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Rethinking Athenian Democracy

A dissertation presented

by

Daniela Louise Cammack

to

The Department of Government

in partial fulfillment of the requirements
for the degree of
Doctor of Philosophy
in the subject of
Political Science

Harvard University
Cambridge, Massachusetts

January 2013

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Professor Richard Tuck Daniela Cammack

Abstract

Conventional accounts of classical Athenian democracy represent the assembly as the primary democratic institution in the Athenian political system. This looks reasonable in the light of modern democracy, which has typically developed through the democratization of legislative assemblies. Yet it conflicts with the evidence at our disposal. Our ancient sources suggest that the most significant and distinctively democratic institution in Athens was the courts, where decisions were made by large panels of randomly selected ordinary citizens with no possibility of appeal.

This dissertation reinterprets Athenian democracy as "dikastic democracy" (from the Greek *dikastēs*, "judge"), defined as a mode of government in which ordinary citizens rule principally through their control of the administration of justice. It begins by casting doubt on two major planks in the modern interpretation of Athenian democracy: first, that it rested on a conception of the "wisdom of the multitude" akin to that advanced by epistemic democrats today, and second that it was "deliberative," meaning that mass discussion of political matters played a defining role. The first plank rests largely on an argument made by Aristotle in support of mass political participation, which I show has been comprehensively misunderstood. The second rests on the interpretation of the verb "*bouleuomai*" as indicating speech, but I suggest that it meant internal reflection in both the courts and the assembly. The third chapter begins the constructive part of the project by comparing the assembly and courts as instruments of democracy in Athens, and the

fourth shows how a focus on the courts reveals the deep political dimensions of Plato's work, which in turn suggests one reason why modern democratic ideology and practice have moved so far from the Athenians' on this score.

Throughout, the dissertation combines textual, philological and conceptual analysis with attention to institutional detail and the wider historical context. The resulting account makes a strong case for the relevance of classical Athens today, both as a source of potentially useful procedural mechanisms and as the point of origin of some of the philosophical presuppositions on which the modern conception of democracy and its limits depends.

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ABBREVIATIONS

Adapted from M. H. Hansen, *Athenian Democracy in the Age of Demosthenes* (Norman, OK: University of Oklahoma Press, 1999), xiii-xvi.

Aeschin. Aischines (*c*. 390-322), *rhētor*

Aesch. Aischylos (c. 525-456), tragic poet

Eum. *Eumenides* (458)

Andoc. Andokides (*c*. 440-*c*. 390)

Ant. Antiphon (*c*. 480-411), *rhētor* and leader of the oligarchical revolution in 411

Ar. Aristophanes (*c*. 445-*c*. 385), poet of old Attic comedy

Ach. *Acharnians* (425)

Av. *Birds* (414)

Eccl. *Assemblywomen* (393 or 392)

Eq. *Knights* (424)

Lys. *Lysistrata* (411)

Nub. *Clouds* (423)

Pax *Peace* (421)

Plut. *Wealth* (388)

Ran. *Frogs* (405)

Thesm. *Thesmophoriazousai* (411)

Vesp. *Wasps* (422)

Arist. Aristotle (384-22), philosopher

EE *Eudemian Ethics*

HA *History of Animals*

NE *Nichomachean Ethics*

Pol. *Politics*

Rhet. *Rhetoric*

Dem. Demosthenes (384-22), *rhētor*

Din. Deinarchos (*c.* 360-290), speech-writer

Diod. Diodoros of Sicily (first century BC), author of a world history in forty books

Diog. Laert. Diogenes Laertios (second century AD), author of compendium of lives of philosophers in ten books

Eur. Euripides (*c.*485-*c.*406), tragic poet

Heracl. *Children of Heracles*

Med. *Medea*

Supp. *Suppliant Women* (422?)

fr. fragment

Hdt. Herodotos (*c.* 484-*c.* 425?), author of a history of the Persian Wars in nine books

Hom. Homer (date uncertain), epic poet

Il. *Iliad*

Od. *Odyssey*

Hyp. Hypereides (*c.* 390-322), *rhētor*

Is. Isaios (*c*.420-*c*.350), speech-writer

Isoc. Isokrates (436-338), author of rhetorical essays and political pamphlets

LSJ H. G. Liddell and R. Scott, rev. H. S. Jones, *A Greek-English Lexicon* (Oxford: Clarendon Press, 1968)

Lycurg. Lykourgos (*c*.390-24), *rhētor*

Lys. Lysias (*c*.445-*c*.380), speech-writer

Pl. Plato (427-347), philosopher

- *Alc*. 1, 2 — *Alcibiades* 1, 2
- *Ap*. — *Apology* (of Sokrates)
- *Clit*. — *Clitophon*
- *Cra*. — *Cratylus*
- *Cri*. — *Crito*
- *Criti*. — *Critias*
- *Def*. — *Definitions*
- *Ep*. — *Letters*
- *Euthyd*. — *Euthydemus*
- *Euthphr*. — *Euthyphro*
- *Grg*. — *Gorgias*
- *Hipparch*. — *Hipparchus*
- *Lch*. — *Laches*
- *Lg*. — *Laws*
- *Men*. — *Meno*

Menex. *Menexenus*

Phd. *Phaedo*

Phdr. *Phaedrus*

Pol. *The Statesman*

Prt. *Protagoras*

Resp. *The Republic*

Smp. *Symposium*

Thg. *Theages*

Tht. *Theaetetus*

Plut. Plutarch (*c*.AD45-*c*.125), author of lives of great men and moral essays

Alc. *Alkibiades*

Dem. *Demosthenes*

Lyc. *Lykourgos*

Nic. *Nikias*

Per. *Perikles*

Poll. Pollux (second century AD), professor of rhetoric in Athens and author of a work on Attic vocabulary in ten books

Ps. Arist. Pseudo-Aristotle

Ath. Pol. *Athēnaiōn Politeia* or *Constitution of the Athenians*, composed in Aristotle's school *c*.330

Ps. Xen. Pseudo-Xenophon

Ath. Pol. *Athēnaiōn Politeia* or *Constitution of the Athenians*, anonymous political pamphlet composed by an Athenian probably in the 420s

