Const Polit Econ
https://doi.org/10.1007/s10602-018-9261-6

ORIGINAL PAPER

The law and economics of sycophancy

Daniel J. D'Amico[1]

Abstract Tullock (in: Rowley (ed) The selected works of Gordon Tullock, Liberty Fund, Indianapolis, pp 399–455, 2005) was skeptical of the presumed economic efficiency of the common law, as adversarialism, apparently inherent to common law procedures, allowed for and was prone to litigiousness. Common law litigations accord to patterns of rent-seeking, as litigants invest ever more resources to assure victory. This paper asks if viable institutional solutions can emerge to resolve the problem Tullock identified. I survey the historical development of the term sycophancy within ancient Greek law as a revealing case study. Though a relatively innocuous pejorative in contemporary parlance, the term's etymological roots stem from a formative process of ancient legal and institutional change within Athenian Greece. In the wake of specific legal reforms that expanded the scope of governmental authority under Solon (born 638–558 BCE), citizens were given explicit financial incentive to report violators of newly implemented public laws. Thereafter, social stigma surrounding third party legal representation leveraged the term sycophancy in reference to prosecutors motivated by private interests over the public welfare. Forgone social status and eventually formal criminal sanction emerged as offsetting differentials against the incentives of sycophancy.

Keywords Tullock · Athens · Sycophancy · Customary law

> *Chremylus.* How can you be good, you house-breaker, if you make yourself an object of hatred by meddling in things that in no way concern you?
>
> *Sycophant.* What? It is not my concern, you booby, to help my city as far as I can?

✉ Daniel J. D'Amico
Daniel_DAmico@brown.edu

[1] The Political Theory Project, Brown University, Providence, USA

Published online: 04 April 2018

Chremylus. Then do you call being a busy-body helping your city?
Sycophant. It isn't that at all. It is aiding the established laws if any one does wrong, not to let it pass.
Chremylus. But doesn't the state appoint judges for just that purpose?
Sycophant. But who is the accuser?
Chremylus. Any one who pleases.
Sycophant. Well that's who I am. So that the affairs of the state now rest on my shoulders.

– Aristophanes (1947, p. 443).

1 Introduction

Gordon Tullock represented a rare contrasting opinion in the early years of law and economics.[1] Whereas many viewed the common law as economically superior over civil law alternatives (Posner 1994). Tullock (2005) highlighted that adversarialism under the common law was a particularly wasteful feature. In short, common law litigation processes, akin to the production of political regulation, are ultimately rent-seeking endeavors (Tullock 1967).

In modern contexts, winning a court case is a lot like winning market share through advertising. Whichever competitor spends the most money also holds a strategic advantage over the other. Hence, litigation trials, like political elections and advertising battles, often devolve into spending races wherein each party continuously aims to invest above the other. Such spending does not contribute to social welfare, as it does not enhance product qualities or lower consumer costs. It merely reflects a dead weight cost, and an ever-larger dead weight cost the higher the levels of spending grow.

Furthermore, as rent seeking raises the general costs of litigation, detecting and correcting errors are also more difficult. Hence, Tullock argued common law processes are more prone to error than alternative legal systems. Different types of cases are also deterred from litigation under different cost structures, and thus adversarialism shapes the evolutionary tendencies of rule making overtime. By dispersing the costs of litigation, the American system for one example, fails to deter frivolous suits and thus the sample of cases contributing to precedent qualitatively suffers over time relative to alternative systems.[2]

Whereas many have described Tullock's position as a broad critique of the common law system writ large, this paper focuses upon the particular feature of litigiousness via adversarialism within the larger basket of common law principles.[3] I

[1] See: Zywicki (2008), Zywicki and Stringham (2013), Voigt (2017).

[2] Zywicki (2008) argues that Tullock's claims against adversarialism are stronger than his case against common law rule making. Luppi and Parisi (2012) comparatively model rule making across the American and English systems finding confirmatory implications from Tullock's secondary implications.

[3] Tullock (2005, p. 413) himself caveats and reserves much of his critique to the Anglo American common law system, especially within the latter twentieth century. He concedes a greater efficiency for the contemporary British system, as it possesses a "loser-pays" norm.

ask simply, if institutional evolutions or adaptations (typical aspects of the common law's decentralized historic origins) can be sufficient to address the potential inefficiencies of adversarialism and litigiousness? In short, I argue yes. With sufficient potential for further institutional innovations and adaptations, an adversarial legal system can effectively create incentive structures to deter against the motivations of frivolous litigations.

A survey of the etymological and legal history surrounding the term sycophancy in Ancient Greece is presented as a useful and revealing case study. Merriam Webster's (2017) defines a sycophant as, "a servile self-seeking flatterer." With listed synonyms like, "apple-polisher, bootlicker, brownnoser, fawner, flunky, lickspittle, suck-up, and toady," sycophancy's derogatory connotations are obvious. No one aspires to be labeled a sycophant, and no one uses the term favorably. Yet, there is a more complex history behind this seemingly simple pejorative. The initial rise of the word's usage, the disputed phenomena to which it referenced, and the obvious negative connotations imbued therein, can all be seen as part and parcel of an evolutionary process of institutional adjustment in the functions of law within democratic Athens (begun in the fifth century BCE).

Though sycophancy entered English parlance amidst the 16th century, its linguistic origins stem from ancient Greek. The word, συκοφάνται (*sukophantēs*) was derived by combining the terms *sykos*, meaning "fig" and *phainein* meaning, "to show or reveal." Commonly translated as "informant", it is thought that literal "fig-showers" were those who testified against tax violators in the fig trade (Harper 2017).[4] Even today, contemptuously gesturing with one's thumb pressed between two fingers, the "sign of the fig", represents a proverbial middle finger across a variety of Turkish and Slavic cultures.

