Dear friends and colleagues,

I’ve attached the Introduction and one chapter, Transitional Justice in Ancient Athens, from my book project, *Law and Order in Ancient Athens*. Those with limited time might want to focus on pp. 1-9 (a statement of the overall thesis of the book); pp. 15-17 (brief chapter summaries); pp. 28-53 (the argument section of the transitional justice chapter). Pages 9-15 provide background on the Athenian legal system.

Looking forward to our discussions!

Adriaan
Law and Order in Ancient Athens  
Adriaan Lanni

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

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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.
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.”

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. Athenians did not ordinarily carry weapons, and the fights and violence that did occur were generally limited to the use of fists, stones, sticks, and potsherds. Despite the existence of banks for safekeeping, we hear of Athenians keeping significant amounts of money and valuables in their homes. To be sure, there is also evidence of theft, banditry, drunken brawls, and enmity erupting into violence. 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, 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 navy—to support a highly successful military, economic, and cultural power. 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.

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. Pol. 1268b40. For discussion, see 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 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 & Papadopoulos 2005.
8 For examples, see Fisher 1999:59-60; Riess 2012:33-49.
9 On which generally, see Christ 2006.
10 Christ 2006:146-47.
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 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

¹³ See Chapter 2 for further discussion.
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.
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 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
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. 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. 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. But in Athens, uncertainty surrounding prosecution, jury verdicts, and enforcement of judgments reduced the direct deterrent effect of statutes. 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, 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; see also Gagarin 2012:312 (noting that the Athenian concept of law “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 below.
relatively homogenous community.\textsuperscript{21} In \textit{Policing Athens},\textsuperscript{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 \textit{Morality and Behaviour in Democratic Athens}\textsuperscript{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 modern legal systems, played an indirect but important role in maintaining order. I want to show that the Athenian legal system \textit{did} encourage compliance with law, but not through the familiar Austinian mechanism of imposing sanctions for violating statutes.\textsuperscript{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.\textsuperscript{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

\footnotesize{\begin{itemize}
\item \textsuperscript{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.”
\item \textsuperscript{22} Hunter 1994.
\item \textsuperscript{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).
\item \textsuperscript{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.
\item \textsuperscript{25} I agree with Forsdyke’s (2012: 176-177; forthcoming) 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.
\end{itemize}}
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.  

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, procedures and regulations that applied to selected market transactions. Perhaps most interesting, we will see that non-citizens, 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 non-citizens. Rather, the protection of non-citizens in well-publicized statutes may have influenced behavior even in the absence of enforcement through the expressive function of law, and litigants may have been indirectly punished for offenses against non-citizens when they were raised as character evidence in unrelated cases.

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26 For discussion, see Chapter 1.
27 For discussion, see Chapter 2.
28 For discussion, see Chapter 3.
29 For discussion, see Chapter 4.
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 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

\(^{30}\) Lanni 2006.
legal institutions and practices, but on their operation and effects.\textsuperscript{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.\textsuperscript{32}

\textbf{A Brief Introduction to Athens and its Legal System}

Some background information may be helpful for readers unfamiliar with Athens and its legal system.\textsuperscript{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,\textsuperscript{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 worked as skilled craftsmen, bankers, or shopkeepers and enjoyed de facto independence.

\textsuperscript{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 & 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).

\textsuperscript{32} Morris 2002:8.

\textsuperscript{33} For a more detailed description of the legal system as well as Athenian society, see Lanni 2006:15-40.

\textsuperscript{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.
The number of citizens, metics, and slaves in classical Athens can only be guessed at from a census taken in 317 B.C.E., 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{37} The Council (\textit{Boule}), or executive body of the Assembly, was composed of 500 men chosen by lot, and a new \textit{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 (\textit{nomoi}) which specified rules of general application, and decrees (\textit{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.\textsuperscript{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

\textsuperscript{35} Hansen 1999: 90-93.
\textsuperscript{36} Hansen 1999: 90-94.
\textsuperscript{37} Hansen 1999: 233-237.
\textsuperscript{38} Hansen 1999:161-175.
B.C.\textsuperscript{39} These speeches represent not an official record of the trial proceedings, but the speech written by a speechwriter (\textit{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. 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.\textsuperscript{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

\textsuperscript{39} Ober 1989: 341-348 provides a catalogue.
\textsuperscript{40} On amateur speech, see Bers 2009.
speeches from both sides of a legal contest; 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. 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.

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. 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. 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

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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.
44 Osborne 1985a; Christ 1998a:118-159.
private suits.\textsuperscript{46} It is unclear to what extent metics were permitted to bring public suits.\textsuperscript{47} With a few exceptions, slaves could serve neither as plaintiffs nor defendants.\textsuperscript{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.\textsuperscript{49} Similarly, women were forced to depend on their male legal guardians to act on their behalf in court.\textsuperscript{50}

This book focuses primarily on the popular courts, the largest jurisdiction in the Athenian legal system.\textsuperscript{51} Litigants were required to present their case to the jury, though they could share their time with a “co-speaker.”\textsuperscript{52} Each Athenian litigant was allotted a fixed amount of time to present his case. Some private cases were completed in less than an hour, and no trial lasted longer than a day.\textsuperscript{53} Although a magistrate chosen by lot presided over each popular court, he did not interrupt the speaker for any reason or permit anyone else to raise legal objections, and did not instruct the jury as to the relevant laws. Athenian laws were inscribed on stone \textit{stelai} in various public areas of Athens. Litigants were responsible for finding and quoting any laws they thought helped their case, though there was no obligation to cite even the law under which the case was brought.

\textsuperscript{46} MacDowell 1993:221-224; Patterson 2000; Todd 1993: 196; Whitehead 1977:92-95.
\textsuperscript{47} A prominent theory is that metics could pursue \textit{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 2000:17 & n.29.
\textsuperscript{48} Todd 1993:187.
\textsuperscript{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.
\textsuperscript{50} Todd 1993:208.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{53} A public suit was allotted an entire day (\textit{Ath.Pol}. 53.3). Private cases varied according to the value of the suit and were timed by a water-clock. MacDowell (1993:249-50) estimates the length of various types of suit based on the one surviving water-clock.
Cases in the popular courts were heard by juries\textsuperscript{54} chosen by lot from adult male citizens and generally ranged from 201 to 501 in size, though in high-profile political cases multiple panels of 500 could be used.\textsuperscript{55} A simple majority vote of the jury, taken without formal deliberation,\textsuperscript{56} determined the outcome of the trial. No reasons for the verdict were given, and there was no provision for appeal.\textsuperscript{57}

While the punishment for some offenses was set by statute, in many cases the jury was required to choose between the penalties suggested by each party in a second speech in a process known as \textit{timesis}. Unlike modern American jurors, Athenian jurors were generally made aware at the guilt phase of the statutory penalty or the penalty the prosecutor intended to propose if he won the case. For this reason, the guilt decision often incorporated considerations typically limited to sentencing in modern American courts, including questions of the defendant’s character and past convictions.\textsuperscript{58}

Imprisonment was rarely, if ever, used as a punishment;\textsuperscript{59} the most common types of penalties in public suits were monetary fines, loss of citizen status (\textit{atimia}), exile, and execution.\textsuperscript{60} With some exceptions, the fine in a public suit was paid to the city.\textsuperscript{61} In most

\textsuperscript{54} I have been using the term “jurors” as a translation for the Greek \textit{dikastai} to refer to the audience of these forensic speeches, but some scholars, notably Harris (1994a:136), prefer the translation “judges.” Neither English word is entirely satisfactory, since these men performed functions similar to those both of a modern judge and a modern jury. I refer to \textit{dikastai} as jurors to avoid the connotations of professionalism that the word “judges” conjures up in the modern mind.

\textsuperscript{55} Hansen 1999:187.

\textsuperscript{56} Audience clamor and conversation while approaching the voting urns may have provided the opportunity for informal deliberation.

\textsuperscript{57} A dissatisfied litigant might, however, indirectly attack the judgment by means of a suit for false witness or might bring a new case, ostensibly involving a different incident and/or using a different procedure. Some of our surviving speeches point explicitly to a protracted series of connected legal confrontations. For discussion, see Osborne 1985a.

\textsuperscript{58} Lanni 2006:53-59.

\textsuperscript{59} Hunter 1997.

\textsuperscript{60} Todd 1993:139-144; 2000a; Allen 2000a: 197-243; Debrunner Hall 1996.

\textsuperscript{61} As we will see in Chapter 2, in some special procedures, such as \textit{phasis} and \textit{apographe}, the prosecutor was entitled to a portion of the fine collected.
private cases damages were paid to the prosecutor, though the penalties for some dikai included public fines in addition to compensation.  

Plan of the Book

Before proceeding to the positive claim in Part II that formal legal institutions helped foster order (albeit in indirect ways), I try to show that the two most obvious explanations for Athenian orderliness cannot be the whole story. Specifically, Part I demonstrates that Athens’ high level of social order cannot be fully explained by either informal social control or the traditional Austinian mechanism of law backed by sanctions. Chapter 1, Informal social control and its limits, surveys what we know about how informal social control operated in practice, including social sanctions, internalized norms, self-help, private discipline, and private dispute resolution. I argue that informal social control, though important, cannot on its own account for the high level of social order in Athens. Chapter 2, Law enforcement and its limits, discusses the role played by straightforward deterrence arising from enforcement of statutes in maintaining order. The reliance on private initiative and the lack of legal certainty significantly reduced the deterrent effect of statutes. At the same time, more straightforward enforcement of laws was available in a few special instances: selected market and shipping transactions and offenses that threatened the public order, including threats to the state and certain theft-related offenses. In this way, Athens insured a minimum level of public order and economic security, making it possible for a more limited formal coercive apparatus to operate effectively in the rest of the system.

