

Private or Public Prisons: Lessons from Ancient Athens*

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Abstract

Ancient Athens is a useful case study to gain insight into modern debates of political economy and prison privatization. The administration of justice in Athens between 800 and 400 B.C. radically changed from a decentralized private market into a centralized state-sponsored legal system. What is the optimal role of the state? I compare the conditions of Athens before and after state prisons and state justice on several margins: economic prosperity, equality before the law, protection of private property, and the potential for rent-seeking and capture. On some margins the private legal system has preferable results. On other margins, the state legal system is not clearly preferred.

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1 Introduction: The Political Economy of Prisons

The law and economics field is split on the topic of prison privatization. There are two opposing views.¹ First, the literature focuses on current privatization trends or “contracting out.”² Should the government save money by contracting out the management of prison facilities? Empirically, contracted prisons cost less and achieve equal or better operations than their government counterparts.³

The economists of the second view are skeptical of the apparent benefits from contracting out. Hart, et al. (1997) argue that the institutional arrangements of public law combined with contracted prisons lead to a lowering of prison quality. In a thin market with few competing bids for prison contracts, private prison managers have secured profits without competitive restraints. They cut costs and maximize profits to the detriment of prison quality. All the while tax payers feel the costs two fold. First, they foot the bill for privately operated prisons, and second they feel costs in terms of less effective law enforcement.

Benson (2003) is concerned that a narrow attention paid to the technological efficiencies of contracted prisons is a threat to individual liberty. There is no agreement on what should and should not be criminalized. Prisons, like any other tool of law enforcement is a scarce

¹Another significant front in the debate comes from outside of the law and economics field: political activists who favor prisoners’ rights. They would argue that the state has a responsibility to respond to crime. To the extent that crime exists and innocent people suffer the state has failed. The responsibility of the state goes further. The state is responsible to provide a standard of living for inmates: to ensure their health, rehabilitation, and successful return to society. Prisoners’ rights advocates are not a major concern for this paper but they are worth taking note of because they have been a major force in exposing quality concerns in both the private and public prisons. In general they are against privatizing prisons in any form.

²Tabarrok (2003, p. 2) writes that there is “reason to maintain a distinction between the term *contracting out* (in which the government remains as the buyer of privately produced goods and services) and *privatization* (in which the government exits the industry as both buyer and seller).”

³Avio (2003) provides an extensive survey of the current prison economics literature. On the margins of escape rates, physical health, mental health, counseling, amount of recreational facilities, recidivism, and other proxies, Hatry, et al. (1993) have found that private facilities had at least a small advantage. Lanza-Kaduce, et al. (1999) find support that private institutions have lower rates of recidivism than public institutions. The broad trend of the literature implies that there is a greater potential to design explicit contracts to control quality in the private sphere compared to the public.

resource and must be allocated between competing enforcement ends. Prisons will be used to enforce policies that reflect the interests of political authority. To the extent that prison space is scarce, the interests of political authority are at odds with the interests of the general citizenry. For example, given the choice between enforcing the war on drugs or securing individual property rights, a government will enforce the system of law that secures its lasting size and strength.⁴

The private prison debate amongst economists parallels a central issue of political economy. How does society protect law and justice without losing individual liberty?⁵ Buchanan (1975) has asked, how do we retain the benefits of protective governance without succumbing to state redistributions? And recently, Djankov, et al. (2003) have modeled the dilemma

⁴Avio (2003, p. 16) surveys the literature on this point:

Nardulli (1984) and Gierts and Nardulli (1985) take up another aspect of the decentralization problem: judges and prosecutors may treat prison space as a commons (see also Benson and Wollan 1989 and Benson 1990, 1994, which identify the common pool/property rights nature of the decentralization problem). These authors view judges as rendering inefficiently severe sentences as the result of a free-rider problem emanating from a misalignment of incentives and cost bearing. Citizens of the local government derive benefits (protection and retribution) from longer sentences, which happen to be specified by local authorities. However, a senior level of government may in part shift the costs of providing prison services from one sentencing jurisdiction onto another via prison financing. Thus, the cost of delivery does not fully constrain the local demand for confinement. The tendency to prison overcrowding in the federal part of the system and to underbuilding in the local part follows directly.

⁵In the *Federalist Papers*, James Madison wrote:

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must be made to counteract ambition. The interest of the man to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government itself, be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions ([1788] n.d., 337).

Higgs (forthcoming) has recently commented on Madison's concern by reiterating the inevitable tendency of governments to ratchet up their size and authority (Higgs, 1987).

of government optimization as an institutional possibility frontier where society tries to minimize the losses between disorderly chaos on the one hand and the losses of invasive dictatorship on the other.⁶

Economists have used history to argue that many contemporary public goods could be and have been provided on the market. The separate components of justice have been theoretically and historically studied to understand how critical the role of the state is to their provision.⁷ Private law enforcement without centralized state control is possible, especially under cultural similarities, unified interests, and repeated interactions.⁸

In the face of case studies showing that markets can work to provide rule and order without the state, the debate has moved away from the claim that society *has to have* the state to provide order and protect against chaos. Now it centers around whether society *would prefer the state*. Are order, wealth, prosperity, and general welfare all easier to achieve at higher levels under centralized states compared to private institutions? In crude terms, the question at hand is: which system is better, and better according to what terms? Can a stateless society develop complex markets with heterogeneous agents and advanced divisions of labor?⁹ Would the outcomes of a stateless society be comparable to the outcomes of a

⁶Boettke et al. (2005) support this approach while Rosser and Rosser (unpublished) support comparative approaches more in line with traditional economics.

⁷Private alternatives to state justice have been outlined in turn. On the development of private law, rights and ownership see: Benson (1998a and 1990 pp. 11 - 42), Demsetz (1967), Dixit (2004), Friedman (1989 pp. 116 - 120), Hayek (1973 pp. 72 - 143), Hume (1973 pp. 484 - 501), Leeson (unpublished a p. 3), Menger (1871 pp. 96 - 97), Rothbard (1970 p. 267 and 1973 pp. 227 - 234), and Tannehill and Tannehill (1970, pp. 116 - 125). On the provision of private police see: Barnett (1986, pp. 30 - 34), Benson (1990 pp. 211 - 213, and 1998b pp. 280 - 281), Friedman (1989, pp. 114 - 116), Rothbard (1973, pp. 201 - 205 and 215 - 222), and Tinsley (1999). On the provision of private courts see: Barnett (1986 pp. 38 - 47), Benson (1990 pp. 213 - 224 and 349 - 378), Friedman (1989, pp. 81 - 83), Rothbard (1973, pp. 222 - 234), and Stringham (1999). On the provision of private security see: Friedman (2006) and Molinari (1849).

⁸Historical examples of functioning private law systems include but are not limited to: Africa (Leeson forthcoming 2007), the American frontier (Anderson and Hill 1979 and 2004, and Benson 1991), Amsterdam (Stringham 2003), China (Friedman 2006), England (Benson, 1998a, 1998b, and 1990 pp. 224 - 230), Europe (Greif 1989, Milgrom et al. 1990), Iceland (Friedman 1979 and Long 1994), Indus Valley (Thompson 2006), Ireland (Peden 1977), Mexico (Clay 1997), Scotland (Leeson unpublished), and Somalia (Coyne 2006, Higgs 2004 pp. 374 - 376, Leeson unpublished, Powell et al. unpublished).

⁹See Boettke (2006). Leeson (unpublished b) has divided the anarchy literature between those studies that explain isolated order (Clay 1997, Dixit 2004, Greif 1989 and 1993, Kranton 1996, Landa 1994, Leeson 2007, 2006a and 2006b, Milgrom, et al. 1990, Zerbe and Anderson 2001) and those that explain broader

centrally governed society? Comparable on what margins?

There are more than one ways to skin a cat. There are several ways to achieve a rule of law, property rights, and enforceable contracts. Prisons alone fit into a slue of possible justice systems. Avio (2003, p. 10) surveys several major economists who impute different purposes of prison institutions:

Adam Smith (1791 [1976], 79, 87-91) suggestively remarked, however, that the private demand for punishment is independent of any consideration of social advantage. (See also Shoup 1964, Thurow 1970, and D. Friedman 2000 on potential conflicts between efficiency and equity.) Ehrlich (1982) permits goals such as retribution to be reflected in the social-cost function, with the degree of retribution related to the number of unpunished offenders and to the severity of their crimes (also see Miceli 1991). However, such grafts rarely seem to capture the considerations that nonconsequentialists deem important. In contrast to economic models, Kantian inspired retributive (“just deserts”) models and their cousins (e.g. the restorative theory of Cragg 1992; the Rawlsian inspired rectification theory of Adler 1991; the restitutive theory of Barnett 1977 and 1998, chaps. 8, 10, 11) generally argue that punishment can and must be justified independent of the consequences as measured in a social-cost function (Duff 1986, 1996).

