

Rethinking Anti-Corruption Reforms: The View from Ancient Athens

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INTRODUCTION

Corruption long has been a problem for democratization and development. Over two millennia ago, Aristotle posited that ruling in one's own interest, not in the people's interest, causes polities to deviate from their intended purpose—what he terms “corruption.”¹ Contemporary empirical research now supports his claim. On the one hand, corruption can impede good governance by short-circuiting accountability,² creating bureaucratic inefficiency,³ and undermining government legitimacy.⁴

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1. See ARISTOTLE, POLITICS bk. 3, § 1279a29-33 (H. Rackham trans., Harvard Univ. Press rev. & reprinted ed. 1990) (Arist. *Pol.* 1279a29-33). Elsewhere Aristotle uses the word *diaptheirein* (“to corrupt”) to describe this process. *E.g.*, *id.* at bk. 5, § 1302b (*diephtharē*). On Aristotle's account of political corruption, see J. Peter Euben, *Corruption*, in POLITICAL INNOVATION AND CONCEPTUAL CHANGE 220, 227-29 (Terence Ball et al. eds., 1989) [hereinafter Euben, *Corruption*].

2. See Daniel Lederman et al., *Accountability and Corruption: Political Institutions Matter*, 17 *ECON. & POL.* 1, 4-5 (2005).

3. See MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY 30 (2005) [hereinafter JOHNSTON, SYNDROMES OF CORRUPTION]; SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 113-74 (1999) [hereinafter ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT]; Daniel Treisman, *What Have We Learned About the Causes of Corruption from Ten Years of Cross-National Empirical Research?*, *ANN. REV. POL. SCI.*, June 2007, at 211, 236-37.

Democracies, particularly stable democracies, thus are thought to exhibit the lowest levels of corruption.⁵ On the other hand, political corruption can cause distortions in economic markets and have an adverse effect on economic investment.⁶ Hence, high rates of corruption correlate with low rates of economic growth.⁷

Given these empirical correlations, it is perhaps unsurprising that a near consensus has emerged on how to design anti-corruption reforms: simply create institutions that resemble polities with seemingly the least corruption, namely, neo-liberal western democracies.⁸ Yet, although

4. Christopher J. Anderson & Yuliya V. Tverdova, *Corruption, Political Allegiances, and Attitudes Toward Government in Contemporary Democracies*, 47 AM. J. POL. SCI. 91, 104 (2003). Morris and Klesner similarly link corruption to lower levels of political trust. Stephen D. Morris & Joseph L. Klesner, *Corruption and Trust: Theoretical Considerations and Evidence from Mexico*, 43 COMP. POL. STUD. 1258, 1260-63 (2010).

5. *E.g.*, Lederman et al., *supra* note 2, at 22-25; Daniel Treisman, *The Causes of Corruption: A Cross-National Study*, 27 J. PUB. ECON. 399, 433-35 (2000) [hereinafter Treisman, *The Causes of Corruption*]. Conversely, a high perception of corruption correlates with weak institutions, particularly authoritarian ones. *See, e.g.*, JOHNSTON, SYNDROMES OF CORRUPTION, *supra* note 3, at 25-26; Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q. J. ECON. 599, 615-16 (1993). Note, though, that the causality here is not conclusive. *See* Treisman, *The Causes of Corruption*, *supra*, at 433-35. Democracies do not necessarily reduce the *amount* of total corruption. *See* JOHNSTON, SYNDROMES OF CORRUPTION, *supra* note 3, at 194-95.

6. *See, e.g.*, JOHNSTON, SYNDROMES OF CORRUPTION, *supra* note 3, at 26-28; ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT, *supra* note 3, at 7-26; Alberto Ades & Rafael Di Tella, *The New Economics of Corruption: A Survey and Some New Results*, 45 POL. STUD. 496, 514 (1997); Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 695-700 (1995); Shleifer & Vishny, *supra* note 5, at 611-15.

7. Mauro, *supra* note 6, at 700-05; Treisman, *The Causes of Corruption*, *supra* note 5, at 429-30. Similarly, Ades and Di Tella link openness to trade with lower levels of corruption, Alberto Ades & Rafael Di Tella, *Rents, Competition, and Corruption*, 89 AM. ECON. REV. 982, 991-92 (1999), although this might be an endogenous factor, *see* Treisman, *The Causes of Corruption*, *supra* note 5, at 435.

8. *See* JOHNSTON, SYNDROMES OF CORRUPTION, *supra* note 3, at 22-23; ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT, *supra* note 3, at 63-68; Lederman et al., *supra* note 2, at 27-28; *see also* DOUGLAS C. NORTH ET AL., VIOLENCE AND SOCIAL ORDERS 151-181 (2009) (detailing key “doorstep” conditions—rule of law among elites, “perpetually lived” forms of public and private organizations, and

scholars have extensively investigated the perceived causes and consequences of corruption, they have focused comparatively little on measuring the actual success, or failure, of anti-corruption reforms.⁹ What evidence we do have suggests that the hallmarks of anti-corruption reform agendas have enjoyed only mixed success in the developing world: recommended reforms simply work better in some places than in others.¹⁰

One reason for this might be that corruption reflects deep structural problems in a society, like inequality or variable access to political and judicial institutions.¹¹ To the extent that corruption undermines collective action¹² or represents a “systemic degeneration of those practices and commitments that provide the terms of collective self-understanding and shared purpose,”¹³ a different kind of institutional design might be needed to combat it.¹⁴ In

political control of the military—requisite for transition to an “open access” order).

9. Mark Robinson, *Corruption and Development: An Introduction*, in *CORRUPTION AND DEVELOPMENT* 1, 12-13 (Mark Robinson ed., 1998). See generally JOHNSTON, *SYNDROMES OF CORRUPTION*, *supra* note 3, at 16-35.

10. For further discussion, see JOHNSTON, *SYNDROMES OF CORRUPTION*, *supra* note 3, at 31-35; ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 3, at 4-6; Robinson, *supra* note 9, at 6, 10; Jakob Svensson, *Eight Questions About Corruption*, *J. ECON. PERSP.*, Summer 2005, at 19, 35-36.

11. See ERIC M. USLANER, *CORRUPTION, INEQUALITY, AND THE RULE OF LAW* 58-93 (2008) [hereinafter USLANER, *CORRUPTION*]; Michael Johnston, *Corruption, Inequality, and Change*, in *CORRUPTION, DEVELOPMENT, AND INEQUALITY* 13, 13-37 (Peter M. Ward ed., 1989); Eric M. Uslaner, *Trust and Corruption*, in *THE NEW INSTITUTIONAL ECONOMICS OF CORRUPTION* 76, 89 (Johann Graf Lambsdorff et al. eds., 2005). As Morris adds, part of the problem might be that empirical analysis based on the *perception* of corruption measures something other than the actual prevalence of corruption. See Stephen D. Morris, *Disaggregating Corruption: A Comparison of Participation and Perceptions in Latin America with a Focus on Mexico*, 27 *BULL. LATIN. AM. RES.* 388, 393 (2008).

12. Mark E. Warren, *What Does Corruption Mean in a Democracy?*, 48 *AM. J. POL. SCI.* 328, 338-39 (2004).

13. Euben, *Corruption*, *supra* note 1, at 222-23.

14. Thus, for Thompson, the kind of “institutional corruption” that exists in western democracies requires a shift in analytical paradigms. See DENNIS F. THOMPSON, *ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION* 6-7 (1995). Similarly, Johnston suggests a different slate of reforms, geared

addition to deterring discrete acts of corruption, such reform might also need to promote “deep democratization.”¹⁵

This paper considers a case study of anti-corruption reforms that, I argue, could have promoted just such deep democratization. The case study comes from ancient Athens, and I will examine here the way the Athenians designed their laws and legal institutions to combat bribery. I focus on Athens’ regulation of bribery specifically, as opposed to corruption more generally, because ancient evidence for bribery is both more continuous and more detailed than it is for corruption.¹⁶

Athens’ anti-bribery reforms are important even today because, by modern standards, Athens was a success of democratization and development, and many of her anti-bribery reforms were paradigmatic. Even so, the Athenian approach to dealing with bribery differed in crucial ways from contemporary anti-corruption reform agendas, for the Athenians actively designed their laws and political institutions to promote democratic values rather than to optimize corruption levels.¹⁷ This resulted in one especially

towards various “syndromes” of corruption that exist across countries. JOHNSTON, SYNDROMES OF CORRUPTION, *supra* note 3, at 200-03.

15. Michael Johnston has been the most vocal proponent of just such a multi-tiered approach to corruption reform. See JOHNSTON, SYNDROMES OF CORRUPTION, *supra* note 3, at 195-220; see also Warren, *supra* note 12, at 341.

16. The vast majority of embezzlement trials at Athens pertain to a specific period (the 390s BCE) and have been examined by Strauss. See Barry S. Strauss, *The Cultural Significance of Bribery and Embezzlement in Athenian Politics: The Evidence of the Period 403-386 B.C.*, 11 THE ANCIENT WORLD 67, 67-74 (1985). Extortion by public officials was exceptionally rare in the ancient sources. I count only three references to the generals: Miltiades, HERODOTUS, *The Histories*, in 3 HERODOTUS bk. 6, ch. 136, § 1 (A.D. Godley trans., Harvard Univ. Press rev. & reprinted ed. 1963) (Hdt. 6.136); Thrasybulus of Steiria, LYSIAS, *Against Ergocles*, in LYSIAS §§ 5-6, 12, 17 (W.R.M. Lamb trans., Harvard Univ. Press reprinted ed. 1967) (Lys. 28.5-6, 12, 17), and Thrasybulus of Collytus, DEMOSTHENES, *Against Timocrates*, in 3 DEMOSTHENES: AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON ch. 24, § 134 (J.A. Vince trans., Harvard Univ. Press 1964) (Dem. 24.134). Looking beyond public corruption, Athens seems to have had trouble with private citizens bringing frivolous legal suits in order to extort money, although this was perhaps not as widespread as the ancient sources indicate. See MATTHEW R. CHRIST, THE LITIGIOUS ATHENIAN 63-67 (1998) [hereinafter CHRIST, THE LITIGIOUS ATHENIAN].

17. See discussion *infra* Part I.

novel approach to anti-corruption enforcement: the creation of a private right of action for bribery suits so that anybody who wanted could prosecute an official for bribery.¹⁸

Part I shows how deep democratization permeated the design of Athens' anti-bribery reforms. Although it is impossible to measure the absolute efficacy of these reforms, Part II surveys evidence suggesting that, over time, these reforms successfully shifted Athens toward less disruptive forms of corruption. Part III then looks in detail at one aspect of Athens' anti-bribery laws that could have brought about this shift: the private right of action for bribery suits. I analyze this feature from an institutional design perspective to gauge what effect it may have had in Athens. In the Conclusion, I extend this analysis to consider the potentially valuable corrective Athenian-style reforms might provide for contemporary anti-corruption agendas.

I. ATHENS' ANTI-BRIBERY REFORMS: A STUDY IN DEMOCRATIZATION

Contemporary anti-corruption agendas try to design institutions that prevent inherently corrupt actors from acting corruptly; accordingly, they focus on the intent of bribe-giving or bribe-taking officials. By contrast, the Athenians looked not to an actor's intent, but to the result of his actions: they designed their institutions to foster outcomes that were in the people's interest, in a sense democratizing anti-corruption enforcement processes. As we will see, this crucial conceptual difference resulted in greater attention to the design of enforcement procedures. Let's take a closer look.

Two common themes recur throughout contemporary anti-corruption reform agendas: a focus on bribery specifically; and a conceptualization of corruption as a principal-agent problem familiar from economic analysis.¹⁹

18. See discussion *infra* Part III.

19. See, e.g., DONATELLA DELLA PORTA & ALBERTO VANNUCCI, CORRUPT EXCHANGES: ACTORS, RESOURCES, AND MECHANISMS OF POLITICAL CORRUPTION 16-18 (1999); ROBERT KLITGAARD, CONTROLLING CORRUPTION 22-24 (1988); ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT, *supra* note 3, at 5 ("The primary goal

In other words, contemporary anti-corruption agendas take what has been called a “rotten apple” account.²⁰ They typically define corruption as an illegal use of power for personal gain and then posit that those who commit corruption consciously choose to do so upon a rational calculus of costs and benefits.²¹ If the costs of bribery outweigh the benefits, the theory goes, no rational agent would choose to take or give a bribe.²²

Consequently, their suggested reforms focus on deterring an agent from committing bribery: to do so, simply reduce discretion, eliminate monopolistic control, and

[of anti-corruption reform agendas] should be to reduce the underlying incentives to pay and receive bribes, not to tighten systems of ex post control.”); SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 4-10 (1978) [hereinafter ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY*]. For a critique of the “new consensus” in corruption scholarship that emerged in the 1990s, see JOHNSTON, *SYNDROMES OF CORRUPTION*, *supra* note 3, at 6.

20. John Warburton, *Corruption as a Social Process: From Dyads to Networks*, in *CORRUPTION AND ANTI-CORRUPTION* 221, 221 (Peter Larmour & Nick Wolanin eds., 2001).

21. For this market-based approach to corruption, see ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 3, at 143-74 (deriving reforms from market-based analysis of political corruption); ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY*, *supra* note 19, at 6-10; Edward C. Banfield, *Corruption as a Feature of Governmental Organization*, 18 *J.L. & ECON.* 587, 587-91 (1975); A.W. Goudie & David Stasavage, *A Framework for the Analysis of Corruption*, 29 *CRIME L. & SOC. CHANGE* 113, 116-19 (1998); Johann Graf Lambsdorff, *Making Corrupt Deals: Contracting in the Shadow of the Law*, 48 *J. ECON. BEHAV. & ORG.* 221, 221-39 (2002). This kind of approach has been criticized both for failing to explain collaboration and cooperation within politics (i.e., altruistic acts at odds with an inherently selfish rational actor), see John D. DiIulio, Jr., *Principled Agents: The Cultural Bases of Behavior in a Federal Government Bureaucracy*, 4 *J. PUB. ADMIN. RES. & THEORY* 277, 281-82 (1994), and for failing to predict the efficacy of certain anti-corruption reforms, see Robinson, *supra* note 9, at 3-5.

