Chapter 5

Isonomia: The dawn of legal equality

Democratic Athens was very different from contemporary liberal democracies.[1] Among many other differences, it was dramatically smaller (estimates vary, but for present purposes, there were, say, perhaps 30,000 full-fledged citizens and substantially more noncitizens);[2] it had an underclass of slaves, operated as a direct democracy in which all important decisions were made by the assembled citizenry, and operated mass popular courts. Nonetheless, it managed to have a surprisingly robust version of the rule of law.

This chapter serves several purposes. First, it supports the overall argument of this book that the rule of law does not subsist in particular institutional configurations – it can exist in societies as different as the contemporary United States and Athens of 400 BCE. Second, it shows that the identification of the rule of law with equality can help us understand an extraordinarily diverse set of societies. For that reason, it supports the factual and normative robustness of the account of the rule of law given in the first four chapters. Third, by abstracting away from contemporary institutional and social facts, it allows us to see some of the abstract dynamics of the rule of law – a point that will be developed in the next chapter.

This chapter defends several key claims. First, contrary to the arguments of some classicists and legal historians, classical Athens substantially satisfied the demands of the rule of law throughout the democratic period.[3] Second, Athenians saw further than many contemporary rule of law theorists: they recognized that the rule of law served the equality of mass and elite; and there was no contradiction (again contra some classicists) between the democratic power of the masses and the rule of law. It sets the groundwork for a third claim, developed in the next chapter: this connection between equality and the rule of law explains the most striking fact about Athenian legality: to wit, the otherwise puzzling effectiveness of a postconflict amnesty after a short-lived oligarchic tyranny at the end of the fifth century BCE.

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I HOW WAS THE RULE OF LAW IMPLEMENTED IN ATHENS?

In this section, I first review the Athenian legal system, then argue for the proposition that it comported fairly well with the rule of law, except for its failures in the domain of generality with respect to women, foreigners, and slaves.

A An overview of the Athenian legal system

The period under consideration begins around 462 BCE, when the *Areopagus*, an elite council of former archons (high magistrates), lost almost all of its legal power to the democratic council, assembly, and courts.[4] From then onward, the Athenian legal system revolved around those three mass institutions. The assembly (*ekklesia*) was the chief legislative body, comprised of the entire male citizen population. It occasionally served a judicial role. The 500-member council (*boule*), whose members were selected by lot, set the agenda for the assembly and occasionally served a judicial function.

The courts (*dikasteria*) comprised, ordinarily, between 200 and 500 jurors, carefully selected at random through an elaborate procedure. Juries heard cases brought before them by private litigants, ordinarily in either a public suit (*graphe*) or a private suit (*dike*), though other specialized procedures existed.[5] There was nothing resembling the contemporary US distinction between questions of law for judges and questions of fact for juries: the Athenian jury decided the whole dispute, and was not subject to appeal.

Two legal procedures were of particular importance for rule of law purposes:

Graphe paranomon was a public suit against one who allegedly made an illegal proposal, either because the proposal was substantively illegal (such as a proposal to execute citizens without trial), or because it was offered by one not entitled to do so (i.e., if the proposer had been judicially deprived of his civic rights). Essentially *graphe paranomon* was a process by which the *ekklesia* could be subject to judicial review.[6] Both oligarchic coups at the end of the fourth century (as described in the next chapter) promptly abolished it.

Graphe hubreos was the prosecution for the crime of hubris, an ill-defined but important offense that included, at a minimum, physical assaults. Hubris (also transliterated as *hybris*) was seen as an insult against the dignity of the victim, rooted in the arrogance of the malefactor.[7]

In 403, in the wake of the oligarchic coups and a democratic restoration, Athens revised its procedure for enacting legislation. Until 403, the assembly made all the laws. Thereafter, it established a distinction resembling that in contemporary constitutional thought between entrenched "higher laws" and ordinary legislation. The former were just denoted laws (*nomoi*), and were to be enacted only pursuant to an elaborate procedure spanning several institutions, including newly created boards of lawmakers (*nomothetai*). The latter were called decrees (*psephismata*), and could be enacted by the assembly acting alone, but were not permitted to contradict *nomoi*.

B The rule of law and the oligarchy

As Ober recounts, the story of democratic Athens is one of a gradual shift in political power from a class of aristocratic elites to the citizenry as a whole.[8] Many aristocrats were dissatisfied with these developments. Throughout the democratic period there was the fear that the aristocrats would seize power. And this fear was justified, since they did so twice, establishing the oligarchies of 411 and 404, and ruling (as will be recounted shortly) with little regard to legal niceties.

We can only understand the rule of law in Athens with regard to this ever-present threat of oligarchic tyranny. A major function of the rule of law was to guard against the capture of the state by elites who would then abuse their newly acquired official power, or their subversion of legal constraints on their wealth and power within the democracy. The law had to constrain private as well as official power, because of the potential of unconstrained private power to assume the Weberian and Hobbesian properties by taking over the state.

