what-is-law approach sheds new light on what it takes to generate behavior based on legal rules. Clear, public rules, for example, not only facilitate compliance, they also facilitate enforcement—which in turn helps to ensure compliance. The problem of incentivizing and coordinating decentralized punishment, however, does more than simply recast our conventional understanding of what makes order “legal.” Perhaps more importantly, it brings to the fore attributes that legal philosophers de-emphasize or overlook. In what follows, we look at several of these attributes.

3.1 Common Knowledge

Legal philosophers emphasize that legal rules must be public so that people can learn the rules with which they must comply in order to avoid penalty. The what-is-law approach emphasizes that mere publicity—accessibility to the public—is not enough to achieve legal order. This conclusion follows because the willingness to bear the cost of participating in the collective enforcement of the rules articulated by a classification institution depends on the belief that enough others will participate in punishing a specific behavior to make the effort worthwhile. This is a recursive problem: every potential participant must believe that other potential participants believe that others believe (etc.)

58 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.

that others will participate in punishment. To solve the recursive problem, the classification that guides punishment behavior must not merely be public: it must also be common knowledge. Others must know that others know that others know (etc.) that *this* is a punishable act and *that* is not.

3.2 Authoritative Stewardship

In a stable environment where there exist longstanding and unambiguous norms, common knowledge may be achieved without a formal classification system. This is true of many cultural norms. For example, people in a stable cultural setting know, as a matter of everyday experience, what is appropriate behavior and know that everyone else knows this as well. But in environments characterized by heterogeneity and change there is bound to be ambiguity or conflict about norms. Economic development, for example, introduces new forms of transactions or social relations about which there is considerable normative uncertainty. In such a setting, the coordination of decentralized enforcement activity is facilitated if the classification institution is under unique and authoritative stewardship: given these conditions, when ambiguity arises about the appropriate norm, enforcers know where to look in deciding when and what to punish. When the classification institution is under authoritative stewardship, it is capable of resolving ambiguity about how norms apply in novel circumstances or which norms apply when there are multiple alternatives, and to direct enforcement accordingly.

3.3 (Qualified) Universality

The what-is-law approach critically emphasizes the need to induce voluntary participation in costly enforcement efforts. This goes beyond the problem of free-riding: even in the absence of an incentive to free-ride, individuals will be unwilling to participate in enforcement efforts if doing so does not ultimately generate benefits for them personally. If this condition does not hold, potential enforcers may conclude that they are better off under some other social order, or even disorder. To induce voluntary participation, then, the rules articulated by the institution must show a form of universality—that is, they ought to address the interests of diverse individuals. This form of universality is qualified in the sense that the logic applies only to those actors who are critical to secure effective enforcement.

3.4 Impersonal, Neutral, Independent Reasoning

Satisfying the incentive compatibility constraint also requires that the classification institution operate in an impersonal, neutral and independent way. The framework assumes that individuals can predict how the classification institution will classify behavior in ways that make them better off relative to the

alternatives. Individuals will be willing to help enforce the rules articulated by the institution, even if they are not immediately benefitted, if they can look ahead to future circumstances in which the rules of the institution will benefit them. In other words, individuals need to be able to trust that rules are interpreted, elaborated, and adapted based on neutral processes that are impersonal in the sense that they do not depend on the specific identity of the classifier and independent in the sense that they are not responsive to the pressures or whims of particular persons or groups.

3.5 Openness

For similar reasons, encouraging widespread participation in collective enforcement efforts also requires a measure of openness, meaning that the process of interpreting, applying, and adapting rules is open to considerations brought by individual enforcers. Individuals may have diverse experiences and idiosyncratic assessments of how to classify behavior, particularly in a diverse and dynamic society. Openness does not imply that a system always adapts to idiosyncratic preferences and experiences. However, we contend, an open system maximizes the potential for ensuring that the interests of those on whom enforcement depends are sufficiently satisfied by the system.