22. See, e.g., KLITGAARD, *supra* note 19, at 22 (“[T]he agent will act corruptly when her likely net benefits from doing so outweigh the likely net costs.”); ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY*, *supra* note 19, at 88 (“The chapters which follow thus develop a theory of bureaucracy in which officials are self-interested and untrustworthy. They follow the rules only if they, on the balance, gain.”).

increase accountability.²³ Note how, in this context, what matters is optimizing the level of corruption so that the marginal cost of enforcement does not exceed the marginal cost of more corruption.²⁴ Thus, something like greater transparency is valued only as a structural change and only to the extent that it fosters optimal enforcement; it is not valued in its own right as, say, an essential or indispensable norm in a democratic polity. This is characteristic of how the “rotten apple” approach focuses more on optimizing institutional structures than on changing institutional norms. Attempting to change an institutional norm—like by instilling greater public spiritedness—is an afterthought at best in these agendas.²⁵

Where contemporary reform agendas thus focus on corrupt intent, Athenians conceptualized bribery in terms of a bad outcome. The Athenian word for bribery was *dōrodokia*, which literally meant “the receipt of gifts in expectation of something bad.”²⁶ There was no word for ‘bribes,’ and without a bad outcome associated with the gifts, there was no bribery to speak of. The main law against bribery, for example, explicitly defined the offense of bribery as whenever someone gives or receives “to the harm of the people.”²⁷ What mattered to the Athenians, therefore,

23. *E.g.*, KLITGAARD, *supra* note 19, at 74-75; ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 3, at 39-68; Goudie & Stasavage, *supra* note 21, at 117-19.

24. *E.g.*, FRANK ANECHARICO AND JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* 153-208 (1996) (arguing that, because corruption controls impose costs by perpetuating bureaucratic pathologies, anti-corruption reforms should take into account those additional costs); KLITGAARD, *supra* note 19, at 24-27; ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY*, *supra* note 19, at 4.

25. *See, e.g.*, KLITGAARD, *supra* note 19, at 90-93; ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 3, at 143-74.

26. On this translation, see KELLAM CONOVER, *BRIBERY IN CLASSICAL ATHENS* 46-54 (PH.D. DISSERTATION, PRINCETON UNIVERSITY 2010). For the Athenian focus on bad outcomes, see also F.D. Harvey, *Dona Ferentes: Some Aspects of Bribery in Greek Politics*, 6 *HIST. POL. THOUGHT* 76, 108-13 (1985).

27. *See* DEMOSTHENES, *Against Meidias*, in 3 *DEMOSTHENES: AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON*, *supra* note 16, § 113 (Dem. 21.113).

was the perceived result of the gifts, not the context in or intent with which they were given.

More specifically, the bad outcome at the heart of bribery was frequently viewed as a violation of a civic trust: bribes effectively severed the reciprocal bonds of friendship between an official and the people.²⁸ In this respect, the Athenian conception of bribery dovetails closely with sociological models of corruption. Both hinge on how corrupt agents frame their own actions in terms of local norms within a micro-social context.²⁹ What is nevertheless distinctive about the Athenian approach is that by definition such framing was subordinated to broader public norms: in Athenian law, the normative value of the bribe was measured according to whether or not its receipt harmed the people. Bribery trials, therefore, were less about whether an official truly took any gifts and more about whether those gifts were in the public interest.³⁰

Unlike in contemporary reform agendas, in Athens the norms guiding public officials' behavior were front and center in her anti-corruption reforms. Rather than aim for an optimal level of policing, these reforms focused on defining and reifying the norms of democratic governance.³¹ The Athenians thus took a deep democratization approach

28. So Leslie Kurke writes, "gift-giving . . . becomes negatively inflected as 'bribery' (*dōrodokia*) when it is felt to interfere with a citizen's obligations to his civic community." Leslie Kurke, *Money and Mythic History: The Contestation of Transactional Orders in the Fifth Century BC*, in *THE ANCIENT ECONOMY* 87, 94 (Walter Scheidel & Sitta von Reden eds., 2002). For further discussion, see CONOVER, *supra* note 26, at 70-71.

29. See JOHANN GRAF LAMBSDORFF ET AL., *THE NEW INSTITUTIONAL ECONOMICS OF CORRUPTION* 53-55 (2005); Mark Granovetter, *The Social Construction of Corruption*, in *ON CAPITALISM* 152, 152 (Victor Nee & Richard Swedberg eds., 2007). Conversely, citizens frame corruption in terms of trust within the micro-social context of a citizen's own relation to the government. See, e.g., USLANER, *CORRUPTION*, *supra* note 11, at 89 (stating that corruption diminishes generalized trust); Anderson & Tverdova, *supra* note 4, at 103-05 (arguing that political allegiance strongly affects perceptions of corruption and trust in civil servants); Morris & Klesner, *supra* note 4, at 1276 (noting that corruption breeds distrust, which diminishes people's willingness to work with the government to fight corruption).

30. See CONOVER, *supra* note 26, at 84-85.

31. *Id.* at 247-48.

to anti-corruption reform: their laws against judicial, executive, and legislative bribery all were designed to foster democratic values. Importantly, these reforms reflect deep thinking about the institutional design of enforcement proceedings—something that is virtually absent from contemporary reform agendas. As Part III will show, such an approach may have made Athens' reforms more, not less, effective in the long run.

Two preliminary notes. My grouping into “judicial,” “executive,” and “legislative” functions is purely to aid the reader. The Athenians had no concept of separation of powers: their polity was designed not to split power among co-equal branches, but to ensure that the people (*dēmos*) exercised power through the Assembly, courtroom, and public offices.³² Also, I take essentially a synchronic approach here: for a historical overview of all Athenian anti-bribery reforms, see Appendix I.

A. *Regulations Against Judicial Bribery*

Judicial corruption ostensibly seems like it would have been a non-issue in ancient Athens: how could someone possibly bribe a jury of over 500 jurors, particularly when those jurors were selected by lottery from a group of 6,000 potential jurors the morning of the trial?³³ Yet, though it might defy expectation, the Athenians repeatedly voiced concerns that certain individuals had corrupted the courts.³⁴

32. See, e.g., Josiah Ober, *The Nature of Athenian Democracy*, 84 *CLASSICAL PHILOLOGY* 322, 327-31 (1989).

33. MOGENS HERMAN HANSEN, *THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES* 181 (J.A. Crook trans., 1991) [hereinafter HANSEN, *THE ATHENIAN DEMOCRACY*].

34. The democrat Anytus, in particular, was renowned for having bribed a jury to obtain an acquittal. See ARISTOTLE, *The Athenian Constitution*, in ARISTOTLE: *THE ATHENIAN CONSTITUTION, THE EUDEMIAN ETHICS, AND ON VIRTUES AND VICES* ch. 27, § 5 (H. Rackham trans., Harvard Univ. Press rev. & reprt. ed. 1967) (*Athen. Pol.* 27.5); CONOVER, *supra* note 26, at 282-83. Calhoun persuasively sets forth the evidence suggesting that bribery involving the courts was possible through Athens' political clubs (*hetaireiai*). GEORGE MILLER CALHOUN, *ATHENIAN CLUBS IN POLITICS AND LITIGATION* 66-76 (1913); see also LENE RUBINSTEIN, *LITIGATION AND COOPERATION: SUPPORTING SPEAKERS IN THE COURTS OF CLASSICAL ATHENS* 198-212 (2000).

Indeed, in the mid-fourth century, the city reenrolled *every* citizen, on the fear that some resident aliens had snuck onto the citizen registries at corrupt citizenship trials.³⁵ To combat these fears, the Athenians repeatedly made significant changes to their jury selection procedures to prevent bribery.³⁶ They also developed three different formal procedures for bringing public suits (*graphai*; singular *graphē*) concerning judicial bribery.³⁷ As this Section shows, both sets of reforms reinforced democratic values.

The Athenians enacted an astonishingly complex jury selection process.³⁸ Aristotle points out, no fewer than four

35. The reenrollment of 346/5 was proposed by Demophilus, who was known for his public accusations of corruption during the citizen enrollment procedures. See AESCHINES, *Against Timarchus*, in THE SPEECHES OF AESCHINES § 86 (Charles Darwin Adams trans., Harvard Univ. Press reprt. ed. 1958) (Aeschin. 1.86). On Demophilus' decree and the reenrollment of 346/5, see DAVID WHITEHEAD, THE DEMES OF ATTICA 508/7-CA. 250 BC: A POLITICAL AND SOCIAL STUDY 104-09 (1986). Citizen anger against those who had corrupted the citizen enrollment process was reported by Demosthenes. DEMOSTHENES, *Against Eubulides*, in 6 DEMOSTHENES: PRIVATE ORATIONS § 49 (A.T. Murray trans., Harvard Univ. Press reprt. ed. 1964) (Dem. 57.49).

36. E.g., Douglas M. MacDowell, *Athenian Laws About Bribery*, 20 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ 57, 64-65 (1983) [hereinafter MacDowell, *Athenian Laws About Bribery*].

37. On these laws and procedures, see HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 33, at 193-94; DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 170-73, 183-86 (1978) [hereinafter MACDOWELL, THE LAW IN CLASSICAL ATHENS]; Claire Taylor, *Bribery in Athenian Politics Part II: Ancient Reaction and Perceptions*, 48 GREECE & ROME 154, 154-57 (2001) [hereinafter Taylor, *Bribery in Athenian Politics Part II*].

38. On this process, see MACDOWELL, THE LAW IN CLASSICAL ATHENS, *supra* note 37, at 36-40; P.J. RHODES, A COMMENTARY ON THE ARISTOTELIAN *ATHENAION POLITEIA* 697-716 (1981). Selection by lot was later viewed as a cornerstone of the democracy. HERODOTUS, *The Histories*, in 2 HERODOTUS bk. 3, ch. 80, § 6 (A.D. Godley trans., Harvard Univ. Press rev. & reprt. ed. 1963) (Hdt. 3.80); see ARISTOTLE, POLITICS, *supra* note 1, at bk. 2, § 1274a5, bk. 4, § 1294b7-9 (Aristot. *Pol.* 1274a5, 1294b7-9); JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY, AND THE POWER OF THE PEOPLE 76-77 (1989) [hereinafter OBER, MASS AND ELITE]. Sortition was essential for including a more diverse range of citizens in the workings of the polity. Claire Taylor, *From the Whole Citizen Body? The Sociology of Election and Lot in the Athenian Democracy*, 76 HESPERIA 323, 338-40 (2007) [hereinafter Taylor, *From the Whole Citizen Body*]. Even so, it likely developed as a pro-elite instrument used to reduce elite competition for office by ensuring broad representation and even distribution.

times, that this process was designed to prevent the corruption of jurors.³⁹ Each juror was given a personalized box-wood ticket with his name, his father's name, his community, and a letter of the alphabet A-K.⁴⁰ On the morning of a court day, jurors filed by tribe into one of ten holding rooms and deposited their ticket into a chest inscribed with a matching letter A-K on it.⁴¹ In each room an affixer was appointed at random to draw ten tickets, one from each chest, and affix those tickets to the lottery machine.⁴² The archon then drew lots of white and black copper dice, the white number corresponding to the number of jurymen required.⁴³ As the dice were slotted into the lottery machine, they fell next to tickets affixed to the machine. If a white die fell next to a ticket, that juror would serve on a jury.⁴⁴

Once jurors had been selected, another randomization process was used to match each juror to a courtroom. First, each selected juror drew from an urn an acorn inscribed with a letter.⁴⁵ He then entered a second holding room,

See Edwin M. Carawan, *Eisangelia and Euthyna: The Trials of Miltiades, Themistocles, and Cimon*, 28 GREEK ROMAN & BYZANTINE STUD. 167, 208 (1987).

39. ARISTOTLE, *The Athenian Constitution*, *supra* note 34, at ch. 64, § 2 (ticket-drawer chosen by lot to prevent mischief) (*Athen. Pol.* 64.2); *id.* ch. 64, § 4 (drawing of acorns prevents packing of jury panels) (*Athen. Pol.* 64.4.); *id.* ch. 65, § 1 (colored sticks and lintels prevent juror from purposely going into the wrong jury court) (*Athen. Pol.* 65.1); ARISTOTLE: THE ATHENIAN CONSTITUTION ch. 66, § 2 (P.J. Rhodes trans. 1984) (men chosen by lot to work the water clock to prevent dishonest arrangements) (*Athen. Pol.* 66.2); *cf.* ARISTOTLE, *The Athenian Constitution*, *supra* note 34, at ch. 66, § 1 (archons assigned to courts by lot to prevent prior knowledge of assignment) (*Athen. Pol.* 66.1). On the sale of jury allotments, see EUBULUS, *Fragment*, in 5 POETAE COMICI GRAECI 74 K-A (R. Kassel & C. Austin eds. 1986) (Eubulus fr. 74 K). Aristotle is followed in the main by MacDowell, MACDOWELL, THE LAW IN CLASSICAL ATHENS, *supra* note 37, at 35-40, and Todd, S.C. TODD, THE SHAPE OF ATHENIAN LAW 87 (1993).

40. ARISTOTLE, *The Athenian Constitution*, *supra* note 34, at ch. 63, § 2 (*Athen. Pol.* 63.2).

41. *Id.* ch. 64, § 1 (*Athen. Pol.* 64.1).

42. *Id.* ch. 64, §§ 1-2 (*Athen. Pol.* 64.1-2).

43. *Id.* ch. 64, § 3 (*Athen. Pol.* 64.3).

44. *Id.* ch. 64, §§ 2-3 (*Athen. Pol.* 64.2-3).

45. *Id.* ch. 64, § 4 (*Athen. Pol.* 64.4).

where the letter on his acorn was matched to the letter of a specific courtroom.⁴⁶ Each juror then received a colored staff matching the color of a lintel on the doorway to the court where he would serve.⁴⁷ As jurors were selected, they marched in color-coded procession to the courtrooms.⁴⁸ This process was repeated anew every single court day.

This complex jury selection ritual was actually a process in democratization. It seems designed, first, to atomize jurors so that they could not self-assemble into large voting blocks, then to ritualize the allotment process through an increasingly complex series of steps in order to remind jurors of the very authority they held as dicasts. Note how the sortition process first broke up jurors by tribe, then by letter groups, precisely the two categories that would have been most easily exploited for collusion. Then, after atomizing jurors, the colored staffs and ceremonious ritual transformed them from citizens into jurors.

