

CHAPTER SEVEN

THE INSTRUMENTAL VALUE OF
OTHERS AND INSTITUTIONAL CHANGE:
AN ATHENIAN CASE STUDY

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1. *Instrumental vs. inherent value*

Among the central problems addressed by contemporary moral philosophy is the ethical question of how others ought to be valued.¹ The primary issue for ethicists is not whether we should value others, but our reasons for valuing them. The categorical imperative of Kantian deontological (rights- and duties-centered) ethics insists that we treat others as inherently valuable ends-in-themselves, rather than as instruments or means to our own valued ends. Utilitarian or consequentialist (outcome-centered) ethics, on the other hand, allows considerable space for instrumentalizing others. The goal of the consequentialist is maximizing the quantity of some good, measured by aggregating utility satisfaction or preferences, across a given population (e.g. the residents of a state, all humanity, or even all sentient beings). Ancient Greek systems of ethics, with their focus on character and the virtues, cannot be reduced to a choice between deontology and consequentialism. Yet the contemporary ethical dichotomy nonetheless provides a useful device for evaluating changes in ancient institutions.²

Since antiquity, political philosophy has been closely aligned with ethics: questions of justice, obedience, and legitimate authority are not easily severed from the ethical question of why and how to value

¹ Sections 3–6 of this chapter are adapted from Ober 2008, chapter 6.

² Deontology and consequentialism: Kagan 1998. For the record my own moral commitments are neither primarily deontological nor primarily consequentialist but rather those of a liberal-leaning inclusivist Aristotelian; see Ober 2007.

others.³ And so, it is worth asking: when ancient political institutions seem newly attentive to the interests of non-citizen others, how was this reevaluation of outsiders by citizen-lawmakers motivated? Classical Greek state institutions were not much concerned with the inherent or ‘human’ rights that are fundamental for modern systems of justice with a deontological bent.⁴ Rather than treating each individual as an intrinsically valuable end, democratic Athenian law was, I will suggest, generally consequentialist in its approach to regulating interpersonal relations.⁵

This chapter argues that a primary motive for certain changes in Athenian rules in the direction of increased legal access and impartiality in the fourth century BCE was Athenian awareness of the increased instrumental value of foreigners. Foreigners became economically valuable—that is, they contributed to the material flourishing of the *polis* both in the form of state revenues and of the livelihoods of individual citizens—when their voluntary choices led them to bring lucrative business to Piraeus rather than (say) to Corinth, Aegina, or Megara. New Athenian rules were aimed at persuading foreigners to do business in Athens. Foreigners gained greater access to some Athenian institutions, and fairness, in the sense of impartiality, was more evident in some forms of legal decision-making. These new rules appear to have worked; Athens became more prosperous by the later fourth century, at least in part because foreigners liked the new rules and so did more business there. Because increased access and impartiality were not prompted by a changed Athenian approach to the ends/means distinction, a Kantian deontologist would deny that the new rules made Athens a better place. A consequentialist might, however, disagree. I will return to the question of evaluating the moral significance of Athenian institutional changes in the Conclusion.

³ Aristotle, for example, intended the *Nicomachean Ethics* to be read in conjunction with the *Politics*. Modern political philosophy was transformed by John Rawls’ project in *A Theory of Justice* of uniting the deontological commitments of Kantian ethics with assumptions about individual rationality drawn from social contract theory: Rawls 1999 (1971).

⁴ For a review of Athenian approach to ‘rights’ see Ober 2005a, Chapter 5.

⁵ Important work on foreigners in Athens includes Whitehead 1977; Baslez 1984; McKechnie 1985; Patterson 2000; Cohen 2005 (each with substantial bibliography).

2. Rules and interests

Athenian institutions, like institutions elsewhere, can be understood as ‘action-guiding rules.’⁶ Athenian rules specified the conditions under which people were allowed to treat others as means to their own ends. The rules defined who was allowed to seek to increase his/her utility in respect to which others, and under what conditions. Athenian citizenship can be understood as (*inter alia*) legal immunity in respect of being forcibly coerced into serving as an instrument to serve other citizens’ ends. Slaves, by contrast, could legally be treated by their masters as means to a very wide variety of utility-maximizing ends (economic gain, sexual pleasure, and so on). Free foreigners, native Athenian women, and the children of citizens fell someplace in between male citizens and slaves in terms of their legal exposure to being coerced into an instrumental role. Here, our main concern is with the rules concerning free foreigners permanently resident in or visiting Athens—*metoikoi* and *xenoi* respectively.

The rules developed by a given state that concern the legal standing of foreigners sometimes change, and any social scientist interested in institutions will want to ask why. The general hypothesis this chapter sets out to test is as follows:

When foreigners become relatively more important (instrumentally valuable) to a state, and when the state lacks the coercive power to extract rents from them, the rules of the state will be changed in their favor (will take their interests and preferences more into account).⁷

In democratic Athens, the rule-makers were citizens: the *dêmos* gathered in the Assembly and, in the fourth century, in boards of lawmakers (*nomothetai*) selected by lot from citizens aged thirty and above. The hypothesis can be tested by looking at the ways in which these Athenian rule-makers responded to changes in the economic importance of outsiders to Athens and to changes in Athenian coercive capacity.