The intentions and purposes of prisons (like any dynamic institution) are diverse and debated. In different contexts, similar institutional changes can have different results, and different institutional changes can have similar results. Contracting out for prison services can carry certain outcomes in modern America and different outcomes in another country or another time. Djankov, et al.’s (2003) slope of the institutional possibilities frontier suggests this point. Hart et al.’s (1997) concern that private incentives would degrade the quality of prisons does not have to conflict with Benson’s (1990) preference for a completely market driven legal system. The margins of quality for a given institution are defined over the course

social order (Benson 1988 and 1990, Friedman 1979, Anderson and Hill 2004, Ellickson 1991, Sobel and Osoba 2006, and Bandiera 2003). In cases of isolated order, similar agents engage repeatedly. Institutions are created that coordinate behaviors, avoid conflict, and induce cooperation. Social order is a more overarching system of rules amongst diverse agents in non-repeated interactions. Leeson (unpublished) argues against the “inability of institutions of isolated order to provide a legal system” and against the claim that “anarchy cannot produce social order (ibid, p. 3).”

of a historical process.

To get at the heart of questions like this one, Mises described *verstehen* (understanding) or *thymology*¹⁰ as a historical technique. The historian seeks out the expressed intentions of individual actors and interprets their actions according to the terms of their stated intentions. Where did prisons come from? Who was responsible? What were they intended to do? Did they achieve that goal? How have prisons changed since? How have the goals of prisons changed? How have they influenced changes in other institutions?

The prison as a social institution has had a long history with several key changes. This paper will investigate what appears to be the first example of state-sponsored prisons where incarceration was used to enforce property law as well as redistributions.¹¹ Section 2 will explain why ancient Athens was selected as a historical case study and it will provide a broadly accepted history of the justice system in early Greece. Section 3 uses a relative price change to explain why the Greek justice institutions transitioned towards state control and tended to stay centralized. Section 4 is a practice in what will be called the New Comparative Historical Political Economy. It lays out multiple margins to compare the institutional environment of Athens before state prisons with the institutional environment after state prisons. Finally conclusions are presented.

¹⁰Greaves (1974, pp. 112 - 113) writes

Whenever Mises refers to psychology in economic studies, he has in mind what some call “literary psychology” and which he has called “*Thymology*”...In this sense, psychology “is on the one hand an offshoot of introspection and on the other a precipitate of historical experience. It is what everybody learns from intercourse with his fellows. It is what a man knows about the way in which people value different conditions, about their wishes and desires and their plans to realize these wishes and desires. It is the knowledge of the social environment in which a man lives and acts.”

Mises explains these concepts fully several times throughout his writings see Mises (1933, pp. 3, 152 - 155, 183 - 202; 1944, p. 230; 1949, pp. v, 12, 123 - 127, 486 - 488; 1957, pp. 264 - 284; 1978, pp. 47 - 28).

¹¹The Egyptians used systematic slavery to build the pyramids and other public works projects, but these slavery programs were not used to enforce property rights of individuals. Though some prison historians refer to the Egyptian slave camps as the first prisons they are not relevant to this paper because they were not intended to protect civic society and social order (Peters, 1995).

Though Foucault (1977) most famously considers the European prison experiment as the “birth of the prison,” several prison historians disagree (Sullivan, 1996 and Rothman, 1973)

2 Institutional Change in Ancient Athens

Why ancient Athens? Ancient Athens appears to be one of the first examples of state controlled incarceration. It was Aristotle who once said, "[h]e who thus considers things in their first growth and origin... will obtain the clearest view of them (Politics, 1252a 24 - 25).” Obviously there is something to be learned about the role of prisons in society, by looking at their historical genesis. What is less obvious is that Athens during this time is not only inventing the state prison, it is also inventing the state in general (western democracy). As Calhoun (1927) has phrased it: “[f]or the first time in the history of the Western world, a political government has by its enactments defined crime somewhat as it is defined today, and has provided machinery for the punishment of crimes by the body politic (ibid., p. 7).”

Athens gives a clear view of the motivating forces behind state prisons because they were implemented into a political environment where no similar institutions existed before. The period from Archaic to Hellenistic Greece is a jack pot of natural experiments. The real conditions of history reflect theoretical *ceteris paribus* conditions.¹² When a theorist says “holding everything else constant;” Athens literally has less of everything else, thus the task is easier.¹³

There is a skeletal history of ancient Greece that can be taken for granted. It is easily recognized by comparing two of the most commented on legal cases from the times. The first is the description of Achilles’ shield in *The Iliad*.¹⁴

¹²*Archaic* literally refers to the time period of the ruling Archons (Early 600s till late 400s B.C.), including Solon (638 - 558 B.C.). More commonly *archaic* refers to the 8th through 6th centuries B.C.. The Hellenistic period refers to the late 300s to mid 100s B.C.. On the meaning of these terms and the dates they refer to see Howard (1981), and Jeffrey (1976).

¹³Perhaps it should also be noted that the time and resources are ripe for a reassessment of Greek history. In the last twenty years or so there has been an explosion of attention paid to more specialized topics within the body of classical history. As well as fresh and previously unavailable English translations of the works of the Attic Orators (the representative attorneys of their day) (Cohen, 2005, p. 2).

¹⁴*The Iliad* has been used as a historical source to describe social historical conditions of Archaic Greece circa 800 B.C. and earlier (Kirk, 1964 and Combella, 1965)

‘In the assembly place were people gathered. There a dispute had arisen: two men were disputing about the recompense for a dead man. The one was claiming to have paid it in full, making his statement to the people, but the other was refusing to receive anything; both wished to obtain trial at the hands of a judge. The people were cheering them both on, supporting both sides; and heralds quieted the people. The elders sat on polished stones in a sacred circle, and held in their hands sceptres from the loud-voiced heralds; with these they were then hurrying forward and giving their judgments in turn. And in the middle lay two talents of gold, to give to the one who delivered judgement most rightly among them. (*Iliad* 18. 497 - 508)

The passage describes Greek judges influenced by a competitive market for their services. Several judges were willing to take the case, the profitable returns were reserved for the best proposed solution. Good rulers were rewarded financially, while bad rulers were avoided.¹⁵ Compare the Greece of Achilles’ shield with Athens when Socrates sits on trial (approximately 399 B.C.).

Shall I choose instead of [Meletus’ proposal for a penalty] something from those things which I know well are bad, penalizing myself with such a thing? First of all, how about with imprisonment? And why is it necessary for me to live my life in prison, enslaved to every successively appointed magistrate? Maybe I should be imprisoned for a financial penalty until I pay? (Socrates in Plato’s *Apology*, 37b - c)

Socrates’ trial takes place in a very different system of justice compared to what was described

¹⁵In general this passage can be interpreted as Homer presenting a dichotomy between the peaceful imagery of the shield in contrast to the bloody war going on around it (Scully, 2003). Despite particular debates concerning the passage’s interpretation it is generally assumed that the individuals described on the shield prefer peace to violence (Sidgwick, 1894). Not only did Homer describe Archaic Greece as a social world that valued peace and order, but he presented it to an audience that was receptive to his message. This strikes to the central theme of *The Iliad*. Violent conflict continually erupts because of stubborn individuals refusing to accept restitution. They suffer blinded by their own *hubris*, (For more on the social perception of *hubris* and its criminality in ancient Greece see Cohen (1991), MacDowell (1976), Fisher (1976 and 1979), and Cairns (1996).) as though they could be above the established law.

‘A man accepts recompense from the killer for his brother or his son who is dead; and so the one remains in his own country after paying a great amount, and the other’s spirit and pride are appeased when he has received recompense. But *You...*[are too stubborn, etc.]’ (*The Iliad*, 9. 632 - 6)

And so ensues a great war and the implication that it all could have been avoided.

on Achilles' shield. Socrates is accused by the state rather than an individual. His sentence is defined as a period of time to be spent in prison rather than a debt. Socrates even refers to the traditions of the past as more reasonable compared to the penalties that the central state is about to levy against him. Socrates' trial is just a partial description of an entire justice system far more centralized than what existed in earlier times. What caused this change, and how should it be characterized?

