Anti-Bribery Legislation in Practice:
How Legal Inefficacy Strengthened the Athenian Democracy

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Classical Athens was a model of democratization and development. Over the course of the 5th and 4th centuries BCE, Athens enjoyed a democracy that grew increasingly participatory and truly saw 'rule of the people'. The democracy preserved political and legal equality, fostered cooperation and collective action, and promoted public accountability. During this time, on a wide variety of economic, social and cultural measures, Athens became the pre-eminent city-state (polis) in the classical period. Moreover, Athens enacted paradigmatic policies to combat bribery: short (one-year) terms in office, officials selected primarily through lottery, frequent monitoring of officials' behavior, collegial not monopolistic authority, effectively little discretion for magistrates, and oppressively high penalties for bribery (ten times the amount of the bribe or, more often, disfranchisement or death).

Despite these textbook anti-bribery reforms, by all accounts bribery appears to have been commonplace in Athens. How could this be? Why were Athens' reforms ineffective? And how could Athens succeed so much if it had so much corruption? This paper addresses both of these questions and attempts thereby to complicate our understanding of the relationship between bribery and democratization, bribery and development. As I argue, Athens' reforms were 'ineffective' because the Athenians frequently used the courts for overtly political purposes; to this extent, they did not have a principle of the 'rule of law', on which contemporary anti-bribery reforms are premised.

Ineffective legislation, however, proved a boon to the Athenian democracy. With commonplace bribery and frequent bribery trials, the Athenians created institutions that aimed not to minimize bribery, but to harness it for the good of the community. I detail three ways in which regular bribery trials and the practice of bribery could have strengthened the Athenian democracy: bribery trials could be used to rethink collectively what 'democracy' should look like; bribery could act as a touchstone for political innovation; and bribery could be used to forge new, more democratic political technologies.

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By many standards, the classical Athenian democracy was a model of democratization and development. From the late-sixth through late-fourth centuries BCE, political rule shifted from tyranny to democracy, with two brief oligarchic interludes at the end of the fifth century; particularly in the fourth century, when violent civil wars fostered political instability throughout Greece, direct democracy at Athens proved remarkably stable and enduring. The democracy itself was founded on the principles of political and legal equality, cooperation and collective action, public accountability, and the preservation of certain quasi-rights like personal security or the liberty to speak out in public. "Rule of the people" (*dēmo-kratia*) was a literal term at Athens, as all major public decisions were voted on by the *dēmos* (the people), probably a considerable majority of citizens held office at some point in their life, and all public officials were held directly accountable to either the *dēmos* or more normally to juries comprised of hundreds of citizens. During this time, Athens was by far the most successful Greek *polis* (city-state) according to a range of cultural and economic criteria, including international reputation, affluence, and military success. Although from a modern standpoint there were certainly drawbacks to the Athenian style of democracy—notably the exclusion of women, slaves, and resident aliens from the political franchise—its successes in democratization and development are unequivocal.[1]

Viewed through the lens of bribery and corruption, however, the Athenian success becomes particularly puzzling. Bribery, a form of corruption, has long been considered a hindrance to political and economic development, as it is thought to raise transaction costs while short-circuiting or distorting political process. In Klitgaard's (1988: 75) influential definition:

Corruption = Monopoly + Discretion − Accountability.

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[1] Viewing Athens as a case-study in democratization has been recently championed by Ober (2008); cf. Lanni (2006; forthcoming), Karayannis and Hatzis (2008). For detailed studies of the development—though not necessarily the 'democratization'—of the Athenian polity, see Ostwald (1986) and Sealey (1987); for an overview of the Athenian democracy in the fourth century, Ober (1989), Hansen (1991).

Anti-bribery reform advocates consequently focus on diffusing political power and reducing discretion while increasing accountability. In making government more efficient and fair, such reforms implicitly make government more responsive to the people's interests. It is perhaps no coincidence, then, that the bulk of reforms entail implementation of what are essentially the hallmarks of modern liberal democracies—public accountability, transparency, clear separation of public and private spheres, and the rule of law.[2]

By these standards, the Athenians enacted paradigmatic reforms for combating bribery. 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. The potential monopolization of resources, whether political, economic, or judicial, was thus slim. Likewise, executive boards were tasked with explicit charges by the *dēmos*; although they might have a certain amount of discretion in *how* they fulfilled their charge, the members of a board nevertheless tended to have effectively little discretionary power of their own. Finally, the Athenians heavily legislated bribery, creating no fewer than six legal processes for prosecuting the gift or receipt of bribes, whether generally or involving specific officials in specific contexts.[3] By modern standards, the penalties attached to these laws—a tenfold fine, disfranchisement, or death—would be considered extreme and, one might imagine, effective deterrents.[4]

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[2] Influential analyses of bribery and anti-bribery reforms can be found in Rose-Ackerman (1978, 1999), World Bank (1997), della Porta and Vannucci (1999), della Porta and Rose-Ackerman (2002), Johnston (2005).

[3] On these laws and procedures, see most recently MacDowell (1983), Hashiba (2006), and Conover (in progress, Chapter Five). These included four public procedures (*graphai*), each most likely pertaining to a distinct law against bribery: the *graphē dōrōn* for a general law against giving and taking gifts illicitly (Dem. 21.113); the *graphē dekasmou* for a law against bribing judicial bodies ([Dem.] 46.26); the *graphē dōroxenias*, presumably attached to a law against bribing a jury for acquittal in a citizenship trial (*AP* 59.3); and an unnamed *graphē* for indicting public prosecutors or witnesses (*synēgoroi*) who had taken gifts for a public or private suit ([Dem.] 46.26 with Rubinstein [2000: 52-3]). Moreover, there were two procedures for prosecuting public officials either while still in office or at the end of their term: respectively, public impeachment (*eisangelia*) according to a law which outlawed generals from taking gifts while on campaign and public speakers from speaking against the city's interests after taking gifts (Hyp. 4.7-8, 29); and prosecution of a public official during his regular audit (*euthyna*) at the end of his term (*AP* 54.2). Finally, from the 340's onward, the Assembly could enjoin the Areopagus Council to investigate and give a preliminary verdict on a bribery case (*apophasis*). In addition to these formal procedures, there was a range of public oaths and curses pronounced before political assemblies.

[4] Our sources give conflicting accounts of the penalties for bribery. Disfranchisement: explicit in the law cited at Dem. 24.113; cf. And. 1.74, Aeschin. 3.232. Tenfold fine: *AP* 54.2, Hyp. 5.24, Din. 1.60, 2.16-17. Death: Isoc. 8.50, Aeschin. 1.86-7 for the *graphē dekasmou*; Din. 1.60, Hyp. 5.24 (conjectured). Of these sources, Aeschin. 3.232 lists only disfranchisement as a penalty for the *graphē dōrōn*, while Din. 1.60 and Hyp. 5.24 both claim that

It is tempting to attribute Athens' success to her stringent crackdown on bribery: we might posit that precisely because the Athenians were so diligent about the prevention and prosecution of bribery, the democracy flourished. What makes Athens exceptional, however, is that these anti-bribery measures, though paradigmatic, were ineffective. Although Athenian conceptions of what did or did not constitute bribery changed over the course of the democracy, these laws apparently did nothing to change the common sentiment that officials could take gifts so long as their actions did not harm the *dēmos*. As a result, the number of public officials who took gifts was enormously high by Western standards. Accusations of bribery abound in Athenian comedy, court cases and historiography: I count 466 accusations in the classical period, or about one accusation per twelve pages of Greek in our non-fragmentary Athenian sources. This is actually remarkably high, as it amounts to, on average, one accusation per oration of Lysias, one account of bribery per year in Thucydides' *Histories* (excluding the Archaeology in Book I), and three accusations per Aristophanic comedy. Though not directly helpful for estimating the incidence of bribery, the frequency of these accusations nevertheless indicates that the Athenians believed bribery to be everywhere.[5]

Moreover, in terms of actual cases of bribery, even with large gaps in our evidence we have attested 32 different prosecutions of bribery with an additional 22 cases of varying degrees of certainty, and we can plausibly estimate that roughly 5-10% of major public officials would have been brought to trial on accusations of bribery.[6] As far as we can tell, the vast majority of

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the penalty was either death or a tenfold fine. We can clear up this confusion, however, by positing that these last two penalties applied only at a *euthyna* or *eisangelia* procedure, while disfranchisement was used in a *graphē dōrōn*. The penalty under an *apophasis* could vary according to the public decree calling for the investigation: in the case of the Harpalus Affair, for example, Demosthenes was fined 50 talents after being suspected of taking 20 talents in bribes (Plut. *Dem*. 26.2). It is unknown what the penalty was for conviction in a *graphē dōroxenias*, but outlawry was likely.

[5] Kulesza (1995: 39-40) rightly remarks that, given the tremendous gaps in our sources, the unusually high prevalence of bribery attested in our sources is most likely only the tip of the iceberg. My count is derived from the index of sources in Harvey (1985) as compared to pages of Greek in the Oxford Classical Text series of classical authors.

[6] For the catalog of bribery trials, see Kulesza (1995: 85-90) and, for a slightly modified list in English, Taylor (2001). All but a handful of these fall between the years 430 and 322 and are prosecutions of generals, public speakers (*rhētores*), or ambassadors (the latter two categories after 400). If we assume roughly 100 *rhētores* during the 90 years after the introduction of an *eisangelia* for bribe-taking by a *rhētor*, and, on average, roughly 20 unique ambassador positions per year over the same time period, this amounts to around 2000 possible bribery cases during this time, of which we have attested in one form or another 55 trials. Given the tremendous gaps in our evidence—with the high frequency of trials in the early fourth century (so Strauss [1985]), the general dearth of evidence for the 370's is particularly striking—let us assume that these trials represent half of the actual number of trials, or about 100 (5%) out of 2000 possible cases. By contrast, Hansen (1975; cf. 1999: 217) points out that, for the most

these cases resulted in conviction. Nor are these statistics biased towards the early democracy, prior to the enactment of the bulk of anti-bribery legislation in the last quarter of the fifth century; if anything, in the fourth century bribery in Athenian politics seems only to have *increased*.[7]

Two puzzles immediately present themselves. If Athenian reforms were, by all appearances, textbook examples of how to combat corruption, what made these laws and institutional changes ineffective? Were they inherently defective in some way—e.g. poorly worded or mere legislative gestures lacking any real bite? Were they difficult to enforce? Why was there no discernible change in political practice after their enactment? This is an important problem, as it directly calls into question the functionalist premise of most suggestions for policy reform: namely, that strong institutional design and tough legislation, provided they have strong political support, are largely sufficient for combating corruption. Athens had both—and the frequency of bribery accusations and trials, and the high penalties for bribery suggest that there was considerable support for these reforms—so it is worth investigating what might be missing from these policy recommendations.

Perhaps more intriguing is the simple observation that Athens actually flourished in the face of corruption. Neither was Athens captured by rent-seeking politicians nor is there evidence that Athens was *really* run by informal criminal networks. On the contrary, commonplace bribery seems to have co-existed with strong institutions; in both theory and practice, the power of the people was only augmented over time.[8] How could this be? How was it that apparently regular corruption did not weaken Athenian political institutions? Any answer to this question, too, will have crucial implications for how we measure the effects of bribery on a polity. To pre-

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important position, the generalship, we know of only 289, or 37%, of the 770 generalships held between 432 and 355. A more accurate assessment of the prevalence of bribery trials thus might be closer to 10% of the major political positions held.

[7] Cf. Isoc. 12.145 for an (admittedly biased account of the) increase in bribery in the fourth century; Kulesza (1995: 40-1).

[8] With the exception of two brief oligarchic interludes at the end of the fifth century, Athens remained a democracy—and, in the fourth century, a stable one—for nearly two centuries. Ancient historians typically contrast the fifth-century 'radical' democracy, in which the Assembly's ability to legislate was unchecked, with the more 'moderate' democracy of the fourth century, where all permanent laws ahd to undergo a complex legislation process (*nomothesia*) designed to prevent the creation or contradictory legislation. But this dichotomy is somewhat misleading, as in the 'moderate' democracy the Athenian *dēmos* exerted *greater* control over public officials and even any private citizen performing public works, citizens had more legal obligations to the community, and the democracy itself enjoyed greater participation.

empt one of my conclusions, perhaps the relevant question is not how Athens succeeded despite bribery, but how she flourished *because of* it.