Under the archon reign of Solon (born 638–558 BCE), sycophancy took on a specifically legal meaning to reference a certain phenomenon of pressing litigations. Legal representation at the time typically took the form of public orations. Hence, orators were the effective equivalent of private legal council in their day. Today, the remnant translated writings of the Attic orators (prominent between the 5th and 4th century BCE), various prominent folk pieces of Greek fiction,[5] and a brief but thorough secondary academic literature (see Lofberg 1917; Osborne 1990; Harvey 1990; Allen 2000 pp. 151–167) provide several consistent vantages from which to better understand sycophancy and its role within the broader historical changes of ancient Athenian law.

Legal norms in early Homeric Greece (1200–800 BCE) differed from later Athenian processes. In the earliest periods, litigations were essentially private affairs; meaning only residual claimants of an offense were entitled to press charges directly against alleged transgressors (Allen 2000, pp. 45–49). In the seventh century BCE, Solon implemented a new series of uniquely "public laws" (*dēmosia*). Such legislations included a substantial overhaul of the legal system, including a redefining of

[4] See also (Harvey 1990, p. 105 fn 5).

[5] Harvey (1990, pp. 107–110) provides a thorough listing of the term's pejorative uses throughout the classical canon.

the accepted system of weights and measures (Lloyd 1890; Billheimer 1938; Harding 1974; Hammond 1940, 1961). Controlling weights and measures and expanded legislative penal authority in turn awarded Solon and subsequent governments de facto powers over land redistribution and regulatory control over trade and tax enforcement (see Allen 2000; D'Amico 2010).

In prior legal epochs, the rewards from litigation represented a sufficient motivation for citizens to monitor and report violations of private laws (*dikē*). Victims were inclined towards legal participation by their likely abilities to regain lost property and wealth.[6] However, individual citizens were obviously less motivated to report and press charges against violators of these relatively newer and more publicly oriented policies and social controls. Additional legislations were needed if such policies were to be enforced. Solon thus provided all citizens the legal rights (*graphē*) and material incentives to prosecute (*eisangelia*) supposed violators of both private and public laws. Essentially, any citizen even without direct harm could serve as a prosecutor thereafter. "Herein sycophancy had its origin (Lofberg 1917, p. 2)."

With greater incentives to prosecute, litigations increased, as did the prominence of frivolous litigations. Furthermore, within a context of costly trials, such incentives created opportunities for blackmail and abuse. Better to simply pay a bribe than endure the costs of trial, the forgone reputational capital entailed therein, and or the risk of losing the case and becoming financially liable for punitive compensations. Sycophancy, thereafter became a condemnatory label directed at those who pressed charges without being personally harmed and referred to those who supposedly leveraged the law for personal gain.[7] Both literal and applied usages of the concept are on display in Aristophanes' comedy, *The Knig*hts (424 BCE). Cleon, a wealthy leather merchant serves as prosecutor and is described thusly, "And you squeeze the audit-passers, pinching them like figs, to try. Which is ripe, and which is ripening, which is very crude and dry. Find you one of easy temper, mouth agape, and vacant look (pp. 259–60)" (Page 1930, p. 149). "Evidently those who are 'fully ripe' are the ones worth 'pulling' for the money they will pay (Lofberg 1917, p. 46)." Eventually, the act of sycophancy also carried criminal sanctions and thus both formal and informal mechanisms were leveraged to better internalize the imposed costs that the behavior entailed.

The historical and institutional conditions surrounding the etymology of sycophancy help to demonstrate a sort of inter-dependence across the multiple features of the common law. While Tullock was perhaps correct to notice the problematic effects of adversarialism and litigiousness, his criticisms do not seem to deny or denigrate the evolutionary potentials also characteristic of the common law. In fact, substantial portions of his main criticism surrounding adversarialism stem from its indirect influence upon legal evolution. Hence, it is possible that under certain historical

[6] Barnett (1977) and Benson (1996) have noted similarly for other primitive and customary legal contexts that leveraged restitution over retributive punishments.

[7] Lofberg (1917, pp. 2–3) recreates the longer dialogue between Chremylus and the Sycophant, partially printed as the epigraph of this essay, as descriptive of the tension surrounding public v. private interest motivations in the legal process.

or social conditions, a sufficiently adaptable legal system could effectively overcome the shortcomings of litigiousness through institutional innovations. Though not formally a common law system, the similarly decentralized Athenian law also suffered litigiousness as an unintended consequence of legislated intervention. Subsequently, both informal and formal adaptations surrounding the phenomena of sycophancy, do not conclusively prove the ultimate efficiency potentials of the customary law, but do demonstrate the self-operating tendencies and potentials inherent therein.

Readers of Tullock's critiques of the common law ought to recognize his emphasis placed upon the Anglo American experience in the latter 20th century, as it was during this time that the common law's litigiousness was at peak. It was also during this time that the Anglo American organizational structure was radically changing away from decentralization and towards greater federal involvement and oversight (Greve 2012). Hence, there was a decreasing potential for the American system to leverage local innovations or adaptations towards self-correction. Alternative socio historical environments may possess different base levels of organizational decentralization and thus different potentials for self-adjustment and self-correction.

The remainder of this paper is organized as follows. Section II provides a brief overview of the common law, how economists view its social performance relative to other legal systems, and Tullock's skepticism thereof. Section III summarizes the processes of legal change in Ancient Greece surrounding sycophancy. Section IV provides some implications and concluding remarks.