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

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

C The Athenian rule of law

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

> [O]rators affirmed that the law must consist of general principles equally applied, that laws should not be enacted against individuals, that no citizen should be punished without a proper trial, tried twice for the same offense, or prosecuted except according to a statute, and that statutes should be clear, comprehensible, and not contradict other provisions.[9]

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

> In no circumstances shall magistrates enforce a law which has not been inscribed. No decree, whether of the Council or Assembly, shall override a law. No law shall be directed against an individual without applying to all citizens alike, unless an Assembly of six thousand so resolve by secret ballot.[10]

In this section, I will compare what we know about the Athenian legal system to the conception of the rule of law developed in the previous chapters in order to judge whether Andocides and the other orators are to be believed.

1 Regularity

It is difficult to confidently assess the extent to which democratic Athens satisfied the principle of regularity. However, the existing evidence offers some support for the proposition that it did.[11]

There are several prominent cases where the citizens occupying Athenian legal institutions seem to have disregarded the law: most notable among these is the trial of the generals (discussed at length later). But their very prominence suggests that they were exceptional circumstances, deviances from the ordinary lawful business of governance. For example, Xenophon emphasized the regret and recriminations that followed shortly after the trial of the generals. And even Pseudo-Xenophon, an aristocratic critic of the democracy, had to acknowledge in the *Constitution of the Athenians* that "there are some who have been unjustly disenfranchised, but very few indeed" and that "it is from failing to be a just magistrate or failing to say or do what is right that people are disenfranchised at Athens."[12]

Athens's institutional structure likely made it very difficult for those citizens who held magistracies under the democracy to abuse their power. Most officials held office for only a year, and were forbidden from holding the same office (except generalships) twice.[13] After leaving office, each official was subject to a *euthyna* at which accusations of misconduct could be heard and referred for prosecution. This probably greatly narrowed the scope for illegal uses of official coercion: an official who wished to seriously abuse his office would have been subject to trial no less than a year from the act, and would no longer have his official powers to protect him. With such short timescales, even a magistrate who discounted the future very heavily would have reason to fear punishment for his crimes.

Perhaps the most striking evidence for the regularity of the Athenian legal system is the post-civil war amnesty, discussed at length in the next chapter. After the Thirty Tyrants were removed, the vast majority of those implicated were granted amnesty for all of their crimes under the oligarchy. Despite the incentives democrats must have had for revenge as well as to remove those who had proven their disloyalty, the amnesty was successfully upheld.[14] The democratic *boule* went so far as to violate the rule of law in *maintaining* it, summarily executing one citizen for attempting self-help vengeance. The democrats even enacted a new judicial procedure, *paragraphe*, in order to prevent illegal prosecutions.

Also to be considered under the rubric of regularity is the extent to which the legal system succeeded in avoiding the danger, mentioned earlier, of oligarchic coups. The elites were mostly prevented from seizing control of the state, with the exception of the two fifth-century oligarchies, and I will argue in the next chapter that both of

these oligarchies were occasioned by exogenous shocks – extraordinary military losses that the democracy could not withstand. And both oligarchies were quickly overthrown. In the next chapter, I will also suggest that failures of the rule of law contributed to these coups, but that the Athenians learned from their mistakes.

With respect to the abuse of elite power short of coup, there is also evidence that the legal system worked. The crime of hubris is often associated with aggressive display of superiority by the wealthy.[15] The extent to which this law actually restrained such violence is not clear, but there is at least evidence that hubris cases were sometimes brought, that in ordinary assault cases the accusation of hubris was also raised, and that threats to bring hubris prosecutions were sometimes made.[16] Carawan argues that the *graphe paranomon* served a similar function as hubris – preventing the powerful from abusing their power against the common interest, in this case by enacting illegal decrees.[17] These provisions offer us at least some reason to believe that the legal system as a whole contributed to regulating the potential for elites' day-to-day abuse of wealth and status.[18]

One worry, leading to a potential objection, with respect to regularity in Athens arises from the extent of the discretion that juries had to convict defendants. While the jurors were required to take an oath to follow the law, some scholars have argued that extralegal evidence was often taken into consideration, such that jurors often didn't act as if they were bound to convict or acquit defendants on legal grounds alone.[19] I am not equipped to intervene on the debate about the actual amount of discretion juries exercised, but I will submit that even if juries exceeded the written law, it does not necessarily follow that their decision-making power was sufficiently unconstrained to violate regularity.

Thus, although scholars such as Lanni argue that the Athenians disregarded the rule of law because juries made rulings on the basis of informal norms,[20] that does not warrant the conclusion that the Athenian legal system was irregular. Lanni was able to discern six clear categories of social norms enforced in the Athenian courts;[21] the mere fact that she can identify them is evidence that they were determinate enough to provide limits on the discretionary coercive power of juries.[22] Here, the immense size of the juries may have helped: no individual juror or small group of jurors could have punished a litigant for idiosyncratic reasons, absent some generally acceptable reason (i.e., rooted in the written law or a strong social norm) to bring along enough votes. Moreover, as Lanni points out elsewhere, the Athenian courts were conducted in a glare of publicity, and this helped hold jurors accountable to the opinion of the community.[23]

Lanni's work thus warrants the conclusion not that the Athenian juries ignored the law, but that the law in Athens included both written enactments of the assembly and those unwritten social norms that were widely accepted about citizens' public and private conduct.[24] In support of this interpretation, note that Thucydides' rendition of Pericles' funeral oration credits Athens with both written and unwritten laws, and Aristotle's *Politics* makes clear that both categories count as law.[25] The Athenian legal practice may have been similar to that of modern common-law states,

which incorporate social custom into the law and still comply with the rule of law.[26] Indeed, even the very word νόμος, which meant law, also meant custom.

