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TRANSITIONAL JUSTICE IN ANCIENT ATHENS: A CASE STUDY

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ABSTRACT

This Article presents our first well-documented example of a self-conscious transitional justice policy—the classical Athenians' response to atrocities committed during the reign of the Thirty Tyrants—as a case study that can offer insight into the design of modern transitional justice institutions. The Athenians carefully balanced retribution and forgiveness: an amnesty protected collaborators from direct prosecution, but in practice private citizens could indirectly sanction even low-level oligarchic sympathizers by raising their collaboration as character evidence in unrelated lawsuits. They also balanced remembering and forgetting: discussion of the civil war in the courts memorialized the atrocities committed during the tyranny but also whitewashed the widespread collaboration by ordinary citizens, depicting the majority of the populace as members of the democratic resistance. This case study of Athens' successful reconciliation offers new insight into contemporary transitional justice debates. The Athenian experience suggests that the current preoccupation with uncovering the truth may be misguided. The Athenian case also counsels that providing an avenue for individual victims to pursue local grievances can help minimize the impunity gap created by the inevitably selective nature of transitional justice.

1. INTRODUCTION

Most accounts of transitional justice institutions begin with the Nuremberg and Tokyo trials following World War II.[1] But, of

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course, the challenge of moving on after civil war or mass atrocity is much older—as old as organized society itself. The ancient Athenian democracy provides our first well-documented example of a self-conscious transitional justice policy. This case study of Athens' successful reconciliation following civil war offers new insight into several contemporary debates over the design of modern transitional justice institutions. More specifically, the Athenian experience suggests that the current focus on uncovering the truth may be misguided. The Athenian case also counsels that providing an avenue for individual victims to pursue local grievances can help minimize the impunity gap created by the inevitably selective nature of transitional justice.

In 404 B.C.E., Athens experienced a civil war marked by horrific violence: in an eight month-period, an oligarchic coup led by the "Thirty Tyrants" resulted in the killing of between five and ten percent of the citizenry as well as the expulsion, by some accounts, of more than half the population.[2] The restored democracy arrived at a careful balance between retribution and forgiveness. Formally, all but the top officials in the former regime were given amnesty, but in practice private citizens could indirectly sanction even low-level oligarchic sympathizers by raising their collaboration as character evidence in unrelated lawsuits. The Athenians also balanced remembering and forgetting: discussion of the civil war in the courts memorialized

[1] *See, e.g.*, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 27 (1998) ("By the end of the twentieth century, politicians, leaders, and human rights activists cited these trials as landmark contributions to the struggles for a just world order.").

[2] For discussion on the number of Athenians killed, see ISOCRATES, *Areopagiticus*, *in* ISOCRATES I 182, 197 (David C. Mirhady & Yun Lee Too trans., Univ. of Tex. Press 2000) (discussing how the Thirty Tyrants executed fifteen hundred citizens without trial) [Isoc. 7.67]; AESCHINES, *Against Ctesiphon*, *in* AESCHINES 159, 244 (Chris Carey trans., Univ. of Tex. Press 2000) [Aesch. 3.235]; ARISTOTLE, *The Constitution of Athens*, *in* ARISTOTLE AND XENOPHON ON DEMOCRACY AND OLIGARCHY 139, 178 (J.M. Moore trans., 1986) (showing that the Thirty embarked on a killing rampage, killing "no less than fifteen hundred men") [Ar. *Ath. Pol.* 35.4]; BARRY S. STRAUSS, ATHENS AFTER THE PELOPONNESIAN WAR 70–86 (1986) (providing a figure for the lowest estimate of the male citizen population at 14,000–16,250); JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS 127 (1989) (estimating that the population range throughout the fourth century was 20,000-30,000). As for the expulsion, see DIODORUS OF SICILY, *Book XIV*, *in* DIODORUS OF SICILY VI 1, 23 (C. H. Oldfather trans., Harvard Univ. Press 1933) (stating that more than half the Athenian population was driven to flee by the murders and lawless actions of the Thirty) [Diodorus Diod. 14.5.7]; ISOCRATES, *supra* note 2, at 182, 197 (declaring that over five thousand were expelled) [Isoc. 7.67].

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the atrocities committed during the tyranny but also whitewashed the widespread collaboration by ordinary citizens, depicting the majority of the populace as members of the democratic resistance. The Athenian reconciliation, which endured until Athens was defeated by Philip of Macedon, was admired throughout Greece for its success in avoiding the cycle of revolution and counter-revolution that afflicted other Greek city-states in the classical period.

This Article begins by examining why the Athenian reconciliation was so successful. I argue that Athens' unique legal culture permitted the amnesty to be implemented in a way that promoted unity while at the same time avoiding a sense of impunity at the local level. There were three aspects to this. First, in the generation following the war, speeches in the Athenian courts helped cultivate reconciliation by creating a unifying (though misleading) collective memory of the civil war that focused blame narrowly on the Thirty Tyrants, downplayed the extent of collaboration, and depicted the Amnesty not as a politically expedient compromise but as proof of the Athenians' moderation and superior character. Second, litigants' collaboration or resistance during the tyranny was often raised as character evidence in unrelated lawsuits and in fitness examinations for public officials. Athenian jury verdicts could turn on this evidence, and the very experience of being accused of collaboration before hundreds of jurors constituted a form of shaming punishment. These indirect sanctions minimized resentment at the local level by providing some limited accountability for crimes committed during the war, while also encouraging former collaborators to publicly pledge their allegiance to the democracy. Finally, Athens' civic institutions, including courts, required the regular, active participation of Athenian citizens. These institutions helped repair individual social relationships by forcing former oligarchs and democratic rebels to work together productively.

Can the Athenian experience tell us something about how we should respond to civil war and mass atrocity today? Ancient Athens may seem too far removed from the modern cultural context to provide a useful comparison. But those who study and design transitional justice institutions are already in the business of trying to draw lessons from settings that are quite different from one another—from Latin America to Western Europe to South Africa to Rwanda to Cambodia. In addition, scholars of transitional justice have tried to draw lessons from historical as

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well as contemporary transitions.[3] Athens offers another case study—in some ways an exceptionally useful one, because we know that the Athenian reconciliation worked over the long term.

Of course, definitive conclusions cannot be drawn from a single case study. We will see that the Athenians' idiosyncratic attitude toward the rule of law precludes the direct adoption of the Athenian approach. But we may be able to draw some mid-level observations from the Athenian case, observations that may be worth testing against other case studies in future transitional justice research while bearing in mind the design of contemporary transitional justice institutions.

First, the Athenian reconciliation demonstrates the importance of addressing reconciliation on the local level, both by providing an outlet for private resentments and by encouraging individuals on opposite sides of the conflict to work together. Centralized institutions that focus exclusively on high-level offenders may not be as effective as schemes that permit individual victims to air complaints. Such decentralized, victim-centered approaches can take many forms; recent transitional justice experiments that incorporate this feature include South Africa's Truth and Reconciliation Commission and Rwanda's *Gacaca* courts. Most controversially, the Athenian case casts some doubt on an assumption underlying the recent proliferation of truth commissions: the cardinal value of uncovering the truth behind the violence.

Section 1 introduces the paper while Section 2 briefly describes the reign of the Thirty Tyrants and the terms of the reconciliation agreement. Sections 3 and 4 explore why the Athenian reconciliation succeeded, tracing the decisive role played by the Athenian courts. Section 5 discusses what we might learn from Athens' successful response to mass atrocity.

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[3] *See generally* JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE (2004) (discussing several historical transitions, including Athens in 411 and 403 B.C. and France from 1814–1815); MINOW, *supra* note 1 (including a variety of historical examples, including most prominently, post-World War II Germany); RUTI G. TEITEL, TRANSITIONAL JUSTICE 27 (2000) (discussing a variety of transitions, including those in Germany, Argentina, Greece, Latin America, Central Europe, and Latin America); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762, 771–77 (2004) (examining a wide range of historical transitions, including the American Civil War and the French Revolution).

2. THE TERROR

More Athenians were killed by the Thirty Tyrants in their nine-month reign than were killed in ten years during the Peloponnesian War.[4] What follows is a basic account of the violence, with a particular emphasis on what we can discern about the level of complicity of various elements of the population. Although there are discrepancies in the sources and many facts about the oligarchic period are still contested by historians,[5] particularly the chronology of events, these debates are not relevant to our story and I will largely avoid them.

2.1. Accession of the Thirty and Judicial Murder

The Athenian Assembly had little choice in the initial appointment of the Thirty. The Athenians had been soundly defeated by the Spartans and were literally starving because of a Spartan blockade when they agreed to surrender, tear down their walls, and hand over most of their fleet. Under pressure from the Spartan commander,[6] the Assembly acceded to the local oligarchic faction and appointed thirty men to draft a constitution in accordance with the ancestral laws (*patrioi nomoi*).[7] Once in power, the Thirty ignored the order to draft a constitution and instead appointed magistrates and a new Council of 500 from among their supporters.[8] Even more ominous, they hired 300 "whip-bearing

[4] *See* XENOPHON, HELLENICA 157 (Carleton Brownson trans., Harvard Univ. Press 1918) (showing that the number of fatalities was less during the Peloponnesian War than during the reign of the Thirty Tyrants) [Xen. *Hell.* 2.4.21].

[5] *See, e.g.*, PETER KRENTZ, THE THIRTY AT ATHENS 64–67 (1982) (highlighting competing theories regarding certain aspects of the reign of the Thirty); THOMAS CLARK LOENING, THE RECONCILIATION AGREEMENT OF 403/402 B.C. IN ATHENS (1987) (examining the reconciliation agreement in depth); MARTIN OSTWALD, FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW 460–90 (1986) (detailing the reign of the Thirty); ANDREW WOLPERT, REMEMBERING DEFEAT (2002) (analyzing the civil war and its aftermath); Edwin Carawan, *Amnesty and Accountings for the Thirty*, 56.1 CLASSICAL Q. 57, 57–76 (2006) (calling into question an interpretation of the nature of the accounting levied in the aftermath of the civil war).

[6] *See* LYSIAS, *Against Eratosthenes, in* LYSIAS 113, 131 (S.C. Todd trans., Univ. of Tex. Press 2000) (revealing the Spartan Lysander's threat to the lives of the assemblymen) [Lys. 12.71–75]; DIODORUS, *supra* note 2, at 14–17 (showing how Lysander ordered the appointment of the Thirty to head the state) [Diod. 14.3.2–7].

[7] *See* XENOPHON, *supra* note 4, at 116–19 (illustrating the first treacherous steps the oligarchy took with the consent of Lysander) [Xen. *Hell.* 2.3.11–14].

[8] *See* ARISTOTLE, *supra* note 2, at 177 (stating that the Thirty disregarded the purpose for which they had been appointed and proceeded to use their

servants" to carry out their orders and intimidate the populace.[9] While it is not clear whether the Assembly decree appointing the Thirty authorized them to govern Athens temporarily until the new constitution was drafted,[10] there is no question that by refusing to issue a constitution and taking complete and indefinite control over the government, the Thirty crossed the line into illegal rule.

The Thirty immediately set to work eliminating their opponents. Jury courts had been suspended during the war and were not revived by the Thirty. Instead, the Thirty tried opponents before the Council of 500, which they packed with their own supporters. This was judicial murder. The trials appear to have been a farce: they dispensed with the secret ballot, and often relied on evidence from informants coerced to testify under threat of death.[11] One description of a trial held soon after the Thirty rose to power against men who had opposed the peace treaty with Sparta recounts the intimidating atmosphere, as members of the Council publicly cast their votes in front of the Thirty.

> The Thirty were seated on the dais. Two tables were set out in front of them, and one had to cast one's vote not into voting urns but openly on these tables, with the vote to convict going on the further table: so how could any of them [i.e., the defendants] be rescued? In a word, the death penalty was passed on all who went to the Council-chamber to face trial.[12]

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appointment to wrest and maintain control of the city) [Ar. *Ath. Pol.* 35.1]; XENOPHON, *supra* note 4, 116–19 (detailing how the Thirty misused their office to further their own goals) [Xen. *Hell.* 2.3.11–14].

[9] *See* ARISTOTLE, *The Constitution of Athens*, *supra* note 2, at 139, 177 (discussing how the hiring of such servants was part of the oligarchy's plan to control the city) [Ar. *Ath. Pol.* 35.1].

[10] The subject of *politeusousi* in Xenophon's description of the Assembly decree is unclear, but may refer to the Thirty. XENOPHON, *supra* note 4, 113–15 [Xen. *Hell.* 2.3.2]. For discussion, see OSTWALD, *supra* note 5, at 477–78, n.70 (attempting to determine the exact powers conferred on the Thirty); KRENTZ, *supra* note 5, at 50 (arguing that the Thirty were elected as a government and not simply as a legislative commission).

[11] *See* LYSIAS, *Against Agoratus, in* LYSIAS, *supra* note 6, at 137, 147, 151–52 (detailing the unfair mode by which the victims were put to death) [Lys. 13.36, 61–62]; XENOPHON, *supra* note 4, at 122–23 (showing that the Thirty killed on account of personal enmity and expediency) [Xen. *Hell.* 2.3.20–22].

[12] LYSIAS, *Against Agoratus*, *in* LYSIAS, *supra note* 6, at 137, 147, 151–52 [Lys. 13.36, 61–62].

