

IMPRISONMENT IN CLASSICAL ATHENS*

I. IMPRISONMENT AS A PENALTY?

Nineteenth-century scholars assumed that the Athenians as a community punished citizens with death, exile, *atimia*, and fines and used imprisonment only to hold those awaiting trial, those awaiting execution, and those unable to pay fines.¹ As they saw it, brief imprisonment in the stocks occasionally supplemented these penalties, but always as additional penalty—never as a penalty on its own. Barkan saw in the use of imprisonment as an additional penalty the likelihood of general penal imprisonment and used evidence from the oratorical corpus to make an argument therefore.² His argument seems to have been largely ignored—the nineteenth-century interpretation continuing dominant; and the issue, largely unexplored but for a few glancing references in recent scholarship.³ The issue remains, thus, sufficiently vexed to make worthwhile a restatement of the argument for the use of punitive imprisonment. Also, the evidence provides clues worth setting forth as to why and when punitive imprisonment developed. Indeed, these are sufficient to make an argument about the relevance of the development to Athenian political history. For the introduction of penal imprisonment in Athens proves an extremely important historical moment, marking as it does both the completion of a general will institutionalized (in a punishment of consumption of the wrong-doer within, rather than of expulsion from, the community) and a significant point in the establishment of *isonomia*.

The mythology of the Athenians attests that they considered binding or the restriction of liberty as punishment, and not just as the restraint of a dangerous enemy or as the acquisition of potential financial resources (as would be the binding of war-hostages or captives held for ransom). The most obvious expression of the mythological concept of penal imprisonment is found in the Promethean myth, in which Zeus binds Prometheus as punishment for having taught humanity about fire. In *Prometheus Bound*, Prometheus exclaims: ‘such are the offences for which I pay the penalty fastened with bonds out in the open air’ (τοιῶνδε ποινὰς ἀμπλακημάτων τινῶν ὑπαίθριος δεσμοῖς πεπασσαλευμένος) (112–14).⁴ In binding Prometheus, Zeus

* The following are works cited frequently and are referred to hereafter by the author's name and the date of publication: Barkan, I. (1935). *Capital Punishment in Ancient Athens*. New York: Arno Press; Barkan (1936) ‘Imprisonment as a Penalty in Ancient Athens’, *CP* 31: 338–41; Bonner, R. J. and Smith, G. (1930, 1938). *The Administration of Justice from Homer to Aristotle*, vols 1 and 2. Chicago: University of Chicago Press; Cohen, D. (1983). *Theft in Athenian Law*. München: C. H. Beckische Verlag; Harrison, A. R. W. (1968, 1971). *The Law of Athens*, vols 1 and 2. Oxford: Clarendon Press; Hunter, V. (1994). *Policing Athens*. Princeton: Princeton University Press; Ober, J. (1989). *Mass and Elite*. Princeton: Princeton University Press; Todd, S. (1993). *The Shape of Athenian Law*. Oxford: Oxford University Press; Vanderpool, E. (June, 1976). ‘The Prison of Socrates’, *Illustrated London News* 274: 87–8.

¹ Thalheim, in Pauly-Wissowa, s.v. *δεσμωτήριον*; R. Dareste [de la Chavanne], *La science du droit en Grèce* (New York, 1976; reprint of 1839), p. 85; G. Gilbert, *The Constitutional Antiquities of Sparta and Athens* (London, 1968; reprint of 1895), p. 414.

² Barkan 1935, 1936.

³ Harrison 1971: 177. In his appendix, Harrison accepts the use of imprisonment as a penalty. Todd (1993: 141) thinks the use of penal imprisonment unlikely. Nonetheless, he writes: ‘Dem. 25.60–2 implies that on occasion the prison could be moderately full, and it seems unlikely that all these prisoners were simultaneously on remand’. Hunter (1994) leaves the question at issue, although she seems to lean toward accepting the use of imprisonment as a penalty.

⁴ The dating of the play is debatable. I claim only that the story was relevant in fifth-century Athens.

has only the purpose of punishment—that is, of designating a wrong-doing and, in one way or another, responding to it as such.⁵ Also, the Athenians commonly punished their slaves by binding them with fetters. Both Zeus' mode of punishing Prometheus and the citizens' punishment of slaves, however, are evidence of an ideology of penal imprisonment that focuses on private retribution and the wronged individual as punisher rather than on public retribution and the wronged community as punisher. This focus on private or personal retribution does not of necessity lead to a transfer of the power to punish by imprisonment from the individual to the community.

In regard to wartime activities, we do have stories of community groups and institutions punishing with imprisonment. In Aeneas Tacticus (10.20), bondage (δεσμόν) is a regular punishment (ζημία) legally imposed by the generals. Likewise, in oratory, we hear of the generals as employing bonds (ps-Lys. 9.5). In Thucydides, we hear of people imprisoned in buildings, ditches, quarries, and pits.⁶

And we know that other Greek cities had prisons. In Arcadia during a period of stasis in 363, most of the aristocrats from all the region's cities were thrown into prison in the city of Tegea (Xen. *Hell.* 7.4.36). The prison (δεσμωντήριον) was soon full and the public hall (δημόσια οἰκία) had to be used. Thus, we know that the city of Tegea had a prison and only one prison, but that, between the prison and the public hall there was room enough for a large number (πολλούς) of aristocrats from the area. Also, in this passage, the verb for being bound, δέδεμαι, is made parallel to being imprisoned (ἐν δεσμωντήριῳ, Xen. *Hell.* 7.4.37–8). Similarly, in talking of Thebes, Xenophon (*Hell.* 5.4.8) uses δεσμώντας to refer specifically to those people in the ἀνακείον, and not only to people bound in fetters, as earlier scholars have asserted that the word was used. We must recognize, then, that often where the verb δέδεσθαι appears we cannot know whether only binding is meant, or rather imprisonment. Alcidas, in *On the Sophists* (17), describes those who are freed from bonds after a long period of time as 'unable to walk like other people, but forced back to the same posture and movements they had to use when they were bound.'⁷ This comment seems to suggest that those held in prison were bound so as to restrain their movement, revealing how binding and imprisonment would each have implied the other.

The prison played a part during a period of stasis at Thebes as well, according to Xenophon. The prisoners were let out and armed by one party, providing a force sufficient in number for the party using them to claim its rule in the city (*Hell.* 5.4.8). And in another case (Xen. *Hell.* 5.4.14.), we are told that 150 men were released from prison. Aristotle (*Rhet.* 1375a6) describes the Argives as punishing the wrong-doer whose deed forces the city to build a new prison or to make a new law. According to Pausanias (6.13.1), fifth-century Croton turned a wrong-doer's house into a prison (δεσμωντήριον).⁸ Of Athens, we know that Syracusan prisoners were enclosed

⁵ A. Keramopollous (ὁ ἀποτυμpanισμός· Συμβολή ἀρχαιολογική εἰς τὴν ἱστορίαν τοῦ ποινικοῦ δικαίου καὶ τὴν λαογραφίαν Athens, 1923), argues that the play represents execution by ἀποτυμpanισμός. L. Gernet ('Capital Punishment', in J. Hamilton and Blaise Nagy [trans.], *The Anthropology of Ancient Greece*. Baltimore, 1981, from 1968 original, pp. 252–71) takes issue with this interpretation. As I argue elsewhere ('A Situation of Punishment: the Politics and Ideology of Athenian Punishment'; dissertation, June 1996), the ἀποτυμpanισμός was probably used both as means of execution and as stocks for public shaming. Thus each scholar may be partly right.