Carugati suggests that the real problem is that the existence of parallel legal and customary norm/rule systems "mak[es] outcomes unpredictable and *ad hoc* [and] defies [rule of law] standards of predictability and consistency."[27] That point, however, depends on the factual supposition that customary norms and legal norms commanded different outcomes. But in a direct democracy, the most plausible assumption in the absence of evidence is that the people wrote their customs into the formal law. The assembly and the jury were both mass institutions; there is scant reason to believe that the norms enforced by the latter would diverge too greatly from the norms enacted by the former, or from those endorsed (and understood) by the public at large. All these entities are made up of the same people. In general, where the formal law is enforced by the people, law that diverges too greatly from social norms is likely to be brought into line, but that pattern alone is not necessarily in tension with the rule of law.[28]

2 Publicity

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

Citizens were given extensive opportunities to participate in the legal process. Any citizen could initiate legal action before the popular courts, on the basis of injury done not only to themselves, but in many cases to anyone else as well (including the polis itself).[29] In addition, officials were held to account after the expiration of their terms in routine judicial procedures (*euthynai*) to which ordinary citizens had access,[30] as well as a special procedure (*eisangelia*) to challenge a magistrate's actions while still in office.[31] There was even a legal procedure (*graphe paranomon*) available to citizens to challenge unlawful decrees of the assembly. Moreover, trials were conducted in a glare of publicity; citizens would know what happened there.[32]

Once legal process was invoked against a citizen, there was ample opportunity to mount a full defense.[33] The seriousness with which a defendant's right to put up a defense was taken can be seen by the outrage Xenophon reports at the failure of the assembly to respect that right in the illegal trial of the generals (discussed later). There were also protections against frivolous or extortionate litigation: in many types of procedure, prosecutors who failed to get a fifth of the votes or who abandoned the cases after bringing them were subject to fine.[34] For illegal prosecutions after the 403 reforms, defendants could bring their own preemptive suit (*paragraphe*), victory in which led to a penalty for the prosecutor and the barring of the original litigation.

Information about the content of the law was more or less readily available, depending on the time under consideration. In 410, an attempt was made to collect the many uncodified laws and publish them in one place; in 404 the code was

inscribed on a wall, and in 399 the final postoligarchical revision of the laws was completed.[35] Around the same period, a centralized location was created for paper copies of the laws.[36] Until that period, laws were published essentially wherever it seemed appropriate, and it may have been difficult for ordinary Athenians to know the laws that applied.[37] The change from scattered and hard-to-discover laws to a centralized law code was a clear improvement from the standpoint of publicity.[38] Generally, however, even before the reforms, Athens's small population, its cultural and religious homogeneity, the public nature of its procedures, and the extent of citizen participation in juries all give us good reason to suppose that ordinary citizens were familiar, in their capacities as subjects, with the law that they enforced in their capacities as jurors.

3 Generality

Athens failed to comport with the principle of generality with respect to women, foreigners, and slaves, each of whom was a subordinate legal class with dramatically inferior rights. However, the rule of law is a continuum, not a binary, and Athens did manage to achieve substantial strides toward generality along the dimension of socioeconomic class.

Eligibility for membership in all political institutions was determined by citizenship, a hereditary status: all people whose parents were both Athenian citizens had the status of citizens (subject to its loss by judicial process); all male citizens ordinarily had equal legal rights relating to, for example, property ownership, protection from violence, and the like, as well as equal rights to participate in the assembly and in the courts both as litigants and as jurors.[39] Metics (resident foreigners), women, and slaves had lesser legal rights, though none were completely devoid of rights.

Fundamental to the idea of Athenian democracy was *isonomia*, or political equality through legal equality. I discuss *isonomia* later; for present purposes it's worth noting only that orators routinely raised the ideology of class equality under law in their arguments, usually to urge the punishment of their rich opponents on the same terms as the poor would be punished. Even the diversity of legal procedures by which citizens could resolve their disputes was thought to accommodate class equality, allowing poorer and more vulnerable citizens to choose procedures that subjected them to less danger, though at the cost of being able to deploy less severe punishments, thus balancing the need to deter frivolous litigation with the need to guarantee equal access to justice.[40]

Even with respect to slaves, Athens did better than its peer cities. Sparta, to take the most striking contrast, allegedly went so far as to subject helots to a minimum number of blows per year to remind them of their inferiority.[41] In Athens, they were protected from private violence, and thus from pervasive terror of citizens and from the need to behave submissively to them.[42] Even if the Spartan story is apocryphal (and it has always sounded, to me, a little too hyperbolic to be true), it surely captures

a real contrast in the extent to which the two leading cities of Greece were shot through with hierarchical organization.

II EQUALITY AND THE ATHENIAN RULE OF LAW

Not only Pseudo-Xenophon (see the end of Chapter 1) recognized that the rule of law led to equality in Athens. Numerous other historical sources reflect an understanding of the rule of law such that faithful enforcement of the laws protects the power and status of the masses against the inegalitarian ambitions of the elites; that is, the rule of law was the guardian of political equality, in the form of two *topoi*, which I call "the respect *topos*" and "the strength *topos*."

