

Introduction

The Puzzle of Athenian Order

This book is motivated by a puzzle. Classical Athens had only a limited formal coercive apparatus to ensure order or compliance with law. There was no professional police force or public prosecutor, and nearly every step in the legal process depended on private initiative. Moreover, Athens did not have a “rule of law” in the sense that the courts did not enforce norms expressed in statutes in a predictable and consistent manner. And yet Athens was a remarkably peaceful and well-ordered society by both ancient and contemporary standards. Why? This book draws on contemporary legal scholarship that understands “law” as the product of the complex interaction between formal and informal norms and institutions to explore how order was maintained in Athens.

Before turning to solutions, it may be helpful to examine each piece of the puzzle. First, what does it mean to say that Athens was a peaceful, well-ordered society? At the most basic level, Athens enjoyed remarkable political stability, particularly by comparison to other Greek city-states and the Roman Republic.¹ Aside from two short-lived oligarchic revolutions near the end of the fifth century, both of which were precipitated by major military defeats, the democracy largely avoided serious civil and political violence and unrest throughout the classical period.²

¹ Ober 2008a:39–48; Fisher 1999:70; D. Cohen 1995:6; Herman 2006:76.

² External violence, of course, was another matter. Athens’ ability to maintain political stability and social order is all the more impressive given the relentless stress of frequent military conflict during our period.

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The level of ordinary crime and violence is harder to assess and impossible to quantify, but our evidence suggests that Athens enjoyed “relatively low rates of criminality.”³ Literary sources indicate that it was not unusual to walk alone or at night in both the city and the countryside without excessive fear of crime.⁴ Athenians did not ordinarily carry weapons,⁵ and the fights and violence that did occur were generally limited to the use of fists, stones, sticks, and potsherds.⁶ Despite the existence of banks for safekeeping, we hear of Athenians keeping significant amounts of money and valuables in their homes.⁷ To be sure, there is also evidence of theft, banditry, drunken brawls, and enmity erupting into violence.⁸ But the overall picture that emerges is one in which fear of crime and violence did not disrupt everyday activities.

Athens also exhibited a high level of social order. Most Athenians appear to have fulfilled their public duties with remarkable regularity. Ordinary Athenians presented themselves for military service despite a near-constant state of war. Hundreds of citizens chosen by lot served as unpaid government officials each year. Despite some shirking,⁹ the wealthy and powerful contributed enough in taxes and liturgies – for much of our period several hundred trierarchs were needed each year to outfit the navy¹⁰ – to support a highly successful military, economic, and cultural power.¹¹ Athens’ economic success would not have been possible unless Athenians could normally rely on compliance with the requirements of fair dealing and other business norms in ordinary commercial transactions.

And here is the paradox: order was maintained despite relatively weak mechanisms of formal coercion. Indeed, some scholars have gone so far as to challenge whether Athens should be categorized as a “state” and whether Athenian officials can be said to have exercised a monopoly of legitimate

³ Fisher 1999:83; 1998:86–92; Ober 2008a:256; Herman 1994; 2006:206–215; cf. Riess 2012:33–49.

⁴ Pl. *Republic* 1.327a1–328b8; Andoc. 1.38–39; Dem. 54.7; for discussion, see Fisher 1999:73–74.

⁵ Thuc. 1.5–8; Ar. *Politics* 1268b40. For discussion, see Fisher 1999:74–75; Herman 2006:206–215.

⁶ E.g., Lys. 3 and 4; Dem. 53.17; Ar. *Birds* 493–498; Fisher 1999:74–75; Herman 2006:206–215.

⁷ E.g., Lys. 12.10; 19.22; Dem. 27.53–57; 29.46–49; Is. 11.43; Herman 2006:208; Hunter 1994:150. Many rural farms included a stone tower, but these seem most likely to have served primarily as a means of preventing slave laborers from escaping rather than as a protection of person or property from theft. For discussion of the evidence for these towers and the various theories attempting to explain their function, see Morris and Papadopoulos 2005.

⁸ For examples, see Fisher 1999:59–60; Riess 2012:33–49.

⁹ On which generally, see Christ 2006.

¹⁰ Christ 2006:146–147.

¹¹ On Athens’ success, see Ober 2008a:39–79.

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violence.¹² What is most important for our purposes is that with limited exceptions (which we will discuss in due course), Athens was dependent on private initiative to enforce the law.¹³ There was no police force charged with investigating crimes or arresting wrongdoers.¹⁴ In most circumstances, public offenses went unprosecuted unless a private individual volunteered to initiate a suit. Even a court judgment could mean little if a victorious private litigant was unable to force his opponent to pay up. This reliance on private initiative resulted in spotty enforcement and reduced deterrence.