*

The what-is-law approach reframes the question of the role of Athens' distinctive legal institutions in securing and sustaining social order. The framework suggests that the critical question we ought to ask is not: did Athens' legal institutions display the attributes we commonly associate with modern legal systems, such as predictability, stability and coherence? Rather, we ask: did Athens successfully transition decentralized collective enforcement efforts from an organization based on informal or elite classification institutions to an organization based on a formal legal classification institution with developing attributes? And to which attributes did Athens' decentralized legal system pay specific attention?

In the next section, we argue that Athens' high levels of social order relied on the presence of those attributes that, as the what-is-law framework emphasizes, were essential to coordinate and incentivize participation in collective punishment efforts.

4. BUILDING LEGAL ORDER IN ANCIENT ATHENS

In this section, we reinterpret the sequence of legal reforms in Athens through the lens of the what-is-law approach.

We begin in the later seventh century, with the introduction of Draco's homicide legislation. Draco's law on homicide is an early instantiation of the effort to use a formal legal process to change patterns of decentralized enforcement behavior. Before Draco, murderers were subject to forms of collective punishment based on privately assessed notions of 'wrongdoing,' often resulting in a cycle of violence. Draco's legislation limited the scope of private, idiosyncratic assessments of how homicide ought to be punished by identifying those responsible for taking the perpetrator to court, the procedure to be followed during and after the trial, and the penalties that attended the perpetrator were he to be found guilty.

Draco's homicide law thus provided a model for coordinating a system of decentralized punishment by establishing a common knowledge institution that operated according to the principles of neutrality and universality. The institution was universal because it addressed the concerns of anyone, elite and non-elite alike, who suffered the murder of a family member. The institution was also neutral in that all families were able to put the formal classification process in motion, regardless of their status.

Solon's reforms broadened Draco's model. Solon authorized "*ho boulomenos*" (lit. anyone who wishes) to prosecute public cases. In so doing, Solon extended to a wider segment of the population and to a broader array of offenses the capacity to activate a common knowledge institution with some features of neutrality and universality. As a result, the institution itself became more universal by offering a higher likelihood of punishing—and therefore deterring—offenses that mattered for a wider array of individuals.

With elites magistrates still in charge of adjudication, however, archaic Athens still faced the problem of how to apply the written, publicly displayed word of the law in a neutral, coherent and independent manner. Solon's creation of the *dikasterion* (lit. popular court)—a new institution in which citizens served as jurors, probably hearing appeals from the decisions of elite magistrates—was a critical step towards legal order. In fact, the popular courts increased the system's capacity to develop more impersonal reasoning, in the sense of interpretations of the laws that were independent of the identity of the interpreter.

Draco's and Solon's reforms introduced critical innovations that put Athens' on the path toward a robust legal order. However, these innovations were limited in scope: in particular, the writing of laws was still under the control of the elites (Draco and Solon were members of the elite) and participation in the popular courts was probably still limited as a practical matter to men of means—those who could afford to spend time sitting in court instead of working to feed their families.

Over the ensuing centuries, however, the composition of Athens' legislative and judicial institutions shifted dramatically, especially in the aftermath of the democratic revolution of 508 BC. In the Assembly and the law-courts, the elaboration and adjudication of laws became increasingly impersonal, as participation in these institutions was progressively extended to all adult male citizens.

By the middle of the fifth century, the introduction of pay for jurors enabled the average Athenian to serve in the courts without loss of critical revenues. At the same time, the power to make law came more firmly in the hands of the popular Assembly, which became the primary, indeed the only, legislative organ. As Plato snidely (and famously) remarked, "the man who rises to advise [the Athenians in the Assembly] may equally well be a smith, a shoemaker, a merchant, a sea-captain, a rich man, a poor man, of good family or of none."⁵⁹ 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 twentieth century.

At the end of the fifth century and throughout the fourth century, Athens took further, critical steps towards the establishment of legal order. In the aftermath of a profound military shock that threatened the polis' political stability and very survival, the Athenians grounded their democracy more firmly on a set of constitutional and legal rules aimed at enabling cooperation and preventing future instability.

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 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.