In the fifth and fourth centuries alike, Athens was very productive (in terms of wealth and power) in comparison with rival *poleis*—yet the sources of Athenian productivity changed over time. For much of the fifth century superior Athenian productivity was, at least in part, a

⁶ Action-guiding rules are discussed in detail in Ober 2008, Chapter 1.

⁷ For discussions of rent-seeking (i.e. the use of power asymmetry to extract economic surplus) see Krueger 1973; Baumol 1993 and 2004.

function of coercive imperialism and violent (or at least potentially violent) resource extraction. But in the early democracy (ca. 506–478 BCE) that preceded the imperial period, and again in the post-imperial fourth century, Athens lacked an empire from which to extract rents substantial enough to sustain the state's prosperity. During these pre- and post-imperial eras, Athenian economic performance depended primarily on domestic production and exchange. Athenian prosperity in the post-imperial fourth century was sustained in part by innovations in public institutions and by newly developed credit instruments.⁸

The early, pre-imperial, democracy had relatively limited coercive capacity and appears to have recognized the value of foreigners—or at least the danger of disregarding their preferences. The democracy began with an act of inclusivity: the Cleisthenic tribe/deme reform that followed immediately upon the revolution of 508/507 BCE implicitly recognized all resident free males as citizens—thus accepting as citizens people who had moved to Athens quite recently, as well as those who could trace their ancestry back to the days of Solon and before.⁹ In the imperial fifth century, however, Athenian military superiority enabled Athens to extract rents in the form of tribute (and other goods and services) from non-Athenian imperial subjects by the use—or threat—of force.¹⁰ [Xenophon] (the 'Old Oligarch'), Thucydides, and Aristophanes make it eminently clear that the relationship between Athens' coercive capacity and Athenian public and private interests was well understood by fifth-century Athenians. Under these conditions, we would expect the rules concerning foreigners to be relatively unresponsive to their interests. This in fact appears to be the case: a notable case in point is the Periclean citizenship law of 451/450 forbidding non-Athenians to marry

⁸ Institutional innovations: Ober 2008; credit instruments: Cohen 1992. It is wrong to imagine that Athens had *no* imperialistic ambitions or tendencies in the fourth century: see Buckler 2003 for detailed discussion. But in any event, with the exception of the control of three Aegean islands, Lemnos, Imbros, and Skyros, which were regular sources of revenue from a grain tax (Stroud 1998), Athenian imperial enterprises before and after the period of the fifth-century 'high Empire' neither produced net revenue gains nor promoted overall Athenian material flourishing. See further Griffith 1978; Oliver 2007; Moreno 2008.

⁹ Citizenship in Cleisthenic reforms: Manville 1990; Badian 2000.

¹⁰ Exactly how coercive the Athenian Empire really was, and when various coercive measures were passed by the Athenian assembly, is much debated; see, recently, Morris 2009; Ma, Papazarkadas, and Parker 2009. But the general point, that Athenian coercive capacity was much greater in the middle decades of the fifth century than before the Persian Wars or after 404 BCE, is not in doubt.

Athenians. Much contemporary scholarly work on Athenian hostility or contempt towards 'outsider-others' focuses on texts and images produced in the imperial fifth century.¹¹

After the Peloponnesian War, with the loss of its empire and naval supremacy, Athens' capacity to coerce outsiders was once again relatively limited. The Athenian state could no longer demand tribute or mandate the use of its coinage in Aegean markets. Yet the Athenian state still required substantial revenues each year to fulfill public purposes (e.g., military and social security). With the end of imperial tribute, foreign traders, both those resident in Athens and transients, became a more important source of state revenue and private Athenian wealth. Taxes on trade and traders constituted a prime source of Athenian revenue. Foreign residents paid a head tax and the state collected a tax on goods entering and leaving Athens' harbors. Meanwhile, many private citizens sought their living in commercial activities. Fewer individual Athenian citizens made their living by extracting imperial rents (e.g. as clerouchs). Fourth-century citizens were more likely to depend, directly or indirectly, on economic endeavors in which the voluntary choices made by foreigners played a significant role. Greek traders now had a choice of where to do business: in the Saronic Gulf alone, Megara, Corinth, and Aegina maintained active ports. And so, *ex hypothesi*, we should expect the Athenian state to have changed the rules in ways that took more account of the preferences and interests of foreigners.¹²

In the 'post-imperial' fourth century certain Athenian procedural rules governing *access to* legal institutions and *partiality of* legal judgments were changed in ways that, on the face of it, ought to have benefited at least some non-citizen residents and visitors—and especially members of the foreign trading community (sections 4–6). Meanwhile, there is good reason to believe that, after a hiatus in the aftermath of the Peloponnesian War, Athens became an increasingly important center of Aegean trade. By the 330s BCE, it appears that Athenian revenues were equal to or higher than what they had been in the 430s, at the height of the Empire. Athens was once again engaged actively in public building projects. The state offered substantial welfare benefits

¹¹ Athenian citizenship law: Patterson 2005. Athenians and 'others': Hall 1989; Cartledge 1993, with counterpoint of Allen 2003a and 2003b.