2 The common law and economic efficiency

It is widely known that different countries possess different legal systems. France, the Scandinavian states, and much of Western Europe rely upon some variant of the civil law, heavily inspired by ancient Roman law (Merryman 1969). In contrast, Britain, the U.S., and the various countries colonized and founded therefrom leverage the common law tradition. The differences across these two main "legal origin" categories are more than nominal. Today, substantial theoretical (Damaska 1986; Pistor 2006) and empirical research (see La Porta et al. 2008) well documents the tangible differences in designed motivations, organizational patterns, and divergent social outcomes across these different systems. The civil law tradition is more associated with legal formalism, it contains intentionally codified public policies and procedures, and possesses more hierarchical organizational patterns; whereas the common law is typically considered to be more decentralized, more aimed towards the preservation of private ordering and conflict resolution, and less formalistic. In result, La Porta et al. (ibid. p. 286) summarize, "[i]n all… spheres civil law is associated with a heavier hand of government ownership and regulation than common law," and thus common law countries tend to correlate with stronger economic performance over time.

Early theorists in law and economics presumed similarly to what contemporary empirics report. Mainly, they perceived a meaningful connection between the common law and economic performance. This connection was reinforced by the conceptual similarities between some features of the common law and basic economic

processes. Mainly, the quasi-competitive nature and decentralized structure of common legal processes appear to operate akin to competitive market economies. Hence, legal institutional innovations and evolutionary advancements tend to displace less effective and less desirable alternatives over time, much like processes of technological change. Thus came the dominant view that the common law better promoted private property rights and fostered superior allocations of capital flows over the civil law (see Hayek 1960; Posner 1973; Landes and Posner 1987).

Again, Tullock was a relatively lone voice of opposition. His commentaries tended to emphasize the inefficient potentials for rent seeking and waste within the adversarial process of litigation. Whereas the typical venues for inefficiency within the civil law stem from its hierarchical structure and associated potential for capture and corruption (Williamson 1981; Sah and Stiglitz 1986; Milgrom and Roberts 1992), civil law tort litigations typically avoid rent-seeking traps. This is so, largely because civil law systems entail formally quantified awards associated with particular breeches of civic norms, whereas common law is more open to the conditional nuance of particular cases and tends to respect the bargaining power of private litigants (Merryman 1969).

However, it is important to remember that not all common law systems are identical. The vast differences across the economic and legal outcomes in the contemporary U.S. versus England are obvious cases in point. Again, Tullock's criticisms against the common law were most often relegated specifically to the Anglo American experience in the latter twentieth century (Tullock 2005, p. 413) as England has largely avoided similar problems via the application of a loser-pays norm. In short, by making the losing litigant liable for the trial costs, litigiousness is deterred. Thus, begging the question as to what particular feature of the common law is most responsible for the problematic effects of litigiousness. And second, can the remaining desirable features of the common law, under certain historical or social conditions be arranged or serve to offset Tullock's concerns?

3 Athens amidst change

The legal system of ancient Greece, and eventually democratic Athens, operated very differently from modern norms. However, some similarities do hold across the Athenian and common law traditions. In both contexts, legal norms first evolved without the design or authority of a formal nation state (Cohen 2005; Gagarin 2005). Similar to how disjointed Anglo Saxon territories fostered a polycentric system of competing legal jurisdictions (Maitland and Pollock 1895; Berman 1983), research on ancient Greek law typically describes a dispersed network of local and privately motivated judicial services prominent throughout the Homeric period (1200–800 BCE) (Allen 1997, 2000; Hunter 1994).

Generally speaking, the earliest Greek legal processes comport with the findings of primitive legal studies (Posner 1980, 1981; Benson 1988, 1989). There were no publically funded police, courts, or prison services. Legal processes were privately motivated, as individuals invested real resources and energies to pre-emptively secure property, design self-enforcing contracts, and seek compensation in the wake

of conflicts or perceived harms. There were no strong distinctions between civil and criminal law (Calhoun 1927; Cohen 1995), as interpersonal adjudication processes were leveraged to resolve even intentionally violent actions and other contemporarily criminal matters (Finley 1953).

Just as the costs of conflict provide incentives to discover, implement, and conform with private property norms (Demsetz 1967), self interests conditioned by the foreseeable costs of conflict and long run reputational losses often motivate disputants in primitive legal settings towards the usage of third party arbitration. Individuals are prone to vengeance, and typically recognize this proclivity in others. Third party judicial authorities thus provide benefits of impartiality, transparency, and demonstrate a clear signal of prudence and conflict avoidance. It is widely held that such incentives motivated the evolution of relatively vibrant and formal markets for judicial services in ancient Greece (MacDowell 1978, pp. 13–18).

Research surrounding spontaneous legal orders suggests that such governance services tend to emerge amidst social needs irrespective of formal state or governmental authorities (Ostrom 1990; Ellickson 1994; Anderson and Hill 2004; Stringham 2015). Hence, judicial processes in ancient Greece were relatively formal operations with dedicated suppliers, significant competition, and some degree of specialized divisions of labor across different security and legal needs. Judges charged fees for legal and arbitration services. Disputants possessed some ability to select across alternative judges or courts for individual cases. Legal authorities essentially competed for profits by producing rulings that mutually satisfied conflicting parties while appealing to the longer run trends of public opinion.[8] Hence, judicial authorities and courts aimed to build reputations for intelligence, fairness, transparency, and impartiality.