According to the respect *topos*, to break the law was to reveal one's character as an oligarch, one who has an arrogant (hubristic) disdain for the masses, as expressed in their distinctively democratic laws. To punish such oligarchs is to protect ordinary people from their hubris as well as to protect the democracy from their urge to overthrow it.[43] Even when citizens ignore the law in their private lives, this is seen as evidence of their oligarchic character and contempt for the masses.

According to the strength *topos*, to defend the law is to defend the democracy itself. Each individual citizen (particularly, each nonelite citizen) in the democracy is made strong when the laws are enforced and weak when they are not, and the relationship is reciprocal: the laws are strong when citizens defend them and are weak when they do not. When the laws are strong, nobody need live in fear, because the laws give the masses the tools to protect themselves against the elites.

The first subsection offers the evidence; the second addresses some objections to this section as well as to the previous one.

Before moving into the evidence proper, however, a linguistic note is in order. Several words can be translated as "equality" in the Athenian corpus, but the most significant is *isonomia*. There has been some debate among classicists about what the term means. According to Vlastos, *isonomia* captured the relationship between legal and political equality.[44] He contrasts the idea of "equality before the law" and "equality maintained through law," and argues that *isonomia* meant the latter, and in particular that the laws "should be equal in the wholly different sense of defining the equal share of all the citizens in the control of the state."[45] Ober suggests that *isonomia* could have meant "equality of participation in making the decisions (laws) that will maintain and promote equality and that will bind all citizens equally."[46] Ostwald interprets *isonomia* as meaning political equality, or "equality of rights and power."[47] For Ostwald, too, political and legal equality are two sides of the same coin in *isonomia*: "what is recognized as valid and binding is so regarded by and for all classes of society."[48] By contrast, Hansen distinguishes the rule of law, and equality under law, from *isonomia*. According to Hansen, "equality before the law" is "sometimes overlooked by historians, or only briefly described, perhaps because no slogan

was coined for it as in the case of *isegoria* and *isonomia*."[49] For Hansen, *isonomia* only meant political equality (i.e., to participate in democratic governance).[50]

The classics literature has developed some of the themes in this section via an interpretation of the concept of *isonomia*. Particularly, Rosivach elucidates the relationship of political equality to hubristic disrespect.[51] On Rosivach's account, in Athens, *isonomia* was understood as the opposite of tyranny: the tyrant, qua feared figure in Athenian political culture, is guilty of *hubris* by virtue of his status-grabbing seizure of power, and can get away with further *hubris* because he is above the law and not subject to judicial control. Of course, such a tyrant could be oligarchic, at least after 399, when the term began to be applied to the regime of the Thirty Tyrants, and tyranny came to be identified less with one-person rule than with undemocratic rule.[52] Lewis argues that Solon established the superiority of law over personal whim in Athens just to solve the problem of widespread *hubris* that led Athenians to forcibly take one another as slaves.[53]

Regardless of these disagreements, it seems clear that there is a close connection between the three ideas of political equality, legal equality, and the avoidance of hubris. This connection will inform the interpretation of the evidence presented in the following subsections.

A *A catalog of Athenian evidence*

I offer evidence from contemporaneous forensic speeches, theater, historians, and philosophers for the relationship between the rule of law and equality. Classical scholars generally accept that forensic speeches are good evidence for Athenian political beliefs. The standard argument is that the speeches, being meant to convince a mass jury, would reflect arguments that talented orators and politicians would expect that jury to accept, so we can reliably use them to approximate mass opinion.[54] Matters are less clear with the theater, history, and philosophy. Theatrical performances, at least, would have been given in order to win popular support and prizes at festivals, so a similar argument could apply, albeit with lower stakes than forensic speeches (since nobody was executed for putting on a bad play). Philosophers' arguments and historians' explanations of events, of course, need be nothing more than the opinions of the individuals writing. Consequently, we should take the forensic speeches offered next as the strongest evidence, and the other materials as somewhat weaker.

1 Forensic evidence for the Athenian equality thesis

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The first sort of forensic evidence for the egalitarian meaning of the rule of law in Athens is in a series of passages associating lawbreaking with oligarchic character. On this recurrent theme, lawbreaking was an indication that the

lawbreaker aspired to be an oligarch. His arrogance and lawlessness on an individual basis were taken to suggest that, given the chance, he would carry those habits over into arrogant and lawless political power. This claim was sometimes elaborated by the notion that the populace had good reason to thus fear the lawbreaker.

Thus Isocrates, in "Against Lochites," argues that Lochites should be punished for assaulting a fellow citizen (the crime of hubris), because his crime reveals his oligarchic character.[55] To punish him, Isocrates argues, is to protect the public against those who wish to overthrow the democracy.

Similarly, Demosthenes, in "On the False Embassy,"[56] equates being superior to the laws to being superior to the people, and distinguishes between the acceptable greatness and power that a politician might achieve in the popular assembly and the unacceptable greatness and power that might be achieved in (that is, over) the courts; equality before the law is "the democratic way." Demosthenes warns that Aeschines is in danger of becoming superior to the courts in this undemocratic fashion, if the jury fails to convict him "merely because this man or that so desires."

