# Athenian Law: The Work of a Mad Economist

The city state of Athens in the fourth and fifth centuries, from the time of Pericles to the time of Demosthenes, is famous for two reasons: as a source of a great deal of literature that still survives and as the first prominent example of democracy. To most moderns, democracy implies a system where government officials are chosen by majority vote or appointed by politicians so chosen. The Athenians had a rather different approach. Laws were made by majority vote of the Assembly (*Ekklesia*), which consisted of all adult male citizens who chose to show up. But the officials–magistrates–were selected by lot, each to serve for a term of one year; the only officials to whom this did not apply were the generals. The result was a government of amateurs and a legal and political system designed to accommodate it. It was a legal system containing a number of clever ideas by clever people, some of which probably worked and some of which probably did not.

## The Athenian Population

The population was divided into three large groups: citizens, metics, and slaves. You were a citizen if you were the acknowledged child of married citizen parents,[[1]](#footnote-1) duly registered as such, although it was possible, under exceptional circumstances, for a non-citizen to be granted citizenship. Being a citizen gave you a bundle of political and economic rights, including the right to marry an Athenian citizen and, if male, the right to vote in the assembly, serve as a magistrate, volunteer for jury duty, serve as a paid arbitrator in your sixtieth year and own property in Attica.

The metics were resident aliens, sometimes resident for several generations. They could not be selected as magistrates or vote in the assembly, could prosecute some but not all sorts of law cases. Their economic rights were more limited than those of a citizen; they could not, save by special dispensation, own land in Attica. A metic had to have a citizen sponsor who was to some degree responsible for him. A metic might be given citizenship or some of the rights of citizenship as a reward for some particularly valuable service.

Debt slavery was abolished as part of the reforms of Solon about two hundred years before the start of the period being discussed, so most slaves were either prisoners taken in war or the descendants of such. They may well have made up a majority of the population.[[2]](#footnote-2) A slave’s owner could sue to collect damages for an injury to his slave and could be sued for damages done by his slave. He was not free to kill his slave but was free to beat him. The child of slave parents was a slave; it is not clear what the status was of the child of a slave and a free man or woman. While many slaves were household servants, farm laborers, or workers in the silver mines from which Athens got much of its wealth, some were independent workers who paid a share of their earnings or a fixed annual sum to their owners.[[3]](#footnote-3)

If a master chose to free a slave, the slave could either return to his home city or become a metic, provided that his previous master was willing to be his sponsor; he could not have any other sponsor. It seems likely that, as in many other societies, a slave could buy his freedom, either with borrowed money or in exchange for a commitment to pay his previous owner from his earnings as a freedman. Other than being freed, a slave had one legal means of leaving his master; he could claim asylum in the Theseion[[4]](#footnote-4) and ask for someone else to buy him.

## Laws and Courts

By the fifth century the assembly had spun off the job of trying cases and functioned primarily as a legislature. Cases were tried by juries in one of several courts, depending on under what law charges had been brought. The procedure was overseen by the magistrate associated with that category of offense. He received the charges that started the process and presided over the trial but the verdict was up to the jury.

Each year, 6000 jurors were selected by lot from those who volunteered; the only qualification was being a male citizen and at least 30 years old. The size of the jury for a case varied over time and according to the nature of the case, but seems usually to have been 200 to 500. Jurors were paid ½ drachma for each day they served, about half the wage of a rower, so jury service provided a sort of low-end welfare. If we accept an estimate of 30,000 for the total number of adult male citizens, at any one time about a fifth of them were on the jury panel. Even allowing for the fact that a juror might not serve every day, that suggests that trials absorbed the attention of a substantial fraction of the citizen population.

Juries gave their verdict by majority vote. The sums at stake in litigation could be substantial and jurors were likely to be poor, which raised an obvious risk of bribery. To prevent that, the Athenians contrived elaborate procedures designed to make sure that no juror would know what case he would be assigned to until the last minute.