        Here I will examine Athens' regulation of bribery to show how legal 'inefficacy' could have proven a considerable boon to the democracy. Indeed, bribery was less an alternative, detrimental means to formal political processes than an important, constitutive feature of politics at Athens. Above and beyond bringing justice to corrupt politicians, bribery trials played a crucial role in the development of Athenian political institutions. In many respects, the Athenians thought through their polity—and innovated accordingly—by thinking with the idea of bribery. After presenting in Part I a theoretical sketch of recent social scientific approaches to bribery, I will consider, in Part II, how Athenian law generally and the role of anti-bribery legislation in the Athenian democracy specifically challenge the assumptions of contemporary models of bribery and anti-bribery reforms. Finally, Part III will take up the question of Athenian uniqueness by way of summing up what bribery and democratization at Athens can teach us about corruption and development today.

Part I. Bribery: Modern Theory, Ancient Practice:

        By and large, modern approaches to anti-corruption reform focus on bureaucratic and legal changes to reduce rates of bribery and thereby curb the cancer of corruption. Ensuring the rule of the law, encouraging political participation and competition, reducing monopolies of bureaucratic power, preventing a bureaucratic professional 'culture' from arising, and providing strong, positive incentives for compliance—all hallmarks of anti-corruption reform agendas— point to the design of institutions and the proper structure of formal rules within those institutions as the key loci of reform.[9] And, indeed, institutional context plays a crucial role in

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[9] See recently Klitgaard (1988), Rose-Ackerman (1999), Doig (2000), della Porta and Rose-Ackerman (2002), Johnston (2005). Robinson (1998) has rightly called for more research as to the efficacy of these specific reforms; his approach prudently privileges analytical empirical research over definitions and models. His uncertainty stems in part from the recognized need to adapt anti-corruption reforms to a local context; in this light, ethnographic studies of corruption have been particularly illuminating: see Haller and Shore (2005) generally and, for specific examples, Ledaneva (1998) and Lane Scheppele (1999) on Russia in transition, Rosenthal (1964) on the Muslim world, and Gupta (1995) on India. As will be clear, my own approach, developed at length in Conover (in progress), is more inclined towards viewing patterns of corruption as constituted by social relations and cultural norms.

shaping behavior, as economic sociologists and institutional economists have long pointed out.[10] Yet these approaches run up against problems because they make the following two assumptions about the role and rule of law in society: bribery can be comprehensively defined; and, because law constitutes legitimate action, the law should be the ultimate arbiter of how bribery is defined. Precisely because Athenian law in action did not work according to these assumptions, I argue, the 'efficacy' of these anti-bribery reforms was diminished significantly; the pay-off, as we will see in the next section, is that these 'inefficacies' strengthened the democracy. dubiousness

First, the problem of definition. Anti-bribery campaigns are regularly predicated on the idea that bribery can be defined in clear, comprehensive (and often static) manner. This quest for definition is somewhat misguided, however, as there is *no* consensus—among scholars, among members of the same society, or across different societies—as to what does and does not constitute bribery. Bribery is understood as a kind of corrupt payment to obtain a benefit or to avoid a cost, but in that case 'corrupt' might be defined as something that contravenes formal (legal) norms, informal (public) norms, or more broadly the public interest.[11]   Moreover, conceptions of bribery change over time, and this makes all the thornier the task of defining what kinds of services can be paid for, by whom and in what context. Bribery defies definition, in part, because it is always measured against the workings of good government—and we do not need Plato and Aristotle to remind us that there has been no consensus definition of that, either.[12]

Athens was no different in this regard. The Athenian word for bribery was '*dōrodokia*', which meant approximately "the receipt of gifts in exchange for a bad outcome" (*dōra* +

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[10] Political economists assume a rational actor model in trying to explain how institutions can best constrain individuals' actions: e.g. Banfield (1975), Rose-Ackerman (1978), Klitgaard (1988), Goudie and Stasavage (1998). Yet this classical economic approach has come under recent fire from both the New Institutional Economics—which studies how agents manipulate institutions to serve their own interests—and the contextualist camp of the New Economic Sociology, which posits that the decisions of *homo economicus* are always shaped by social context. See especially Lambsdorff, Taube and Schramm (2005) for the former, the seminal work of Granovetter (1985), Warburton (2001) on corruption and, with particular relevance to the ancient economy, Polanyi (1944) for the latter.

For the purposes of this paper, I assume a classical economic actor in order to expose how cultural understandings of the law in action can nevertheless distort the expected outcomes of anti-bribery reforms. Elsewhere, I show how a relation approach to bribery—one which moves beyond both institutional economics and contextualist approaches to economic sociology—best explains how actors within a bribery scenario understand their own actions: see Conover (in progress, Chapter One) and, similarly, Lane Scheppele (1999).

[11] This threefold typology comes from Heidenheimer (1970); cf. Génaux (2004). For modifications of this typology, see Philp (1997), Johnston (2005).

[12] Cf. Philp (1997) and Génaux (2004). I develop this idea at length in Conover (in progress).

dekomai).[13] While tautological, this definition illuminates a particular point about the Athenian approach to bribery: gifts (*dōra*) were evaluated not by the context in which they were given— i.e. it was not unequivocally 'bad' to give gifts to politicians, say—but by their perceived result. Politicians could and did receive gifts in office, and this was permitted so long as it was thought that a good, not a bad, outcome resulted from the gift. Nowhere, including in the law, did the Athenians attempt to define bribery more precisely. Even when the original law against bribery was redrafted, in part to articulate a clearer definition of what constituted bribery, bribery was defined merely as giving, receiving or promising to give gifts "to the harm of the people" (Dem. 21.113). If the Athenians had a more exact understanding of what constituted bribery—which kinds of things were 'bad' gifts, under which specific circumstances a gift might be deemed 'bad', and the like—that definition is not in our record.

What I maintain, therefore, is that there may be no 'correct', comprehensive definition of bribery, whether generally or in Athens, specifically. Instead, if the Athenian case is any indication, we should be open to the possibility that 'bribery' is not a set of practices that can be marked off by clear, definable boundaries. On this view, 'bribery' is not the intrusion of the market into the public sphere of politics, as commonly envisaged, but is, in fact, a subset of politics—one of numerous ways in which social relations are leveraged, legitimately or illegitimately, to obtain political outcomes. People can differ in which sets of relations they consider legitimate or illegitimate, but these judgments hinge on ideas about how politics should function in an ideal world. Because these normative judgments about a just polity are neither unchanging nor uncontested, bribery will always elude strict definition.

To seek to derive or impose a comprehensive, static definition of bribery is thus a misguided pursuit, so it is doubly problematic to assume that the *law* should be the ultimate source of this definition. And here we encounter the second problem typical of anti-corruption reform agendas: focusing heavily on the apolitical rule of law obscures the intensely political work of defining which actions do and do not constitute bribery. One implicit goal of strengthening the rule of law and reducing the effects of bureaucratic 'culture' is to make law the central source of legitimacy within a polity. Where there are strong local norms or extra-legal norms—for example, standards of conduct particular to one department or one segment of

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[13] See Conover (in progress, Chapter One) and, for a detailed examination of the vocabulary of bribery, Harvey (1985: 82-9).

society—these often conflict with legal definitions of what conduct is permissible. As is commonly noted, this conflict of general and local norms creates the potential for more bribery, as actors are inclined to adopt the prevailing local norms, even if this entails illicit action ('bribery') as defined in law.[14] Strengthening the rule of law is thought to defuse these potential normative conflicts by making law the ultimate arbiter of which norms should prevail in the practice of politics: it purportedly reduces bribery by making it clearer which practices are and are not allowed.[15]

Yet there are two difficulties with understanding the effects of the rule of law in this way. On the one hand, if bribery defies definition, then it is unclear how any legal definition, no matter how extensive, could comprehensively cover all instances of bribery. Indeed, one possible outcome is that the 'grey' areas which had previously fostered bribery would simply be transposed from conflicts between legal and local norms to conflicts or ambiguities within the law itself. On this view, there is no reason to assume that the rule of law, in itself, would necessarily reduce the incidence of bribery.

On the other hand, the idea of 'grey' areas—conflicts between local and legal norms— raises the very issue of legitimacy. When scholars advocate the rule of law, they presume that a legal definition of bribery would or should be inherently legitimate. Yet this is certainly not always the case: the perennial debates over campaign finance in the United States or the use of gifts in commercial transactions in China only underscore, respectively, how what is legal is not always legitimate, nor what is legitimate always legal.[16] According to reform agendas, the solution is to drum up enough public support for legislative and institutional reform so that the law attains legitimacy.

We can put to one side whether or not construing the relationship between law and legitimacy in this way would be effective in cultures that have remarkably different understandings about what 'the law' is or should do. I would like to focus here on an underlying tension already present within the textbook approach: namely, how the rule of law, though intended to be apolitical, actually conceals the highly political process of allowing certain norms and practices while banning others. If what is most important is establishing and maintaining the

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[14] Schweitzer (2005) abstracts a theory of corruption as just such a conflict between universalistic and particularistic norms.

[15] Alt and Lassen (2003), Rose-Ackermann (1999: 14), Johnston (2005: 37-9). Cf. Warren (2006: 3)

[16] A point duly underscored by Pardo (2004: 5) and Corbin (2004).

legitimacy of public institutions, the rule of law is not the only way to achieve this aim; in other legal cultures, different approaches might be more effective.

Athens provides a good illustration of a different way the relationship between law and legitimacy can be construed and thereby demonstrates how a different relationship can actually foster less distance between law and legitimacy. The Athenians certainly believed in equality before the law: all citizens had equal access to the courts, and nobody was to be above the law. And the laws themselves were constantly hailed as one, if not the, central authority on communal norms. Yet it would be misleading to conclude that, for the Athenians, 'the law' was a predictable, autonomous system of rules that constituted legitimate action; in this sense, the Athenians did not adhere to what we might call 'the rule of law'.[17] Instead, Athens was a legally pluralistic society: although citizens used the courts to legitimate certain actions, as we will see shortly, law did not have a monopoly on legitimacy, nor did its authority always trump that of the people.[18] This was particularly true with bribery, as noted by the fourth century orator Hyperides (5.24): the laws forbad profiting from public office, but the people nevertheless allowed officials to take gifts provided that doing so did not harm the *dēmos*.[19]

Adriaan Lanni has rightly argued that there are good historical reasons for thinking that the courts at Athens were used to enforce informal norms generally rather than to uphold formal, legal statutes specifically.[20] Without a police force or public prosecutors, prosecution—like the enforcement of a penalty—was left largely to private initiative, whether by the victim in a private suit or by 'whoever was willing' in a public suit.[21] As a result, with no legal experts—no professional lawmakers, judges, or lawyers—the Athenians never imagined that the language of 'the law' was in any way autonomous from society.[22] The jury, usually composed of some 200

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[17] This is *contra* the view taken by Ostwald (1986) and Sealey (1987), on which see the succinct reply by Todd (1993: 299-300).

[18] The extent to which the Athenians developed a concept like 'the rule of law' has been hotly debated among ancient historians: see Ostwald (1986), Sealey (1987), Todd (1993: 299-300), Lanni (2006; forthcoming), Karayiannis and Hatzis (2008). Fourth-century evidence that 'laws' were sovereign: Aeschin. 1.4-5, 3.6, 3.169; Dem. 21. 223-5, 23.73, 22.46, 24.5, 24.75-6, 24.118, 25.20-1, 57.56; Lyc. 1.3-4; Din. 3.16; Hyp. 4.5. Cf. Hansen (1975: 48; 1990: 239-42), Ostwald (1986: 497), Ober (1989: 299-304). Yet the modern conception of sovereignty here is misplaced; certainly the laws were authoritative, but they were still only guides, not absolute authorities: Todd (1993: 59).

[19] Hyperides' distinction has rightly become the accepted view among ancient historians since Harvey (1985: 108-13).

[20] Lanni (2006, forthcoming). See also Johnstone (1999).

[21] Hunter (1994), Lanni (forthcoming: 2).