Later in the speech, the oligarchic connection to all of this becomes clearer: having "perpetrated wrongs without number," Aeschines wishes to set himself up as an oligarch.[57] It's striking that in this latter passage Demonsthenes credits Aeschines' lawbreaking behavior for his turn toward oligarchic sentiments. There was a more natural supposition available to him: Demosthenes had been accusing Aeschines of taking Philip of Macedon's bribes; why didn't Demosthenes complete that theme and accuse him of becoming an oligarch because of his increase in wealth? The supposition seems to be that losing respect for the laws and losing respect for the democracy, and thus the equality of mass and elite, go together.

[Pseudo-?]Andocides expresses shock that Alcibiades is seen as a supporter of democracy, "that form of government which more than any other would seem to make equality its end," and cites as evidence for the contrary position Alcibiades' flouting of the laws in his private life, as well as his use of force to defend himself against the laws when called to account for his private profligacy.[58]

Finally, Isocrates, again in "Against Lochites," directly recognizes the relationship between equality under law and social status.[59] He argues that the penalty for hubris should be the same for a poor plaintiff as for a rich plaintiff, on the grounds that to treat them differently would amount to claiming that the poor have inferior civic status. To do so would "teach the young men to have contempt for the mass of citizens."[60] We can read this claim one of two ways. First, failing to enforce the law might lead the young (elite) men to have contempt for the masses just by virtue of the latter's having de facto inferior legal rights; that is, the inferior legal status of the masses might induce the elites to see the masses as inferior. Alternatively, failing to enforce the law against hubris might encourage young (elite) men to commit hubris, since they wouldn't be punished, and, by doing so, express contempt for the masses.

Either way, the failure of the law against hubris encourages unequal status between mass and elite.

B THE STRENGTH TOPOS

The second repeated theme in the forensic orations is that defending the law amounts to defending the power of the democracy, and, consequently, the individual strength and security of each citizen. According to Demosthenes in "Against Medias," the faithful enforcement of the law against hubris, particularly against rich men like Medias, allows citizens to live in security against casual violence and insult, regardless of how powerful their hubristic enemies are.[61] The relationship is reciprocal: the faithful enforcement of the laws by the masses makes the laws strong, and the laws, in turn, make each individual member of the masses strong against the depredations of the powerful.[62]

The strength *topos* helps fill out [Pseudo?-]Andocides' account of why Alcibiades is such a threat to the community: when Alcibiades wanted a painting, he threatened the painter with imprisonment unless he did the work. He then carried out this threat, treating the painter "like any acknowledged slave,"[63] and, when the polis failed to punish him for this, it "increased the awe and fear in which [Alcibiades] is held."[64] He then goes on to relate still another story, in which Alcibiades beat up a competing chorus leader, and the judges ruled in his favor out of fear.[65] And why all this fear? Well: "The blame lies with you. You refuse to punish insolence [hubris]." That is, Alcibiades' past hubris, and his demonstrated ability to get away with it, allows him to intimidate his fellow citizens into letting him get away with more hubris in the future. The jurors have failed to uphold the laws; consequently, the laws have lost their power to bind Alcibiades, and each of them is now in danger from his hubris. (This argument fits particularly well with the strategic account laid out in the next chapter, according to which the Athenian rule of law depended on citizens consistently signaling their willingness to enforce the law in the courts.[66])

Aeschines, at the beginning of "Against Ctesiphon," claims that the difference between a tyranny or oligarchy and a democracy is that the first two are ruled by the arbitrary will of the rulers, while the latter is ruled by the law (not, as one might otherwise suspect, the arbitrary will of the masses).[67] Consequently, absent enforcement of the law against illegal motions (*graphe paranomon*), the democracy is under threat: no law, no democracy. Thus, he equates ruling according to the law to serving in battle: each is necessary to defend the polis.[68]

Toward the end of the same speech, he argues that the power of the individual citizen in a democracy depends on the faithful enforcement of the laws, and to let lawbreakers off is to deliver that power into the hands of the scofflaw *rhetor*.[69] He goes on to suggest that politicians who would create oligarchy first must make themselves immune to law ("stronger than the courts"), and that this was the pattern displayed by the Thirty Tyrants. Since both oligarchic revolutions in fifth-century

Athens started off by abolishing the *graphe paranomon* in order to shield their actions from the courts, this claim stood on solid ground.

He makes a similar claim in another speech, "Against Timarchus," where he again says that democracies are distinct from oligarchies and autocracies in that democracies are ruled by the law, and further claims that the laws provide security to the citizens and the state, while oligarchs and tyrants must defend themselves by force of arms.[70] He then again urges the jury to follow the laws, because they have a government "based upon equality and law" and their strength depends on the vigilant enforcement of the laws.[71] The security claim is similar to a claim made in Hyperides' funeral oration, in which he echoes the idea of terror in alleging that the happiness and freedom of men depend on the supremacy of "the voice of law, and not a ruler's threats," and says that the safety of the citizenry must "depend on . . . the force of law alone."[72]

2 Evidence from poets, philosophers, and historians

There are nonforensic sources that also attest to the relationship between the rule of law and equality.[73] The most interesting evidence comes from Aristotle. In the *Politics*, he argues that "the law courts [are] an institution favoring the people," and that Solon "established popular power by opening membership in the law courts to all."[74] Ostwald further elaborates on this passage and similar passages in the *Constitution of the Athenians* to argue that (a) Solon's creation of jurisdiction in the popular courts and (b) his allowing anyone to bring a *graphe* regardless of individual injury together gave the public a check on the arbitrary use of power by elites.[75] That is, by making the courts widely participatory, they became more reliable in enforcing the laws against the elite, and reinforcing the strength of the masses.