Like other rituals in the Athenian *polis*, civic and otherwise, one purpose of transforming the citizens into this civic category of jurors was to foster a new solidarity among participants *qua* dicasts, one thus drawn along public, not private lines.⁴⁹ In this respect, as more steps of the allotment procedure became randomized, they also became invested with greater social significance, creating greater separation between ordinary citizen and authoritative juror. Hence, the involvement of more jurors in executing the selection process or the use of more props (tickets, colored staffs) to dramatize the jurors' roles fostered an important

46. *Id.* ch. 64, § 5-ch. 65, § 1 (*Athen. Pol.* 64.1-65.1).

47. *Id.* ch. 65, §1 (*Athen. Pol.* 65.1).

48. *Id.* ch. 65, §2 (*Athen. Pol.* 65.2).

49. Victor Bers underscores the ritual aspects of the sortition process but ultimately claims that the process was meant to assuage non-jurors of the number and probity of jurors selected. See Victor Bers, *Just Rituals: Why the Rigmarole of Fourth-Century Athenian Lawcourts?*, in *POLIS AND POLITICS: STUDIES IN ANCIENT GREEK HISTORY* 553, 557-58 (Pernille Flensted-Jensen et al. eds., 2000). By contrast, I would point to the very real significance that the ritual could have for the participating jurors themselves.

kind of social separation.⁵⁰ In essence, the Athenians designed the jury selection procedure not merely to minimize the chance of corruption, but especially to instill in jurors the political value of judging justice at arms-length.

Like the jury selection process, Athens' formal procedures against judicial bribery also were designed to reinforce democratic values. There was the *graphē dekasmou* for those who had bribed a judicial body;⁵¹ the penalty for conviction was death.⁵² The *graphē dōroxenias* was presumably attached to a law against bribing a jury to acquit a defendant in a citizenship trial;⁵³ the penalty is unknown but was likely outlawry (a kind of exile).⁵⁴ And we hear of an unnamed *graphē* for indicting public prosecutors (*synēgoroi*) who had taken gifts for a public or private suit; that penalty is unknown.⁵⁵ Anybody who wanted—

50. The implementation of the lot at each step of the way may very well have been a reminder of the profoundly religious character of the jurors' office, as signaled by the oath of the heliasts sworn by all potential jurors each year. On the religious and secular dimensions of the lot, see *id.* at 558-59.

51. DEMOSTHENES, *Against Stephanus 2*, in 5 DEMOSTHENES: PRIVATE ORATIONS § 26 (A.T. Murray trans., Harvard Univ. Press reprt. ed. 1964) (Dem. 46.26); Yuzuru Hashiba, *Athenian Bribery Reconsidered: Some Legal Aspects*, 52 CAMBRIDGE CLASSICAL J. 62, 67 (2006); MacDowell, *Athenian Laws About Bribery*, *supra* note 36, at 66-68.

52. AESCHINES, *Against Timarchus*, in THE SPEECHES OF AESCHINES, *supra* note 35, §§ 86-87 (Aeschin. 1.86-7); ISOCRATES, *On the Peace*, in ISOCRATES § 50 (George Norlin trans., Harvard Univ. Press reprt. 1962) (Isoc. 8.50).

53. ARISTOTLE, *The Athenian Constitution*, *supra* note 34, at ch. 59, § 3 (*Athen. Pol.* 59.3); MacDowell, *Athenian Laws About Bribery*, *supra* note 36, at 68-69.

54. Outlawry was a kind of effective exile in which a citizen (and his property) lost all protection from the law. Anyone so penalized was thus subject to property theft or violent crime with no legal remedy. In the face of such risks, most outlawed individuals chose to leave Athens permanently. See MOGENS HERMAN HANSEN, *EISANGELIA: THE SOVEREIGNTY OF THE PEOPLE'S COURT IN ATHENS IN THE FOURTH CENTURY B.C. AND THE IMPEACHMENT OF GENERALS AND POLITICIANS 55-56* (1975) [hereinafter HANSEN, *EISANGELIA*]. For a defense that outlawry was the penalty for being convicted in a *graphē dōroxenias*, see CONOVER, *supra* note 26, at 290-91 n.76.

55. See DEMOSTHENES, *Against Stephanus 2*, in 5 DEMOSTHENES: PRIVATE ORATIONS, *supra* note 51, § 26 (depicting a *graphē* before the *thesmothetai*) (Dem. 46.26). For more discussion, see RUBINSTEIN, *supra* note 34, at 52-53.

regardless of whether he had been affected by the bribery—could bring one of these suits.⁵⁶ Withdrawing the suit before trial or failing to win one-fifth of the jury votes, however, resulted in a substantial fine (nearly one-and-a-half years' pay for a skilled worker) and loss of the right to bring that kind of prosecution again.⁵⁷

There were two ways in which the design of these laws and procedures fostered democratic values. First, their wording was substantively vague. The *graphē dekasmou* allowed the prosecution of anyone who “bribe[d] the Heliaia or any of the courts in Athens or the Council by giving money for the purpose of bribery.”⁵⁸ The *graphē dōroxenias* suit was allowed whenever it seemed that someone’s acquittal at a citizenship trial had been “unjust.”⁵⁹ And the unnamed *graphē* targeted public prosecutors suspected of taking money “for the sake of a judicial suit.”⁶⁰ Nowhere are “bribery,” “unjust,” or “for the sake of a judicial suit” legally defined; rather, as with many substantively vague Athenian laws, what seemed to be on trial was the norm itself.⁶¹

Likely, the public prosecutors mentioned in the law were the twenty prosecutors who brought allegations of corruption against public officials at their mandatory financial audit. On these prosecutors, see HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 33, at 222.

56. HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 33, at 222.

57. This was the standard penalty for all *graphai*. See DEMOSTHENES, *Against Neaera*, in 6 DEMOSTHENES: PRIVATE ORATIONS, *supra* note 35, § 16 (Dem. 59.16).

58. DEMOSTHENES, *Against Stephanus 2*, in 5 DEMOSTHENES: PRIVATE ORATIONS, *supra* note 51, § 26 (Dem. 46.26).

59. Hyperides, *Fragments, Against Aristagora for Failure to Obtain a Patron I and II*, in 2 MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES ch. 28 § 2 (J.O. Burt trans., Harvard Univ. Press reprt. ed. 1980) (Hyp. fr. 28.2 Blass).

60. DEMOSTHENES, *Against Stephanus 2*, in 5 DEMOSTHENES: PRIVATE ORATIONS, *supra* note 51, § 26 (Dem. 46.26).

61. The substantive vagueness of Athenian laws was noted already in antiquity. ARISTOTLE, *The Athenian Constitution*, *supra* note 34, at ch. 9, § 2 (*Athen. Pol.* 9.2); see ARISTOTLE, *THE “ART” OF RHETORIC*, bk.1, § 1354a27-30 (J.H. Freese trans., Harvard Univ. Press 1959) (*Arist. Rhet.* 1.1354a27-30); cf. *The Athenian Constitution*, *supra* note 34, at ch. 35, § 2 (*Athen. Pol.* 35.2). For a discussion on this point, see CONOVER, *supra* note 26, at 226 & n.23; ADRIAN LANNI, *LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS* 117-18 (2006) [hereinafter LANNI, *LAW AND JUSTICE*]; Christopher Carey, *Legal Space in*

For each procedure, then, it is plausible that a prosecutor would have to advocate why a previous jury trial had resulted in a bad outcome—an unjust acquittal or, possible with the *graphē dekas mou*, an unjust conviction.⁶² By placing the norm on trial, these suits reinforced the democracy's commitment to popular justice, for it was ultimately a popular jury's decision about what constituted bribery or an unjust outcome that won out. Moreover, that it was private citizens, and not government officials, who usually initiated these suits only maintained the Athenian commitment to a limited state.⁶³

In addition to reaffirming Athens' commitment to popular justice, these trials actually re-legitimated the very democratic processes that had been threatened by judicial corruption in the first place. Normally there was no appellate review in Athens: in line with the democratic ideal that the people's decisions were authoritative, there simply was no higher body to which one could appeal a decision.⁶⁴ Although we have no attested examples of their use, these suits seem to have offered the opportunity for judicial review of a sort, with an eye toward achieving a correct result. Importantly, they repeated the judicial process, but with a larger jury.⁶⁵ This had the effect of decreasing the risk of potential error and, given how difficult it would have been to bribe a jury in the first place, decreasing the risk of

Classical Athens, 41 GREECE & ROME 177, 178-79 (1994); S.C. Todd, *The Language of Law in Classical Athens*, in THE MORAL WORLD OF THE LAW 17, 29-30 (Peter Coss ed., 2000).

62. Hyperides, *Fragments, Against Aristagora for Failure to Obtain a Patron I and II*, in 2 MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES, *supra* note 59, at ch. 28, § 2 (Hyp. fr. 28.2 Blass).

63. On this point, see Adriaan Lanni, *Social Norms in the Courts of Ancient Athens*, 1 J. LEGAL ANALYSIS 691, 726-27 (2009) [hereinafter Lanni, *Social Norms*].

64. HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 33, at 189. Earlier there had been appeal to a popular court (*epheisis*) from a judgment by a *magistrate*, but there was no similar sort of appeal for trials that had been before a popular court in the first instance. *Id.*

65. Note how, because these were important public trials, the juries likely may have exceeded the regular size of 201 jurors for private suits or 501 for public suits. See HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 33, at 187.

renewed corruption, as well.⁶⁶ By *repeating* the process, and hopefully achieving a more just result, the Athenians thereby reaffirmed the legitimacy of their courts. This could have been a particularly helpful practice in the face of judicial corruption that otherwise threatened to erode the public's trust in the courts.⁶⁷

B. *Regulations Against Executive Bribery*

Executive officials were not life-long professionals in Athens: virtually all officials served just one-year terms. The great majority served on boards of ten in positions acquired by entering a voluntary lottery similar to that for the jury selection process.⁶⁸ The only elected officials were those requiring special expertise: namely, certain military and financial leaders and ambassadors.⁶⁹ But even officials serving short terms could cause major problems for Athens' "rule by the people" (*dēmo-kratiā*). Thus, it was a defining moment of the democracy when the people instituted public accountability for public officials.⁷⁰

Executive bribery was viewed, in this light, as a threat to the supremacy of the people's authority.⁷¹ The fear was

66. McCannon applies Condorcet's Jury Theorem to Athenian jury sizes and concludes that the larger juries empanelled for high-profile public cases would have reduced the risk of possible error. Bryan McCannon, *Jury Size in Classical Athens: An Application of the Condorcet Jury Theorem*, 64 KYKLOS 106, 113-18 (2011).

67. By reducing the risk of renewed corruption, these retrials would have increased the perceived procedural fairness, which is essential for bolstering legitimacy. See Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 382-84 (2006). On the corrosive link between institutional legitimacy and corruption, see Morris & Klesner, *supra* note 4, at 1260-63.

68. See Taylor, *From the Whole Citizen Body*, *supra* note 38, at 323-24, 330-31.

69. HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 33, at 160.

70. See *id.* at 36-37; OBER, MASS AND ELITE, *supra* note 38, at 77-78; MARTIN OSTWALD, FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW 70-73 (1986); Sally Humphreys, *The Evolution of Legal Process in Ancient Attica*, in TRIA CORDA: SCRITTI IN ONORE DI ARNALDO MOMIGLIANO 229, 242-47 (E. Gabba ed., 1983).

71. For an overview of this idea, see CONOVER, *supra* note 26, at 96-112.

that an executive official—a military general, for example, or an overseer of the market—might disobey the people’s will and enact a different policy, or enact the people’s policy in way that was unjust. As a result, the Athenians held accountable those generals who failed to sack certain cities,⁷² ambassadors who failed to secure certain terms in diplomatic negotiations,⁷³ and other officials whose actions seemed to cause harm to the polity.⁷⁴

To combat executive bribery, the Athenians had two main enforcement procedures: *euthūnai* (“straightening

72. Examples include Anytus, see ARISTOTLE, *The Athenian Constitution*, *supra* note 34, at ch. 27, § 5 (*Athen. Pol.* 27.5); Cimon, see PLUTARCH, *Cimon*, in 2 PLUTARCH’S LIVES: THEMISTOCLES AND CAMILLUS ARISTIDES AND CATO MAJOR CIMON AND LUCULLUS ch. 14, §§ 1-4 (Bernadotte Perrin trans., Harvard Univ. Press reprint. ed. 1967) (*Plut. Cim.* 14.1-4); PLUTARCH, *Pericles*, in 3 PLUTARCH’S LIVES: PERICLES AND FABIVS MAXIMVS NICIAS AND CRASSVS ch. 10, § 6 (Bernadotte Perrin trans., Harvard Univ. Press reprint. ed. 1967) (*Plut. Per.* 10.6); Sophocles, Pythodorus, and Eurymedon, see 2 THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR bk. 4, ch. 65, §§ 2-3 (Charles Forster Smith trans., Harvard Univ. Press reprint. ed. 1965) (*Thuc.* 4.65.2-3); PHILOCHORUS, in 3B DIE FRAGMENTE DER GRIECHISCHEN HISTORIKER (*F Gr H*) ch. 328, § 127 (Philochorus *FGrH* 328 F127); Demosthenes, *cf.* 2 THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR, *supra*, at bk. 3, ch. 98, § 5 (*Thuc.* 3.98.5); and Nicias, *cf.* 4 THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR bk. 7, ch. 48, § 4 (Charles Forster Smith, trans., Harvard Univ. Press rev. ed. 1965) (*Thuc.* 7.48.4).

73. Examples include Timagoras, see DEMOSTHENES, *On the False Embassy*, in 2 DEMOSTHENES: DE CORONA DE FALSA LEGATIONE §§ 31, 137, 191 (C.A. Vince & J.H. Vince trans., Harvard Univ. Press reprint. ed. 1963) (*Dem.* 19.31, 137, 191); PLUTARCH, *Pelopidas*, in 5 PLUTARCH’S LIVES: AGESILAUS AND POMPEY PELOPIDAS AND MARCELLUS ch. 30, § 6 (Bernadotte Perrin trans., Harvard Univ. Press reprint. ed. 1961) (*Plut. Pelop.* 30.6); XENOPHON, *Hellenica*, in 2 XENOPHON bk. 7, ch. 1, § 38 (Carleton L. Brownson trans., Harvard Univ. Press reprint. ed. 1961) (*Xen. Hell.* 1.38); Epicrates, Onomasas, and Phormisius, see LYSIAS, *Against Epicrates and His Fellow Envoys*, in LYSIAS, *supra* note 16, § 1 (*Lys.* 27.1); and Epicrates, see 3 ATHENAEUS, DEIPNOSOPHISTS bk 6, ch. 251 (S. Douglas Olson, trans., Harvard Univ. Press rev. ed. 2008) (*Athen.* 6.251); PLUTARCH, *Pelopidas*, in 5 PLUTARCH’S LIVES: AGESILAUS AND POMPEY PELOPIDAS AND MARCELLUS, *supra*, at ch. 30, § 7 (*Plut. Pelop.* 30.7).