At first, the Thirty executed only a small number of political opponents and "sycophants" (men known for bringing frivolous prosecutions). Despite the procedural irregularity of these trials, both Xenophon and Aristotle's the *Constitution of the Athenians*[13] report that these actions were widely popular.[14] Over time, the executions multiplied, and, with them, opposition to the regime: Xenophon describes the "great numbers continually—and unjustly—put to death," causing "many to band together and wonder what the state was coming to."[15]

2.2. The Creation of the 3000 and Widespread Extrajudicial Killings

Theramenes, one of the Thirty, opposed the prosecutions, arguing that the terror tactics were alienating potential supporters and weakening the regime. In response, the Thirty agreed to widen their base of support slightly by drawing up a list of 3000 citizens who would participate in the government, disenfranchising the remaining three-quarters of the population.[16] To the extent we can discern the motivations of the Thirty, they appear to have wanted to establish a society along the Spartan model, in which a narrow group of elite *homoioi* would exercise citizenship rights, relegating the rest of the population to a second-class status.[17] The 3000 appear to have been handpicked by the

[13] The *Constitution of the Athenians* was not an enacted constitution, but a partial history and description of Athenian political and legal institutions probably written by Aristotle or his students. *See* ADRIAAN LANNI, LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS 6 (2006).

[14] *See* XENOPHON, *supra* note 4, at 118–19 (showing that citizens who were not under threat of guilt were pleased with the first condemnatory and punitive steps of the Thirty) [Xen. *Hell.* 2.3.12]; ARISTOTLE, *The Constitution of Athens*, *supra* note 2, at 139, 178 (describing the initial delight of the populace with the actions of the Thirty that they deemed to be motivated by noble intentions) [Ar. *Ath. Pol.* 35.3].

[15] *See* XENOPHON, *supra* note 4, at 122–23 (showing Theramenes' musings on whether the state was being led in a good direction) [Xen. *Hell.* 2.3.20–22].

[16] *See* ARISTOTLE, *The Constitution of Athens*, *supra* note 2, at 139, 178 (describing the circumstances leading to the list of 3000 as well as Theramenes' criticisms of the creation of the list) [Ar. *Ath. Pol.* 36.1–2]; *see also* XENOPHON, *supra* note 4, at 121–23 (describing the creation of the 3000 as a response to Theramenes' concerns about the disempowerment of the citizens under the oligarchy) [Xen. *Hell.* 2.3.18–22].

[17] *See, e.g.*, KRENTZ, *supra* note 5, at 64–67 (stating that the Thirty attempted to reform Athens using a "model of idealized Sparta" and comparing the structural hierarchy of the Thirty and the 3000 with the structures of Sparta's government); *see also* OSTWALD, *supra* note 5, at 485–87 (analyzing the adoption of portions of the Spartan system by the Thirty and comparing and contrasting the 3000 with the Spartan *homoioi* and hoplite class); David Whitehead, *Sparta and the Thirty Tyrants*,

Thirty.[18] In practice, the 3000 did not play an active role in the government; we know of only one meeting of the full 3000 and one other meeting involving all hoplites and cavalry on the list, both of which were held after the democratic opposition had gained the upper hand and the Thirty was on the defensive.[19]

The consequences of exclusion from the list of 3000 went beyond the humiliation of formal disenfranchisement. The Thirty announced that anyone not in the 3000 could be killed by the Thirty without trial, while members of the 3000 had a right to a trial before the Council.[20] Not long after the list of 3000 was published, the Thirty collected the arms of the disenfranchised and began a brutal killing spree.[21] Xenophon suggests that many of the murders were motivated by personal enmity or a desire to confiscate property rather than because of political opposition.[22] The Thirty's decision to kill a number of metics (resident aliens) at one point was attributed to several different motivations: xenophobia, elimination of the political opposition, and the desire to confiscate property.[23] Isocrates claims that the number of people

in 13/14 ANCIENT SOCIETY 106, 106–30 (1982–83) (discussing the reasons why the Thirty sought to remodel Athenian society as Sparta).

[18] *See* ARISTOTLE, *supra* note 2, at 178 (describing the arbitrary factors used by the Thirty to select the list of 3000 and the secrecy surrounding the list and its revisions prior to its delayed publication) [Ar. *Ath. Pol.* 36.2].

[19] *See, e.g.*, XENOPHON, *supra* note 4, at 148–49, 156–59 (discussing the limited, inconsistent participation of the 3000 in the violence and the minor role of the 3000 during the deposition of the Thirty) [Xen. *Hell.* 2.4.9, 2.4.23]; ARISTOTLE, *supra* note 2, at 179 (describing the marginal role of the 3000 within the violent rule of the Thirty) [Ar. *Ath. Pol.* 38.1].

[20] *See* ARISTOTLE, *supra* note 2, at 178 (suggesting that the additional protection granted to the 3000 was minimal and arguing that the list of 3000 did not create a significant obstacle to the Thirty's attempts to rid themselves of opposition) [Ar. *Ath. Pol.* 36.1]; XENOPHON, *supra* note 4, at 120–21, 139–41 (describing how the Thirty simply struck Theramenes' name from the list of 3000 when it became apparent that the Council would not vote to condemn Theramenes and executed him without the vote) [Xen. *Hell.* 2.3.18, 2.3.50–51].

[21] *See* ARISTOTLE, *supra* note 2, at 179 (detailing the disarmament of the general population and the continuing violence of the Thirty) [Ar. *Ath. Pol.* 37.2]; *see also* XENOPHON, *supra* note 4, at 145 (describing the growing confidence of the Thirty and the expanding scope of their actions) [Xen. *Hell.* 2.4.1].

[22] *See* XENOPHON, *supra* note 4, at 123 (stating that the Thirty "put many people to death out of personal enmity, and many also for the sake of securing their property.") [Xen. *Hell.* 2.3.20–21].

[23] Xenophon (2.3.20-22) and Lysias (12.6) attribute the Thirty's actions to greed. XENOPHON, *supra* note 4, at 123 [Xen. *Hell.* 2.3.20–22]; LYSIAS, *Against Eratosthenes*, *in* LYSIAS *supra* note 6, at 113, 116–17 [Lys. 12.4]. Others dismiss the arguments attributing the murders to greed and fear and suggest that the Thirty

executed without trial by the Thirty over these three months was more than the number of subjects the Athenians put on trial during the entire period of its empire.[24]

2.3. Informers and Citizens' Arrests

In addition to acquiescing to the senseless violence, ordinary citizens sometimes served as informers or assisted in arrests. However rigged they may have been, trials before the Council still required some showing of evidence; this evidence could be provided by willing or unwilling informers. The trial of one such informer after the restoration of the democracy survives.[25] Predictably, the defendant seems to have made the assertion that he only testified because he was under duress, but the prosecution argues that the defendant was a willing informant, pointing out that the defendant had a chance to escape and refuse to become an informant by fleeing Athens but did not take it.[26] Interestingly, the prosecutor's narrative reveals that informers were often subject to considerable pressure. The prosecutor recounts how another man, Menestratus, became an informer only after he was arrested on a capital charge so that he could gain immunity; the prosecutor praises the heroism of one Aristophanes who refused to become an informant and was executed as a result; and the prosecutor's case is predicated on the notion that the defendant would have had to go into voluntary exile to avoid serving as an informer.[27]

The guilt of citizens who actually carried out arrests and turned individuals over to the Thirty is murkier. In Plato's *Apology*, Socrates recounts how the Thirty ordered him and four others to arrest Leon of Salamis so that he could be put to death. According

ordered the killings to suppress political opposition. *See* KRENTZ, *supra* note 5, at 80–82. Xenophobia is also presented as a possible motivation for the Thirty's action against the metics. *See* OSTWALD, *supra* note 5, at 487.

[24] *See* ISOCRATES, *Panegyricus, in* ISOCRATES II 23, 55–56 (Terry L. Papillon trans., 2004) [Isoc. 4.113].

[25] *See* LYSIAS, *Against Agoratus*, *in* LYSIAS, *supra* note 6, at 140–60 (prosecuting Agoratus for his actions as an informer) [Lys. 13].

[26] *See id.* at 146, 149–50 (stating that Agoratus could have left instead of becoming an informant but chose to stay because he believed he would be rewarded for being an informant) [Lys. 13.31, 52].

[27] *See id.* at 149–52 (arguing that Agoratus was guilty of the same crimes as Menestratus and therefore should be punished with the same sentence as Menestratus and suggesting that Agoratus should be responsible for his choice because others such as Aristophanes did not make the same decision under similar circumstances) [Lys. 13.52–61].

to Socrates, the Thirty "often ordered many others to do such things, since they wanted to implicate as many others in their causes."[28] While the four others arrested Leon, Socrates simply went home, neither taking part in the arrest nor trying to save or warn Leon. Socrates was not punished for his disobedience. Perhaps, as Socrates claims, the Thirty would have killed him in retaliation if the regime had not been close to collapse. Perhaps Socrates' special stature and association with Critias, his former student and a leader of the Thirty, saved him. Or perhaps the failure to carry out an arrest was less likely to provoke retaliation from the tyrants than other offenses. One source suggests that some citizens took revenge on personal enemies by initiating summary arrests during the killing spree.[29] After the restoration of the democracy, court speakers would at times declare their clean record during the oligarchy by stating that in addition to not being members of the Council or officers under the Thirty, they also did not carry out any arrests.[30] This suggests that citizen arrests were common, were regarded as particularly blameworthy, or both. It is interesting that speakers generally do not state that they did not serve as informers; while having been an informer may have been considered morally blameworthy, informers do not appear to have been considered part of the oligarchy in the same way that those who carried out arrests were. It seems that while it was understood that many informers testified under the true threat of death, there was a suspicion that at least some of the citizens who carried out arrests initiated the action themselves or could have avoided carrying out the Thirty's orders.

[28] PLATO, *Apology of Socrates, in* THE TRIAL AND EXECUTION OF SOCRATES 57 (Thomas C. Brickhouse & Nicholas D. Smith eds., 2002) [Pl. *Apol*. 32c-d].

[29] *See* LYSIAS, *For the Soldier, in* LYSIAS, *supra* note 6, at 95, 96–100 (detailing a soldier's argument that he was being accused for nothing more than enmity) [Lys. 9].

[30] *See id.* at 98–99 (demonstrating that the lack of participation in public office could be used as evidence supporting innocence) [Lys. 9.13–17]; *see, e.g.*, LYSIAS, *On a Charge of Overthrowing the Democracy, in* LYSIAS, *supra* note 6, at 260, 265 (defending against allegations of oligarchic sympathies by stating that "during the oligarchy nobody suffered summary arrest at my hands, none of my enemies was punished, and none of my friends was rewarded") [Lys. 25.15].

2.4. Involuntary Exile, Massacre at Eleusis, and the Rise of the Democratic Opposition

At some point after the extra-judicial murders of those excluded from the 3000, the Thirty took the additional step of banning everyone excluded from the 3000 from the urban center and confiscating their property.[31] Most of the displaced individuals settled in the Piraeus, the port and commercial center of Athens; some may have gone into exile.[32]

By this point, an opposition force made up of a small number of citizens and a larger group of mercenaries and resident aliens had formed.[33] When the resistance won a number of victories, the Thirty became nervous and decided to take the village of Eleusis, a town within Athens' territory, as a possible refuge. Xenophon describes in detail how the Thirty murdered the male inhabitants in order to take control over the town.[34] The cavalry ordered a mandatory registration of male Eleusinians under the pretense of determining how large a garrison to leave in the town.[35] After each man registered, he was ordered to walk out the city gate, where each was arrested and brought to Athens.[36] Xenophon continues:

> On the following day they summoned to the Odeum the hoplites who were on the roll and the cavalry also. Then Critias [one of the Thirty] rose and said: "We, gentlemen," . . . "are establishing this government no less for you than for ourselves. Therefore, even as you will share in honours, so also you must share in the dangers. Therefore you must

[31] *See* LYSIAS, *On a Charge of Overthrowing the Democracy*, *in* LYSIAS, *supra* note 6, at 260, 267 (recounting the expulsion of other citizens from the town) [Lys. 25.22]; XENOPHON, *supra* note 4, at 145 (describing the evictions mandated by the Thirty as one of the expansions of the Thirty's power after the death of Theramenes) [Xen. *Hell.* 2.4.1].

[32] S*ee* WOLPERT, *supra* note 5, at 18 (discussing how those not enrolled in the Three Thousand, fled to Piraeus to escape the tyranny of the Thirty). *Compare* DIODORUS, *supra* note 2, at 103–05 (stating that the Thirty transferred citizens with no political rights to Piraeus while others were exiled) [Diod. 14.32.4] *with* XENOPHON, *supra* note 4, at 145 (noting that the exiled fled to Piraeus) [Xen. *Hell.* 2.4.1].

[33] *See* KRENTZ, *supra* note 5, at 83–84 (detailing the composition of the men at Phyle: about 100 were Athenians, 300 were mercenaries, and 300 were foreigners).

[34] For a detailed description of the Thirty's strategy to take control of Eleusis, see XENOPHON, *supra* note 4, at 147–49 [Xen. *Hell.* 2.4.8–10].

[35] *Id.* at 147 [Xen. *Hell.* 2.4.8].

[36] *Id.* at 147–49 [Xen. *Hell.* 2.4.8–10].

> vote the condemnation of the Eleusinians who have been seized, that you may have the same hopes and fears as we."[37]

Those present were then instructed to vote in the open, in the presence of both the Thirty and the armed Spartan guards who had been requested to help the oligarchy keep control of Athens.[38] Nearly the entire male population of Eleusis was executed in this manner. The Thirty also massacred the inhabitants of Salamis, though our sources do not report how the murders were carried out or whether a similar vote was arranged.[39]

When the opposition forces approached the Piraeus, many of the citizens excluded from the city, as well as metics, foreigners, and even slaves joined the fight.[40] The rebels routed the Thirty in Piraeus, killing two of their leaders, including Critias. Following this defeat, the 3000 met in Athens and voted to replace the Thirty with a board of Ten; the deposed members of the Thirty settled in Eleusis.[41] As the opposition grew in strength and threatened to attack the city, the oligarchic leaders in the city asked Sparta to

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[37] XENOPHON, *supra* note 4, at 149 (footnotes omitted) [Xen. *Hell.* 2.4.9].