Classicists generally agree that between 800 and 400 B.C. Athens was the birthplace of the *polis*¹⁶ or the city state. In its earliest time, Greece was a land of small cities and towns connected by geography rather than politics.¹⁷ During and after the reign of the Archons, Athens became more of a formal, modern, and political state. Draco established some of the first written codes of law for the city (approximately the 7th century B.C.), followed by Solon whose quantity and influence of formal legislation was unprecedented. After Solon's reign, the political climate of Athens and Greece was never the same. Athens eventually became a formal, centrally-controlled, political empire.

I borrow the thesis that Solon's penal reforms, and the construction of the Athenian state-prison were the essential catalysts for this broader change.¹⁸ Prisons were a unique innovation in the technology of law enforcement. Individuals who possessed ruling authority over institutional choices faced significantly different costs in the presence of a functioning prison system than without. Prisons significantly decreased the relative cost of producing more centrally controlled legal institutions. With a prison system in hand, a ruling authority could more easily levy taxes, redistribute wealth, control the money supply, create new social policies, and launch wars.

¹⁶On the rise of the *polis* see: Ehrenberg (1937) and Austin and Naquet (1972, pp. 49 - 52).

¹⁷On the decentralized nature of Greek cities in the Homeric period see Finley (1953, pp. 3 - 23).

¹⁸There is common agreement that Solon's administration (at least) is responsible for the policy changes I am concerned with. Allen (1997, 2000) refers to Solon's policies as an "overhaul" of the previous Draconian system. Similarly Rhodes (1970) describes how the role of victim changes from the individual to the community under Solon's rule, and Vlastos (1946) refers to Solon's reign as advancing "The Naturalization of Justice," where crime is viewed as a "source of *public* danger, [and] creates a *public* interest which requires the compulsory intervention of central authority (ibid., p. 67, italics mine)."

To explain the critical role of Solon's reforms and the institutional changes it caused, it is important to have a clear understanding of how justice in Athens operated before Solon (approximately 800 - early 600s B.C.).¹⁹ A fuller description of Greece as it existed for Homer is needed, a vision of Greece as it existed beyond the confines of Achilles' shield.²⁰

2.1 Athens and Greece before Solon

Until Solon's administration, justice in Athens functioned without public police, public courts, and without publicly operated prisons. There are only four texts used to describe Athenian justice before the archaic period: *The Odyssey* and *The Iliad* by Homer, and *The Theogony*, and *Works and Days* by Hesiod. None are explicitly concerned with describing Athenian law or enforcement, but they reveal important insights about the perceptions of law and justice in these early years nonetheless.²¹

As viewed through the epics, Homeric Greece seems similar to the legal systems described by spontaneous order legal theorists (see footnotes 7, 8 and 9). I argue that the legal process in Homeric Greece operated well because it contained properties similar to competitive markets. Competition in two realms brought about good outcomes in ancient Greek justice. First, conflict between individuals was restrained by their competing private interests. Second, competition amongst for-profit judges combined with an active citizenry held judges' potential to abuse power in check.

The spontaneous law tradition argues that early legal systems were accumulations of defined

¹⁹The date's of Solon's reign are debated by historians, so are the dates of his policies. See Rihll (1989) and Milne (1943).

²⁰Cohen (2005, p. 3) has noted that Gagarin (2005) agrees with Finley's (1953) thesis, "There was no 'Greek law' in terms of common underlying legal ideas and basic principles of substantive law..." apart from the coexisting norms of separate cities. That interacted and influenced the content of one another.

²¹Austin and Vidal-Naquet (1972, pp. 37 - 47), Finley (1953, pp. 213 - 245), Kirk (1964), and Combella (1965) all explicitly discuss the methodological concerns of extracting meaningful historical content from the epic poems.

property rights.²² In primitive law, ownership disputes are the most common cases brought to court. MacDowell (1978, p. 10) explains that according to the epics, this was the case in the earliest days of Athens.

In one passage in *The Odyssey* it is regarded as normal and acceptable for a man to get hit while fighting to keep possession of his cattle. ‘Indeed, there is no sorrow or grief in a man’s heart when he is hit while fighting for his own possessions, for cattle or white sheep; whereas... (*Odyssey* 17. 470 - 3)’ And in the *Iliad*... ‘Just as two men contend about boundaries, with measuring-rods in their hands, in a common field, and fight about equal shares in a small piece of ground, so... (*Iliad* 12. 421 - 4)’ (MacDowell, 1978, p. 11 - 12)

Individuals use the physical resources around them to consume or produce. All is fine until people’s usages conflict with one another. There are no public prosecutors, no public police forces, and no public prisons. An individual is his own prosecutor when he has been wronged. He must use his own physical force or his fellows’ to insure a judge’s ruling. Conflict and the use of force is costly. Norms such as ownership through traditional usage and the right to buy and sell property emerge because they avoid conflict, they communicate ownership, and they make trade more reliable.²³

As conflicts continually erupt, there is opportunity to specialize in arbitration and dispute settlement. Judges and arbiters standardize the norms of ownership in the cases they rule over so they can judge more frequently and more reliably. Subtle differences in the law coexist but the ones that are preferred by agreeing plaintiffs and defendants last the test of time. In ancient Greece there is evidence to suggest that similar good results spontaneously emerged. This process produced clear and reliable social norms from two sources of competition: competition between plaintiffs and defendants on the one hand, and competition between for-profit judges on the other.

²²Hume (1739 [2005], pp. 484 - 501) introduced this concept while Menger (1871 [1994]) and Demsetz (1967) reintroduced it later. More recently this theory has been applied in Benson (1989).

²³Boettke and Coyne (2007).

2.2 Competition between plaintiffs and defendants produced good results.

It is commonly assumed that if individuals conflict outside of the final authority of the state, violence and chaos abound.²⁴ Two less recognized insights are: first, when confronted with likely violent retaliation, disputants often opted for impartial third party arbitrators for whom violent action serves no gain; and secondly, private compensation schemes emerged to settle feuds long before central state-authorities existed.²⁵ Once in place, the social norms of compensation converted violent offenses into financial penalties paid to victims. Together these practices avoided violent and costly blood feuds.²⁶

During the Homeric period, Greek law was predominantly concerned with property rights and dispute resolution. Winning prosecutors accepted monetary restitution for pain, suffering, and even deaths caused by loosing defendants.²⁷ The strategic interactions between plaintiffs and defendants lead to bargaining over case settlements. The bargaining process served as a restraint against individuals exploiting power and privilege over one another. Financial sentences did not escalate to uncontrollable levels. Plaintiffs and defendants strategically

²⁴Hobbes (1651 [1985]) notoriously described the state of nature as a “constant war of all against all.” Nozick (1974) summarizes the state of nature also described by Locke (1690 [1980]):

Men who judge in their own case will always give themselves the benefit of the doubt and assume that they are in the right. They will overestimate the amount of harm or damage they have suffered, and passions will lead them to attempt to punish others more than proportionately and to exact excessive compensation (sects. 13, 124, 125). Thus private and personal enforcement of ones rights (including those rights that are violated when one is excessively punished) leads to feuds, to an endless series of acts of retaliation and exactions of compensation (Nozick, 1974, p. 11).

²⁵Barnett (1977, p. 354) argues:

The image of a criminal punishment arising from a bloody Hobbesian jungle is pure myth. Monetary payments had replaced violence as the means of dispute settlement and functioned well for over 600 years. It was only through the violent conquest of England, Ireland and other parts of Europe that state criminal punishment was reluctantly accepted.

See also, Schaffer (1965 and 1970).

²⁶On feuding in ancient Athens see Cohen (1995, pp. 87 - 118).

²⁷The earliest times used blood prices to settle even murder cases. But the intrinsic nature of murder as a crime which cannot be repaid caused it to critically change the face of criminal law (Calhoun, 1927).

drafted their case settlements to be most likely to win the favor of the ruling judge and the observing public. For example, “sentencing by the process of *timeoi* required that the jury vote between the penalty proposed by the litigant and the penalty proposed by the prosecutor, some scholars have argued that it was not possible for the jury to come up with a third option (Allen, 1997, p. 125).”²⁸ Long (1996) remarks that this simple institutional arrangement had profound effects in avoiding inefficiencies typical of modern judicial systems and guided criminal sentences to optimal and proportionate levels.

Prosecutors were prevented from proposing excessively harsh penalties by the fear that this would make the jury more likely to choose the defendants milder proposal; defendants were likewise prevented from proposing excessively mild penalties by the fear that this would make the jury more likely to choose the prosecutors harsher proposal. This was an ingenious way of ensuring moderation in punishments (*ibid.*, p. 8).