74. For example, the general Timotheus was convicted of bribery for having failed to help his fellow general Chares. See ISOCRATES, *Antidosis*, in ISOCRATES, *supra* note 52, § 129 (*Isocr.* 15.129); Dinarchus, *Against Demosthenes*, in 2 MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES, *supra* note 59, § 14 (*Din.* 1.14); Dinarchus, *Against Philocles*, in 2 MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES, *supra* note 59, § 17 (*Din.* 3.17).

out”), for officials who had just left office,⁷⁵ and *eisangelia*, (“denunciation”), for officials still in office.⁷⁶ The *euthūnai* were a *mandatory* audit of an official’s accounts and conduct before a jury of 501; at this time, any individual who wanted could bring an accusation of bribery.⁷⁷ We do not know what the wording of this law was, but it is likely that bribery was defined as gifts given or received “to the harm of the people.”⁷⁸ The penalty for bribery at *euthūnai* was death or a tenfold fine for the amount of the bribe.⁷⁹

The *eisangelia* was the quintessential, and earliest, tool for accountability at Athens: it was used for the most serious offenses, including treason, political conspiracy, and overthrowing the democracy.⁸⁰ Thousands of citizens would judge an *eisangelia* during a special meeting of the

75. See ARISTOTLE, *The Athenian Constitution*, *supra* note 34, at ch. 54, § 2 (*Athen. Pol.* 54.2). For an overview of the *euthūnai* process, see HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 33, at 222-24; MACDOWELL, *THE LAW IN CLASSICAL ATHENS*, *supra* note 37, at 170-72.

76. See Hyperides, *In Defence of Euxenippus*, in 2 *MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES*, *supra* note 59, §§ 7-8, 29 (*Hyp.* 4.7-8, 29). For an overview of the *eisangelia* procedure, see HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 33, at 212-18, and MACDOWELL, *THE LAW IN CLASSICAL ATHENS*, *supra* note 37, at 183-86.

77. See ARISTOTLE, *The Athenian Constitution*, *supra* note 34, at ch. 48, § 4 (*Athen. Pol.* 48.4); HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 33, at 222.

78. CONOVER, *supra* note 26, at 233-34; see DEMOSTHENES, *Against Timocrates*, in 3 *DEMOSTHENES: AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON*, *supra* note 16, § 113 (*Dem.* 24.113).

79. See CONOVER, *supra* note 26, at 216 n.3; Dinarchus, *Against Demosthenes*, in 2 *MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES*, *supra* note 59, § 60 (*Din.* 1.60); Hyperides, *Against Demosthenes*, in 2 *MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES*, *supra* note 59, at frag. 6 (*Hyp.* 5.2).

80. On the political significance of the *eisangelia*, see CONOVER, *supra* note 26, at 242; HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 33, at 215-18; Hyperides, *In Defence of Euxenippus*, in 2 *MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES*, *supra* note 59, §§ 7-8, 29 (*Hyp.* 4.7-8, 29). The *eisangelia* was thought to have been instituted by the lawgiver Solon nearly one century before the democracy. See ARISTOTLE, *POLITICS*, *supra* note 1, at bk. 2, § 1274a15-18, bk. 3, § 1281b31-4 (*Arist. Pol.* 2.1274a15-18, 3.1281b31-4); ARISTOTLE, *The Athenian Constitution*, *supra* note 34, at ch. 9, § 1 (*Athen. Pol.* 9.1).

Assembly.⁸¹ Perhaps because of the grave importance of the crimes tried at an *eisangelia*, there was no penalty for failing to win one-fifth of the vote.⁸² The law on *eisangeliai* mentioned two types of corruption: military generals who “took gifts” while on campaign; and public speakers who advocated “against the people’s interests” after taking money.⁸³ As with *euthūnai*, the penalties for both were either death or a tenfold fine.⁸⁴ This Section will focus on the *eisangelia* as it applied to military generals; the next Section will look at the *eisangelia* in reference to public speakers. In addition, we hear of ambassadors prosecuted via *eisangelia* for taking bribes while on an embassy, but we do not know what the exact wording of that law would have been.⁸⁵

81. HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 33, at 159.

82. *Id.* at 214-15. In the 330s toward the end of the democracy, however, the Athenians instituted a monetary penalty to make the *eisangelia* more in line with other public trials. See CHRIST, THE LITIGIOUS ATHENIAN *supra* note 16, at 136-37.

83. Hyperides, *In Defence of Euxenippus*, in 2 MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES, *supra* note 59, § 8 (Hyp. 4.8).

84. This is apparent from the actual penalties meted out. For instance, the general Ergocles was killed. See DEMOSTHENES, *On the False Embassy*, in 2 DEMOSTHENES: DE CORONA DE FALSA LEGATIONE, *supra* note 73, § 180 (Dem. 19.180); LYSIAS, *Against Ergocles*, in LYSIAS, *supra* note 16, §§ 1-17 (Lys. 28.1-17); LYSIAS, *Against Philocrates*, in LYSIAS, *supra* note 16, §§ 2, 5 (Lys. 29.2, 29.5). At the same time, the general Timotheus was fined the astonishing sum of 100 talents. See Dinarchus, *Against Demosthenes*, in 2 MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, AND HYPERIDES, *supra* note 59, § 14 (Din. 1.14); Dinarchus, *Against Philocles*, in 2 MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, AND HYPERIDES, *supra* note 59, § 17 (Din. 3.17); DIODORUS SICULUS bk. 16, ch. 21, § 4 (Charles L. Sherman trans., Harvard Univ. Press reprint. ed. 1963) (Diod. 16.21.4); ISOCRATES, *Antidosis*, in 2 ISOCRATES § 129 (George Norlin trans., Harvard Univ. Press reprint. ed. 1961) (Isocr. 15.129).

85. Examples include Timagoras, see DEMOSTHENES, *On the False Embassy*, in 2 DEMOSTHENES: DE CORONA DE FALSA LEGATIONE, *supra* note 73, § 137 (Dem. 19.137); PLUTARCH, *Artaxerxes*, in 11 PLUTARCH’S LIVES: ARATUS, ARTAXERXES, GALBA AND OTHO ch. 22, § 6 (Bernadotte Perrin trans., Harvard Univ. Press reprint. ed. 1962) (Plut. Art. 22.6), and Epicrates, Andocides, Eubulides, and Cratinus, see DEMOSTHENES, *On the False Embassy*, in 2 DEMOSTHENES: DE CORONA DE FALSA LEGATIONE, *supra* note 73, §§ 277-80 (Dem. 19.277-80); LYSIAS, *Against Epicrates and His Fellow Envoys*, in LYSIAS, *supra* note 16, §§ 1-16 (Lys. 27).

Though ostensibly distinguished based on whether officials were in office or out of office, the design of the *euthūnai* and *eisangelia* procedures actually seems to point to different democratic values fostered by each process. On the one hand, the mandatory nature of *euthūnai* represented a standardization of process: an egalitarian commitment to the rule of law giving all officials the same treatment.⁸⁶ Having each and every public official line up to have their accounts examined thus dramatized a conception of political justice predicated on arms-length, professional ties.⁸⁷

On the other hand, the *ad hoc* nature of the *eisangelia* process suggests a different focus. Another way of looking at the *euthūnai-eisangelia* distinction is in terms of elected versus lotteried executive positions. Of our twelve securely attested *eisangeliai* for bribery, not one is against an official who acquired his position by lot; all are for ambassadors, generals, or public speakers.⁸⁸ By contrast, we have a mix of *euthūnai* for elected and lotteried officials.⁸⁹ What prompted citizens to bring these most serious prosecutions forward,

86. In fact, this seems to have been the overarching purpose when mandatory *euthūnai* were first implemented. See CONOVER, *supra* note 26, at 166-67, 269-70. This procedure was created alongside a broad standardization of political practices, including the rhetoric of public praise, see David Whitehead, *Cardinal Virtues: The Language of Public Approbation in Democratic Athens*, 44 CLASSICA ET MEDIAEVALIA 37, 47 (1993), the language on public decrees, see RHODES, THE ATHENIAN BOULE 52-81 (1972) [hereinafter RHODES, THE ATHENIAN BOULE], and the awarding of civic honors, see AESCHINES, *Against Timarchus*, in THE SPEECHES OF AESCHINES, *supra* note 35, §§ 111-12 (Aeschin. 1.111-12); ARISTOTLE, *The Athenian Constitution*, *supra* note 34, at ch. 46, § 1 (*Athen. Pol.* 46.1); DEMOSTHENES, *Against Androtion*, in 3 DEMOSTHENES: AGAINST MEIDIAS, ANDROTIION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON, *supra* note 16, §§ 36, 38-39 (Dem. 22.36, 22.38-9).

87. This point is developed at length in CONOVER, *supra* note 26, at 162-67.

88. See numbers 19 (Epicrates, Andocides, Eubulides, and Cratinos, ambassadors), 22 (Ergocles, general), 25 (Thrasybulus, general), 26 (Timagoras, ambassador), 27 (Callistratus, public speaker), 28 (Timotheus, general), 29 (Philocrates, ambassador), 31 (Aeschines, ambassador), 33 (Euxenippos, public speaker) in the list of bribery trials in Claire Taylor, *Bribery in Athenian Politics Part I: Accusations, Allegations, and Slander*, 48 GREECE & ROME 53, 59-61 (2001) [hereinafter Taylor, *Bribery in Athenian Politics Part I*].

89. See, for example, numbers 8 (Laches, elected general) and 16 (unnamed administrative official) in the list of bribery trials in *id.* at 58-59.

therefore, seems to have been intrinsic to the elected officials' functions. Recall that lotteried officials worked almost exclusively on boards of ten, while elected officials were more akin to experts and given greater discretion in the execution of their public functions. This evidence suggests, though cannot prove, that *eisangeliai* for bribery were specifically "about" curbing abuses of executive discretion.

If that inference is correct, then the design of the *eisangelia* procedure suggests that, through bribery trials, the Athenians reaffirmed the political authority of the people. In particular, they redecided the value of a policy originally ratified by the Assembly and allegedly corrupted by an official. A significantly larger number of citizens were present at an *eisangelia* than at *euthūnai*; indeed, the *eisangelia* trial itself often was conducted at the Pnyx, the same location where the Assembly had voted on the policy in question.⁹⁰ Just as the procedures for prosecuting judicial bribery reaffirmed popular justice by replicating trials, the *eisangelia* procedure seems to have legitimated the people's authority by replicating a deliberative policy vote by the Assembly. Those officials who had overstepped their bounds and used too much discretion were punished severely. Of the ten *eisangeliai* for bribery for which we know the outcome and penalty, eight resulted in death,⁹¹ one resulted

90. The original public proposal for an *eisangelia* occurred at a full meeting (*ekklesia kyria*) of the Assembly. HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 33, at 214. At that time, the citizen bringing the charge proposed whether to try the case in a popular court or before the Assembly. *Id.* Those cases tried before the Assembly would have been held on the Pnyx, where normal Assembly meetings were held. *Id.* at 128, 133-34.

91. See numbers 20 (Epicrates, Andocides, Eubulides, and Cratinus), 22 (Ergocles), 26 (Timagoras), 27 (Callistratus), and 29 (Philocrates) in the list of bribery trials in Taylor, *Bribery in Athenian Politics Part I*, *supra* note 88, at 59-60.

in the largest financial penalty ever imposed at Athens,⁹² and only one resulted in acquittal.⁹³

C. *Regulations Against Legislative Bribery*

Because of its immense political authority, the Assembly needed to aggregate and sift through high quality information by necessity.⁹⁴ As the Athenians learned with the disastrous Sicilian expedition during the Peloponnesian War, the costs of poor information could be catastrophic.⁹⁵ When deliberating, the Athenians likely took cues from each other—applauding a trusted expert, for example, or shouting down someone who had a bad track record of public proposals—and thereby aggregated the wisdom of the crowds.⁹⁶ Yet this type of knowledge aggregation was exceptionally vulnerable to breaches in public trust. Precisely because the Athenians trusted that any given

92. Timotheus was fined the impossibly high sum of 100 talents—or nearly seventy percent of the annual income of all of Athens at the time. Dinarchus, *Against Demosthenes*, in 2 MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES *supra* note 59, § 17 (Din. 1.17). On this calculation, see HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 33, at 316.

93. See number 31 (Aeschines) in the list of bribery trials in Taylor, *Bribery in Athenian Politics Part I*, *supra* note 88, at 58-61.

94. Ober helpfully walks through Athens' necessity for epistemic quality in its public deliberations. OBER, DEMOCRACY AND KNOWLEDGE: INNOVATION AND LEARNING IN CLASSICAL ATHENS 80-117 (2008) [hereinafter OBER, DEMOCRACY AND KNOWLEDGE].

95. Even in antiquity, the Sicilian Expedition became emblematic of the Assembly's perceived inadequacies. See OBER, POLITICAL DISSENT IN DEMOCRATIC ATHENS: INTELLECTUAL CRITICS OF POPULAR RULE 104-20 (1998). The vulnerability of the Assembly to make poor collective decisions at the end of the fifth century is also borne out by the contemporary creation of a procedure for illegal proposals, or *graphē paranomōn*, see HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 33, at 205-12, and the distinction between public decrees (*psēphismata*) and laws (*nomoi*), which were forged through the complex process of lawmaking, or *nomothesia*, see *id.* at 168-69.