⁶ E.g. Thuc. 4.38, 41; 5.18; 7.87. Also, Soph. *Ant.* 775; Aesch. *Agam.* 820, 1639–42.

⁷ Translation from M. Gagarin and P. Woodruff, (edd., trans.) *Early Greek Political Thought* from Homer to the Sophists (Cambridge, 1995).

⁸ Whether his house became *his* prison or his house became a prison is unclear in the Greek.

(ἐιργμένους) in a stone quarry in the Piraeus (Xen. Hell. 1.1.14). And during the oligarchy, the Eleven, or Athenian prison officials, were capable of receiving in the prison (δεσμωτηρίῳ) all the male townsfolk from Eleusis (Xen. Hell. 2.4.9).

In the extant sources, we hear of slaves as punished with imprisonment in a mill-house (μυλών: Lys. 1.18; Dem. 45.33; Eur. Cyc. 240), which susceptibility to corporal punishment marked slaves as such. Only slaves, according to Demosthenes, are responsible in person (σώματι) for their offences; freemen can protect their persons even in the worst cases, for in most cases, the law punishes (λαμβάνειν δίκην) with fines (Dem. 22.55). The hindrance, then, to a development of a community use of imprisonment was not a lack of a conception of punitive imprisonment, but rather, in addition to the difficulty of transferring the role of prisoner from individual to community, a need to distinguish between slaves and citizens.

Those few historians of Athenian democracy who subscribe to the notion that the Athenians used prison as a penalty for citizens (and not just as an additional penalty or as a means of holding a wrong-doer before trial or execution) point most frequently for proof to Socrates' action in the *Apology*.¹⁰ Socrates' suit was an ἀγὼν τιμητός, which is to say, it had no sentence provided for by law (as did cases that were ἀτιμητοὶ); the penalty had to be decided by a process of additional jury vote, after the vote on innocence and guilt, called τίμῃσις. After the jury has voted against him, Socrates must suggest to the jury and offer to a vote an assessment of what he thinks is a fitting penalty for his crime. He discusses (37b–c) the possibilities of imprisonment simple, a fine with imprisonment until payment of the fine, exile, and death:

ἀντὶ τούτου δὴ ἔλωμαι ὧν εὖ οἶδά τι κακῶν ὄντων τοῦ τιμησάμενος; πότερον δεσμοῦ; καὶ τί με δεῖ ζῆν ἐν δεσμωτηρίῳ, δουλεύοντα τῇ ἀεὶ καθισταμένῃ ἀρχῇ; ἀλλὰ χρημάτων καὶ δεδέσθαι ἕως ἂν ἐκτίσω;

Shall I choose instead of [Meletus' proposal for a penalty] something from those things which I know well are bad, penalizing myself with such a thing? First of all, how about with imprisonment? And why is it necessary for me to live my life in prison, enslaved to every successively appointed magistrate? Maybe I should be imprisoned for a financial penalty until I pay?

Because he has Socrates make such a clear distinction between imprisonment as attached to a fine and as a punishment *per se*, Plato shows that by soon after 399, the idea of penal prison is already reasonably well-embedded in the workings of the state. He implies that penal imprisonment was an option by 399.

Andocides in *On His Return* of 409/8 (?) testifies (2.15) to the use of imprisonment as a penalty (in that it is a substitute for execution):

εἰς γὰρ τοὺς θεοὺς ἔχοντα ὀνειδῆ οὗτοι με μᾶλλον τῶν ἀνθρώπων εἰκάσι κατελεῆσαι, βουληθέντων τε αὐτῶν ἀποκτείνειν με οὗτοι ἦσαν οἱ διασώσαντες. δεσμά τε ὕστερον καὶ κακά ὅσα τε καὶ ὅλα τῷ σώματι ἠνεσχόμην, μακρὸν ἂν εἴη μοι λέγειν.

Although I bore the shame before the gods, they seemed to pity me more than did men; when men were wishing to execute me, it was the gods who saved me. My subsequent imprisonment and the amount and kinds of evils I bore with my body, it would take too long for me to tell.

Also making markedly clear the distinction between imprisonment attached to a fine and imprisonment simple, Lysias writes in 399 that Andocides had proposed a prison penalty for himself as punishment for his possible future failure to deliver his slave for torture.¹⁰ Lysias comments ([6].21–2): ἔδρασε ἐαυτὸν τιμησάμενος

⁹ Harrison 1971: 177; Barkan 1936: 338–41; Todd (1993: 140) points out that Socrates does this in a piece of fiction.

¹⁰ Todd (1993: 140) points out that this is a contingent penalty rather than one proposed in τίμῃσις and resulting from trial. What matters, however, is simply that imprisonment, as opposed to, say, *atimia*, was proposed as a penalty.

δεσμοῦ . . . καίτοι πῶς οὐ θεῶν τις τὴν τούτου γνώμην διέφθειρεν, ὃς ῥᾶον ἡγήσατο δεσμοῦ τιμῆσασθαι ἢ ἀργυρίου; 'He imprisoned himself, having proposed at trial the penalty of bonds. . . . And indeed, how could it not be that one of the gods had destroyed the judgement of this man, who thought it easier to be penalized with imprisonment than with a fine?'¹¹ Democritus (DK fr. 262.1–3) refers to people who have done things worthy of exile, imprisonment (δεσμῶν), or penalty (θωινή), making the three parallel penalties. Equally indicative of the penal use of imprisonment is the comment made by Ps.-Andocides in *Against Alcibiades* that:

Concerning these things, the law of ostracism appears to me to overdo it and to leave the matter incomplete. For I think this an excessive punishment for private wrongdoing, and for public wrong-doing, I think it a small and worthless penalty, when it is possible to punish with fines and bondage and death (ἐξὸν κολάζειν χρήμασι καὶ δεσμῶ καὶ θανάτῳ. 4.4–5).

If the bondage mentioned in this passage is of a seriousness to rival ostracism, it must be a long prison sentence rather than a few days' bondage in stocks or some such relatively minor additional penalty. And, as we have seen above, the vocabulary of binding can itself also refer to lodgement in prison.