R&O *Greek Historical Inscriptions 404-323*, ed. P. J. Rhodes and R. Osborne (Oxford: Oxford University Press, 2003)

schol. *Scholia*: Hellenistic or Byzantine notes on classical authors, written in the margins of manuscripts or published separately

Theophr. Theophrastos (c.370-c.285), pupil of Aristotle and after his death the head of his school

Char. Thirty short character sketches

Thuc. Thucydides (*c*.460-*c*.395), author of a history of the Peloponnesian War down to 411 in eight books

Xen. Xenophon (*c*.425-*c*.355), historian and essayist

Cyn. *On Hunting*

Eq. Mag. *The Cavalry Commander*

Hell. *Hellenika*, seven books: history of Greece 411-362

Lac. *The Constitution of the Lakedaimonians*

Mem. *Memorabilia*, four books: recollections of Sokrates

Author's Note:

The transliteration of Greek is notoriously vexed. I have tried to follow Greek lettering as closely as possible, except where the result might prove distracting (e.g. Thoukydides for Thucydides). Translations are from the Loeb Classical Library unless otherwise indicated.

ACKNOWLEDGMENTS

It gives me great pleasure to acknowledge my debts to the many individuals and institutions who have provided moral, intellectual and financial support during the writing of this dissertation.

First I must record my enduring gratitude to Richard Tuck, without whose stimulating teaching, unstinting support, shrewd questioning and sound advice I would not have begun to study political theory, let alone write a dissertation on ancient Greek political thought, a subject about which I knew next to nothing when I started the Ph.D. program at Harvard in 2006.

Second, I want to thank Jane Mansbridge, an exemplary teacher and mentor whose unfailing intellectual and personal generosity has been a continual source of profit and inspiration to me since meeting her in 2008.

Third, I am greatly indebted to Bryan Garsten, for whose warm personal support and helpful interrogation of my work I already had reason to be grateful before he stepped in, at relatively short notice, to act as the third member of my dissertation committee.

I would also like to express warm thanks to the following individuals for the intellectual energy they have invested in my work: Henry Farrell, Eugene Garver, Alex Gourevitch, Katherine Hunt, Sean Ingham, Roland Lamb, Matthew Landauer, Melissa Lane, David Langslow, Adriaan Lanni, Anne Malcolm, Kirsty Milne, Josiah Ober, Siobhan Phillips, Jedediah Purdy, Patrick Riley, Lucas Stanczyk, Ian Simmons, Paul

Steedman, Sophy Tuck, and Victor Walser. I owe a special debt of thanks to the incomparable George Scialabba, whose kindness and immaculate editing skills have transformed many pages of this dissertation. Needless to say, while these friends deserve thanks for rescuing me from many errors of fact and inadequacies of interpretation and explication, I take full responsibility for all the faults that remain.

Earlier versions of Chapter 1, "Aristotle on the Virtue of the Multitude," were presented at the Harvard Political Theory Workshop and the annual meeting of the Northeastern Political Science Association, Philadelphia, PA, November 18, 2011. I thank Matthew Landauer, Jeffrey Dirk Wilson, Thanassis Samaras and Eric Petrie for their comments on these occasions. I would also like to thank the NPSA prize committee for naming this their "Best Paper by a Graduate Student" in 2012 and the NPSA Women's Caucus for awarding it their prize for "Best Paper by a Woman Political Scientist." This chapter will be appearing in *Political Theory* in April 2013: I am grateful to Mary Dietz and two anonymous reviewers for their comments.

Earlier versions of Chapter 2, "Deliberation in Classical Athens: Not Talking, But Thinking" were presented at the Harvard Political Theory Workshop and at the Midwest Political Science Association Annual Meeting, Chicago, IL, April 13, 2012. I thank Daniel Betti, Beth Janairo, and Matthew Landauer for their comments at these events.

An earlier version of Chapter 3, "The Most Democratic Branch? The Athenian Assembly vs. Its Courts," was scheduled to be presented at the (eventually cancelled) American Political Science Association Annual Meeting, New Orleans, LA, September 1, 2012. I thank Stefan Dolgert very warmly for his comments.

An earlier version of Chapter 4, “Plato and the Construction of Justice,” was presented at the annual meeting of the Northeast Political Science Association, Boston, MA, November 17, 2012. Again, I am grateful to Matthew Landauer for his comments.

For financial and institutional support during the research and writing of this project, I thank the Harvard University Government department, the Harvard Program on Justice, Welfare and Economics, the Mahindra Humanities Center, and Yale Law School. I would also like to express my warm thanks to the von Clemm Foundation and to the tutors and fellows of Wadham College, Oxford, especially Jane Garnett and Robert Young, who first nursed my taste for intellectual history. I am also very grateful to Emma Rothschild, Jennifer Hochschield and Eric Nelson, who along with Richard Tuck approved my original dissertation prospectus on the birth of modern constitutional thought in the seventeenth and eighteenth centuries, a project to which I hope to return in due course.

Finally, I would like to dedicate this dissertation, with much love, to my family: Gabriela Patricia Cammack Ortiz, Paul Antony Cammack, Anamaria Cammack and David Singh Grewal. I am especially grateful to my father for reading and commenting on a large number of drafts of work on varying subjects over a great number of years, with uniform clarity, good sense and patience; and to my husband, for his daily support of all my endeavors, large and small. But I owe them all more than I can say.

EPIGRAPHS

"To strip the magistrates of all their judicial power, except that of imposing a small fine, and the Areopagus of all its jurisdiction except in cases of homicide--providing popular, numerous, and salaried dikasts to decide all the judicial business of Athens as well as to repeal and enact laws--this was the consummation of the Athenian democracy."

George Grote, *History of Greece* 5:511 (London, 1849)

"A farmer shall be a farmer and not a judge also."