[38] Xenophon and Aristotle offer very different accounts of when the Spartan garrison was called in. According to Xenophon (2.3.14) they were called in very early in the reign of the Thirty, while Aristotle (37.2) states that they did not arrive until much later, after the Thirty was seriously threatened. ARISTOTLE, *supra* note 2, at 179 [Ar. *Ath. Pol.* 37.2]; XENOPHON, *supra* note 4, at 119 [Xen. *Hell.* 2.3.14].

[39] *See, e.g.*, DIODORUS, *supra* note 2, at 103–05 (stating that the Thirty killed the Eleusians and Salaminians for siding with the exiles) [Diod. 14.32.4]; *see also* LYSIAS, *Against Agoratus*, *in* LYSIAS, *supra* note 6, at 137, 148 (discussing the massacres in Salamis and Eleusis generally) [Lys. 13.44]; LYSIAS, *Against Eratosthenes*, *in* LYSIAS, *supra* note 6, at 113, 126 (describing how three hundred citizens in Salamis and Eleusis were condemned to death "by a collective vote") [Lys. 12.52].

[40] *See, e.g.*, ARISTOTLE, *supra* note 2, at 180–82 (discussing how opposing forces gained strength as all Greeks joined their side) [Ar. *Ath. Pol.* 38.3, 40.2]; DIODORUS, *supra* note 2, at 107 (explaining that exiles from around all of Greece flocked to the Piraeus "to lay siege to the city") [Diod. 14.33.4]; XENOPHON, *supra* note 4, at 159 (noting the diversity of men among the opposition forces) [Xen. *Hell.* 2.4.25].

[41] *See* ARISTOTLE, *supra* note 2, at 179 ("The men from the city returned after the battle, met in the Agora the next day, and deposed the Thirty and elected ten citizens with full powers to bring the war to an end.") [Ar. *Ath. Pol.* 38.1]; XENOPHON, *supra* note 4, at 157–59 (describing the process which led to the deposition of the Thirty and the election of the ten, which consisted of one member from each of the ten tribes) [Xen. *Hell.* 2.4.23–24].

send reinforcements.[42] The Spartans at first blockaded the Piraeus, but then changed strategy and the Spartan commander Pausanias negotiated a reconciliation agreement under which the democracy was restored.[43]

2.5. Forms of Collaboration

What were the crimes committed under the Thirty and who committed them? Between September 404 and May 403 the Thirty Tyrants executed approximately 1500 Athenians and drove out of the city and confiscated the property of thousands more.[44] Those bearing the most guilt for this violence were, of course, the senior public officials: the Thirty themselves, plus the so-called Eleven, who were the magistrates charged with carrying out executions. However, responsibility was widespread, in part because of the Thirty's deliberate strategy of implicating others.[45] Members of the Council sent countless innocents to their deaths. Some citizens gave testimony that led to executions, often to save their own lives. Other citizens arrested men and handed them over to the Eleven to be killed without trial. Some of these citizens made these arrests under threat of death and some made them on their own initiative. The cavalry arrested the men of Eleusis, and the entire armed forces voted to condemn them. More broadly, much of the

[42] *See* XENOPHON, *supra* note 4, at 161 (detailing this request for assistance and explaining Lysander's plan to blockade the men in Piraeus by land and by sea in order to induce a rapid surrender) [Xen. *Hell.* 2.4.28].

[43] *See* XENOPHON, *supra* note 4, at 161–71 (discussing the circumstances ultimately leading to Pausanias' change in strategy to restore democracy in Athens) [Xen. *Hell.* 2.4.28–43].

[44] *See* AESCHINES, *Against Ctesiphon, in* AESCHINES, *supra* note 2, at 159, 244 (noting that more than fifteen hundred citizens were killed without trial) [Aesch. 3.235]; ARISTOTLE, *supra* note 2, at 178 (detailing the widespread attacks on the citizenry which resulted in more than fifteen hundred deaths) [Ar. *Ath. Pol.* 35.4]; DIODORUS, *supra* note 2, at 23 (stating that in addition to executing ordinary citizens, the Thirty also killed wealthy citizens for their property and appropriated the property of citizens who fled to protect themselves) [Diod. 14.5.6]; *see also* ISOCRATES, *Areopagiticus, in* ISOCRATES I, *supra* note 2, at 182, 197 (contrasting the restraint of the exiles with the extensive violence of the Thirty) [Isoc. 7.67].

[45] *See, e.g.*, PLATO, *supra* note 28, at 57 ("[W]hen the oligarchy came to power, the Thirty summoned me and four others to the Rotunda and ordered us to bring Leon from Salamis to be put to death.") [Pl. *Apol.* 32c]; XENOPHON, *supra* note 4, at 149 (describing how the Thirty forced the hoplites and cavalry of Eleusis to condemn to death certain male Eleusian citizens so that they "may have the same hopes and fears as [them]") [Xen. *Hell.* 2.4.9].

population stayed in the city and did not object during the unjust judicial murders and massacres of hundreds of citizens without trial. The overall picture is one of widespread collaboration, or at least acquiescence, by the citizenry in mass violence orchestrated by a small but highly intimidating leadership.

3. "RECONCILIATION"

The Athenians remembered the reconciliation agreement as a complete success,[46] an act of generosity and unity that set Athens apart from other city-states.[47] One orator told the Athenian jury, "the whole of Greece regards you as very generous and sensible men, because you didn't devote yourselves to revenge for the past, but to the preservation of the city and the unity of its citizens."[48] The reconciliation agreement *was* successful in the sense that Athens avoided the widespread bloodshed that often accompanied civil wars in other Greek states and established a stable democracy that endured for the remainder of Athens' history as an independent state. But while Athenians on opposite sides of the conflict found a way to live and govern together in the restored democracy, our sources reveal that private, human resentment over actions taken during the oligarchy remained strong for decades after the end of the civil war.

3.1. The Terms of the Reconciliation Agreement

The terms of the reconciliation agreement were less a product of generosity than of military necessity. Although the democrats had gained the upper hand at the time of the settlement, the arrival

[46] *See* ANDOCIDES, *On the Mysteries, in* ANTIPHON AND ANDOCIDES 99, 137–38 (Michael Gagarin & Douglas M. MacDowell trans., 1998) (showing that the Athenian reconciliation was regarded as a "satisfactory settlement of mutual disagreements") [Andoc. 1.140]; ARISTOTLE, *supra* note 2, at 182 (discussing how well the Athenians managed their affairs post-reconciliation) [Ar. *Ath. Pol.* 40.3]; ISOCRATES, *Special Plea Against Callimachus, in* ISOCRATES I, *supra* note 2, at 96, 104 (arguing that Athens exhibited a superior intelligence in handling post-war civil strife) [Isoc. 18.31–32]; XENOPHON, *supra* note 4, at 171 (recognizing that the Athenians chose not to remember past grievances) [Xen. *Hell.* 2.4.43].

[47] *See* ANDOCIDES, *On the Mysteries, in* ANTIPHON AND ANDOCIDES, *supra* note 46, at 99, 137–38 (reaffirming the attitude of generosity and sensibility exhibited by the Athenians following the reconciliation) [Andoc. 1.140]; ISOCRATES, *Special Plea Against Callimachus, in* ISOCRATES I, *supra* note 2, at 96, 104 (arguing that Athens exhibited a superior intelligence in handling post-war civil strife) [Isoc. 18.31–32.].

[48] ANDOCIDES, *On the Mysteries, in* ANTIPHON AND ANDOCIDES, *supra* note 46, at 99, 137 [Andoc. 1.140].

of Spartan forces to bolster the oligarchs threatened the democrats' success.[49] Pausanias, the Spartan commander, presided over an agreement that guaranteed the restoration of the democracy but also treated the oligarchs and their supporters with relative leniency.

The highest officials of the oligarchy—the Thirty, the Ten who succeeded the Thirty, the Eleven who carried out executions, and the governors of the Piraeus—were given the option of forfeiting their Athenian citizenship to live autonomously in the village of Eleusis with any of their supporters who wished to join them.[50] Remarkably, the agreement not only gave the former oligarchs control over the village whose men they had massacred; it also forced current inhabitants of Eleusis to sell their land if one of the settlers wished to buy it.[51] This experiment in splitting Athens into two autonomous settlements was short-lived: when the Athenians learned two years later that the former oligarchs were hiring mercenaries, the Athenians killed the opposing generals and reintegrated Eleusis into a single Athenian state.[52]

The top oligarchic officials who did not want to relocate to Eleusis were permitted to remain in Athens provided they underwent an *euthuna*, a trial-like accounting of their conduct in office, and accepted any punishment meted out by the court.[53] The accounting was not an extraordinary transitional justice institution but the standard procedure faced by all outgoing officials under the democracy both before and after the revolution. The only adjustment made to the procedure was that the oligarchs were to be judged not by a jury drawn from all adult male citizens but from citizens with taxable property,[54] a form, as one scholar has

[49] *See* XENOPHON, *supra* note 4, at 171 (noting the difficulty caused by the Spartan troops prior to the eventual success of the agreement) [Xen. *Hell.* 2.4.43].

[50] *See* ARISTOTLE, *supra* note 2, at 180–81 (discussing the conditions surrounding the option to move to Eleusis) [Ar. *Ath. Pol.* 39–40.1].

[51] *See id.* (relaying how land was transferred between settlers) [Ar. *Ath. Pol.* 39.3].

[52] *See* XENOPHON, *supra* note 4, at 171 (showing that the strategic hiring of mercenaries by the oligarchs elicited a definitive response from the Athenians) [Xen. *Hell.* 2.4.43].

[53] *See* ARISTOTLE, *supra* note 2, at 181 (discussing how members of the Thirty and the Eleven and the ten governors of Peiraeus would be "immune from prosecution once they had submitted to the *euthuna*") [Ar. *Ath. Pol.* 39.6].

[54] *See id.* (noting that the jury for the *euthuna* of the governors of Piraeus were the citizens of Piraeus and the jury for the *euthuna* of the others who held office in the city was limited to citizens with taxable property) [Ar. *Ath. Pol.* 39.6].

put it, of "loser's justice."[55] The procedure appears to have been as even-handed in practice as advertised: at least one member of the Thirty appears to have consented to, and passed, an accounting,[56] and the *Constitution of the Athenians* tells us that several of members of the Board of Ten who ruled at the end of the oligarchy passed their accountings.[57]

Everyone below the top officials was granted amnesty under the agreement.[58] The Assembly swore an oath, *me mnesikakein*, which is sometimes translated as "not to remember past wrongs," but is more accurately (though less literally) translated as "not to bear a grudge" or "to cancel past grievances."[59] The amnesty banned physical retaliation and lawsuits against those who committed crimes during the oligarchy. Each year, the Council swore not to accept summary arrests that violated the amnesty, and jurors similarly swore to uphold the law and not to bear a grudge for events under the Thirty.[60] The Amnesty had one

[55] ELSTER, *supra* note 3, at 22.

[56] *See* LYSIAS, *Against Theomnestus for Defamation, in* LYSIAS, *supra* note 6, at 101, 110 (stating that someone brought a homicide charge against one or more members of the Thirty in the year 399/398, which suggests that at least one oligarch passed his accounting and remained in Athens) [Lys. 10.31]; *see also* KRENTZ, *supra* note 5, at 122 (explaining that one scholar has argued that the passages in *Against Eratosthenes* suggest that there was more than one defendant at this accounting, however, as Krentz points out, "the plural references can be understood as Lysias' attempt to condemn by association"); LYSIAS, *Against Eratosthenes, in* LYSIAS, *supra* note 6, at 113, 115 (noting the prosecution speech at the accounting of another member of the Thirty, Eratosthenes, survives although the specific outcome of the accounting is unknown) [Lys. 12].

[57] *See* ARISTOTLE, *supra* note 2, at 180 (explaining how Rhinon and his friends, members of the Board of Ten, passed their accounting under the democracy) [Ar. *Ath. Pol.* 38.4].

[58] *See* ANDOCIDES, *On the Mysteries, in* ANTIPHON AND ANDOCIDES, *supra* note 46, at 99, 137–38 (reiterating positive attitudes toward the reconciliation, as well as the fact that all collaborators below the Thirty and the Eleven were granted total amnesty) [Andoc. 1.140]; ARISTOTLE, *supra* note 2, at 181 (recognizing that complete amnesty was given to everyone except the Thirty) [Ar. *Ath. Pol.* 39.6].

[59] *See* EDWIN CARAWAN, RHETORIC AND THE LAW OF DRACO 130–31 (1998) (examining the use of the phrase in other Greek treaties and agreements); *see also* NICOLE LORAUX, THE DIVIDED CITY: ON MEMORY AND FORGETTING IN ANCIENT ATHENS 149–52 (2002) (interpreting *me mnesikakein*); David Cohen, *The Rhetoric of Justice: Strategies of Reconciliation and Revenge in the Restoration of Athenian Democracy in 403 BC*, 42 EUR. J. SOC. 335, 339 (2001) (noting that one of the possible translations of *me mnesikakein* is "not to hold a grudge").