The resulting increase in the rationality and accessibility of the laws projected Athens toward the final stage of the process of building legal order, which the polis began in the late seventh century. We illustrate this final stage by turning to a review of the attributes of the Athenian legal setting that, as the what-is-law approach suggests, are critical for achieving legal order based on decentralized collective enforcement.

59 Plato, *Prot.* 319c-d.

4.1 Common Knowledge

In the fourth century, Athenian legal institutions offered robust mechanisms for achieving common knowledge of legal rules. The Assembly seated 6,000 adult male citizens (out of a total of perhaps 30,000), while the law-courts featured hundreds of citizens selected through complex randomized procedures that guaranteed that jury panels were broadly representative of the Athenian population as a whole. The sheer size and composition of these bodies contributed to fostering common knowledge among adult, male citizen participants about the content of rules and the punishment that attended violators.

Moreover, as Ober has shown, adult, male citizens were part of larger social networks connecting them (through both weak and strong ties) to the community as a whole (particularly to other adult, male citizens). Within these networks, relevant knowledge concerning the functioning of Athenian institutions and about offenses and punishment could spread remarkably quickly and easily.⁶⁰

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 punishment to other members of the citizen body, as well as to Athenian residents beyond the citizen body, e.g., foreigners, slaves and women.⁶¹

4.2 Authoritative Stewardship

As we mentioned in the introduction, the Athenian legal system did not rely on specialized legal experts—professional prosecutors, judges and lawyers—to ensure the coherent application of legal rules in adjudication. The amateurism of Athens' courts may suggest that the polis did not have what we call an 'authoritative steward.' But we should not confuse lack of 'expertise' with lack of 'authority.'

Although they were manned by amateurs, Athens' courts were authoritative in the sense that citizens recognized, as a matter of common knowledge, that the courts were *the* source of information about what was, and what was not, punishable. The evidence suggests that, by the fourth century, the Athenians may have litigated between 2000 and 8000 cases per year.⁶² The high volume of

60 Ober (2008, ch. 4). The architectural design of the very buildings where the Athenians met facilitated the achievement of common knowledge by fostering intervisibility among participants (Ober (2008, pp. 199–205)).

61 Lanni (2009; 2012); Carugati (2015, ch. 4).

62 Hansen (1999, pp. 186–188). Lanni (2009, p. 17); Carugati (2015, ch.1). Athenian 'litigiousness' was a *topos* of ancient comedy, as Aristophanes' *Clouds* indicates. Based on a total population estimate of ca. 100,000 people (Hansen 1999, p. 93), the Athenians litigated at a rate that was comparable with

litigation—that is, the sheer frequency with which the Athenians turned to the popular courts to resolve their disputes—suggests that they recognized the authority of the jury to speak as the unique and final arbiter of what was and was not punishable. The presence of the courts as an authoritative steward, in turn, greatly enhanced the efficiency of decentralized enforcement efforts.

4.3 (Qualified) Universality

The creation of democratic institutions that extended participation and access to all adult Athenian males, regardless of status, helped to ensure that the rules, as adopted and as implemented, served the interests of those on whom enforcement depended, making participation in enforcement incentive-compatible for ordinary citizens. Reforms in the mid-fourth century, which extended access to the courts to foreigners (such as the defendant in the story of Nomios), can be understood as a further extension of universality, helping to make enforcement procedures even more reliable, particularly for foreign merchants on whom the vibrancy of the Athenian economy depended.

4.4 Impersonal, Neutral, and Independent Reasoning

The most unusual features of an Athenian jury to the modern observer are its large size and representative composition, the absence of deliberation, and the use of voting procedures such as the secret ballot and majority rule to reach a verdict. Rather than interpreting these features as evidence of the failure of the Athenians to develop legal reasoning, we suggest that these features played a crucial role in securing widespread participation in the enforcement of judicial decisions. Large and representative juries, lack of deliberation and voting procedures reassured the Athenians that jury verdicts were the product of impersonal, neutral and independent reasoning.