Plato, *Republic* 397e

INTRODUCTION

Reasons to Rethink Athenian Democracy

On Monday, January 19th, 1891, a short article appeared in the London *Times* announcing the discovery of a papyrus manuscript of a lost work of Aristotle. Over the previous fifty years, the reporter explained, archaeologists in Egypt had unearthed many treasures of classical antiquity, including first-ever examples of work by the Athenian orator Hypereides, new fragments of Euripides and the lyric poet Alkmaion, and early copies of Homer, Thucydides, Plato, Isokrates, Demosthenes and other greats among the Greeks. But the present discovery might "fairly claim to rank above all of these in importance." It was a work "well known in name," from which "more quotations are found in the writers of the early centuries of the Christian era than from any other of the many lost writings of its author." Plutarch had drawn on it extensively, as had all the early Greek grammarians and lexicographers. A few years earlier, there had been "great excitement" when two scraps of papyrus in the Berlin Museum had turned out to contain some sentences from it; and now almost the whole text had been discovered on four rolls of papyri bought by the British Museum and was on the point of being published.[1]

The promised volume appeared a few days later, and the identity of the manuscript was rapidly confirmed. It was indeed a copy of a fourth-century account of the Athenian political system, traditionally attributed to Aristotle (though as many later

[1] "A Lost Work of Aristotle," *The Times*, January 19, 1891, 9, cols. d-e.

scholars would agree, most likely written by one of his students).[2] The original treatise had been written in the late 330s BC; the copy found in Egypt dated to around 100 AD and was severely mutilated towards the beginning and end, but it was nonetheless easily recognizable. At the end of the *Nicomachean Ethics*, Aristotle had referred to a collection of treatises on different *poleis* on which his more theoretical political writings were to be based, and Diogenes Laertios and other ancient cataloguers had mentioned a set of 158 such accounts among his extant works.[3] Now, finally, one of this collection had been found--and that of the most famed *polis* of all.

The manuscript, known today as the *Athēnaiōn Politeia* ("Constitution of the Athenians" or "Athenian Constitution"), comprised two sections. The first, consisting of forty-one chapters, gave an account of Athens' political development to the end of the fifth century BC: specifically, to the archonship of Pythodoros, or 403 BC by our reckoning.[4] The second section, of twenty-eight chapters, outlined the political system of Athens in the writer's own day. According to the initial report in the *Times*, the first section threw "some interesting light on certain dark places in Athenian history" and seemed altogether "a most valuable authority for the period for which it deals." But the second section was deemed rather less interesting, both "on account of its own nature"

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[2] On authorship and dating, see P. J. Rhodes, *A Commentary on the Athēnaiōn Politeia* (rev. ed., Oxford: Clarendon Press, 1993), 37-63. See also G. E. M. de Ste. Croix, "The *Athenaiōn Politeia* and Early Athenian History," in *Athenian Democratic Origins* (Oxford: Oxford University Press, 2004), 253-325, with the afterword by P. J. Rhodes, 325-7.

[3] Arist. *NE* 1181b18; Diog. Laert. 5.1.27. See also Rhodes, *Commentary*, 1-2.

[4] On the Athenian calendar, see M. H. Hansen, *Athenian Democracy in the Age of Demosthenes* (Norman, OK: University of Oklahoma Press, 1999), 135-6.

and because it had been "freely excerpted by later lexicographers," such that much of its contents was already known.[5]

As the twentieth century progressed, however, doubts began to arise concerning the manuscript's first, historical section. Some of the information it contained was almost certainly spurious, such as the "constitution of Draco," a seventh-century lawgiver, that featured in the fourth chapter.[6] Various other oddities also appeared: for example, the author's description of Kimon, in Chapter 26, as "rather young" around 460, when he was in fact "about fifty years old, had been active for twenty years and had recently been ostracized," and the ascription of Themistokles and Aristides to the same side in politics in Chapter 23, but opposite sides in Chapter 28.[7] Evidently some of the sources on which the author had relied had been inconsistent or inaccurate or both.

While opinions of the first section fell, however, estimates of the second section, which was to all appearances based on first-hand research, rose. By the early 1980s, the initial assessment of the *Times* had been reversed. According to the author of the standard modern commentary on the text, Peter Rhodes, it was clear that although the manuscript contained "a great deal of valuable information which we do not find anywhere else," it

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[5] "Lost Work of Aristotle," col. d.

[6] Rhodes, *Commentary*, 84-8.

[7] Aristotle, *The Athenian Constitution*, ed. and trans. P. J. Rhodes (Harmondsworth: Penguin, 2002), 12.

also contained "a certain amount of rubbish," especially in the historical section.[8] The contemporary section, by contrast, was deemed both significant and generally reliable.[9]

On one important point, however, scholars have remained skeptical of the author's account of Athens in his own time, and this will serve as the jumping-off point for this dissertation. At issue is the author's characterization of the development of democracy (*dēmokratia*) in the fourth century, from the archonship of Pythodoros down to Athens' final defeat by the Macedonians in 322. The significant claim appears in Chapter 41, in the course of a summary of the eleven revolutions (*metastaseis*) that had occurred in Athens by the end of the fifth century. The major theme of this passage is the continually increasing degree of democracy in the *politeia* over time, give or take a few setbacks. The great lawgiver Solon is described as the first to establish the roots of democracy, early in the sixth century. There had followed a period of tyranny, after which Kleisthenes created a system that was "more democratic" (*dēmotikōtera*) than Solon's. During the wars with Persia, the Areopagos, the aristocratic council that had in an earlier era been the primary governing body in the city regained some of its former power, but the reforms of Perikles and Ephialtes in the mid-fifth century stripped it of almost all of its functions and created a *politeia* that was more democratic than ever. An oligarchical

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[8] Rhodes, *Athenian Constitution*, 12, 33-4.

[9] Cf. C. A. Hignett, *A History of the Athenian Constitution* (Oxford: Oxford University Press, 1952), 27-9: "the historical survey in the *Ath. Pol.* resembles a careful essay written by a modern research student who brings to his task much industry but no judgment." See also S. C. Todd and P. Millett, in *Nomos: Essays in Athenian Law, Politics and Society*, ed. P. Cartledge, P. Millett and S. C. Todd (Cambridge, UK: Cambridge University Press, 1990), 13-14: while the first part of the text is "derivative" and combines "in a fairly random fashion some important new information with gross errors of fact," the second is "probably the author's own work, and is generally reliable and of considerable historical value."

coup in 411 disrupted the trend, but *dēmokratia* was speedily restored; a second, bloodier coup in 404 proved harder to overcome, but after a period of civil war *dēmokratia* was restored for a second time.