Other ingenious constraints on interpersonal conflicts developed to restrict the frequency and level of accusations individuals laid against one another. If one person was found guilty of stealing from another, the typical debt was double the stolen amount. This could be exploited by people laying false accusations against others or planting their own property in the homes of their neighbors. Instead the custom was that accusers could only search the house of the accused while naked. Silly maybe, but certainly effective at avoiding both frivolous accusations and the false planting of evidence.²⁹

²⁸See also Saunders (1990, p. 76). In cases that were “*timeoi*, ‘needing an estimate’... the prosecutor and defendant each made an estimate (*timesis*) of the penalty to be awarded in case of conviction, and the court had to adopt one or the other.”

²⁹David Friedman has brought this example to my attention.

2.3 Competition between judges produced good results.

The evidence that disputes were taken to objective third parties is clear and prevalent. When determining the winner of a bet between Idomeneus and Aias, Homer writes:

‘Come on, let us wager a tripod or a cauldron, and let us both make Agamemnon son of Atreus the judge of which mares are leading, so that you may learn and pay up.’ (*Iliad* 23. 485 - 7)

Taking disputes to third party interpreters had a significant effect on the amount and frequency of violence in primitive history. The active participants of a dispute weigh their subjective losses higher than others. By outsourcing for resolution, both sides recognize the benefits that come from the arbiter having no motive to engage in violence. But what kinds of people filled the niche for dispute resolution in Ancient Greece, and what kept them in line?

The bet between Idomeneus and Aias where the disputants select Agamemnon (a king) and the next passage by Hesiod, both serve as evidence that, kings and elders were chosen as judges to decide disputes because they had reputations for being wise and reasonable in their decisions (MacDowell, 1978, pp. 13 - 18).

‘All the people look to him as he decides rights by straight judgments. Speaking surely, he skillfully ends at once even a grave dispute. This is the function of prudent kings: for people who are harmed in their dealings, they bring about restitution easily, talking men over with soft words.’ (*Theogony* 81 - 90)

Choosing one of many possible arbiters worked as a selection mechanism so that rulers with principled interpretations of legal norms succeeded, and those without were either compelled to change their rulings or fall out of the market. As mentioned in the description of Achilles’ shield, profit motives also promoted good results amongst competing judges.

The most leveling check on the authority of judges was the dispersed power of the people. The ruling authority of the people was absolute and kept a close eye on judicial operations. Todd and Millett(1990) describes that “[i]n everyday political the *demos* (People) exercised the *kratos* (sovereign power) in all three spheres of legislation, executive action and jurisdiction.”³⁰ Back to the passage about Achilles’ shield, notice that the case is heard in the open public and Homer implies that the ruling was subject to acceptance or denial by the observing group.

Even later periods of Athens, when parts of the justice system were handled by the state, the remaining private parts are noted as functioning well. Allen (2000, 1997), Long (1998, 1996), Hunter (1994), Finley (1994), Freeman (1963) and Cohen (1992) all explicitly reference and describe portions of Athenian law enforcement as “private.” Throughout its entire life, Athens had a self-regulating civic society. The city was relatively free, both socially and economically.³¹ Private individuals and groups organized institutions to promote art, education, and banking. Athenian citizens were very engaged in civic life, and rules of conduct such as trust, reciprocity and fairness tended to emerge as common standards in business and personal dealings.

Athenian justice functioned thanks to a high level of social participation invoked from the inter-personal character of its institutions. Allen (2000) writes “[t]hose private and public actors who participate in a society’s system of public punishment are forced to enter into, to use, and to shape its discourse of justice, desert, and fairness. Modern citizens are no longer obliged to participate in these sorts of discourses.” Long (1998) quotes Hunter (1994)

³⁰See also: Rhodes (1972, p. 147) and Sinclair (1988, p. 82 - 3).

³¹On the liberal nature of Athens in general, Long (1998) writes, “[d]emocratic Athens in particular allowed considerable scope for private action free from governmental interference, both in market transactions (Athens was one of the chief commercial centers of the Mediterranean) and in expression of opinion (Athens was likewise a magnet for philosophers and poets from all over the Greek world)” and goes on to quote Pericles funeral oration in Thucydides (II. 37-43), “...We are free and tolerant in our private lives; but in public affairs we keep to the law... [E]ach single one of our citizens, in all the manifold aspects of life, is able to show himself the rightful lord and owner of his own person...” On private banking in Athens, Long quotes heavily from Cohen (1992) in reference to the “*trapezai*...unincorporated businesses operated by individual proprietors or partners, almost entirely free of governmental regulation; [unlike] modern banks (Ibid, p. 9).”

to show that the Athenian system fostered ties of cooperation among its citizens:

Private initiative and self-help were fundamental to policing Athens. This means that Athenian citizens participated to an unprecedented degree in the social control of their own society. Such a system of policing has much to tell us about the way in which that society functioned. For it indicates yet another sphere in which Athenians were bound to each other by ties of reciprocal dependency. In order to carry out the tasks of policing and law enforcement, they required a dependable network of kin and friends... This helps to explain why Athenians tried at all costs to avoid quarrels with their fellow demesmen, who were generally synonymous with their neighbors. It was in their interest to sustain good relations with their neighbors... (ibid., p. 149)

The historical evidence would suggest that incarceration like the rest of the justice system before Solon's reforms, was privately instigated. But that is not to say that *prisons*³² were even used before Solon. Individuals held criminals as indentured servants until their debts were paid off. So there was a natural restraint on the amount of time an individual was restrained and the number of people incarcerated at any given time. This put a lighter burden on public services and finances compared to policies in later years.

The functionality of the early justice system has caused some scholars to dismiss the usage of prisons in Athens all together.³³ Hunter (1997, p. 316) points out that prison populations (if temporary jails can be considered prisons) at this early time were likely very small because individuals who paid their fines were set free, and post-trial criminals were left in the hands of their victims rather than held in cells. Small scale jails or holding cells were only used for

³²In other words there is a subtle distinction between *incarceration* where any individual or group holds an individual under arrest versus *imprisonment* where a formal building is used to hold larger quantities of people for long periods of time.

³³Some historians have gone so far as to look back at ancient Greece and deny the existence of prisons altogether. MacDowell (1978, p. 257) claims imprisonment was a "normal" (the obvious recourse in criminal trials) punishment. Barkan (1936a, p. 341) says imprisonment was "indisputable" at least as an "additional" penalty (added to restitution payment to victims). Harrison (1971, p. 177) also accepts the use of imprisonment as a penalty. On the other side of the debate, Todd (1993, p. 141) thinks imprisonment to have been "unlikely," and Hunter (1994) believes the issue is still open, but later Hunter (1997) blames the remaining debate on the lack of investigation on the purposes of imprisonment.

detaining those awaiting trial, those criminals who were an active and dangerous threat to others, and criminals who were thought to try to evade trial.

Before state involvement in punishment, large-scale imprisonment simply would not have been feasible. Unless a private punisher is capable of working the punished as a slave or ransoming the captive, the punisher is not likely to hold a prisoner indefinitely, since keeping a wrong-doer in captivity requires effort and expense. Thus, a prison must be to a certain extent, an artificial construct of a community rather than a natural outgrowth of the processes of private retribution (Allen, 1997, p. 126).

With what appears to be a functioning system of justice and rights protection, what caused the drastic change in the organization of justice? Why did Athens eventually construct a formal prison building³⁴ and time based criminal sentences? It is doubtful that prisons were introduced as a direct response to a lawless quality of Athenian justice, but what *does* explain the rise and dominance of state sponsored justice ever after?

3 Changes in the relative costs of constructing institutions

Axelrod (1981) put forth several conditions where cooperation could hold as a stable equilibrium amongst competing agents. He also pointed out that asymmetries of power and information threaten cooperation. As I have explained, the general legal history of ancient Athens can be described as a broad transition from a decentralized enforcement regime into a state-centralized legal system. Similar to how Axelrod described power amongst his agents *invading* the otherwise cooperative environment, I argue that the state prison was a unique

³⁴See Vanderpool (1980).

enforcement technology, it created a power asymmetry between the government and the governed, and it displaced the other decentralized legal institutions.

Centralized incarceration effected the costs and benefits to choosing between institution types. It changed the shape and type of the institutional basket chosen by Athenians and Athenian rulers. With cheap and technologically effective enforcement, a marginal expansion of centralized institutions was relatively cheaper. After the door to centralized legal institutions had been opened, the tendency for expanding state authority made it ever more difficult to shut. In fact, as state-controlled legal institutions grew, the old self-serving norms fell apart at the seams.