Part II turns to examine various non-Austinian mechanisms through which the legal system fostered order and compliance with norms. While my focus is on exploring the operation of formal legal institutions, I emphasize throughout how these institutions interacted with and

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62 MacDowell 1993:257.
complemented informal modes of discipline. Chapter 3, *The expressive effects of statutes*, argues that Athenian statutes may have fostered compliance with law even though they were not directly enforced. A law may serve an “expressive” or “symbolic” function: it makes a statement about what the society considers acceptable and unacceptable behavior. Under some circumstances, legal scholars have shown that law can strengthen or weaken the social norms surrounding a practice, and thereby indirectly influence behavior. I argue that the expressive function of law may have served an even more important role in ancient Athens than it does today because Athenian laws were relatively direct, well-publicized expressions of community sentiment. This chapter also includes two detailed case studies of laws that were rarely enforced but appear to have had some effect on behavior: (1) the protection of slaves in the law forbidding *hubris*; and (2) the laws forbidding former male prostitutes from actively participating in politics.

Chapter 4, *Enforcing social norms in court*, contends that the courts may have had a substantial impact on behavior despite the ad hoc nature and inherent unpredictability of individual verdicts. Because of the wide use of character evidence in court speeches and the frequency of ligation, the court system provided concrete incentives to conform to a host of relatively stable extra-statutory norms lest they be used against them in a later, unrelated case. This approach facilitated the use of informal social sanctions by giving litigants incentives to discover and publicize their opponents’ past norm violations. I argue that this peculiar approach of enforcing extra-statutory norms through the formal court system mitigated the effects of under-enforcement in a system dependent on private initiative.

Chapter 5, *Court argument and the shaping of norms*, argues that Athenian court arguments, delivered before hundreds of jurors, helped maintain order by shaping and reinforcing norms. Paradoxically, the courts’ ad hoc and incremental approach may have given
them advantages over the Assembly as a better forum for collective norm elaboration, particularly where norms were controversial or in flux. I also offer case studies of how court arguments may have helped shape and shift norms on controversial topics including sexual behavior, interpersonal violence, self-help, and the relation between public and private spheres.

Chapter 6, *Transitional justice in Athens: laws, courts, and norms*, draws together the themes of the book through an examination of Athens’ successful transition to democracy in 403 B.C.E. following the bloody reign of the Thirty Tyrants. Athens’ approach to reconciliation illustrates each of the mechanisms discussed in Chapters 3-5. I examine the symbolic function of the amnesty forbidding prosecutions based on actions taken during the coup, how the courts nevertheless rewarded and punished litigants for their actions during the revolution in unrelated cases, and how court arguments in this period helped persuade Athenians to carry out a peaceful transition.
Chapter 6

Transitional justice in Athens: Law, courts, and norms

Thucydides famously describes how Corcyra and other Greek cities were convulsed by civil wars between oligarchic and democratic factions during the Peloponnesian War, leading to a complete breakdown of civil society. Violence and mistrust spiraled out of control with no end in sight:

Revenge was dearer than self-preservation. ...An attitude of suspicious antagonism prevailed; for there was no word binding enough, no oath terrible enough to reconcile enemies. Each man had concluded that it was hopeless to expect a permanent settlement...\(^{63}\)

Toward the end of the war, Athens itself experienced a civil war marked by horrific violence: in an eight month period at the end of the fifth century, an oligarchic coup resulted in the killings of between five and ten percent of the citizenry and the expulsion, by some accounts, of more than half its population.\(^ {64}\) But unlike other Greek states, Athens pulled itself back from the brink. When the oligarchy was overthrown, an amnesty was instituted for all but the top officials in the former regime, and the restored democracy endured without significant internal threat until Athens was conquered by Philip of Macedon in 338 B.C.E. The Athenian reconciliation was

\(^{63}\) Thuc. 3.82-83 (translation adapted from Jowett).

\(^{64}\) Approximately fifteen hundred Athenians were killed. Isoc. 7.67; Aesch. 3.235; Ar. Ath.Pol. 35.4. Strauss (1986:70-86) provides the lowest estimate of the male citizen population at 14,000-16,250; Hansen (1985) suggests 25,000; Ober (1989: 127) estimates that the population range throughout the fourth century was 20,000-30,000. As for the expulsion, Diodorus 14.5.7 states that more than half the population was driven out; Isocrates 7.67 states that over 5000 were expelled.
admired throughout Greece for its success in avoiding the cycle of revolution and counter-revolution that afflicted other cities.

This chapter describes how Athens’ legal institutions helped restore order after the civil war. The civil war, the reconciliation agreement, and the rhetorical echoes of these events in Attic oratory have been extensively studied. The goal of this chapter is not to provide a comprehensive account of why the reconciliation succeeded. Rather, I want to present the Athenian reconciliation as a single episode that illustrates the various ways in which the courts maintained order in the absence of a rule of law that we have been exploring in the previous chapters. That is, the Athenian response to civil war demonstrates how Athenian courts fostered order and a peaceful transition, though not through the familiar Austinian mechanism of imposing sanctions for violating statutes.

To a modern, this may not seem surprising. Modern transitional justice mechanisms typically take the form of special war crimes tribunals, truth and reconciliation commissions, and administrative justice procedures that disqualify those involved in the former regime from public office or employment. To varying degrees, all these procedures forfeit full criminal accountability for all crimes committed during the prior regime in return for a peaceful transition. Many transitional justice procedures, particularly truth commissions and war crimes tribunals, consciously pursue a variety of goals besides determining the guilt of individuals, including providing an outlet for victims to tell their stories, understanding the larger pattern of complicity in atrocities, and promoting reconciliation. In this way, modern transitional justice mechanisms tend to operate apart from the ordinary legal system, and their procedures and goals

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65 E.g., Ostwald 1986:460-524; Krentz 1982; Loening 1987; Elster 2004:3-23; Carawan 2002, 2006, 2013; Quillin 2002; Dorjahn 1946; Loraux 2002. I should mention in particular Wolpert 2002 and D. Cohen 2001, both of whom address the way in which court speakers portray the reign of the Thirty and the Amnesty, a topic that I discuss below in Part IIIA.
are often in some tension with the rule of law. But because of Athens’ unique legal culture, we will see that its ordinary popular courts were able to accommodate the broader goals of transitional justice, from creating a shared understanding of the civil war to promoting trust between neighbors on opposite sides of the conflict. The Athenian popular courts routinely performed functions that moderns tend to associate only with extraordinary legal responses to conflict.  

I first describe the mass violence committed during the reign of the Thirty Tyrants and the collaboration by various portions of the population. I then discuss the terms of the reconciliation agreement and its success in achieving peace and encouraging those on opposite sides of the conflict to cooperate and govern together, if not quite to forgive each other. The remainder of the chapter traces the role of Athenian legal institutions in the reconciliation. I argue that Athens’ unique legal culture permitted the Amnesty to be implemented in a way that promoted unity while at the same time avoiding a sense of impunity at the local level. Court rhetoric helped construct a unifying collective memory of the tyranny. At the same time, indirect legal sanctions for collaboration in unrelated lawsuits and examinations of incoming magistrates minimized resentment at the local level by providing some limited accountability. And Athens’ civic institutions, including courts, helped repair individual social relationships by forcing former oligarchs and democratic rebels to work together productively.

I. The Terror

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66 On the extraordinary nature of modern transitional justice, see, e.g., Teitel 2000:4-9. For an argument that modern transitional justice is not different in kind from ordinary domestic law, see Posner & Vermeule 2004.
Between September 404 and May 403 the Thirty Tyrants executed approximately 1500 Athenians, drove out of the city and confiscated the property of thousands more, and terrorized the resident alien population. According to one contemporary historian, more Athenians were killed by the Thirty in less than a year than were killed in ten years during the Peloponnesian War. What follows is a basic account of the violence, with a particular emphasis on what we can discern about the level of complicity of various elements of the population. Although there are discrepancies in the sources and many facts about the oligarchic period are still contested by historians, particularly the chronology of events, these debates are not relevant to our story and I will largely avoid them.

Accession of the Thirty and judicial murder

The Athenian Assembly had little choice in the initial appointment of the Thirty. The Athenians had been soundly defeated by the Spartans and were literally starving because of a Spartan blockade when they agreed to surrender, tear down their walls, and hand over most of their fleet. Under pressure from the Spartan commander, the Assembly acceded to the local oligarchic faction and appointed thirty men to draft a constitution in accordance with the ancestral laws (patrioi nomoi). Once in power, the Thirty ignored the order to draft a constitution and instead appointed magistrates and a new Council of 500 from among their
supporters. Even more ominous, they hired 300 “whip-bearing servants” to carry out their orders and intimidate the populace. While it is not clear whether the Assembly decree appointing the Thirty authorized them to govern Athens temporarily until the new constitution was drafted, there is no question that by refusing to issue a constitution and taking complete and indefinite control over the government the Thirty crossed the line into illegal rule.