Thus far, the fourth-century author's account was uncontroversial. The same story had been established long before the rediscovery of the *Athēnaiōn Politeia*, and remains standard today.[10] The contentious claim appeared in the following line. According to the ancient author, the second democratic restoration had established the "now existing constitution" (*tēn nun ousan politeian*), and ever since, the system had "continued down to its present form, constantly taking on additions to the power (*tēn exousian*) of the multitude (*tō plēthei*)."[11] This last claim has been rejected by modern scholars. The ancient author evidently believed that the long-running democratizing trend in Athens had continued into the fourth century, but no recent author accepts this. In the words of Peter Rhodes, while democracy certainly "persisted" in Athens after 403, the ancient commentator was simply "wrong" to believe that it had "continually become ever more extreme."[12]

Rhodes laid out the evidence for this judgment in an article of 1980.[13] Three kinds of change had taken place in the Athenian political system after 403, but few if any, he

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[10] See e.g. G. Grote, *History of Greece* (London: J. Murray, 1846-56); J. Ober, *Mass and Elite in Democratic Athens* (Princeton, NJ: Princeton University Press, 1989), 53-103; Hansen, *Athenian Democracy*, 23-54.

[11] Ps-Arist. *Ath. Pol.* 41.2.

[12] Rhodes, *Athenian Constitution*, 18; cf. 85.

[13] P. J. Rhodes, "Athenian Democracy after 403 BC," *Classical Journal* 75 (1980): 305-23.

argued, had had the effect of increasing the power of the *dēmos*.[14] The first set of changes concerned legislation and legislative processes. At the very end of the fifth century, the Athenians had recodified and republished their entire body of laws, established a new distinction between laws and decrees, transferred the power to make law from the assembly to a newly created body of legislators (*nomothetai*) drawn from the same group of citizens that heard cases in the courts, and created a new criminal charge against the proposers of disadvantageous laws. The second set concerned what might be called the division of political labor. In a move away from the thoroughgoing amateurism of the fifth century, specialization and professionalization increased in the military, treasury, and other public bodies. The third set involved judicial activity. The selection procedure for judges[15] was progressively tightened, and the Areopagos council, whose sole function since the mid-fifth century had been to judge cases of homicide, gained a more significant political role.[16]

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[14] *Plēthos*, "multitude" or "majority," was frequently used interchangeably with "*dēmos*," "people," in ancient Greek. Rhodes adopted this practice, as do I in what follows.

[15] Actually, Rhodes referred to "jurors" rather than "judges." The Greek *dikastai* (sing. *dikastēs*) can with equal accuracy be translated either way: see the discussion at pp. 43-4 below. In what follows, I will use the translation "judge," since I regard the *dikastēs*' function of judging both fact and law as more significant than the fact that he normally acted as one of a large panel (especially since *dikastai* did not confer). For a variety of perspectives on this issue, see M. I. Finley, *Democracy Ancient and Modern* (New Brunswick, NJ: Rutgers University Press, 1985), 117; R. Sealey, *The Athenian Republic: Democracy or the Rule of Law?* (University Park, PA: Pennsylvania State University Press, 1987) 54; S. C. Todd, *The Shape of Athenian Law* (Oxford: Oxford University Press, 1993), 82-3; M. Christ, *The Litigious Athenian* (Baltimore, MD: Johns Hopkins University Press, 1998), 20; E. M. Harris and L. Rubenstein, *The Law and the Courts in Ancient Greece* (London: Duckworth, 2004), 18; A. Lanni, *Law and Justice in the Courts of Classical Athens* (Cambridge, UK: Cambridge University Press, 2006), 38.

[16] This was through the procedure of *apophasis*, discussed at p. 226 below.

To be sure, not all these changes were unambiguously anti-democratic, as Rhodes himself made clear. Most important, anything relating to the political powers of the courts called for careful interpretation, since Athens' courts were themselves highly democratic bodies. They consisted of panels of hundreds, sometimes thousands of ordinary citizens, chosen by lot from whoever among those listed on the judicial roll turned up at the courts on any given day.[17] The judicial roll was constructed annually, also by lot, from all citizens in good standing over the age of thirty who wished to be included on it. Those selected were required to take the judicial oath, which bound them to judge in accordance with the laws and decrees of Athens, or if these seemed unclear, then in accordance with their own best judgment.[18] In the fifth century, six thousand citizens were chosen annually to go on the roll; we lack evidence for the fourth century, but there is no reason to think that the number decreased. The courts, then, were a remarkably democratic institution, and Rhodes accepted that this complicated his assessment of the level of democracy in Athens. Nonetheless, he maintained that the author of the *Athēnaiōn Politeia* was "mistaken" in his view that the power of the multitude increased during the fourth century. By the end of the period, Rhodes wrote, members of the *dēmos*[19] were "still willing to work the machine": there were still important decisions to be made, and

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[17] Rhodes, "Athenian Democracy," 320, with n. 112, 320-1. Note that trials lasted no more than a day: see D. M. MacDowell, *The Law in Classical Athens* (Cornell, NY: Cornell University Press, 1978), 249-50.

[18] Hansen, *Athenian Democracy*, 182. The dikastic oath is discussed further in Chapter 4, p. 193.

[19] *Plēthos*, "multitude" or "majority," was frequently used interchangeably with "*dēmos*," "people," in ancient Greek. Rhodes adopted this practice, as do I in what follows.

"genuine debates still took place in the Assembly." But, he suggested, "the atmosphere was different...the positive enthusiasm for democracy had gone." [20]

To an extent, Rhodes' judgment echoed an enduring theme in the historiography of classical Athens: that its fifth-century glory had been followed by a period of decline.[21] But there was more to his assessment than that. Almost all the changes he outlined pointed in the same direction: to the decreasing powers of the *dēmos*, the body of ordinary citizens, functioning directly in the assembly. In the years after 403, the assembly undeniably lost power to the courts, *nomothetai*, military and financial professionals and the Areopagos. It was presumably strengthened by the introduction of payment for attendance in the early fourth century, and again later in the century when, following the enlargement of its meeting-place on the Pnyx, the maximum number of attendees was increased.[22] But these developments did nothing to mitigate the new limits placed on its political authority. And since the assembly is typically identified as the primary democratic institution in the Athenian political system, it would seem to follow from this that democracy as the Athenians understood it had begun to wane.