¹² The increased importance of trade and foreign traders in the fourth century: McKechnie 1989; Burke 1990.

to citizens, and wages for both skilled and unskilled laborers were strikingly high when compared to other ancient and medieval societies.¹³

In sum, the voluntary presence of foreigners in the *polis* was of relatively greater value to the Athenian economy in the fourth century than in the fifth. In the course of the fourth century, some Athenian rules were changed in ways that appear very likely to have suited the preferences of foreigners—and especially foreign traders. In light of the striking growth of Athenian revenues in the later fourth century, there is every reason to suppose that more foreigners did in fact chose to do more business in Athens. This chapter suggests that these correlations are not mere happenstance: Athenian rule-makers were motivated by a recognition of the instrumental value of foreigners to Athens, and the new rules affected the behavior of foreigners by addressing their interests. That is to say: counterfactually, had Athenian rule-makers *not* recognized the value of foreigners, had they *not* understood their preferences, had Athens *not* changed the rules in question, then fewer foreigners would have chosen to do business in Athens and Athens would have been a poorer place. One important mechanism through which new rules persuaded foreign traders to choose Athens over other Aegean markets was lower transaction costs.

3. Law and transaction costs

A rule (say, a law) gains purchase on people's future behavior when it is codified as a potentially accessible item of public information. In classical Athens, diverse kinds of information were captured, through the act of codification, in a text—a written law (*nomos*) or decree (*psêphisma*). Especially in the fourth century, that text might be inscribed on a *stêlē* and publicly displayed. Sections 3–6 suggest that fourth-century Athens arguably did relatively well compared to rival *poleis* in attracting trade and traders in part because Athenian rules were changed to be clearer, more reliable, and (in certain cases) relatively more open to entry by foreigners, and relatively more fair in the sense of treating insiders and outsiders with less pronounced partiality. These changes were in line with

¹³ Athenian fourth-century prosperity and its relationship to overseas trade: Burke 1985 and 1992. Public projects and welfare benefits: Ober 2008: 65–69, 254–258. High wages: Scheidel 2010.

the preferences of foreigners and thus motivated them to do business in Athens rather than elsewhere.

Codification promotes predictability, but it also risks ossification. The Athenian process for legal amendment, along with the legal and social contexts in which the codified rules were used, pushed back against the tendency to institutional ossification; the rules could be and were readily changed as conditions changed—e.g., when imperial sources of wealth dried up and the instrumental value of foreigners was increasingly appreciated by the citizenry.¹⁴ There is, inevitably, a trade-off between stable rules and adaptation: highly stable institutions tend to ossify, whereas constant legal innovation lowers people's capacity to assess risks and to make rational plans for the future. Classical Greeks were well aware of the ossification / innovation dilemma: the contrast between innovative Athenians and conservative Spartans is the organizing principle of the speech of the Corinthians to the Spartans in Thucydides Book 1 (Th. 1.70.2–71).

The *reductio* of the intentional ossification of Greek law was the Locrian procedure described by Demosthenes (24.139–143). In Locris, according to Demosthenes' approbative account, he who wished to change the law must present his proposal with a noose around his neck; the unsuccessful would-be innovator was hung. Codified laws enabled individual residents of Athens (like Demosthenes' Locrians) to lay their plans for the future with some confidence. Yet Athenian procedures allowing for legal amendment encouraged Athenians (unlike Demosthenes' Locrians) to think about ways in which their individual and collective circumstances might be improved if the rules were changed, and to act, when serving as lawmakers, on those thoughts.¹⁵ Fourth-century Athenian lawmakers appear to have sought, with some success, to balance reliability against adaptability: their success is reflected in Athens' increased prosperity.

The relative productivity of a society is, in large part, a function of how well that society captures the benefits of social cooperation.¹⁶ By enacting rules that would persuade more foreigners to trade in Athens, the Athenians stood to capture more of those benefits. Voluntary exchanges of

¹⁴ Explosive growth in the number of preserved Athenian public inscriptions from the fifth to the fourth century: Hedrick 1999. Link of innovation to comparatively strong Athenian performance: Ober 2008, Chapter 2. Legal amendment: Schwartzberg 2007.

¹⁵ Athenian lawmaking procedures: MacDowell 1978; Todd 1993. 'Rule of law' vs. interpretation in Athenian courts: Lanni 2006.

¹⁶ Benkler 2006.

goods and services—that is, transactions regarded as beneficial by all parties to the exchange—are an important kind of productive cooperation, and self-evidently important to traders. Exchange is more productive (to individuals and in the aggregate) when the costs associated with transactions are lower. This means that one determinant of the effect a new policy will have on individuals and on social productivity is whether it serves to raise or to lower the costs of transactions—that is, the *ex ante* and *ex post* costs to individuals of making potentially profitable contracts or bargains.

Information is a central element in the transaction-cost / productivity equation: if both parties to an exchange share full and transparent access to all the information relevant to the exchange, their transaction costs drop accordingly. When transaction costs are lowered, productivity is raised (at least potentially) because the increased profit from low-cost bargains increases the value and the frequency of transactions. But under conditions of incomplete information—and especially of asymmetrical access to important information—transaction costs increase.¹⁷

The basic idea behind transaction-cost economics is quite simple: if the costs of doing business are low, more business will be done and, all other things being equal, this will benefit the society as a whole—it will raise the society's aggregate of goods by allowing society to reap more benefit from the socially cooperative activity of free exchange. Whether that larger basket of goods is distributed fairly, and what fairness in respect to distribution means to a given society, remain vitally important questions. But those questions concern distributive rather than procedural fairness. Here, the fairness I am concerned with is open access to institutions and procedural impartiality and their role in increasing aggregate goods—not fairness in respect to distribution of the goods thereby gained.¹⁸

I suggested above that fourth-century Athenians valued non-citizens instrumentally, because Athens was enriched when non-citizens brought business to Athens. All other things being equal, foreign traders were likely to prefer to do business where transaction costs were relatively lower. We can now refine the argument by suggesting that Athenian lawmakers recognized that non-citizens would choose to do business in

¹⁷ Transaction-cost economics: Coase 1988; Williamson 1981; Benkler 2006, 106–116. Application of transaction-cost principles to questions of state formation and international institutions: North 1981; Keohane 1984. Transaction costs and ancient law: Frier and Kehoe 2007.