A major element in the Thirty’s reign of terror was judicial murder. The jury courts had been suspended during the war and were not revived by the Thirty. Instead, they tried opponents before the Council of 500. Our sources generally do not specify the charges, but death appears to have been the only possible penalty. From the beginning, the trials appear to have been a farce. One description of a trial held soon after the Thirty rose to power against men who had opposed the peace treaty with Sparta recounts the intimidating atmosphere, as the secret ballot was dispensed with and members of the Council cast their votes in front of the Thirty:

The Thirty were seated on the dais. Two tables were set out in front of them, and one had to cast one’s vote not into voting urns but openly on these tables, with the vote to convict going on the further table: so how could any of them [i.e., the defendants] be rescued? In a word, the death penalty was passed on all who went to the Council-chamber to face trial.

At first, the Thirty executed only a small number of political opponents and sycophants (men known for bringing frivolous prosecutions). Despite the procedural irregularity of these trials, both Xenophon and the Aristotle’s *Constitution of the Athenians* report that these actions

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74 Ar. Ath. Pol. 35.1; Xen. Hell. 2.3.11.
75 Ar. Ath. Pol. 35.1.
76 The subject of politeousousi in Xenophon’s (Hell. 2.3.2) description of the Assembly decree is unclear, but may refer to the Thirty. For discussion, see Ostwald 1986: 477-478 & n.70; Krentz 1982: 50.
77 Lys. 13.36.
were widely popular.\textsuperscript{78} Over time, the executions multiplied, and, with them, opposition to the regime: Xenophon describes the “great numbers continually—and unjustly—put to death,” causing “many to band together and wonder what the state was coming to.”\textsuperscript{79}

*The creation of the 3000 and widespread extrajudicial killings*

Theramenes, one of the Thirty, opposed the prosecutions, arguing that the terror tactics were alienating potential supporters and weakening the regime. In response, the Thirty agreed to widen their base of support slightly by drawing up a list of 3000 citizens who were to share in the government, disenfranchising the remaining three-quarters of the population.\textsuperscript{80} To the extent we can discern the motivations of the Thirty, they appear to have wanted to establish a society along the Spartan model, in which a narrow group of elite *homoioi* would exercise citizenship rights, relegating the rest of the population to a second-class status analogous to the Spartan *perioikoi* who conducted commerce and served in the army but were denied the vote.\textsuperscript{81} The 3000 appear to have been hand-picked by the Thirty.\textsuperscript{82} In practice, the 3000 did not play an active role in the government; we know of only one meeting of the full 3000 and another involving all hoplites and cavalry on the list, both of which were held after the democratic opposition had gained the upper hand and the Thirty was on the defensive.\textsuperscript{83}

\textsuperscript{78} Xen. *Hell.* 2.3.12; Ar. *Ath. Pol.* 35.3.
\textsuperscript{79} Xen. *Hell.* 2.3.20-22.
\textsuperscript{80} Xen. *Hell.* 2.3.18-22; Ar. *Ath. Pol.* 36.1-2.
\textsuperscript{82} There does not seem to have been a transparent standard such as a property qualification; we are told that the Thirty kept the list secret for a long time and the altered the status of several individuals before it was finally published. Ar. *Ath. Pol.* 36.2.
\textsuperscript{83} Xen. *Hell.* 2.4.23; Ar. *Ath. Pol.* 38.1; Xen. *Hell.* 2.4.9.
The consequences of exclusion from the list of 3000 went beyond the humiliation of formal disenfranchisement. The Thirty announced that anyone not in the 3000 could be killed by the Thirty without trial, while members of the 3000 had a right to a trial before the Council.\textsuperscript{84} Not long after the list of 3000 was published, the Thirty collected the arms of the disenfranchised and began a brutal killing spree.\textsuperscript{85} Xenophon suggests that many of the murders were motivated by personal enmity or a desire to confiscate property rather than political opposition.\textsuperscript{86} At one point the Thirty decided to kill a number of metics (resident aliens), perhaps out of xenophobia, perhaps because they supported the opposition, or perhaps simply to confiscate their property.\textsuperscript{87} Isocrates claims that over three months the Thirty executed more people without trial than the number of subjects the Athenians put on trial during the entire period of its empire.\textsuperscript{88}

\textit{Informers and citizens’ arrests}

In addition to acquiescence to the senseless violence, ordinary citizens sometimes served as informers or assisted in arrests. However rigged they might be, trials before the Council required some evidence, which could be provided by willing or unwilling informers. The trial of one such informer after the restoration of the democracy survives.\textsuperscript{89} Predictably, it seems that the defendant asserted that he testified only under duress, while the prosecution argues that he informed willingly, pointing out that he had a chance to escape by fleeing Athens.

\textsuperscript{84} Xen. \textit{Hell.} 2.3.18; Ar. \textit{Ath. Pol.} 36.1. But the Thirty did not let even this minimal protection for the 3000 stand in the way of their attempts to rid themselves of opposition; when it became clear that the Council would not vote to condemn Theramenes, the Thirty ended the trial before the vote, struck him from the list of 3000, and put him to death. Xen. \textit{Hell.} 2.3.50-51.

\textsuperscript{85} Ar. \textit{Ath. Pol.} 37.2; Xen. \textit{Hell.} 2.4.1.

\textsuperscript{86} Xen. \textit{Hell.} 2.3.20-21.

\textsuperscript{87} Xenophon (2.3.20-22) and Lysias (12.4) attribute the Thirty’s actions to greed; for an argument that political opposition was the true motive, see Krentz 1982: 80-82; on possible xenophobia, see Ostwald 1986:487.

\textsuperscript{88} Isoc. 4.113.

\textsuperscript{89} Lys. 13.
but did not take it. Interestingly, the prosecutor’s narrative reveals that informers were often subject to considerable pressure. He recounts how another man, Menestratus, turned informer only after he was arrested on a capital charge in order to gain immunity; he praises the heroism of one Aristophanes who refused to inform on others and was executed as a result; and his case is predicated on the notion that the defendant would have to go into voluntary exile to avoid serving as an informer.

The guilt of citizens who actually carried out the arrests and handed them over to the Thirty is murkier. In Plato’s *Apology*, Socrates recounts how the Thirty ordered him and four others to arrest Leon of Salamis so that he could be put to death. He states that the Thirty “issued such orders to many men, since they wanted to implicate as many as they could in their crimes.” While the four others arrested Leon, Socrates simply went home, refusing either to take part in the arrest or to try to save or warn Leon. Socrates was not punished for his disobedience. Perhaps, as Socrates claims, the Thirty would have killed him in retaliation if the regime had not been close to collapse. Perhaps Socrates’ special stature and association with Critias saved him. Or perhaps failure to carry out an arrest was less likely to provoke retaliation. One source suggests that during the killing spree some citizens took revenge on personal enemies by initiating summary arrests. Lawcourt speakers after the restoration of the democracy at times declare their clean record during the oligarchy by stating not only that they were not members of the Council or officers under the Thirty, but also that they carried out no arrests, which suggests either that citizen arrests were common or were regarded as particularly blameworthy, or both. It is interesting that speakers do not generally state that they did not serve

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90 Lys. 13.31, 52.  
91 Lys. 13.52-61.  
92 Pl. *Apol.* 32c-d.  
93 Lys. Fr. 9.  
94 Lys. Fr. 9; 25.15.
as informers; while having been an informer may have been considered morally blameworthy, informers do not appear to have been considered part of the oligarchy in the same way that those who carried out arrests were. It seems that while it was understood that many informers testified under true threat of death, there was a suspicion that at least some citizens who carried out arrests initiated the action or could have avoided carrying out the Thirty’s orders.

_Involuntary exile, massacre at Eleusis, and the rise of the democratic opposition_

At some point after the extra-judicial murders of those excluded from the 3000, the Thirty took the further step of banning everyone not in the 3000 from the city (astu) and confiscating their property. 95 Most settled in the Piraeus, the port and commercial center of Athens; some may have gone into exile. Some sources suggest that they were settled involuntarily in the Piraeus, which would make sense given the Thirty’s apparent ambition to give them a position similar to the perioikoi; another source suggests that they were simply excluded from the city and that many voluntarily moved to the Piraeus. 96

By this point an opposition force made up of a small number of citizens and a larger group of mercenaries and metics had formed. 97 When the resistance won some victories, the Thirty became nervous and decided to take the village of Eleusis, a town within Athens’ territory, as a possible refuge. Xenophon describes in detail how the Thirty murdered the male inhabitants in order to take control over the town. 98 The cavalry ordered the male Eleusinians to register, pretending that they were trying to determine how large a garrison to leave in the town.

95 Lys. 25.22; Xen. _Hell_. 2.4.1.
96 Compare Diod. 14.32.4 and Justin 5.9.12 to Xen. _Hell_. 2.4.1.
97 Krentz 1982: 83-84.
98 Xen. _Hell_. 2.4.8-10.
After each man registered, he was ordered to walk out the city gate, where each was arrested and brought to Athens. Xenophon continues:

The next day they summoned registered hoplites and the cavalry too. Critias rose and said: "Gentlemen, we are creating this government no less for your sake as for ourselves. Consequently, just as you will share in honors, so too you will share in dangers. You must convict the men from Eleusis who have been arrested on order that you take heart and feel fear in tandem with us."