More socially desirable rulings and evidentiary standards stood the test of time and became commonly benchmarked legal norms. The ancient Greek system, in its earliest manifestations, was largely focused upon the mitigation of proprietary disputes and interpersonal conflicts.[9] Without publically financed, produced, or managed prisons, and simultaneously motivated by plaintiffs' efforts to recoup tangible losses, ancient Greek punishments were typically framed as pecuniary or tangible resource debts to be paid by the guilty towards the winning litigants. The administration of physical penalties and or bondage was also privately motivated, but reserved as a "secondary" or additional threat to induce compliance to restitution (Barkan 1936). Hence, if an individual refused to make payment they could be physically

[8] Perhaps the most iconic source material description of primitive Greek legal processes is Homer's description of Achilles shield in the *Iliad*, "…And in the middle law two talents of gold, to give to the one who delivered judgment most rightly among them (18.508)." Homer additionally describes the usage of impartial third parties elsewhere (Iliad 23. 485–487). Hesiod's *Theogony* (81–90) reports similarly noting that good judges implement fair and welcomed rulings while de-escalating violence and conflict.

[9] MacDowell (1978, pp. 10–12) argues the bulk of legal references throughout the epics concern proprietary disputes. Similarly, Austin and Vidal-Naquet (1972, p. 25) argue the bulk of political and institutional change in ancient Greece centered on land disputes. See also: Calhoun (1927) and Cohen (1995).

punished. If a liable party could not afford payment, he could then be held in bondage as an indentured servant.[10]

The market metaphor of law and economics is perhaps more obviously at play within such customary legal settings, as agents can be recognized to adjust their behaviors and strategies in direct response to changing incentives. Furthermore, when framed as debts, punishments more obviously operate akin to pricing mechanisms in a market economy. Essentially punishments attempt to impose transparent costs against the benefits of illicit behavior (Becker 1968). The case of ancient Greece is no exception. At each phase of the ancient Greek legal process (pressing litigation, judicial decision-making, and the gauging of punitive sanctions) incentives guided outcomes and invoked self-regulating tendencies.

Citizens pressed charges when they believed that the amount they could regain through trial, discounted by the probability of winning the case, was greater than the foreseen costs. Hence plaintiffs pursued cases most-often when they possessed clear evidence to communicate their own legitimacy and the wrong doing of their opponents. More litigations were more likely when the costs of trial were low and the perceived benefits high. Such foresight contributed to the evolutionary properties of the legal system writ large by suppressing frivolous cases grounded on weak evidentiary standards. If caseloads became too large for courts to handle, judicial authorities could thus increase fees and deter extraneous litigations (Todd and Millet 1990, p. 220). Hence, one key function of this customary and decentralized system was its self-regulating tendency to mitigate against frivolous prosecutions and suppress excessive requests for punitive vengeance.[11]

The interactive incentives of litigants similarly created a form of self-regulation by shaping the types and quantities of punitive sanctions away from vengeful excess and towards predictable and consistent outcomes. Given that cases operated akin to modern tort procedures, disputants could, and most often did, pre-emptively resolve disputes before trial (Osborne 1990, p. 98). If a defendant thought his probability to win the case was low and his expected debt would be high, then he would be willing to pay any lesser amount to avoid trial and salvage his reputation. Inversely, prosecutors would be enticed to accept settlement with higher legal fees and reputational costs of trial. Hence, in line with basic law and economic theory, the more predictable the outcome of a case is, the less likely it is to go to court (Posner 1973). For cases that lacked obvious pre-emptive winners, restitutions had to be gauged in some meaningful and proportionate way for judges to satisfy litigants and appease public sentiments. Several have noted that the ancient Greek norm of *timeoi* ("needing an estimate"), wherein judges and juries were required to select

[10] As wealthier citizens made payments to satisfy punitive sentences, poor Athenians were more often subjected to bondage. Thus, as formal state authority subsumed the right of bondage but retained the social norms of restitution, systemic inequality of bonded populations drew the public's ire (see Allen 2000).

[11] The unique Athenian law of hubris is a similar example. In short, hubris was a charge pressed against an original plaintiff who lacked sufficient evidence or good cause to have originally pressed charges. It was a direct reference to the financial costs of time supposedly wasted by the initial defendant (Fisher 1990).

proposals (*timesis*) designed by litigants, rather than craft original sentences, was an effective way to both induce moderation amongst conflicting agents and limit the imposition of excessive legal fees (Saunders 1990, p. 76; Long 1996; Allen 1997, p. 125; D'Amico 2010).

In result, most customary restitution systems tend to evolve relatively consistent arrays of sanctions across different harms (Friedman 1979). Similarly ranked punitive scales can be found across a variety of times, places, and cultures (Sellin and Wolfgang 1964). Furthermore, similar conditional moderation and self-regulation has been argued to operate around the more physically intensive secondary punishments of bondage and indentured servitude. First, a restitution norm meant that once paid, a violator could go free. Second, the logistic challenges and overhead costs associated with housing and feeding a servant put an upper bound on the number and duration of such practices (Hunter 1994, p. 316; Allen 1997, p. 126).

Again, much like the transition from Anglo-Saxon customary law towards modern legal institutions, Athens overhauled its legal system and judicial processes simultaneously with the development of formal state authority. Athens was essentially the birthplace of the city-state and democracy therein (Calhoun 1927; Ehrenberg 1937; Austin and Vidal-Naquet 1972). While unique in fostering and leveraging democratic norms, Athens also had Archon positions (translated as "rulers" or "lords") that retained substantial levels of legislative, executive, and economic authority over the public operations of the city.