[22] Carey (1994), *contra* Johnstone (1999).

or 500 citizens who may or may not have been familiar with a given law, learned the 'relevant' law only if one of the litigants chose to have it read aloud. Even then, the content of laws was not granted any privileged authority within the courts, as statutes were treated just like any other source of communal norms, including poetry, public decrees, or general platitudes about good or bad behavior.[23] When jurors cast their votes, they did so immediately after the litigants' speeches, without consulting among themselves, and without any instruction from a legal expert, often without any instruction about the law.

When a defendant was brought to court, therefore, he was tried according to whatever legal and extra-legal norms his opponent thought relevant. Note how this means that his guilt or innocence in a court of law need not have hinged on whether he had violated the particular legal statute under which he had been prosecuted. Frequently, in fact, litigants made no mention of the 'relevant' law, and with one exception—bribery, to which we will return momentarily—there was little effort to establish that the defendant had committed an offense, as defined by the law in question. Whereas the 'rule of law' would consistently and predictably enforce legal norms, the Athenian preference for discretionary justice enforced formal and informal norms only irregularly. The up-shot was that irregular enforcement and a very high rate of litigiousness created strong incentives for complying with both legal and extra-legal norms: sooner or later an Athenian citizen would be in court, so it was in his interests to adhere to the community's norms throughout his life rather than risk that a violation would be brought up in court.[24]

Lanni's view helpfully illuminates how the relationship between law and legitimacy at Athens was not straightforward: even within the courts, there were multiple sources of legitimacy—legal norms as well as communal norms, evidenced by statutes, decrees, poetry, gossip, history, and sometimes even past trials—none necessarily more authoritative than any other. In this way, jurors and litigants, alike, relied on multiple sets of previously established norms by which to judge actions. These norms sometimes conflicted, however, and were not always clearly defined. One conspicuous feature of Athenian law was that it was primarily procedural, not substantive in nature: crimes were rarely defined in Athenian legislation, and early Athenian laws had the reputation for being arcane and substantively vague. The original law on bribery, for example, simply began, "If someone commits bribery…, let him be

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[23] For the significance of this, see Mirhady (1990), Lanni (2006, forthcoming).
[24] On the litigiousness of the Athenians parodied in Aristophanes' *Wasps*, Christ (1998) is foundational.

outlawed"; there were, likewise, four other laws against bribery that nowhere defined what 'bribery' was beyond giving or receiving gifts "to the harm of the people".[25]   Again, this is understandable in a context in which there were no legal experts, and there was no real concept of 'legal language'. Uncertainty over what, precisely, constituted bribery ("harm to the people") could have had the advantage of making citizens err on the side of safety; as a whole, then, the destabilizing effect of vague statutes could have reduced the incidence of bribery, as Lanni's view suggests.

This does not seem to have happened, however, and I suggest that Athenian legislation against bribery thus complicates Lanni's picture about the relationship between law and legitimacy in Athens. At least with bribery, the Athenians used the courts, I argue, not simply to leverage already legitimate norms, as Lanni proposes, but especially to define which competing norms regarding bribery should be legitimate. With bribery the Athenians shifted the problem of definition we encountered above: it was up to an individual to define the offense, not according to some strict legal definition, but according to broader community norms.[26] More often than not, litigants on both sides of a trial thereby defined bribery as a kind of harm to the people: prosecutors would claim that the outcomes tied to the receipt of gifts had been detrimental to the city, while defendants would claim that their actions had in fact benefited, not harmed, the community.[27]   In the case of bribery, therefore, litigants offered their own conception of what constituted "harm to the people," and a jury of hundreds of citizens—with potentially hundreds more looking on[28]—would cast their vote, effectively in favor of one definition over another. This was not a contest between two equally legitimate norms, but a contestation of which

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[25] See further MacDowell (1983: 74-6) and Conover (in progress, Chapter Five). Even when this law was revised, it still only mentioned giving or taking "to the harm of the *dēmos*" (Dem. 21.113). Likewise, the *eisangelia* against public speakers defines bribery as taking money and speaking against the interests of the Athenian *dēmos* (Hyp. 4.8); the *graphē dekasmou* simply calls the offense *dōrodokia*; and *apophasis* by the Areopagus was based on a public decree which need not define the offense more specifically than taking gifts "against the country" (*kata patridos*, e.g. Din. 1.13).

[26] I am particularly interested in bribery, but it should be noted that bribery was not the only offense for which this would have been true: *hybris* (~arrogance) and likely *asēbeia* (impiety) also were not strictly defined in law. It is again possible that the lack of a legal definition intentionally fostered contestation of the norm itself.

[27] Both Cimon (*ad* Plut. *Cim*. 14.3) and the unnamed magistrate in Lysias 21 defend themselves on the grounds that they had benefited the *polis*. The juxtaposition of harm and benefit is particularly pronounced in Aeschines' and Demosthenes' mutual accusations of bribery. Demosthenes, for example, proclaims how his opponent's harmful actions were due to bribery, while his own actions were both beneficial and unrelated to bribery: cf. Dem. 19.15-16, 18, 33, 45-6, 150-2 with 155 and 157, 205-8, 211-12, 223, 229-30.

[28] Lanni (1998) on the bystanders at Athenian trials. Likewise, audience members, whether bystanders or jury members, might create a roar (*thorybos*) of approval or disapproval: Bers (1985).

definition of a norm should become legitimate. Here, in the case of anti-bribery legislation, the Athenians appear to have actively used the courts as a *locus* for creating and contesting the legitimacy of certain public norms. It should be noted that, if what constituted bribery was contested by individuals and was decided ultimately by the people, not by the law *per se*, any legal definition of bribery need not have acted as a deterrent.

To be sure, this is a new interpretation of how Athenian anti-bribery legislation functioned in practice, so I will defend it here with reference to the peculiar legal history concerning Athenian bribery, a history that entailed both a legal redefinition of bribery and frequent changes in which judicial body would hear bribery cases. Around the end of the fifth century, the original law against bribery was changed from "If someone is bribed…" to "If someone gives or receives…to the harm of the people…"; similar wording can be found in other anti-bribery legislation that was created around the same time.[29] Such a modification to the general law seems to have incorporated a generally accepted, albeit still quite vague, definition of bribery. Prior to this re-definition, Athenians frequently defined bribery in roughly similar terms as a general 'bad' to the community[30]; remarkably, after this legal redefinition, in the fourth century bribery was defined by litigants not as a general 'bad' but specifically as a 'harm'.[31] This is the *only* example in all of Athenian law in which there is a strong correlation between how litigants and the law defined an offense.[32] The redrafting of the original law against bribery thus had the crucial effect of focusing litigants' attention on what, precisely, constituted 'harm against the people'; the norm itself was under trial.

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[29] *Graphai*: original law against bribery (Dem. 21.113); the *graphē dekasmou* also makes explicit reference to the original law against bribery (cf. *epi dōrodokiai*, [Dem.] 46.26). *Eisangelia*: The law governing *eisangeliai* says that *rhētores* could be prosecuted for "taking gifts and speaking against the interests of the Athenian *dēmos*" (μὴ λέγῃ τὰ ἄριστα τῷ δήμῳ τῷ Ἀθηναίων χρήματα λαμβάνων, Hyp. 4.8). *Apophasis*: When the Areopagus conducted an *apophasis* in the Harpalus Affair, its charge was probably to determine whether or not the indicted officials had taken gifts "against the country" (*kata patridos*), as this phrase recurs throughout the speeches of prosecutors: e.g. Din. 1.13, 1.26, 1.60, 1.64, 1.67, 2.6, 3.18, 3.22; cf. 1.3, 1.99, 2.26; Hyp. 5.21, 5.38. See Conover (in progress, Chapter Four).

[30] So, in Sophocles' *Antigone* money is said to re-teach the minds of good men so that they take to 'shameful' deeds (*aischra*, 299); in this respect, it is a 'bad' institution (*kakon*, 296). Similarly, the Rhodian poet Timocrates twice lambastes Themistocles for being 'unjust' in having taken bribes to break his promise to restore the poet: Plut. *Them*. 21.1-3. When Callias was (perhaps?) condemned for bribery at a *euthyna* after serving as an ambassador, he was purportedly condemned for being hateful and 'not useful' to the *polis* (*alysiteles*, Dem. 19.275).

[31] This argument is partial, at best, for we simply do not have enough forensic evidence prior to the adoption of the law, and afterwards we have primarily only forensic evidence.

[32] *Contra* Carey (1994), who maintains that there was never any such marked legal language at Athens; cf. Johnstone (1999).

It is certainly possible that this was an unintended, even unforeseeable, effect of the new anti-bribery legislation towards the end of the fifth century—we have no contemporary evidence either way about the discussions that went into anti-bribery legislation, so certainty is impossible. Yet the legislative motivation I am positing here accords well with another curious feature of Athenian anti-bribery legislation: the wide range of institutional settings in which bribery trials could be held. For any given offense in Athenian law there were often multiple legal procedures, each with its own distinct incentives and legal penalties (for both prosecutor and defendant)—presumably to give prosecutors the greatest flexibility in choosing whether or not to prosecute. Most of these options, however, did not change the *venue* of the trial. Whereas most offenses had at most two different venues for prosecution, at one point or another bribery trials were heard by at least four different institutional bodies: a public jury, the Assembly, the Areopagus Council, and the Assembly with preliminary investigation and verdict by the Areopagus.[33] For three of these four venues the relevant law specified that bribery entailed 'harm' to the people.[34]

The wide range of venues for bribery trials suggests more than mere 'flexibility'; indeed, it seems that the Athenians were keen to match bribery to the 'right' judicial venue. So, in the archaic period prior to the democracy, when bribery was viewed as a kind of moral pollution to the community, a public suit for taking bribes (*graphē dōrōn*) was created, and all such suits were tried before the Areopagus Council, the most hallowed body in Athens. The Areopagus was the main court for cases incurring the greatest religious pollution—murder, intentional wounding, cutting down Athens' sacred olive trees, and serious political crimes in the first part of the democracy—so it was uniquely qualified to assess the pollution caused by bribery.[35] By

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[33] Public trials (*graphai*) presided over by the *thesmothetai* were held for those prosecuted for the general offense of bribery (*graphē dōrōn*), bribing a judicial body (*graphē dekasmou*), or taking bribes while a public prosecutor or witness (*synēgoros*), and probably bribing the jury in a citizenship trial (*graphē dōroxenias*). Trials for outgoing magistrates (*euthynai*) accused of bribery were presided over by the financial examiners (*logistai*), while impeachment of public officials still in office (*eisangelia*) and public speakers (*rhētores*) came before the Assembly. Finally, in the early part of the democracy, the trials of magistrates were heard by the Areopagus court (*euthyna* or *eisangelia*). From the 340's on, a new procedure in which the Areopagus performed an investigation (*apophasis*) and gave their verdict prior to a trial before the Assembly was created for bribery trials. For a more in-depth overview, see MacDowell (1983) and especially Conover (in progress, Chapter Five).

[34] Even then, the only exception to this rule is the prosecution of magistrates before the Areopagus, but these grew out of the archaic period prior to the re-drafting of the original law against bribery.

[35] Areopagus as protector of laws (*nomophylakia*): Cawkwell (1988). This role of protector can be understood, in part, as an outgrowth of its role in policing religious pollution. After all, the Areopagus was renowned as a hallowed body: Dem. 59.80, *IG* ii² 204.16-33 (decree granting Areopagus authority over certain religious sanctuaries, 352/1). Note how the penalty for most of these crimes was exile, a purging of the offender from the community: so Allen (2000: 210-11).

the start of the democracy, however, the people as a whole began to regulate what did and did not constitute bribery, first through a series of public curses and oaths and then through formal trials, as around 462/1 the jurisdiction over bribery trials was transferred from the Areopagus to jury courts and the Assembly. As the next section will detail, part of the motivation behind this shift was that the Areopagus' judgments in bribery trials were no longer deemed legitimate by the people; shifting jurisdictions thus allowed those who 'should' be the authoritative judge of what constituted bribery—the people—to judge bribery trials. Subsequent laws against bribery, ones which included the new legal definition, similarly called for trials before the courts or, in the case of impeachment (*eisangelia*), the Assembly. Finally, towards the end of the democracy in the 340's, as certain decisions made in the Assembly or the courts were viewed with suspicion, the Areopagus' reputation as the ancient 'guardian of the laws' made it an ideal authority for passing preliminary verdicts (*apophasis*) in bribery trials before the Assembly.[36]

What I am proposing, therefore, is that part of the motivation behind Athenian anti-bribery legislation was to use various judicial bodies to legitimate competing visions of what 'bribery' was—and, hence, what 'good governance' was. The law itself provided at best a heuristic for thinking about bribery. If anything, its vague wording would have encouraged more, not fewer, prosecutions for bribery, as litigants would look to the law and see that the prevailing norm was, merely, a general 'harm' to the people. As a result, bribery trials became a popular means of contesting the legitimacy of political outcomes: practically any bad political outcome could be considered a 'harm' and was, accordingly, blamed on bribery.[37] With each bribery trial, the appropriate authoritative body would signal whether or not an outcome should be deemed a 'harm', or a benefit, to the community.