Those present were then instructed to vote in the open, in the presence of both the Thirty and armed Spartan guards who had been requested to help the oligarchy keep control of Athens. As a result the nearly the entire male population of Eleusis was executed. The Thirty also massacred the inhabitants of Salamis, though our sources do not report how the murders were carried out or whether a similar vote was arranged.

When the opposition forces approached the Piraeus, many of the citizens excluded from the city, as well as metics, foreigners, and even slaves joined the fight. The rebels routed the Thirty in Piraeus, killing two of their leaders, including Critias. Following this defeat, the 3000 met in Athens and voted to replace the Thirty with a board of Ten; the deposed members of the Thirty settled in Eleusis.

The Spartans at first

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99 Xen. Hell. 2.4.9.
100 Xenophon and the Ath. Pol. offer very different accounts of when the Spartan garrison was called in: according to Xenophon (Hell. 2.3.14) they were called in very early in the reign of the Thirty, while the Ath. Pol. (37.2) states that they did not arrive until much later, after the Thirty was seriously threatened.
101 Lys. 12.52; 13.44; Diod. 14.32.4.
102 Ar. Ath. Pol. 38.3; 40.2; Diod. 14.33.4; Xen. Hell. 2.4.25.
103 Xen. Hell. 2.4.23-24; Ar. Ath. Pol. 38.1.
104 Xen. Hell. 2.4.28.
blockaded the Piraeus, but then changed strategy and the Spartan commander Pausanias negotiated a reconciliation agreement between the two parties.105

Forms of collaboration

Before turning to the details of the reconciliation agreement, it may be helpful to briefly summarize the complicity of various segments of the population in the violence committed during the oligarchy. Of course, members of the Thirty, the Eleven (the officials charged with carrying out executions), and the other public officials bore the most responsibility. Members of the Council sent countless innocents to death. Some citizens gave testimony that led to executions, often in order to save their own lives. Other citizens arrested men and handed them over to the Eleven to be killed without trial, some under threat of death and some on their own initiative. The cavalry arrested the men of Eleusis, and the entire armed forces voted to condemn them. And much of the population stayed in the city and did not object during the unjust judicial murders and massacres of hundreds of citizens without trial. As already noted, the Thirty seem to have tried to implicate as many people as possible in their crimes.106 The overall picture that emerges is one of widespread collaboration, or at least acquiescence, among the citizenry in the mass violence orchestrated by a small but highly intimidating, repressive leadership.

II. “Reconciliation”

The Athenians remembered the reconciliation agreement as a complete success,107 an act of generosity and unity that set Athens apart from other city-states.108 One orator told the

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105 Xen. Hell. 2.4.28-43.
106 Pl. Apol. 32c; Xen. Hell. 2.4.9.
107 Ar. Ath. Pol. 40.2; Xen. Hell. 2.4.43; Andoc. 1.140; Isoc. 18.31-32
Athenian jury, “the whole of Greece regards you as very generous and sensible men, because you didn’t devote yourselves to revenge for the past, but to the preservation of the city and the unity of its citizens.” The reconciliation agreement was successful in the sense that Athens avoided the widespread bloodshed that often accompanied civil wars in other Greek states and established a stable democracy that endured for the remainder of Athens’ history as an independent state. But while Athenians on opposite sides of the conflict found a way to live and govern together in the restored democracy, our sources reveal that private, human resentment over actions taken during the oligarchy remained strong for decades after end of the civil war.

The Terms of the Reconciliation Agreement

The terms of the reconciliation agreement were less a product of generosity than military necessity. Although the democrats had gained the upper hand at the time of the settlement, the arrival of Spartan forces to bolster the oligarchs threatened the democrats’ success. Pausanias, the Spartan commander, presided over an agreement that guaranteed the restoration of the democracy but also treated the oligarchs and their supporters with relative leniency.

The highest officials of the oligarchy—the Thirty, the Ten who succeeded the Thirty, the Eleven who carried out executions, and the governors of the Piraeus—were given the option of forfeiting their Athenian citizenship to live autonomously in the village of Eleusis with any of their supporters who wished to join them. Remarkably, the agreement not only gave the former oligarchs control over the village whose men they had massacred; it also forced current

108 Andoc. 1.140; Isoc. 18.31-32.
109 Andoc. 1.140.
110 Xen. Hell. 2.4.30-35.
111 Ar. Ath. Pol. 39. The émigrés were originally given ten days to register and twenty days to move to Eleusis, but apparently Archinus cut the emigration period short to keep more citizens in Athens. Ar. Ath. Pol. 40.1.
inhabitants of Eleusis to sell their land if one of the settlers wished to buy it.\textsuperscript{112} This experiment in splitting Athens into two autonomous settlements was short-lived; when the Athenians learned two years later that the former oligarchs were hiring mercenaries, the Athenians killed the opposing generals and reintegrated Eleusis into the Athenian state.\textsuperscript{113}

Under the reconciliation agreement the top oligarchic officials who did not want to relocate to Eleusis could remain in Athens provided they underwent an \textit{euthuna}, a trial-like accounting of their conduct in office, and accepted any punishment meted out by the court.\textsuperscript{114} The \textit{euthuna} was not an extraordinary transitional justice institution but the standard procedure faced by all outgoing officials under the democracy both before and after the revolution. The only adjustment made to the procedure was that the oligarchs were to be judged not by a jury drawn from all adult male citizens but from citizens with taxable property,\textsuperscript{115} a form, as one scholar has put it, of “loser’s justice.”\textsuperscript{116} The procedure appears to have been as even-handed in practice as advertised: at least one member of the Thirty appears to have consented to, and passed, an \textit{euthuna},\textsuperscript{117} and the \textit{Constitution of the Athenians} tells us that several of members of the Board of Ten who ruled at the end of the oligarchy passed their accounting.\textsuperscript{118}

\textsuperscript{112} Ar. \textit{Ath. Pol.} 39.3. \\
\textsuperscript{113} Xen. \textit{Hell.} 2.4.43. \\
\textsuperscript{114} Ar. \textit{Ath. Pol.} 39.6. \\
\textsuperscript{115} Ar. \textit{Ath. Pol.} 39.6. \\
\textsuperscript{116} Elster 2004:22. \\
\textsuperscript{117} Lys. 10.31 states that someone brought a homicide charge against one or more members of the Thirty in 399/398, which suggests that at least one oligarch passed his accounting and remained in Athens. The prosecution speech at the accounting of another member of the Thirty, Eratosthenes, survives (Lys. 12); the outcome is unknown. One scholar has argued that passages in this speech suggest that there was more than one defendant at this accounting, but as Krentz (1982:122) points out, “the plural references can be understood as Lysias’ attempt to condemn by association.” \\
\textsuperscript{118} Ar. \textit{Ath. Pol.} 38.4.
Everyone except the top officials under the Thirty who refused to undergo an accounting was granted amnesty under the agreement. The Assembly swore an oath *me mnēsikakein*, which is sometimes translated “not to remember past wrongs,” but is more accurately translated “not to bear a grudge” or “to cancel past grievances.” The amnesty banned physical retaliation and lawsuits against those who committed crimes during the oligarchy. Each year, the Council swore not to accept summary arrests that violated the amnesty, and jurors similarly swore to uphold the law and not to bear a grudge for events under the Thirty. The Amnesty had one exception: charges of homicide and wounding for actions taken during the oligarchy could proceed provided that the defendant killed or wounded “with his own hand” (*autocheir*). But this exception, probably included for religious reasons, had little practical effect. Nearly all of those responsible for criminal violence committed during the civil war were shielded by the Amnesty because the actual executions were committed by the Board of Eleven, who were excluded from the Amnesty and who presumably all fled to Eleusis or into exile after the reconciliation. After the reintegration of Eleusis in 401/400, the Amnesty was reaffirmed to make clear that the terms of the Amnesty extended to those who had relocated to Eleusis.

**Implementation and resistance**

119 Ar. *Ath. Pol.* 39.5; Andoc. 1.90.

120 Carawan (2002:3; 2006:6; 1998:129-131) examines the use of the phrase in other Greek treaties and agreements. See also D. Cohen 2001:339; compare Loraux 2002:85-91, who translates it as “not to recall past misfortunes,” and emphasizes that the Amnesty was a form of amnesia.

121 Andoc. 1.90-91.


123 Xen. *Hell.* 2.4.43. There is some debate about whether the Amnesty was part of the reconciliation of 403/2 and reaffirmed after the fall of Eleusis, which would accord with the account given in the *Ath. Pol* (39.6) and Andocides (1.90-91), or whether the Amnesty was only instituted after the fall of Eleusis, which is how Xenophon’s (*Hell.* 2.4.43) narrative presents it. For discussion, see Loening 1987:26-28; Carawan 2006.