Individuals with marginal levels of power and authority in the Homeric period were constrained competitively by other leaders and the watchful eye of an engaged citizenry. Though separately operated, the production of law, the interpretation of law, and the enforcement of law all fit together as complementary institutions. Once prisons became an accessible enforcement technique, the remaining institutions were no longer well-suited to meet the needs of new problems that erupted in society. They also had to change in turn. Archons after Solon faced an environment where modifying legal institutions was easier, less costly, and at times insisted upon unlike in previous years.

To understand the institutional changes in ancient Athens, a budget constraint is useful. Figure 1. represents the social choice between alternative forms of legal institutions. The X axis is labeled: *centralized institutions*, and the Y axis: *decentralized institutions*. A budget constraint exists between the two types because individuals living under them gain utility from the functionality of the institutional basket rather than their type. If people's property rights are secure, their contracts are enforced, and their persons are safe, they do not care where the funding and management of security services comes from just so long as they work. People are indifferent between the types of institutions, but they prefer arrangements

that achieve higher rates of social welfare. They prefer to be safe rather than threatened, they prefer contracts to be secure rather than uncertain, and they prefer their property to be protected rather than susceptible.³⁵

The space up and to the right of the diagram represents the welfare of individuals living within or acting in control of the institutional context. As they move further away from the origin, social welfare and utility (in the terms described) increases. With a sound rule of law, secure property rights, and accessible means of enforcement, individuals feel safe and secure. They form and rely upon stable expectations about their contracts and dealings with other people. Stability promotes more trade and leads to economic prosperity. Well functioning legal systems avoid exploitation and asymmetries of power by providing generalized rules and equality before the law. The legal environment is functional and cannot be manipulated to reflect the interests of a few at the expense of the majority. All of these good things are represented as positions further and further away from the origin.

The aim of institutional construction is to be productive according to some, any, or all of these utility margins. But only institutions on the X axis are capable of being manipulated in this way. By definition the institutions on the Y axis are the result of complex dynamic processes that no individual would have power or authority over. Y axis institutions are the result of human action but not of human design. Ideally, a successful construction of new institutions looks like an institutional income effect. Figure 2. illustrates an income effect; budget line A is replaced by budget line B, where B is always and everywhere more utility enhancing compared to line A. Budget line B hits the X axis further from the origin than budget line A, this shows a greater amount of affordable centralized institutions. Budget lines A and B each connect to the Y axis at the same point, demonstrating that no loss of

³⁵This may not be a universal insight, in fact it probably is not. I would not be surprised if in today's political climate people held an explicit preference for centrally structured institutions over decentralized alternatives. Where this preference comes from is an interesting cultural point. However this framework does apply in the historical setting because no explicit preference for central institutions could exist because no central institutions existed before.

decentralized institutions is suffered by the presence of the new centralized institutions.

Despite the indifference that individuals within the institutions have over their shape and formation, historically there is a real trade off between the two institutional types. Centralized institutions crowd out and displace pre-existing decentralized institutions. Figure 3. captures this relationship as a substitution effect. Line C is the new budget constraint between centralized and decentralized institutions. Unlike line B which was always and everywhere utility enhancing, line C shows that while centralized institutions have gotten cheaper, decentralized institutions have gotten more expensive. When given the choice over combinations of the two institutional types, individuals will choose marginally more centralized institutions at their new cheaper rate.

In terms of social welfare this is not necessarily a bad thing. Return to the central question of political economy that I introduced at the beginning of this paper. Which institutional bundle is better? It is an empirical question to be answered once there is a meaningful definition for what is meant by *better*. Where along the new budget constraint will the real allocation of institutions occur? I claim that substitution effects are always more descriptive of institutional change compared to income effects. Rulers and conscious actors within institutional environments may have good intentions to increase the welfare and prosperity of the community by constructing centralized institutions, but they often fail to recognize the costs paid in forgone decentralized institutions. That is not to say that a substitution effect cannot achieve an increase in social welfare. It most certainly can; if the bundle of institutions that gets selected falls on the lower portion of budget constraint C (beyond the region of utility marked out by budget constraint A) than it is obviously a utility increase. It is further up and to the right. But is this the whole story?

I argue that the legal history of ancient Greece is a case where centralized institutions (especially law-enforcement institutions) were subject to capture, rent-seeking, and personal

manipulation in ways that decentralized institutions were not. In other words, the utility region marked out by budget constraint C, beyond A, was distributed unevenly amongst the individuals who lived within the institutional environment. The rewards of higher social welfare got doled out to individuals with political authority often to the detriment of other citizens. At this point the entire social welfare metaphor falls apart. In ancient Athens and other historical cases, institutional construction is not objectively welfare increasing. The stories available are not fairy tales where everyone lives happily ever after. They are stories where small groups of people gain wealth, power, and authority at the expense of the masses.

3.1 The rise and dominance of centralized law

Solon's policy overhaul was not singular nor instantaneous. He levied several, specifically-honed pieces of legislation that invoked many processes of social change.³⁶ First, Solon implemented the *Seisachtheia*, (the relief of burdens)³⁷ in which he redefined citizenship so that no Athenian could be subject to the bodily force of another Athenian. If a man was incarcerated, he was a slave and slaves were not Athenian citizens. By definition Solon insisted that citizens could not hold one another as captives. Self-serving incarceration was no longer an available enforcement technique to ensure contracts, enforce case-rulings, or levy justice. In effect, that single piece of legislation monopolized the role of law enforcement to the sole responsibility and right of the state.³⁸

The *Seisachtheia* was a response to wealth inequality in the urban territories (see later section 4.1), but it had several unintended consequences. In the traditional legal system, the winner of a court case had the responsibility to enforce the ruling. The case was decided and the observing public accepted it. When the winner "went to the mattresses," and took back

³⁶On this see Case (1888), Milne (1943), and Rhodes (1970).

³⁷For several thorough interpretations of the *Seisachtheia* see Lloyd (1890), Harding (1974), Hammond (1940 and 1961) and Billheimer (1938).

³⁸See Aristotle's *Constitution of Athens*, Allen (1997, p. 127) and Davies (1977).

his money or property no one interrupted him. Sometimes this meant taking a debtor under indentured servitude or debt-slavery. After the *Seisachtheia*, this was no longer an option. Without an effective means of enforcement, case ruling were in name only, contracts were uncertain, and property rights were under threat. Athenians turned to the ruling authority of the state to solve this problem.³⁹

The state prison was created to provide credible law enforcement, but it also erupted a series of unintended consequences. In the traditional system, cases were usually disputes concerning property and ownership. Rulings were framed in terms of financial debts to be paid by the loser to the winner of the case. When the loser of the case could not pay his debt from his existing wealth the winner could take him as an indentured servant. The length of his servitude was determined by the amount of the debt and his ability to work it off.

The new enforcement technique of imprisonment was not met by a new body of laws or a new way to interpret the law. Legal norms were still predominantly concerned with property ownership. When cases were settled after private incarceration was outlawed, case winners had no real means to ensure that the ruling would be followed. When the state first offered imprisonment as an enforcement technique, it was similarly applied mostly to cases concerning property disputes and debts. The state prison became an intense expression of Athen's unequal wealth structure. When the loser of a case had enough money or property to pay his debt he did so and served no jail time. Imprisonment was predominantly a "secondary" punishment, only relied upon to induce the repayment of debts. In reality what this meant was that only the poorer classes wound up in jail. While in jail, it was nearly impossible to raise the funds necessary to repay their debts.

[P]oor Athenians probably had no way of meeting their penal requirements and

³⁹Rizzo and Whitman (2003) have written a contemporary theory of this phenomenon. The state authority imposes some degree of *paternalism* (I know what's best for you) upon its citizens quickly following the citizens are inculcated to rely upon the state and eventually participate in *parentalism* (please help me, I don't know what's best for me).

therefore found themselves facing de facto sentences in prison of indefinite length...[and noted] I Barkan (1936b: 339) agrees; mentions of lengthy terms in prison are found at Dem 24.125 [‘Does not imprisonment run in Androtion’s family? Why, you know yourselves that his father often went to jail for five years at a stretch’], 135 [‘and he stayed in that building for many years, until he had repaid the money in his possession which was adjudged to be public property’], 25.61 [‘But the Tanagan, a fresh-caught fish, was getting the better of the defendant, who was thoroughly pickled, having been long in jail’]; Din 2.2 [‘It will be no new alarming experience for the defendant if he is convicted, for he has committed in the past many other crimes meriting the death penalty and has spent more time in prison than out of it. While he has been in debt to the state he has prosecuted men with citizen rights... (Allen, 1997, p. 128)

This arrangement could not stand for long. The poor masses were discontent with the blatantly unequal application of imprisonment. Incarceration as a “normal” punishment was presented as a solution to this political unrest. Finally, the state abandoned debt-based settlements entirely and put in place a system where crimes, offenses, and contract violations were converted into time-based sentences to be served in the state prison by the rich and the poor alike.