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[20] Rhodes, "Athenian Democracy," 320-3. Cf. e.g. W. R. Agard, *What Democracy Meant to the Greeks* (Chapel Hill, NC: University of North Carolina Press, 1942), 195: "Though the old institutions survived, the former zest on the part of the people was gone."

[21] See e.g. W. F. Ferguson, *Greek Imperialism* (New York: Houghton Mifflin, 1913), 41; G. Glotz, *The Greek City* (London: Routledge, 1921), 128-262; A. R. Burn, *History of Greece* (Harmondsworth, UK: Penguin, 1985), 193-321; R. Garner, *Law and Society in Classical Athens* (London: Macmillan, 1987). For discussion, see Hansen, *Athenian Democracy*, 21-22; M. I. Finley, *Aspects of Antiquity* (New York: Viking, 1969), 81-2.

[22] Hansen, *Athenian Democracy*, 353-4.

Yet it is precisely the traditional identification of Athenian democracy with the character and functions of the assembly that the *Athēnaiōn Politeia* invites us to question. This dissertation attempts to defend the ancient author against his modern critics, not by disputing any of the details of Athenian political development in the fourth century--Rhodes's account cannot be challenged on that score--but by developing a fresh account of the conception of *dēmokratia* held by the ancient Athenians, particularly as regards its chief institutional vehicle. While modern scholars have focused their attention on the assembly, our ancient evidence suggests that the Athenians regarded their *courts* as their most distinctively democratic institution and the body whose control by the *dēmos* was most critical to the preservation and flourishing of democracy as such. Viewed in this light, the judgment advanced by the author of the *Athēnaiōn Politeia* makes perfect sense: the majority of political changes after 403 either directly or indirectly strengthened the power and importance of judges in the popular courts--hence we can indeed say that the multitude gained power in the system overall.

Admittedly the price of this reinterpretation is high: it asks that we revise fundamentally the conception of Athenian democracy held by modern scholars, attributing far less significance to participation in policymaking in the assembly and more to participation in the administration of justice in the courts. Yet if the conception of democracy that emerges from this revision seems in some respects profoundly alien, the practices it supported proved highly successful. At least until the dramatic expansion of the Macedonian empire put an end to the autonomy of all Greek *poleis*, democratic or otherwise, the power of ordinary citizens in Athens' courts does seem to have given them

supreme power in Athens overall. This form of democracy also seems to have punched far above its weight in relation to the history of political thought. It provoked a significant philosophical backlash in the form of the work of Plato: a backlash that had few serious short-term political consequences[23] but proved remarkably powerful in the long run. Indeed, this Platonic backlash may itself go some way to explaining why the conception of Athenian democracy entertained by modern scholars has ended up so far from that of the fourth-century author of the *Athēnaiōn Politeia*.

The Conventional View of Athenian Democracy

The centrality of the assembly to the idea and practice of democracy in Athens is supported by a wide variety of works, both recent and classic, produced by ancient historians, classicists, and political theorists alike. Athenian democracy was "assembly democracy";[24] it was a "direct democracy," in which "policy, even in matters of detail, was decided by an assembly of all male citizens";[25] power in Athens "lay with the assembly," in which "every male citizen counted for one, and one only";[26] the assembly, composed of "the citizenry as a whole," was "the key sovereign body in Athens";[27] it was

[23] Though see D. S. Allen, *Why Plato Wrote* (Malden, MA: Blackwell, 2010), 90-141.

[24] Hansen, *Athenian Democracy*, 304.

[25] W. G. Forrest, *The Emergence of Greek Democracy* (New York: McGraw-Hill, 1966), 16-18.

[26] R. Lane Fox, *The Classical World* (Harmondsworth, UK: Penguin, 2006), 96.

[27] D. Held, *Models of Democracy* (Palo Alto, CA: Stanford University Press, 2006), 17.

the "key decision-making body in the Athenian state,"[28] the "prime democratic body,"[29] the "real sovereign of the city,"[30] the "supreme power of the state,"[31] "in a very real sense a sovereign body,"[32] the "dynamo" of the political system,[33] the embodiment of "absolute democracy."[34] Moses Finley stated the case with characteristic assurance. The assembly was quite simply the "crown" of the Athenian political system. It possessed "the right and power to make all policy decisions, in actual practice with few limitations, whether of precedent or scope." No account of Athenian democracy could have "any validity" if it overlooked this point, which was simply "obvious."[35]

There would certainly seem to be many good reasons to hold this view. To begin with, the assembly was easily the largest and most inclusive institution in Athens. Open to all male citizens over the age of eighteen (or possibly twenty in the later fourth century), it regularly attracted over six thousand attendees to its meetings, of which there were normally no fewer than forty per year.[36] Before the Peloponnesian War, this meant

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[28] Ober, *Mass and Elite*, 7.

[29] R. Osborne, *Athens and Athenian Democracy* (Cambridge, UK: Cambridge University Press, 2010), 27.

[30] N. D. Fustel de Coulanges, *The Ancient City* (Baltimore, MD: Johns Hopkins University Press, 1980 [1864]), 322.

[31] V. E. Ehrenberg, *The Greek State* (London: Methuen, 1969 [1960]), 58.

[32] A. H. M. Jones, *Athenian Democracy* (Baltimore, MD: Johns Hopkins University Press, 1986 [1957]), 3.

[33] Ferguson, *Greek Imperialism*, 51.

[34] Glotz, *Greek City*, 162.

[35] Finley, *Democracy Ancient and Modern*, 49-50. Cf. M. I. Finley, *Politics in the Ancient World* (Cambridge, UK: Cambridge University Press, 1983), 71 with fn. 4.