124 Presumably those in Eleusis who were excluded from the Amnesty, such as the Thirty and the Eleven, went into voluntary exile to escape punishment. We are not aware of any member of the Thirty or the Eleven returning to Athens after the fall of Eleusis. See Loening 1987:116-117; Krentz 1982:122.
Aside from returning the land that had been confiscated, the reconciliation agreement offered little to those who had been victimized by the Thirty. Not surprisingly, some Athenians resisted complying with the Amnesty. We are told of at least one former informer who, though covered by the Amnesty, opted to go into exile because of fear of retaliation. And we hear of one man who immediately violated the Amnesty, probably by taking physical vengeance, prompting one of Athens’ leaders to make an example of him by having the Council execute him without trial. Aristotle suggests that this measure successfully deterred those intent on private vengeance. Attempts to bring private suits in violation of the Amnesty prompted the Athenians to create a new procedure, the *paragraphe*, which allowed a defendant to challenge the legality of a prosecution and imposed a financial penalty on the prosecutor if the case was thrown out. And we know of a few attempts, at least one of which appears to have been successful, to use creative legal arguments to get around the Amnesty and hold informers responsible for judicial murders committed under the Thirty. But despite some resistance, it appears that the Amnesty

125 All real property that had been confiscated was to be returned, as were movables if they had not been resold. Lys. Fr. 7. In the case of real property that had been sold, it is possible that the victims would have to pay some compensation to the buyer, but our text is too fragmentary to determine for certain. For discussion, see Todd 2000:368; Loening 1987:51-52.
126 Lys. 6.45. Todd (2000:74 n.34) points out that one of Lysias’ lost speeches is entitled “On the Death of Batrachus,” which, if it refers to the same man, may suggest that he was tracked down and killed by his enemies in Athens.
128 Ar. *Ath. Pol.* 40.2. Nepos (*Thrasyb.* 3.3.) also states that Thrasybulus stopped some of the returning democrats from killing their enemies.
129 Ar. *Ath. Pol.* 40.3.
130 Isoc. 18.2-3. There is some question about whether the *paragraphe* procedure was introduced soon after the reconciliation or only after the fall of Eleusis. For discussion of the dating and application of the *paragraphe* procedure, see Ostwald 1986:510; MacDowell 1971; Carawan 2006:75; Loening 1987:99-102; Harrison (1971): 106-124.
131 Lys. 13.55-57 argues that the informer Menestratus was tried and condemned.
was generally honored in the sense that very few prosecutions were brought for the thousands of confiscations, murders, and other crimes committed under the Thirty.\footnote{Xen. Hell. 2.4.43 states that the demos abided by its oaths; the speaker in Isocrates 18 (22-23) cites a case in which the defendant presented no defense other than immunity based on the Amnesty and was acquitted, and describes how two powerful individuals refrained from bringing suit to recover money lost during the oligarchy because of the Amnesty; and Andocides 1.94 states matter-of-factly that Meletus has immunity for his arrest of Leon of Salamis due to the reconciliation.}

Although the amnesty shielded most wrongdoers from direct prosecution, the peculiar features of the Athenian court system left room for indirect accountability. In the generation after the civil war, litigants often attacked their opponents’ conduct under the Thirty as a form of character evidence in unrelated cases. Similarly, one’s allegiance and behavior during the oligarchy became an important part of the judicial examination of incoming public officials (\textit{dokimasia}). It appears that neither tactic was deemed to violate the terms of the Amnesty, though they were obviously at odds with the spirit of the reconciliation agreement.\footnote{Dorjahn 1946:32.} As much as sixteen years after the end of the civil war, one candidate for the archonship was rejected and the alternate candidate vigorously challenged based on their conduct during the oligarchy.\footnote{Lys. 26.13-15. For discussion, see Todd 2000:271-273.} Clearly, the reconciliation agreement did not elicit total forgiveness from victims or completely erase resentment toward citizens who had participated in or collaborated with the oligarchy. Nevertheless, the settlement did succeed in quelling violence, limiting lawsuits, and restoring a functioning democracy.

\section*{III. The Role of Legal Institutions in Reconciliation}

In comparison to the experience of other Greek states, Athens’ recovery from civil war stands out as a shining success. In this section, I explore how Athenian legal institutions helped
foster reconciliation and a peaceful transition to democracy. I argue that Athens’ unique legal and political culture permitted the terms of the reconciliation agreement to be implemented in a way that promoted unity and social solidarity while at the same time recognizing the need to avoid a sense of impunity for collaborators at the local or private level. First, in the generation following the war, speeches in the Athenian courts helped cultivate reconciliation by creating a collective memory of the “misfortunes” that downplayed the extent of collaboration and lionized Athens for the generosity embodied in the Amnesty. Second, through the use of character evidence in unrelated cases and challenges to incoming officials at the dokimasia hearings, the Athenian courts provided some measure of individualized accountability at the private level, while also encouraging former collaborators to publicly pledge their allegiance to the democracy. Finally, the highly participatory nature of Athenian civic institutions—not just courts, but also polis-wide and local deliberative assemblies—helped repair local relationships by forcing individuals on opposite sides of the conflict to work closely together.

Before discussing these three mechanisms of reconciliation in more detail, I would like to emphasize one broader point, which is that the Athenian legal system was able to perform these functions without any significant change in its culture or design—a continuity that gave it a distinct advantage over modern institutions charged with dispensing “transitional justice.” The broad notion of relevance and contextualized approach to adjudication characteristic of Athenian

136 In this way, Athenian transitional justice mechanisms were not epiphenomena but causal factors in the success of the reconciliation. For a similar argument in the modern context, see Posner and Vermeule 2004:770; Teitel 2000:4-9. Gowder (2015) offers a different account of how Athens’ transitional justice mechanisms played a causal role in the success of the reconciliation: he argues that the Athenian juries’ adherence to the Amnesty following the civil war signaled the Athenians’ commitment to the rule of law, thus discouraging future oligarchic threats.

137 Andoc. 1.140.

138 Excellent discussions of how Athenian court rhetoric constructed a collective memory of the civil war include Wolpert (2002: 75-99) and D. Cohen (2001). For a discussion of how court rhetoric addressing the civil war and amnesty influenced the Athenians’ notions of law, see Wohl 2010:201-242.

139 For a discussion of possible lessons for modern transitions that can be drawn from the Athenian experience, see Lanni 2010.
courts\textsuperscript{140} made them a more effective forum for the creation of collective memory than modern war crimes tribunals. In modern tribunals, the desire of prosecutors or judges to use the trial to create a shared understanding of the etiology of administrative massacres is inevitably constrained by the law’s narrow focus on the conduct and responsibility of the individual defendants.\textsuperscript{141} Athenian court procedures, by contrast, could comfortably accommodate these non-traditional goals. Moreover, in the modern context, the creation of special transitional justice procedures—whether courts, truth commissions, or procedures for administrative penalties—inevitably raises questions of legitimacy for two reasons. First, they are often perceived to be politicized because they are ad hoc institutions designed to address a specific political crisis.\textsuperscript{142} Second, modern transitional justice institutions subject individuals to procedures and, sometimes, substantive legal standards that did not exist at the time of conduct that is later challenged.\textsuperscript{143} By contrast, Athens’ legal response to the atrocities of the Thirty utilized only pre-existing democratic legal procedures, precisely because these procedures could accommodate transitional justice goals. In this way, “transitional justice” in Athens was not a departure from but rather an integral part of the restored democratic order.

Was Athenian legal culture the most important element in the success of the reconciliation? Definitive proof is impossible, but it is worth pointing out that the other obvious potential factors cannot completely explain Athens’ peaceful transition. Political scientists in the realist tradition often argue that transitional justice measures are epiphenomenal, and that successful reconciliations can be traced to an equilibrium between well-balanced opposing forces. This explanation does not work for the Athenian case. While the initial settlement did

\begin{itemize}
\item \textsuperscript{140} On which, see generally Lanni 2006.
\item \textsuperscript{141} E.g., Koskenniemi 2002:13; Minow 1998:46-47.
\item \textsuperscript{142} Minow 1998:30-31.
\item \textsuperscript{143} On the problem of retroactivity, see Minow 1998:30-31; Teitel 2000: 11-26.
\end{itemize}
emerge from a stalemate between the rebels and the Spartan-backed oligarchs, once the settlement had been made the Spartans quickly exited the picture. There was no balance of power: the democrats were firmly in control and in a position to exact harsh retribution on the former oligarchs if they had chosen to do so. Moreover, the picture that emerges of postwar Athens is not of two opposing factions in equipoise but rather of a united restored democracy in which a fair number of former oligarchs played an active role. Second, it is true that after the loss of the empire Athens faced dire economic and military danger, and that it could not afford continued internal strife.\textsuperscript{144} And yet Thucydides provides examples of other cities in the grip of civil war who failed to act rationally, for whom, in his words, “revenge was more important than self-preservation.”\textsuperscript{145} Finally, some scholars argue that the constitutional reforms at the end of the fifth century removed the basis for oligarchic discontent.\textsuperscript{146} The significance of the reforms has divided classicists.\textsuperscript{147} While my view that the reforms did not meaningfully reduce popular sovereignty is open to debate, there is no question that at least in intellectual circles—Plato is the most prominent example—many remained discontented with the democracy and attracted to oligarchic forms of government. While we cannot determine precisely how much of Athens’ success can be attributed to the discourse in the courts, we will see that the courts clearly played an important role in unifying the Athenians and fostering cooperation and reconciliation at the city, local, and even individual level.