¹⁸ Justice as procedural fairness, and as fairness in respect to distribution in ancient Greek moral thought and law: Ober 2005b.

Athens if transaction costs were relatively lower there than elsewhere, and that the Athenians acted accordingly through changing some of the rules relevant to access to institutions and fairness in the sense of impartiality. If this is right, then Athenian material flourishing in the later fourth century may be explained in part by its success in lowering transaction costs. Of course, all of this assumes that Athenians had at least a rough and ready conception of what is now called transaction-cost economics (section 5).

How might changes in the rules affect the transaction costs incurred by the members of the extended Athenian community—understood as those persons doing business and making their living within Athenian territory? Transaction costs can be lowered through standardizing and publicizing rules and practices that in turn helped build and maintain a relatively reliable and secure exchange environment. We can test the idea that Athenians grasped the value of lowering transaction costs by, first, specifying how various instruments available to a participatory democracy *should* operate if the state's goal were optimizing (i.e. driving down and keeping down) transaction costs; and then asking how far Athens conformed to or diverged from that optimal position (see Table 1).

We should keep in mind, however, that in light of the various non-material ends sought by the democratic *polis*, low transaction costs must be thought of as what economists call a 'satisficing condition'—a condition that is necessary for the achievement of a general goal (e.g. *polis* flourishing), but one that is not subject to maximization because it must be somehow limited in order to allow for the presence of other necessary conditions.¹⁹ Thus, we ought not to expect Athenian institutions (or those of any other state) to do everything that might be done to minimize the costs of transactions.

Among the instruments available to participatory democracies (as well as to more hierarchical organizations) are clear and accessible codes of formal rules (laws, customs, administrative protocols) designed to protect persons and their property; standardized and easy-to-use dispute-resolution procedures (mandatory or optional modes of binding or non-binding arbitration, courts of law); and dependable state-imposed sanctions for punishing delinquents. A second set of instruments includes established standards for weights and measures; standardized exchange media (government-issued and guaranteed currency, standard forms of

¹⁹ Simon 1955.

contract); convenient facilities, such as centralized marketplaces, well-designed transport and communication networks; and effective policing. Finally, the state can keep transaction costs low by keeping down the rents it extracts on exchanges (directly or indirectly), or that it allows others to extract.

Table 1. State-determined conditions for low transaction-cost bargaining

Instrument	Open access	Impartiality
1a. Formal rules (laws, decrees, customs).	Publicly posted or common knowledge, stable, archived, legible, simple, non-contradictory, comprehensive, relevant to current conditions.	Apply impartially to all parties; protect bodily integrity, property, dignity of all. <i>Bodily integrity and dignity of citizens favored.</i>
1b. Dispute procedures (litigation, arbitration).	Swift, reliable, easy to use, difficult to abuse, available to all. <i>Non-citizens without standing in some legal procedures.</i>	Treat similar cases and similar disputants similarly.
1c. Sanctions (punishments, limitations).	All delinquents are liable to punishments that are standardized, appropriate to the infraction, widely publicized.	Apply similarly to similar infractions. <i>Intentional murder of citizen punished more severely. Slaves liable to beating as additional or replacement penalty.</i>
2a. Exchange media (coinage, weights, measures, contracts, sureties).	Readily obtainable, comprehensive, stable, recognizable, reliable, standardized.	Impersonal, used by all. <i>Only citizens (with some exceptions) may own real estate.</i>
2b. Facilities (marketplaces, communications, transport, storage, security).	Centralized open-access markets, low-cost communication and transport systems, reliable and secure storage. Housing, religious apparatus readily available.	Available for use by all on similar terms.
3. Third-party rents (taxes, bribes, protection).	Taxes on exchanges low, simple, centralized, returned to productive system. Restraints on corruption, violence, rent-seeking, misuse of government apparatus.	Apply similarly to similar cases. <i>Most metics pay special taxes. Athenian settlements abroad and tax-farming favor citizens.</i>

Key: Italics = substantial and systematic Athenian deviations from optimal conditions (see Hansen 1999: 87–88, 97–99, 116–122).

Each of these various instruments must manifest two general properties if it is to work effectively to lower transaction costs: it must be *open* and it must be *impartial*. By open, I mean that the instrument is accessible in respect to entry (as opposed to restricting entry according to extraneous criteria) and clear in respect to interpretation (as opposed, for example, to being interpretable only by insiders ‘in the know’). By impartial, I mean that the instrument distributes goods and bads according to criteria that are even-handed (as opposed to criteria that are arbitrary or ‘loaded’ in favor of insiders) and impersonal in that it does not identify and pre-select particular categories of individuals for special treatment (good or bad) on the basis of extraneous criteria. These various optimizing criteria are laid out schematically in Table 1.