By construing a different relationship between law and legitimacy, the Athenians could perform crucial political work that would have been too time-consuming for the Assembly to do in each and every case. Indeed, it is political work that nowadays is performed not by judges or jurors, but by legislators in crafting the law. Whereas the rule of law presupposes that law

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[36] Ultimately, these notions were part of a larger political debate about what the 'ancestral constitution' (*patrios politeia*) was. A return to the ancestral constitution, including restoring to the Areopagus some of the powers Ephialtes had stripped from it, was viewed as a way to make Athens more democratic: see Ruschenbusch (1958), Witte (1995).

[37] A point nicely brought out by Harvey (1985: 112-13). Hyperides (4.3) makes a similar claim about how in his day the impeachment law (*nomos eisangeltikos*) was being abused to enable prosecutions for trivial offenses, like hiring out flute-girls at a price higher than that fixed by law, that had nothing to do with the impeachment law itself.

defines the contours of a sphere of legitimate action—what is legal *should* be legitimate—law in Athens was used in the case of bribery as an arena for contesting the boundaries of that sphere. The Athenian approach incorporated informal discussion of political values into formal judicial process and thereby avoided a crucial vulnerability in the rule of law: its inability to adapt quickly to changing notions of legitimacy.[38] Under the rule of law, precisely because law-making is ideally distinct from adjudication, there can be considerable distance between what is legal and what society considers legitimate. By contrast, in Athens this distance between legitimacy and law in action was effectively minimized, as with each subsequent bribery trial a potentially new, emerging conception of what did or did not constitute a 'harm' to the community—hence bribery—could be forwarded and, if it accorded with popular notions of what was good for the city, legitimated.[39]

Already we can begin to see how in Athens, thinking of bribery *as* politics, albeit a 'bad' political outcome or process, went hand-in-hand with creating a formal space within the courts to discuss and legitimate which outcomes were 'good', which were 'bad'. In both cases the Athenians' attitudes towards bribery and the law differed markedly from those of contemporary scholars advocating the rule of law. Moreover, to a degree these differences can account for why bribery was so prevalent in Athens even despite the purportedly ideal design of Athenian political institutions and regulations. Because bribery was nowhere rigorously defined, officials confident that they were acting to the benefit of the community might willingly engage in normatively 'grey' actions—that is, they might achieve outcomes even though they knew these outcomes might be regarded as normatively ambiguous. Given that what 'the law' said was neither a direct nor a necessarily dominant guide to behavior, the 'efficacy' of Athenian anti-bribery legislation would have been attenuated. Even with the specific legal definition of bribery as a kind of 'harm', we should keep in mind the possibility that this redefinition may have been

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[38] So, Warren (2004: 330-1) critiques modern conceptions of bribery on the grounds that they are essentially normatively static: comparative studies simply posit some set of 'background norms' against which the workings of law, politics, and the market should operate. In reality, however, this background is dynamically contested and in constant flux. What is important for our purposes here is that, likewise, what was considered 'socially legitimate' at Athens was not normatively static, but was in fact constituted through the political practices of Athenian citizens.

[39] It should be noted that this is not a blanket criticism about the potential efficacy of the rule of law; rather, it is an observation that one reason law and legitimacy can diverge so significantly is precisely because there is little formal recourse within the law to allow it to evolve lock-step with shifting public norms.

added not just as a deterrent to bribery, but in particular as a public guide to how the Athenians should conceptualize bribery.

Part II. Bribery in Athenian Politics

We have seen why textbook anti-bribery reforms at Athens may not have been as effective as might be expected. In this section, then, we will trace why the persistence of bribery in Athens did not fatally weaken the developing democracy—how, that is, the Athenian democracy flourished, against modern expectations, amid relatively common corruption.   One answer lies, I think, in the formal political space we have been uncovering, a space opened up within and by the law. Because of this space, political values could be consistently wed to law enforcement even as new ways of practicing politics developed and as popular ideas about the legitimate or ideal practice of politics were in constant flux, like they tend to be in developing polities.

This section will examine three different ways in which the Athenians capitalized on the relatively high frequency of bribery in order to strengthen their polity. In the next section we will consider how these three points might help reframe contemporary approaches to anti-bribery reform. Throughout, it will be important to remember that one crucial measure of the political and economic costs of bribery is precisely how the 'problem' itself is publicly discussed and regulated. In an apolitical rule of law environment, regulation of and deliberation about the practice of politics are typically kept separate. This strategy, however, could have proven fatal for Athens. As Josiah Ober (2008) has recently illuminated, one of the biggest problems that Athens faced as a polity was the need to adapt in a fast-paced political world marked by high-stakes competition: separating deliberation and regulation could have taken simply too much time for Athens to adapt efficiently. Accordingly, Ober examines how Athens' deliberative institutions (Assembly, Council, executive boards) fostered efficient collective action and political innovation. As a complement to Ober's approach, I offer here how the courts could have played a crucial role in this process by providing frequent feedback about the efficacy of political reforms.

Assuming a handful of high profile bribery trials per year—that is, a consistent handful of instances in which a broad cross-section of the people could legitimate which political outcomes

were beneficial, which were harmful to the city—bribery trials could have provided a novel supplement to the deliberative institutions of the democracy. This supplement would only gain in effectiveness if we reasonably push the number of such trials closer to ten per year, on average.[40] To discuss bribery at a trial was to discuss democracy, as we will see, and in this way accusations of bribery became *the* prime vehicle for signaling disapproval of public policies or political outcomes. Simply by considering the results of frequent bribery trials—some of which were publicized, others of which doubtless circulated around through informal channels—an Athenian could quickly gather a rough approximation of which emergent political practices were gaining legitimacy, which were consistently considered illegitimate. Considerations like these are often overlooked when bribery is treated as a cancer—an undesirable practice that is inherently foreign to the aims of politics and one that must be contained—yet readily appear as vital concerns if we think of bribery as a subset of politics. Thus, as we will see, the Athenians may not have been effective in containing the 'cancer' of bribery, but they were unusually effective at leveraging bribery accusations (and the practice of bribery) for the greater good.

In our first two examples, the Athenians used bribery as a reference point for how to create legitimate, sound political institutions.   On the one hand, as evinced by an examination of how the Athenians first instituted public accountability, the idea of 'contesting the norm', raised above in consideration of how bribery was prosecuted in Athenian courts, spilled over into other Athenian deliberative institutions.   'Bribery' functioned like a paradigmatic anti-type, a metaphor used for thinking through which kinds of political processes were 'democratic', which were 'undemocratic'.   By making an accusation of bribery at a bribery trial, an Athenian implicitly offered a contrasting view of what constituted the legitimate practice of democratic politics, and this view both reflected and shaped political discourse within deliberative institutions.   'Undemocratic' political practices, by contrast, were labeled as bribery and were thus delegitimized by court decisions and, subsequently, public action.

On the other hand, bribery could be held up as the paradigmatic political problem; the way that bribery was regulated could be used as a practical touchstone for developing other

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[40] The importance here is public discussion of bribery and the 'proper' workings of the democracy. Accordingly, this count probably underestimates the actual number of bribery trials, as it assumes only 5% (and not the potentially more likely figure of 10%) of major public officials were prosecuted for bribery, and takes into consideration neither the prosecution of lesser officials nor the frequency with which bribery accusations appeared in other non-bribery trials.

regulatory practices. This is exactly what we find in the gradual development of the *euthyna* process for all outgoing public officials. In this case, the persistence of bribery forced the Athenians to rapidly formalize what had been *ad hoc* processes for holding officials accountable; the up-shot was that this newly formalized system could readily be expanded to hold *all* officials accountable, not just those suspected of bribery.

In the third case we trace the rise and regulation of public speakers (*rhētores*) at Athens. These speakers were neither full-fledged public officials nor mere private citizens but represented an indispensable intermediary in public deliberation and policymaking. As we will see, bribery had a lot to do with just how they came to play this quasi-formal role in Athenian politics. By this point, the use of bribery trials to legitimate or delegitimize certain aspects of the *rhētores'* roles will be familiar; what this third example will add, however, is that the new roles taken on by *rhētores*, whether ultimately deemed legitimate or not, were often forged through bribery. In this sense, the *rhētores* were political entrepreneurs whom regular citizens leveraged, often through bribery, to achieve political outcomes; these outcomes, and the political technologies that achieved them, were subsequently accepted or rejected by an Athenian jury at a bribery trial. At each step in the formalization of the *rhētores'* role within the Athenian polity, bribery helped foster political innovation and improvement.

What is of chief importance in these examples is that the Athenians never treated bribery as a unique, discrete problem, a local cancer, if you will, pertaining only under specific conditions. Instead, debates over what to do about bribery were necessarily debates over to what to do about democracy and how to create a more just polity overall. Significantly, too, in viewing public speakers as political entrepreneurs—as opposed to, say, rent-seekers—we can begin to see how these very same considerations about what was and was not a just polity factored into how individual citizens went about conducting politics. The lessons learned about (and from thinking about) bribery were thus applied to all sorts of political practices, and it was this kind of political innovation that I think helps account for the Athenians' unexpected success.

II.1: Bribery trials could be used to re-think what 'democracy' should look like:

One of the hallmarks of the Athenian democracy, public accountability, arose in response to purported bribery. As our sources describe it, the trial of the military general Cimon in 463/2 appears to have been just another prosecution of a top Athenian official on the charge of bribery.

Cimon had been charged to oppose the Persians in the Chersonese: all told, he drove out the Persians, conquered their allies the Thracians, subdued the entire region of the Chersonese, and then defeated the Thasians when they revolted (Plut. *Cim*. 14.2). However, he did not continue further and take Macedon, which his accusers claimed he could have done. It was assumed that he had been bribed by the Macedonian king to turn around, and he was accordingly prosecuted for bribery (Plut. *Cim*. 14.3). As usual, the bribery trial was a way to hold someone (Cimon) accountable for an unacceptable political outcome (failing to perform his complete charge).

So far so good, but what is crucial for our purposes is what happened *after* Cimon's trial. Cimon was acquitted, and corruption was immediately suspected. One Ephialtes subsequently prosecuted members of the court where Cimon had been tried for "doing injustice to the people" (τῶν τὸν δῆμον ἀδικούντων, Plut. *Per*. 10.7, cf. *AP* 25.2-4).[41] We do not know the substance of this charge, but it is more than likely that a form of illicit influence—bribery is a main suspect here—was assumed. After all, in an alternate tradition one of the public prosecutors, a young Pericles, was publicly rumored to have gone soft in his prosecution of Cimon after Cimon's sister had unsuccessfully tried to seduce him.[42] The unacceptable acquittal of Cimon was thus attributed to corruption generally, and probably bribery specifically.[43] When Cimon left the city again on campaign, Ephialtes quickly moved to change the procedures for accountability so that public officials would be held accountable to the people: the fear of bribery enabled true democratic accountability at Athens.[44]

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[41] Ephialtes' "public reputation for being *adōrodokētos* and just with respect to the constitution" is telling (δοκῶν καὶ ἀδωροδόκητος εἶναι καὶ δίκαιος πρὸς τὴν πολιτείαν, *AP* 25.1).