Elsewhere in the *Politics*, Aristotle claims that the rule of law is necessary for those who are equals.[76] The argument proceeds as follows. He first claims that equal participation in government is the appropriate form of rule for people who are naturally equal. Next, he argues (in what seems to be an inference from the previous claim) that giving (discretionary) power to magistrates is inconsistent with the equality of all citizens, and, consequently, that the magistrates should be nothing more than "guardians and ministers of the law," for if the law rules, no individual rules.

Thucydides agrees with Aristotle. In his version of Pericles' funeral speech, we learn that Athens is a democracy in part because "[i]n private disputes all are equal before the law."[77]

Thucydides also echoes the respect *topos*. The masses feared Alcibiades, he says, because of his lawlessness: "Alarmed at the greatness of the license in his own life and habits, and at the ambition which he showed in all things whatsoever that he undertook, the mass of the people marked him as an aspirant to the tyranny and

became his enemies."[78] That is, the rich and powerful, when they ignore the laws in their personal lives, are seen as tending toward oligarchic or tyrannical sentiments, and consequently inspire fear in the populace.

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

> Nothing is more hostile to a city than a despot; where he is, there are first no laws common to all, but one man is tyrant, in whose keeping and in his alone the law resides, and in that case equality is at an end. But when the laws are written down, rich and weak alike have equal justice, and it is open to the weaker to use the same language to the prosperous when he is reviled by him, and the weaker prevails over the stronger if he has justice on his side. Freedom's mark is also seen in this: "Who has wholesome counsel to declare unto the state?" And he who chooses to do so gains renown, while he, who has no wish, remains silent. What greater equality can there be in a city?[79]

Aeschylus puts the strength *topos* in the mouth of Athena, explaining to the Athenians that she has established the court on the *Areopagus* as a "guardian of the land," and that if the Athenians respect and do not pollute the law, they will have "a defense for your land and salvation of your city." The court is "awake on behalf of those who sleep," Athena explains, and with the support of the citizens with their ballots, contrasts both with anarchy and tyranny.[80]

Pseudo-Xenophon, as discussed in Chapter 1, also transposes the strength and respect *topoi* to the relationship not between elite and mass citizens but between citizens and slaves. Likewise, Plato, in *Crito*, repeats a version of the strength topos. Socrates imagines the laws criticizing him on the grounds that to use bribery to procure impunity from jury verdicts will destroy the city: "Or do you think it possible for a city not to be destroyed if the verdicts of its courts have no force but are nullified and set at naught by private individuals?"[81]

In Herodotus's *History*, Otanes echoes the respect *topos*.[82] Monarchs become "outrageously arrogant" and "insolent," and this hubris is a consequence of their unconstrained power: "Even the best of men, if placed in this position of power, would lose his normal mental balance, for arrogance will grow within him." Otanes, like Pseudo-Xenophon, also suggests that the failure of the rule of law gives the weak reason to performatively affirm their lower status with subservient behavior: "if you admire him to a moderate degree, he is vexed that he is not being treated with sufficient deference, but if you treat him subserviently, then he becomes annoyed by your obsequiousness." He closes with a contrast between monarchy, characterized by lawlessness, and democracy, characterized by equality:

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

practice, the majority does not act at all like a monarch ... it holds all of these officials accountable to an audit.[83]

III BUT IS THE RULE OF LAW REALLY CONSISTENT WITH EGALITARIAN DEMOCRACY?

The Athenian orators evidently thought (or expected the masses to think) that the rule of law was an integral part of the power of the masses, and thus of democratic equality. But they may have been mistaken. In particular, there's a potential tension between radical sorts of democracy characterized by the supremacy of popular or representative legislative institutions and the rule of law: what happens if the legislature uses its supreme power to rule by decree? This is not just a problem for the ancient Athenian *ekklesia*, but also for the contemporary British Parliament. The United Kingdom, today, is widely recognized as a rule of law state, but how is this to be reconciled with the doctrine of parliamentary supremacy? The standard answer for the British case is Dicey's: Parliament is constrained by strong constitutional norms, or "conventions"; even though it has the nominal legal power to overthrow the law, these norms provide a political check preventing it from doing so.[84] Does Dicey's argument also apply to Athens?

In this section, I will suggest that it does, by way of addressing two objections. Each objection centers on the notion that the democratic assembly exercised such broad powers that it was inconsistent with the rule of law. Both objections thus pose a threat to both arguments of this chapter, suggesting that Athens did not, in fact, have the rule of law, and that even if Athenians thought the rule of law was related to democratic equality, in fact, democratic equality as they conceived of it (as political equality, instantiated in strong mass legislative institutions) was inconsistent with the rule of law.