The deterrent effect of statutes was further limited because Athenian juries did not enforce clearly defined statutory norms in a consistent and predictable manner. The question of whether Athens had a “rule of law”¹⁵ has been intensely debated by classicists in recent decades. Some scholars, primarily those of an anthropological bent, contend that courts served primarily a social, political, or ritual role, and did not attempt to resolve disputes according to established rules or principles equally and impartially applied.¹⁶ At the other extreme, some historians have argued that Athenian juries did strictly and predictably enforce the law.¹⁷ Still others, myself included, have argued that while Athenian juries sought to reach a just outcome to the legal dispute before them, in doing so they had the discretion not only to apply the relevant statute, but also to consider, if they wished, a variety of other legal, equitable, and contextual considerations.¹⁸

¹² Berent 2000; Osborne 1985b:7; cf. Hansen 2002; Hunter 1994:188.

¹³ See Chapter 2 for further discussion.

¹⁴ Hunter 1994:120–153.

¹⁵ While the “rule of law” can have many different meanings, the feature most relevant for debates about the Athenian legal system is the consistent and predictable application of clear rules. Most classicists agree that the Athenian system satisfied narrow definitions of “rule of law” that focus on formal equality before the law or protection from arbitrary exercise of power by officials. For a sophisticated discussion of the debate, see Forsdyke Forthcoming a. For a discussion of the rule of law in Athenian sources, see Forsdyke Forthcoming c.

¹⁶ D. Cohen (1995:87–88) portrays Athenian litigation as a form of feuding behavior; Osborne (1985a:52) sees Athenian litigation as status competition; Riess (2012:143–145) views Athenian litigation as ritual performances that were “always unpredictable” and did not necessarily “operate rationally.”

¹⁷ E. Harris 2013; Meyer-Laurin 1965; Meineke 1971. Others (Hansen 1999:161–177; Ostwald 1986:497–524; Sealey 1987:146–148) have emphasized that the institutional reforms at the end of the fifth century signaled a shift from the sovereignty of the people to the sovereignty of law, without specifically arguing that Athenian juries faithfully and predictably applied statutes. Gowder (2014:10–18) argues that Athens had a rule of law based primarily on a narrow definition of “rule of law” that emphasizes the limits on officials’ use of coercion against citizens.

¹⁸ Lanni 2006:2–3, 41–75, 115–148; Christ 1998a:195–196; Scafuro 1997:50–66; Humphreys 1983:248; Forsdyke Forthcoming a; see also Gagarin 2012:312 (noting that the Athenian concept of law

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For example, litigants regularly argue that jurors should consider excuses or defenses not expressed in the statute, the relationship and long-term interactions between the parties, the effect a conviction might have on the defendant and his family, and the character of the parties, including unrelated crimes and a record of military or public service.¹⁹ As discussed in detail in Chapter 2, this ad hoc, discretionary form of jury decision-making, together with the vagueness of many statutes, made it difficult to predict ex ante when a jury would find a violation, thereby reducing incentives to comply with the statute nominally at issue. If crime did not pay in Athens, it was not because the punishment for breaking a law was sure and certain.

To a modern, a natural place to begin to explain social order and compliance with norms would be the straightforward mechanism of law enforcement articulated most clearly by Austin: rules backed by sanctions.²⁰ But in Athens, the direct deterrent effect of statutes was reduced by the uncertainty surrounding jury verdicts and the lowered probability of prosecution and enforcement of judgments caused by the reliance on private initiative. So it is not surprising that scholars who have attempted to explain how order was maintained in Athens tend to emphasize informal enforcement mechanisms and internalized norms growing out of a small, relatively homogenous community.²¹ In *Policing Athens*,²² for example, Virginia Hunter focuses on informal social sanctions such as gossip and private dispute-resolution mechanisms such as self-help and private arbitration. Central to Gabriel Herman's explanation for Athens' success in *Morality and Behaviour in Democratic Athens*²³ is an internalized code of behavior requiring self-restraint and cooperation that fostered order and compliance with law.

In this book I will argue that Athenian legal institutions, though very different from the straightforward deterrence mechanisms that dominate

“was broader than our own” and included “the broad set of customs or traditional rules that Athenians generally accepted whether or not they were enshrined in statute”).

¹⁹ See Lanni 2006:41–75; Chapter 2 in this book.

²⁰ Austin 1995:13–15.