[36] Hansen, *Athenian Democracy*, 129-32. The frequency of meetings is attested only for the fourth century.

that around a sixth of the adult male citizen body was probably present at any given meeting; in the fourth century, the proportion will have been closer to a fifth.[37] Once estimates for the numbers of women, minors, foreign residents (*metoikoi* or "metics"), and slaves are factored in, we can say that an average assembly meeting in the fourth century will have included something like two per cent of the entire population of Attika, out of around ten per cent of the population who would have been eligible to attend.[38] This may seem a relatively low figure, and both the exclusion of women from political power and the existence of slavery have been deplored by many modern scholars.[39] Yet it does, of course, compare favorably with the extent of the franchise in almost all times and places prior to the twentieth century. Moreover, notably, Athenian assemblygoers were not engaged in the selection of political representatives, as are voters in modern electoral democracies; rather, they were participating in government themselves.

The assembly was not only *open* to all male citizens, moreover; the range of those who actually attended was also apparently wide. The evidence at our disposal, though scanty, suggests that the socioeconomic background of attendees could vary considerably. Plato, for example, has Sokrates say that a speaker in the assembly might be "a

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[37] Hansen, *Athenian Democracy*, 92-4, with citations. The adult male citizen population in the fifth and fourth centuries is estimated at 40,000 (before the Peloponnesian war) and 30,000 respectively.

[38] Hansen, *Athenian Democracy*, 93, with citations. The total citizen population, including women and minors, can on the basis of demographic modeling be estimated at around 100,000. To this we may add around 40,000 metics and about 150,000 slaves (Hyp. fr. 33). The total population may thus be estimated at around 300,000.

[39] See e.g. P. J. Rhodes, *Athenian Democracy and Modern Ideology* (London: Duckworth, 2003).

blacksmith, shoemaker, merchant, sea-captain, rich, poor, of noble family or low-born."[40] Xenophon, likewise, depicts Sokrates as saying that an average meeting might include "fullers, shoemakers, builders, smiths, farmers, merchants and profiteers."[41] A couple of generations later, Aristotle's premier student, Theophrastus, painted a similar picture: laying out the character of a rather dandified supporter of oligarchy, Theophrastos described him as "ashamed" when in the assembly "some scrawny, unwashed type seats himself beside him." Relatively extreme social mixing was evidently at least conceivable in this setting.[42] Widespread attendance was encouraged by the provision of a stipend, introduced in early in the fourth century at the rate of three obols per meeting, approximately equivalent to an entire day's low-paid labor for an event that would in all probability be over by noon.[43] By the end of the period, moreover, the amount had increased to six obols for an ordinary meeting and nine for the first and most important meeting of the month.[44]

The Athenian assembly was thus a remarkably large and inclusive body, and its procedures were similarly open and equal. Every citizen was free to propose, in advance, items to go on the agenda for the next meeting; to address the crowd from the speaker's

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[40] Pl. *Prt*. 319d.

[41] Xen. *Mem*. 3.7.6.

[42] Theophr. *Char*. 26.4.

[43] Ps-Arist. *Ath. Pol*. 41.3. On wages, see M. M. Markle, "Jury Pay and Assembly Pay at Athens," *History of Political Thought* 6 (1985), 265-97; reprinted in *Athenian Democracy* ed. P. J. Rhodes, (Oxford: Oxford University Press, 2004), 95-131. On the duration of meetings, see Hansen, *Athenian Democracy*, 136-7.

[44] Ps-Arist. *Ath Pol*. 62.2.

platform; and to vote, by show of hands, on all motions.[45] Proposals could be tabled for reconsideration at a later date, but most were decided on the spot by majority opinion and put into immediate effect.[46] To be sure, some citizens had a larger role in shaping the opinions of the crowd than others: Mogens Hansen estimates that during the fourth century, there may have been only about twenty to forty regular "*rhētores*," "orators" or "politicians," active at any one time.[47] But no formal distinctions were drawn between attendees; every speech and every vote was, at least officially, worth the same as every other.

Finally, the assembly had remarkably wide-ranging powers. From the revolution of Kleisthenes in 510, down to Athens' final absorption into the Macedonian empire in 322 (with the exception of two oligarchical interludes in 411/10 and 404/3), the assembly was the chief and final decision-maker on virtually all political issues. These included war, peace, and foreign relations; national self-defense; public finance and expenditure; the regulation of imports and exports; the bestowal of honors and rewards, including

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[45] Hansen, *Athenian Democracy*, 141-50. However, a secret ballot (and quorum of 6000) applied when voting on an award of citizenship.

[46] This majoritarianism is striking. As Ste. Croix stressed, majority rule was practiced in Greece earlier than in any other society we know about, though it has attracted less attention than it deserves. G. E. M. de Ste. Croix, *The Origins of the Peloponnesian War* (London: Duckworth, 2001 [1972]), 348-9.

[47] Hansen, *Athenian Democracy*, 143-5; Hansen, "The Number of *Rhētores* in the Athenian *Ecclesia*, 355-322 BC," *Greek, Roman and Byzantine Studies* 25 (1984), 123-55. Hansen himself avoids the term "politicians": see e.g. "*Rhētores* and *Strategoi* in Fourth-Century Athens," *Greek, Roman and Byzantine Studies* 24 (1983), 151-80. However, since "*rhētor*" was specifically used to denote one of a small group of individuals who took it upon themselves to act as political leaders, I find this an appropriate translation (as does e.g. Allen, *Why Plato Wrote*, 4 and *passim*, though she does not defend the choice). To the extent that the standing and functions of Athenian "politicians" differ from those of their modern counterparts, the distinction concerns not so much the concept "politician" as the character of politics in the two settings.

citizenship; the election of military generals and certain other important officials; the organization of public works; the celebration of festivals; and most instances of legislation and policy-making. It also held regular votes of confidence in office-holders, including generals, and retained the right to impeach any responsible agents in cases of suspected misconduct.[48] In short, the assembly maintained supreme control of state policy and those responsible for executing it, and it did so directly, regularly, and on a wholly amateur basis.