Table 1 is meant to specify the ways that government actions in respect to a market would render bargaining in that market as close to frictionless as possible—thus as close as possible to the ideal conditions of exchange imagined in what has become known as the Coase Theorem. As Ronald Coase himself emphatically pointed out, the ideal conditions of the Coase Theorem do not and could not exist in the real world—and thus, even with the best possible will, no government could *eliminate* transaction costs.²⁰ To exist and thereby facilitate the low transaction-cost regime, a government must have some way to maintain itself, which makes it very likely that it will need to levy taxes of some sort on at least some kinds of exchange (Table 1, row 3).

4. *Dikai emporikai*

A striking change in Athenian legal access and impartiality was introduced in the mid fourth century, with the establishment of new procedures for trying cases involving merchants. The ‘maritime suits’ (*dikai emporikai*) were distinguished by two new features: first, non-citizens, certainly including *metoikoi* (metics: resident foreigners) and *xenoi* (short-term visitors), and most probably including slaves, were offered the same legal standing in these commercial cases as citizens. All persons engaged in maritime trade in Athens (or at least all males) now had the right to initiate a case, to serve as witnesses, as well as to defend

²⁰ Coase 1988.

themselves against charges in their own name. Next, the ordinarily broad judicial discretion of the Athenian jury was limited by the requirement that charges be filed, and the case be decided, by reference to a written contract.²¹

The responsibility of the jury in a maritime case was to decide whether the terms of a specific contract had or had not been fulfilled. While this still entailed judging the veracity of narratives offered by the litigants, the interpretive scope of the jury was restricted. As a result, the decisions of juries in maritime cases were said to be ‘carried out according to the rule’ or ‘by the book’ (*akribeis*: Dem. 7.12, with Lanni 2006: 149 n. 4), rather than being made on the basis of jurors’ all-things-considered judgment, which included the past behavior and estimated future social value of those engaged in the dispute. The motivation for the new procedure is not stated in the five extant speeches on which our knowledge of the legal innovation primarily rests. Yet it is widely, and surely correctly, assumed to be the state’s desire to attract foreign traders to the Athenian market, by offering them free access to dispute resolution procedures on an equal footing with Athenians. Moreover, the provision that the new suits be judged ‘monthly’ (Dem. 33.23)—while obscure in precise meaning—was explicitly intended to guarantee swift legal action, thereby removing the incentive of locals to drag out proceedings to the disadvantage of temporary visitors.

Adriaan Lanni suggests that ‘litigants in *dikai emporikai* appear to have focused their arguments on the terms of the contract, whereas speakers in non-maritime cases involving written contracts or wills include a more contextualized account, basing their claims on what they perceive to be the fair result as well as the proper contractual interpretation.’²² The ‘fairness’ to which Lanni refers concerns just distribution of goods, with fair shares determined by the relative social worth of the parties, rather than the ‘fairness as impartiality’ I have emphasized here.

²¹ Lanni 2006, 149–174 offers a concise description of the maritime cases, and cites a wealth of earlier scholarship. Cohen 1973 reopened interest in the maritime suits and remains the most detailed analysis, but Cohen’s belief that maritime cases were tried by special juries of experts in commercial law rests on dubious evidential grounds and appears incorrect; see Todd 1993, 334–337. On the other hand the doubts raised by Todd 1994 regarding the access of non-citizens to courts trying maritime cases are unconvincing. Cohen 2005 offers a succinct survey of Athenian commercial law. See also Patterson 2000.

²² Lanni 2006, 166.

Lanni rightly argues that the procedural innovations employed in maritime cases do not point to a revolution in standard Athenian legal doctrine. Continued attention to social context, and the relatively broad view of what counted as a relevant argument in non-maritime cases, are, she suggests, indicative of a sustained and fundamental Athenian commitment to legal procedures that gave the jury broad interpretive scope. As I have argued elsewhere, interpretive scope on the part of jurors was an important safeguard against elite capture of the democratic court system.²³

The dikai emporikai ought not, however, to be regarded simply as anomalous, or as driven entirely by the particular needs of the mid fourth century. Rather, the two senses of fairness—as *procedural* justice (fair rules) and as *substantive* justice (fair distribution of goods and bads)—represent two facets of Athenian democratic values. The first, procedural, sense of fairness centers on the value of impartiality in respect to judgment—an aspect of equality in respect to opportunity. The second sense of fairness centers on getting the best, most equitable outcome. If, when they came into court, litigants had no way of guessing which value would be to the fore, the simultaneous presence of the two senses of fairness would have led to confusion, arbitrary judgments, and probably to widespread opting-out of the legal system.

During the crisis of the late fifth century, this dysfunctional devolution appeared to be well advanced. The mass condemnation of the Arginusai generals in 406 combined a novel and unfair procedure (mass trial) with an outcome that distributed bads (execution) inequitably. The Arginusai trial was a nadir for Athenian democratic law and led to Socrates' famous dissent (Pl. *Ap.* 29b) and the condemnatory narrative of Xenophon (Xen. *Hell.* 1.7). But the devolution was arrested before it led to a Corcyra-like tipping point (cf. Thuc. 3.82–84). In the codified legal environment of the fourth century, the Athenian legal system regained its legitimacy and therefore its salutary role in stabilizing the democratic social equilibrium and rebuilding the Athenian economy. With the inauguration of the maritime suits, two distinct dispute resolution domains were clearly distinguished, and potential disputants could therefore be reasonably clear about the values and rules that would apply in a given case.