This drove a distinction between the civil and the criminal law, similar to what we observe today.⁴⁰ Because victim’s of contract breaches received almost no compensation when their debtors were incarcerated, it was in their interests to creatively draft explicit self-enforcing contracts. Offering bonds as collateral made contracts more reliable without having to depend on the public justice system. Hence the growth of a separate civil legal system. By default, criminal laws became explicit matters of violence, murder, and violations against state ordinances (Cohen, 1995).

⁴⁰MacDowell (1978, p. 57) writes,

Athenian cases are generally classified according to the procedure by which they were initiated and brought to the stage of trial. The word for a case is *dike*, and the broadest distinction is between a private case (*dike idia*) and a public case (*dike demosia*)... The most ordinary type of public case was *graphe* (meaning ‘writing’), so called presumably because it had originally been the only type of case in which the charge had to be put in writing.

Thomas (2005) argues that written laws and codes rather than reflecting the true content of customary traditions and opinions about law, the first written codes were amongst the most disputed. By putting a law in writing the drafter had an opportunity to secure his own interpretation.

The state was in de facto ownership and control over the prison system which gave it a power and authority over the content, interpretation, and enforcement of criminal law that it had never had before. The scarce resources used to promote and protect law and order would be allocated in a new way. The traditional decentralized legal system harnessed the tastes, preferences, and perceptions of justice held by the citizenry, but the new centralized legal system had no method of determining the content of the people's interests nor of expressing them optimally. The new allocation of court time, prison cells, police officers, etc. reflected the interests of the state. I argue that these state-interests were often in conflict with, rather than in support of the general interests of the masses.

4 The New Comparative Historical Political Economy

Was the state prison of Athens a step of progress for civilization. Should it be included in the set of institutions that economists consider to be crucial for markets to begin and prosper? The devil's in the details, the proof is in the pudding. to compare the "quality" of law-enforcement institutions before and after state-prisons there has to be some meaningful benchmarks of objective quality. At the very least institutional theorists have imputed a correlation between effective institutions and real economic well-being. The historical record has also left explicit clues as to what Solon's own aims and motivations were in crafting his new legislations. Were the institutional changes successful on these terms?

4.1 Were state-prisons a foundational institution for economic development and growth?

It is popular amongst new institutionalist economists to point out a critical relationship between minimal state institutions on the one hand, and economic development and pros-

perity on the other. North (1990 and 2005) argues that institutions are the “underlying determinant” of economic performance. When property rights are insecure, exchange and production are costly and less productive. De Soto (2000 and 1989) defines property rights as those “which confer on their holders inalienable and exclusive entitlement to them (ibid., p. 159).” New institutionalists assert a crucial and necessary role for centralized institutions to define, allocate, and enforce property rights. Without formalized and centrally controlled institutions markets cannot develop nor grow.

To understand the Athenian case according to the new institutionalist framework ask: did transitioning to a public prison and central legal system assist Athens in achieving economic development or economic growth? There is not sufficient evidence to attribute the economic development of ancient Greece to the existence of central law enforcement. Before Solon’s legislative overhaul and without central institutional guidance, Greece had transitioned from a collection of separate nomadic herding societies into a land of several, small, but productive agricultural cities and villages. Agricultural production processes yielded higher output and more varied diets and Greece experienced a population surge, that can be dated to as early as 800 and 700 B.C..⁴¹ It is not supported by the historical record that central legal institutions were a necessary precondition to functioning markets, the existence of property rights, or the beginning stages of economic development. Economic development had begun before central legal institutions had hit the scene.

Unfortunately, weather and geographical conditions stretched the agricultural output of the land to a near breaking point. Topsoil dried, once loosened it washed away much of the once fertile land. Less land produced less of the traditional grain crops. Unable to produce sufficient food for both sustenance and trade, peasant classes borrowed against their land and eventually against their own persons in order to survive. As time passed, peasants were unable to pay these debts. They wound up handing over their lands and eventually their

⁴¹See Millett (1991), Austen and Vidal-Naquet (1972), Finley (1953), and Starr (1977).

persons to a few wealthy landowners who ruled over an entire class of indentured servants. This was not a profitable arrangement, even for the landlords. Peasants continued to raise unprofitable grains because converting to long term crops would starve them before it earned a profit. Peasants were stuck in an unending cycle of borrowing and increasing their debts. Landlords were stuck lending food to peasants in exchange for more future labor hours (the only profitable asset at their disposal) (French, 1956; Garnsey, 1988; and Sallares, 1991).

Solon argued, and it has been repeated by historians ever since that this unyielding class divide motivated his policies. His legislative reforms explicitly repealed the long standing debts of the serf class, and his judicial policies were explicitly designed to avoid the situation from reoccurring. Solon obviously had some vision of economic prosperity in mind behind his legislative reforms, but that is not to say that the Athenian state-prison was an institutional foundation for economic prosperity.

At first glance the economic prosperity of ancient Greece fits nicely with the new institutionalist argument. A market developed but ran into an institutional rut, then the incentives and ownership rights were realigned, finally economic prosperity came about. But is there an explicit causal relationship between these observations? In order for Greece's prosperity to fit the new institutionalist story, we would expect to see the central legal system provide security and stability so that more trades could take place in existing markets, new individuals could gain access to traditional markets, and new markets could develop and grow. It would be these areas that would have to be the cause for increased wealth in Athens after the central legal system develops.

Instead there was a lot of dissatisfaction amongst the Athenians, rich and poor alike, to the point of near rebellion. The growth of wealth in the Athenian region during and after Solon's reign is predominantly explained as a result of state-planned international trade⁴²

⁴²See Peacock (2006) and Billheimer (1938).

and wealth reaped through expanding warfare. Both were easier to plan and carry out with a state monopoly of law enforcement and incarceration. On their own terms, this is not what is meant by economic prosperity in the new institutionalist framework.

How did international commerce work after the *Seisachtheia*? It is important to note that Solon did not magically restructure the land ownership of ancient Greece. He did not necessarily return the land that had been offered as debt to its original owners.⁴³ He merely absolved the existent debts and made it so that the peasants could not be subjected to debt slavery any more. This allowed for the remaining wealthy land owners to change their crop production as they could not before. The new crops would be selected as those that were demanded in foreign markets.⁴⁴ The poorer classes were freed up to relocate into the urban areas as craft laborers making arms and weaponry for foreign wars and trade voyages. They could also become soldiers. Conscription was mandatory during and after Solon's reign and when violated punishable by imprisonment. Centrally-controlled international relations, both peaceful and aggressive, were easier to enforce, fund, and manipulate with a domestically state-controlled legal system.

How was the wealth achieved through imperial warfare felt by the classes of Athenians? Large portions of the poor population were sent off to fight long, labor intensive, and deathly wars.⁴⁵ The remaining population received the rewards of money, resources, and enslaved populations of the defeated territories. On net it appears that pure wealth in Athens rose after Solon, but the structural allocations of that wealth cannot objectively be considered an increase in social welfare.

⁴³See Finley (1953b), Hammond (1961), and Milne (1945).

⁴⁴The Persian wars took place between 499 and 448 B.C. and the Peloponnesian War was between 431 and 404 B.C..

⁴⁵Lea (unpublished) has built upon Levy's thesis (1989) that election by lot was a solution to rent-seeking and capture in Athenian politics. Lea describes how the broader decision to convert from a standing army to a marine fleet shifted the burden of serving in the army to the poorer classes despite the creative constitutional controls.

4.2 Did the state prison achieve equality before the law?

It is no surprise that the growth of central law in Athens does not fit perfectly into the new institutionalist framework. Economic prosperity defined as “generalized increasing returns from trade” was not a stated motivation for Solon’s policies nor has it occupied much concern in the minds of classicist historians. Wealth, power and prestige; maybe?