[60] *See* ANDOCIDES, *On the Mysteries, in* ANTIPHON AND ANDOCIDES, *supra* note 46, at 99, 125 (describing the oath taken to grant amnesty for conduct which occurred under the Thirty, and to permit the Thirty and the Eleven, the main

exception: charges of homicide and wounding for actions taken during the oligarchy could proceed provided that the defendant killed or wounded "with his own hand" (*autocheir*).[61] But this exception, probably included for reasons of religious pollution, had little practical effect. Nearly all of those responsible for criminal violence committed during the civil war were shielded by the Amnesty because the actual executions were committed by the Board of Eleven, who were excluded from the Amnesty and all of whom, presumably, fled to Eleusis or into exile after the reconciliation. After the reintegration of Eleusis in 401/400, the Amnesty was reaffirmed[62] to make clear that the terms of the Amnesty extended to those who had relocated to Eleusis.[63]

3.2. Implementation and Resistance

Aside from returning the land that had been confiscated,[64] the reconciliation agreement offered little to those who had been victimized by the Thirty. Not surprisingly, some Athenians resisted complying with the Amnesty. We are told of at least one former informant who, though covered by the Amnesty, opted to

perpetrators, to remain in Athens, if they submitted to, and passed, an examination of their conduct in office) [Andoc. 1.90–91].

[61] *See* ARISTOTLE, *supra* note 2, at 181 (noting the lack of amnesty given to those who had killed another person with their own hands) [Ar. *Ath. Pol.* 39.5–6].

[62] *See id.* (showing that the Amnesty was in effect prior to the fall of Eleusis) [Ar. *Ath. Pol.* 39.6]; *see also* ANDOCIDES, *On the Mysteries, in* ANTIPHON AND ANDOCIDES, *supra* note 46, at 99, 125 (supporting the conception that the Amnesty was part of the reconciliation and that it was reaffirmed after the fall of Eleusis) [Andoc. 1.90–91]. *But see* XENOPHON, *supra* note 4, at 171 (presenting a narrative that supports the idea that the Amnesty was only instituted after the fall of Eleusis) [Xen. *Hell.* 2.4.43]. *See generally* LOENING, *supra* note 5, at 26–28 (discussing this reconciliation debate in greater detail).

[63] *See* KRENTZ, *supra* note 5, at 122 (arguing that those in Eleusis excluded from the Amnesty went into voluntary exile); LOENING, *supra* note 5, at 116–17 (noting that those in Eleusis who were excluded from the Amnesty, such as the Thirty and the Eleven, presumably went into voluntary exile to escape punishment). We are not aware of any member of the Thirty or the Eleven returning to Athens after the fall of Eleusis.

[64] *See* LYSIAS, *Against Hippotherses, in* LYSIAS, *supra* note 6, at 366, 368 (describing the complex rules in place under the reconciliation agreement surrounding the return of confiscated real property as well as movables and suggesting that payment would often have to be made for the recuperation of confiscated property) [Lys. 7]; *see also* LOENING, *supra* note 5, at 51–52 (discussing this property compensation process).

go into exile out of fear of retaliation.[65] And we hear of one man who immediately violated the Amnesty, probably by taking physical vengeance,[66] prompting one of Athens' leaders to make an example of him by having the Council execute him without trial.[67] Aristotle suggests that this measure successfully deterred those intent on private vengeance.[68] Attempts to bring private suits in violation of the Amnesty prompted the Athenians to create a new procedure, the *paragraphe*, which allowed a defendant to challenge the legality of a prosecution and imposed a financial penalty on the prosecutor if the case was thrown out.[69] And we know of a few attempts, at least one of which appears to have been successful,[70] to use creative legal arguments to get around the Amnesty and hold informants responsible for judicial murders committed under the Thirty.[71] But despite some resistance, it appears that the Amnesty was generally honored in the sense that there appears to have been very little violent retaliation and very few prosecutions brought for the thousands of confiscations, murders, and other crimes committed under the Thirty.[72]

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[65] *See* LYSIAS, *Against Andocides*, *in* LYSIAS, *supra* note 6, at 61, 74 (comparing Andocides to an informer under the Thirty who may have been tracked down and killed by his enemies in Athens) [Lys. 6.45].

[66] *See* CARAWAN, *supra* note 59, at 130–31 (discussing an example where Archinus arrested an unnamed citizen who violated the Amnesty and had him put to death without trial).

[67] *See* ARISTOTLE, *supra* note 2, at 181–82 (stating that Archinus stopped some of the returning democrats from killing their enemies) [Ar. *Ath. Pol.* 40.2]. Nepos also states that Thrasybulus stopped some of the returning democrats from killing their enemies. *See* CORNELIUS NEPOS, *Thrasybulus, in* CORNELIUS NEPOS 92, 99 (John C. Rolfe trans., 1984) [*Thrasyb.* 3.3].

[68] *See* ARISTOTLE, *supra* note 2, at 182 (suggesting that the execution examples prevented Athenians from taking both private and public revenge) [Ar. *Ath. Pol.* 40.2–3].

[69] *See* ISOCRATES, *Special Plea Against Callimachus, in* ISOCRATES I, *supra* note 2, at 97, 97–98 (describing the introduction of the *paragraphe* as a measure to stop prosecutions that violated the Amnesty) [Isoc. 18.2–3].

[70] *See* LYSIAS, *Against Agoratus, in* LYSIAS, *supra* note 6, at 137, 150–51 (stating that the informer, Menestratus, was tried and condemned) [Lys. 13.55–57].

[71] *See id.* at 150 (describing the successful prosecution of of Menestratus for being an informer) [Lys. 13.55–57].

[72] *See* XENOPHON, *supra* note 4, at 171 (stating that the demos abided by its oaths) [Xen. *Hell.* 2.4.43]; *see also* ANDOCIDES, *On the Mysteries, in* ANTIPHON AND ANDOCIDES, *supra* note 46, at 99, 125–26 (stating that Meletus had immunity for his arrest of Leon of Salamis due to the reconciliation) [Andoc. 1.94]; ISOCRATES, *Special Plea Against Callimachus, in* ISOCRATES I, *supra* note 2, at 97, 102-03 (citing a case in which the defendant presented no defense other than immunity, based on the Amnesty, and was acquitted, and describing how two powerful individuals

But was it that easy? Very seldom, and never before and after in the ancient world, has a bloodletting so great been followed by an amnesty so generous. What is striking about the amnesty is that the Athenians stuck to it long after the Spartan threat receded and despite the fact that many victims of the Thirty harbored resentment decades later.[73] How did this happen?

4. THE ROLE OF LEGAL INSTITUTIONS IN RECONCILIATION

In this section, I explore how Athenian legal institutions fostered reconciliation and a peaceful transition to democracy. I argue that Athens' unique legal and political culture permitted the terms of the reconciliation agreement to be implemented in a way that promoted unity and social solidarity while it also recognized the need to avoid impunity for collaborators at the local or private level.[74] First, in the generation following the war, speeches made in the Athenian courts helped cultivate reconciliation by creating a collective memory of the "misfortunes"[75] that downplayed the extent of collaboration and extolled Athens for the generosity embodied in the Amnesty.[76] Second, through the use of character evidence in unrelated cases and challenges to incoming officials, the Athenian courts provided some measure of individualized accountability at the private level, while also encouraging former collaborators to make a public proclamation of their allegiance to the democracy. Finally, the highly participatory nature of Athenian civic institutions—not just courts, but also polis-wide

refrained from bringing suit to recover money lost during the oligarchy because of the amnesty) [Isoc. 18.22–23].

[73] *See* LYSIAS, *Against Euandrus, in* LYSIAS, *supra* note 6, at 271, 277 (challenging a candidate to the archonship by referring to his conduct during the oligarchy) [Lys. 26.13–15].

[74] In this way, Athenian transitional justice mechanisms were not epiphenomena but instead contributed to the success of the reconciliation. *See* TEITEL, *supra* note 2, at 3–9 (arguing against the view that "[j]ustice seeking in [modern transitional] periods is fully epiphenomenal and best explained in terms of the balance of power"); *see also* Posner and Vermeule, *supra* note 3, at 770–77 (providing modern examples of transitional justice mechanisms "as causal factors that may contribute to or undermine the success of a transition").

[75] *See* ANDOCIDES, *On the Mysteries*, *in* ANTIPHON AND ANDOCIDES, *supra* note 46, at 99, 137 (referring to the civil war obliquely as "the misfortunes") [Andoc. 1.140].

[76] Excellent discussions of how Athenian court rhetoric constructed a collective memory of the civil war include WOLPERT, *supra* note 5, at 75–99 and Cohen, *supra* note 59.

and local deliberative assemblies—helped repair local relationships by forcing individuals on opposite sides of the conflict to work closely together.

A few words of background on the Athenian court system may be helpful here.[77] There were no lawyers or professional judges in ancient Athens; with few exceptions, litigants were required to deliver their own speeches to the jury.[78] Each Athenian litigant was allotted a fixed amount of time to present his case. Although a magistrate chosen by lot presided over each popular court, the magistrate did not interrupt the speaker for any reason or permit others to raise legal objections. The magistrate did not even instruct the jury as to the laws relevant to the case. Cases in the popular courts were heard by juries of adult male citizens chosen by lot and generally ranged from 201 to 501 in size. A simple majority vote of the jury, taken without deliberation, determined the outcome of the trial. No reasons for the verdict were given, and there was no provision for appeal.

Litigants regularly introduced evidence—such as character evidence relating to the litigant's military service or how he treated his parents—that modern courts would deem irrelevant and/or prejudicial.[79] Evidence of a litigant's collaboration or resistance during the civil war could influence jury verdicts in part because Athenian jurors did not feel constrained to strictly apply the statute under which a case was brought.[80] The treatment of law in the surviving speeches is consistent with Aristotle's characterization of laws as a form of evidence, similar to contracts and witness

[77] *See generally* LANNI, supra note 13, at 31–40 (outlining the structure of the Athenian legal system).

[78] A litigant could donate some of his time to another speaker. For an in-depth study of the use of supporting speakers in Athenian courts, see LENE RUBINSTEIN, LITIGATION AND COOPERATION: SUPPORTING SPEAKERS IN THE COURTS OF CLASSICAL ATHENS (2000).

[79] *See generally* LANNI, *supra* note 13, at 41–74 (discussing extra-legal arguments brought up in Athenian courts).

[80] For a more detailed discussion, see generally *id.* Although others have reached a similar conclusion, for example MATTHEW R. CHRIST, THE LITIGIOUS ATHENIAN 193–224 (1998) ("The laws are a splendid thing; but a man who looks too closely to the laws is clearly a sykophant [sic].") (quoting Menander). Some disagree. *See, e.g.*, P.J. Rhodes, *Keeping to the Point*, *in* THE LAW AND THE COURTS IN ANCIENT GREECE 137 (Edward M. Harris & Lene Rubinstein eds., 2004) (arguing for a more qualified notion of relevance in Athenian litigation).

testimony, rather than as a decisive guide to a verdict.[81] The Athenian laws were inscribed on stone *stelai* in various public areas of Athens. Litigants were responsible for finding and quoting any laws they thought helped their case, though there was no obligation to explain the relevant laws. Rather than focusing on the elements of the particular charge at issue and applying them to the facts of the case, Athenian litigants would sometimes cite an array of laws that did not govern the charges in the case,[82] and on occasion would not consider it relevant to discuss—or even mention—the law under which the suit was brought.[83] In many cases, the primary purpose of the relevant law may have been to set out a procedure for bringing a case to court. The jury then attempted to arrive at a just outcome for the broadly defined dispute.

Before discussing the three mechanisms through which the courts fostered reconciliation in more detail, I would like to emphasize one broader point: the Athenian legal system was able to perform these functions without any significant change in its culture or design—a continuity that gave it a distinct advantage over modern institutions charged with dispensing transitional justice. The broad notion of relevance and the contextualized

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[81] *See* ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 102 (George A. Kennedy trans., Oxford Univ. Press 2007) (discussing five items—laws, witnesses, contracts, tortures and oaths—that factor into judicial rhetoric) [Ar. *Rhet.* 1.15].

[82] Speakers sometimes cited laws to bolster their portrayal of the character of the parties. *See, e.g.*, Michael de Brauw, "*Listen to the Law Themselves": Citations of Laws and Portrayal of Character in Attic Oratory*, 97.2 CLASSICAL J. 161 (2001–2002) (exploring the citation of law in Athens as a means to portray character). Speakers also cited the law to give the general impression that the laws supported their position. *See, e.g.*, C. Carey, *Nomos in Attic Rhetoric and Oratory*, 116 J. HELLENIC STUD. 33, 34 (1996) (arguing that litigants sometimes cite multiple law of questionable relevance "to overwhelm the jury with a seemingly compelling array of legal support"). Ford provides a case study of the use of law in Aeschines' *Against Timarchus.* He notes that the discussion of the law at issue, which accounts for only one-sixth of the speech (1.28–32), is surrounded by a number of laws irrelevant to the charge but useful in constructing an image of the education and moral character of a proper orator that can be contrasted with the record and character of the speaker's opponent. Andrew Ford, *Reading Homer from the Rostrum: Poems and Laws in Aeschines'* Against Timarchus*, in* PERFORMANCE CULTURE AND ATHENIAN DEMOCRACY 231, 241 (Simon Goldhill & Robin Osborne eds., 1999).