A. Courts and Collective Memory

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\begin{itemize}
\item ober 1989: 98-100.
\item Thuc. 3.82.
\item E.g., Elster 2004:14-15.
\item Compare, e.g., Ober 1989:95-103 with Ostwald 1986.
\end{itemize}
Legal procedures following administrative massacres can influence the society’s “collective memory” of the events, that is, the community’s shared understanding of the extent and reprehensibility of the atrocities and the relative culpability of different actors.\textsuperscript{148} Trials can serve as legal rituals, which, in the words of David Garland, “provide a kind of didactic theatre through which the onlooker is taught what to feel, how to react, what sentiments are called for.”\textsuperscript{149} While there is no blueprint for designing transitional justice institutions that will positively influence collective memory, the twentieth century offers some success stories.\textsuperscript{150} In Western Europe, for example, it has been found that the collective memory of the Holocaust (judged from opinion surveys and textbooks) is weakest and least accurate in those countries that conducted few or no postwar trials of collaborators.\textsuperscript{151} It is important to note that a society’s collective memory need not be historically “accurate” to generate social solidarity; the siege of Masada and the denial of extensive French collaboration during World War II are examples of shared historical fictions that are thought to have fostered solidarity.\textsuperscript{152} Similarly, we will see that the shared memory of the reign of the Thirty tyrants constructed in Athenian court discourse helped foster unity by denying the true extent of collaboration and by depicting the Amnesty as a gesture of pure benevolence rather than a deal struck between evenly-matched forces.

Despite the Amnesty, the reign of the Thirty was discussed frequently in Athenian courts in the generation after the civil war. At least one member of the Thirty, and several members of the Ten, underwent accountings \textit{(euthunai)} in court; the prosecution speech against Eratosthenes,

\textsuperscript{149} Garland 1990: 67 (quoted in Osiel 1997:38). See also Osiel 1997:24-58 for more discussion of the process through which collective memory is shaped.
\textsuperscript{150} On the difficulties facing conscious attempts to construct collective memory, see Osiel 1997:59-292.
\textsuperscript{151} Osiel 1997:229. The countries with the weakest collective memories are Austria, Poland, Italy, and the Netherlands.
\textsuperscript{152} Osiel 1997: 234-235 (Masada); 159-161 (France).
a member of the Thirty, survives.\textsuperscript{153} Allegations of wrongdoing during the oligarchy arose frequently in examinations of incoming public officials (\textit{dokimasia}); we have portions of two prosecution speeches and three defense speeches at these hearings.\textsuperscript{154} We also have speeches involving two prosecutions that appear to have violated the Amnesty: the prosecution of an informer for homicide, and the \textit{paragraphe} speech challenging as illegal under the Amnesty a private suit attempting to recoup money confiscated during the oligarchy.\textsuperscript{155} In addition to trials that centered on events during the civil war, several court speeches in unrelated cases discuss the reign of the Thirty, the Amnesty, or the litigants’ conduct during the oligarchy.\textsuperscript{156}

Of course, the courts were not the only forum for constructing collective memory. War memorials erected after the restoration of the democracy and the funeral orations honoring the war dead (and praising Athens’ superior character and form of government) that were delivered annually when Athens was at war also contributed to Athens’ shared understanding of the tyranny and the Amnesty.\textsuperscript{157} Despite the importance of drama and the arts in many modern post-conflict societies, Athenian drama was likely less significant in post-war Athens. From early on, tragedies were almost always set outside Athens, and often concerned mythological themes. When Athenian tragedy does address contemporary politics, it does so only obliquely and ambiguously. And while comedies in the fifth century often parodied issues of the day, by the fourth century—the age of “middle comedy”--comic subjects had turned from political commentary to domestic life. In any case, no forum could rival the courts as a medium of

\textsuperscript{153} Lys. 12.
\textsuperscript{154} Prosecution speeches: Lys. 26; 31; Defense speeches: Lys.16; 31; Fr. 9 \textit{For Eryximachus}.
\textsuperscript{155} Lys. 13; Isoc. 18.
\textsuperscript{156} E.g., Pl. \textit{Apol} 32 c-d; Lys. 18.10; 24.24; 25.15; 28.12;30.12; Andoc. 1.140.
\textsuperscript{157} For discussion of memorials, see Wolpert 2002: 87-90. The only surviving epitaphios from the immediate postwar period is Lysias 2, which does praise the Athenians’ decision to forgo punishment in favor of unity (Lys. 2.60-65). For a brilliant study of how funeral orations helped construct a semi-official (and misleading) history of Athens, see Loraux 1986.
collective discourse regarding the civil war: these courts met approximately 200 times a year;\textsuperscript{158} the importance of character evidence made discussion of the civil war likely in cases tried in the postwar period;\textsuperscript{159} and hundreds of jurors were present at each case.

The discourse in the courts fostered reconciliation in three ways, which I will discuss in turn: (1) discrediting the oligarchy by depicting the horrors of the tyranny; (2) constructing unity by downplaying the extent of collaboration and focusing blame on the Thirty; and (3) praising the Amnesty as characteristic of the Athenians’ unusual wisdom and benevolence.\textsuperscript{160}

\textit{Discrediting the Oligarchy}

Athenian trials publicized the crimes committed by the Thirty, thereby discrediting the former regime. The broad notion of evidence in Athenian courts permitted prosecutors to range beyond the specific charges against the defendant to describe the larger pattern of tyranny. The prosecution of an informant whose testimony led to a judicial murder early in the Thirty’s reign, for example, includes discussion of atrocities that did not involve the defendant and were committed after the events in question, including the massacres of Salamis and Eleusis, the unjust arrests and executions, the confiscations of property, and the expulsion of all but the 3000 from the city.\textsuperscript{161} The trial at Eratosthenes’ accounting provides another example. The prosecution speech includes a detailed and poignant description of the murder of the speaker’s brother in the massacre of the metics that emphasizes the outrageousness of the Thirty, who had the audacity to

\textsuperscript{158} Hansen 1999:186.
\textsuperscript{159} On the importance of character evidence, see Lanni 2006:41-74.
\textsuperscript{160} I am indebted to two excellent discussions of the court speaker’s rhetorical strategies when discussing the civil war: D. Cohen 2001 and Wolpert 2002.
\textsuperscript{161} Lys. 13.43-47.
rip the earrings directly from the ears of the victim’s wife and refused to let the family have one of the victim’s cloaks to give him a proper burial. But the speech also includes a detailed account of how the oligarchy came to power and a recitation of the collective crimes of the Thirty. While the speaker opines that many prosecutors would be required to describe all the crimes of the Thirty, the speech does manage to provide a broad-ranging account of the crimes committed under the oligarchy and an assessment of where the primary responsibility should lie.

These public airings in court of the horrific crimes of the oligarchy helped to discredit not only the former regime, but also oligarchic opposition to the democracy more generally. The repressive rule of the Thirty, with its rigged trials and extra-judicial murders, made it easy for democrats to associate oligarchy with lawless tyranny. Although oligarchic sympathies survived and even thrived in elite intellectual circles in the fourth century, oligarchy became a political non-starter after the civil war. As Cohen points out, decades later even those too young to have been involved in the Thirty could be tarred with accusations of having oligarchic tendencies. The prosecutor in an assault case derides his opponent, “Even if he is younger than those who held power then [i.e., under the oligarchy], he has the character of that government. These were the natures that betrayed our empire to the enemy, razed the walls of our homeland, and executed fifteen hundred of our citizens without trial.”

\[\textit{Constructing Unity}\]

\[\begin{align*}
162 \text{ Lys. 12.17-19.} \\
163 \text{ Lys. 12.70ff.} \\
164 \text{ Lys. 12. 95-96.} \\
165 \text{ Lys. 12.99.} \\
166 \text{ For discussion, see D. Cohen 2001:347-349.} \\
167 \text{ Isocrates, Plato, and Aristotle are prominent examples.} \\
168 \text{ D. Cohen 2001:347-349.} \\
169 \text{ Isoc. 20.11; for discussion see D. Cohen 2001:349.}
\end{align*}\]
Like many modern transitional justice legal procedures, then, Athenian trials helped to instill a shared sense of condemnation of the crimes committed by the former regime. But while many modern tribunals or truth commissions seek in part to encourage the broader public to engage in self-scrutiny and confront their own complicity, Athenian court speakers did nothing of the kind. In the decades after the civil war, litigants who discussed the violence under the oligarchy took pains to focus blame narrowly on the Thirty while downplaying the extent of collaboration. This understanding of events was quite explicit in the speeches. To cite one stark example: in discussing the massacre of the metics (resident aliens) at the accounting of Eratosthenes, the prosecutor states, “the rest of the Athenians [i.e. those not in the Thirty], it seems to me, could have a plausible excuse for what happened by laying the blame on the Thirty.” Both defendants and prosecutors in suits involving participation in the crimes of the oligarchy take this approach, depicting the entire citizenry as opponents and victims of the Thirty. Undoubtedly the speakers (and their speechwriters) chose this tack because they thought that it would be well received by the jurors. But the effect of this rhetorical strategy was to help construct a misleading collective memory of a unified populace victimized by the tyrannical Thirty.

Lysias’ depiction in the accounting trial of Eratosthenes of the process by which the Thirty came to power provides an example. His narrative places blame squarely on Theramenes, a member of the Thirty, and minimizes the role of the Athenians who did, after all, vote the Thirty into office. Lysias’ account of the Assembly meeting minimizes the citizens’

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170 The trial of the Auschwitz guards seems to have had this effect. Osiel 1997:192-193. The 1983 junta trial in Argentina also seems to have been premised on this idea, but was less successful. Osiel 1997:194-195.
171 Lys. 12.28.
172 Prosecutors: Lys. 26.2, 16; Lys. 12.30; defendants: Isoc. 18.2 (the speaker is the plaintiff in the paragraphe, but the defendant in the sense that he is being charged with wrongdoing under the oligarchy).
173 Lys. 12.70-75.
responsibility as much as possible: he states that many in the Assembly initially opposed the proposal, and even after the Spartan general threatened to destroy the Athenians if they did not acquiesce, some Athenians got up and left the Assembly, others stayed but remained silent, and only a “few evil-minded scoundrels voted the proposal through.”