No full text of the laws has survived, merely pieces quoted in the orations written by professional speechwriters to be memorized by prosecutor or defendant and fragments of laws recorded in surviving inscriptions, and we cannot be sure that even what we do have is accurate; an orator might deliberately misrepresent the law in order to make it more favorable to his case. It appears, however, that each law included, explicitly or implicitly, a description of the court in which cases arising from it was to be tried and the procedure for initiating a case; the magistrate responsible for the case would be the magistrate associated with that category of offense. Most cases were to be initiated by the plaintiff summoning the defendant to an initial hearing before the relevant magistrate, a few by bringing the defendant to the magistrate to be arrested. Unlike the Chinese statutes, the laws often did not specify the penalty, leaving that to the jury.

Once the case was initiated, it was up to the plaintiff to collect evidence and the magistrate to run the trial. The parties were not allowed a legal representative to present their case, as in a modern trial; each had to speak for himself, although it was permitted for a party to yield some of his time to a friend to speak for him on an unpaid basis. There were no limits to what sorts of arguments could be introduced; it was claimed that a defendant would sometimes bring his children to stand by him in the hope of inspiring pity in the jurors. Litigants could employ speechwriters to write speeches for them which the litigant would then memorize and deliver. A considerable number of these speeches were preserved for their literary value, which is why we know as much as we do about the legal system.[[5]](#footnote-5)

Witnesses gave their testimony in writing in advance; during the trial, their only contribution was to confirm that it was indeed theirs. Witnesses could not be cross-examined but the parties could, if they wish, question each other.

The evidence of slaves was admissible only if given under torture and only if the owner permitted it.[[6]](#footnote-6) The reason may have been the belief that a slave could not otherwise be trusted to tell the truth, at least in testimony against his master. There are surviving orations arguing that slave testimony under torture was entirely reliable, never having proved false, others arguing that it was entirely unreliable, since the slave would say whatever the torturer demanded. One speechwriter wrote one of each–for different clients. Torturing free men was not permitted by the law.

A witness could be asked to testify to a certain fact or event but was allowed to swear an oath that he did not have knowledge of it. A slave owner could not be required to permit his slave to give evidence but his refusal to do so could be introduced as evidence.

## Public and Private Cases

Most law cases were either public or private. A public case corresponded roughly to our criminal cases; it was supposed to be for an offense that injured not merely a single person but the whole community.[[7]](#footnote-7) At one time such cases may have been prosecuted by magistrates but by our period that was possible only for minor charges. The ordinary procedure was for the case to be privately prosecuted by any male citizen who chose to do so. If prosecution was successful and led to the defendant paying a fine, the prosecutor would, for many but not all sorts of cases, receive a substantial fraction of the fine, sometimes as much as half, as his reward. If the case was based on the claim that the defendant was holding property that properly belonged to the state, a successful prosecution would result in half of the property forfeiting to the state, half to the prosecutor.

Such a system raises the risk of suits against innocent defendants believed to be rich, unpopular, or both. One solution was a provision of the law under which, in many public cases, a prosecutor who failed to get at least a fifth of the jurors to vote for conviction was himself both fined and barred from any future suits of the same kind. The fine was 1000 drachmas, roughly two years’ wages for an ordinary craftsman. It was also possible to charge a prosecutor with the crime of sycophancy, abusive prosecution, although such charges were limited to at most three citizens and three metics each year.[[8]](#footnote-8)

In some cases, if the defendant was convicted, prosecutor and defendant each got to propose penalties; the jury voted on which to accept. In addition to fines, possible penalties included execution, exile, forfeiture, disfranchisement of descendants, loss of some privileges of citizenship, and, for a metic or other alien, enslavement.

The equivalent of our tort suit was a private case, a case based on the claim that the plaintiff or someone the plaintiff was representing, such as a woman or child for whom he was responsible, had been injured by the defendant. Some categories of private cases were required first to go to arbitration, the arbitrator being selected from a group of citizens in their sixtieth year. If both parties accepted the arbitrator’s verdict, the case was over. Either could instead appeal, in which case there would be a jury trial. No new evidence could be introduced; only the evidence that had been presented to the arbitrator was admissible. It was also possible for parties to bring their case to a mutually agreed upon private arbitrator whose verdict would be binding.