According to the Athenian constitution (Aristotle [1984]), Draco implemented some of the first written codes of law during the archonship of Aristachmus (624–623 BCE). Infamous in today's common parlance, Draco's policies are typically considered to have been oppressive and to have generated class inequality via indentured servitude. Solon was chosen as chief magistrate of Athens in 594 BCE. Often awarded the moniker "law bringer", Solon's reign represented a period of substantial legal reform supposedly designed to mitigate the social inequities remnant from Draconian policies.

In addition to liberating indentured servants via the *Seisachtheia* ("the relief of burdens"), Solon substantially redistributed ownership claims to land and imposed a standardized system of weights and measures (Lloyd 1890; Harding 1974; Hammond 1940, 1961; Billheimer 1938). In result, Athenian government under Solon and thereafter possessed a new host of regulatory and interventionist powers. Again, previously laws were informally the evolved norms of proprietary ownership and the commonly accepted practices of contract and personal rights. Thus, Solon's reforms produced a new arena of public laws. But, by changing the formal substance of the law, these new public policies lacked many of the self-reinforcing incentives and tendencies of the previous customary legal regime.

By introducing an essentially new arena of public laws, but without the surrounding customary institutional norms to motivate citizen participation or enforcement, Solon's policies disrupted many of the previously self-regulating tendencies of the legal process. This is not to say that previous customary norms were fully displaced or that self-adjustment would cease, merely that new social and legal equilibriums were inevitable. Most obviously, additional policies and enforcement techniques were required to assure compliance of newly applied social controls.

To cope with the logistic challenges of prohibiting indentured servitude, Solon formalized the resources and application of imprisonment in Athens (Vanderpool 1980; D'Amico 2010). Without the secondary threat of private bondage, legal rulings lacked credible commitments. Hence, the punitive norm of ancient Athens eventually shifted from debt-based restitutions into a more modern-esque practice of prioritizing time served in state controlled prison facilities.[12] Just as violators lacked a sufficient incentive to abide legal rulings without the threat of imprisonment, prosecutors lacked a sufficient incentive to report and enforce the new swath of public laws. The reporting and prosecution of private violations was previously complemented by restitution, as plaintiffs were directly rewarded for winning cases. But, public crimes lacked the same form of tangible rewards to encourage citizen participation in the legal process. Having a slue of legal policies but effectively no enforcement, not only weakens public confidence in the ruling authority, but also weakens the public respect for the broader system of legal order. In response, Solon extended the rights of citizens to press charges beyond their own residual claimants.[13] Any citizen, even those not directly harmed by legal violations, were entitled to press charges against public and private violators.

Across different institutional contexts, the process of litigation always carries some positive costs. Such costs can take various forms such as, court fees, the price of hiring a representative attorney, or simply the time and effort involved in attending trials and making your case. Other things constant, when those costs are low the frequency of litigation will be high, and vice versa. The cultural context of democratic Athens possessed several traits that directly shaped the costs of litigation, mainly the strong value of public reputations.

Again, legal processes in democratic Athens were somewhat different from previous Homeric practices. In particular, juries had a much stronger influence relative to judges under democratic Athens. Athenian juries were much larger than their contemporary counterparts, as they were comprised of the general public who attended a trial, typically held in a public space. "In everyday political life the *demos* (people) exercised the *kratos* (sovereign power) in all three spheres of legislation, executive action, and jurisdiction (Cartledge 1990, p. 43)." Thus one of the major factors shaping the costs of litigation for a citizen was how the trial would influence his public reputation.

As mentioned previously, if an individual pressed for too severe amounts of restitution, their potential loss of public reputation could mitigate the potential gains of winning the case and thus deter more frivolous charges. Similar to the incentives motivating disputants towards third party adjudication, private legal representation is another self-affirming tendency of customary legal processes. Any individual with more experience, education and or skill in legal proceedings likely has a better chance of making and winning a case (Osborne 1990, p. 86). Furthermore, the reputational value of legal representation heightens amidst a context so heavily

[12] Socrates trial (approximately 399 BCE) described in Plato's *Apology* (37b-c) represents markedly different legal and punitive processes from earlier periods.

[13] See Everson (1984, p. 216) and (Perrin 1967, pp. 451–455).

reliant upon jury authority. Subsequently private legal representatives have longer run interests than individual citizens and are thus more mitigated towards prudence and away from vengeance.

However, amidst the new expansion of public laws, all citizens had direct incentives to press charges against public violators.[14] Hence, the risk of forgone reputations operated as a greater risk for defendants relative to plaintiffs and prodded excessive litigations from particularly skilled orators.[15] If a prosecuting citizen pressed accusations against a wealthy Athenian, the wealthy individual had a certain set of viable opportunities to minimize his costs. First, he could ignore the charges, but if the accuser proceeded nonetheless the defendant would still likely endure reputational losses. Thus, there was a general incentive to either plea bargain a payment to the accuser or participate in a trial. Participating in litigation still entailed the inevitable costs of time and those associated with obtaining legal defense services. Litigation also carried the possibility of losing at trial and the costs of punishment discounted by some uncertain probability, which would likely be the most expensive of all possible scenarios. In simplest terms, if the cost of paying a plea or bribe to the accuser was perceived to be less than the total costs of participating in the trial, regardless of winning or loosing, then the accused's best strategy was to pay the blackmail.

Various socio-conditional factors within democratic Athens created a large opportunity space for accusers to profit from threatening litigation against wealthy citizens. And threaten they did. Most obviously was the direct financial incentives attached to reporting against public violations. In short, fines for violating trade policies were first paid to the state coffers, but equal amounts were also awarded to the citizen prosecutor (Lofberg 1917, p. 27). Hence, the profit opportunities for pressing frivolous charges were even greater than the strategic set previously described.