Demosthenes' speech *Against Timocrates* (353 B.C.E.) provides probably the most useful evidence for discerning the role that prisons played in the Athenian *polis*. Demosthenes has charged Timocrates with bringing an illegal decree that touches on imprisonment. To point out Timocrates' misdeed, Demosthenes (24.146,151) must explain the role of prisons:

οὔτε γὰρ ἂν, ὦ ἄνδρες δικασταί, ἐξήν ὑμῖν τιμᾶν ὅ τι χρή παθεῖν ἢ ἀποτεῖσαι (ἐν γὰρ τῷ παθεῖν καὶ ὁ δεσμός ἐνι· οὐκ ἂν οὖν ἐξήν δεσμοῦ τιμῆσαι), οὐθ' ὅσων ἐνδειξίς ἐστιν ἢ ἀπαγωγῇ, προσεγέγραπτο ἂν ἐν τοῖς νόμοις "τόν δ' ἐνδειχθέντα ἢ ἀπαχθέντα δησάντων οἱ ἑνδεκα ἐν τῷ ξύλῳ," εἴπερ μὴ ἐξήν ἄλλους ἢ τοὺς ἐπὶ προδοσίᾳ τῆς πόλεως ἢ ἐπὶ καταλύσει τοῦ δήμου συνιόντας ἢ τοὺς τὰ τέλη ὠνούμενους καὶ μὴ καταβάλλοντας δῆσαι. νῦν δὲ ταῦθ' ὑμῖν τεκμήρια ἔστω ὅτι ἐξεστὶ δῆσαι. . . .
τὰ γὰρ κρίνοντα τὰς κρίσεις ἀπάσας τὰ δικαστήριά ἐστιν, οἷς ἐξουσία ἐστὶ καὶ δεσμὸν καὶ ἄλλο ὅ τι ἂν βούλωνται καταγιγνώσκειν.

It would not have been possible for you, jurors, to assess what thing ought to be suffered or paid—for imprisonment is a corporal punishment (something that is suffered), and therefore you could not have penalized with imprisonment—nor could it have been written in the laws, in however many cases where there is information laid or summary arrest, that 'the Eleven shall bind in the stocks any man against whom information is laid or who has been arrested,' if it had not been possible, with the assessment, to imprison any offenders besides those who conspire to betray the city, or to dissolve the popular government, or tax-farmers who do not satisfy their contract. Now let these things be signs for you of how it is possible to put in bonds. . . . It is the courts that decide all questions brought to trial; and it is possible for them to pass a sentence of imprisonment or whatever else they want.

Demosthenes, then, has defined imprisonment as a corporal penalty explicitly in opposition to and distinct from a pecuniary penalty. More importantly, however, Demosthenes has also let slip that the courts have the jurisdiction to pass a sentence of imprisonment if they should so please. It is worth noticing the phrase 'sentenced bonds' (δεσμὸν καταγιγνώσκειν); the word *καταγιγνώσκειν* is regularly used in Greek oratory to describe the act of sentencing, with the object of the verb referring

¹¹ D. MacDowell (*Andokides: On the Mysteries*. Oxford, 1962: appendix D) considers this passage (and its implication, in what follows on, of a lengthy stay in prison for Andocides) in comparison with Andocides' own claim (1.64) that he was only in prison for a day as a result of this matter. MacDowell comes to the conclusion that the stories (Lys. [6]. 21–4, Plut. *Alk.* 21.4–6) of the friendships that Andocides makes in prison and the denunciations that he makes in order to get out of prison justify accepting that Andocides did have a lengthy stay in prison and lied in his own speech.

to the particular penalty imposed.¹² Nor is Demosthenes the only person who uses this formula with *δεσμὸν*.¹³ The penalty of imprisonment was not simply an option open to a defendant who could not pay a fine but was actually a penalty that the jury (or presiding magistrate) could use in sentencing of its own volition. In fact, Demosthenes (24.118) reinforces the right of the jury to prescribe imprisonment elsewhere in the speech:

καίτοι οἱ μὲν ὄντες ἡμῖν κύριοι νόμοι τουτουσὶ ποιουσι κυρίουσ ἀπάντων, καὶ διδῶσιν αὐτοῖς ἀκούσασιν, ὅποῖον ἂν τι νομίζωσι τὸ ἀδίκημα, τοιαύτη περὶ τοῦ ἡδίκηκός τοι χρησθαι τῇ ὀργῇ, μέγα μεγάλῃ, μικρὸν μικρᾷ. ὅταν γὰρ ᾗ ὅ τι χρὴ παθεῖν ἢ ἀποτεῖσαι, τὸ τιμᾶν ἐπὶ τούτοις γίγνεται.

Indeed, the laws that are masters for us make them (the jurors) masters of all, and they permit them (the jurors), after hearing the case, to apply their wrath, according to what they think of the wrongdoing, in a penalty as befits to the offence: great for great, small for small; for it falls to them (the jurors) to sentence whenever there may be the phrase [in the law] 'whatever penalty, corporal or pecuniary'.

Since imprisonment qualifies as a corporal punishment, infliction of imprisonment must fall within the jurisdiction of the jury as defined here. It seems, then, that the Athenians could punish their fellows with prison and that the jury itself did have the power to impose such sentences.

Since sentencing by the process of *τίμῃσις* required that the jury vote between the penalty proposed by the litigant and the penalty proposed by the prosecutor, some scholars have argued that it was not possible for the jury to come up with a third option.¹⁴ This has led some to argue that the court did not have jurisdiction over the determination of the penalty other than to choose between two options over which it had no control.¹⁵ We must not forget, however, that in many cases the presiding magistrate would also be the prosecutor, responsible for suggesting a penalty.¹⁶ The choice to be made during *τίμῃσις*, in many cases, would be between the suggestion of the defendant and the suggestion of the magistrate. In the sense that the magistrate heads the court and acts with the name of the *δημός*, the court, or the people institutionalized, suggests the penalty.¹⁷ Also, if the magistrate had to put forward his proposal during *τίμῃσις*, after condemnation, he might well take into account the shouts of the jurors and their reactions to the case. In this way, the court could probably inflict whatever penalty it wished.

One might offer as an objection to this the point that, according to Ps-Demosthenes in *Against Macartatus*,¹⁸ the magistrate had to make his suggestion of a penalty in

¹² E.g. *κατάγοντες τὸν θάνατον* in Ant. 5.47; And. 1.79; Lyc. 1.93; Din. 2.8; 3.21; Hyp. 2.8.

¹³ See, e.g., And. [4].3–5, 27; 2.16; Dem. 24.12.

¹⁴ M.H. Hansen, *The Athenian Democracy in the Age of Demosthenes* (Oxford, 1991), p. 202.

¹⁵ Harrison (1971: 63–4): 'In *agones timētoi* the jury, if it convicted, had to choose between the penalty proposed by the defendant and by the prosecutor; but in certain passages in *Against Meidias*, Demosthenes suggests the possibility of more than two options. We need not make too much of the phrase 'whatever penalty you think just' (Dem. 21.21); but later he speaks of death or confiscation of property, which implies at least three possible penalties, since Meidias' proposal must have been less than either of these.'