Murder cases were under a special part of the law believed to predate the reforms of Solon. Prosecution was normally by kin of the victim in analogy to a private case, but there may have been exceptions for someone not related who had a close relationship to the victim. For intentional murder, the penalty was execution with forfeiture of property, for unintentional killing, exile without forfeiture. A defendant who expected to lose had the option, after his first speech of the trial, of going into exile instead of proceeding with his defense.

When looking at any legal system, one question, one that we will return to in a later chapter, is what incentive those who enforce the law have to do so. If there is no benefit to the prosecutor from prosecuting offenses, it is unlikely to happen. If there is too much benefit, defendants may be prosecuted even if they have done nothing wrong. In the Athenian case, the obvious incentive was a share of fine or property in a public case, a damage payment in a private case. An additional incentive might be to injure a political enemy.

The victim of theft was entitled to get back both his stolen property and a sum equal to twice its value. We worry about police planting drugs on a suspect in the process of search; the Athenians worried about a private party planting his own property on someone in order to accuse him of stealing it. They had a simple solution. The accuser was allowed to search the house where he suspected his stolen property was hidden. But he had to do it naked.[[9]](#footnote-9)

## Miasma

Athenians, like gypsies and Cheyenne Indians, believed that certain acts resulted in pollution; their equivalent of marimé was miasma. It was contagious and it brought bad luck.[[10]](#footnote-10) One consequence was that a murder trial had to be held in the open for fear that in an enclosed space the miasma would spread from the defendant to others present. Another was that someone charged with murder was not permitted to be present in temples or courts. In one case we know of, a defendant charged with murder claimed that the only reason for the charge was to keep him from showing up in another court to prosecute a different case.[[11]](#footnote-11)

In another case the belief in miasma may have been used to get around an amnesty. The defendant, it was charged, had committed murder during the brief period when Athens, having been defeated by Sparta, was under the rule of an oligarchy. The killer could not be prosecuted for murder because the restoration of democracy had been accompanied by a blanket amnesty for crimes committed under the Thirty. Instead, according to at least one source, he was charged with entering temples and courts even though, being a murderer, he was polluted and so not permitted in such places.[[12]](#footnote-12)

Miasma shows up in at least one other oddity of the law: An object responsible for killing an Athenian had to be ceremonially exiled, removed beyond the boundaries of Attica. That reminds one of the deodand in early English law, an object which, having been responsible for someone’s death, forfeited to God via the Crown to be sold and the money applied to some pious use. It also resembles civil forfeiture in modern law. Trying a rock for murder seems odd. But we are in a poor position to make fun of the practice, given that our legal system produces civil forfeiture cases such as “*The State of California vs 88 Ford Truck*.”

## Marriage and Inheritance

As a result of a law introduced by Pericles, in order for someone to be an Athenian citizen both parents had to be citizens.[[13]](#footnote-13) Marriage was monogamous, although the husband was also permitted to have a concubine, a recognized position with less status than that of wife; the concubine could be a slave or a free non-citizen, such as a metic. A free woman, wife, concubine, or unmarried, had to have a lord, a *kyrios*,[[14]](#footnote-14) a man who was responsible for supporting her. He was also responsible for representing her at law since a citizen woman could not sue on her own behalf. Before marriage a woman's *kyrios* was her father,[[15]](#footnote-15) after marriage her husband. If her husband died and she returned to her own family her *kyrios* was again her father. If she remained in what had been her husband’s household it would be the head of that household, usually her own son or a different son of her husband.

For a woman to be first betrothed and then married required the consent not of the woman but of her *kyrios*, usually her father. Divorce was permitted at the initiative of either side, with the woman's dowry going back to the man who had provided it, again usually her father. A dying man could assign wife and dowry to another or specify in his will to whom they were to go.

When a man died, his property was divided among his sons, who were then obligated to support his widow and provide dowries for his daughters. While he had some control over the details of the division, he could not disinherit any of them save by denying his legitimacy. The only way in which he could bequeath property to someone other than his sons was by adoption, in which case the adopted son forfeited any claim he might have to inherit from his actual parents. If a man died with a daughter but no male descendants, she was required to marry the nearest male relative, outside of the narrow limits of the incest rules, who would have her. If already married, she was required to divorce her husband. One motive for these rules may have been to keep the household in existence in order that there would be someone to take care of the family tombs and do the required ceremonies on behalf of dead ancestors.