96. In the lawcourts, for instance, the approving or censuring shout (*thorubos*) from the crowd helped jurors reach a decision. For helpful explorations of this phenomenon, see generally Victor Bers, *Dikastic Thorubos*, in CRUX: ESSAYS IN GREEK HISTORY PRESENTED TO G.E.M. DE STE. CROIX ON HIS 75TH BIRTHDAY 1-15 (P.A. Cartledge & F.D. Harvey eds., 1985); Adriaan M. Lanni, *Spectator Sport or Serious Politics? Hoi Periestekotes and the Athenian Lawcourts*, 117 J. HELLENIC STUD. 183 (1997).

speaker truly spoke what he personally thought was best, bribery of public speakers was a particularly pernicious offense. As Peter Euben explains, “A bribe destroyed [the] conflation of man and policy”: with such legislative bribery, the Athenians could no longer hold accountable the source of a proposed policy.⁹⁷

As a result, the Athenians developed a range of informal and formal measures to prosecute such legislative corruption. On the informal side, there were a few different oaths sworn by members of various political bodies. When jurors were first sworn in for the year, they took an oath not to “take gifts illicitly in exchange for [their] vote in the Heliastia,” as Athens’ earliest court was called.⁹⁸ Further, a public curse spoken at meetings of the Assembly and Council appears to have condemned a long list of impeachable offenses, including committing bribery and then speaking in public “against the people’s interests.”⁹⁹ Although no source explicitly attests to a clause against bribery in the oath sworn by Council members, such a clause is likely, if only based on analogy to other oaths and

97. J. PETER EUBEN, *CORRUPTING YOUTH: POLITICAL EDUCATION, DEMOCRATIC CULTURE, AND POLITICAL THEORY* 103 (1997). When public trust began to wane, therefore, it was public speakers who were first suspected of corruption. See DEMOSTHENES, *On the False Embassy*, in 2 DEMOSTHENES: DE CORONA DE FALSA LEGATIONE, *supra* note 73, §§ 182-84 (Dem. 19.182-84); see also CONOVER, *supra* note 26, at 175-80.

98. DEMOSTHENES, *Against Timocrates*, in 3 DEMOSTHENES: AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON, *supra* note 16, § 150 (Dem. 24.150). This clause is preserved only in a version of the Heliastic Oath inserted by a scholiast into a speech of Demosthenes. *Id.* §§ 149-51. On this oath, see HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 33, at 182-83. The authenticity of the bribery clause has recently been questioned. See *id.* at 182; David C. Mirhady, *The Dikast’s Oath and the Question of Fact*, in HORKOS: THE OATH IN GREEK SOCIETY 48, 50 (Alan H. Sommerstein & Judith Fletcher eds., 2007). Yet based on comparanda from other jury oaths in local Attic demes, Harrison seems correct in finding the clause authentic. A. R. W. HARRISON, 2 *THE LAW OF ATHENS* 48 (1971). For further discussion, see CONOVER, *supra* note 26, at 255 n.7.

99. The reconstruction of the curse accurately records the sense of this clause as “takes bribes to speak against the interests of Athens.” RHODES, *THE ATHENIAN BOULE*, *supra* note 86, at 37. This particular wording, though, might date to the second half of the democracy. See CONOVER, *supra* note 26, at 256 n.8.

to the curse at the beginning of meetings of the Council.¹⁰⁰ The oaths and curses called for a licit form of community violence against an offender, though not through formal judicial process. Thus, in one early example, the Athenians rose up as a community and stoned the Councilman Lycides and his family when he proposed that the Council listen to a messenger from the Persians.¹⁰¹

Inherent in their design and the nature of their penalties, these early public pronouncements reified the boundaries of new political bodies in the democracy. In essence, they grasped at some kind of accountability, even when bribery threatened to hold the true source of a policy proposal beyond the realm of accountability. The punishment of cursing and stoning an offender was a way to remove a pollution threatening the city like a foreign enemy.¹⁰² By removing that enemy “outsider,” the community reasserted the pure, uncorrupted physical and symbolic boundaries of the Council’s, or Assembly’s, or jury’s domain.

At the same time, it is significant that these were only *informal* processes: we have no attested example of a juror, Assembly member, or Councilman being brought to trial for taking bribes. Such a distinction between informal and formal enforcement mechanisms shielded participants from legal liability. In so doing, it qualitatively distinguished the

100. See RHODES, *THE ATHENIAN BOULE*, *supra* note 86, at 12-13. In addition, an early oath sworn by archons—the most important public officials prior to the democracy—included a clause against “taking gifts for the sake of one’s office.” ARISTOTLE, *The Athenian Constitution*, *supra* note 34, at ch. 55, § 5 (*Athen. Pol.* 55.5); see CONOVER, *supra* note 26, at 255.

101. See HERODOTUS, *The Histories*, in 4 HERODOTUS bk. 9, ch. 3-5 (A.D. Godley trans., Harvard Univ. Press reprinted ed. 1961) (Hdt. 9.3-5). On this episode, see also DANIELLE S. ALLEN, *THE WORLD OF PROMETHEUS: THE POLITICS OF PUNISHING IN DEMOCRATIC ATHENS* 143-45 (2000); CONOVER, *supra* note 26, at 258-60; HERODOTUS: *HISTORIES BOOK IX* 107-08 (Michael A. Flower & John Marincola eds., 2002); Lycurgus, *Against Leocrates*, in 2 *MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES*, *supra* note 59, § 122 (*Lyc.* 1.122).

102. Note how, according to Lycurgus, Lycides’ recommendation was tantamount to betraying the city. See Lycurgus, *Against Leocrates*, in 2 *MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES*, *supra* note 59, § 122 (*Lyc.* 1.122). For the contiguities between stoning and religious purification, see ALLEN, *supra* note 101, at 205-06.

collective judgments of the Assembly, Council, or courts from those made by, say, public officials who were formally liable for their actions. Just as these oaths and curses seem to have reaffirmed the symbolic boundaries of political bodies, therefore, they seem to have reified the sanctity of decisions made by those bodies.

In addition to such informal oaths and curses, there were two formal measures that could be used against public speakers. As we saw in the previous Section, frequent public speakers (*rhētores*) were subject to an *eisangelia* for “taking money and speaking against the public’s interest.”¹⁰³ As with the *eisangelia* against generals, the punishment was either death or a tenfold fine, and prosecutors risked nothing by bringing a suit: there were no penalties for withdrawing an accusation or failing to win one-fifth of the vote.¹⁰⁴ There also was a *graphē dōrōn* based on a general law against giving and taking gifts “to the harm of the people,” as well as for making corrupt promises.¹⁰⁵ This could be used against any private citizen,¹⁰⁶ and the penalty was probably *atimia*, which originally meant outlawry but later came to mean civic disfranchisement.¹⁰⁷

103. Hyperides, *Defence of Euxenippus*, in 2 MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES, *supra* note 59, § 8 (Hyp 4.8).

104. See HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 33, at 215-18.

105. DEMOSTHENES, *Against Meidias*, in 3 DEMOSTHENES: AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON, *supra* note 16, § 113 (Dem. 21.113); see also CONOVER, *supra* note 26, at 215; Hashiba, *supra* note 51, at 67-74; MacDowell, *Athenian Laws About Bribery*, *supra* note 36, at 74-76.

106. See DEMOSTHENES, *Against Meidias*, in 3 DEMOSTHENES: AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON, *supra* note 16, §§ 110-14 (discussing how the statute might apply to Demosthenes’ opponent Meidias) (Dem. 21.110-14).

107. The ancient sources give conflicting accounts of the penalties for bribery under a *graphē dōrōn*. Aeschines lists only *atimia* as a penalty for the *graphē dōrōn*, see AESCHINES, *Against Ctesiphon*, in THE SPEECHES OF AESCHINES, *supra* note 35, § 232 (Aesch. 3.232), while both Dinarchus, see DINARCHUS, *Against Demosthenes*, in 2 MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES, *supra* note 59, § 60 (Din. 1.60), and Hyperides, see HYPERIDES, *Against Demosthenes*, in 2 MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES, *supra* note 59, at frag. 6 (Hyp 5.24), claim that the penalty was either death or a tenfold fine. We can reconcile these by positing that a tenfold fine and death applied only at *euthūnai* or an *eisangelia*, which

Both of these formal measures reflected a cornerstone of the democracy: that citizens were free to do as they pleased—up until that action harmed the people as a whole.¹⁰⁸ Indeed, both seem to have been back-door ways to regulate essentially private dealings, whether of public speakers collaborating with interested parties seeking public support for their idea, or of citizens engaged in any activity (the *graphē dōrōn* is that vague).¹⁰⁹ Like the informal oaths, therefore, these formal measures reinstated the public accountability that had been destabilized by bribes. The law drew the line at the precise moment when those dealings had a detrimental effect on the community: when a speaker proposed something against the people's interest, or when gifts or promises caused harm to the people. Encouraging all citizens to evaluate their own conduct based on its harm or benefit to the community, these procedures also fostered a democratic ethos.

II. THE EFFECTIVENESS OF ATHENS' ANTI-BRIBERY REFORMS

Having surveyed the distinct ways in which the Athenians democratized their enforcement procedures for regulating bribery in Part I, Part II attempts to gauge how helpful Athens' novel approach to anti-corruption reform

originally would have been called a *graphē*. If correct, that would mean that, as Aeschines attests, *atimia* (disfranchisement) was the only penalty used in a *graphē dōrōn* suit.

108. See ARISTOTLE, *POLITICS*, *supra* note 1, at bk. 6, § 1320a30 (Aristot. *Pol.* 1320a30); DEMOSTHENES, *Against Androtion*, in 3 DEMOSTHENES: AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON, *supra* note 16, § 51 (Dem. 22.51); LYSIAS, *Defence Against a Charge of Subverting the Democracy*, in LYSIAS, *supra* note 16, at 33 (Lys. 25.33); see also HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 34, at 74-81; Lanni, *Social Norms*, *supra* note 63, at 726-29.

109. Lanni shows how the Athenian courts often regulated private conduct and extra-statutory norms in precisely this kind of indirect manner. See Lanni, *Social Norms*, *supra* note 63, at 694, 710-17. Demosthenes suggests that the *graphē dōrōn* could have been used against someone who had bribed another to bring a lawsuit against a third party. See DEMOSTHENES, *Against Timocrates*, in 3 DEMOSTHENES: AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON, *supra* note 16, §§ 104-13 (Dem. 24.104-13).

was. Absolute measures of reform success are, of course, impossible. Even in contemporary societies, it is impossible to measure, say, how many officials decide against taking bribes in light of some recent reform or another.¹¹⁰ Moreover, whereas political scientists can take new measurements on contemporary societies—conduct new surveys on perceptions or experiences of corruption, for example—Athens is a historical society (and quite ancient at that!). We cannot conduct new measurements; we are limited to what precious little data we already have.

Theory and practice seem to point to completely divergent conclusions about the prevalence of bribery in ancient Athens. On the one hand, recall that anti-corruption reform advocates focus on diffusing political power and reducing discretion while increasing accountability.¹¹¹ In theory, then, the Athenians enacted near paradigmatic institutions for minimizing bribery. The potential monopolization of resources, whether political, economic, or judicial, was slim. The vast majority of public officials at Athens were selected by lottery for one-year terms and worked collaboratively on executive boards, not individually; similarly, the most significant court cases were decided by juries consisting of hundreds of Athenians, selected at random from a pool of 6,000 potential jurors each year.¹¹² Likewise, because the people tasked them with explicit charges, executive boards effectively had little discretionary power on their own.¹¹³ Finally, Athens subjected *all* public officials to mandatory scrutiny, in addition to a range of other laws and legal procedures under which they might be prosecuted.¹¹⁴ By modern standards,

110. See Morris, *supra* note 11, at 389-94 (surveying different methodologies for measuring contemporary corruption and concluding that each may well only partially measure the problem); A.J. Brown, *What Are We Trying to Measure? Reviewing the Basics of Corruption Definition*, in *MEASURING CORRUPTION* 57, 57, 61-69 (Charles Sampford et al. eds., 2006) (posturing that measuring corruption hinges on a universal definition of corruption and no such definition exists).

111. See *supra* text accompanying note 23.

112. See discussion *supra* Part I.A-B.

113. See discussion *supra* Part I.B.

114. See discussion *supra* Part I.B-C.

the penalties attached to these laws—a tenfold fine, disfranchisement, or death—would be considered extreme and, one might imagine, effective ways to hold officials accountable.

On the other hand, two different empirical measures suggest just the opposite conclusion: that the number of Athenian officials who took gifts was very high by western standards. First, the number of bribery prosecutions and convictions at Athens, to say nothing of instances that never came to trial, is enormously high by western standards.¹¹⁵ Even with considerable gaps in the ancient evidence, we have attested thirty-two different prosecutions of bribery with an additional twenty-two cases of varying degrees of certainty; all but a handful of these cases fall during the period 430 to 322, the best-attested period of the democracy.¹¹⁶ At least thirty-six of these fifty-four trials resulted in conviction.¹¹⁷ Although extrapolating from the

115. Scholarly estimates run the gamut. See Harvey, *supra* note 26, at 102 (“more [frequent] than would be regarded as acceptable in our own society”); MacDowell, *Athenian Laws About Bribery*, *supra* note 36, at 78 (noting that bribery was widespread); S. Perlman, *On Bribing Ambassadors*, 17 GREEK ROMAN & BYZANTINE STUD. 223, 231 (“not a very widespread custom”); Strauss, *supra* note 16, at 73 (stating there was widespread peculation); Taylor, *Bribery in Athenian Politics Part II*, *supra* note 37, at 168 (“[T]here was not so much a bribery culture, more an accusation of bribery culture.”) (emphasis in original). “Given the tremendous gaps in [the ancient] sources, however, the unusually high prevalence of bribery attested in [these] sources is most likely only the tip of the iceberg.” See CONOVER, *supra* note 26, at 21 n.25 (citing RYSZARD KULESZA, DIE BESTECHUNG IM POLITISCHEN LEBEN ATHENS IM 5. UND 4. JAHRHUNDERT V. CHR. KONSTANZ 39-40 (1995)).

116. For the catalog of bribery trials, see KULESZA, *supra* note 115, at 85-90 and, for a slightly modified list in English, see Taylor, *Bribery in Athenian Politics Part I*, *supra* note 88, at 58-61.

117. For the thirty-four known bribery trials—thirty-two known plus two for which bribery is mentioned in the ancient sources but not at the trial—nineteen resulted in conviction, four resulted in acquittal, six presumably resulted in acquittal, and the result for five is unknown. See CONOVER, *supra* note 26, at 21 n.27. Of the remaining twenty trials, seventeen resulted in conviction, one probably did so, there was one acquittal, and one with unknown outcome. *Id.* Of these latter seventeen convictions, however, nine come from the trial of the Treasurers of Hellas (*Hellēnotamiai*), who reportedly were convicted unjustly; the tenth was saved from certain death when proof of his innocence was discovered at trial. See Antiphon, *On the Murder of Herodes*, in 1 MINOR ATTIC

ancient evidence is hazardous, we can plausibly estimate that roughly six to ten percent of major public officials would have been brought to trial on accusations of bribery, and roughly half of those officials would have been convicted.¹¹⁸

Second, Athenians accused each other of taking bribes with similar frequency: a remarkable 450 accusations running the gamut of our extant literary sources for the democracy, or one for every twelve pages of Greek.¹¹⁹ We have already examined the legal processes for prosecuting bribery, but it should be pointed out that many of these laws and procedures underwent significant change throughout the democracy, particularly in the fifth century.¹²⁰ These numbers suggest a far from “ideal” volume of bribery in ancient Athens.