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

A *The conceptual objection: constitutionalism as the rule of law*

The first objection to the notion that Athens satisfied the rule of law, at least until 403, is suggested by Ostwald's characterization of the "principle of popular sovereignty" as a contrast to the "principle of the sovereignty of the law."[85] On this account, Athens was under the "sovereignty of law" only after the post-Thirty reforms to the legislative process forbade the assembly from ruling by decree and required

new laws to pass an elaborate process of scrutiny by boards of independent lawmakers as well as the courts.

Accepting this dichotomy seems to commit Ostwald to the proposition that "the sovereignty of law" – which I take to mean something equivalent to the rule of law – requires denying a legislative body like the *ekklesia* full control over the law.[86] But that proposition is mistaken.

To see why, we should make a distinction between the rule of law (or the "sovereignty of law") and a related concept that currently goes by the name "constitutionalism." For political scientists and theorists, a major function of constitutions is to permit political/legal actors to coordinate on widely shared values, and, by doing so, promote political stability in the face of pluralism by lowering the stakes of day-to-day politics – entrenching some basic values into a fundamental law code that is more difficult to change than day-to-day legislation.[87]

The changes in Athens after the Thirty nicely fit that conception of constitutionalism. By constitutionalizing the basic laws of Athens, identified with the ancestral laws of Solon and Draco, Athens entrenched the fundamental values of the democracy.[88] Its doing so immediately on the heels of devastating internal conflict that had been riddled with radical changes to the law suggests that the purpose was in fact to lower the stakes of politics – to make it more difficult for the polis to make the sorts of fundamental changes in political organization that contributed to political conflict and supported oligarchic tyranny.[89]

But these constitutional changes bear no direct relationship to the rule of law. In a stable political community, the rule of law can exist with or without constitutional entrenchment. This is just Dicey's point: as long as officials are constrained to conform to the law, the mere fact that some of it isn't entrenched won't keep them from doing so. And the converse is also true: no matter how entrenched the constitution is, coordinated action by some section of the population (e.g., a sufficient supermajority to change the constitution) can toss aside the laws, or those in control of military force can just ignore the laws, no matter what those laws say about how they are to be changed. Constitutionalism and the rule of law are distinct concepts. In fact, logically, the rule of law is necessary for (effectively enforced) constitutionalism, not the other way around. The rules that provide for things like supermajorities to amend the constitution are themselves legal rules, and will be obeyed only if the rule of law is respected in a state. A constitutional state without the rule of law is just a fraud – consider the Soviet constitution.

Consequently, contra Ostwald, I argue that Athens had the "sovereignty of law" long before it adopted a practice of constitutional entrenchment. While several of the post-Thirty law reforms did improve matters from a rule of law standpoint, depriving the assembly of absolute legislative power was not necessary for the rule of law.[90]

B The practical objection: arbitrary democracy and the trial of the generals

While there is significant evidence that the laws were respected, and that there was a strong norm of ruling the state under law, the assembly was also seen (at least by radical Athenian democrats) as supreme, and possessing, in principle, the capacity to rule by decree.[91] In fact, sometimes the assembly did so. The most prominent example of its law-ignoring rule by decree is the infamous trial of the Arginusae generals.

Xenophon is the standard source for these matters. I begin with some background. Eight generals together won a naval victory at Arginusae; in the process some ships were disabled, and the generals were unable to rescue their crews. On their return to Athens, several were put on trial in the assembly for the botched rescue, and were given very little opportunity to put up a defense. Perhaps most infamously, when one citizen by the name of Euryptolemus attempted to indict the prosecutor (presumably by *graphe paranomon*) for proposing the illegal summary mass trial, he was shouted down with cries that "it was a terrible thing if someone prevented the people from doing whatever they wished."[92] Making matters worse, the assembly loudly supported another citizen's threat to prosecute Euryptolemus along with the generals. The assembly then illegally sentenced all of the generals to death on a single vote.[93]

This highlights the evident dangers of radical democracy for the rule of law. It also calls into question the closeness of the relationship between the rule of law and equality in Athens: if the Athenians understood equality to consist in radical democratic institutions, and if those institutions posed a threat to the rule of law, *isonomia*, political and legal equality together, starts to seem like a contradiction in terms.

Yet this tension is easy to overstate. First, the trial of the generals was an extraordinary and aberrant incident.[94] Accordingly, Xenophon reports that the polis immediately regretted the rash decision and punished those who incited it.[95]

Second, there is evidence that the Athenians recognized that their political equality depended on some legal restraints on the assembly, and that the democracy required such restraints. As Hansen shows, in the fourth century, it was widely accepted that the *graphe paranomon* was necessary for democracy, and, consistent with this belief, both of the fifth-century oligarchical coups were accompanied or preceded by an abolition of the action.[96] On Hansen's account, radical democrats saw an unfettered assembly as the appropriate locus of political equality; moderate democrats found this in the popular courts and their law-enforcing role.[97] On the moderate democratic position, legal restraints on the assembly's power are not only compatible with, but necessary for, political equality as democracy.[98]

There are three other classic examples of miscarriages of Athenian justice. The first is the trial of Socrates. The second is the hysteria, with various excessive punishments meted out, on the eve of the Sicilian expedition, when a number of people were believed to have profaned the mysteries and/or mutilated statutes of

Hermes.[99] The third is the stoning of a Council member and his family for proposing to put a Persian peace proposal before the assembly.[100] The affair of the Herms/Mysteries was a particular disaster for Athens, leading to numerous arbitrary persecutions, seriously undermining civic unity in the midst of a massive (and ill-fated) military expedition, and pushing Alcibiades into one of his many treasons. Still, the argument in this section covers those cases, too. With the exception of the trial of Socrates (which seems to me to have been merely unjust, not illegal), all were the acts of a citizenry swept up in wartime hysteria.