Legitimacy was a serious issue, since it affected not only inheritance but citizenship as well. Citizens took precautions to guard their wives, permitting them only very limited opportunities to go out of the household. If a man caught another in adultery with his wife he was required to divorce the wife, entitled to either kill the seducer or hold him for ransom. According to at least one source,[[16]](#footnote-16) seduction was treated as a more serious crime than rape, the latter being punished with a fine, initially 100 drachma, later set by the jury. Seen from the standpoint of the husband, that made sense; seduction implied the loss not only of confidence that his wife's children were his but also of his future trust in her.

## Liturgies: The Production of Public Goods

The Athenians had a straightforward solution to the problem of producing public goods such as the maintenance of a warship or the organizing of a public festival. If you were one of the richest Athenians, every two years you were obligated to produce a public good. The relevant magistrate would tell you which one.

“As you doubtless know, we are sending a team to the Olympics this year. Congratulations, you are the sponsor.”

Or

“Look at that lovely trireme down at the dock. Guess who gets to be captain and paymaster this year.”

Such an obligation was called a liturgy. There were two ways to get out of it. One was to show that you were already doing another liturgy this year or had done one last year. The other was to prove that there was another Athenian, richer than you, who had not done one last year and was not doing one this year.

How, in a world without accountants, income tax, public records of what people owned and what it was worth, do I prove that you are richer than I am? The answer is not an accountant’s answer but an economist’s–feel free to spend a few minutes trying to figure it out before you turn the page.

I offer to exchange everything I own for everything you own. If you refuse, you have admitted that you are richer than I am; you get to do the liturgy that was to be imposed on me.

1. At one time it was sufficient that one parent be a citizen. [↑](#footnote-ref-1)
2. Freeman estimates that the free adult male population consisted of about 30,000 citizens and 15,000 metics; allowing for women and children would bring the total free population to something between a hundred and two hundred thousand. She guesses a slave population of 200,000-400,000. *The Population of Ancient Athens* by A.W.Gomme, 1933, estimates for 431 B.C. a total population of about 315,00, of whom 40,000 were adult male citizens and 115,000 slaves. [↑](#footnote-ref-2)
3. The same was true of slaves in the ante-bellum South; there was at least one who was a steamship captain. [↑](#footnote-ref-3)
4. A temple on the Acropolis, later known as the Hephaisteion**.** [↑](#footnote-ref-4)
5. Readers interested in seeing what the speeches look like will find sixteen of them in Freeman. [↑](#footnote-ref-5)
6. This was also the rule in Roman law. [↑](#footnote-ref-6)
7. As in some of the other systems–Islamic law, for example–some offenses that we think of as crimes, such as murder, were treated as private cases. [↑](#footnote-ref-7)
8. We do not know of any actual cases where sycophancy was charged, so it is possible that the charge existed only in rhetoric. [↑](#footnote-ref-8)
9. Or possibly stripped to his underwear. [↑](#footnote-ref-9)
10. “You know that, before now, many men whose hands are unclean, or who have any other sort of pollution, have gone on board ship, and by doing so have brought destruction on the innocent souls who sailed with them, or have brought them into grave danger.” Helos, defending himself against a charge of having murdered Herodes, offers the fact that he and his shipmates did not have bad luck as evidence of his innocence. Freeman p. 81. [↑](#footnote-ref-10)
11. The same issue appears in Icelandic law as reported in *Gragas*. *K99 p. 175*. [↑](#footnote-ref-11)
12. MacDowell pp. 121-2. Michael Gagarin suggests a different possibility for how the amnesty was evaded (personal communication). [↑](#footnote-ref-12)
13. It is not clear whether marriage was ever prohibited between citizens and non-citizens, but it may have been in the fourth century. [↑](#footnote-ref-13)
14. The same title was used for the head of a household. If a woman was married to a man who lived in his father's household, her *kyrios* would be her husband but the *kyrios* of the household she was part of would be her husband's father. [↑](#footnote-ref-14)
15. Or brother or under some circumstances uncle if her father was no longer alive. [↑](#footnote-ref-15)
16. Lysias 1, but many scholars believe it to be misleading. [↑](#footnote-ref-16)