Furthermore, the large degree of wealth inequality, the strong role of public reputations, and the legal authority of public juries created a strong bias for paying out pleas and avoiding trials. If the jury was a representative sample of the Athenian public it was most likely that they held a certain degree of animosity against the rich and powerful (ibid. p. 15).[16] In so far as wealthier citizens could more easily afford material wealth relative to their reputational capital, they had a high willingness to pay in order to fend off litigation.

Hence, talented orators, with weak or no evidence could pose a substantial and credible threat against wealthier citizens. Victims of such blackmail were left with the hard decision of risking reputational losses by ignoring threats, paying for premium legal representation still with a substantial degree of uncertainty, or paying off

[14] Osborne (1990, p. 92) notes the apparently systemic difference between sycophancy accusations in cases related to public relative to private violations. The latter having a rare occasion for the term, yet the former near universal invocation.

[15] Osborne (1990, p. 86) quotes Isocrates XXI.5 "[t]hose who are clever at speaking but poor' are particularly keen to bring sycophantic allegations, and their favoured victims are those who are incapable as orators but able to pay out cash."

[16] This sense of hostility against the rich has been challenged. See: Jones (1958, p. 36).

the bribe. Such frequent shake downs thrived under these conditions.[17] In response, linguistic and cultural norms evolved the pejorative implications and criminal sanctions more commonly associated with sycophancy as a meaningful and effective bulwark against this entire professional class engaged in bribery against the wealthy.

Once the negative connotations surrounding sycophancy were widely held by ordinary citizens and jury participants, defendant orators could strategically leverage the accusation to draw attention back to more tangible and verifiable evidentiary standards. As Harvey (1990, p. 106) explains [i]f a plaintiff failed to secure one fifth of the jury's votes, he was liable to a fine, and in some cases partial loss of citizen rights: he was probably not permitted to bring any similar cases in the future." In result, legal extortions had a more limited potential. Repeatedly losing cases in the face of sycophancy accusations would substantially weaken an orator's reputation and future profitability. Later political authorities took formal enforcement actions against legal extortion.[18]

4 Implications and conclusions

Understanding the processes of institutional change that occurred under Solon, and the role sycophancy played therein, carries several implications for constitutional political economy more generally. First, this case study affirms the merits of viewing law through an incentive-based lens. The scholarly field of law and economics rests upon a "law as market" metaphor (Posner 1973), and sycophancy represents one of the earliest examples wherein citizens, legal professionals, and social commentators all grappled with the predictable effects of incentives and strategic behaviors within the legal process. Both commentators at the time and subsequent historians clearly recognize how legal processes and norms were directly shaped by the strategic incentives inferred by citizen participants. Hence, the broader case of Athenian law and specifically sycophancy therein represent a confirming data point in favor of the general applicability and validity of the law and economics framework and theories therein.

Second, the term's charged normative connotations support a particularly Public Choice approach to law and economics. Long before Yandle's (1983) insights regarding "bootleggers and Baptists," ancient Greeks were exposing the ulterior motives of sycophants as legal interlopers. The gist of sycophancy's meaning in its ancient usages parallels its common parlance today. A sycophant's testimonies and legal actions were not to be trusted at face value; they merely provided a cloak for private interests.

[17] Some have inferred sycophancy so prominent as to represent an entire professional class of citizens (Osborne 1990). While this specific claim is contested, the likely prominence of sycophantic behaviors and accusations throughout trial procedures is well empirically established and widely accepted (Harvey 1990, pp. 107–109).

[18] Harvey (1990, p. 106) cites "Lipsius 1905–1915, 449, Bonner and Smith (1938, pp. 56–57), MacDowell (1978, p. 64) and Harrison (1971, p. 83)" all documenting the formally criminal connotations of sycophancy.

Third, the prominence and rise of sycophancy as a derogatory smear, demonstrates first the thickness and robustness of the market for private legal representation in ancient Athens. Osborne (1990) goes so far as to argue that the act of sycophancy itself operated as a check against wealthy elites using and manipulating the law for private gain and thus considers sycophancy a welfare-enhancing norm. Harvey (1990) disagrees, but in either case the phenomenon demonstrates a self-adjusting property to quasi-customary legal processes in line with previous surveys of spontaneous law (Benson 1989, Parisi 1995). By referring to someone as a sycophant, defendant litigants were essentially prodding jurors to discount the prosecutions' claims and impose reputational costs on would be frivolous litigators. Thus, the pervasive negative connotations of sycophancy shaped the evolutionary process of case selection and rule formation within the Greek legal tradition.

Last, given sycophancy's direct relation to the costs and benefits of litigation, the case of Athenian law can be leveraged for comparative analysis to investigate Tullock's (2005) criticisms of the common law. Ancient Athens was obviously orthogonal to common law history and operated differently from both present-day England and the US, but this case can and does help to isolate some particular features of Tullock's critiques nonetheless.[19] Tullock saw contemporary trends in US adversarialism as wasteful, error prone, and disruptive to efficient rule making; but the modern English system largely avoids similar problems by means of a loser pays norm. In short, if you lose a case, you have to cover the legal expenses of the opposing litigant. Hence, a disincentive against frivolous claims is self-reinforcing. The negative social connotations of sycophancy similarly imposed reputational costs against extraneous prosecutions. Furthermore, it is important to recognize that adversarialism only appears to be problematic in the Athenian case after specific policy changes expanded the scope of public law. Hence, Tullock's criticisms may be better understood as conditional to the latter twentieth century US experience. Decentralized legal systems may avoid the efficiency challenges associated with adversarialism in so far as their surrounding institutional components foster good incentives for adaptation and self-adjustment.