Of course, no one acquainted with the classical Athenian political system would suggest that the practice of democracy in Athens was *limited* to the assembly. To the contrary, it was a genuinely multi-institutional affair, extending well beyond the assembly to include the council (*boulē*), which consisted of five hundred citizens chosen annually by lot; hundreds of low-level executive officials appointed by lot; nine chief archons, or magistrates, whose tasks were mainly religious and administrative, and who were also selected by lot; and finally the popular courts (*dikastēria*).[49] Athenian citizens could also participate in government through their *dēmē*, or local political unit, of which there were 139 in Attika.[50] More informal political activity also took place in Athens' squares,

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[48] Hansen, *Athenian Democracy*, 155-60.

[49] Ps-Arist. *Ath. Pol.* 42-69. For a full count of the different officials involved in the Athenian *politeia*, along with their estimated cost, see J. K. Davies, *Democracy and Classical Greece* (2nd ed., Cambridge, MA: Harvard University Press, 1993 [1978]), 230-3. See also A. R. W. Harrison, *The Law of Athens: Procedure* (Oxford: Clarendon Press, 1971), 4-36.

[50] See R. Osborne, *Demos: The Discovery of Classical Attika* (Cambridge, UK: Cambridge University Press, 1985), esp. 64-92; D. M. Whitehead, *The Demes of Attica, 508/7-c.250 BC* (Princeton, NJ: Princeton University Press, 1986). Cf. the only slight exaggeration of Fustel de Coulanges, *Ancient City*, 321: "The smallest group of people in Attica had its archon, its priest, its secretary, its receiver, its military chief. One could hardly take a step in the city or the country without meeting an official."

schools, theaters, and social clubs, although the democratic significance of these bodies is ambiguous, since decisions were not taken there.[51] Other significant political institutions, though not normally counted on the side of democracy, included the prominent board of military generals, chosen annually by election, and finally the Areopagos. The roots of this last institution were wholly aristocratic, but by the mid-fifth century it consisted exclusively of former chief archons chosen by lot, and exercised only judicial powers as the court responsible for judging cases of homicide.

Of all these bodies, the two most significant for the character of democracy in Athens were the council and the courts. Positions on the council were allotted in proportion to the population of each *dēmē*; it was thus the only institution in Athens to form a demographic miniature of the entire citizen body, and its powers, likewise, can be regarded as a scaled-down version of the full range of political activity in Athens.[52] The council made provisional decisions when the assembly was not in session, received envoys from abroad, heard reports from serving generals and ambassadors, and supervised magistrates on a day-to-day basis. Perhaps most important, it prepared, debated, and publicized the agenda of upcoming assembly meetings, including suggesting

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[51] Cf. e.g. J. Ober, *The Athenian Revolution* (Princeton, NJ: Princeton University Press, 1996), 103-139; J. J. Winkler and F. I. Zeitlin, eds, *Nothing to Do with Dionysos?* (Princeton, NJ: Princeton University Press, 1990), cf. P. J. Rhodes, "Nothing to do with Democracy: Athenian Drama and the *Polis*," *Journal of Hellenic Studies* vol. 123 (2003), 104-19; G. Calhoun, *The Athenian Clubs in Politics and Litigation* (Austin, TX: University of Texas Press, 1913); W. R. Connor, *The New Politicians of Fifth Century Athens* (Princeton, NJ: Princeton University Press, 1971).

[52] On representative character of the council, see J. A. O. Larsen, *Representative Government in Greek and Roman History* (Berkeley, CA: University of California Press, 1955), 3-7; P. J. Rhodes, *The Athenian Boule* (Oxford: Oxford University Press, 1972), 192; Whitehead, *Demes*, 265; Hansen, *Athenian Democracy*, 247-248. Cf. however Osborne, *Demos*, 81 with fn. 39.

specific wordings for decrees.[53] The courts, in their turn, were also strikingly democratic and politically significant. Staffed entirely by ordinary citizens, with no room for professional judges or advisors of any kind, they had complete discretion over all legal cases in the *polis* (with the single exception of homicide, which was judged by members of the Areopagos).[54] Moreover, since Athenian law included many overtly political offenses, such as treason, accepting bribes, lying to the *dēmos*, subverting the democratic system, speaking before the *dēmos* despite lacking the proper civic and ethical credentials, making an illegal proposal, and proposing a disadvantageous law, a great many issues that would not be justiciable in a modern setting were ultimately decided in court. The courts were also responsible for judging *dokimasiai*, the preliminary "scrutinies" that applied to every incoming office-holder (which included councillors, though not judges), and the same officials' post-tenure "audits" (*euthynai*). Other formally non-political charges could also have a political complexion, since the courts were frequently used as a venue for social competition between political rivals. The result was that the courts were a fully popular and highly visible political entity.[55]

No matter how democratic and politically significant the council and courts are known to have been, however, the view that the assembly was the "crown" of the

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[53] Hansen, *Athenian Democracy*, 255-65.

[54] Though it should also be noted that many disputes never made it to court, but were decided by arbitrators at an earlier stage. See A. C. Scafuro, *The Forensic Stage: Settling Disputes in Graeco-Roman New Comedy* (Cambridge, UK: University of Cambridge Press), 35-37, 131-40, 383-91.

[55] Hansen, *Athenian Democracy*, 178-224. See also R. Bauman, *Political Trials in Ancient Greece* (London: Routledge, 1990), Todd, *Shape of Athenian Law*, 154-63, and D. Cohen, *Law, Violence and Community in Classical Athens* (Cambridge, UK: Cambridge University Press, 1995).

Athenian democratic system holds firm. Both the council and courts were, after all, considerably smaller than the assembly: only five hundred citizens a year participated in the council, while a judicial decision on a public charge could be made by as few as five hundred and one.[56] Moreover, in contradistinction to the assembly, neither the council nor the courts were open to all comers. They were closed to anyone under the age of thirty, or who was in debt to the state, or who had lost some or all of his citizen rights. Additionally, no one could serve on the council more than twice in a lifetime, or for two years in succession, or who had failed his *dokimasia*; and no one could act as a judge who had not taken the judicial oath at the start of the year.[57] Perhaps most important, neither the council nor courts enjoyed anything like the assembly's wide-ranging powers. To be sure, the council's "probouleutic" or "pre-considering" functions led some in the early part of the twentieth century to argue that it was the "real" ruler of Athens, but this view has long since been dismissed, given the assembly's frequently used capacity to reject or amend the council's suggestions.[58] Equally, the courts' control of the administration of justice may seem inherently less "political" than the assembly's general authority. The frequency with which political issues ended up being decided in court--especially via the

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[56] Hansen, *Athenian Democracy*, 187.