¹⁶ Harrison 1971: 4.N6

¹⁷ As catalogued in Harrison (1971: 81–2), suits that were *τιμητοί* (or only *ἀτίμητοι* in that the magistrate had suggested a penalty) included: *Δίκαι ἐπιτροπῆς*, *κλοπῆς*, *αἰκείας*, *ἐξαίρεσως*; *ψευδομαρτυρίων*, *λιπομαρτυρίου*, *κακοτεχνιών*, *βιαίων*; *Εἰσαγγελία δελίαν*, wrongs against orphans and heiresses; procedures under *φάσις*; procedures under *εὐθυνα*; *Γραφαὶ ἀσεβείας* (with certain exceptions), *δώρων*, *δεκασμού*, *παρὰ νόμων*, *παρὰ πρεσβείας*, *ψευδοκλητείας*, *ὑβρεως*, *κλοπῆς*, *συκοφαντίας*.

¹⁸ Dem. 43.75: *ἐὰν δὲ μείζονος ζημίας δοκῇ ἄξιός εἶναι, προσκαλεσάμενος πρόπεμπτα καὶ τίμημα ἐπιγραφάμενος, ὅ τι ἂν δοκῇ αὐτῷ, εἰσαγέτω εἰς τὴν ἡλιαίαν.*

writing with the charges and pleas on the original citation that he sent to the court. Is it possible that the magistrate could, during the trial, change his assessment from what it had been on the citation? Or is it possible that as processes of punishment were changing through the century, the magistrates at one time did and at another time did not have to document their proposed assessment ahead of trial? Unfortunately, *Macartatus* is undated, while we know that Demosthenes' comments in *Timocrates* and *Meidias* about the freedom of the courts to penalize as they wished both date to the mid fourth century. At the very least, we may argue that since the prosecutor was in some cases also presiding over the court, the 'court', rather than simply private litigants, did have a say in determining the penalty. To summarize, then, the power of the Athenians to accept the defendant's suggestion of imprisonment arose sometime before 400, since we see it definitely available by that approximate date; the possibility that the court itself could choose imprisonment arose between 400 and approximately 350.

The author of *Ath. Pol.*, when discussing the public penalties that apply to private suits, writes of imprisonment in a way that may be interpreted as labelling it as an additional penalty rather than as a penalty sufficient in and of itself. Speaking of δίκαι, he says (67.5.2) that the jury decides the penalty in two cases: πρόσεστι δεσμός ἢ θάνατος ἢ φυγή ἢ ἀτιμία ἢ δήμευσις χρημάτων, ἢ τίμησαι δεῖ ὁ τι χρὴ παθεῖν ἢ ἀποτεῖσαι'; 'where there is an additional penalty [above and beyond compensation] of imprisonment, or death, or exile, or loss of civil rights, or confiscation of property, or where it is necessary to decide a sentence of what it is necessary for the wrong-doer to suffer or pay'. This statement has been taken to mean that imprisonment was only an additional penalty. The statement refers just as clearly, however, to execution, exile, *atimia*, and dispossession as additional penalties when all of these were certainly penalties in their own right.¹⁹ Because *Ath. Pol.* in no way distinguishes bondage from these other penalties, the statement does not support the claim that the Athenians applied prison solely as an additional penalty. The second half of the statement, which discusses sentencing in general, in no way excludes the possibility of imprisonment as a penalty to be applied by the jury; in the context of the remarks quoted above from Demosthenes about the definition of corporal punishment (indicated by the word *πάθειν*), the statement that the jury must judge whether someone should suffer a physical penalty (or pay something) could as easily refer to prison as it does to death. *Ath. Pol.*'s statement, from sometime after 336, is hardly inconsistent with a system that imprisoned punitively.

II. ISONOMIA AND THE DEVELOPMENT OF PENAL IMPRISONMENT IN THE SIXTH AND FIFTH CENTURY

Before state involvement in punishment, large-scale imprisonment simply would not have been feasible. Unless a private punisher is capable of working the punished as a slave or ransoming the captive, the punisher is not likely to hold a prisoner indefinitely, since keeping a wrong-doer in captivity requires effort and expense. Thus, a prison must be, to a certain extent, an artificial construct of a community rather than a natural outgrowth of the processes of private retribution. Indeed, even where processes of state punishment are relatively rigorously organized, imprisonment need not immediately (or ever) gain a significant place. Any penalty that does not render efficient justice or revenge must have a certain public purpose beyond the

¹⁹ See Dem. 21.44 for an example of a situation in which the additional penalty is monetary.

utility of disposing of a trouble-maker. If a society expends energy or resources on holding people for an extended period of time, it must have conscious communal reasons to do so.

In Rome, where punishments given in jury courts were allotted specifically according to the crime and status of the defendant, legal punishments included death, outlawry, monetary fines, torture, and forced labour. The *carcer* was used for those awaiting trial and those awaiting execution. *Custodia* (detention) could also be applied, based on a magistrate's power of coercion to prevent trouble. Where *custodia* did become a matter of punishment, it seems to have resulted from the extension of preventative detention and the discretion of *cognitio* judges who could penalize as they wished. Simple imprisonment, however, was never legally recognized as a punishment.²⁰ Where the Roman state did keep criminals in custody, they worked them in the mines and on public works. The benefit of this sort of imprisonment seems clear. What in the Athenian political system explains the development of a punitive measure that is not a natural outgrowth of private retribution and that is not obviously economically productive?

As far as we can tell, public penal institutions in Athens, up until the time of Draco, made no provision for imprisonment, leaving that in private hands. That power was mostly employed through debt slavery. When Solon became archon in 594/3, great numbers of Athenians were in bondage to their fellows or had been sold abroad. Thus, the concept of the utility of imprisonment was wholly wrapped up in its capacity to provide an efficient return of the creditor's losses. And this sense of utility was wholly private.

Solon's use in his poems of words from the root δέω (bind) provides evidence that he was indeed working within the framework of private and personal bondage. Solon freed debt slaves from bonds or δεσμοῖσι and allowed citizens to bequeath their property to whomever they chose provided that they did not make their decision under the influence of pain, bondage (δέδεσθαι), drugs, old age, or the persuasion of a woman.²¹ The two instances in which he uses the words both refer to the liberties that Athenians had taken with one another's bodies before his reforms. The word δέω did not originally have a legal meaning, and only over the course of the development of the democracy did additional words, like δεσμωτήριον, arise from this root in a form specifically related to legal processes, public action, and professionalism.²²

As he had done in other areas of the Athenian political system with the introduction of the public case called the γραφή, Solon used imprisonment in such a way as grafted conceptions of public retribution and public utility onto the Athenian conceptions of private retribution. Among his reforms of 594 with which he created a mechanism of public retribution, three in particular opened the door to the use of imprisonment by the polis. Solon put an end to debt slavery and thereby defined an Athenian citizen as someone who could not forfeit his body to another person. The end of debt slavery eliminated the only means heretofore available by which one

²⁰ J. L. Strachan-Davidson, *Problems of the Roman Criminal Law* (Amsterdam, 1969), p. 165; P. Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford, 1970), pp. 103, 147–54; A. H. J. Greenidge, *The Legal Procedure of Cicero's Time* (Oxford, 1901), p. 514.