²³ Ober 1989.

5. *Xenophon*, Revenues

We have no direct access to the intentions of the individuals who proposed or voted on the new *dikai emporikai*, but we do have a text that might bear on those intentions. Shortly before the new procedure for maritime suits was introduced, in the mid 350s BCE, the prolific and generically innovative Athenian writer Xenophon circulated a pamphlet on the subject of *Revenues*, in which he made a number of suggestions for increasing Athenian state income.²⁴ He recommended a mix of rent-seeking and access-expanding measures. His most retrograde suggestion was to have the Athenians acquire a large body of state-owned slaves who could be leased out to private parties, especially as laborers in the silver mines. The right analogy, Xenophon argued, was tax farming, but slave farming would be more lucrative, he claimed, because it is less liable to manipulation. The slaves could be controlled, even in time of war, he urged, by tattooing them as public property and establishing strategic garrisons in the mining district. The shadow of classical Sparta, where Xenophon had lived in exile, with its state-owned helot population, looms large in these passages.

On the other hand, whereas Sparta was famous for its periodic mass expulsions of foreigners,²⁵ Xenophon proposed institutional changes intended to make Athens more attractive to foreigners. The goal was economic growth: 'the rise in the number of residents and visitors would of course lead to a corresponding expansion of our imports and exports, of sales, opportunities for wages, and custom-taxes' (Xen. *Vect.* 3.5). The means Xenophon advocated was opening entry and assuring quick and fair dispute resolution procedures. He suggests offering prizes to state market officials who most justly and quickly resolved disputes, arguing that, as a result, a 'far larger number of merchants would trade with us and with much greater satisfaction' (Xen. *Vect.* 3.3). He furthermore suggested granting foreigners greater rights in respect to real-estate ownership (*enktêsis*, Xen. *Vect.* 3.5).

Xenophon also favored changes in the civic duties imposed upon metics. He proposed freeing metics from mandatory service in the hoplite ranks, but allowing them the honorable role of serving as voluntary cavalrymen. In this last measure, we can perceive Xenophon's adroit

²⁴ This text is discussed in detail by Gauthier 1976; Doty 2003.

²⁵ Rebenich 1998.

manipulation of both positive and negative attitudes towards foreigners. If metics were relieved of mandatory infantry service, native (and a few naturalized) Athenian hoplites would regain a monopoly on this ideologically charged domain of civic life—the citizen monopoly meant that (mercenaries aside) sacred Athenian soil would be exclusively defended by the spears and shields of citizen soldiers. The reform of the *ephēbeia* in the mid 330s BCE points in a similar direction. Meanwhile, however, if Xenophon's new military service standards were adopted, the wealthy Athenians who served in the cavalry would have an enhanced opportunity to form closer relations with the better sort of metics (i.e. the ones whose zeal for cavalry service suited Xenophon's aristocratic tastes). Xenophon's plan might be seen as the military correlative to his contemporary Isocrates' aristocratic vision of a cosmopolitan elite among whose members 'Hellenic' would be a marker of cultural choice rather than ethnic heritage. Xenophon and Isocrates both offered plans for Athenian renewal that intermixed a backwards-looking traditionalism (associated with the values of the hoplite) with a forward-looking vision of a new world of increasingly open access—at least for elites.²⁶

Xenophon points out that many of the changes he advocated required no new revenue streams—they were simply a matter of changing the rules: 'these [measures] need cost us nothing whatever beyond benevolent public decisions (*psēphismata*) and proper implementation (*epimeleiai*)' (Xen. *Vect.* 3.6). Other measures, including building new hostels for ship-owners and visitors, and improving the market facilities for merchants, would, Xenophon, acknowledged, require substantial capital inputs by the state. But Xenophon believed that it would be possible for Athens to borrow the necessary capital from private sources. The state could offer high rates of interest and, at least as important, loans would be guaranteed by the credibility of the state itself, 'which is to all appearances the safest and most durable of human institutions' (ὁ δοκεῖ τῶν ἀνθρωπίνων ἀσφαλέστατον τε καὶ πολυχρονιώτατον εἶναι, Xen. *Vect.* 3.9). Although Xenophon does not say so explicitly, the established reputation of the restored democracy for repaying loans contracted by the Athenian government (favorably noted in reference to the post-Peloponnesian democratic restoration by [Arist.] *Ath. Pol.* 40.3) is the relevant background condition. Xenophon's assumption that the

²⁶ On the ephobic reform and Isocrates' cosmopolitanism see Ober 2005a, 76–77, 84 (Isocrates), 153–156 (*ephēbeia*).

democracy could borrow its way out of a financial/military hole on the basis of its credible commitment to repay loans anticipates contemporary arguments for the political-economic roots of the 'democratic advantage'.²⁷

It is not wildly fanciful to imagine a committee of the Athenian Council of 500 considering Xenophon's ideas, rejecting his plan for seeking rents by acquiring and farming public slaves, but fastening on the genuine value of offering greater legal access to non-Athenians engaged in trade. While it remains unknown whether this, or any of Xenophon's other proposals, were directly taken up by Athenian decision-makers, the similarity between certain of his recommendations in the *Revenues* and the reformed procedure for maritime suits is strong and suggests that at least some of Xenophon's notions were aligned with the political realities of the mid fourth century and with the motivations and intentions of fourth-century legislators.