Perhaps most striking is the historical fiction, employed in several speeches, that every member of the jury was a member of the resistance in the Piraeus and/or a direct victim of the Thirty. As several scholars have pointed out, although most jury panels must have included members of the 3000 and other types of collaborators, speakers regularly speak to the jury as former men of the Piraeus, discussing how the jurors, addressed as “you,” were driven out of the city, had their property confiscated, houses invaded and family members taken, took part in freeing the city, and returned from the Piraeus.

A rare exception is a passage in Lysias’ prosecution of Eratosthenes at his accounting, in which he briefly addresses “those from the city (astu)” and “those from the Piraeus” separately. But even this passage has a unifying message. Lysias depicts the men who remained in the city as innocent victims forced to fight against their own kin: “you who are from the city should realize that the defendants ruled you so badly that you were compelled to fight a war against your brothers, your sons, and your fellow citizens…. The prosecutor goes on to emphasize that the former men of the city have gone from being slaves of the oligarchy and their Spartan garrison to participating in governing the polis and joining with the democrats to protect it from external threats:

174 Lys. 12.75.
175 E.g., Lys. 12.30, 57; 13.47; 26.2; Andoc. 1.81; Isoc. 18.2. For discussion, see Wolpert 2002: xv, 90-94; D. Cohen 2001:341.
176 Lys. 12.92. In a similar vein, the speaker in Isocrates 18.17 emphasizes that while some citizens participated in arrests and property confiscations they did so only out of compulsion.
“Realize that you were ruled by the defendants, who were the worst of men; realize too that you now share the government with good men, you are fighting against external enemies, and you are taking counsel for the city; and remember the mercenaries [i.e., the Spartan garrison employed by the Thirty] that the defendants established on the Acropolis as guardians of their power and of your slavery.”177

One speaker goes so far as to state that the men who did not actively participate in the killings but remained in the city can claim credit for the overthrow of the oligarchy, suggesting, contrary to our historical evidence, that victory was secured by widespread political opposition within the city.178 To be sure, the use of these rhetorical topoi in court did not erase individual victims’ resentment against specific collaborators who had done them harm. But the collective memory of the oligarchy constructed in the courts may have made victims more willing to trust men whose level of active collaboration was minimal or unknown to them. For those who had remained in the city, the discourse in the courts offered a rationalization for past collaboration and provided comfort that there was a place for them in the restored democracy.

Praising Amnesty

Finally, court speeches in the years after the civil war helped create a myth of refounding in which the Amnesty, and the forgiveness that it implied, exemplified the Athenians’ superior character. To be sure, defendants accused of collaboration often defend the Amnesty on pragmatic grounds, arguing that taking retribution would endanger the democracy by alienating

177 Lys. 12.94.
former oligarchs. But speakers also praise the Amnesty in a way that made a powerful appeal to the Athenians’ honor. In these passages, the Amnesty is transformed from a concession made out of military necessity to an act of will that defines the Athenian democratic spirit. Speakers argue that the Athenians’ willingness to reject revenge earned them a reputation throughout Greece for extraordinary generosity, reasonableness, and wisdom. Under this reimagining, the Amnesty is not a reminder of the darkest period in Athenian history, but rather one of the high points worthy of celebration: the speaker in Isocrates 18 states, “while our ancestors accomplished many noble things, the city has won renown not least from these settlements. You can find many cities that have fought nobly in war, but no one could point to a city better advised with regard to civil strife. Moreover, of those activities that carry risk, one might ascribe the greatest part to luck, but no one would attribute credit for our moderation to anything other than our intelligence.” We can see evidence that this identification of the democracy with moderation took root: in the fourth century authors refer to the Athenians’ characteristic mildness or forbearance in contexts unrelated to the civil war. Again, it is difficult to imagine that these encomia of the Amnesty could induce victims to forgive individuals directly responsible for the murder of their kin. Nevertheless, the Amnesty--which was reaffirmed by collective oath each year by jurors and members of the Council and was widely praised in court speeches--may have had some expressive effect, encouraging the Athenians to live up to their

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179 E.g. Lys. 25.3-28; Isoc. 18.44; Andoc. 1.105. Quillin (2002) applies a model based on decision theory to argue that Athenian jurors rarely punished collaboration because of fear of a resurgence of oligarchic sentiment.
180 Isoc. 18.2, 31-32; Andoc. 1.140; Aesch. 2.176. D. Cohen 2001:354-355 notes that the participation of Sparta in the reconciliation agreements is conspicuously absent from these passages.
181 Andoc. 1.140; Aesch. 2.176.
182 Isoc. 18.31-32.
183 E.g. Ar. Ath. Pol. 22.4; Lys. 6.34. For discussion, see DeBrunner Hall 1996.
184 On the differing ability of law to have an expressive effect on behavior based on the relative importance and centrality of the issue to the subject’s identity, see chapter 3.
185 For discussion of the expressive effect of law, see Chapter 3.
myths and take a more conciliatory attitude toward former collaborators who did not personally cause them harm.

B. Courts and Accountability

A recurring theme in studies of modern transitions is that many victims seem to get more satisfaction from punishment of or acknowledgment of guilt by local perpetrators than from broad-ranging investigations of wrongdoing or trials of high-level war criminals. A common complaint among modern victims is repeatedly seeing neighbors, co-workers, and fellow-villagers who collaborated in atrocities going about their lives as if nothing had happened. Because Athenian victims could indirectly sanction collaborators for their conduct during the oligarchy, the Athenians were able to minimize this “impunity gap” at the local level, while still maintaining the unifying collective narrative of rejecting vengeance for Amnesty. In this way, the courts fostered reconciliation by offering some limited accountability as a safety-valve for local resentments based on crimes committed during the Thirty.

Collaboration could be raised in court, without violating the terms of the Amnesty, in two forms: (1) as character evidence in an unrelated public or private law suit; and (2) in the dokimasia, the examination of incoming magistrates. Where collaboration was introduced in an unrelated lawsuit, it was up to the individual jury to determine how much weight to accord this character evidence in reaching its verdict. At the dokimasia, anyone who wished could challenge a candidate for any reason, including collaboration; if rejected by the jury, the only penalty was

186 See, e.g., Isaacs 2009:136-139; Stover 2004:107. This insight is also part of the impetus behind the gacaca courts in Rwanda. For discussion, see Karakezi et al 2004.
187 Sotiropoulos (2007:121) tells the story of a former member of the resistance who had been imprisoned under military rule passing the judge who convicted him sitting in a coffee shop every morning as he walked to work, and of another resistance member who had been tortured learning that his torturer had become the chief of police. For similar stories, see Rosenberg 1996: 320 (Stasi informants); Isaacs 2009: 136 (victims in Guatemala living near informants or executioners).
188 See chapter 4.
disqualification for office. The *dokimasia* procedure shares some similarities with modern forms of administrative justice, such as denazification in Germany and lustration in post-Communist Europe, whereby those who were affiliated with or participated in the former regime could be barred from public office and/or public employment.\(^{189}\)

Athens’ indirect accountability mechanisms reduced victims’ worries about impunity, but did not go so far as to alienate former collaborators with severe sanctions. Most collaborators were likely to be selected by lot for office or to face litigation at some point in their lives,\(^{190}\) leaving them vulnerable to attacks based on their conduct during the oligarchy. But this mechanism was self-limiting in that collaboration only became an issue in court if a victim or an enemy brought it up; victims who needed to air their grievances against a particular collaborator were given the opportunity to do so, but there was no attempt to systematically stigmatize or exclude from office all those who participated in the oligarchy.