References

Acemoglu, D., & Robinson, J. (2016). Paths to inclusive political institutions. *Working Paper.*

Allen, D. (1997). Imprisonment in classical Athens. *The Classical Quarterly, 41*(1), 121–135.

Allen, D. (2000). *The world of Prometheus, the politics of punishing in democratic Athens*. Princeton: Princeton University Press.

Anderson, T., & Hill, P. (2004). *The not so wild, wild west: Property rights on the frontier*. Palo Alto: Stanford Economics and Finance.

Aristotle (1984). Everson, S. (ed.). *The politics and the constitution of Athens.* Cambridge: Cambridge University Press.

Austin, M., & Vidal-Naquet, P. (1972). *Economic and social history of Ancient Greece, an introduction*. Los Angeles: University of California Press.

[19] Other researchers have also made explicit comparisons between Ancient Greece and the common law tradition. See: Todd and Millet (1990) and Acemoglu and Robinson (2016).

Barkan, I. (1936). Imprisonment as a penalty in Ancient Athens. *Classical Philology, 31*(4), 338–341.
Barnett, R. (1977). Restitution: A new paradigm for criminal justice. *Ethics, 87,* 279–301.
Becker, G. (1968). Crime and punishment an economic approach. *Journal of Political Economy, 76*(2), 169–217.
Benson, B. (1988). Legal evolution in primitive societies. *Journal of Institutional and Theoretical Economics, 144*(5), 772–788.
Benson, B. (1989). The spontaneous evolution of commercial law. *Southern Economic Journal, 55*(3), 644–661.
Benson, B. (1996). Restitution in theory and practice. *Journal of Libertarian Studies, 11*(1), 44–78.
Berman, H. (1983). *Law and revolution: The formation of the western legal tradition*. Cambridge: Harvard University Press.
Billheimer, A. (1938). The seisachtheia and inflation. *The Classical Journal, 33*(8), 471–478.
Bonner, R., & Smith, G. (1930–1938). *The administration of justice from Homer to Aristotle*, Vol. 2. Chicago: Chicago University Press.
Calhoun, G. (1927). *The growth of criminal law in Ancient Greece*. Berkley: University of California Press.
Cartledge, P. (1990). Fowl play: A curious lawsuit in classical Athens. In P. Cartledge, P. Millett, & S. Todd (Eds.), *NOMOS: Essays in Athenian law, politics and society*. New York: Cambridge University Press.
Cohen, D. (1995). *Law, violence, and community in classical Athens*. New York: Cambridge University Press.
Cohen, D. (2005). Introduction. In D. Cohen & M. Gagarin (Eds.), *The Cambridge companion to Ancient Greek law*. New York: Cambridge University Press.
D'Amico, D. (2010). The prison in economics: Private and public incarceration in Ancient Greece. *Public Choice, 145*(3–4), 461–482.
Damaska, M. (1986). *The faces of justice and state authority: A comparative approach to the legal process*. New Haven: Yale University Press.
Demsetz, H. (1967). Towards a theory of property rights. *The American Economic Review, 57*(2), 347–359.
Ehrenberg, V. (1937). When did the polis rise? *The Journal of Hellenic Studies, 57*(2), 147–159.
Ellickson, R. (1994). *Order without law: How neighbors settle disputes*. Cambridge: Harvard University Press.
Everson, S. (Ed.). (1984). *Aristotle: The politics and the constitution of Athens*. Cambridge: Cambridge University Press.
Finley, M. (1953). *Economy and society in Ancient Greece*. New York: The Viking Press.
Fisher, N. (1990). The law of Hubris in Athens. In P. Cartledge, P. Millett, & S. Todd (Eds.), *NOMOS: Essays in Athenian law, politics and society*. New York: Cambridge University Press.
Friedman, D. (1979). Private creation and enforcement of law: A historical case. *Journal of Legal Studies, 8*(2), 399–415.
Gagarin, M. (2005). The unity of Greek law. In D. Cohen & M. Gagarin (Eds.), *The Cambridge companion to Ancient Greek law*. New York: Cambridge University Press.
Greve, M. (2012). *The upside-down constitution*. Cambridge: Harvard University Press.
Hammond, N. (1940). The seisachtheia and the nomothesia of Solon. *The Journal of Hellenic Studies, 60,* 71–83.
Hammond, N. (1961). Land tenure in Attica and Solon's seisachtheia. *The Journal of Hellenic Studies, 81,* 76–98.
Harding, P. (1974). Androtion's view of Solon's 'seisachtheia'. *Pheonix, 28*(3), 282–289.
Harper, D. (ed.) (2017). Sycophant. *Online Etymology Dictionary*. Accessed July 17, 2017. http://www.etymonline.com/index.php?term=sycophant&allowed_in_frame=0.
Harrison, A. (1971). *The law of Athens*. Oxford: Oxford University Press.
Harvey, D. (1990). The sycophant and sycophancy: Vexatious redefinition? In P. Cartledge, P. Millett, & S. Todd (Eds.), *NOMOS: Essays in Athenian Law, Politics and Society* (pp. 103–122). Cambridge: Cambridge University Press.
Hayek, F. (1960). *The constitution of liberty*. Chicago: University of Chicago Press.
Hesiod (1991). *The works and days, Theogony, and the shield of Herakles* (trans: Lattimore, R.). Ann Arbor: University of Michigan Press.
Homer (1951). *The Iliad of Homer* (trans: Lattimore, R.). Chicago: University of Chicago Press.
Hunter, V. (1994). *Policing Athens*. Princeton: Princeton University Press.