Even if we cannot obtain an unambiguous measure of the absolute volume of bribery by Athenian public officials, we can nevertheless glean some faint trends in the overall patterns of corruption that appeared in Athens over the course of the democracy. First, the sheer volume of bribery trials contrasts with only a spike in embezzlement trials in the 390’s, when concerns over the depleted Treasury were paramount, and an absence of any attested trials of fraud or extortion.¹²¹ This correlates with the literary record, where accusations of bribery are legion, while accusations of embezzlement are isolated, and accusations of extortion are virtually nonexistent.

Second, there seems to have been a consistently high rate of bribery trials. In our two best-documented periods of the democracy, from the 420’s through the 390’s and from the 340’s through the 320’s, there were seventeen and

ORATORS: ANTIPHON AND ANDOCIDES §§ 69-71 (K.J. Maidment trans., Harvard Univ. Press. reprint. ed. 1960) (Ant. 5.69-71).

118. See CONOVER, *supra* note 26, at 21.

119. *Id.* at 3-4.

120. See generally CONOVER, *supra* note 26, at 233-94; Hashiba, *supra* note 51; MacDowell, *Athenian Laws About Bribery*, *supra* note 36; *infra* app. I.

121. On these trials, see Strauss, *supra* note 16, at 70-71. See generally HANSEN, EISANGELIA, *supra* note 54.

eighteen securely attested bribery trials of major officials, respectively.¹²² These trials follow a well-known trend from predominantly *euthūnai* in the fifth century to predominantly *eisangeliai* in the fourth century.¹²³ For this last period, a spike in references to an “unbribeable” politician suggests a perception of frequent corruption, as more politicians tried to rescue their reputation.¹²⁴

122. These numbers follow from a modified count based on Kulesza’s catalog of bribery trials. See KULESZA, *supra* note 115, at 85-90.

123. Hansen documents this trend for all crimes prosecuted using either process. See generally HANSEN, EISANGELIA, *supra* note 54. *Euthūnai* for bribery were relatively common in the fifth century: we have two securely attested *euthūnai*, as well as five more probable *euthūnai* in the last three decades of the fifth century. The securely attested *euthūnai* for bribery are for the general Phormion, ANDROTION, in 3B DIE FRAGMENTE DER GRIECHISCHEN HISTORIKER, *supra* note 72, at ch. 324, § 8 (Androtion FGrH 324 F 8), and the general Paches, PLUTARCH, *Aristides*, in 2 PLUTARCH’S LIVES: THEMISTOCLES AND CAMILLUS ARISTIDES AND CATO MAJOR CIMON AND LUCULLUS, *supra* note 72, at ch. 26, § 3 (Plut. *Arist.* 26.3); PLUTARCH, *Nicias*, in 3 PLUTARCH’S LIVES: PERICLES AND FABIVS MAXIMVS NICIAS AND CRASSVS, *supra* note 72, at ch. 6, §§ 1-2; (Plut. *Nic.* 6.1-2). The defendant in Lysias 21 also was probably at his *euthūnai*; and it is likely that the generals Sophocles, Pythodorus, and Eurymedon were also convicted at *euthūnai*: they were convicted by “the Athenians in the city,” see 2 THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR, *supra* note 74, at bk. 4, ch. 65, § 3 (Thuc. 4.65.3), which might refer to either *euthūnai* or an *eisangelia*. If the reference in Aristophanes’ *Wasps* to Laches’ *euthūnai* is accurate, then the general Laches was also convicted at *euthūnai*. See ARISTOPHANES, *Wasps*, in 2 ARISTOPHANES: CLOUDS, WASPS, PEACE lines 240-2, 894-7, 960-1 (Jeffrey Henderson trans., Harvard Univ. Press 1998) (Aristoph. V. 240-2, 894-7, 960-1).

By contrast, we have attested only two possible examples from the fourth century, both from the 390s. The ambassadors Epicrates, Phormisius, and Onamasis were tried probably at *euthūnai*. LYSIAS, *Against Epicrates and His Fellow Envoys*, in LYSIAS, *supra* note 16, § 1 (Lys. 27.1); PLUTARCH, *Pelopidas*, in 5 PLUTARCH’S LIVES: AGESILAUS AND POMPEY PELOPIDAS AND MARCELLUS, *supra* note 73, at ch. 30, § 7 (Plut. *Pelop.* 30.7). The law-inscriber Nicomachus was also probably tried at *euthūnai*, although his trial might not have been for corruption. See LYSIAS, *Against Nicomachus*, in LYSIAS, *supra* note 16, § 9 (Lys. 30.9).

124. See OBER, MASS AND ELITE, *supra* note 38, at 236-38. Examples of “unbribeable” politicians include Phocion, PLUTARCH, *Phocion*, in 8 PLUTARCH’S LIVES: SERTORIUS AND EUMENES PHOCION AND CATO THE YOUNGER ch. 18, ch. 21 §§ 3-5, ch. 30, §§ 1-5 (Bernadotte Perrin trans., Harvard Univ. Press reprint ed. 1959) (Plut. *Phoc.* 18, 21.3-5, 30.1-5), and Lycurgus, 2 *Inscriptiones Graecae: Inscriptiones Atticae Euclidis anno Posteriores* 457.13 (Johannes Kirchner ed., 2d ed. 1913) (IG ii² 457.13). On this point, see also AESCHINES, *Against Ctesiphon*, in THE SPEECHES OF AESCHINES, *supra* note 35, § 82 (Aeschin. 3.82);

That spike may indicate a broader shift, moreover, in terms of who was committing bribery. Although judicial bribery seems to have been a persistent and unsolved problem in Athens, the Athenians may have had more success combating other types of bribery.¹²⁵ In the fifth century, of the ten securely attested bribery trials, seven were against generals,¹²⁶ with one against a public speaker,¹²⁷ and zero against ambassadors.¹²⁸ By contrast, in the fourth century, of thirty-one securely attested trials, just three were against generals (none later than the 350's),¹²⁹ while there were at least eleven trials against each of the public speakers and ambassadors.¹³⁰ This trend was

DEMOSTHENES, *Against Theocrines*, in 6 DEMOSTHENES: PRIVATE ORATIONS, *supra* note 35, § 35 (Dem. 58.35); DEMOSTHENES, *On the Crown*, in 2 DEMOSTHENES: DE CORONA DE FALSA LEGATIONE, *supra* note 73, § 250 (Dem. 18.250); DEMOSTHENES, *On the False Embassy*, in 2 DEMOSTHENES: DE CORONA DE FALSA LEGATIONE, *supra* note 73, §§ 4, 27, 232, 274 (Dem. 19.4, 19.27, 19.232, 19.274).

125. The legal procedures for prosecuting judicial bribery appear only in the late fifth century. ARISTOTLE, *The Athenian Constitution*, *supra* note 34, at ch. 27, § 5 (*Athen. Pol.* 27.5). For a discussion on this point, see CONOVER, *supra* note 26, at 246-48; MacDowell, *Athenian Laws About Bribery*, *supra* note 36, at 63-69. Likewise, repeated changes to the jury selection procedure occurred from ca. 420 to the 370s. MacDowell, *Athenian Laws About Bribery*, *supra* note 36, at 65-67. And even after that we hear of the extraordinary reenrollment of all citizens in 346/5 and additional judicial bribery suits. AESCHINES, *Against Timarchus*, in THE SPEECHES OF AESCHINES, *supra* note 35, §§ 86-87 (Aeschin. 1.86-87).

126. See numbers 5 (Cimon), 8 (Laches), 9 (Sophocles, Eurymedon, and Pythodorus) in the list of bribery trials in Taylor, *Bribery in Athenian Politics Part I*, *supra* note 88, at 58. In addition, I consider securely attested numbers 45 (Phormio) and 46 (Laches—but sources should read Paches) in the list of bribery trials in KULESZA, *supra* note 115, at 85-90.

127. See number 6 (Agoratus) in the list of bribery trials in KULESZA, *supra* note 115, at 86.

128. The remaining two securely attested bribery trials are number 16 (unnamed official) in Taylor, *Bribery in Athenian Politics Part I*, *supra* note 88, at 59, and one where private citizens were tried for being bribed to bring false prosecutions, Antiphon, *On the Choreutes*, in 1 MINOR ATTIC ORATORS: ANTIPHON AND ANDOCIDES, *supra* note 117, §§ 49-50 (Ant. 6.49-50).

129. See numbers 22 (Ergocles, 389), 25 (Thrasybulus, 388/7), 28 (Timotheus, 356/5) in Taylor, *Bribery in Athenian Politics Part I*, *supra* note 88, at 60.

130. For trials against public speakers, see numbers 27 (Callistratos), 33 (Euxenippos), 34 (Demosthenes and nine others) in Taylor, *Bribery in Athenian*

accompanied by a discursive shift toward describing bribery in ways that resemble “influence markets” today.¹³¹ In a range of different contexts, accusers posited that a network of corrupt citizens was influencing public policy decisions and the distribution of rewards within society.¹³² The focus on corrupt public speakers and ambassadors—who formed the crucial political nodes for major policy decisions—thus may have emblemized a broader shift in how politics was conducted.

These trends, if they even can be called that, should be accepted only with great caution. The ancient evidence for Athens as a whole, and particularly for the quotidian workings of politics, is woefully incomplete: the presence or absence of a single attestation of bribery in certain periods can shape our perceptions of any “trend.” That said, I would call the record incomplete, not ambiguous. *If* the above analysis presents even a remotely accurate picture of democratization and reform in Athens, we can generally correlate Athens’ anti-bribery reforms with a long-term trend toward less disruptive forms of corruption. Specifically, the arc of Athens’ development suggests a movement from individual to institutional corruption. Even with judicial bribery, there does not seem to have been an issue of certain individuals consistently receiving corrupt judgments.

Politics Part I, supra note 88, at 60-61. For trials against Ambassadors, see numbers 19 (Epicrates, Phormisios, and Onomasas), 20 (Epicrates, Andocides, Eubulides, and Cratinos), 26 (Timagoras), 29 (Philocrates), 30 (Aeschines), 31 (Aeschines) in *id.* at 59-60.

131. The term “influence markets” comes from Johnston’s typology of syndromes of corruption. *See* JOHNSTON, SYNDROMES OF CORRUPTION, *supra* note 3, at 38-43. Describing advanced western democracies almost exclusively, influence markets tend to have steady political competition and participation, as well as mature markets. *See id.* Corruption in influence markets involves access to, and competition over, advantages within established institutions; corrupt actors focus on influencing policy and work within the system to do so. *See id.* at 38-43, 60-88.

132. CONOVER, *supra* note 26, at 169-211. Distinctive in these accusations was the idea that a corrupt network, of which the accused bribe-taker was a member, was redistributing rewards—civic honors, policy decisions, etc.—to benefit the network as a whole. *Id.* The picture was not one in which a single corrupt agent redirected resources for his own private gain.

This result is both tentative and correlative: proving causation is impossible. Nevertheless, Part III will look at one way in which Athens' approach to anti-corruption reform *could* have fostered a long-term trend toward less disruptive patterns of corruption.

III. SOME ADVANTAGES TO ATHENIAN-STYLE REFORM

We have seen that deep democratization heavily informed Athens' anti-bribery reforms. In designing enforcement processes to combat judicial, executive, and legislative bribery, the Athenians focused on reifying democratic values rather than optimally policing her public officials. Although the total volume of bribery may not have decreased, Athens' approach nevertheless may well have paid off by shifting patterns of corruption to less disruptive forms over time.

Part III moves away from delineating historical causation, which would be impossible, to understanding the importance of institutional design choices. In particular, I focus here on one of Athens' most novel legal designs: the creation of a private right of action so that "anyone who wished" could bring a prosecution for bribery. Using methods of institutional analysis culled from contemporary legal scholars and political scientists, I will assess the strengths and weaknesses of this feature. It is impossible to know, to any helpful degree of certainty, how this unusual design choice actually affected political discourse and practices. Here, my goal is much more modest: to understand, simply, what effect this choice *could* have had. My approach will be necessarily speculative at points, but it is hoped that this speculation ultimately illuminates the value of treating Athens as a successful case study in democratization and development.

Athens' entire legal system was predicated on private rights of action. With no real police force and no dedicated public prosecutors or legal professionals, the enforcement of Athens' laws was left to private initiative.¹³³ The cornerstone

133. See CHRIST, *THE LITIGIOUS ATHENIAN*, *supra* note 16, at 118 ("[V]olunteer prosecution came to occupy a position of importance in democratic Athens that

of such a system of private initiative was *ho boulomenos*, “anyone who wished” to bring a public suit.¹³⁴ Certainly wealthy litigants were at an advantage here: they could hire expert speechwriters to craft particularly persuasive legal speeches, and they could more readily risk the substantial fine for failing to win one-fifth of the jury vote.¹³⁵ And, because of these potential penalties, Athens’ system of private initiative may very well have resulted in systematic *under-enforcement* of statutory offenses.¹³⁶

But within the context of democratic Athens, a private right of action for bribery suits could have offered three main advantages as well. First, it would have minimized the potential for corruption within the enforcement of Athens’ anti-bribery laws. It did so by minimizing the potential for conflicts of interest posed by local enforcement without losing the informational advantage gained by local enforcement. Second, although a private right of action may have resulted in sub-optimal enforcement of anti-bribery laws, it likely would have ensured that the most egregious types of bribery were prosecuted. Such a ‘political’ level of enforcement would have distorted perceived enforcement rates and communicated a norm of zero-tolerance for the most egregious forms of bribery. In the long-term, then, this level of enforcement could have caused the trend toward less disruptive forms of bribery. Finally, a private right of action actively fostered greater participation in the political process. This could have boosted the perceived legitimacy of the democracy even at the very moment when its legitimacy was most vulnerable. Insofar as bribery trials acted as a kind of coordinating norm within the democracy, greater

was without parallel in the rest of the Hellenic world.”); Lanni, *Social Norms*, *supra* note 63, at 723-26 (noting that volunteer prosecution, although central to Athenian justice system, led to sporadic enforcement of norms).