The jury was an impersonal institution because large size and majority rule ensured that verdicts reflected broad community expectations, as embodied in the median member of the jury.⁶³ The representativeness of the jury helped to ensure neutrality because the median member on each given jury panel was unlikely to be systematically aligned with the interests of particular litigants. The absence of deliberation would also have assisted the achievement of neutrality, by helping to ensure that influential individuals would not be able to

litigation rates in modern developed democracies. Based on estimates in [Hadfield & Heine \(forthcoming\)](#) the Athenians litigated about as many cases per person as the modern-day French, English or Germans.

63 Carugati (2015, ch. 4) and Carugati & Weingast (forthcoming b).

sway the vote to one side or the other. Finally, lack of deliberation and the use of the secret ballot helped preserve the independence of verdicts by making it virtually impossible to bribe enough jurors to secure a favorable verdict and to assess whether the juror voted as promised.

4.5 Openness

Although magistrates were forbidden to allow access to the jury without a statement of formal charges based on written law, the surviving speeches demonstrate that litigants could argue their case based on an array of arguments that often did not stem from the law on which the charge was based.

What are the effects of openness in legal argumentation? Lanni points to openness as evidence of the ad hoc and unpredictable nature of the Athenian legal regime.⁶⁴ Conversely, we see openness as a source of robustness—a means whereby the Athenians established a robust legal order that was both common knowledge and incentive compatible for enforcers.

Private enforcement of judicial decisions requires that each individual trusts that the classification of behavior supplied by formal legal institutions *overlap in substantial ways* with the individual's own normative classification. As the Athenian legal system shifted from largely unwritten norms to largely written laws, the fact that formal courts drew considerably on both formal and informal rules when reaching their decisions served as a crucial mechanism to protect individual incentives to participate in enforcing judicial decisions.

To clarify this point, let us revisit the case of Nomios, but with a counterfactual twist. Suppose that suspicion of foreigners and solidarity with fellow citizens was an important and highly salient collective norm. Had Nomios been forbidden to appeal to the jury's view that foreigners should be distrusted, there would have been a higher likelihood of a result from the jury at odds with the average Athenian's sense of the merits of the case. Suppose Nomios had indeed lost. Then both Nomios and his friends would have faced a challenging question: should they defer to the verdict and abstain from efforts to collect compensation from the foreigner who, in their view, hoodwinked Nomios in the Agora? Or should they look to their community's norms and take what they feel Nomios was rightfully owed?

The Athenian system, particularly in its formative years, would have faced this challenge on a regular basis. To survive as a stable system, those like Nomios and his friends ought to have decided, with some reasonable degree

64 See Lanni (2004, 2006, 2009). Harris (2007a [2013, ch. 7]) suggests, *contra* Lanni, that the Athenian courts were concerned with, and did in fact to a reasonable extent achieve, consistency defined as the application of the same verdict to the same charge brought to court on the grounds of the same decree. We discuss our contribution to this debate below.

of regularity, to look to the jury verdict and not their own norms to govern their enforcement behavior. The more jury verdicts converged with pre-existing norms, the less often was their allegiance put to the test.

Openness to whatever the Athenians thought relevant in a given case was therefore an important source of robustness, as the Athenians sought to encourage a relatively large population of reasonably diverse people to respect the verdicts of the jury. At the same time, the openness of the Athenian systems made it particularly well-suited to respond to changes in norms and to move away from norms that had become unsustainable, for example as a result of shocks.

Indeed, to follow our imaginary tale of Nomios, over time the system proved robust enough to support an express effort to overcome the natural inclination to protect the interests of citizens over strangers, based on critical fiscal and economic requirements: mid-century, Athens took active steps to protect the economic interests of foreign merchants by extending to them privileges previously held uniquely by Athenian citizens, such as the right to legal redress. The extension of access to institutions to non-citizen economic actors was crucial to Athens' extraordinary commercial success in the later fourth century.