6. Other foreigner-preference-satisfying policy changes

The *dikai emporikai* are not unique evidence for rule changes plausibly motivated by a changed Athenians valuation of non-citizens: in 375 / 374 a law was passed on the proposal of a certain Nikophon that specified procedures for certifying the silver coins to be used in the Athenian market. The procedures were, in the first instance, meant to protect the value of Athenian-minted owls, but the rules carefully protected the property rights of traders (citizen and non-citizen alike) who were in possession of good (i.e. near-pure silver, fair weight) *imitation* owls by specifying that such coins *not* be confiscated but 'handed back' to their owner. Moreover, citizens and non-citizens alike had the right to bring legal charges against traders who violated the law (by refusing to accept 'approved' owls). As in the somewhat later *dikai emporikai*, the intent of the legislation seems self-evidently to lower transaction costs for those trading in the Athenian market by increasing access to and reliability of legal procedures. The approval law also lowers transaction costs to traders by providing experts (two government-paid approvers of coins, one in the city agora and the other in Piraeus) who would quickly and reliably determine whether a given coin was an 'official' Athenian

²⁷ Schultz and Weingast 2003.

state-issued owl, a ‘good’ imitation with silver content comparable to an Athenian state-minted owl, or a ‘bad’ imitation with low silver content—this last category of coin was taken out of circulation by the approvers. The approver system removed the information asymmetry between those who offered coins in exchange for goods (who might be expected to know whether their coins were good or not) and sellers of goods worried about being paid with bad imitations.²⁸

The Athenians granted major honors to foreigners, including citizenship, more readily in the fourth century than they had in the past and these grants were much more than empty gestures.²⁹ As wealthy and generous foreigners gained access to the Athenian public economy of esteem, honor, and reciprocal gratitude, they also gained the valuable assurance of secure refuge in a powerful *polis* should things go wrong at home.³⁰ In some cases, Athens-resident communities of foreigners were granted *enktêsis*—public permission to acquire real estate—with the express purpose of establishing the religious cult practices of their homelands. In 333/332 BCE, for example, the Assembly granted a group of Athens-resident merchants from Citium on Cyprus *enktêsis* for a sanctuary dedicated to Aphrodite, ‘just as also the Egyptians have built the sanctuary of Isis.’³¹

Access to property rights and to preferred forms of religious worship are conjoined in the relevant decrees, and the conjunction obviously would have lowered the psychic costs to worshippers of Citian Aphrodite and Egyptian Isis of long-term residence in Athens. While the decree does not say why the grant was given, it does mention that it was to a group of *merchants*. It seems likely on the face of it that the legislative intent was to make Athens more attractive to foreign (including non-Greek) traders.

There were many other attractions to trading in Athens, and at least some of these can be ascribed to the democratic state’s self-conscious employment of the principles of open access and impartiality as incentives to merchants. Like other *poleis*, Athens protected retail traders and their customers by mandating standard weights and measures.³² The state provided market officials of various sorts (*agoranomoi*, *sitophulakai*,

²⁸ Rhodes and Osborne 2003, 25, with discussion and bibliography in Ober 2008, Chapter 6.

²⁹ Henry 1983.

³⁰ Allen 2003a.

³¹ Rhodes and Osborne 2003, 91, with Simms 1989 on dating and legislative intent.

³² Lang and Crosby 1964; Figueira 1998, 296–315.

epimelêtai tou emporiou) as well as approvers of silver currency to enforce fair trade practices.³³

The harbor facilities at Piraeus were improved in the course of the fourth century, and provided for storage of grain.³⁴ In 325 BCE, in an attempt to fight piracy more effectively, the Athenians mandated the foundation of a new naval station somewhere in the Adriatic. The interests of non-Athenian traders are prominently mentioned; among the explicit goals of the decree was that ‘those Greeks and barbarians sailing the sea, and themselves sailing into the Athenians’ naval station, will have their ships and all else secure, knowing that ...’ (here the text is interrupted by a lacuna of several lines: the decree is Rhodes and Osborne 2003, 100, lines 165–271).

7. Conclusions: evaluation

Every real-world government falls short of fully satisfying the interests and preferences of foreigners. This shortfall is at least in part due to the fact that governments attempt to achieve a variety of ends in legislation. Lower transaction costs, a primary preference of traders, must be balanced against other goals of state policy. In modern governments, for example, the principle of openness, both in terms of entry and clarity, is compromised not only by security considerations but also by rules created by legislative enactment and by administrative protocols developed and administered by professional bureaucrats. These rules are intended to fulfill important public purposes; they are meant (*inter alia*) to protect consumers from fraud or safety risks. The net result of the complexity of modern rules, and the technical legal language in which they are cast, is to raise some transaction costs. Complex rules require (*inter alia*) that those making bargains employ legal specialists to design contracts and to defend the principals to exchanges against charges of having violated rules that are far from transparent to non-experts lacking the necessary technical training. This in turn bars entry to those who cannot afford to purchase the requisite legal expertise.³⁵

³³ [Arist.] *Ath. Pol.* 51; Cohen 2005.

³⁴ See discussion in Stroud 1998.

³⁵ Huber and Shipan 2002 offer a comparative analysis of the choice of modern legislators to draft detailed legislation or to leave the details to administrative rules drafted by unelected civil servants—in either case the result is that the end users are subject to rules that require expert interpretation.