134. CHRIST, *THE LITIGIOUS ATHENIAN*, *supra* note 16, at 118. For an overview of the use of private initiative in Athenian litigation, see *id.* at 118-59 (discussing how public concerns limited the actual use of private prosecutors to primarily suits brought on behalf of the city).

135. See *id.* at 33-34.

136. On this point, see Lanni, *Social Norms*, *supra* note 63, at 723-24.

legitimacy could have created a virtuous circle of good governance.

A. *A Private Right of Action Minimized Conflicts of Interest in Enforcement*

Like corruption more generally, bribery poses particularly thorny problems for monitoring and enforcement because it often occurs in secret. Monitoring costs can be high as a result.¹³⁷ For this reason, numerous anti-corruption agendas focus on increasing transparency throughout a bureaucracy—in effect, reducing the costs of obtaining insider information.¹³⁸ But even once that information has been made public, enforcement arms may not necessarily act on it. As recent studies have shown, local prosecutors who work closely with the officials they regulate can suffer from regulatory “capture,” where sub-optimal enforcement arises from conflicts of interest.¹³⁹ What contemporary literature on anti-bribery enforcement suggests, therefore, is that any enforcement system needs to

137. ANECHARICO & JACOBS, *supra* note 24, at 75-119; KLITGAARD, *supra* note 19, at 82-87.

138. *E.g.*, KLITGAARD, *supra* note 19, at 82-83; ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 3, at 162-65.

139. See Norman Abrams, *The Distance Imperative: A Different Way of Thinking About Public Official Corruption Investigations/Prosecutions and the Federal Role*, 42 *LOY. U. CHI. L.J.* 207, 212-27 (2011) (surveying various problems that may arise when prosecutors are too close to the corrupted entity they prosecute); Sanford C. Gordon, *Assessing Partisan Bias in Federal Public Corruption Prosecutions*, 103 *AM. POL. SCI. REV.* 534, 549 (2009) (finding strong evidence of partisan bias in U.S. Attorney prosecutions for corruption); Andrew B. Whitford, *Bureaucratic Discretion, Agency Structure, and Democratic Responsiveness: The Case of the United States Attorneys*, 12 *J. PUB. ADMIN. RES. & THEORY*, 3, 21-22 (2002) (finding that a number of cases brought and concluded by U.S. Attorneys depends on the affluence and political leaning of their district). For this reason, one proposed solution has been to create independent anti-corruption agencies on the model of the successful Hong Kong Independent Commission Against Corruption (ICAC). KLITGAARD, *supra* note 19, at 107-21; ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 3, at 159-62. Lee details the success of the Hong Kong ICAC, Ambrose Lee, *The Public as Our Partner in the Fight Against Corruption*, in *MEASURING CORRUPTION*, *supra* note 110, at 221-32, but this may only shift the issue of capture to a new agency.

be able to leverage insider information without resulting in regulatory capture. Athens' private right of action seems to have done just that. Private rights of action in the Athenian context successfully navigated what Norman Abrams has termed the "distance imperative": the need to prevent conflicts of interest in bribery prosecutions.¹⁴⁰ These can arise whenever there is a close working relationship between prosecutor and police, prosecutor and judge, or prosecutor and official.¹⁴¹ Put differently, such conflicts of interest are most pronounced when a prosecutor is a repeat player with either monopoly power or unfettered discretion over prosecuting corrupt officials.

In ancient Athens, certainly some citizens could have distinguished themselves by becoming repeat prosecutors in high-profile public cases, but they did not have a monopoly over this opportunity. Nor did their frequent appearance before a jury court seem to have given them a sizeable advantage; although Athenian juries seem to have rewarded many defendants for the good works they had performed for the city,¹⁴² they also convicted well over half of those defendants on trial for bribery.¹⁴³ Moreover, as we will see in

140. Abrams, *supra* note 139, at 242.

141. *Id.* at 212-27.

142. On juries' rewarding good behavior, see MATTHEW R. CHRIST, *THE BAD CITIZEN IN CLASSICAL ATHENS* 172-81 (2006); STEVEN JOHNSTONE, *DISPUTES AND DEMOCRACY: THE CONSEQUENCES OF LITIGATION IN ANCIENT ATHENS* 100-06 (1999); OBER, *MASS AND ELITE*, *supra* note 38, at 226-30; Lanni, *Social Norms*, *supra* note 63, at 715-16.

143. Of the thirty bribery trials for which we know the outcome, twenty-one were convictions. ANTIPHON, *On the Choreutes*, in 1 *MINOR ATTIC ORATORS: ANTIPHON AND ANDOCIDES*, *supra* note 117, §§ 49-50 (unnamed private citizens) (Ant. 6.49-50); see numbers 6 (Callias), 9 (Sophocles, Pythodorus, and Eurymedon), 19 (Onomasas), 20 (Epicrates, Andocides, Eubulides, and Cratinos), 22 (Ergocles), 25 (Thrasybulus), 26 (Timagorus), 27 (Callistratus), 28 (Timotheus), 29 (Philocrates), 34 (Demosthenes and Demades) in the list of bribery trials in Taylor, *Bribery in Athenian Politics Part I*, *supra* note 88, at 58-61; numbers 6 (Agoratus), 45 (Phormio) and 46 (Laches—but sources should read Paches) in the list of bribery trials in KULESZA, *supra* note 115, at 85-90. Note that the figure of nine known acquittals is somewhat inflated, for six came from the Harpalus affair. See number 34 in the list of bribery trials in Taylor, *Bribery in Athenian Politics Part I*, *supra* note 88, at 61. Those particular acquittals may have resulted, simply, from a desire to hold accountable only the most prominent citizens involved.

the next Section, the great majority of known prosecutors in bribery trials were political enemies of the defendant: the social distance between prosecutor and defendant was thus maximized.

In addition to minimizing the potential for a conflict of interest in enforcement, the Athenian private right of action seems to have done a good job of leveraging sufficient insider information for a conviction. In fact, an Athenian prosecutor probably would have required minimal information to secure a conviction. This was due in large part to the way the Athenians viewed liability: public officials often were held fully responsible for the results of their actions, irrespective of any kind of willfulness or intent.¹⁴⁴ Many political trials thus hinged on considerations of policy or satisfaction with an official's performance—not on legal issues of intent or, in the case of bribery, proving *quid pro quo*.¹⁴⁵ What an Athenian prosecutor really needed by way of informational requirements was to have the public on his side.

In Athens, therefore, the insider information requirement turned into an issue of political will, and there is good reason to think that the most egregious types of bribery were consistently prosecuted as a result. Outside of mandatory *euthūnai*, there were essentially two ways that a bribery trial came about: an insider brought the corruption to light and led the prosecution;¹⁴⁶ or there was public

144. Hence, in many cases there is little evidence that an official actually broke a law. See JENNIFER TOLBERT ROBERTS, *ACCOUNTABILITY IN ATHENIAN GOVERNMENT* 107-13 (1982).

145. Roberts systematically goes through the sources on this point and concludes that most political convictions represented disagreements with policy or dissatisfaction with an official's inadequate performance. See *id.* at 11-160. At the same time, Lanni has shown how extra-statutory norms and extra-legal considerations could influence the outcome of a trial substantially. Lanni, *Social Norms*, *supra* note 63, at 707-10.

146. As occurred when Leon sued his fellow ambassador Timagoras, DEMOSTHENES, *On the False Embassy*, in 2 DEMOSTHENES: DE CORONA DE FALSA LEGATIONE, *supra* note 73, § 137 (Dem. 19.137), or when Demosthenes sued his fellow ambassador Aeschines, DEMOSTHENES, *On the False Embassy*, in 2 DEMOSTHENES: DE CORONA DE FALSA LEGATIONE, *supra* note 73, §§ 1-343 (Dem. 19), or when Demosthenes sued his fellow ambassador Aeschines, AESCHINES,

discussion over a bad outcome, possibly initiated by an insider, and someone else led the prosecution.¹⁴⁷ In either case, bringing a suit would have been only moderately expensive: court fees were only a moderate expense, especially for elite citizens, and the case itself lasted at most one day.¹⁴⁸ Given the possible penalty of bringing a frivolous bribery suit, however, it is likely nobody would have prosecuted unless he could be assured that a substantial portion of the people supported the suit. The more egregious the bad outcome that had resulted from the alleged bribery, the more likely that a would-be prosecutor would have sufficient public support to bring a bribery suit.

The next Section will examine some of the implications of this design. For now, it is sufficient to note that, at least within Athens' idiosyncratic legal system, a private right of action for bribery suits minimized the chance of a corrupt enforcement process, yet also succeeded in leveraging sufficient insider information to bring at least the most egregious types of bribery to light.¹⁴⁹

B. *A Private Right of Action Created a 'Political' Level of Enforcement*

Contemporary political scientists have highlighted that two problems inherent in private rights of action stem from

On the Embassy, in THE SPEECHES OF AESCHINES, *supra* note 35, §§ 1-184 (Aeschin. 2).

147. Cimon's bribery prosecution followed this pattern, PLUTARCH, *Cimon*, in 2 PLUTARCH'S LIVES: THEMISTOCLES AND CAMILLUS ARISTIDES AND CATO MAJOR CIMON AND LUCULLUS, *supra* note 72, at ch. 14, §§ 1-4 (Plut. *Cim.* 14.1-4), as did Lycides' stoning at the hands of the Council, HERODOTUS, *The Histories*, in 4 HERODOTUS, *supra* note 101, at bk. 9, chs. 3-5 (Hdt. 9.3-5), although the latter was not a formal judicial process. Thucydides reports that the general Nicias was afraid to return from Sicily lest one of his soldiers claim that he had taken bribes to withdraw from the island. 4 THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR, *supra* note 72, at bk. 7, ch. 48, § 4 (Thuc. 7.38.4).

148. See HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 33, at 187.

149. If this theoretical sketch is correct, then it might explain why convictions were so frequent at bribery trials. If trials predominantly consisted of cases where the public has already demonstrated sufficient outrage to risk bringing a suit in the first place, then the case selection will be skewed *ex ante* in favor of more convictions.

the way they affect overall enforcement rates. Private rights of action can generate bad legal outcomes: harmful precedent that arises when individuals prioritize short-term wins over long-term advancement of the law.¹⁵⁰ And they can result in over-deterrence, or at least sub-optimal enforcement rates.¹⁵¹ This latter problem results from the incentives that private litigants have to bring suit (e.g. punitive damages),¹⁵² as well as from the failure of private prosecutors to coordinate their actions with other enforcers, like agencies.¹⁵³ As will be clear, in Athens, only optimal enforcement would have been a problem for private rights of action in bribery suits. Even then, while the Athenians probably did not achieve optimal deterrence, they nevertheless may have achieved a ‘political’ level of enforcement that eliminated the most disruptive forms of bribery over the long term.

First, it is difficult to see how Athens’ private right of action for bribery suits could have caused poor long-term legal strategy. Just as there were no legal professionals in the modern sense of the phrase, legal judgments by a jury had no formally binding precedential effect.¹⁵⁴ Rather, litigants could choose to cite previous cases and even hypothesize about the reasons why those cases were decided

150. See Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 66-67 (2002); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Agencies*, 91 VA. L. REV. 93, 116 (2005).

151. See Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1332-36 (2008); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 581-86 (1997); Stephenson, *supra* note 150, at 115-16; Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 201 (2000) [hereinafter Thompson, *The Continuing Innovation*].

152. John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 231 (1991); Rose, *supra* note 151, at 1333; Stephenson, *supra* note 150, at 115-16.

153. David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. (forthcoming 2013) (providing a helpful reframing of this coordination problem); see also Rose, *supra* note 151, at 1326-30; Stephenson, *supra* note 150, at 117-18.

154. LANNI, *LAW AND JUSTICE*, *supra* note 61, at 118.

as they were, but such arguments were no more persuasive than any other type of legal or extra-legal argumentation.¹⁵⁵ There was little danger, therefore, that unfavorable facts in one bribery trial might establish a poor rule for another. The only long-term legal strategy that seemed to work was to advance sensible arguments that appealed to common stereotypes.¹⁵⁶ The actions of even a careless and myopic private prosecutor would have had an insignificant effect on the potential litigation strategy of another.

That Athens' private right of action resulted in sub-optimal enforcement, however, is far more likely, although the concern here would have trended toward *under-enforcement*, not *over-enforcement*.¹⁵⁷ The primary incentives an individual had for bringing a bribery suit were revenge and social capital: even non-elites increased their honor by emerging victorious over their opponents.¹⁵⁸ In a study of litigation patterns for all known non-political public suits that were brought by a private party, Robin Osborne has shown that political rivalry motivated the suit where the offense did not have a specific victim.¹⁵⁹ This held true even where there was a monetary reward for winning such a suit.¹⁶⁰

Although bribery trials did not offer a financial award, Osborne's insight seems to pertain to bribery trials as well.

155. *Id.* at 126.

156. See LANNI, *LAW AND JUSTICE*, *supra* note 61, at 59-64 (finding that these norms were relevant as a kind of character evidence); OBER, *MASS AND ELITE*, *supra* note 38, at 43-46 (discussing why stereotypical arguments were so frequent in Athenian litigation); Lanni, *Social Norms*, *supra* note 49, at 700-07 (discussing six categories of such norms).

157. By contrast, contemporary scholars are quick to note potential for *over-enforcement* with private rights of action. See, e.g., Rose, *supra* note 151, at 1333; Shavell, *supra* note 117, at 581-86; Stephenson, *supra* note 150, at 114-15.

158. CHRIST, *THE LITIGIOUS ATHENIAN*, *supra* note 16, at 34-36; Lanni, *Social Norms*, *supra* note 63, at 715; see DAVID COHEN, *LAW, VIOLENCE, AND COMMUNITY IN CLASSICAL ATHENS* 61-86 (1995) (noting that revenge and social capital played large role in Athenian litigation).

159. Robin Osborne, *Law in Action in Classical Athens*, 105 *J. HELLENIC STUD.* 40, 52 (1985). Where there was a specific victim, however, the prosecutor overwhelmingly was the victim himself. *Id.*

160. See *id.* at 44, 47.

Of the twenty-four securely attested bribery suits in which we know the identity of both parties, twenty-three were brought by a political rival.¹⁶¹ In other words, political rivalry, not the merits, drove bribery prosecutions. Even then, though, given the high rate of convictions in bribery trials and the substantial penalties for bringing a frivolous suit, political rivals seem to have brought suit only when conviction was clearly probable.¹⁶² This would have led to under-enforcement where either a bribe-taker had no political rival or where any rival would have thought that conviction was unlikely.