In conclusion, we return to Lanni's challenge: Did the openness of the Athenian legal system mean that jury verdicts were unpredictable and *ad hoc*? We argue that institutional design vastly curtailed the threat that jury decisions would be either unpredictable or *ad hoc*. Because they were the product of large, representative panels of jurors voting through majority rule, secret ballot and without deliberation, jury verdicts were consistent with broad community expectations concerning the norms and laws at issue in a given court case. Based on such configuration, the real threat to the Athenian legal system was not that verdicts would be unpredictable and *ad hoc*: to the contrary, the threat was that jury verdicts would be so stable as to prevent change. As we argued, the openness of the Athenian system to a variety of arguments introduced a degree of flexibility in the system that was critical to sustain the democracy and the polis' prosperous economy in the face of shocks.⁶⁵

5. CONCLUSIONS

We ask in this article, how did Athens establish and maintain order and stability? Relying on the "what-is-law" account of legal order elaborated by Hadfield & Weingast (2012), we offer a fresh interpretation of the role that Athenian legal institutions played in sustaining the polis' stable democracy and

65 On stability and innovation in the athenian legal system see Carugati (2015, ch. 4) and Carugati & Weingast (forthcoming b).

thriving economy during a time of unprecedented, and long-lasting growth in both aggregate and per capita consumption. Whereas other scholars have seen in Athens' open and amateur legal system a reason to doubt that the polis enjoyed truly legal order, we see in these distinctive features the elements necessary to coordinate and incentivize decentralized enforcement efforts.

Between the seventh and the fourth century BC, Athens' legal institutions evolved to induce ordinary citizens to participate in enforcing judgments, and to continue to do so even in the face of ambiguity, by establishing an authoritative steward that secured common knowledge and incentive compatibility for punishers in a largely decentralized system of coercion. The incentive-compatibility requirement, in particular, relied on three critical features of Athenian courts: (qualified) universality, impersonal, neutral and independent reasoning, and openness.

Evidence from Athenian legal oratory further suggests that the Athenians self-consciously encouraged individual citizens to recognize that legal order, as the bulwark against chaos and elite rule, benefitted each of them personally and that the stability of legal order depended on citizens' own responsibility to act in support of the law.

In the passage quoted in the epigraph to this article, Demosthenes urges the Athenians to stand up for the law "in just the same way as any individual would stand up for himself if attacked" and to "take the view that offenses against the law are common concerns."⁶⁶ 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.

We also see this express effort to encourage citizens to see themselves as critical to the stability of the legal system, and thus the democracy, in the juror's oath. At the beginning of each year, the 6,000 Athenians selected by lot to be jurors for the year swore an oath where they pledged, among other things, to vote "in accordance with the laws and decrees of the Athenian people," and, concerning matters about which there are no laws, "to vote with the most just judgment" and to decide "neither through enmity nor through favor."⁶⁷ Acting out of enmity for one's natural opponents and favor for one's natural allies is precisely the system of informal norms from which the

66 Dem. 21. 223-225.

67 The reconstruction of the two clauses is based on Dem. 20. 118 and 39. 39-40 and grounded on the broad scholarly consensus that the obligation to vote according to the "most just judgment" (*gnome dikaiotate*) applied to those matters "about which there are no laws." However, it is important to note that the wording of the oath and the application of the phrase *gnome dikaiotate* are the object of

Athenians were seeking to break free.⁶⁸ The oath is an overt expression of the aspiration of Athens' legal order to shift from deciding which claims to support and which to resist on the basis of longstanding (and no doubt powerful) informal norms to deciding on the basis of a collective formal effort to classify wrong from right.

There may be lessons in fourth century Athens for twenty-first century efforts to build the rule of law in places where governments are weak, corrupt or non-existent. Focus not, the lesson seems to be, on creating the modern complex apparatus of the state and centralized enforcement. Focus instead on developing centralized institutions that are capable of coordinating decentralized enforcement mechanisms by (i) elaborating and publicizing decisions as common knowledge about wrongful behavior and its appropriate punishment; (ii) incentivizing decentralized punishment by fostering individual trust in the system; and (iii) linking individual participation to the survival of the political community.

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intense debates in classical scholarship. For an overview of these debates and an account of the diverging positions see Harris (2006b); Mirhady (2007).

68 This is, indeed, Polemarchos' idea of justice as 'helping friends and harming enemies.' Plato, *Resp.* bk.1.

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