²¹ Nomographus frag. 4.24–6; See also Hyp. 3(5).8.4–8; Plut. *Sol.* 21.4–5.

²² C. D. Buck and W. Petersen, *A Reverse Index of Greek Nouns and Adjectives: Arranged by Terminations with Brief Historical Introductions* (Chicago, 1944). See esp. pp. 43–47. Δέω is common already in Homer and used with reference, for instance, to the binding of horses, wounds, people, and ships. The -τηριον ending appears only once in Homer and once in Hesiod, becoming frequent, however, in the fifth and fourth centuries.

private citizen could impose on another some sort of system of legitimate imprisonment.

Also, according to Plutarch, Solon repealed Draco's law in which death was punishment for almost all crimes. According to Aristotle (*Pol.* 1274b15–19), little could be said about Draco's laws but that they were severe. Although it is difficult to say with certainty that under Draco death was the punishment for a great number of crimes, we can at least say that Solon must have mitigated the severity of Draco's penalties. Solon removed many of the stricter penalties by one degree with *atimia* and by two degrees with extensive monetary punishments, as well as leaving many penalties unlegislated and left to the discretion of the jurors and judges. Those debtors and convicts who were unable to pay their fines either were made *atimoi* or were required to stay in prison until they could pay.²³ Then, 'if [a debtor] persevered in his refusal to pay, he could be kept in prison indefinitely, even for life'.²⁴

Finally, Solon instituted the penalty of five days and five nights in the stocks, or *ποδοκάκκη*, as a public penalty imposed in addition to private pecuniary penalties. The penalty for theft by night was instant slaughter, or wounding and arrest to be brought before the Eleven. Likewise daytime thieves stealing items of more than 50 drachmas in value were subject to conveyance before the Eleven, who would prescribe and inflict the death penalty. The thief would have no other option of repayment (*Dem.* 24.113, 353).²⁵ In other cases of theft, if the thief returned the stolen item, his penalty was twice the value of the item. If he did not return it, he had to repay ten times its worth. And the court might add an additional penalty of five days spent in the stocks if it desired (*Δεδέσθαι δὲ ἐν τῇ ποδοκάκκῃ ἡμέρας πέντε τὸν πόδα, ἐὰν προοσιμῇσῃ ἡ ἡλιαία*).²⁶

As a practical result of Solon's institution of the pecuniary penalties, debt imprisonment by the *polis* must, paradoxically enough, have replaced debt imprisonment or enslavement by private Athenians. This change would have been particularly relevant (i) to matters of theft tried by *γραφή*,²⁷ (ii) to matters for which the magistrates imposed fines (they could fine, without taking the matter before a court, up to a certain limit—anywhere from ten to fifty drachmas depending on the office); and (iii) to matters covered by those few suits that were *ἀτίμητοι* (that is, which had a sentence provided by law) and probably provided for fines (*ἀδίκως εἰρχθῆναι ὡς μοιχόν, ψευδεγγραφῆς, βουλευσέως, μοιχείας, ἐταιρήσεως, προαγωγείας, ἀργίας*). Once Solon instituted pecuniary sentences as preliminary measures to be used before penalties of death and exile, he created a situation in which poor Athenians probably had no way of meeting their penal requirements and, therefore, found themselves facing *de facto* sentences in prison of indefinite length.²⁸

Thus, imprisonment, although not a penalty *per se*, must effectively have become part of the Athenian penal code, and the enclosed, physical space of prisons for citizens must have become necessary for the first time.

²³ Harrison 1971: 177, 244; Bonner and Smith 1938: 275.

²⁴ Bonner and Smith 1938: 275.

²⁵ For a careful analysis of this passage and previous interpretations of this passage, see Cohen 1983: 40–4, 63ff.

²⁶ *Dem.* 24.105; also *Lys.* 10.15–16. I am not taking these passages as exhaustive of the issue of theft but merely use them as an example of penal organisation. For a thorough treatment of the issue of theft see Cohen 1983.

²⁷ See Cohen (1983: 44–9) for the possibilities of such, mostly having to do with theft of public property; and see also for the confusing set of references to both fines and penalties of death in relation to theft.

²⁸ I. Barkan (1936: 339) agrees; mentions of lengthy terms in prison are found at *Dem.* 24.125, 135; 25.61, *Din.* 2.2.

This transformation of financial penalties into lengthy sentences of imprisonment or permanent *atimia* was scarcely mitigation of the severity of Draco's penalties. For Plato's Socrates, the beginning of life in prison was the end of free living. That the Athenians were conscious of a prison sentence as potentially even a protracted death sentence is evident from the stipulation, in their agreement as described by Thucydides (7.82.2–3) to give up their arms to the Syracusans, that they should not die by imprisonment (ἔπειτα δ' ὕστερον καὶ πρὶν τοὺς ἄλλους ἅπαντας τοὺς μετὰ Δημοσθένους ὁμολογία γίνεται ὥστε ὅπλα τε παραδοῦναι καὶ μὴ ἀποθανεῖν μηδένα μήτε βιαίως μήτε δεσμοῖς μήτε τῆς ἀναγκαιοτάτης ἐνδεία διαίτης). Several statements in various sources indicate that the city did not always feed its prisoners sufficiently but left them to fend for themselves.²⁹ In this vein, the Athenian stranger in Plato's *Laws* (909) wishes to have, in the agora of the city that he was designing as a mental construct, a central prison where strict rationing would lead to death. Whether or not the same occurred in prisons in Athens is impossible to tell, although the fourth century comedian Alexis (fr. 220–221.10) refers to a daily prison diet (δίαιταν δεσμωτηρίου) as consisting of one clean wheat cake and one cup of water. According to Herodotus (6.136), in 489 an already sick Miltiades died during his imprisonment for failure to pay the fifty talent penalty imposed on him. Whatever the case, the Athenians did employ torture. An undated decree abolished torture of citizens at some point,³⁰ but in 409/8 Andocides (2.15) complained of bodily suffering during his stay in prison.³¹