[42] Plut. *Cim*. 14.4, *Per*. 10.5. The story sounds apocryphal, but it reveals the need to explain Pericles' unexpectedly soft behavior towards Cimon at his trial. Both the supposition of bribery and the story of Elpinice explain a bad outcome with reference to a close relationship and potential personal gain. Cf. Carawan (1987: 204, 205-6n.58), Rubinstein (2000: 208). Connor (1971: 58-64) provides background on Pericles and Cimon's friendship. According to sources unnamed by Plutarch (*Per*. 10.4), earlier Cimon and Pericles had entered into a secret pact whereby Cimon could be recalled to the city only if he agreed to handle external affairs while Pericles would be given control of the city. That this rumor even existed is a good indication that at least some Athenians were concerned about the pair's relationship.

[43] Based on Plutarch's wording of 'doing injustice (*adikountōn*) to the people', the only other plausible legal process used was a public denunciation for 'maladministration' (*graphē adikou*): cf. *AP* 54.2. This obscure process later came under the purview of the Council (*AP* 54.2) and is otherwise first attested in the 430's when Pericles was prosecuted whether for bribery, embezzlement, or *adikion* (Plu. *Per*. 32.2). It is unclear, however, what kind of financial crime beyond bribery could have been committed by the Areopagites here.

[44] Note how Aristotle suggests the same institutional change as a remedy for corruption among the Spartan *gerontes*: Aristot. *Pol*. 2.1271a3-6. After Ephialtes' reforms, the Areopagus no longer had the right to initiate and conduct the *euthynai* of magistrates. Instead, each year ten members of the Council of 500 were designated as *euthynoi* in charge of lodging indictments as needed against public officials at the end of their term. Cases of treason could still

The backdrop for Cimon's trial and the prosecutions it enjoined was one of class conflict, according to our sources. The Areopagus Council and its predominantly elite membership had increasingly been viewed as a source of elite conservatism; even if the political body was not an instrument of class warfare, the rhetoric of pro- vs. anti-democratic views was likely employed heavily.[45] In other words, public debate at this time likely would have boiled down to what 'democratic' results would look like: the pro-democratic leader Themistocles had recently been convicted by the Areopagus while away from Athens, and this certainly could have been viewed as an 'undemocratic' outcome (Thuc. 1.138, Plut. *Them.* 22.1, *AP* 25.3). The Areopagus' place within the democracy could have consequently been deemed corrupt and undemocratic. A bribery trial like that of Cimon—himself aligned with the more elite interests in the city—or those of the Areopagites would have lent itself well towards legitimizing the people's view that the Areopagus simply was not producing 'democratic' outcomes. As it turns out, the very process by which public officials would be held accountable seemed, itself, to be on trial.

Concerns about judicial corruption seem to have surrounded Cimon's trial from the outset. Cimon was not prosecuted according to the regular process of accountability (*euthyna*), in which the Areopagus or any willing citizen indicted a public official before the Areopagus. Instead, Cimon's trial was hand-tailored to the occasion: essentially, a modified *probolē* process, in which the Assembly gave a preliminary hearing and non-binding verdict before the final hearing before the Areopagus. As in a *probolē* process, the trial was initiated by the people as a whole, rather than by the Areopagus or by some willing citizen; moreover, unlike the *probolē* process, Cimon's trial featured public prosecutors directly appointed by the people.[46] Although some of these procedural details might simply have been conflated in later accounts of the trial, it is possible that the people strategically employed a *probolē*-like process to ensure that Cimon

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be heard by the Assembly, but Ephialtes surely transferred jurisdiction over *euthynai* and all other cases of maladministration from the Areopagus to the Council of 500 and the newly created popular courts.

[45] Cf. Wilamowitz (1893: 2.94). So, Plutarch records intonations of class conflict: Ephialtes was "terrifying to the oligarchs [i.e. the elites] and inexorable in his pursuit of *euthynai* and prosecutions of those who had done the *dēmos* injustice" (τῶν τὸν δῆμον ἀδικούντων, Plut. *Per.* 10.7, cf. *AP* 25.4); similar language is found in Aesch. *Eum.* 690-2.

[46] *Probolē* was normally employed for prosecuting someone who had deceived the *dēmos*. For Cimon's trial, Carawan (1987: 202-5) assumes a straightforward *probole* was employed, yet the additional use of public prosecutors should not be understated. In this respect, it would be unsurprising to find that *AP* calls the process a *euthyna* (τὰς εὐθύνας, *AP* 27.1), while Plutarch refers to it as a *probolē* (*Per.* 10.6). On *probolē* generally, see Carawan (1987: 179-81), MacDowell (1990: 13-17); for Cimon's trial, Ostwald (1986: 40-2). Initiated by the *dēmos*: Plut. *Per.* 10.5, *Cim.* 14.5. Pericles and nine other citizens were appointed to prosecute Cimon: Plut. *Per.* 10.6. Preliminary hearing in the Assembly: Plut. *Per.* 10.5, *Cim.* 14.3.

would actually go to trial and, we might surmise, be convicted. After all, Cimon normally should have been prosecuted by the Areopagus, whether on its own accord or after having assessed an indictment brought by any willing citizen. Likely, when it became clear that the Areopagus would not lodge an indictment, the people stepped in to ensure collectively that Cimon would be brought to trial by conducting all initial proceedings on their own, as in a *probolē* process.[47] The form of Cimon's trial was thus highly unusual, designed as if the people were intent on ensuring that the 'correct' result (a conviction) would be reached.

Of course, even despite this exceptional process, Cimon was acquitted by the Areopagus. As noted above, Ephialtes responded by prosecuting a number of members of the Areopagus most likely on a charge of bribery, and I suggest that these trials played a crucial mediating role between an unacceptable political outcome (Cimon's acquittal) and subsequent political innovation (Ephialtes' reforms). We know regrettably little about this series of trials, but our sources clearly understood them in tandem with Ephialtes' legislative reforms: more than mere retributive measures, they were especially public ways of signaling the illegitimacy of accountability before the Areopagus. In effect, Cimon's unusual trial allowed the people to judge his case (resulting in a preliminary conviction) and then gave the Areopagus the opportunity to follow suit or to acquit the general and thereby signal its presumed 'anti-democratic' bias. Given the ideological tensions and concerns with bribery reported in our sources—and especially given how in Athenian bribery trials what constituted bribery was, itself, under trial—we can plausibly conjecture that this anti-democratic bias would have come under fire when Ephialtes alleged that the Areopagites had 'done injustice to the people'. On this reconstruction, Ephialtes' prosecution of the Areopagites pitted two sides against each other: 'acquit', anti-democratic, and bribery were lined up against 'convict', democratic and an 'uncorrupt' way of hold officials accountable (i.e. Ephialtes' imminent reforms). I propose that the series of bribery trials was used, in part, to delegitimize the Areopagus' method of accountability and to signal public support for a new way to secure legitimate political results

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[47] Cf. Carawan (1987: 179). At least by the 420's the Athenians were certainly concerned that *euthynoi*, like those in the Areopagus, might fail to prosecute an offender. So, *IG* ii² 127.18-20 records an explicit punishment for *euthynoi* who failed in this respect. Carawan (1987: 188) suggests that this was an archaic penalty. If he is correct, then this archaic law becomes early evidence of precisely the kind of abuse of authority I am positing was feared in Cimon's trial.

(such as convictions at a bribery trial like Cimon's). The very process by which public officials would be held accountable seemed, itself, to be on trial.

On this view, it is surely significant that the unusual way in which Cimon was brought to trial—with public prosecutors conducting the case before a judicial body composed of the people—would subsequently form the backbone for public accountability after Ephialtes' reforms.[48] Ephialtes transferred jurisdiction for trials of public officials from the Areopagus to the Council of 500 and the jury courts, the composition of both of which accurately represented the people and thus gave manifestly 'democratic' results. Both the Council of 500 and the popular jury courts represented a broad cross-section of the citizen population of Attica: Council members were drawn by lot for one-year terms from those who presented themselves as candidates; while jurors were drawn by lot each day from a group of 6000 eligible jurors annually, who had been drawn by lot from those who had wanted to serve as jurors for the year. As such, the decisions made by each body straightforwardly manifested the norms of the entire community, not just those of its elite citizens.[49] By transferring to the Council of 500 and the jury courts the Areopagus' rights to initiate and conduct proceedings for public officials, Ephialtes made it less likely that an official who had been publicly reputed to be corrupt would go untried or, worse, unpunished like Cimon.

If we look between Cimon's exceptional trial and Ephialtes' subsequent reforms, therefore, we can begin to uncover a vital public debate over how to hold public officials accountable; I underscore that the Areopagites' bribery trials likely played a crucial role in this debate. The same courtroom arguments concerning what should or should not be considered bribery—that is, which modes of politics were and were not legitimate—shaped and were shaped by public debates found in deliberative institutions like the Assembly. The accusations of bribery surrounding Cimon's trial—the injustice done to the Athenian people or the prosecutor Pericles' suspicious involvement with Cimon's sister—certainly were ways of delegitimizing

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[48] Recall that in Cimon's trial the people elected ten public prosecutors to conduct the trial before the Assembly and the Areopagus. After Ephialtes' reforms, prosecutions at *euthynai* were conducted either by *euthynoi*, who were ten members chosen by lot from the Council, or by any willing citizen; depending on the offense, these trials would be held before either the Council or a jury court.

[49] Indeed, selection by lot was later viewed as a cornerstone of the democracy: Hdt. 3.80, Aristot. *Pol.* 3.1274a5, 4.1294b7-9: Headlam (1933: 4-12, 19-26), Badian (1971: 9), Ober (1989: 76-7). Whether viewed as a pro-democratic or, more likely, a pro-elite instrument used to reduce elite competition for office by ensuring broad representation and even distribution—so Carawan (1987: 207-8) and Conover (in progress, Chapter Two)—sortition was essential for including a more diverse range of citizens in the workings of the polity: Taylor (2007).

Cimon's acquittal; simultaneously, too, they signaled the illegitimacy of accountability before the Areopagus. In claiming that bribery, or some kind of corruption, had occurred, these accusations implicitly called for a more 'democratic' approach, one which had been partly employed in Cimon's trial and was soon instituted through Ephialtes' reforms.[50]

II.2: Bribery could act as a practical touchstone for political innovation:

In the previous example we saw how bribery trials could provide crucial venues for public debate about the legitimacy of certain political institutions; indeed, in the case of the Areopagites' bribery trials, the very issue on trial seemed to be how to create 'democratic' accountability. In this section we will consider the flip-side to this conclusion: namely, how bribery trials could be used positively to legitimate and strengthen existing political institutions. Once deliberation about political institutions was opened up in the course of a bribery trial— once the norm of how to conduct politics came under trial—modifications to existing institutions naturally would have followed suit.

Hence, inasmuch as bribery was the paradigmatic political problem at Athens, it could be held up as a practical touchstone for developing other regulatory practices. This is exactly what we find in the gradual development of the *euthyna* process for all outgoing public officials. In this case, the persistence of bribery forced the Athenians to rapidly formalize what had been *ad*

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[50] The creation of the *apophasis* procedure for suspected acts of treason and corruption may also have resulted from repeated concerns about the illegitimacy of judicial processes towards the middle of the fourth century. Similar to Cimon's trial, the *apophasis* procedure entailed an investigation, preliminary report and verdict by the Areopagus, followed by a final verdict and punishment by a jury, with the prosecution led by publicly elected prosecutors, on which process see MacDowell (1978: 190-1), Wallace (1989: 113-18), Hansen (1991: 292-4), Todd (1993: 115). We can date its creation to the mid 340's, exactly the same time that there were a number of trials for judicial bribery (Aeschin. 1.86) and fears that 'traitors' were destroying the city. To be sure, part of the impetus for the change lay in contemporary constitutional debates, which focused on the Areopagus' ancestral authority as "guardian of the laws": see especially Carawan (1985: 138-40). But it is worth considering what need the Athenians had for these debates at this particular time. Amid fears of widespread institutional corruption, the Athenians looked to restore the Areopagus' authority as 'guardian of the laws'—and thereby to restore the democracy itself—precisely because the laws were supposedly being contravened on a systematic basis.