Athenian legislative processes produced government rules and other instruments that were comparatively accessible, simple, and clear—compared, that is, to modern legislation and, more relevantly, to the rules that we may guess (although it can be little more than that) pertained in rival *poleis*. Athenian laws and decrees, for example, were brief and composed in ordinary language, posted in public places, and available for consultation in standard forms.³⁶ Nor is there any reason to suppose that there were complex administrative protocols working in the background.

Athenian government instruments were, however, far from completely open and impartial. As noted on Table 1, various Athenian instruments discriminated, in one way or another, according to the status of the individual in question. Non-citizens continued to suffer various disabilities in respect to ownership of real estate, marriage to Athenians, and legal standing in non-commercial cases; long-term residents paid a head tax; naturalization (and thus the grant of political participation rights) remained relatively rare. Moreover, certain Athenian rules constrained the freedom of traders living in Athens to buy and sell just as they pleased: laws aimed at ensuring that there would always be an adequate supply of grain in the *polis* required Athens-resident traders to ship grain only to Athens' harbor and forbade loans on grain shipments that would not come to Athens. Although substantial amounts of grain certainly *were* legally re-exported, Athens probably limited the right to re-export grain once it had arrived in the Piraeus.³⁷

The hypothesis of this chapter is that certain changes in Athenian rules were motivated by an increased recognition of the value of non-citizen others to the *polis* and that the new rules sought to create the low transaction-cost conditions preferred by foreign traders. If the preferences of traders were perfectly understood by Athenian lawmakers, and dispositive in respect to rule-making, the Athenians ought (*ex hypothesi*) to have gone much further in the direction of opening access, limiting partiality, and removing other impediments to achieving a low transaction-cost trading environment. But preferences of foreigners

³⁶ See, e.g., Thomas 1989, 60–93 and 2005; Hedrick 1999; Richardson 2000; Davies 2003.

³⁷ Limitations on metics: Whitehead 1977; disputed in some particulars by Cohen 2000. Restrictions on grain trade: Lanni 2006, 151–152; re-exports: Whitby 1998; Oliver 2007, Chapter 1.

were neither perfectly understood nor dispositive. Nor, perhaps, can they be in any democratic state, in which the sometimes selfish preferences of citizens are expressed (although, once again, never perfectly) in legislation.

In practice, Athenian rule-making was a compromise between creating foreigner-preference-satisfying openness and impartiality, and maintaining long-established legal distinctions between citizens and others. Those distinctions were built into the foundations of the *polis* as a citizen-centered community, and into the theory and practice of Athens' deliberative and participatory democracy. Because the hypothesis of this chapter predicts rule changes under changed valuing conditions, and because increased openness and reduced partiality are the most relevant changes in Athenian institutions in the post-imperial fourth century BCE, it is the open-access/impartiality side of the equation (rather than the residual advantages for citizens) that has been the primary focus of this chapter. I have argued that those changes were motivated by a recognition of the instrumental value of foreigners to public and private Athenian interests and that their effectiveness in persuading foreigners to do business in Athens contributed to Athenian prosperity in the fourth century. But we must remember that, even without attending (as we must) to slavery and to women's unequal standing, the cup of Athenian attention to the preferences of non-citizens was never more than very partially filled.

Where does all of this leave us in terms of an evaluative moral judgment of legal changes made over time in classical Athens? Kantian deontologists must regard the turn towards openness and impartiality in some Athenian rules as morally irrelevant, in that these reforms were wrongly motivated—by valuing others as instruments to desired ends, rather than as inherently valuable ends-in-themselves. Deontologists would be able to point to the unabated morally repugnant practice of slavery at Athens as the logical end-point of instrumentalizing others. Consequentialists would also need to take into account the great disutilities experienced by Athenian slaves, as well as by women, and by foreigners (in light of the limited scope of the reforms).

Yet, if we stipulate for the sake of the argument that the bads suffered by women and slaves were constant over time, then, at the margin, there surely was growth in the aggregate store of goods—whether measured in the currency of utility or preference satisfaction. Recent studies of social psychology have shown that procedural fairness matters a lot to people in the modern world; 'justice as procedural fairness' is recognized

by some modern moral philosophers as being of independent value.³⁸ If we assume that procedural fairness in the senses of open access and impartiality was independently valued (i.e. regarded as a good in itself, as well as a means to other good ends) in the ancient Greek world, it would appear that some Athenian residents benefited from the fourth-century institutional changes in ways that included, but also exceeded, material advantage.

Meanwhile, as a result of the rule changes, the aggregate of material goods available for distribution in Athens undoubtedly increased over the course of the fourth century. This increase was obviously not distributed in ways that would satisfy egalitarians, but recent work on real wages in antiquity suggests that the growth was not concentrated in the hands of a tiny elite.³⁹ And so, based on the stipulation that the bad conditions of slaves and women did not worsen, consequentialists might conclude that in the course of the fourth century Athens became, in limited but salient ways, a better place. Whether the stipulation that conditions for slaves and women did not worsen in the course of the fourth century is true in fact, and whether eudaimonists (ancient or modern) ought to agree with the deontologists' decidedly negative assessment or the consequentialists' guardedly positive assessment, remain as important questions for future research.

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³⁸ Social psychology of proceduralism: Tyler, Kramer, and John 1998. For an excellent philosophical defense of the independent value of proceduralism, with special reference to democratic authority and legitimacy, see Estlund 2008.

³⁹ Scheidel 2010.

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