Nor was the permanent *atimia* that devolved upon the poor a mitigation of the financial penalty. Whoever was *atimos* and not permitted to enter the assembly or courts of judgement and the political spaces could not defend himself legally against attacks on his person and property and, therefore, was at the mercy of the other citizens. Says one orator: 'I had unfortunate difficulties with the public treasury so I could not bring a suit' (Isaeus 10.20). The sentences of imprisonment, whether considered as a life sentence or as a possible death sentence, and the sentences of permanent *atimia* were reserved in practice for poor Athenians. Considering the sensitivity of the Athenians to issues of wealth and class,³² this might well be expected to have seemed unjust to the people of Athens. Indeed, such sentiment is evident in the following statement written by Isocrates (16.47) in 397: τῶν γὰρ αὐτῶν τιμημάτων ἐπιγεγραμμένων οὐ περὶ τῶν αὐτῶν ἅπασιν ὁ κίνδυνός ἐστιν, ἀλλὰ τοῖς μὲν χρήματα κεκτημένοις περὶ ζημίας, τοῖς δ' ἀπόρων ὥστερ ἐγὼ διακειμένοις περὶ ἀτιμίας; 'for although the same penalties are prescribed for all by our laws, the danger in relation to these is not the same for all; those possessing wealth are in danger in relation to a fine, but those who are poor, as I am, are in danger of *atimia*'. Before imprisonment became a penalty to be assessed in court, the rich could commit crimes with some degree of impunity (whether the suit was an ἀγὼν τιμητός or ἀτίμητος) safe in the knowledge that they could afford to pay whatever fines might be assigned them or whatever fines were prescribed by law. Solon's reforms, then, mitigated harsh punishments for the wealth elite alone.³³

²⁹ Dem. 25.61; Soph. *Ant.* 775: Creon leaves Antigone only enough food to live for a short while; Thuc. 7.87: the prisoners of the Syracusans do not have enough food to fend off hunger; Aesch. *Agam.* 820, 1639–42: here it is implied that hunger and bondage are associated.

³⁰ Harrison 1971: 150.

³¹ Hunter (1994: 174–6) makes a convincing argument for the rarity of torture of citizens.

³² See Ober 1989, for instance.

³³ I use the term 'wealth elite' here, rather than 'wealthy elite' to acknowledge that different sorts of elites may be defined by the characteristic of which the members of the elite are the few possessors, i.e. an intellectual elite or a noble birth elite. See Ober 1989: 11–17.

The most important development of the prison system, then, was the shift from *de facto* punishments of imprisonment and additional punishments of imprisonment to *de jure*, primary punishments of imprisonment. Thanks to Solon and his introduction of the stocks as additional penalty, the Athenians of the sixth and fifth centuries would have become accustomed to the idea of a limited period of bondage as punishment. By the end of the fifth century, Aristophanes (*Thesmophoriazousae*: 927ff., 1001ff.) can use the ordeal of being bound in stocks for comic material. Although the stocks did not have a position among the foremost of Athens' penalties for its citizens, it does indicate a shift from the notion of private imprisonment to that of community-based imprisonment. It seems likely that during the same time period, in the context of the fifth-century rise of the navy and introduction of jury pay, the Athenian citizens would have become aware of the uneven weight of financial penalties; the early fourth-century interest of the orators in discrepancies in the treatment of rich and poor (as seen above) is unlikely to have been novel. This combination of an acceptance of public bondage as punishment with the political pressure to deal with the difference in how political burdens fell on rich and poor would have provided ideological space in cases that were *τιμητοί* for the use of limited terms of imprisonment as a substitute for financial punishments. Plato in the *Laws* suggests a practice that may also have helped manoeuvre the institutional transition: in the *Laws*, those imprisoned for their inability to pay fines could be released when they had paid *or* when they had persuaded the city's officials or the prosecutor that they had spent time enough in prison (857a2–b3). Indeed, it seems likely that this is the process Demosthenes is describing in *Against Timocrates* (46–9) when he reminds his jury that an assembly of 6,000 people can be petitioned to take up, as a separate question, the issue of whether to remit the debts of an imprisoned state debtor (*ἄφεςις*) or to accept a term (or arrangement) (*τάξις*) as substitute. Aristotle (*Pol.* 1261a34) uses this latter term (*τάξις*) in describing terms in office, so it seems possible it could also refer to a term in prison.

This change in the legal system and the introduction of punitive imprisonment probably occurred shortly before the middle of the fifth century. As was said, Miltiades died in 489 during his imprisonment for failure to pay the fifty talent penalty imposed on him (Hdt. 6.136). Although he was sick when imprisoned, the financial burden passed on to his son after his death, implying that, even if Miltiades had lived longer, he would not have been free from his penal obligations and imprisonment until the fine was paid, no matter how long that took. By the time of the *Apology*, however, both Plato and Lysias could make matter-of-fact comments on the use of limited imprisonment as a penalty to be suggested during *τίμῃσις*.

A change occurred in the way the Athenians used their prison between 500 and 400, and I suggest that that change occurred around 460–50 as the result of the reforms of Ephialtes. The introduction of imprisonment as a penalty, that is to say, of limited prison terms, coincides in effect with reforms, such as jury pay, aimed at succouring the democratic masses. Ehrenberg labels Ephialtes 'a ruthless partisan of democracy' amongst whose most important reforms was the transfer of power over all secular penal jurisdiction from the Areopagus, a court of ex-archons, 'to the council of five hundred, the assembly, and the law courts, the forces of mass rule'.³⁴ It is certainly the elite members of the former that had benefited from the discrepancy in the criminal justice system caused by the use of pecuniary penalties. (Until 457 archons were selected from the top two wealth classes; after that time, they were selected from the

³⁴ V. Ehrenberg, *From Solon to Socrates* (New York, 1968), p. 212.

top three and *de facto* from all four). By focusing on the financial element within a state in which financial strength varied greatly among the citizens, laws that seemed equal in that they applied a nominally identical response to all citizens actually inflicted varying degrees of punishment on the populace. Quite possibly, the diminishing influence of the Areopagus removed an obstacle from the path of poorer citizens who could well have desired limited prison penalties as a substitute for financial punishment—an egalitarian reform in that it made citizens subject to laws of more equal rigour. In contrast, Charondas of Catana solved the problem, according to Aristotle (*Pol.* 1297a20–35), by legislating different financial penalties for different wealth classes. That the Athenians did not choose this method makes even more probable the possibility that the Athenians saw in imprisonment a solution to the problem of *isonomia*.

Furthermore, archaeological evidence dates to approximately 450 an unusual building near the agora constructed in the style of a public building and fitting the requirements of no Athenian public building we know of other than those of a prison, as specified from the practical requirements of prisons in general and from literary references to the prison in Athens in particular.³⁵ Construction of such a building, if it was a prison, in close proximity to the agora, the very public centre of the city, suggests that the prison had recently taken on a role of greater importance in the city than it had had previously.³⁶ And perhaps the regular use of imprisonment in military activity and the increasing institutional power of the generals also contributed to making imprisonment seem acceptable within the political system in Athens.