The details of the *apophasis* procedure support this interpretation. It is telling, after all, that unlike the preliminary judgments of officials, which simply established that a certain case was worth of trial before a jury, in an *apophasis* the Areopagus also passed a preliminary verdict on guilt or innocence in drafting its report. It was up to the jury to accept or reject the Areopagus' verdict, but prosecutors were sure to point out how just and true the Areopagus' report must be. So, in the Harpalus Affair, prosecutors continually referred back to the Areopagus' verdict as their (sole) evidence that Demosthenes and others were guilty; for them, the verdict of the Areopagus was unimpeachable: Carawan (1985: 136-7). Note how frequently the prosecutors weigh the upstanding nature and justice of the Areopagus' report against the corruption and injustice of the defendants: Din. 1.45, 1.87, 2.1, 2.2, 2.6-7, 3.7; Hyp. 5 fr.3.5-7.

hoc processes for holding officials accountable; the up-shot was that this newly formalized system could readily be expanded to hold *all* officials accountable, not just those suspected of bribery.

Although our sources are frustratingly scarce and incomplete, it appears that a system of mandatory public accountability emerged, in a sense, by accident at Athens in the last decade of the fifth century.[51] For nearly two centuries before this time, accountability had been an *ad hoc* affair: any willing citizen could bring an official to trial for any offense; alternatively, an official would be prosecuted if one of the examiners (*euthynoi*) suspected an offense had been committed.[52] Even with Ephialtes' reforms, there was no mandatory examination process for outgoing magistrates, with the exception of the nine major officials (the archons) who were examined by the Areopagus from the archaic period onwards.[53] Yet, beginning in the years after Ephialtes' reforms, the Athenians created the official post of the auditors (*logistai*), who automatically examined the financial accounts of certain officials, usually those who had handled public monies. Originally, even such auditing was *ad hoc* in nature, as the people usually decreed which group's financial accounts should be examined.[54] By century's end, however, *all* public officials were subject to mandatory examination first by the *logistai* and then by the *euthynoi*; both auditors and examiners reviewed the conduct of all officials.[55]

This system of public accountability entailed considerable political innovation over a long period of time. On the one hand, the Athenians had to combine the work of the auditors

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[51] I follow Hashiba (2006), with previous scholarship cited, in accepting the revision of the laws in 403 as the date of this institution, but it should be noted that the final 'systematization' was an ongoing process, as I detail in Conover (in progress, Chapter Five) that may not have had a strict cut-off date for completion. Here I call into question the common scholarly assumption that this 'system' was instituted consciously at a single point in time, either as part of Ephialtes' reforms or at the end of the fifth century. It should be noted that this assumption has been thoroughly undermined by detailed examinations of the early history of the *euthyna*: see Piérart (1971), Carawan (1987), Hashiba (2006: 64-7).

[52] Note how in public inscriptions the verb εὐθύνεσθαι ('to undergo a *euthyna*', lit. 'to correct') continued to imply some kind of accusation until the end of the fifth century. Only in the beginning of the fourth century did it cease to be used this way: Piérart (1971: 548-9, 558).

[53] Even this, however, was more to ensure eligibility for entrance to the Areopagus than to hold an archon accountable for his conduct, *per se*.

[54] So, from 454/3 we find the *logistai*, selected by lot from the Athenian citizen body, examining the accounts of the *hellēnotamiai* in charge of collecting the tribute for the treasury of Athena. Yet the jurisdiction of these *logistai* only grew in subsequent decades. By the 430's, we find them calculating monies due to other treasuries, as well as examining the accounts of generals and of the sacred treasurers of Athena and other gods. *Hellēnotamiai*: *IG* i³ 52=*ML* 58.A6; *IG* i³ 369=*ML* 72.2. Treasuries of other gods: *IG* i³ 52=*ML* 58.A7-9. Other officials: *IG* i³ 52=*ML* 58.A24-9; *IG* i³ 369=*ML* 72 (*passim*).

[55] *AP* 48.4-5, 54.2. Carawan (1987: 207-8), Hansen (1991: 222-4), Hashiba (2006: 64-7).

(itself a new position in the mid-fifth century) and the examiners so that financial and non-financial matters were reviewed in succession. On the other hand, the Athenians had to standardize the process so that all officials would automatically go before both boards. In both instances, as we will see, the Athenians gradually refined and systematized practices which had originally been used for dealing with bribe-takers. Athens' regulation of bribery thus provided the inspiration for how all officials would later be held accountable. So bribery trials were used as a kind of practical touchstone for designing the most efficient system of mandatory public accountability.

First, the grouping together of auditors and examiners. After the transfer of the Delian League treasury from Delos to Athens in 454/3, we find a range of institutional changes that reflect a new concern that the tribute, which was an enormous annual influx of funds from Athens' allies, needed to be monitored closely. In fact, the board of *logistai* seemed to have been created for precisely this reason, as it initially appears only in conjunction with monitoring the tribute.[56] From its creation, however, this board of auditors did not work together with the examiners; rather, the pair's collaboration was a process only of gradual convergence. This collaboration must have been significant by the 420's, when the accounting duties of the *logistai* were considered synonymous with the examination process of the *euthyna*.[57] It was complete as late as 410/9, when it is suggested that any willing citizen could lodge an indictment against an official (i.e. at a *euthyna*) in the *logistērion* or 'workplace of the *logistai*'.[58]

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[56] Probably in 454/3 the board of thirty *logistai* was created to oversee the finances of the imperial tribute, which, beginning in that year, was brought directly to Athens. Cf. *IG* i³ 259=*ATL* i.1.1-4, *IG* i³ 260=*ATL* i.2.1, *IG* i³ 261=*ATL* i.3.1, all dated between 454/3 and 452/1. Certainty is impossible in dating the institution of the *logistai*, but our epigraphical sources seem to suggest 454/3, with the transfer of the Delian League treasury. As recent scholars rightly emphasize, *logistai* are not attested prior to this time, and for a few decades thereafter they are found only in conjunction with imperial revenues: cf. Piérart (1971: 564-5), Hashiba (2006: 66n.19-20). Other scholars have assumed, largely based on the later collaboration of *euthynoi* and *logistai*, that *logistai* of some sort were created with Ephialtes' reforms as part of the *euthyna* process: see, for example, Hignett (1952: 204), Carawan (1987: 190). But what would have prompted Ephialtes to create *financial* auditors for *euthynai*? No such financial overseers had existed prior to his reforms, and the financial accounts of Cimon (and others) never even seemed to be at issue. Moreover, the assumed pairing of *euthynoi* and *logistai* overlooks the *ad hoc* nature of both boards prior to the 430's: see above for *euthynoi* and below for *logistai*.

[57] Cf. Ar. *V.* 553-7, 570-1 (422); Eupolis' *Poleis*, fr. 223K (c. 420). Hashiba (2006: 66) for discussion. This merging may have occurred already by the 430's, when Pericles was charged at his *euthyna* possibly with a series of crimes—embezzlement (*klopē*), bribery (*dōra*), and maladministration (*adikion*)—all of which would have entailed auditing his financial accounts. Plut. *Per.* 32.2 with Hashiba (2006: 66). Date: 438/7, following Frost (1964); Hansen (1975) suggests 430/29.

[58] Lys. 20.10. Similarly, in 405, the *euthynoi* were said to conduct their work in the *logistēria* (And. 1.78). Whether there was just one such workplace or many (as suggested by Andocides) is perhaps solved by following Wilamowitz

In retrospect, the convergence of these two boards seems a manifestly efficient means of unifying divergent procedures for holding officials accountable, and indeed in the fourth century it was; at the time, however, this convergence was by no means easily intelligible. The auditors dealt with financial matters, the examiners with official conduct; even in the fourth century after the boards converged, these jurisdictions were treated as fundamentally distinct, as there was a clear division of which board would prosecute violations of which offenses.[59] Moreover, although in the middle of the fifth century each board held officials accountable in an *ad hoc* manner, they did so in very different ways. The examiners reviewed only those officials who had been publicly denounced, while the auditors reviewed the financial accounts of officials only as per the Assembly's instruction. Accordingly, the examiners originally reviewed only those already suspected of an offense, while the auditors vetted the accounts of all officials on certain boards, regardless of whether or not they were under suspicion.

It is worth asking, therefore, why, given their different jurisdictions and approaches to accountability, these boards eventually converged, and why they do so only gradually? I think the answer lies in how the Athenians dealt with a specific kind of bribery and, consequently, how the frequency of bribery trials fostered a more regular process of accountability for all officials. When the board of auditors was created, one major fear the Athenians had was that a new kind of bribery involving the tribute had arisen: that those involved in the tribute's collection were somehow being bribed either to under-collect or to embezzle some of the funds.[60] As contemporary inscriptions suggest, the Athenians treated this new kind of bribery as a kind of hybrid: misconduct, yet of a financial nature. So, the Clinias decree, alternately dated to 448/7 or 425/4, mandates that any Athenian or ally who "does injustice to the tribute" ([... ἀδικεῖ περὶ τὸ]-ν φόρον) either should be indicted (immediately) before the Council, or, crucially, should be charged at an examination (*euthyna*) with bribery, with an expressed penalty of 10,000 drachmas, an enormous sum equivalent to over thirty years' pay for a public official.[61] Normally

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(1893: 2.235) and Piérart (1971: 572) in assuming that there were ten *logistēria*, one for each tribe's *logistai*. Cf. *AP* 48.4-5, 54.2

[59] In short, bribery, embezzlement, and maladministration fell to the auditors, while all other kinds of offenses were prosecuted by the examiners: *AP* 48.4-5, 54.2.

[60] Aristoph. *Eq.* 66, 69, 403, 802, 830-5, 996, *V.* 669-77, *Nu.* 591; [And.] 4.30-1; Lys. 19.52 with Thuc. 6.12.2, 6.15.2.

[61] [...hοὶ δὲ πρυτά]νες ἐσαγ[όντον]/ ἐς τὲμ βολὲν [τὲν γραφὲν ἥν τι]ς ἂγ γραφετα[ι ἒ εὐθ]-/υνέσθο δόρο[ν μυρίαισι δραχμ]ε͂σ[ι hἕκαστος (*IG* i³ 34=*ML* 46.35-7). Similarly, although the Assessment Decree (425/4) omits

an official's *euthyna* was conducted by the examiners (*euthynoi*), on an *ad hoc* basis as the decree suggests. What the decree omits, however, is that it surely would have been the auditors who would have double-checked the tribute and determined whether 'injustice' had been done. In order to regulate this new kind of bribery, therefore, the two bodies of *logistai* and *euthynoi* would have been forced to work together on an *ad hoc* basis at an early date.

Still, *ad hoc* collaboration in discrete instances for certain officials is not quite the automatic, standardized process we find at the end of the fifth century; this broader shift entailed both expansion of the jurisdiction of the auditors and regularization of the work of the examiners. What could have prompted these developments? Again, bribery seems to provide a clue. Even in cases which did not involve tampering with the tribute or financial mismanagement, in the fourth century bribery was always treated like a financial crime and, along with embezzlement, was prosecuted by the auditors, not the examiners. A plausible explanation for this is that, as the scrutiny process became standardized, the offense of 'bribery'—whether or not it involved public finances—came to be modeled off of the process described in the Clinias decree. If this is correct, then it helpfully explains how the jurisdiction of the auditors would *ever* expand into 'non-financial' spheres to include officials who did not deal with public monies. After all, to the extent that the Athenians were afraid that all sorts of officials were engaged in bribery, they could have stipulated that increasingly more officials each year have their financial accounts audited at the end of their tenure in office. On this reconstruction, first bribery was fixed as a kind of financial crime that would be assessed by the auditors; later the jurisdiction of the auditors was augmented to address potential bribery by a range of officials, not simply those involved with public finances.