²¹ E.g., Hunter 1994; Herman 2006; Allen 2000a:142–145; Finley 1985a:29–30. D. Cohen (1995:24) is an exception: he describes the role of courts as an arena for feuding and pursuing conflict that paradoxically both “contributed to the maintenance of social order as well as help[ed] to threaten it.”

²² Hunter 1994.

²³ Herman 2006:23, 352–354, 392–393. It is important to note that Herman does, however, contend that the demos also had the potential to exercise significant coercive force (Herman 2006:221).

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modern legal systems, played an indirect but important role in maintaining order. I want to show that the Athenian legal system *did* encourage compliance with law, but not through the familiar Austinian mechanism of imposing sanctions for violating statutes.²⁴ I use contemporary research on the interaction between law, social norms, and behavior to explore the various ways in which formal legal institutions promoted order in Athens.²⁵ For example, the Athenian procedures for enacting and publicizing laws meant that even statutes that were rarely enforced may have altered behavior, as part of what modern legal scholars call the expressive function of law. The use of character arguments in court and the frequency of legal procedures provided powerful incentives for Athenians to abide by social norms: prior misconduct could be brought up in a later unrelated court case, which not only might influence the verdict, but would also facilitate social sanctions by publicizing the prior norm violation. Court arguments were a form of moral persuasion performed before a large number of Athenian citizens on a daily basis, providing an arena for debating, shaping, and reinforcing internalized norms. Through these examples and others, I show how formal institutions facilitated the operation of informal social control in a society that was too large and diverse to be characterized as a “face-to-face community” or “close-knit group.” In this way, Athens provides a provocative example of how recent theories about how law can create order may have worked in a time and place far from our own.

Although I focus on formal legal institutions that were dominated by adult male citizens, my account also addresses how order was maintained among the less privileged members of society. Women and slaves were almost always disciplined privately, within the household.²⁶ Metics (resident aliens) could be disciplined through the court system, though their participation in trade and commercial matters may have made them more likely to experience the special, and more straightforward and predictable,

²⁴ Riess (2012) and D. Cohen (1995) also contend that Athenian litigation fostered order through non-Austinian means, though their proposed mechanisms (respectively, ritual performance and feuding arena) are quite different from mine.

²⁵ I agree with Forsdyke’s (2012:176–177; Forthcoming a) observation that informal and formal modes of justice were inextricably intertwined in Athens throughout the classical period. I focus here on exploring the role played by formal legal institutions because they fostered order through mechanisms other than a familiar deterrence regime. Throughout, we will see that formal legal institutions worked in conjunction with informal mechanisms of social control.

²⁶ For discussion, see Chapter 1.

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procedures and regulations that applied to selected market transactions.²⁷ Perhaps most interesting, we will see that noncitizens, including slaves, were protected to some extent from violence and mistreatment by the formal legal system, though not primarily through the straightforward mechanism of lawsuits charging individuals with committing offenses against noncitizens. Rather, the protection of noncitizens in well-publicized statutes may have influenced behavior even in the absence of enforcement through the expressive function of law,²⁸ and litigants may have been indirectly punished for offenses against noncitizens when they were raised as character evidence in unrelated cases.²⁹

It may be helpful to clarify the aims and limits of my argument. We cannot quantify the relative contribution of the various elements that helped foster order in Athens. And while I attempt to demonstrate that neither a traditional deterrence regime nor informal mechanisms like self-help or social sanctions can entirely explain the puzzle of Athenian orderliness, I do not deny that all these mechanisms played a role in maintaining order. The chapters that follow explore how formal legal institutions, often working in conjunction with informal means of social control, helped foster order through mechanisms quite different from the straightforward operation of deterrence created by punishment for violations of law. My analysis applies insights drawn from modern legal sociology, particularly the academic literature on social norms and the expressive function of law, to classical Athens. We will see that the high level of publicity surrounding Assembly and court activity and the Athenians' contextualized approach to adjudication made these mechanisms much more powerful in the Athenian context than they are in modern legal systems.

It is important to emphasize that I am not providing a functionalist analysis. That is, I am not arguing that the features of the legal system I describe developed as they did because they fostered order and compliance with norms. Nor do I contend that the Athenians consciously created their legal system with these benefits in mind. We will see that widespread citizen participation in the assembly and courts, together with the loose approach to relevance and legal argument in Athenian adjudication, were central to the mechanisms that helped foster order in Athens. As

²⁷ For discussion, see Chapter 2.

²⁸ For discussion, see Chapter 3.

²⁹ For discussion, see Chapter 4.