[83] *See, e.g.*, LYSIAS, *Against Nicomachus, in* LYSIAS, *supra* note 6, at 296 (omitting any citation to a law) [Lys. 30].

approach to adjudication characteristic of Athenian courts[84] made them a more effective forum for the creation of collective memory than modern war crimes tribunals. In modern tribunals, the desire of prosecutors or judges to use the trial to create a shared understanding of the causes of 'administrative massacres'—atrocities perpetrated with the assistance of the modern bureaucratic state—is inevitably constrained by the law's narrow focus on the conduct and responsibility of the individual defendants.[85] Athenian court procedures, by contrast, could comfortably accommodate these non-traditional goals. Moreover, in the modern context, the creation of special transitional justice procedures—whether they are courts, truth commissions, or procedures for administrative penalties—inevitably raises questions of legitimacy on two grounds. First, they are often perceived to be politicized because they are ad hoc institutions designed to address a specific political crisis.[86] Second, modern transitional justice institutions subject individuals to procedures and, on occasion, substantive legal standards that did not exist at the time the prosecuted conduct occurred.[87] By contrast, Athens' legal response to the atrocities of the Thirty utilized only pre-existing democratic legal procedures precisely because these procedures could accommodate transitional justice goals. In this way, "transitional justice" in Athens was not a departure from but rather an integral part of the restored democratic order.

Was Athenian legal culture the most important element in the success of the reconciliation? It is impossible to prove definitively, but it is worth pointing out that the other obvious, potential factors cannot completely explain Athens' peaceful transition. Political

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[84] *See generally* LANNI, *supra* note 13, at 41–74 (describing the use and relevance of extra-legal arguments within the Athenian legal system).

[85] *See* Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 13 (2002) ("[T]he meaning of historical events often exceeds the intentions or actions of particular individuals and can be grasped only by attention to structural causes, . . . or a broad institutional logic through which the actions by individuals create social effects."); *see also* MINOW, *supra* note 1, at 46–47 ("[T]he focus on select individuals cannot tell the complex connections among people that make massacres and genocides possible.").

[86] *See, e.g.*, MINOW, *supra* note 1, at 30–31 (describing the contemporary criticisms of the International Tribunal's actions during the Nuremberg trials).

[87] *See id.* (discussing the problem of retroactivity at the Nuremberg, Bosnia and Rwanda tribunals); *see also* TEITEL, *supra* note 2, at 11–26 (exploring the meaning of "the rule of law" within societies undergoing political transformation).

scientists in the realist tradition often argue that transitional justice measures are epiphenomenal, and that successful reconciliations can be traced to equilibrium between well-balanced opposing forces. This explanation does not work for the Athenian case. It is true that the initial settlement emerged from a stalemate between the rebels and the Spartan-backed oligarchs. However, once the settlement had been made the Spartans quickly made their exit. There was no balance of power; the democrats were firmly in control and in a position to exact harsh retribution on the former oligarchs if they had chosen to do so. Moreover, the picture that emerges of postwar Athens is not of two opposing factions in equipoise, but rather of a united restored democracy in which a fair number of former oligarchs played an active role. In addition, although Athens faced dire economic and military danger after the loss of its empire and could not afford continued internal strife,[88] Thucydides provides examples of other cities in the grip of civil war who failed to act rationally, cities for whom, in his words, "[r]evenge was more important than self-preservation."[89] Similarly, the absence of racial or ethnic differences between the factions does distinguish Athens from many modern transitions, but it does not explain why Athens was more successful than other, similarly ethnically homogenous, Greek city-states that also experienced civil wars. Finally, some scholars argue that the constitutional reforms at the end of the fifth century removed the basis for oligarchic discontent.[90] But there is no question that, at least in intellectual circles, many people—Plato being the most prominent example—remained dissatisfied with the democracy and were attracted to oligarchic forms of government.

While we cannot determine precisely how much of Athens' success can be attributed to the discourse in the courts, we do know that Athens was nearly alone in avoiding the cycle of retribution that afflicted other city-states during and after the Peloponnesian War. We also know that its legal system was very

[88] *See, e.g.*, OBER, *supra* note 2, at 98–100 (describing the dire economic and political situation in Athens after the war).

[89] *See* THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 209 (Rex Warner trans., Penguin Books 1954) (discussing the deterioration of law and order in favor of revenge and greed during the revolution in Corcyra) [Thuc. 3.82].

[90] *See, e.g.*, ELSTER, *supra* note 3, at 14–15 (describing a provision in the reformed constitution which promoted democratic procedures by prohibiting the use of laws not included within the written code and requiring proposed revisions to the law to pass a series of discussions before the Assembly).

different from any other city-state, indeed different from just about any other legal system the world has known. Thus it seems worthwhile to try to identify aspects of the legal system in Athens that may have produced this extraordinary outcome.

4.1. Courts and Collective Memory

Legal procedures following administrative massacres can influence the society's "collective memory" of these events, that is, the community's shared understanding of the extent and reprehensibility of the atrocities and the relative culpability of the different actors.[91] Trials can serve as legal rituals, which, in the words of David Garland, "provide a kind of didactic theatre through which the onlooker is *taught* what to feel, how to react, [and] which sentiments are called for."[92] While there is no blueprint for designing transitional justice institutions that will positively influence collective memory, the twentieth century offers some success stories.[93] In Western Europe, for example, it has been found that the collective memory of the Holocaust (judged from opinion surveys and textbooks) is weakest and least accurate in those countries that conducted few or no postwar trials of collaborators.[94] It is important to note that a society's collective memory need not be historically "accurate" to generate social solidarity; the siege of Masada and the denial of extensive French collaboration during World War II are examples of shared historical fictions that are thought to have fostered solidarity.[95]

[91] *See, e.g.*, MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 2 (1997) ("Trials of those responsible for large-scale state brutality . . . indelibly influence collective memory of the events they judge."); TEITEL, *supra* note 2 (exploring how "transitional accountings" helps construct a state's political identity); Koskenniemi, *supra* note 85, at 12 (describing how past "normality" is politicized when seeking transitional justice).

[92] DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 67 (1990) (emphasis added); *see also* OSIEL, *supra* note 91, at 2 ("By highlighting official brutality and public complicity . . . trials often make people willing to reassess their foundational beliefs and constitutive commitments, as few events in political life can do.").

[93] *See* OSIEL, *supra* note 91, at 59–239 (describing the positive impact of transitional justice institutions in Germany and Japan and identifying the effective and ineffective components of the respective institutions).

[94] *Id.* at 229 (noting that the countries with the weakest collective memories—Austria, Poland, Italy and the Netherlands—did not conduct significant postwar trials).

[95] *Id.* at 234 (describing the re-characterization of the siege of Masada as a means of creating a unified collective memory in Israel).

Similarly, we will see that the shared memory of the reign of the Thirty tyrants constructed in Athenian court discourse helped foster unity by denying the true extent of collaboration and by depicting the Amnesty as a gesture of pure benevolence rather than a deal struck between evenly-matched forces.[96]

Despite the Amnesty, the reign of the Thirty was discussed frequently in Athenian courts in the generation after the civil war. At least one member of the Thirty, and several members of the Ten, underwent accountings (*euthunai*) in court and the prosecution speech against Eratosthenes, a member of the Thirty, still survives.[97] Allegations of wrongdoing during the oligarchy arose frequently in examinations of incoming public officials (*dokimasia*); portions of two prosecution speeches and two defense speeches at these hearings have survived.[98] We also have speeches involving two prosecutions that appear to have violated the Amnesty: the prosecution of an informer for homicide, and the *paragraphe* speech challenging the legality of a private suit under the Amnesty which attempted to recoup money confiscated during the oligarchy.[99] In addition to trials that centered on events during the civil war,

[96] *See* Cohen, *supra* note 59, at 348 ("In Athens, after the restoration, democratic politicians realized the uses to which critiques of oligarchy could be put and were quick to occupy the high ground of the rule of law by appropriating its rhetoric for their cause."); WOLPERT, *supra* note 5, at 75 ("Through civic discourse, [the Athenians] distanced themselves from the Thirty while simultaneously constructing a continuity with the democracy of the fifth century.").

[97] *See* LYSIAS, *Against Eratosthenes*, *in* LYSIAS, *supra* note 6, at 113 (accusing Eratosthenes of the murder of Lysias' brother Polemarchus) [Lys. 12].

[98] The prosecution speeches are: LYSIAS, *Against Euandrus, in* LYSIAS, *supra* note 6, at 271 (challenging Euandrus at his *dokimasia* for the archonship based on his conduct during the civil war) [Lys. 26]; LYSIAS, *Against Philon, in* LYSIAS, *supra* note 6, at 308 (challenging the candidature of Philon to the Council of Five Hundred) [Lys. 31]. The defense speeches are: LYSIAS, *For Mantitheus, in* LYSIAS, *supra* note 6, at 177 (defending the candidate against accusations of having served in the cavalry under the Thirty during a *dokimasia*) [Lys. 16]; LYSIAS, *For Eryximachus, in* LYSIAS, *supra* note 6, at 378 (defending Eryximachus against the allegation that he supported the Thirty during the civil war) [Fr. 9 *For Eryximachus*].

[99] *See* LYSIAS, *Against Agoratus, in* LYSIAS, *supra* note 6, at 137 (prosecuting an informer, Agoratus, for murders committed under the Thirty) [Lys. 13]; ISOCRATES, *Special Plea Against Callimachus*, *in* ISOCRATES I, *supra* note 2, at 96 (offering the first special plea, in which the speaker defends himself against the admissibility of the prosecutors charge, in Athenian history) [Isoc. 18].

several court speeches discuss the reign of the Thirty, the Amnesty, or the conduct of litigants during the oligarchy.[100]

Of course, the courts were not the only forum for constructing collective memory. War memorials erected after the restoration of the democracy and funeral orations honoring the war's dead (and praising Athens' superior character and form of government), which were delivered annually when Athens was at war, also contributed to Athens' shared understanding of the tyranny and the Amnesty.[101] Despite the importance of drama and the arts in many modern post-conflict societies, Athenian drama was most likely less significant in post-war Athens. From early on, tragedies were almost always set outside Athens and were often concerned with mythological themes. When Athenian tragedy did address contemporary politics, it only did so obliquely and ambiguously. Though comedies in the fifth century, such as those of Aristophanes, often parodied issues of the day, by the fourth century—the age of "middle comedy"—comic subjects had turned from political commentary to domestic life. In any case, no forum could rival the courts as a medium of collective discourse regarding the civil war: these courts met approximately 200 times a year;[102] the importance of character evidence made discussion of

[100] *See, e.g.*, ANDOCIDES, *On the Mysteries*, *in* ANTIPHON AND ANDOCIDES, *supra* note 46, at 99, 137 (praising the jury for focusing on preserving the city and unity among its citizens) [Andoc. 1.140]; LYSIAS, *On the Property of Nicias' Brother*, *supra* note 6, at 195 (discussing the actions of Diognetus during the reign of the Thirty) [Lys. 18.10]; LYSIAS, *For the Disabled Man*, *in* LYSIAS, *supra* note 6 (denying accusations relating to the defendant's conduct during the civil war in an effort to receive a disability pension) [Lys. 24]; LYSIAS, *On Overthrowing the Democracy*, *in* LYSIAS, *supra* note 6, at 265 (discussing how the litigant did not take advantage of the chaos and punish his enemies or attempt to advantage his friends during the city's defeat) [Lys. 25.15]; LYSIAS, *Against Ergocles*, *in* LYSIAS, *supra* note 6, at 291 (challenging the defendant on his actions while in office) [Lys. 28.12]; LYSIAS, *Against Nicomachus*, *in* LYSIAS, *supra* note 6, at 301 (discussing political intrigues that were aided by laws the defendant produced) [Lys. 30.12]; Plato, *supra* note 28, at 57 (describing the oligarchy under the Thirty) [Pl. *Apol*. 32 c–d].

[101] *See* WOLPERT, *supra* note 5, at 87–90 (discussing the functions of war memorials in Athens and how certain war memorials became symbols of the Athenian democracy). The only surviving epitaphios from the immediate postwar period is Lysias 2, which does praise the Athenians' decision to forgo punishment in favor of unity. LYSIAS, *Funeral Speech*, *in* LYSIAS, *supra* note 6, at 38–39 [Lys. 2.60–65]. For a brilliant study of how funeral orations helped construct a semi-official (and misleading) history of Athens, see NICOLE LORAUX, THE INVENTION OF ATHENS (1986).

[102] *See* MOGENS HERMAN HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES: STRUCTURE, PRINCIPLES, AND IDEOLOGY 186 (J.A. Crook trans., Univ. of Okla. 1999) (noting that the courts met approximately 200 times per year).

the civil war likely in cases tried in the postwar period;[103] and hundreds of jurors were present at each case.

The discourse in the courts fostered reconciliation in three ways, which I will discuss in turn: (1) discrediting the oligarchy by depicting the horrors of the tyranny; (2) constructing unity by downplaying the extent of collaboration and focusing blame on the Thirty; and (3) praising the Amnesty as characteristic of the Athenians' unusual wisdom and benevolence.[104]

4.1.1. Discrediting the Oligarchy

Athenian trials publicized the crimes committed by the Thirty, thereby discrediting the former regime. The broad notion of evidence in Athenian courts permitted prosecutors to reach beyond the specific charges against the defendant to describe the larger pattern of tyranny. For example, the prosecution of an informant whose testimony led to a judicial murder early in the Thirty's reign, includes discussion of atrocities that did not involve the defendant and were committed after the events in question, including the massacres of Salamis and Eleusis, unjust arrests and executions, confiscations of property, and the expulsion of all but the 3000 from the city.[105] The trial at Eratosthenes' accounting provides another example. The prosecution speech includes a detailed and poignant description of the murder of the speaker's brother in the massacre of the resident aliens that emphasizes the outrageousness of the Thirty, who had the audacity to rip the earrings directly from the ears of the victim's wife and refused to let the family have one of the victim's cloaks to give him a proper burial.[106] But the speech also includes a detailed account of how

[103] *See* LANNI, *supra* note 13, at 41–74 (discussing the use and influence of character evidence in cases heard in post war Athenian courts).