This introduction of penal imprisonment, however, did not entirely end the inequity of punishments; since imprisonment was only a substitute for a fine, a possibility to be suggested during *τίμης*, the rich had no obligation to suggest it and could easily commit whatever crimes they felt they could afford financially. Thus, while the poor no longer would suffer life imprisonment for the same offence for which the wealthy had quickly and easily paid a fine, they still did not have the same power to ignore the laws as was available to the wealthy.

III. ISONOMIA AND THE DEVELOPMENT OF PENAL IMPRISONMENT IN THE FOURTH CENTURY

The relative rarity in the oratorical corpus of references to the imposition of imprisonment as a penalty may well testify to the continuance in the late fifth and early fourth century of the democratic nature of the institution of penal

³⁵ E. Vanderpool 1976. I do not accept the argument that this building, called the Poros building in the publications of the American School of Classical Studies Agora excavations, was necessarily 'the prison of Socrates' nor the argument that it had to be 'the prison in Athens'. I accept the argument that this building is of such structure and stone as mark it as a public building and that, of public buildings, it is unique in ways that would befit a prison. The argument for the use of imprisonment as a penalty in no way stands or falls on the status of the building. I use the status of the building as a prison only to attempt a more specific chronology of the changes in the penal system.

³⁶ Interestingly, the *Prometheus Bound*, a play that explores the concept of imprisonment as a penalty, was roughly contemporaneous to the construction of the prison, and writers in later centuries associated the story of Prometheus with the *δεσμωτήριον*. S. Radt, *Tragicorum Graecorum Fragmenta*, vol. 3 (Gottingen, 1985), Aesch. fr. 202a, concerning *Prometheus Luomenos*. The fragment derives from Philodem. *De piet. pap.* Hercul. 1088 III 18. In fr. 204a, from *Prometheus Purkaios*, appears the word fragment *-ήριον*, which is usually restored as *δεσμωτήριον*. If the restoration is correct, this is the first instance of the word in our extant sources

imprisonment. If penal imprisonment primarily affected those not sufficiently wealthy to pay a fine, the status of the oratorical corpus as essentially the product of the wealth elite could explain the emphasis in the speeches on monetary penalties and the obfuscation therein of the debate over imprisonment.³⁷

What happened between 400 and 350? Two more changes further increased the democratic emphasis inherent in the Athenian use of imprisonment. The development that finally made all citizens essentially equal before the penal law was the jury's acquisition, by 350, of the power to impose, of its own volition during *τίμῃσις*, punitive imprisonment.³⁸ Following on this development, the Athenians may have begun, toward the end of the democracy, a transition toward the application of imprisonment in suits that were *ἀτίμητοι*, i.e. had penalties prescribed by law.³⁹ It is worth noting here that the first occurrence of the plural *δεσμωτήρια*, indicative of an increased use of imprisonment in the fourth century, occurs in Menander's *Dyskolos* of 317/6.⁴⁰

Demosthenes' *Against Timocrates* indicates that the change in the penal system remained a point of political contention and of confusion in application for quite a while. That case focuses largely on a supposedly illegal decree by Timocrates that, rather than forcing people who owed money to the state treasury to remain in prison until they could pay, would allow them to go free if they could provide a surety. A few groups such as tax-farmers were to be exempted from this privilege (Dem. 24.40). Demosthenes presents the decree as a reaction to attempts to imprison the elite as well as the common people. He argues that the *δεσμωτήριον* is 'a place where many genuine Athenians have sojourned. Indeed, people have been imprisoned there before now for debt and on judgement and have submitted patiently' (*καίτοι καὶ ἐπὶ χρήμασιν ἥδη τινὲς ἐδέθησαν καὶ ἐπὶ κρίσεσιν, ἀλλ' ὁμως ὑπέμενον*) (24.132).⁴¹ Timocrates and his friends, however, refuse to do so. According to Demosthenes (24.142), they gladly imprison the common people but refuse to submit to imprisonment themselves:

οἱ δὲ παρ' ἡμῖν ῥήτορες . . . ἔπειτ' αὐτοὶ μὲν τοὺς ιδιώτας εἰς τὸ δεσμωτήριον ἄγουσιν ὅταν ἀρχώσιν, ἐφ' ἑαυτοῖς δ' οὐκ οἰόνται δεῖν ταῦτό δίκαιον τοῦτ' εἶναι . . . εἰ οὖν μὴ τιμωρήσεσθε τούτους, οὐκ ἂν φθάνοι το πλῆθος τοῦτοις τοῖς θηρίοις δουλεῦον.

Those who are rhetors among us, when they are in office, they themselves then always lead private citizens off to jail; but they do not think it necessary for this same measure to be just when applied to themselves . . . If, therefore, you will not punish these men, right away the people will be enslaved to these beasts.

³⁷ Todd (1993: 140) suggests that, concerning penalties, 'these [oratorical] sources may be unrepresentative, because they tend to concentrate disproportionately on high crimes and misdemeanours.'

³⁸ The jury's power to impose imprisonment as a penalty was acquired in the first half of the fourth century, at least before Demosthenes' speeches *Against Timocrates* (353) and *Against Meidias* (348–6).

³⁹ As catalogued in Harrison (1971: 82), suits that were *ἀτίμητοι* included: *Δίκαι ἀποστασίου, κακηγορίας; εἰσαγγελία* of an arbitrator, *προδοσία*; procedures under *δοκιμασία*; procedures under *ἀπαγωγή, ἔνδεξις*, and *ἐφήγησις*; *Γραφαὶ ἱεροσυλίας, ψευδεγγγραφῆς, βουλευσέως, ἀδίκως εἰρχθῆναι ὡς μοιχόν, ξενίας, ἀστρατείας, δειλίας, λιποταξίου, ἀναυμαχίου, μοιχείας, ἐταιρήσεως, προαγωγείας, ἀργίας*, and probably *δωροξενίας* and *ὑποβολῆς*. For suits that were *τιμητοί*, see n. 17.

⁴⁰ According to Vanderpool (1976: 87), the Poros building tentatively identified as a prison was remodelled at the end of the fifth or beginning of the fourth century and again at the end of the fourth century.

⁴¹ Here we need notice again the explicit distinction between imprisonment for debt and imprisonment as penalty *per se*.

Timocrates and his friends would have it, argues Demosthenes (24.165), that a poor man, or even a wealthy man who had spent a great deal and was short of funds, would be afraid, as under the Thirty Tyrants, to go into the market-place, and would even think it dangerous to stay at home (because he could not afford to be charged with any criminal activity or dragged to prison). He would not have been able to gain release. Demosthenes maintains that the wealth elite was trying to secure the status quo; Timocrates' law, in which this elite suffered far less for their crimes than did other citizens, would have been an example of a member of the wealth elite manoeuvring the political structure to the advantage of his class.