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I have argued elsewhere, these features arose from two ingrained cultural values: (1) a normative belief in contextualized and individualized justice and (2) a democratic commitment to popular participation and wide jury discretion.³⁰ I focus here not on the origins of Athenian legal institutions and practices, but on their operation and effects.³¹ To borrow the terms used by Ian Morris to distinguish between “humanistic” and “social scientific” approaches, this book aims to help us “understand” how Athenian legal culture worked rather than to “explain” how it came to take the form it took or to quantify the precise degree to which social order can be attributed to the operation of formal legal institutions.³²

A Brief Introduction to Athens and Its Legal System

Some background information may be helpful for readers unfamiliar with Athens and its legal system.³³ Athens’ territory of approximately 900 square miles included rural farming villages, small towns, a cosmopolitan port known as the Piraeus, and the teeming city that served as the political, commercial, social, and religious center of the polis. Athens was a direct democracy, but an extremely limited one: most legal and political rights were limited to male citizens. And citizens accounted for only a small portion of the total population. Metics were either manumitted slaves or freeborn foreigners living in Athens,³⁴ generally as craftsmen, traders, or businessmen. Slaves occupied the bottom rung of Athenian society, though slaves’ lifestyles could vary considerably. The majority worked the land (either on small plots owned by a modest farmer, or on a larger holding supervised by an overseer) or in their masters’ house or workshop. The least fortunate toiled in the silver mines and the most fortunate

³⁰ Lanni 2006.

³¹ This is not to deny the possibility that the effectiveness of Athenian legal practices in maintaining order contributed to the persistence of Athenian legal institutions. But we have no direct evidence that this is the case, and process-oriented anthropological studies have demonstrated that societies can reach a successful equilibrium in the absence of social order (e.g., Roberts 1976; Comaroff and Roberts 1981; Bourdieu 1977; for an excellent discussion of trends in legal anthropology as they relate to classical Athens, see D. Cohen 1995:1–24).

³² Morris 2002:8.

³³ For a more detailed description of the legal system as well as Athenian society, see Lanni 2006:15–40.

³⁴ It seems likely that a foreigner was obliged to register as a metic (and pay the metic tax) once he had spent a short time – perhaps one month – living in Athens. For discussion of the evidence, see Whitehead 1977:7–10.

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worked as skilled craftsmen, bankers, or shopkeepers and enjoyed de facto independence.

The number of citizens, metics, and slaves in classical Athens can only be guessed at from a census taken in 317 BCE, after the fall of the democracy, and from sporadic statements in our earlier sources providing estimates of troop strengths or the adult male citizen population. In the fourth century, the adult male citizen population was perhaps 30,000, the total citizen population approximately 100,000.³⁵ The numbers of metics and slaves are much less certain and are likely to have fluctuated at different times depending on the economic and political circumstances. Hansen's estimate of 40,000 metics, somewhere in the range of 150,000 slaves, and a total population of close to 300,000 seems reasonable.³⁶

Within the citizenship group, Classical Athens was a highly participatory democracy run primarily by amateurs: with the exception of military generalships and a few other posts, state officials were selected by lot to serve one-year terms.³⁷ The Council (*Boule*), or executive body of the Assembly, was composed of 500 men chosen by lot, and a new *epistates* ("president") of the Council was chosen by lot for each day's session. Adult male citizens voted in the Assembly on nearly every decision of the Athenian state, from the making of war and peace to honoring individuals with a free dinner. At the end of the fifth century a distinction was made between laws (*nomoi*) which specified rules of general application, and decrees (*psephismata*) which were specific, short-term measures. In the fourth century, laws, unlike decrees, required not just the vote of the Assembly, but also the approval of a board chosen from the jury pool following a trial-like hearing on the merits of the law.³⁸

The Athenian law courts are remarkably well-attested, at least by the standards of ancient history: roughly one hundred forensic speeches survive from the period between 420 and 323 BCE.³⁹ These speeches represent not an official record of the trial proceedings, but the speech written by a speechwriter (*logographos*) for his client (or, in a few cases, for himself) and later published, possibly with minor revisions in some cases, with a view to attracting future clients or promoting a political position in political trials.

³⁵ Hansen 1999:90–93.

³⁶ Hansen 1999:90–94.

³⁷ Hansen 1999:233–237.

³⁸ Hansen 1999:161–175.

³⁹ Ober 1989:341–348 provides a catalog.