Classicists do not spend time discussing the link between stable legal institutions and economic growth, but they do spend a good bit of time discussing the non-monetary benefits of functioning, central legal systems. Several historians accept a public interest motivation lay behind the transition. They describe the citizens within the new institutions as acting collectively and supporting the changes.⁴⁶

MacDowell (1978) claims that bringing suspected criminals to trial without centralized authority was nearly impossible. “It was clearly in the *public interest* that disputes *should* be settled by judicial procedure rather than by fighting (ibid., p. 22, italics are mine).” In their notes, Todd and Millet point out; “Harrison (1968: 201 n. 2) [who] suggests that the *absence of a concept of ownership* was the reason for the *limited* nature of the remedies available to a would-be Athenian claimant of property (Todd and Millet, 1990, p. 5, italics are mine).” Though not explicitly referring to the change in justice as a step in the right direction, these scholars’ language paints later periods of state-controlled justice as better at protecting law

⁴⁶See Rushchenbusch (1968), Glotz (1928), Rhodes (1970, and Fisher (1990).

and order than the earlier “limited” self serving system.⁴⁷ Solon’s own prose reads:

This my soul commands me teach the Athenians:
A bad constitution brings civic turmoil,
But a good one shows well-ordering and coherence,
As it put shackles ’round about wrong-doing
It smoothes out the rough; it checks greed, tempers hubris,
And withers the fruits of reckless impulse.
It takes crooked judgments and makes them straight,
Softens arrogant deeds, halts seditious acts,
And ends the bile of grievous strife. And so under it,
Everything for mankind becomes whole and wise (Solon 580 B.C.).

Most recently legal equality has been attributed as the critical motivation behind centralized legal institutions and specifically the state-prison of Athens. Allen’s (1997) thesis is straightforward.

[T]he introduction of penal imprisonment in Athens proves an extremely important historical moment, marking as it does both the completing of a *general*

⁴⁷In addition to the sources surveyed here, more references to Solon’s motivations exist throughout the classical literature. *Plutarch* writes:

If a man has been struck or treated with force or suffered damage, it was permitted to anyone who was able and who wished to bring a *graphe* and prosecute the offender, since the lawgiver correctly aimed at accustoming the citizens to feel and sympathize with one another as if they were parts of one body. When asked which seemed to him to be the best managed of the cities, he said it was that city in which those who had not been wronged were no less ready to prosecute and punish the wrong-doers than those who had been wronged *Solon*, 18).

Osborne (1985) translates *Demosthenes* similarly,

[Solon] knew that the inhabitants of the *polis* could not all be equally clever, or bold, or moderate, and that if he made the laws in such a way as to enable the moderate to exact justice then there would be many be people about...(ibid., xxii).

And also Aristotle who writes:

The following three features of Solon’s constitutional arrangements seem to be those which were most weighted towards the common people: first and most important the prohibition on loaning money against eprsonal security; second the possibility for the man who so desired to secure punishment on behalf of the injured party; third (and they say that this was the most important in strengthening the people) appeal to the court (ibid., Ath. Pol. 9.1).

will institutionalized (in a punishment of consumption of the wrong-doer within, rather than of expulsion from, the community) and a significant point in the establishment of *isonomia* (ibid., p. 121, italics mine).

Allen emphasizes *isonomia* (equality before the law)⁴⁸ and describes the adoption of time-based incarceration as producing legal equality amongst the economically unequal classes of Athens.

Quite possibly, the diminishing influence of the Areopagus removed an obstacle from the path of poorer citizens who could well have desired limited prison penalties as a substitute for financial punishment an *egalitarian* reform in that it made citizens subject to laws of more equal rigour... [it is probable] that the Athenians saw in imprisonment a solution to the *problem of isonomia* (Allen, 1997, p. 131, italics mine).

Solon allegedly looked out upon the community, witnessed great inequality, and set out to fix it. There were obvious wealth classes amongst the Athenian population so this message rang strong. There are several areas of the traditional justice system that appear unequal and even unfair without a working knowledge of the entire process of justice.

When Solon looked out into the community he saw several individuals who were so called “citizens” yet they were under the direct ruling authority of other individuals. These were indentured servants sentenced by the process of law and restitution to work off their debts to the claimants and sometimes victims of their actions. At first glance, there is an obvious inequality in the arrangement. The indentured servant is unequal compared to the power and authority that his owner levies over him.

⁴⁸The word *isonomia* was,

borrowed from the Greeks but which has since gone out of use, ‘Isonomia’ was imported into England from Italy at the end of the sixteenth century as a word meaning ‘equality of laws to all manner of persons,’ shortly afterward it was freely used by the translator of Livy in the Englished from ‘isonomy’ to describe a state of equal laws for all and responsibility of the magistrates. It continued in use during the seventeenth century until ‘equality before the law,’ ‘government of law,’ or ‘rule of law’ gradually replaced it (Hayek, 1960, p. 164).

The second example of inequality shows itself when you compare multiple court rulings from the traditional legal system. One debtor may pay his debt off immediately, a second work it off fairly quickly, and a third may take months or years before his debt is whittled down to zero, yet all of their actions may have been extremely similar. It would appear that the same crime was being punished differently. Both types of inequality were separately addressed by Solon's penal reform. By making everyone subject to time in jail rather than financial debts a crime appears to carry an equal penalty for all who break the law regardless of class or circumstance. But did state operated prisons succeed as a means of achieving legal equality in Athens?

The creation of the state-prison was not well suited to the traditional legal norms of Athens. Though enacted in the name of promoting equality the state prison magnified societies existing inequality.⁴⁹ Hunter's (1997, p. 316) work leads one to believe that the average poor citizen of Athens held more legal equality before the creation of the state prison. She points out that prison populations (if temporary jails can even be considered prisons) in the early stages of Greece were likely small because individuals who paid their fines were set free, and post-trial criminals were in the hands of their victims. There was no identifiable lower class characterized by criminal traits in early Greece because the population of individuals serving debt-sentences was constantly churning itself. Debtors and criminals would serve sentences, earn their freedom, and return to society. Compare that to the potential life sentences of Solon's state prison.

Before the reign of Solon the ordinary citizen was not a lamb for the slaughter. There were several institutions that protected him from unnecessary exploitation in the courts. Judges underwent a selection process where preferred judge rulings earned profits and bad judges went broke. Ordinary citizens were constrained as to which cases they brought to court

⁴⁹This is an empirical dilemma even in modern society. Sabol et al. (2006) reports that "[o]n June 30, 2006, an estimated 4.8 percent of black men were in prison or jail, compared to 1.9 percent of Hispanic men and 0.7 percent of white men."

and to what extent they requested retribution. Disputants were inclined to draft reasonable resolutions so they would be more likely to win their case. Cases would only be brought to court by individuals or their relatives who had directly suffered loss. The traditional legal context this constraint avoided frivolous suits and false claims from wasting the time and energy of the courts.

After Solon's *Seisachtheia* the potential losses of losing a trial (a likely life sentence in jail) were much higher for the rich and poor alike. Similar to how politicians in today's political climate spend real resources to win privilege from politicians and political contracts, wealthier Athenians probably spent real amounts of resources to insure their victory in court cases. The higher the stakes the higher the expenditures. Once again, Solon was induced to tweak his policy cocktail with additional reform.

The *nomothesia* (the general legislation), Solon's second round of legislative reform,⁵⁰ opened up the opportunity for anyone to press charges against criminals. This contributed more to the growing divide between civil and criminal law. It soon became the case that crime was no longer a personal matter at all, crime became an offense against the *polis*. Criminals harmed the entire city of Athens. The harm felt by a single victim seemed pale in comparison.

From a cultural perspective, this phenomenon is difficult to parse out. It seems that in the temporary context (where poor Athenians were exposed to the exploitation of wealthier citizens manipulating the legal system), poor citizens would have welcomed the *nomothesia* with open arms. Here was an apparent opportunity to achieve justice even while lacking sufficient funds to endure the trial. Instead, the few references in the classical literature that are made to *sycophants* (those who bring trial for personal profit) paint the role negatively with disdain and even hatred (Harvey, 1990). The incongruity of these sources could be explained as a bias towards the opinions of the wealthier classes. The winners of wars and

⁵⁰See Milne (1943), Rhodes (1985), Hammond (1940), and Tarbell (1889).

the wealthier classes write the history books.⁵¹ Wealthier Athenians likely viewed private legal representation as an annoyance. The animosity over the role of *sycophants* arose as a result of the tension between the de facto traditional legal system and the artificially imposed de jure legal policies of Solon.⁵²

4.3 Did the state prison help individuals protect their private property?

Some historians have explained the transition from private to public justice in ancient Greece as an inevitable consequence of the private incentives of the citizens. Desperate and wanting for secure property rights, certainty in their business dealings, and effective contract enforcements, the typical citizen and especially the impoverished would have gladly accepted the public system of law enforcement. The individual user pays only a small fraction of the total cost of providing enforcement. Did public law enforcement achieve sound and secure property rights for Athenian citizens?