[104] *See* WOLPERT, *supra* note 5 (analyzing the discussions of the civil war by court speakers and noting the rhetorical strategies discussed in this Section); Cohen, *supra* note 59 (discussing the rhetorical strategies employed in courts to foster reconciliation).

[105] *See* LYSIAS, *Against Agoratus, in* LYSIAS, *supra* note 6, at 137, 148–49 (describing the disasters that befell Athens after Agoratus killed the men who went to the Council's chamber to face trial) [Lys. 13.43–48].

[106] *See* LYSIAS, *Against Eratosthenes, in* LYSIAS, *supra* note 6, at 113, 119 (noting that the Thirty's administration of justice toward Polemarchus began with a summary arrest and instructions to drink hemlock and ended with the denial of a customary burial) [Lys. 12.17–19].

the oligarchy came to power[107] and a recitation of the collective crimes of the Thirty.[108] While the speaker opines that many prosecutors would be required to describe all the crimes of the Thirty,[109] the speech does manage to provide a broad-ranging account of the crimes committed under the oligarchy and an assessment of where the primary responsibility should lie.

These public airings in court of the oligarchy's horrific crimes helped discredit not only the former regime, but also oligarchic opposition to the democracy more generally.[110] The repressive rule of the Thirty, with its rigged trials and extra-judicial murders, made it easy for democrats to associate oligarchy with lawless tyranny. Although oligarchic sympathies survived and even thrived in elite intellectual circles in the fourth century,[111] oligarchy became a political non-starter after the civil war. As Cohen points out, decades later even those too young to have been involved in the Thirty could be tarred with accusations of having oligarchic tendencies.[112] The prosecutor in an assault case derides his opponent: "Even if he is younger than those who held power then [i.e., under the oligarchy], he has the character of that government. These were the natures that betrayed our empire to the enemy, razed the walls of our homeland, and executed fifteen hundred of our citizens without trial."[113]

4.1.2. Constructing Unity

Like many modern transitional justice legal procedures, then, Athenian trials helped to instill a shared sense of condemnation of the crimes committed by the former regime. But while many

[107] *See id.* at 130–31 (describing Theramenes' political strategy for depriving the people of hope in order to overpower them) [Lys. 12.70].

[108] *See id.* at 135 (calling for a display of anger for the crimes committed by the Thirty) [Lys. 12. 95–96].

[109] *See id.* at 136 (closing the argument in the prosecution speech against Eratosthenes, a former member of the Thirty, and calling for a favorable verdict) [Lys. 12.99].

[110] *See* Cohen, *supra* note 59, at 347–49 (discussing the methods used to discredit the oligarchy).

[111] Isocrates, Plato, and Aristotle are prominent examples.

[112] *See* Cohen, *supra* note 59, at 347–49 (discussing the accusations placed upon those who lived under the oligarchy even where they had no direct role in its rule).

[113] ISOCRATES, *Against Lochites, in* ISOCRATES I, *supra* note 2, at 123, 126 [Isoc. 20.10–11]; *see also* Cohen, *supra* note 59, at 349 (discussing the lasting taint of the oligarchy on those who lived under its rule).

modern tribunals or truth commissions seek in part to encourage the broader public to engage in self-scrutiny and confront their own complicity,[114] Athenian court speakers did nothing of the kind. In the decades after the civil war, litigants who discussed the violence under the oligarchy took pains to focus blame narrowly on the Thirty while downplaying the extent of collaboration. This understanding of events was quite explicit in the speeches. To cite one stark example: in discussing the massacre of the metics (resident aliens) at the accounting of Eratosthenes, the prosecutor states, "[t]he rest of the Athenians [i.e. those not in the Thirty], it seems to me, could have a plausible excuse for what happened by laying the blame on the Thirty . . . ."[115] Both defendants and prosecutors in suits involving participation in the crimes of the oligarchy take this approach, depicting the entire citizenry as opponents and victims of the Thirty.[116] Undoubtedly the speakers (and their speechwriters) chose this tack because they thought that it would be well received by the jurors. But the effect of this rhetorical strategy was to help construct a misleading collective memory of a unified populace victimized by the tyrannical Thirty.

Lysias' depiction in the accounting trial of Eratosthenes of the process by which the Thirty came to power provides an example. His narrative places blame squarely on Theramenes, a member of the Thirty, and minimizes the role of the Athenians who did, after all, vote the Thirty into office.[117] Lysias' account of the Assembly meeting minimizes the citizens' responsibility as much as possible: he states that many in the Assembly initially opposed the proposal, and even after the Spartan general threatened to destroy Athens if they did not acquiesce, some Athenians got up and left the

114 *See* OSIEL, *supra* note 91, at 192–95 (discussing the trial of Auschwitz guards, which seems to have had this effect, and the 1983 junta trial in Argentina, which also seems to have been premised on this idea, but was less successful).

115 *See* LYSIAS, *Against Eratosthenes, in* LYSIAS, *supra* note 6, at 113, 121 [Lys. 12.28].

116 *See id.* at 121 (addressing the jurors as victims of the Thirty) [Lys. 12.30]; LYSIAS, *Against Euandrus, in* LYSIAS, *supra* note 6, at 271, 274–78 (illustrating how the prosecutors depicted the entire citizenry as the victims of the Thirty in the trials of Euandrus) [Lys. 26.1–16]; ISOCRATES, *Special Plea Against Callimachus*, *in* ISOCRATES I, *supra* note 2, at 97 (assuming all the juries had been in Piraeus rather than the city) [Isoc. 18.2].

117 *See* LYSIAS, *Against Eratosthenes, in* LYSIAS, *supra* note 6, at 113, 130–31 (chronicling the Thirty's rise to power beginning with Theramenes' demand that the city be entrusted to the control of thirty men) [Lys. 12.70–75].

Assembly, others stayed but remained silent, and only a "few evil-minded scoundrels voted the proposal through."[118]

Perhaps most striking is the historical fiction, employed in several speeches, that every member of the jury was a member of the resistance in the Piraeus and/or a direct victim of the Thirty. As several scholars have pointed out, although most jury panels must have included members of the 3000 and other types of collaborators, speakers regularly address the jury as former men of the Piraeus, and describe how the jurors, addressed as "you," were driven out of the city, had their property confiscated, houses invaded and family members taken, took part in freeing the city, and returned from the Piraeus.[119]

A rare exception is a passage in Lysias' prosecution of Eratosthenes at his accounting, in which he briefly addresses "those from the city (*astu*)" and "those from the Piraeus" separately. But even this passage has a unifying message. Lysias depicts the men who remained in the city as innocent victims forced to fight against their own kin: "you who are from the town should realize that the defendants ruled you so badly that you were compelled to fight a war against your brothers, your sons, and your fellow-citizens . . . ."[120] The prosecutor goes on to emphasize that the former men of the city have gone from being slaves of the oligarchy and their Spartan garrison to participating in governing the polis and joining with the democrats to protect it from external threats:

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[118] *Id.* at 131 [Lys. 12.75].

[119] For prosecutors' attempts to persuade juries that the defendants were the victims of the crimes committed by the Thirty, see *id.* at 121, 127 [Lys. 12.30, 57], LYSIAS, *Against Agoratus, in* LYSIAS, *supra* note 6, at 137, 148–49 [Lys. 13.47], and LYSIAS, *Against Euandrus, in* LYSIAS, *supra* note 6, at 271, 274 [Lys. 26.2]. *See also* ANDOCIDES, *On the Mysteries*, *in* ANTIPHON AND ANDOCIDES, *supra* note 46, at 99, 122 (addressing the jury as if they were all direct opponents of the Thirty's rule and direct participants in the restoration of democracy) [Andoc. 1.81]; ISOCRATES, *Special Plea Against Callimachus, in* ISOCRATES I, *supra* note 2, at 96, 97 (assuming that the entire jury had been in exile in the Piraeus) [Isoc. 18.2]; WOLPERT, *supra* note 5, at 90–94 (describing why speakers address the jury as though they had all been in the Piraeus); Cohen, *supra* note 59, at 341 (discussing the nature of the prosecutions of those who had collaborated with the Thirty).

[120] LYSIAS, *Against Eratosthenes, in* LYSIAS, *supra* note 6, at 113, 135 [Lys. 12.92]. *See also* ISOCRATES, *Special Plea Against Callimachus*, *in* Isocrates I, *supra* note 2, at 101, 101–02 (emphasizing that while some citizens participated in arrests and property confiscations they did so only out of compulsion) [Isoc. 18.17].

> Realize that you were ruled by the defendants, who were the worst of men; realize too that you now share the government with good men, you are fighting against external enemies, and you are taking counsel for the city; and remember the mercenaries [i.e., the Spartan garrison employed by the Thirty] that the defendants established on the Acropolis as guardians of their power and of your slavery.[121]

One speaker goes so far as to state that the men who did not actively participate in the killings but remained in the city can claim credit for the overthrow of the oligarchy, suggesting, contrary to our historical evidence, that victory was secured by widespread political opposition within the city.[122] To be sure, the use of these rhetorical topoi in court did not erase individual victims' resentment against specific collaborators who had done them harm. But the collective memory of the oligarchy constructed in the courts may have made victims more willing to trust men whose level of active collaboration was minimal or unknown to them. For those who had remained in the city, the discourse in the courts offered a rationalization for past collaboration and provided comfort that there was a place for them in the restored democracy.

4.1.3. Praising Amnesty

Finally, court speeches in the years after the civil war helped create a myth in which the Amnesty, and the forgiveness that it implied, exemplified the Athenians' superior character. To be sure, defendants accused of collaboration often defend the Amnesty on pragmatic grounds, arguing that taking retribution would endanger the democracy by alienating former oligarchs.[123] But

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121 LYSIAS, *Against Eratosthenes, in* LYSIAS, *supra* note 6, at 113, 135 [Lys. 12.94].

122 *See* LYSIAS, *Against Euandrus, in* LYSIAS, *supra* note 6, at 271, 278–79 (attributing the defeat of the Thirty to the people) [Lys. 26.18–19].

123 *See* ANDOCIDES, *supra* note 46, at 128 (noting the importance of the jurors' decisions in creating precedents for which laws and customs will be followed by the public) [Andoc. 1.105]; ISOCRATES, *Special Plea Against Callimachus, in* ISOCRATES I, *supra* note 2, at 96, 106 (arguing that if amnesty is destroyed then civil strife will result) [Isoc. 18.44]; LYSIAS, *On Overthrowing the Democracy*, *in* LYSIAS, *supra* note 6, at 260, 262–68 (speaking in defense of his right to hold public office and arguing that the jury should be wary of alienating citizens with accusations of misdeeds during the civil war) [Lys. 25.1–28]; James M. Quillin, *Achieving Amnesty: The Role of Events, Institutions, and Ideas*, 132 TRANSACTIONS AM. PHILOLOGICAL ASS'N 71

speakers also praise the Amnesty in a way that made a powerful appeal to the Athenians' honor. In these passages, the Amnesty is transformed from a concession made out of military necessity to an act of will that defines the Athenian democratic spirit.[124] Speakers argue that the Athenians' willingness to reject revenge earned them a reputation throughout Greece for extraordinary generosity, reasonableness, and wisdom.[125] Under this re-imagining, the Amnesty was not a reminder of the darkest period in Athenian history, but rather the manifestation of one its high points, worthy of celebration. The speaker in Isocrates 18 states:

> [W]hile our ancestors accomplished many noble things, the city has won renown not least from these settlements. You can find many cities that have fought nobly in war, but no one could point to a city better advised with regard to civil strife (*stasis)*. Moreover, of those activities that carry risk, one might ascribe the greatest part to luck, but no one would attribute the credit for our moderation to anything other than our intelligence.[126]

We can see evidence that this identification as a democracy with moderation took root: in the fourth century authors refer to the Athenians' characteristic mildness or forbearance in contexts unrelated to the civil war.[127] Again, it is difficult to imagine that

(2002) (arguing that the surprising leniency toward former oligarchs was rational because it appeased former oligarchs and prevented unrest).

[124] *See* AESCHINES, *On the Embassy*, *in* AESCHINES, *supra* note 2, at 88, 156 (stating that because of the Amnesty "the world thought our city exceptionally wise") [Aesch. 2.176]; ANDOCIDES, *On the Mysteries*, *in* ANTIPHON AND ANDOCIDES, *supra* note 46, at 99, 137–38 (praising the Athenians' wisdom in refraining from taking revenge on those who lived under the Thirty's rule and arguing that the public's unified vote would determine whether they would rely on the laws of Athens or find other means to escape their accusers) [Andoc. 1.140]; Cohen, *supra* note 59, at 354–55 (noting that the portrayal of reconciliation helped unify the polis over its enemies); ISOCRATES, *Special Plea Against Callimachus, in* ISOCRATES I, *supra* note 2, at 96, 102, 104 (praising Athenians for their moderation and wisdom in dealing with civil strife) [Isoc. 18.22, 31–32].

[125] *See* ANDOCIDES, *On the Mysteries*, *in* ANTIPHON AND ANDOCIDES, *supra* note 46, at 99, 137–38 (praising the Athenians as generous and sensible for not seeking revenge) [Andoc. 1.140]; AESCHINES, *On the Embassy, in* AESCHINES, *supra* note 2, at 88, 156 (noting that the success of the Amnesty earned the Athenians a world-wide reputation for wisdom) [Aesch. 2.176].