In addition to maintaining procedures that harmed the poorer citizens, the wealth elite sometimes made conspicuous use of the advantage that it had. According to Demosthenes (*Ep.* 3.16), Taureas, Pataecus, Aristogeiton, and Timocrates, though they had been committed to prison, were not only not in chains but would even address the Assembly. This the poorer citizens would not allow. While they were quite willing to permit differences in wealth and standards of living, the citizens of Athens would not permit the reflection of such differences in their laws. In other words, the Athenians could tolerate discrepancies in their material well-being, but they refused to tolerate legal abuses that denied them justice and refused to accord them their full dignity as citizens—all of which they saw in the clear evidence that for their crimes some were suffering far less than others.

By winning the battle over whether or not prison sentences could be applied to anyone during *τίμῃσις*, the common people did not, however, entirely complete the egalitarian development of the punishments. In order fully to instate imprisonment within the penal apparatus of the city, punishment would have to be applied in cases that were *ἀτίμητοι* and provided for financial penalties as well as in cases that were *τιμητοί*. If the Athenians did begin a transition toward the application of imprisonment in suits that were *ἀτίμητοι*, they did so only shortly before the Macedonian conquest.

Demosthenes' discussion of jury-given prison sentences in *Against Timocrates* may possibly capture the democracy at a point of transition to the inclusion of imprisonment as a fixed penalty for cases that were *τιμητοί*. Demosthenes conflates the language of simple prison penalties and that of prison penalties derived from the need to enforce payment of a financial penalty. He clearly recognizes that imprisonment can result from a debt owed to the treasury, as a practical measure to ensure payment, and yet, in describing Timocrates' newly passed law, he refers to such imprisonment (24.39) as a penalty in and of itself rather than as some sort of proceeding to ensure payment of a penalty.

καὶ εἴ τιμι τῶν ὀφειλόντων τῷ δημοσίῳ προστέτιμῃται κατὰ νόμον ἢ κατὰ ψήφισμα δέσμου. . . .

If one of the debtors to the treasury has been punished according to law or decree with the additional penalty of imprisonment, [he shall be able to nominate sureties]⁴²

Instead of being a provision to force payment from state debtors, the imprisonment in relation to debt has become an *additional penalty*. Even debt-related procedural imprisonment assigned by law or decree is taking on the quality of punishment in the minds of the Athenians.

Similarly, Demosthenes describes certain crimes as susceptible to imprisonment in their own right, and remarks that Timocrates' law will allow for their committer's

⁴² This quotation is inserted into the text of the speech as the law of Timocrates. I use the quotation because what follows after in Demosthenes' own text, at 46 and 55, refers to this law and quotes it in such a way as to confirm the text quoted here.

release. Timocrates' law (as it is quoted by Demosthenes), however, allows only for the release of those criminals being held until they paid the *financial* penalty assessed for their crime. Thus, the law should not provide for the release of wrong-doers who have committed crimes that are susceptible to imprisonment in their own right. While it is possible that Demosthenes did not quote the whole of the law, it is not likely that he would leave out a part that supported his argument, which runs (24.60):

And you may not say this other thing—that of all persons punished with imprisonment (*ῥοῖς δεσμοῦ προστιμᾶται*) tax-farmers are the greatest wrong-doers of these and do us the greatest injustice, with the result that you do not give them alone the benefit of your law. Surely men who betray the community (*οἱ προδιδόντες τι τῶν κοινῶν*), men who wrong their own parents, men who enter the market-place without clean hands, offend far more: and all those criminals are threatened with imprisonment by the existing laws (*οἱ μὲν ὑπάρχοντες νόμοι δεσμὸν προλέγουσιν*), while your law grants them instant release.

Of these crimes, the charge of treason (*προδοσία*), for instance, had a penalty of death established by law.⁴³ The offenders would, presumably, have been arrested and held until trial without being allowed to post bail. But Demosthenes cannot here refer to bail imprisonment since Timocrates' law applies explicitly to people who have already undergone judgement. Thus, the death penalty for *prodosia* has perhaps become either a financial penalty or an imprisonment penalty. The language of this passage seems to imply that the new penalty was imprisonment, whereas the logic of the legal questions implies that it was a financial penalty. Whatever were the penalties for the crimes listed here, the language of the passage indicates that the Athenians at this point may have associated certain crimes with punishments of imprisonment. The confusion of language and the slow rate of change of the Athenian penal system reflect the living and pragmatic character of an Athenian political system always in a state of flux as the Athenians learned by doing.

Unlike private damage claims enforced by neighbours on one another, unlike *atimia* (exile from the city and/or its public spaces, effected by community knowledge), unlike fines enforced by the threat of *atimia*, and unlike the death penalty (also enforced by the threat of *atimia*),⁴⁴ imprisonment did not ultimately depend for its enforcement on the power of communal knowledge, discourse, and 'peer pressure' working through the threat of sight of the 'public eye' and *atimia* and private action. The prison-building—with its keepers and executioner, the Eleven and the *Δημόκοινο*s (Peoplecommon)⁴⁵—could work as a substitute for the community and existed as a form of power and control sufficient in itself and without the help of the power of public knowledge and community action. In introducing a self-sufficient and coercive institutional power, the development of imprisonment, perhaps already when debt-related and definitely when a penalty, marked the actual birth at Athens of a mechanism of *public* retribution, or the birth of an infant state. In this regard, it is indeed significant that the oligarchs were associated with frequent use of the prison and the prison seen as the tool of their power: power that is independent of the power of community knowledge, opinion, and discourses can be controlled or possessed by groups (or individuals) that are organized in any number of different ways.⁴⁶

⁴³ Bonner and Smith 1938: 284.

⁴⁴ Even the death penalty so depended, insofar as an escaped convict had to fear being seen (and recognized by fellow citizens) in locales from which he was forbidden. This would drive him into exile, the result of 'escape' from the death penalty.

⁴⁵ D. MacDowell, *The Law in Classical Athens* (Ithaca, 1978), p. 254; Soph. frag. 780, Ant. 1.20, Isoc. 17.15.

⁴⁶ Dem. 24.165; Lys. 12.17; 13.54, 56, 66. Lys. 13.45: 'You remember those led to prison then because of private enmities. . . . and forced to perish by the most shameful and most infamous destruction'.

The Athenian democrats attempted to attach the new modes of power to the power of community knowledge and discourses. Imprisonment, according to Demosthenes (24.114–15), was used so that everybody might see the bound man, the story of his wrong become part of the community's knowledge, and the wrong-doer live in disgrace for the rest of his life. What matters most, however, in the Athenians' relation to the modes of power of the prison, as substitute for the community, is that when the substitute failed in its job, the job fell back to the community. Demosthenes argues: 'Suppose you were told that the prison had been thrown open, and that prisoners (*δεσμῶται*) were escaping . . . there is not a man, however apathetic, who would not help as much as possible' (Dem. 24.208). Such would not apply were the prison the prison of the oligarchs. The placement of the prison, which to some extent replaces the power of social discourse with a foetal state power, in the hands of, specifically, the *Δημόκοινος* is what made Athens a democracy.

King's College, Cambridge

DANIELLE ALLEN