First, the immediate result of the *seisachtheia* was a total lack of contract enforceability, an elimination of credible threats in court cases, and a general threatening of property rights. It was not until later that Solon subsidized law enforcement to appease the masses wrought with uncertainty. Were property rights more secure after Athens received subsidized police and prisons?

The relationship between the state prison and the state's capacity to tax was closely linked (Hunter, 1997, p. 318). After the state usurped the dominant role of protecting legal rights it took with it the great opportunity to create new legal policies. As with most subsidies

⁵¹See Durkheim (1895).

⁵²Beottke et al. (2005 and 2007) argue that these sorts of tensions between de facto societal norms and de jure centralized legislation result in high and rising costs of enforcement.

also comes the responsibility to pay for the service in question. The state of Athens had both a growing need and capacity to tax its citizens which it did. State fines got tacked onto criminal offenses and fees were charged for settling contractual disputes in the public courts.

The distinction between criminal and civil offenses had never existed before. In real terms, fines due to the state were larger than their private counter parts. They were also called on to be paid first. Allen (2000) points to extensive evidence on the supremacy of public debts over private. She writes:

penalties in *dikai* were smaller than in public cases, and in a *dike* the wrongdoer paid his penalty to the prosecutor. In public cases in general and in *graphai* in particular, the reverse situation obtained: the main penalty went to the city. In a *dike* the jury could decide to impose an additional fine or penalty that would rebound to the benefit of the city, while in a *graphe* a minimal portion of the fine owed to the city might be paid out to the prosecutor (ibid., pp. 46 - 47).

She goes on to survey several supporting scholars and sources in the classical literature (because they are so revealing of this point the classical passages are reprinted in footnotes).

Her note reads:

See Dem. 21.42-44⁵³ where a distinction is made between *dikai* that concern only the litigants and the *dikai* where a penalty also goes to the *demosion* or public

⁵³Dem. 21.42-44 reads

Very well; since he has clearly done what I accuse him of, and has done it by way of insult, we must now consider the laws, gentlemen of the jury, for it is in accordance with the laws that you have sworn to give your verdict. Observe, moreover, that the laws treat the willful and insolent transgressors as deserving more resentment and a heavier punishment than other classes of offenders...It is not only in these, but in all cases, that the laws may be seen to be severe against premeditated outrages. For how is it that if a man who has lost his case fails to pay, the law thereupon is not content with a private suit for ejection, but directs the imposition of a further fine to the treasury? Or again, how is it that if a man takes from another by mutual consent a sum of one, two, or ten talents, and then fraudulently withholds it, the State has no concern with him; but if a man, taking something that would merit only a trifling fine, keeps it back by force, then the laws direct the jury to impose an additional fine for the treasury equal to that paid to the private owner?

treasury. See also Dem. 18.210⁵⁴, 24.99,⁵⁵ 46.26;⁵⁶ *Ath. Pol.* 59.5,⁵⁷ 67.1. On the private-public distinction, see also Lipsius 1915, 239; MacDowell 1978, 57 - 61; Osborne 1985a, 40; Cohen 1991, 74 - 77; Hunter 1994, 125. Most recently Todd (1993, 109-12) has tried to sort out the differences between *dikai* and *grapai*. He points out that in *graphai* penalties were more severe and the prosecutor ran a risk of a fine for failing to get at least 20 percent of the votes (*ibid.*, p. 346).

Incarceration was once handled by the decentralized actions of individuals with vested interests to wield force proportionately to the level of the offense. When crimes, contractual breeches, or outstanding debts increased marginally in society they naturally induced an additional marginal supply of enforcement. On the other hand, centralized law enforcement was allocated according to arbitrary scarcity. Policing could only occur to the extent that the public coffers could afford, and incarceration could only take place so long as there was room in the state prison for an additional inmate.

⁵⁴Dem. 18.210 reads:

It must now be clear to all of you, Athenians, that Philip never concluded a peace with you, but only postponed the war; for ever since he handed Halus over to the Pharsalians, settled the Phocian question, and subdued the whole of Thrace, coining false excuses and inventing hollow pretexts, he has been all the time practically at war with Athens, though it is only now that he confesses it openly in the letter which he has sent.

⁵⁵Dem. 24.99 reads:

What are we to do for the first eight? Tell us this, Timocrates: are we never to meet and deliberate? If so, shall we still be living under popular government? Shall there be no sessions of the courts, civil or criminal? If so, what security will there be for complainants? Shall the Council not attend at their office to transact their legal business? If so, what remains but complete disorganization? You may reply that we shall go on without payment of fees. Then is it not monstrous that the Assembly, the Council, and the law-courts must go unpaid for the sake of a statute which you were paid to introduce?

⁵⁶Dem. 46.26 reads:

If any man enter into a conspiracy, or join in seeking to bribe the Heliaea or any of the courts in Athens, or the Senate, by giving or receiving money for corrupt ends, or shall organize a clique for the overthrow of the democracy, or, while serving as public advocate, shall accept money in any suit, private or public, criminal suits shall be entered for these acts before the Thesmothetae.

⁵⁷*Ath. Pol.* 59.5 reads:

They also introduce private actions in commercial and mining cases, and actions against slaves for slandering a freeman. And they assign the public and the private jury-courts by lot among the magistrates.

Given that penalties assigned to public offenses were higher in amount than private offenses, given that the amount of defined public offenses were increased after Solon, and given that the real resource of enforcement was scarce, there is good reason to believe that the prisons were probably filled with state offenders. This probably left little of the so-called “public good” prison to be applied to securing the interests of the actual citizenry (Hunter, 1997 p. 317 and Rhodes, 1972 p. 151). On this more specific point there is only a few historical sources. *Demosthenes* 24.135 reads:

and yet even he admitted that the laws must be as binding upon him as upon people without influence, and he stayed in that building for many years, until he had repaid the money in his possession which was adjudged to be public property; nor did Callistratus, who was in power, and who was his nephew, try to make new laws to meet his particular case. Or take Myronides; he was the son of that Archinus who occupied Phyle, and whom, after the gods, we have chiefly to thank for the restoration of popular government, and who had achieved success on many occasions both as statesman and as commander.

When the state prison was used to protect the interests of citizens, those citizens were the type who held political influence and favor; the wealthy and elite. “In this regard it is indeed significant that the oligarchs were associated with frequent use of the prison (Allen, 1997, p. 134).” *Lysias* 13:45 reads: “[y]ou remember those led to prison then because of private enmities... and forced to perish by the most shameful and most infamous destruction,” and later *Lysias* 13:54 reads:

‘And Hippias of Thasos, and Xenophon of Curium, who were summoned by the Council on the same charge as this man, were put to death, - the one, Xenophon, after suffering on the rack, the other Hippias, in the manner; because in the eyes of the Thirty they did not deserve to be saved, - they had not destroyed one Athenian! But Agrotus was let off, because in their eyes he had done what was most agreeable to them.’⁵⁸

⁵⁸Also noted by Allen (1997) but less directly relevant are Dem 24.165, Lys 12.17, 13.56, and 13.66.

There are several reasons based on the incentives and rational motivations of the individuals involved to believe that justice functioned well to protect the property and rights of individuals before the Solonian era. With the rise of the state prison these incentive arrangements were eventually completely replaced with a socialized system that invoked different incentives for the rulers and citizens alike. The degree to which property was secure in Athens after Solon should not be attributed to the successful operation of the state sponsored justice system. The police, courts and prisons were predominantly allocated to enforce the state's rising amount of policies, fines, and taxes. What was left to meet the wants of citizens was subject to capture. I am skeptical of any net gain in the security of private property rights in post-Solon Athens. A net loss seems more probable.

5 Conclusion

The history of legal institutions in ancient Athens helps understand what the optimal role of the state should be in providing prison services. As in ancient Greece there is a coeval relationship between incarceration and the content of the legal system and its interpretation. By imposing changes in the funding, maintenance and operation of prisons, state authorities must recognize the influences that their policies have upon the types of laws that get created and the way existing laws get interpreted.

The polycentric legal system of early Greece functioned and adapted to the needs and wants of the community. Norms of restitution emerged from the self-interests of individuals engaged in the process of conflict and dispute resolution. As a result of this process, the supply of law enforcement resources was linked to the expressed demand of the community. Criminal sentences were constrained and emerged as commonly accepted norms. Individuals were protected from exploitation and injustice by competitive markets in judges and the sovereignty of the people.

When the state authority first took over the role of law enforcement and subsequently constructed the first prison building, the traditional institutions and social norms were thrown out of wac. As time passed, the new centralized institutions were often subject to capture and rent-seeking in ways that had been avoided by the traditional legal system.

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