In the decades after the Clinias Decree, the examination of the financial accounts of public officials became increasingly regular, and I am arguing that concerns about bribery prompted this regularization.   As the checking of financial accounts became a matter of course for more officials, so, too, would the collaboration of auditors and examiners have become necessary in order to prosecute those officials for bribery. Again, even if we assume only about

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any mention of a bribery suit, it also lays out a *euthyna* for officials, with a penalty of 10,000 drachmas, in case the tribute is not paid (*IG* i³ 71.36-7). The dating of the Clinias decree is controversial: the discussion at *ML* 46 and Meritt and Wade-Gery (1962) suggest 448/7, while Mattingly (1961: 150-69) reasserts the formerly orthodox view of 425/4 or later: see *AE* 165-73 for discussion. Although it does not affect my argument, I follow the earlier dating of 448/7. In the fifth century, Councilors were normally paid 5 obols per day (6 obols=1 drachma; 6000 drachmas=1 talent).

a handful of bribery trials during each annual examination period, the auditors and examiners would have had to collaborate every single year. The frequency of bribery trials thus would have made their collaboration a matter of course.[62]

The final step in this development—the regularization of *euthynai* for all magistrates—can also be seen as an extension of the practice developed for holding officials accountable for bribery. We have no sources that discuss this last shift, but it is worth speculating why the work of the examiners eventually became automatic, like that of the auditors. One answer is simply that because the auditors and examiners were already collaborating for bribery trials, and because the auditors themselves were already conducting automatic scrutiny of financial accounts, it was thought that the examiners, too, might as well shift from *ad hoc* to regular examination of officials. This is certainly plausible, but I would add, simply, that the Athenians may have seen inherent value in the *automatic* examination of conduct. After all, this presumably would have been the same reasoning underlying the expansion of the auditors' jurisdiction: in order to hold officials better accountable for bribery, the examination of financial accounts became a mandatory instead of some chance occurrence arising from an accusation of bribery. Perhaps the automatic scrutiny of many officials' financial accounts was thought to have successfully curbed bribery, or perhaps the Athenians wanted to ensure that officials were held strictly accountable for misconduct—either way, the recent shift from *ad hoc* to automatic auditing in order to address bribery seems to have served as a model for action.

Although the full systematization of public accountability may have been held off until 403, the pieces for this system were gradually put in place throughout the second half of the fifth century, as we have seen. At each step, bribery seems to have provided a touchstone for future development: the Athenians innovated in order to deal with new problems posed by bribery, these innovations became familiar and regular through frequent bribery trials, and lessons learned from regulating bribery were used to address other types of misconduct as well. Though seemingly 'accidental', Athenian public accountability was engineered through trial-and-error and repeated use. In particular, I have argued, bribery trials functioned as a critical touchstone

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[62] In fact, this may very well have been the motivation for creating an official period of three days after the examining of an official's financial accounts, during which time a citizen could register a complaint to be taken up by the *euthynoi*: *AP* 48.4. This time-period, calibrated to the auditors' duties, served as an official space during which accusations of misconduct could be heard by the examiners.

for this development—both in standardizing the collaboration of auditors and examiners and in quickly giving the Athenian people an indication of how successful their innovations were.

II.3: Political innovation could be forged through bribery:

In the first two case-studies, bribery was used as a focal point as Athenians thought through and implemented 'democratic', effective political institutions. The prevalence of bribery and, consequently, the relatively high frequency of bribery trials proved a political boon by creating additional opportunities for the people to legitimate or delegitimize certain modes of political practice. In so doing, bribery trials provided a valuable public venue for discussing how Athenians might improve their political institutions. Our third case-study, on the rise and quasi-formalization of the role of the *rhētores* (public speakers) at Athens, investigates what was, essentially, prior to both of these processes. Even before new political technologies, or ways of practicing politics, could be legitimated or delegitimized in courtroom discussions, these technologies had to have come from somewhere. Often, bribery was suspected to have played a role in their emergence. Through bribery, a new, potentially beneficial mode of politics could thus arise, and likewise through bribery trials its eventual role in the democracy could be shaped and improved.

Although any willing citizen could speak in the Assembly—proposing a decree, or law, or making a motion for the formal indictment of a magistrate, say—at any given time the bulk of formal actions were taken up by a concentrated group of only about a couple dozen or so prominent, wealthy public speakers, a group that would be known in the fourth century as the *rhētores*.[63] These were the closest thing that Athens had to professional politicians: people actively engaged in the workings of the Assembly, the Council, and frequently appearing in the courts as witnesses or litigants. The *rhētores* provided an invaluable good for the polity, for they clarified and publicized the needs of the people, and they recommended what needed to be done by the people as a whole. A successful *rhētor* was thus a citizen who could be trusted to promote

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[63] Hansen (1991: 272; cf. 1989: 120-2) provides numbers on this point: whereas at any point in time there may have been several hundred citizens who had spoken in the Assembly once or twice, there were approximately 10-20 *rhētores* who had done so as many as hundreds of times in their career.

measures that were beneficial to the community, and who had a considerable track-record to prove it.[64]

Yet, if this elite group of public speakers always acted as a vital conduit for public discourse, which interests these speakers channeled seems to have changed over the course of the democracy along with the basis for their political support.   Originally, the most prominent public speakers came from aristocratic families and derived political support from a broad coalition of political 'friends' (*philoi*), who included extended family, neighbors, and members of social and political networks. In the early democracy, men like Themistocles, Aristides or Cimon acted as an effective conduit for the competing interests that emerged from different, competing networks of *philoi*; yet these coalitions had little place for the poor Athenian masses. By contrast, towards the last quarter of the fifth century, the so-called New Politicians emerged, claiming to be *philoi* with the entire Athenian people. It was the rhetorical ability of a Cleon or a Hyperbolus that could win over the masses and thus gain a *rhētor* significant public support. Though these speakers, too, were wealthy, they did not depend on their wealth or heritage to win them prestige; rather, they were defined by their rhetorical skills as **rhētores**.[65]

The New Politicians represented both a significant improvement for, and a new potential danger to, the democracy. On the one hand, their use of rhetoric explicitly to win over the masses fostered more 'democratic' politics: attention to and inclusion of the interests of more citizens, and consequently policies aimed at the benefit of the masses as a whole, instead of a smaller subsection of it. In effect, this meant that any citizen who had an idea would have a greater chance of having it proposed by a *rhētor* (and thereby hopefully approved) than he would have earlier in the democracy. On the other hand, this meant that *any* citizen who had an idea would have a greater chance of having it proposed by a *rhētor*. When all it takes is a persuasive public speaker to have a motion approved, there is potentially less quality control on the kinds of issues brought up for public discussion or, worse, the kinds of proposals successfully voted on. Perhaps unsurprisingly, therefore, this new, more democratic political technology brought with it

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[64] On the importance of the *rhētores* to the workings of the democracy, see Perlman (1963), Connor (1971), Ober (1989), Hansen (1991: 268-87).
[65] This was a major shift in how politics in the democracy was conducted, on which Connor (1971) is indispensable. Cf. Finley (1962), Ober (1989: 84-93).

concomitant concerns that the democracy had become a ochlocracy or a polity ruled by the fickle masses.[66]

This outline should be familiar to almost anyone even remotely familiar with the Athenian democracy. What I would like to pose here is the question of how this shift actually came about. Our sources pin this shift on one man, Cleon, the purported son of a tanner, who was Pericles' main political rival for two years until Pericles' death in 429. All of our sources agree that, after Pericles and beginning with Cleon, politics simply was not the same—and, to be sure, they seem correct in this estimation—but how exactly did Cleon manage to forge this new style of politics? Upon closer investigation, I suggest, we will find that bribery played an important though perhaps unexpected role.

Cleon's most distinctive difference from his predecessors was that he repudiated his circle of friends and proclaimed to be friends—'lovers' as Aristophanes would call it—with the *dēmos* as a whole.[67] He was also lambasted by his opponents for being corrupt: he was forced to 'cough up' 5 talents of silver that he had either taken as a bribe or embezzled, and Aristophanes suggests that he had 'bribed' the people with favorable policies so that he could get away with even more profit.[68] While no subsequent *rhētor* would follow suit in rejecting his own *philoi*, after Cleon most of them did try to court the people's favor, as Aristophanes famously parodies in the *Knights*. Like Cleon, however, these *rhētores* were consistently open to the accusation that they were peddling their political services—in short, trafficking in decrees, laws, honors, and policies.[69] Cause and effect are somewhat muddled here—did Cleon first befriend the *dēmos* and then begin to profit from it, or was it the other way around?—but the difference is crucial. In the first instance, we are led to believe that Cleon was corrupted by power gained from his newly acquired mass support; in the second, Cleon's corrupt activity was *constituted by* his courting of the masses.

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[66] Ober (1998: 72-121) thoroughly discusses the criticisms that emerged in the late-fifth and early-fourth centuries.

[67] Aristoph. *Eq*. 732-4, 1340-4 with Connor (1971: 96-104). See also Thuc. 3.36.6, 4.27.5-28.5, 4.21.3; *AP* 28.3; Plut. *Nicias* 8.3; Theopompus *FGrH* 115 F 92   For Cleon's relationship with his friends, see especially Connor (1971: 91-4).

[68] Coughing up 5 talents: Ar. *Ach.* 5-8 with scholiast (=Theopompus *FGrH* 115 F 94); see discussion in Olson (2004: *ad loc*) and Carawan (1990).   For similar accusations, see Aristoph. *Eq*. 103, 258, 707, 824-7.

[69] This became a common motif in Comedy: Jackson (1919) collects the evidence, while Connor (1971: 152-8) helpfully points out the potential class tensions inherent in calling someone a 'peddler' or 'manufacturer'.

There are good reasons for thinking that the latter occurred, that is, that Cleon's new practice of politics was inherently considered corrupt and that, in fact, it was plied through bribery. First, we should note that political alliances do not spring up *ex nihilo*; some kind of reciprocal relation is needed in order to leverage political support. For the old-school public speakers, this relation readily appeared in the form of *philia*; for Cleon, who had renounced his friendships, at first there would have been no such basis for establishing and organizing mass support. Indeed, given how entrenched the old style of politics was (it would continue until well into the fourth century), it is difficult to see how Cleon could have thought he would succeed in this move. Certainly he could have won support through pro-*dēmos* policies—like increasing the pay of jurors (Aristoph. *Eq*. 800; *V*.684-5, 689-90)—but it is unclear why Pericles would not have received the same support, or the same castigation from his critics, in creating jury pay some two decades prior. Indeed, by and large what was 'new' about the New Politicians was not that they created substantively new policies, but that they opened up political access to a broader swath of the public.[70]

It is here, therefore, in this broadening of political access, that we should find the key to Cleon's success. Most plausibly, this key entailed bribery. Let us reframe the issue of access from the perspective of a relatively poor Athenian who, in the old system, would have lacked the *philoi* needed to pass a proposal in the Assembly. One way to overcome such social distance would have been to create a similar obligation through money: by simply paying a public speaker to make a proposal, a citizen could potentially tap into that speaker's network of *philoi*. Whereas this kind of practice would have been antithetical to the aims of the old style of politics—because someone would have been benefiting a non-*philos*—and understandably would have been viewed as the corruption of the friendships that were the foundation of that system, for Cleon and the New Politicians money for political services would have been less problematic; indeed, it naturally would have created the desired kind of reciprocal relationship, albeit between two otherwise complete strangers.

On this view, we should perhaps flip our picture of the New Politicians on its head and assign the real innovation not to Cleon but to the political entrepreneurs who tried to overcome the inaccessibility of the old system of politics by paying public speakers to make a motion on

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[70] Finley (1962), Connor (1971), Ober (1989: 91-3),

their behalf—that is, to the masses who had previously been excluded from the old networks of *philoi*. I suggest that Cleon was simply the first-mover, the first public speaker to accept the bribes of non-*philoi* and thereby allow them a kind of political access usually granted to one's *philoi*. For this reason, he was thought to have renounced his friends among the elite; and it makes sense that he did so, too, for bribery enabled him to secure broad support with the masses. The bribe itself served as the initial basis for a reciprocal relationship between public speaker and citizen. Over time, that relationship was only reinforced at both an individual level (when individuals continued to pay Cleon for his services) and a more general level (when Cleon exchanged favorable public policies for broad-based support).

To modern ears, Cleon probably comes across as a corrupt crook at worst or a political opportunist at best, but it should be noted that the style of politics he began became the standard for generations to come. In other words, what initially were considered 'bribes' later became perfectly regular 'payments'.[71] Far from being a self-interested opportunist, in fact, he might genuinely have thought himself 'champion of the people' (or the two could be one and the same).[72] After all, in renouncing his old friendships, he reportedly criticized the corruption that could result from conducting politics through selective social and political channels. *Philia*, Plutarch has him claim, "often softened one's thinking and led one astray from right and just policy in politics."[73] Following Plutarch, we might imagine that Cleon was, himself, trying to improve a corrupt system. Whether this testimony is apocryphal or not, we cannot be certain, but it does make sense if we adopt the perspective of those Athenians who had effectively been excluded from the old style of politics.