C *The problem of informality*

Athens is both a fruitful and a difficult case for understanding the rule of law in modern states – fruitful because its institutional differences allow us to see the dynamics of the rule of law at a very general level, yet difficult because those same differences make it challenging to see the Athenian rule of law and the rule of law in modern states as genuine versions of the same kind of thing. For example, one key difference between Athens and later rule of law states is that Athens lacked the concept of "equity," a formal method for relaxing legal rules in cases where the strict application of those rules would lead to injustice – and to do so on the basis of explicitly stated reasons.[101] Quite the contrary: adjudication in Athens involved no reason-giving on the part of decision makers at all (and how could it, with hundreds-strong juries?) and we can understand legal rules and considerations of justice as continuous rather than separate in the Athenian legal system.[102]

Yet for all that, the Athenian legal system largely appears to have managed to carry out the core function and chief ethical mandate of the rule of law: holding power to be accountable to public reasons, in the interest of the equal status of all (always remembering the unjust cultural framework that excluded women and slaves from "all"). And it did so by ensuring that the use of power would be accountable to norms that were understood by the people as a whole and enforced by their committed collective action – which, I shall suggest in the next several chapters, is the key institutional feature of the rule of law.

Moreover, although Athens had no notion of equity or of a judicial opinion, those who used power – not perhaps the sovereign demos as a whole, acting through the assembly or the courts, but individuals, both wealthy and aristocratic private citizens and those who were entrusted with magistracies, as well as those who appeared before the demos qua court to request the use of its power – were required to state reasons for their uses of power, and quite directly subject those reasons to the scrutiny of the whole community by defending their actions in person in the jury room.

Athens varies from our standard picture of modern formal legal systems primarily in the unique feature of direct mass rule. Normally, the rule of law constrains the exercise of core organs of the state, as well as day-to-day officials and (where

necessary) powerful private citizens, in the interest of the people as a whole. In Athens, the people as a whole directly held the reins of those core organs, and used them to constrain the power of officials and private elites. The tool to constrain power, a chief entity to be constrained, and the intended beneficiary of the constraint were different descriptions of the same collective agent (the jury/those who controlled the power of the polis/the demos).

Under such an arrangement, it should not be surprising that it sometimes becomes hard to distinguish between formal legal rules, overarching ethical norms, and the will of the masses. Still, Athens typically managed to achieve formality when it mattered: the trial of the generals was such a failure of the rule of law just because it represented an abandonment of the normal structured procedure of reason-giving by which prosecutor and defendant would stand before the jury and explain themselves as well as justify prospectively the use of power that they proposed for the demos as a whole. And even that dramatic failure, like the others, came in the context of the people as a whole lashing out at some of their elites, not, as in the twentieth-century tyrannies such as the Soviet Union, Maoist China, Papa Doc's Haiti, Pinochet's Chile, and Nazi Germany, top-level officials and elites rampantly running amok and wielding the power of the state willy-nilly against the weak. (When that was tried in Athens, it was quickly overthrown, twice.) Even the major Athenian legal failures, that is, remained consistent with the core idea of power bound to be accountable to the community as a whole, including its weakest members.

IV LAW CONTRA OLIGARCHY

Law, in classical Athens, was the distinctive possession of the masses. They served en masse in their juries – for which they were paid, to ensure access to the lowest classes – and the law was written to protect their equal status, to the point that the law against hubris directly forbade the arrogance of the rich and powerful. No surprise, then, that when before the courts the elite orators appealed directly to the interest of the masses in preserving the protections of the law. And, as we'll see in the next chapter, when the rule of law failed, the Athenians quickly reestablished it, and made it stronger, and with it their democracy recovered. Athens knew the egalitarian rule of law.

V APPENDIX: A BRIEF TIME LINE OF THE LATE-FIFTH-CENTURY ATHENIAN UPHEAVALS

This time line covers the relevant events at the end of the fifth and beginning of the fourth centuries, and will provide useful context for the next chapter.[103]

415	Affair of the Herms/Mysteries
415–413	Sicilian expedition
411–410	Democracy falls, short-lived oligarchic rule of the Four Hundred, then of the Five Thousand
410	Restoration of democracy
406–405	Trial of the Arginusae generals
404	Athenian defeat in the Peloponnesian War
404–403	Rule of the Thirty Tyrants, civil war
403	Peace and amnesty imposed by Pausanias (Spartan king), second restoration of democracy
401–400	Reconquest of Eleusis from the oligarchic party
400–399	Reform of the legal system completed
399	Trial of Socrates
395	Athens joins Corinthian War against Sparta