[126] ISOCRATES, *Special Plea Against Callimachus, in* ISOCRATES I, *supra* note 2, at 96, 104 [Isoc. 18.31–32].

[127] *See, e.g.*, ARISTOTLE, *supra* note 2, at 165 (discussing how within the customary forbearance of the Athenian democracy, only those who had

these encomia of the Amnesty could induce victims to forgive individuals directly responsible for the murder of their kin. Nevertheless, the Amnesty—which was reaffirmed by collective oath each year by jurors and members of the Council and was widely praised in court speeches—may have had some expressive effect, encouraging the Athenians to live up to their myths and take a more conciliatory attitude toward former collaborators who did not personally cause them harm.

4.2. Courts and Indirect Accountability

A recurring theme in studies of modern transitions is that many victims seem to get more satisfaction from the punishment or acknowledgment of guilt by local perpetrators, as distinguished from broad-ranging investigations of wrongdoing or trials of high-level war criminals.[128] A common complaint among modern victims is repeatedly seeing neighbors, co-workers, and fellow-villagers who collaborated in atrocities going about their lives as if nothing had happened.[129] Due to the fact that Athenian victims

committed crimes during civil unrest were not allowed to live in Athens) [Ar. *Ath. Pol.* 22.4]; LYSIAS, *Against Andocides,* in LYSIAS, *supra* note 6, at 61, 71–72 (referring to the Athenians' "gentleness" with regard to criminal prosecution) [Lys. 6.34]. *See* Margaretha DeBrunner Hall, *Even Dogs have Erinyes: Sanctions in Athenian Practice and Thinking*, *in* GREEK LAW IN ITS POLITICAL SETTING 73, 88–89 (L. Foxhall & A.D.E. Lewis eds., 1996) (discussing the Athenians' reputation for mildness and arguing that this reputation was largely undeserved).

128 *See, e.g.*, Anita Isaacs, *Truth and the Challenge of Reconciliation in Guatemala*, *in* RECONCILIATION(S): TRANSITIONAL JUSTICE IN POSTCONFLICT SOCIETIES 116, 136–39 (Joanna Quinn ed., 2009) (discussing the importance of informal acknowledgements to local communities in righting wrongs); Eric Stover, *Witnesses and the Promise of Justice in the Hagu*e, *in* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 104, 107 (Eric Stover & Harvey Weinstein eds., 2004) (describing the feeling of dissatisfaction experienced by witnesses who felt that their work would not be complete until they testified against local war criminals). This insight is also part of the impetus behind the gacaca courts in Rwanda. *See generally* Urusaro Karekezi, Alphonse Nshimiyimana, & Beth Mutamba, *Localizing Justice: Gacaca Courts in Post-genocide Rwanda*, *in* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 69, 69–84 (Eric Stover & Harvey Weinstein eds., 2004) (discussing the use of gacaca courts which allow local communities to bring charges against genocide suspects who allegedly committed atrocities in said communities).

129 *See* Dmitri A. Sotiropoulos, *Swift Gradualism and Variable Outcomes: Vetting in Post-Authoritarian Greece*, *in* JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES 121 (Alexander Mayer-Rieckh & Pablo de Greiff eds., 2007) [hereinafter JUSTICE AS PREVENTION] (telling the story of a former member of the resistance who had been imprisoned under military rule and who on the way

could indirectly sanction collaborators for their conduct during the oligarchy, the Athenians were able to minimize this "impunity gap" at the local level, while still maintaining the unifying collective narrative of rejecting vengeance for Amnesty. In this way, the courts fostered reconciliation by offering some accountability as a safety valve for local resentments based on crimes committed during the reign of the Thirty.

Collaboration could be raised in court, without violating the terms of the Amnesty, in two forms: (1) as character evidence in an unrelated public or private lawsuit; and (2) in the *dokimasia*, the examination of incoming magistrates. Where collaboration was introduced in an unrelated lawsuit, it was up to the individual jury to determine how much weight to accord this character evidence in reaching its verdict. At the accounting, anyone who wished could challenge a candidate for any reason, including collaboration. If rejected by the jury, the only penalty was disqualification for office. The accounting procedure shares some similarities with modern forms of administrative justice, such as de-Nazification in Germany and lustration in post-Communist Europe. In all three contexts, those who were affiliated with or participated in the former regime could be barred from public office and/or public employment.[130]

Athens' indirect accountability mechanisms reduced victims' worries about impunity, but did not go so far as to alienate former collaborators by doling out severe sanctions. Most citizens were likely to be selected by lot for office or to face litigation at some point in their lives,[131] leaving them vulnerable to attacks based on their conduct during the oligarchy. However, this mechanism was

to work, passed by the judge who convicted him sitting in a coffee shop every morning, and of another resistance member who had been tortured learning that his torturer had become the chief of police). For similar stories, see Isaacs, *supra* note 128, at 136, which shows that victims in Guatemala lived near informants or executioners, and TINA ROSENBERG, THE HAUNTED LAND 321 (1996), which illustrates how Stasi informants were banned from holding public sector jobs for fifteen years.

130 *See* TEITEL, *supra* note 2, at 149–90 (discussing the use and forms of administrative justice during periods of political transformation). *See generally* JUSTICE AS PREVENTION, *supra* note 129 (discussing various vetting procedures where members of old regimes were prevented from participating in newly formed governments or public positions).

131 *See* Adriaan Lanni, *Social Norms in the Courts of Ancient Athens*, 1 J. LEGAL ANALYSIS 691, 693 (2009) (discussing both the collaborative and contentious environment Athenian citizens faced).

self-limiting in that collaboration only became an issue in court if a victim or an enemy brought it up. Victims who needed to air their grievances against a particular collaborator were given the opportunity to do so, but there was no attempt to systematically stigmatize or exclude from office all those who participated in the oligarchy.

The uncertainty over whether and when former collaborators in one's village would face punishment through these indirect mechanisms was much less troubling for those seeking retribution in the context of a society that believed in divine sanctions. Divine sanctions were uncertain and unpredictable, and could occur years or even generations after a violation.[132] Even the awareness that those who had participated in the oligarchy *might* face indirect sanctions in court at some later time may have tempered victims' perception of impunity.[133]

At the same time, these potential indirect sanctions were not so severe that they risked permanently alienating former collaborators. For one thing, the only penalty that attached to being rejected at one's accounting was disqualification from office. Men who were disqualified in this way could still participate fully in the Assembly and the law courts.[134] Moreover, participation under the Thirty did not doom a litigant or prospective magistrate; this evidence was merely one factor in the jury's consideration.[135] One man, challenged at his *dokimasia* because he was a member of the Council and the cavalry under the Thirty, nevertheless appears to have been confirmed as an archon, one of the highest offices of

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132 *See* Adriaan Lanni, *The Laws of War in Ancient Greece*, 26 LAW & HIST. REV. 469, 475 (2008) (discussing the Athenian belief in punishment from the gods).

133 Of course, a lack of apology or recognition of guilt on the part of the perpetrators might diminish victims' satisfaction. The limited sense of accountability provided by the Athenian procedures was more acceptable to victims in part because the oligarchic sympathizers who were most likely to draw retaliation probably opted to resettle in Eleusis. *See* ELSTER, *supra* note 3, at 22–23, who points out that by the time some of those settlers returned to Athens after the fall of Eleusis in 401 BC, retributive emotions had some time to diminish.

134 The one exception was that those who were convicted under the *dokimasia ton rhetoron* were rendered ineligible to speak in the Assembly.

135 *See* LYSIAS, *For Polystratus, in* LYSIAS, *supra* note 6, at 217, 219–27 (defending Polystratus successfully against loss of his rights as a citizen despite charges of oligarchic sympathies) [Lys. 20]; LYSIAS, *For Mantitheus*, *in* LYSIAS, *supra* note 6, at 177, 181 (giving another example of a man being confirmed in office despite challenges at the *dokimasia*) [Lys. 16.9].

the democracy.[136] Another court speaker suggests that many cavalry members under the oligarchy went on to serve in the Council and even as generals.[137]

Perhaps most importantly, wide-ranging examination of litigants' and prospective magistrates' character was routine in Athenian courts. Defendants would not experience discussion of their conduct under the oligarchy and any resulting indirect sanctions as a specific attack aimed at former collaborators, but as standard operating procedure in court. In fact, one defendant in a *dokimasia* claims that he is glad to have the opportunity to refute widespread accusations that he served in the cavalry under the Thirty:

> The people who force those who are unjustly accused to undergo an investigation of their life's record are in my view responsible for great benefits. I am so utterly confident in myself that I expect even someone badly disposed toward me to change his mind when he hears me speak about what happened and to think much better of me in the future.[138]

Like many modern vetting procedures, such as lustration, the examination of an individual's conduct under the previous regime in the accounting was both backward- and forward-looking.[139] Disqualification from office was both a sanction for past

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136 *See* LYSIAS, *Against Euandrus, in* LYSIAS, *supra* note 6, at 271, 273 (discussing the unsuccessful prosecution of Euandrus who later served as an archon) [Lys. 26].

137 *See* LYSIAS, *For Mantitheus, in* LYSIAS, *supra* note 6, at 177, 181 (stating that several cavalry members under the oligarchy went on to hold high offices) [Lys. 16.8].

138 *Id.* at 179–80 [Lys. 16.1–3]. Of course, litigants were vulnerable to completely fabricated accusations of collaboration, just as they could face false accusations of all sorts of violations of legal and social norms in court. This problem was at least reduced by the availability of suits for false witness and the likelihood that someone among the hundreds of jurors or spectators might have knowledge of the facts and shout down the speaker.

139 *See, e.g.*, TEITEL, *supra* note 2, at 164 (discussing Czechoslovakia's use of lustration to bar former state security personnel from a wide variety of jobs). *See generally* JUSTICE AS PREVENTION, *supra* note 129 (discussing various vetting measures including lustration). *See* CHRISTIANE WILKE, *The Shield, the Sword and the Party: Vetting the East German Public Sector, in* JUSTICE AS PREVENTION, *supra* note 129, at 348, 349 (observing that even when the stated purpose of modern vetting procedures is a forward-looking one, such as in East Germany, the social understanding of these procedures is often as a backward-looking sanction).

wrongdoing and a safeguard to prevent those who committed crimes or who had oligarchic sympathies from exercising power in the restored democracy. But unlike most modern vetting procedures, the accounting was as concerned with a candidate's current political commitments and view of the Thirty as with his past conduct under the former regime. Wolpert points out that the accounting served in part as a ritual in which former collaborators publicly pledged their allegiance to the democratic constitution.[140] This does not mean that former collaborators expressed remorse or even admitted participation in the oligarchy — in our surviving speeches, litigants and prospective magistrates accused of collaboration vehemently deny that they held offices under the Thirty — or were in any way involved in the crimes committed by the regime.[141] Due to the fact that very few magistrates exercised significant individual power, the importance of the *dokimasia* to the security of the democracy lay less in accurately ferreting out and excluding from office those with oligarchic sympathies and more in the symbolism of these hearings. Having passed a *dokimasia*, a former collaborator might gain a sense of membership and belonging under the new regime, and resentment at a collaborators' holding office might be eased by his public repudiation of the oligarchy. Conversely, rejecting a candidate allowed the demos to make a statement about the sort of collaboration that it deemed incompatible with full citizenship.

In sum, the indirect sanctions for collaboration made possible by the Athenians' distinctive legal culture ranged far wider than any direct trials of collaborators could possibly have done. These mechanisms encouraged reconciliation by minimizing the resentment created by the sense that local collaborators enjoyed impunity and by offering a procedure whereby those with

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[140] *See* LYSIAS, *For Mantitheus, in* LYSIAS, *supra* note 6, at 177, 180 (declaring Mantitheus's loyalty to the current Athenian Constitution) [Lys. 16.3]; WOLPERT, *supra* note 5, at 115–16 (discussing the "suspension of belief" Athenian juries exercised in hearing testimony from former collaborators in which they denied any wrongdoing and declared their current allegiance).

[141] *E.g.*, LYSIAS, *For Mantitheus, in* LYSIAS, *supra* note 6, at 177, 181 (denying any wrongdoing) [Lys. 16.8]; LYSIAS, *On a Charge of Overthrowing the Democracy, in* LYSIAS, *supra* note 6, at 260, 265 (denying criminal conduct during the oligarchy) [Lys. 25.15–16]; LYSIAS, *For Eryximachus, in* LYSIAS, *supra* note 6, at 378, 381 (asserting his innocence under the rule of the Thirty) [Lys. Fr. 9.110]; PLATO, *supra* note 28, at 57 (denying participation in the crimes of the Thirty, specifically the arrest of Leon of Salamis) [Pl. *Apol.* 32 c–d].

questionable pasts could be publicly reintegrated into the community.

4.3. Participation and Social Repair

Scholars who study conflict resolution and transitional justice often rely on the "contact hypothesis," the assumption that "tension and hostility between [opposing] groups will be reduced when these groups are brought in systematic contact with each other."[142] Athens' highly participatory civic institutions may have helped foster reconciliation by encouraging members on opposite sides of the civil war to work together in a variety of contexts.