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Only speeches that were attributed to one of the ten Attic orators subsequently deemed canonical have been preserved. As a result, the speeches in our corpus are atypical in the sense that they represent cases in which one of the litigants could secure the services of one of the best speechwriters in the city. We do not know for certain whether and how the speeches of poor litigants might have differed from our surviving speeches.⁴⁰ But it is important to note that the social class of the parties involved in the surviving cases are quite varied: we have, for example, cases involving a wealthy banker who was formerly a slave (Demosthenes 36), a man who admits that his family was so poorly off that his mother was reduced to selling ribbons in the agora (Demosthenes 57), an accusation against an admitted prostitute for impersonating a citizen (Demosthenes 59), and, if the case is authentic, even a disabled man receiving the Athenian equivalent of social security payments (Lysias 24). The speeches in the corpus run the gamut from politically charged treason trials and violent crimes to inheritance cases and property disputes between neighbors.

Despite their copiousness, these sources are not without their problems. The Attic orations were preserved not as legal documents but as tools for teaching boys and young men the art of rhetoric in the Hellenistic and Roman periods. As a result, the information a legal historian would most like to know about any particular case is generally lost. We almost never have speeches from both sides of a legal contest;⁴¹ we rarely know the outcome of the case. Citations of laws and witness testimony are often omitted or regarded as inauthentic later additions. Most important, any statement we meet in the speeches regarding the law or legal procedures may be a misleading characterization designed to help the litigant's case.⁴² As is often pointed out, however, a litigant who wished to be successful would presumably limit himself to statements and arguments that were likely to be accepted by a jury. Speakers may at times give us a self-serving account of the law, but their arguments generally remain within the realm of plausible interpretations of the legal situation in question.⁴³

⁴⁰ On amateur speech, see Bers 2009.

⁴¹ Only two pairs of speeches survive (Demosthenes 19 and Aeschines 2; Aeschines 3 and Demosthenes 18); in two other instances (Lysias 6 and Andocides 1; Demosthenes 43 and Isaeus 11) we have imperfectly matched speeches on both sides of a particular issue.

⁴² On how to deal with apparent outliers in our sources, see Bers 2002.

⁴³ Dover 1994:8–14.

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In what the Athenians called “private cases” (*dikai*), the victim (or his family in the case of murder) brought suit. In “public cases” (*graphai*), any adult male citizen – literally *ho boulomenos* (“he who is willing”) – was permitted to initiate an action. However, our surviving *graphai* suggest that volunteer prosecutors were rarely disinterested parties seeking to protect third-party victims; *graphai* are more often brought by the primary party in interest or enemies of the defendant.⁴⁴ Although no ancient source explains the distinction between *graphai* and *dikai*, most *graphai* seem to have been cases regarded as affecting the community at large.⁴⁵ This division is not quite the same as the modern criminal–civil distinction; murder, to take a spectacular example, was a *dike* because it was considered a crime against the family rather than the state.

Athenian courts were largely, but not entirely, the province of adult male citizens. Foreigners and resident aliens (metics) could be sued in Athenian courts, and could initiate private suits.⁴⁶ It is unclear to what extent metics were permitted to bring public suits.⁴⁷ With a few exceptions, slaves could serve neither as plaintiffs nor defendants.⁴⁸ When a slave was involved in a dispute or the victim or perpetrator of a crime, the case was generally brought by or against the slave’s owner.⁴⁹ Similarly, women were forced to depend on their male legal guardians to act on their behalf in court.⁵⁰

This book focuses primarily on the popular courts, the largest jurisdiction in the Athenian legal system.⁵¹ Litigants were required to present their case to the jury, though they could share their time with a “co-speaker.”⁵² Each Athenian litigant was allotted a fixed amount of time to present his

⁴⁴ Osborne 1985a; Christ 1998a:118–159.

⁴⁵ Todd 1993:102–109. For discussion of whether the Athenians had a conception of crime, see D. Cohen 2005a; Hunter 2007.

⁴⁶ MacDowell 1993:221–224; Patterson 2000; Todd 1993:196; Whitehead 1977:92–95.

⁴⁷ A prominent theory is that metics could pursue *graphai* only in cases where they were the victim, and were not permitted to prosecute on behalf of a third party or the state (Whitehead 1977:94); for some skepticism on this point, see Hunter 2000a:17 and n.29.

⁴⁸ Todd 1993:187.

⁴⁹ MacDowell 1993:81. The suit could be brought directly against the slave if the slave was acting without his owner’s permission (Dem. 55.31), but the owner was still responsible for defending the suit in court and for any damages awarded.

⁵⁰ Todd 1993:208.

⁵¹ Homicide and maritime cases followed somewhat different procedures and, most importantly, may have had a more developed concept of relevance. Lanni 2006:75–114, 149–174.

⁵² In ordinary cases, “co-speakers” were relatives or friends and take pains not to act the part of an expert advocate. For an in-depth study of the use of supporting speakers in Athenian courts, see Rubinstein 2000.