Given Cleon's purported concerns with the old style of politics, it is ironic that the very danger of this new style of politics was that money or trying to win over the masses could also

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[71] This is a somewhat controversial claim given how often our sources rail against the payments received by *rhētores*: e.g. Hyp. 5.25 (Demosthenes received 60 talents for his decrees and for proposing his trierarchic law); Dem. 18.312 (Aeschines received 2 talents to oppose Demosthenes' trierarchic law), Plut. *Mor*. 848B (Demosthenes received 5 talents for *not* saying anything). The veracity of these claims is impossible to assess—despite the best efforts of Wankel (1982): cf. Harvey (1985) and Hansen (1991: 274-6; cf. 1980). Given the extraordinary sums cited, these instances most likely represent *problematic* exceptions, that is, instances when a *rhētor* received a sum so great that it somehow corrupted his judgment, rather than strong indications that payments for *rhētores* were banned. In fact, the very point of Hyperides' testimony is that these kinds of payments were allowed so long as they did not result in harm to the *dēmos*.

[72] *Prostatēs tou dēmou*: Aristoph. *Eq*. 1128, *Ra*. 569; cf. *V*. 419, *Pax* 684, *Pl*. 920; Thuc. 8.89.4. Connor (1971: 110-15).

[73] ὡς πολλὰ τῆς ὀρθῆς καὶ δικαίας προαιρέσεως μαλάσσουσαν ἐν τῇ πολιτείᾳ καὶ παράγουσαν, Plut. *Mor*. 806F.

lead one astray away from right and just policies. Though improving access to policymaking, the new style of politics thus could create outcomes just as bad as before.   By the end of the century, therefore, the Athenians created a series of accountability measures designed to ensure that public speakers would not simply follow the money or pander to the masses: with both the *graphē paranomōn* and the creation of an *eisangelia* for prosecuting *rhētores*, public speakers would be held accountable for the laws, decrees, and proposals they recommended. The *graphē paranomōn*, or public suit against 'unconstitutional' proposals, was used against any speaker who had proposed a law or decree that conflicted with other laws or decrees.[74] In the fourth century, it was used frequently, and often the basis for prosecuting a public speaker was that his proposal had been against the city's interests.[75] The penalty was a sometimes considerable fine, and disfranchisement if convicted three times. Similarly, an *eisangelia*, as noted above, was used against *rhētores* who had spoken against the best interests of the *dēmos* after having taken money.[76] The penalty was variable, but could be an extraordinary fine or, most often, death.

Essentially, these measures laid out the parameters within which *rhētores* could operate: they could gather inspiration for their proposals from any source, and they could even receive money in exchange for speaking, but they could never speak against the interests of the people. Within the context of the potentially grave danger posed by the new style of public speaking, these reforms are revealing. In the first place, they clearly illuminate the legitimacy of this new style, including paying for a public speaker's services, for in both cases it was the content—not the source—of the public speech that mattered. Referring the matter to a court was simply another way to determine whether or not the proposal was, or should be, publicly legitimate. Rather than ban outright or limit pay for public proposals, the law allowed public speakers to continue being political entrepreneurs like Cleon and his new *philoi*. Wherever they could find new sources or ideas for public policies, so much the better, provided the policies themselves

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[74] In 403/2, the distinction between *nomoi* (laws) and *psēphismata* (public decrees, which were *ad hoc* measures) became formalized with different processes for enacting each: Hansen (1983: 161-76). At this point, the Athenians created a *graphē nomon mē epitēdeion theinai* (public suit for enacting an inexpedient *nomos*) to deal with unconstitutional laws, while the *graphē paranomōn* continued to be used for unconstitutional decrees.

[75] E.g. Dem. 22.35-78, 23.100-214; Aeschin. 3.49-200. Wolff (1970: 45-67). As catalogued in Hansen (1974), we have at least 35 attested examples of the *graphē paranomōn* dating to the second half of the democracy (403-322), from which Hansen (1991: 208-9) plausibly extrapolates that the 'vast majority' of Athenian political leaders would have been prosecuted under the *graphē* at one point or another in their career.

[76] Hyp. 4.7-8 gives the text of the law. See further discussion in Hansen (1975), Todd (1993: 114-15) and Conover (in progress, Chapter Five). Hansen (1975) lists 17 different examples of *eisangelia* used against a *rhētor*.

were 'democratic'. Moreover, just as we examined in Sections I and in our earlier two case-studies, these laws opened up the courts as an alternative venue to assess and legitimate the correct policies and policymakers. In addition to being forged through bribery, therefore, this new political technology was shaped through repeated bribery trials in the courts.

Part III. Lessons from Athens

These case-studies are emblematic of what I see as likely trends in how the Athenian democracy functioned so successfully. Our evidence for consistent connections between bribery and politics like the ones I propose here is, however, very limited, and ultimately the value of these case-studies is perhaps more theoretical than empirical. Accordingly, this section summarizes what I think are the most salient lessons that can be gleaned from the Athenian case. After an overview of the results from the previous two sections, I will conclude with a few remarks on the rule of law and contemporary anti-corruption reform agendas.

Commonplace bribery proved a boon at Athens, in part, because **frequent bribery trials enabled the law to reflect changing political values**. Accusations of bribery were rampant—in literature, at public venues like the courts, and of course at bribery trials. But these accusations were more than descriptive claims about the conduct of an individual; they were prescriptive about how a political actor should act. Specifically, as we have seen, bribery trials functioned as a vital political opportunity for the public to think through and weigh in on a particular outcome or policy. Through bribery trials, the people could signal their disapproval with certain political results: a 'failed' military campaign, for instance, or a 'harmful' public proposal. In so doing, they could begin formal deliberation on what a better solution to 'corrupt' institutions might be. All bribery trials offered, whether explicitly or implicitly, a different view of what a 'democratic' polity should look like, and these views could play a foundational role in shifting—and legitimating—public debate.

Because the Athenian conception of bribery was outcome-oriented—'bribery' was constituted not by illegal activity, but by an action that was deemed harmful to the public interest (whatever that actually meant at any given time)—**frequent bribery helped foster political innovation**. This occurred in two ways. First, the regularity of bribery trials helped the Athenians to maintain and refine their political institutions after problems arose. Precisely

because a bribery trial hinged on some perceived political shortcoming, whether in an individual's performance or in an institution's design (or perhaps even both), the Athenians could readily adjust to new problems they encountered. As the political values of the *dēmos* shifted over time, so too could the resultant deficiencies in institutions be quickly pointed out and delegitimized at a bribery trial much like Ephialtes' prosecution of the Areopagites. Likewise, the regularity of bribery trials could promote standardization of practices which, at least in the case of public accountability, could be deemed desirable for the democracy.

Second, an outcome-oriented approach to bribery encouraged individuals to anticipate problems before they arose. As we saw in the rise of the New Politicians, political actors could be thought of as political entrepreneurs who anticipated what might be in the best interests of the *dēmos*. This view entails thinking of the Athenians not as confined by a static political constitution or legal framework, but as constantly adapting, constantly shifting their practices according to whatever new needs may arise. What is striking about this approach is that it empowered individuals to anticipate, not follow, the formal legitimization of new political practices: instead of waiting for the law to change, individuals could help effect that change by publicly arguing, at a bribery trial perhaps, why their new political technology should be considered democratic. By the same token, even those individuals who were simply staying the course and trying to do what they had always done potentially could have found themselves accused of bribery. It was expected that all political actors would consider and follow what constituted the greater good for the community; in a sense, this greater good was regularly stated at bribery trials as at other public venues. With great opportunity therefore came exceptional responsibility.

Finally, a point which was not explicitly discussed but which emerges from our investigation, **the Athenian view of bribery shifts our focus from individual to institutional corruption**. This claim may seem counterintuitive given just how frequently individuals were held accountable for their purportedly corrupt actions, but I think it follows from our earlier point that accusations of bribery were implicit statements of democracy. To call foul was to have a clear idea of what was fair. Often, as we saw with Ephialtes or Cleon, accusations of individuals quickly became proxies for condemning an entire institution. It was at the bribery trial of a specific individual that his accuser raised larger concerns about how well the institution itself was working. Although this point may nowadays seem self-evident to someone advocating

institutional reforms for a developing democracy, its true value may lie in rethinking our approach to corruption in already developed democracies.[77]

Again, both the absolute frequency of bribery and bribery trials cannot be ascertained, and it is difficult to estimate the true extent to which these case-studies represent genuine trends in Athenian politics. Yet if my conclusions are correct, frequent bribery and consequently frequent bribery trials played a critical role in the democracy's stability. At the very least, then, we have arrived at tentative answers to our initial two questions. Why was Athenian anti-bribery legislation ineffective? Because the meaning of 'law' to the Athenians was very different from what is assumed in 'rule of law' contexts; indeed, by wedding deliberation of political values with the workings of law, Athens was able to adapt and survive in an unstable world. And was it a bad thing that Athenian anti-bribery legislation was ineffective? Ultimately, the answer to this depends on crucial assumptions we make about the purpose and ideal practice of politics. As I have argued, though, ineffective anti-bribery legislation was perfectly consistent with Athenian democratic values, and Athens flourished *because of*, not in spite of, this inefficacy.[78]

It is not clear to what extent reforms like the Athenians'—or even legal inefficacy more broadly—would be successful instruments of democratization in other societies; in this respect it is unclear how easily findings from Athens can be translated into a different context. Certainly, where gift exchange is not a cornerstone of society, it would be more difficult to imagine that bribery would take on the same meaning as in Athens and, as a result, that it could be used in the same way to improve, not simply to corrupt, the workings of politics. After all, in a society where gift exchange is limited, allowing more frequent bribery may result in patterns of bribery

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[77] So Thompson (1995), Warren (2004: 31).

[78] It should be noted that the amount of bribery envisaged in Athens is considerably more than the minimal amount advocated by political economists, who recognize that controlling bribery itself creates additional costs in time, money, and effort: e.g. Klitgaard (1988: 24). What conventional political economic wisdom suggests is that the ideal amount of bribery lies at the equilibrium where trying to regulate it further would accrue more costs than simply letting the bribery exist. It could be argued that, given severe informational asymmetries in the world of Athenian politics—that is, given the enormous costs of trying to monitor public officials' financial accounts—this equilibrium was astonishingly high; on this view, given Athens' inefficient technologies for monitoring public officials, we could only expect that they would have a high amount of bribery.

This view is unattractive, however, given the extreme monitoring the Athenians already achieved: they employed treasurers whose sole job was to look after the accounts of generals, they examined the financial accounts of magistrates *ten* times a year, and Athenians did not seem shy about bringing a bribery suit against an official. Indeed, if political economists have correctly modeled the cost-benefit analysis of bribery and its regulation, then Athens' success as democracy and economy is doubly impressive, for she invested seemingly excessive resources in combating corruption.

different from those in the Athenian case: more harm-inducing bribes, or bribes only in certain sectors, bribes that quickly transform into extorted payments, etc.

The kind of analysis we have performed here suggests that, even if we take into account different cultural norms and definitions of 'bribery' and then legislate accordingly, we might still miss the point that different societies use 'law' in different ways. On this view, the 'rule of law' is as much as cultural norm and practice as it is a desired end in its own right. Indeed, recall how, given a different cultural context at Athens, adhering to the strict rule of law could have proven disastrous. Even in democracies that uphold the rule of law, the outcomes generated by law are not viewed as just at all times, for all people, and for all actions. But bribery is always about injustice and illegitimacy, as the Athenian case reminds: its normative value stems from social, not legal, conceptions of how politics should work. Further, as the Athenian case reminds, eschewing the rule of law can nevertheless allow a polity to be more responsive to (changes in) popular conceptions of justice and thus be more legitimate overall.

In this paper I have argued for three different ways in which the Athenians succeeded at democratization and development even amid common corruption. Other thick accounts of cross-cultural or historical comparison might yield similar results. It is hoped that examples like these will open our eyes to a different understanding about the ideal role of corruption in a polity. Far from minimizing bribery through precise legal restrictions and 'proper' institutional design, a more valuable approach to anti-corruption reform might be to think of ways bribery can continually be leveraged for the greater good.

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