Jones, A. (1958). *Athenian democracy*. New York: Frederick A. Praeger.
La Porta, R., Lopez-de-Silanes, F., & Shleifer, A. (2008). The economic consequences of legal origins. *Journal of Economic Literature, 46,* 285–332.
Landes, W., & Posner, R. (1987). *The economic structure of tort law*. Cambridge: Harvard University Press.
Lipsius (1905–1915) Das attische Recht und Rechtsverfahren, 3 vols in 4. I. Gerichtsverfassung; II.1. Offentliche Klagen; II.2 Privatlagen; III. Prozessgang. Leipzig (repr. Darmstadt 1966, Hildesheim 1984).
Lloyd, W. (1890). Seisachtheia. *The Classical Review, 4*(6), 271.
Lofberg, J. (1917). *Sycophancy in Athens: A dissertation*. Chicago: University of Chicago Libraries.
Long, R. (1996). The Athenian constitution: Government by jury and referendum. *Formulations*. Available at: www.libertariannation.org.
Luppi, B., & Parisi, F. (2012). Litigation and legal evolution: Does procedure matter? *Public Choice, 152*(1/2), 181–201.
MacDowell, D. (1978). *The law in classical Athens*. Ithaca: Cornell University Press.
Maitland, F., & Pollock, F. (1895 [1965]). *The history of English law before the time of Edward I*. Indianapolis: Liberty Fund.
Merriam-Webster's Dictionary. (2017). *Sycophant*. Accessed Jul 17, 2017. https://www.merriam-webster.com/dictionary/sycophant.
Merryman, J. (1969). *The civil law tradition: An introduction to the legal systems of Europe and Latin America* (3rd ed.). Palo Alto: Stanford University Press.
Milgrom, P., & Roberts, J. (1992). *Economics, organization and management*. Upper Saddle River: Prentice Hall.
Osborne, R. (1990). Vexatious litigation in classical Athens: Sycophancy and the sycophant. In P. Cartledge, P. Millett, & S. Todd (Eds.), *NOMOS: Essays in Athenian law, politics and society* (pp. 83–102). Cambridge: Cambridge University Press.
Ostrom, E. (1990). *Governing the commons: The evolution of institutions for collective action*. Cambridge: Cambridge University Press.
Page, T. E. (Ed.). (1930). *Aristophanes* (Vol. I). London: William Heinemann Ltd.
Page, T. E. (Ed.). (1947). *Aristophanes* (Vol. III). London: William Heinemann Ltd.
Parisi, F. (1995). Toward a theory of spontaneous law. *Constitutional Political Economy, 6*(3), 211–231.
Pistor, K. (2006). Legal ground rules in coordinated and liberal market economies. In K. Hopt, E. Wymeersch, H. Kanda, & H. Baum (Eds.), *Corporate governance in context: Corporations, states, and markets in Europe, Japan, and the US* (pp. 249–280). Oxford: Oxford University Press.
Plato's apology (1997). J. Cooper (Ed.). Plato, complete works. Indianapolis: Hacket.
Posner, R. (1973). *Economic analysis of law*. Chicago: Wolters Kluwer Law & Business.
Posner, R. (1980). A theory of primitive society, with special reference to primitive law. *Journal of Law and Economics, 23*(1), 1–53.
Posner, R. (1981). *The economics of justice*. Cambridge: Cambridge University Press.
Posner, R. (1994). What do judges maximize? (the same thing everybody else does). *Supreme Court Economic Review, 3,* 1.
Sah, R., & Stiglitz, J. (1986). The architecture of economic systems: Hierarchies and polyarchies. *The American Economic Review, 76*(4), 716–727.
Saunders, T. (1990). Plato and the Athenian law of theft. In P. Cartledge, P. Millett, & S. Todd (Eds.), *NOMOS: Essays in Athenian law, politics and society*. New York: Cambridge University Press.
Sellin, T., & Wolfgang, M. (1964). *The measurement of delinquency*. New York: Wiley.
Stringham, E. (2015). *Private governance: Creating order in economic and social life*. New York: Oxford University Press.
Todd, S., & Millet, P. (1990). Law, society and Athens. In P. Cartledge, P. Millett, & S. Todd (Eds.), *NOMOS: Essays in Athenian law, politics and society*. New York: Cambridge University Press.
Tullock, G. (1967). The welfare costs of tariffs, monopolies, and theft. *Western Economic Journal, 5*(3), 224–232.
Tullock, G. (2005). The case against the common law. In G. Rowley (Ed.), *The selected works of Gordon Tullock* (Vol. 9, pp. 399–455). Indianapolis: Liberty Fund.
Vanderpool, E. (1980). The state prison of Athens. In K. De Vries (Ed.), *From Athens to Gordion: The papers of a memorial symposium for Rodney S Young* (pp. 17–31). Philadelphia: University of Pennsylvania Press.

Voigt, S. (2017). Tullock on the common law: A loose-cannon iconoclast in action? *Constitutional Political Economy, 28*(1), 35–47.

Williamson, O. (1981). The economics of organization: The transaction cost approach. *The American Journal of Sociology, 87*(3), 548–577.

Yandle, B. (1983). Bootleggers and Baptists: The education of a regulatory economist. *Regulation, 7*(3), 12.

Zywicki, T. (2008). Spontaneous order and the common law: Gordon Tullock's critique. *Public Choice, 135*(1/2), 35–53.

Zywicki, T., & Stringham, E. (2013). Common law and economic efficiency. In F. Parisi (Ed.), *The Production of Legal Rules* (pp. 107–131). Cheltenham: Edward Elgar.