Jury service in the courts was just one of the many opportunities for men of the city and men of the Piraeus to interact productively after the civil war. Other venues for joint decision-making included the Assembly, the Council, and the deme (village) assemblies. Service on the Council of 500 involved particularly intense interaction. The Council met about 275 days a year. During the one-tenth of the year that each member served on the fifty-person executive committee, he was expected to live and work in the Council chamber with the rest of the committee. Participation in several civic institutions—Council service, military service, and performance of the dithyrambic chorus at the Festival of Dionysus, for example—was organized according to tribe, which meant that one was more likely to participate alongside members of one's local village. Repeated productive interactions in these various contexts between collaborators and the men of the Piraeus may have helped to rebuild trust and foster cooperation after the restoration of democracy.

5. CONTEMPORARY LESSONS

Every society in transition must manage the inherent tension between the impulse to go back over the past—to understand, to record for history, to judge, and to punish—and the impulse to move on, to forfeit full accountability in the interests of peace and reconciliation.[143] We have seen that ancient Athens' successful

[142] Caitlin Donnelly & Joanne Hughes, *Contact and Culture: Mechanisms of Reconciliation in Schools in Northern Ireland and Israel*, *in* RECONCILIATION(S): TRANSITIONAL JUSTICE IN POSTCONFLICT SOCIETIES 147, 150 (Joanna R. Quinn ed., 2009).

[143] *See, e.g.*, MINOW, *supra* note 1, at 2 (discussing the tension between acknowledgement and recovery when dealing with past atrocities).

reconciliation managed this tension in a unique way. The Athenians put the past behind them by instituting a formal amnesty, by creating a unifying (and misleading) collective narrative of the war, and by providing opportunities for the reintegration of collaborators in the democracy and shared experiences between former antagonists. At the same time, Athens' legal institutions offered an outlet for private, local resentments by providing ordinary victims with an indirect means of airing accusations against quite specific oppressors.

What lessons might the Athenian experience offer for those designing transitional justice institutions today? Much of transitional justice scholarship utilizes the case-study method; scholars analyze the advantages and disadvantages of various forms of transitional justice institutions in part by examining how these institutions performed in a variety of historical and/or contemporary situations.[144] This Article presents Athens as a case study of how one society was able to move on.[145]

The types of lessons we can draw from the Athenian case are limited by evident cultural differences. The wholesale adoption of specific Athenian practices is obviously not in the cards, particularly since the absence of the rule of law is a feature of the system rather than a bug. Rather, as noted previously, the Athenian case provides some mid-level observations about factors that may contribute to a successful transition. The Athenian experience suggests (1) the importance of granularity, that is, letting individual victims at the local level decide whether to prosecute their antagonists; and (2) that uncovering the truth is not always the best way to ensure peace and reconciliation following

144 *See generally* RECONCILIATION(S): TRANSITIONAL JUSTICE IN POSTCONFLICT SOCIETIES (Joanna R. Quinn ed., 2009) (citing several individual case studies); ELSTER, *supra* note 3 (discussing a variety of historical examples of transitional justice); MINOW, *supra* note 1 (analyzing the different emotional and political responses to atrocities which were adopted by various countries and populations throughout history); TEITEL, *supra* note 2 (drawing comparisons between several historical and contemporary approaches to transitional justice); Koskenniemi, *supra* note 85 (discussing the function of trials in the context of war crimes in Europe); Posner & Vermeule, *supra* note 3 (analyzing the costs and benefits of transitional justice in the context of several historical transitions).

145 It is, of course, impossible to draw definitive conclusions from any individual case study. Rather, each case study is merely suggestive, offering some insight into how a particular approach to transitional justice played out in a specific context. Hypotheses derived from individual case studies must then be tested against other case studies, with close attention to cultural, political, or economic factors that might cause a successful approach to fail in other contexts.

atrocities. These observations from the Athenian case offer insight into prominent contemporary issues in transitional justice. First, the Athenian experience suggests that attention to local resentments and ordinary victims and perpetrators may be just as important as centralized, exemplary justice or the exposure of the command structure behind atrocities. Second, the Athenian experience invites us to reexamine whether the focus on truth seeking (so common in contemporary transitional justice institutions) is well founded. In this Part, I will explore each of these claims in some detail.

5.1. Addressing Local Resentments Through Private Complaint Procedures

The Athenian experience suggests that piecemeal private prosecution or complaint procedures at the local level may be as important as the more centralized, systematic schemes directed by public officials that tend to dominate contemporary transitional justice institutions.

We have seen that ancient Athens had no systematic program of punishing, or even excluding from office, former oligarchic sympathizers. Most of the high-level officials under the Thirty fled to Eleusis or into exile, and the remainder of the population was protected from direct litigation by the Amnesty. Rather, indirect sanctions for collaboration were initiated by individual victims and acquaintances, which provided a safety valve to ease local resentment in the absence of direct sanctions. Punishment for collaboration was selective and exemplary, in the sense that many collaborators escaped these accusations, but there was no official decision to single out particular offenders for punishment. In this way, the flexibility of the Athenian legal system mitigated the tension between ordinary, rule-of-law justice and expedient political settlement. The Athenian approach also created the possibility of piecemeal retributive justice without forcing the all-or-nothing choice that a comprehensive, top-down system invites.

Many modern forms of transitional justice, particularly prosecutions, involve a centralized approach that attempts to focus selectively on the most serious violations and, to the extent possible, high-level offenders.[146] Most contemporary criminal

[146] *See, e.g.*, MINOW, *supra* note 1, at 31, 40–45 (describing the factors which influence selectivity in prosecution and punishment as well as the dangers of this selectivity); TEITEL, *supra* note 2, at 27–68 (discussing various successor trials

approaches involve prosecutors or other public officials consciously selecting individual defendants whose trials can provide exemplary justice, in addition to furthering other goals, including the shaping of collective memory.[147] Most students of transitional justice assume that one aim of these selective approaches should be to focus on tracing responsibility as far up the chain of command as possible.[148] Instances where low-level actors have faced prosecution, such as the trial of German guards for shooting individuals attempting to escape over the Berlin Wall, have drawn widespread criticism.[149] Indeed, the difficulty of proving criminal responsibility for high-level actors is commonly cited as an advantage that truth commissions have over criminal prosecutions.[150] Most of these modern approaches are not just deliberately selective; they are also deliberately centralized. In fact, some scholars have argued that the very act of transferring the responsibility for accusation and punishment from victims to public bodies is absolutely essential to ending hatred and promoting reconciliation.[151]

The Athenian example suggests that given the inevitably selective nature of transitional justice, centralization and focusing exclusively on major crimes and high-level officials may be misguided. The Athenian experience is in keeping with some recent research on contemporary transitions noting that victims

throughout the course of history which have held prior political regimes responsible for past injustices).

147 *See, e.g.*, MINOW, *supra* note 1, at 46 ("[C]ollective memory probably can only be enshrined through trials if the intention to achieve this end is concealed from the public audience . . . ."); TEITEL, *supra* note 2, at 69–118 (analyzing the role that legal processes play in constructing transitional narratives of history).

148 *See, e.g.*, MINOW, *supra* note 1, at 40–42, 59–61 (discussing the perceived unfairness of prosecuting subordinates without holding their superiors responsible and the need to prioritize the interests of the victims).

149 *See id.* at 59 (describing a similar chain of command involved in the atrocities in South Africa and emphasizing the difficulty of unraveling this type of hierarchical responsibility); TEITEL, *supra* note 2, at 40 (describing the broad scope of the trials in Germany after the Berlin Wall shootings).

150 *See* MINOW, *supra* note 1, at 60–61 (stating that one advantage truth commissions have over trials is the commissions' ability to assign blame to high-level actors in cases where the chain of responsibility would be hard to establish in a court of law).

151 *See id.* at 11–12 (discussing the commonly-held view that "the way to avoid such escalating violence," arising out of hatred and a desire for vengeance, "is to transfer the responsibilities for apportioning blame and punishment from victims to public bodies acting according to the rule of law").

often find investigations and prosecutions of local, low-level perpetrators more satisfying than punishment or investigation of high-level offenders.[152] The Athenian case offers some support for approaches that do not maintain a centralized monopoly on prosecutions but rather provide outlets for individual victims to pursue local grievances, including grievances against relatively low-level offenders. Modern approaches in this vein include the South African Truth and Reconciliation Commission and the Gacaca courts of Rwanda. In South Africa, individual victims were provided the opportunity to give testimony before the human rights committee in a non-adversarial format.[153] In Rwanda, each local community—acting through the local general assembly—met to identify for trial those suspected of involvement in local massacres.[154] As these two examples demonstrate, such decentralized, locally focused, victim-centered approaches can take a variety of forms, and can be deployed alongside more systematic, top-down institutions.[155] The Athenian experience does not recommend a particular institutional design, but merely suggests that approaches that provide an outlet for local, individual

[152] *See, e.g.*, ISAACS, *supra* note 128, at 136 (citing the Guatemala case as an example where victims "frequently insist that neighbors, friends, and relatives are guilty, implicated in the crimes whether as informants or as executioners"); Stover, *supra* note 128, at 106, 115 (emphasizing the importance victims placed on receiving explanations and apologies from their neighbors and seeing fellow citizens being brought to justice).

[153] *See, e.g.*, MINOW, *supra* note 1, at 72–74 (emphasizing the contrast between the more communal qualities of truth commissions and the rigid, discrete roles of traditional courts).

[154] *See* KAREKEZI, *supra* note 128, at 72 (describing at the local level how Gacaca courts were implemented by observing three phases that were common practices throughout all gacaca courts); Phil Clark, *Hybridity, Holism, and "Traditional" Justice: The Case of the* Gacaca *Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT'L L. REV. 765, 777–89 (2007) (describing the evolution of the gacaca courts in Rwanda and the multifaceted purposes served by these courts in the Rwandan government and community).

[155] In South Africa, individual victim testimony was combined with, among other things, a more centralized investigative process that issued a report; the Rwandan genocide was addressed not only in the Gacaca courts but also in the International Criminal Tribunal for Rwanda and more formal domestic criminal trials. *See* Rosemary Nagy, *Traditional Justice and Legal Pluralism in Transitional Context: The Case of Rwanda's Gacaca Courts*, *in* RECONCILIATIONS: TRANSITIONAL JUSTICE IN POSTCONFLICT SOCIETIES 86, 87 (Joanna R. Quinn ed., 2009) ("Through the face-to-face participation of all community members in gacaca, the government sought to establish truth, justice, and reconciliation on the basis of Rwandan custom.").

resentments can minimize the "impunity gap" created by selective justice, thereby fostering reconciliation at the local level.

5.2. Questioning the Value of Truth in Reconciliation

Most controversially, the Athenian case casts doubt on an underlying assumption held by many who study transitional justice: the importance of establishing and recording the truth behind mass atrocities.[156] The recent proliferation of truth and reconciliation commissions is indicative of a widespread belief that investigating and recording how atrocities came about is an essential component of reconciliation.[157]

And yet, accurately assigning responsibility for atrocities committed during the tyranny played no role in Athens' spectacularly successful transition. We have seen that the Athenian courts created a false collective memory of the war, which focused blame narrowly on the Thirty and denied the widespread collaboration and participation by ordinary Athenians in the violence. This narrative appears to have promoted a sense of unity among the populace. To be sure, the use of these fictions in court did not erase individual victims' resentment against specific collaborators who had done them harm. But the collective memory of the oligarchy constructed in the courts may have made victims more willing to trust men whose level of active collaboration was minimal or unknown to them. For those who had remained in the city, the discourse in the courts offered a rationalization for past collaboration and provided comfort that there was a place for them in the restored democracy.

The Athenian experience suggests that there may be some instances where a shared fiction might do more to foster unity and reconciliation than the truth.[158] The myth of widespread popular

156 *See, e.g.*, TEITEL, *supra* note 2, at 69–118 (discussing the establishment of historical truth as a central function of transitional justice). *But see* Erin Daly, *Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition*, 2 INT.'L J. OF TRANSITIONAL JUST. 23, 36–39 (2008) (providing a more skeptical account of the role of truth in reconciliation).

157 *See, e.g.*, Geoff Dancy et al., *The Turn to Truth: Trends in Truth Commission Experimentation*, 9 J. HUM. RTS. 45 (2010) (analyzing the proliferation and evolution of truth commissions throughout the world).

158 I am not suggesting consciously attempting to create such a shared fiction, which poses all sorts of difficulties. *See* OSIEL, *supra* note 91, at 240–92 (discussing the promises and pitfalls of consciously creating collective memory, including the creation of misleading accounts of history). Rather, I am simply suggesting that

opposition in France to the Nazi occupation provides a similar example.[159] Of course, there may be independent normative reasons to insist on uncovering the truth regarding prior atrocities. But the Athenian case suggests that at least in some situations pursuing a true account of who bears responsibility for atrocities may not be necessary, or even desirable, if the primary aim is to ensure an enduring, peaceful reconciliation.

The Athenian courts did not seek to hash out the truth; because there was no public prosecutor and no detailed understanding of what constituted collaboration, they did not stir up grievances unnecessarily. But they also allowed the airing of any wrong, no matter how old or unconnected to the subject of the suit. Moreover, they were inscrutable in their adjudications—no one knew why the jurors decided as they did, and no rule was established. Did the jury believe that an allegation of collaboration was untrue, or did it find that the allegation, even if true, was outweighed by other factors? No one knew. But clarity in the wake of civil war is not necessarily a virtue. People told their story and got their verdict; they believed what they wanted to believe about what the verdict meant. The system moved on to the next case, and slowly everyone got on with his or her lives.

the widespread assumption that uncovering the truth is necessary to a successful transition may be incorrect.

[159] *See id.* at 101 (describing how the initial scope of the postwar criminal trials in France was limited to high-ranking officials and to those in other prominent positions, although in many cases the general population also participated in the atrocities).