The uncertainty over whether and when former collaborators in one’s village would face punishment through these indirect mechanisms was much less troubling for those seeking retribution in the context of a society that believed in divine sanctions. Divine sanctions were uncertain and unpredictable, and could occur years or even generations after a violation.\(^{191}\) Even the awareness that those who had participated in the oligarchy *might* face indirect sanctions in court at some later time may have tempered victims’ perception of impunity.\(^{192}\)

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\(^{189}\) Such vetting procedures can take a variety of forms. For discussion, see Mayer-Reich & DeGreiff 2007; Teitel 2000:149-190.
\(^{190}\) For discussion, see Chapter 4.
\(^{191}\) For discussion, see Lanni 2008:475.
\(^{192}\) Of course, the lack of apology or recognition of guilt on the part of the perpetrators might diminish victims’ satisfaction. But it is interesting to note that at least in the case of Stasi informants, even when perpetrators do admit the facts of collaboration, they often do not accept full responsibility in a manner satisfying to the victims. Rosenberg 1996. The limited sense of accountability provided by the Athenian procedures was also more acceptable to victims because the oligarchic sympathizers who were most likely to draw retaliation probably opted to resettle in
At the same time, these potential indirect sanctions were not so severe that they risked permanently alienating former collaborators. For one thing, the only penalty that attached to being rejected at one’s *dokimasia* was disqualification from office; men who were disqualified in this way could still participate fully in the Assembly and the law courts. Moreover, participation under the Thirty did not doom a litigant or prospective magistrate; this evidence was merely one factor in the jury’s consideration. One man who was challenged at his *dokimasia* because he was a member of the Council and the cavalry under the Thirty nevertheless appears to have been confirmed as archon, one of the highest offices of the democracy. Another court speaker suggests that many cavalry members under the oligarchy went on to serve in the Council and even as generals. Perhaps most importantly, wide-ranging examination of litigants’ and prospective magistrates’ character was routine in Athenian courts. Defendants would not experience discussion of their conduct under the oligarchy in court, and any resulting indirect sanctions, as a specific attack aimed at former collaborators but as standard operating procedure. In fact, one defendant in a *dokimasia* claims that he is glad to have the opportunity to refute widespread accusations that he served in the cavalry under the Thirty:

The people who force those who are unjustly accused to undergo an investigation of their life’s record are in my view responsible for great benefits. I am so utterly confident in

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Eleusis. As Elster (2004:22-23) points out, by the time some of those settlers returned to Athens after the fall of Eleusis in 401, retributive emotions had some time to diminish. The one exception was those who were convicted under the *dokimasia ton rhetoron*, which rendered them ineligible to speak in the Assembly. Of course, accusation alone could serve as a shame sanction and facilitate informal social sanctions. For discussion, see Chapter 4. Lys. 26. For discussion, see Todd 2000:270-273. Lys. 16.8.
myself that I expect even someone badly disposed toward me to change his mind when he hears me speak about what happened and to think much better of me in the future.\textsuperscript{197}

Like many modern vetting procedures, such as lustration, the examination of an individual’s conduct under the previous regime in the \emph{dokimasia} was both backward- and forward-looking.\textsuperscript{198} Disqualification from office was both a sanction for past wrongdoing and a safeguard to prevent those who committed crimes or who had oligarchic sympathies from exercising power in the restored democracy. A passage from the prosecution speech in Evander’s examination for the archonship encapsulates the dual purposes of the \emph{dokimasia}. He imagines the public reaction if Evander is confirmed:

How do you think the rest of the citizens will feel, when they see that a person who ought to be paying a penalty for his crimes has instead been approved by you for this type of office? Or that the man who ought himself to be on trial before the Areopagus [i.e. for homicide] is instead judging homicide cases? Do you not believe that they will be angry, and hold you responsible, when they think back to those times when many of them were summarily dragged off to prison, were executed by these people without trial, were forced to flee their country… What is Evander’s attitude toward the city? For how many crimes has he been responsible?\textsuperscript{199}

\textsuperscript{197} Lys. 16.2-3. Of course, litigants were vulnerable to completely fabricated accusations of collaboration, just as they could face false accusations of all sorts of violations of legal and social norms in court. This problem was at least reduced by the availability of suits for false witness and the likelihood that someone among the hundreds of jurors or spectators might have knowledge of the facts and shout down the speaker.

\textsuperscript{198} Mayer-Reich & DeGreiff 2007; Teitel 2000:149-190. As Wilke (2007:349) points out, even when the stated purpose of modern vetting procedures is a forward-looking one, such as in East Germany, the social understanding of these procedures is often as a backward-looking sanction.

Unlike most modern vetting procedures, the *dokimasia* was as concerned with a candidate’s current political commitments and view of the Thirty as with his past conduct under the former regime. Wolpert points out that the *dokimasia* served in part as a ritual in which former collaborators publicly pledged their allegiance to the democratic constitution.\(^{200}\) This does not mean that former collaborators expressed remorse or even admitted participation in the oligarchy; in our surviving speeches litigants and prospective magistrates accused of collaboration vehemently deny that they held offices under the Thirty or were in any way involved in the crimes committed by the regime.\(^{201}\) Because very few magistrates exercised significant individual power, the importance of the *dokimasia* to the security of the democracy lay less in accurately ferreting out and excluding from office those with oligarchic sympathies and more in the symbolism of these hearings. Having passed a *dokimasia*, a former collaborator might gain a sense of membership and belonging under the new regime, and resentment at a collaborators’ holding office might be eased by his public repudiation of the oligarchy. Conversely, rejecting a candidate allowed the demos to make a statement about the sort of collaboration that it deemed incompatible with full citizenship.

In sum, the indirect sanctions for collaboration we have looked at in this section, made possible by the Athens’ distinctive legal culture, ranged far wider than any direct trials of collaborators could possibly have done. These mechanisms encouraged reconciliation by minimizing the resentment created by the sense that local collaborators enjoyed impunity and by offering a procedure whereby those with questionable pasts could be publicly reintegrated into the community.

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\(^{200}\) Lys. 16.3; for discussion see Wolpert 2002:115-116.  
\(^{201}\) E.g. Lys. 16.8; Lys. 25.15-16; Fr. 9.110; Pl. *Apol.* 32 c-d; Wolpert 2002:115-116.
C. Participation and Social Repair

Those who have studied and designed transitional justice systems have recently focused on rebuilding trust and social relationships between those on opposite sides of the conflict at a local and even an individual level. Relying on the “contact hypothesis,” the assumption that “tension and hostility between groups will be reduced when these groups are brought in systematic contact with each other,” initiatives in several post-conflict societies seek to increase interaction between opposing groups through joint participation in activities such as sports teams, art and music programs, business ventures, schools, and other forms of educational programs. Initial signs indicate that these co-existence programs can help build trust and cooperation between individual members of opposing groups, particularly when groups are not simply brought into contact with one another (e.g. by taking a class or watching a film together) but are required to work together, for example through shared decision-making or productive activity. Athens’ highly participatory civic institutions functioned like a model co-existence initiative, encouraging members on opposite sides of the civil war to work together in a variety of contexts.

Jury service in the courts was just one of the many opportunities for men of the city and men of the Piraeus to interact productively together after the civil war. Other venues for joint decision-making included the Assembly, the Council, and the deme (village) assemblies. Service on the Council of 500 involved particularly intense interaction. The Council met about 275 days a year, and during the one-tenth of the year that each member served on the fifty-person executive committee, he was expected to live and work in the Council chamber with the rest of

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203 Donnelly & Hughes 2009:150.
the committee. Participation in several civic institutions—Council service, military service, and performance of the dithyrambic chorus at the Festival of Dionysus, for example—was organized by tribe, which meant that one was more likely to participate alongside members of one’s local deme (village). Repeated productive interactions in these various contexts between collaborators and the men of the Piraeus may have helped to rebuild trust and foster cooperation after the restoration of democracy.

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In sum, Athenian legal institutions helped promote peace and reconciliation after the civil war, but not through the straightforward mechanism of meting out sanctions for violations of law. The Amnesty’s importance may have lay chiefly in its expressive and persuasive effect, as court speakers constructed a (misleading) collective memory of the tyranny and reconciliation that promoted unity and social solidarity. Indirect legal sanctions for collaboration may have done more to dispel local resentments and promote reconciliation than the formal trials of members of the Thirty. And repeated interactions in participatory institutions like the courts may have helped build trust and cooperation between those on opposite sides of the conflict.

The peculiar features of the Athenian legal system enabled an especially successful approach to transitional justice by leveraging various institutional advantages that for the most part are not available in modern contexts. First, the courts had a larger market share of cultural/communicative space in Athens than modern transitional justice mechanisms can hope to achieve. The desire for a higher profile in the country undergoing transition is one of the driving forces behind the recent creation of “hybrid” international courts that operate locally but

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207 On the courts as a form of public entertainment, see Lanni 1997.
combine domestic and international rules and personnel, but even these efforts pale in comparison to the cultural monopoly enjoyed by the Athenian courts. And the broad participatory opportunities created by the Athenian courts fostered a widespread sense of participation in and ownership over the reconciliation rarely attempted in modern contexts.

Moreover, the flexibility of the Athenian legal system mitigated the tension between ordinary, rule-of-law justice and expedient political settlement. The Athenian popular courts could accommodate the broader transitional justice functions generally reserved in the modern world for special tribunals. Athenian legal culture also created the possibility of piecemeal retributive justice without forcing the all-or-nothing choice that a comprehensive, top-down system invites. Finally, the Athenian approach permitted the transitional process to extend over a longer time frame and to proceed gradually and organically rather than attempting the type of once-and-for all settlement that is commonly seen in the modern context.

Unlike most modern transitional justice schemes, Athenian courts were traditional in form and unimpeachable in composition—to quarrel with a jury verdict was to quarrel with democracy itself. They did not stir up grievances unnecessarily, since there was no public prosecutor and no detailed understanding of what constituted collaboration. But they also allowed the airing of any wrong, no matter how old or unconnected to the subject of the suit. Moreover, they were inscrutable in their adjudications—no one knew why the jurors decided as they did, and no rule was established. Did the jury believe that an allegation of collaboration was untrue, or did it find that the allegation, even if true, was outweighed by other factors? No one knew. But clarity in the wake of civil war is not necessarily a virtue. People told their story and

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208 On which, see Dickenson 2003.
209 Rwanda’s gacaca courts may be an exception. On the Rwanda experience, see Karekezi et al. 2004.
got their verdict; they believed what they wanted to believe about what it meant. The system moved on to the next case, and slowly everyone got on with their lives.