Of course, at least when it came to bribery by public officials, private citizens were not the only ones who could bring suit: public prosecutors (*synegoroi*), too, could bring suit at an official's mandatory *euthūnai*.¹⁶³ There was no meaningful coordination between these two groups, nor did public prosecutors have a chance to preclude a claim from going forward. In theory, then, even if private initiative on its own resulted in under-enforcement, the combination of

161. ANTIPHON, *On the Choreutes*, in 1 MINOR ATTIC ORATORS: ANTIPHON AND ANDOCIDES, *supra* note 117, §§ 49-50 (judicial rivals accused by Phanostratos) (Ant. 6.49-50); see numbers 5 (Cimon accused by Pericles), 8 (Laches accused by Cleon), 20 (Epicrates, Andocides, Eubulides, and Cratinos, all accused by Callistratus of Aphidna), 26 (Timagoras accused by Leon), 28 (Timotheus accused by Chares), 29 (Philocrates accused by Aeschines), 30 (Aeschines accused by Timarchus), 31 (Aeschines accused by Demosthenes), 33 (Euxenippos accused by Polyeuctos), and 34 (Demosthenes and nine others accused by political rivals) in the list of bribery trials in Taylor, *Bribery in Athenian Politics Part I*, *supra* note 88, at 58-61. The one exception is number 6 in the list of trials in KULESZA, *supra* note 115, at 85-86, where Agoratos had no discernible ties to his accuser Eudikos.

162. This argument hinges on a correlation between high rates of conviction and, on average, better cases on the merits. Had there been more frivolous suits, presumably those would have resulted in acquittal. Shermer points out that, with no monetary rewards, there is a smaller chance for frivolous suits; in fact, as he shows, historically citizens have not filed meaningless lawsuits in the environmental law context. See Steven D. Shermer, *The Efficiency of Private Participation in Regulating and Enforcing the Federal Pollution Control Laws: A Model for Citizen Involvement*, 14 J. ENVTL. L. & LITIG. 461, 487-88 (1999). My conclusion supports Adriaan Lanni's conjecture that the entire Athenian legal system under-enforced statutory crimes. See Lanni, *Social Norms*, *supra* note 63, at 724-25.

163. HANSEN, *THE ATHENIAN DEMOCRACY*, *supra* note 33, at 222.

private and public prosecutors could have resulted in over-enforcement.

The actual numbers for different types of bribery suits, however, do not support this claim. Although the ancient evidence is spotty, it is disproportionately weighted toward bribery suits brought either via *eisangelia* or *euthūnai*: there are attested only seven uses of the other procedures combined. Ostensibly, then, the majority of bribery suits were brought under one of these two procedures.¹⁶⁴ For there to have been over-enforcement, therefore, there would need to have been a high number of *euthūnai* brought by *synegoroi* (to be added to all other suits brought by private citizens). Yet *euthūnai* are sparsely attested in the ancient evidence. Compared to the thirty-two certain (plus twenty-two somewhat certain) attested bribery trials, there were only seventeen attested *euthūnai total* throughout the entire democracy¹⁶⁵ and only seven for bribery. If accusations at *euthūnai* had been more common, likely the Athenians would have expanded the number of days for private citizens to lodge accusations at *euthūnai*: after all, they apparently allotted only three days to audit 1200 officials!¹⁶⁶ Thus, even if all of the attested *euthūnai* for bribery stemmed from accusations by *synegoroi*, this would add little to our total level of enforcement.

Accordingly, there does not seem to have been over-enforcement caused by a lack of coordination between private and public prosecutors. I suggest that, instead, there was a 'political' level of enforcement. Although there was nothing like an independent agency at Athens that could have taken a synoptic view of the problem and

164. Even when we factor in the expectation that the historical record would preserve only the most controversial cases—i.e., ones high-profile enough to have been at an *eisangelia* or *euthūnai*—the severe imbalance in favor of these procedures is still striking.

165. On this point, compare HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 33, at 224 (noting there were only about fifteen *euthūnai* cases), with the additions of the *euthūnai* of the unnamed defendant in Lysias 21 and of Laches, which I take to be genuine, ARISTOPHANES, *Wasps*, in 2 ARISTOPHANES: CLOUDS, WASPS, PEACE *supra* note 123, at lines 240-2, 894-7, 960-1 (Aristoph. V. 240-2, 894-7, 960-1).

166. HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 33, at 223-24.

discerned the optimal level of enforcement, the intensely public nature of these suits could have given Athenians a general idea of how much bribery of what type had been prosecuted in any given period. At least 500 jurors, and possibly hundreds of bystanders, would have witnessed a bribery trial, and a conviction would have quickly become public gossip. Hence, catalogs of corrupt politicians were common in Athens: everybody knew who had been convicted of corruption and often for what reason.¹⁶⁷ Though any given Athenian may have had at best only a vague idea of “how much” bribery had been prosecuted, the crowd as a whole could have had a pretty good idea when it voiced its initial approval or denial for a new bribery trial.

Recall from the previous Section that likely the cases that would have made it to trial would have been the most egregious cases: ones in which a substantial portion of the people, when they heard about the events, would have suspected bribery. A continuous string of such intensely public cases, the great majority of which resulted in conviction, would have distorted any would-be corrupt official’s perception of the rate of enforcement. He likely would have suspected that the enforcement rate was much higher than it actually was. To the extent that his subsequent actions were then influenced by the perceived rate of enforcement, Athens’ pattern of bribery trials would successfully deter him from the most egregious forms of bribery. Over time, therefore, we could expect that this pattern of prosecution would yield gradually less and less disruptive (that is, less egregious or less controversial) patterns of corruption.

C. *A Private Right of Action Leveraged the Expressive Value of the Law*

The final advantage that Athens’ private right of action created is something rarely considered by contemporary

167. See e.g., PLATO, *Gorgias*, in 3 PLATO: LYSIS, SYMPOSIUM, GORGIAS § 515c (W.R.M. Lamb trans., Harvard Univ. Press reprt. ed. 1975) (Plat. *Gorg.* 515c). Such catalogs were not uncommon in speeches at bribery trials. E.g., DEMOSTHENES, *On the False Embassy*, in 2 DEMOSTHENES: DE CORONA DE FALSA LEGATIONE, *supra* note 73, § 137 (Dem. 19.137).

anti-corruption advocates and factors only obliquely into discussions of modern private rights of action.¹⁶⁸ Reform agendas frequently point to the vital need for public involvement in government reform.¹⁶⁹ And, it is true, reform agendas are never long-lived without public support or public monitoring. But the Athenians involved the people in a crucially overlooked way: the people themselves were litigating on behalf of their own community. This approach could have yielded substantial value in terms of reinforcing the legitimacy of the democracy.

Scholars have long recognized that citizen participation in decision-making and enforcement fosters greater governmental legitimacy.¹⁷⁰ Whether this stems from merely having a voice¹⁷¹ or from greater perceived treatment when included in a decision making process,¹⁷² greater

168. Thompson briefly considers how private rights of action in the contemporary environmental context might function as a kind of democratic participation, but scholars have not pursued this idea further. See Thompson, *The Continuing Innovation*, *supra* note 151, at 209.

169. See, e.g., ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT, *supra* note 3, at 165-67 (1999) (positing that the efficacy of reforms hinges on robust public support and discussion); Ambrose Lee, *The Public as Our Partner in the Fight Against Corruption*, in MEASURING CORRUPTION, *supra* note 110, at 221-32 (describing how public support was vital in transforming Hong Kong from a graft society into "one of the world's cleanest metropolitan cities"). See generally Michael Johnston, *Fighting Systemic Corruption: Social Foundations for Institutional Reform*, 10 EUR. J. DEV. RES. June 1998, at 85 (1998) (establishing that anti-corruption reforms need long-term social foundation).

170. See Morris & Klesner, *supra* note 4, at 1274-78; Shermer, *supra* note 162, at 478-79; see also Michael X. Delli Carpini et al., *Public Deliberation, Discursive Participation, and Citizen Engagement: A Review of the Empirical Literature*, 7 ANN. REV. POL. SCI. 315, 332-34, 336 (2004) (surveying experimental research on the effects of political deliberation and concluding that they support the theory that deliberative engagement enhances legitimacy).

171. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 147 (Princeton Univ. Press 2006) (1990) (concluding that permitting public participation in decision-making processes gives public authorities the flexibility to pursue sound long-term policies).

172. See Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215, 233 (2001).

participation can foster better governance.¹⁷³ These conclusions have usually come from studies of citizen involvement in *deliberative* processes, but they may well apply to ancient Athenian judicial involvement as well. The law's expressive effect in solving collective action problems is, after all, one familiar way in which legal judgments can foster greater cooperation and civic trust.¹⁷⁴ And Adriaan Lanni has recently extended this idea to the Athenian courts.¹⁷⁵

Yet, as we saw with the *eisangelia* process in particular, there were also features specific to bribery trials that aligned them with deliberative meetings by the Assembly. They involved substantial numbers of citizens listening to competing arguments over what often amounted to how a particular policy or outcome should be evaluated. Although bribery trials would have featured only two speakers—far fewer than the number at deliberative meetings of the Assembly—the signaling effect of a jury vote could have differed little from a straight policy vote. Indeed, to the extent that the judgment was intended to “send a message” to others, as prosecutors frequently enjoined,¹⁷⁶ it would have communicated the people's commitment to stopping the most egregious forms of corruption. In this respect, it

173. In this respect, Warren's idea that corruption in a democracy is a form of civic *exclusion* from collective decision-making helps explain why corruption breeds a climate of distrust that weakens political institutions. Mark E. Warren, *What Does Corruption Mean in Democracy?*, 48 AM. J. POL. SCI. 328, 333 (2004); see also Morris & Klesner, *supra* note 4, at 1274-78.

174. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 19-20 (1990); see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2029-32 (1996); see also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 993-1007 (1995).

175. See Lanni, *Social Norms*, *supra* note 63, at 720; Adriaan Lanni, *The Expressive Effect of the Athenian Prostitution Laws*, 29 CLASSICAL ANTIQUITY 45, 58-64 (2010).

176. *E.g.*, DEMOSTHENES, *On the False Embassy*, in 2 DEMOSTHENES: DE CORONA DE FALSA LEGATIONE, *supra* note 73, §§ 231-32, 339-40, 343 (Dem. 19.231-32, 339-40, 343); Dinarchus, *Against Demosthenes*, in 2 MINOR ATTIC ORATORS: LYCURGUS, DINARCHUS, DEMADES, HYPERIDES, *supra* note 59, § 11 (Din. 1.11).

would have functioned no differently than laws and decrees passed in the Assembly.¹⁷⁷

In Athens' legal system, with the Athenians' approach to conceptualizing bribery, private rights of action for bringing bribery suits thus may have been closely analogous to other forms of political participation, particularly deliberation in the Assembly. The long-term benefits to having a private right of action may have extended well beyond any short-term coordination or expression of public norms. From a procedural justice perspective, Athenian private rights of action may actually have fostered greater trust in the democracy as a whole.

CONCLUSION: THE VIEW FROM ATHENS

Certainly nobody would advocate a return to Athenian-style democracy—what with its restricted franchise, slavery, and bare guarantees of due process or substantive rights. But Athens' success in democratization and development may nevertheless prove a valuable case study for advocates of anti-corruption reforms. The democracy was a paradigm of institutional design, if only for the way its institutional structure constrained officials' actions and thereby reduced the likelihood of bribery. And the Athenians' novel approach to corruption—focusing on outcomes, not intent, and designing reforms to instill democratic values—may yet provide a clearer path to successful reforms.

But what emerges in perhaps the sharpest focus when we look back at Athens is the close attention paid to institutional design. Where contemporary reform agendas focus on monitoring, policing, and enforcement, the Athenians homed in on enforcement, judgment, and repairing the broken bonds of their society. They tapped into powerful institutional design with the result that their anti-bribery enforcement seems to have benefited the polity above and beyond mere deterrence. Although we cannot

177. See OBER, *DEMOCRACY AND KNOWLEDGE*, *supra* note 94, at 168-210, on the idea of Athenian legislation as a coordinating norm for aligning preferences within the community.

know what precise effect this institutional design had, Athenian-style anti-corruption reform—democratization through enforcement—may well be of value to our future.

APPENDIX I: CHRONOLOGY OF ATHENIAN ANTI-BRIBERY
MEASURES¹⁷⁸

594/3: Original law against public officials' receiving bribes. *Graphē dōrōn* heard by the Areopagus. Punishment: *atimia* (outlawry).

508/7-470's: Addition of clauses against taking bribes inserted into archons' oath, jurors' oath, curse pronounced at beginning of Assembly and Council meetings, and perhaps Council's oath. Punishment: destroying offender's house and home (archons were to set up gold statue).

440's-410's: *Ad hoc* creation of monetary penalty for bribery certain public officials. Originally a flat fine (10,000 drachmas).

Pre-411: bribery added to two clauses of the *nomos eisangeltikos*. Specifically dealt with bribery by generals and public speakers. Punishment: death, presumably.

440-409: Creation of *graphē dekasmou* for bribery of large political bodies (Assembly, Council, jury). Prosecution before the *thesmothetai*. Penalty: death.

420-404/3: Original law against bribery emended to include giving bribes and corrupting through promises; "harm to the community" added to the definition; prosecution before the *thesmothetai*. Expanded to include regular citizens.

404/3: *Euthūnai* become mandatory for all public officials; monetary penalty for bribery at *euthūnai* standardized to a tenfold fine.

420-380: Revision of jury selection procedure (jurors assigned to court on day of trial).

380-370: Revision of jury and magistrate selection procedures to include lottery machines (*klērōtēria*).

Pre-351: Creation of unnamed *graphē* for bribing witnesses and/or public prosecutors (*synēgoroi*).

178. This chronology comes from CONOVER, *supra* note 26, at 240-98.

mid-fourth century: Creation of *graphē dōroxenias* before a jury court for people who had bribed a jury in a citizenship trial. Punishment likely *atimia* (expulsion from community).

346/5: Extraordinary re-registration of entire citizenry in demes due to fears of corrupted votes on citizenship.

mid-340's: *Apophasis*, or investigation to the Areopagus Council, used to prosecute bribery. Penalty: variable, but often tenfold fine or death.