[57] Hansen, *Athenian Democracy*, 87, 218-219, 249. See also R. Bonner, *Aspects of Athenian Democracy* (Berkeley, CA: University of California Press, 1933), 12.

[58] Discussed in R. K. Sinclair, *Democracy and Participation in Athens* (Cambridge, UK: Cambridge University Press, 1988), 84-8; Rhodes, *Athenian Boule,* 64-81 and 213-23. See also Hignett, *History of the Athenian Constitution*, 242-3, and R. A. de Laix, *Probouleusis in Athens: A Study of Political Decision-Making* (Berkeley, CA: University of California Press, 1973). On the link to the "Iron Law of Oligarchy" advanced by Robert Michels and Vilfredo Pareto among others, see Finley, *Democracy Ancient and Modern*, 1-12, and Ober, *Mass and Elite*, 15-16.

charge of *graphē paranomōn*, used to strike down "illegal proposals" made in the assembly or council--certainly gave judges significant political clout. But the great bulk of political decisions undeniably continued to be made in the assembly.[59]

Both for what it was and for what it did, therefore, the assembly is conventionally regarded as the primary vehicle of democracy in Athens. And this perception may be seen in the secondary literature on this subject in ways both large and small. One relatively minor but telling point is the fact that the assembly almost always comes first in lists of Athenian political institutions and analyses of the Athenian political system.[60] In a similar way, the council, courts and other bodies are frequently characterized as "assisting" the assembly in managing the affairs of the *polis*, or as "committees" of the assembly, "feeder institutions," or as the recipients of responsibilities "delegated" from the larger body, rather than as autonomous institutions in their own right.[61]

Some of the major themes of modern works on Athenian democracy--the wisdom of the multitude, the benefits of mass deliberation, the significance of equality of speech (*isēgoria*) and frank speech (*parrhēsia*), the involvement of the "whole people" in decision-making--also suggest the predominance of the assembly. These concepts are not,

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[59] Hansen, *Athenian Democracy*, 333.

[60] e.g. Jones, *Athenian Democracy*, 3; Forrest, *Emergence*, 16-18; Hansen, *Athenian Democracy*, 125; Ober, *Mass and Elite*, 7, 132-8; Glotz, *Greek City*, 152; Burn, *History of Greece*, 238-9; D. Stockton, *The Classical Athenian Democracy* (Oxford: Oxford University Press, 1990), 67; K. Raaflaub, J. Ober and R. Wallace, *Origins of Democracy in Ancient Greece* (Berkeley, CA: University of California Press, 2007), 4; Todd, *Shape of Athenian Law*, 293-4. A notable exception is Sinclair, *Democracy and Participation*, who opens his discussion of Athens' institutions with the accountability of all magistrates to the Demos (77).

[61] E.g. Raaflaub, Ober and Wallace, *Origins*, 4; Forrest, *Emergence*, 20; Glotz, *Greek City*, 182; Davies, *Democracy and Classical Greece*, 226.

to be sure, considered absent or irrelevant in any other part of the Athenian political system, but they would seem to be better exemplified by the activity of the assembly than that of any other body.[62]It would be going to far to suggest that the modern conception of Athenian democracy is inferred *entirely* from the character and functions of the Athenian assembly, but it is fair to say that, as our point of entry to the core ideological commitments of Athenian democracy, the assembly looms overwhelmingly large in the political imagination of modern scholars of the ancient world.

The View from the Fourth Century

On the modern understanding of Athenian democracy, then, the assembly was both the single most significant body in the Athenian political system and the most distinctively democratic. Yet if we focus exclusively on our primary evidence, a more checkered picture emerges. If we ask which political institution appears from our ancient sources to have been the most *prominent* in Athens, the answer would certainly be the assembly. But if we ask instead which institution our ancient authors associate most closely with "*dēmokratia*" according to their conception of that term, the answer that comes up again and again, particularly but not exclusively in our fourth-century texts, is not the assembly, but the courts. Both in the sense of being the most "demotic" (*dēmotikon*) institution in

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[62] See e.g. Finley, *Democracy Ancient and Modern*, 19; A. Saxonhouse, *Free Speech and Democracy in Ancient Athens* (Cambridge, UK: Cambridge University Press, 1996), 1; R. K. Balot, *Greek Political Thought* (Malden, MA: Blackwell, 2006), 65-66; J. Waldron, *The Dignity of Legislation* (Cambridge, UK: Cambridge University Press, 1999), 92-119; Ober, *Mass and Elite*, 163-5; J. Ober, *Democracy and Knowledge: Innovation and Learning in Classical Athens* (Princeton, NJ: Princeton University Press, 2008); I. Sluiter and R. M. Rosen eds. *Free Speech in Classical Antiquity* (Leiden and Boston: Brill, 2004). By contrast, the only practices commonly identified with Athenian democracy that do not relate chiefly to the assembly are equality in law (*isonomia*), payment for public service, and the use of the lot.

the political system--that is, most closely tied to and on the side of the *dēmos*, conceived as a distinct subset of the *polis*[63]--and in the sense of providing the most crucial support for the preservation and development of the rule of the *dēmos* over the *polis* as a whole, the courts, rather than the assembly, seem to have been conceived by contemporaries as the *sine qua non* of classical Athenian democracy and the locus of the most specifically democratic activity in the *polis*. This view is evident in a number of texts, but I shall concentrate here on Aristotle's *Politics*, the Aristotelian *Athēnaiōn Politeia*, and samples of work from the canonical orators, Aristophanes, and Plato.

As Mogens Hansen and Eugene Garver have observed, Aristotle does not often mention Athens directly in the *Politics*.[64] Although it is sometimes assumed that whenever he speaks of "extreme" democracy he must have had Athens in mind, there are too many democracies among the ancient Greek *poleis* about which we know very little for us to feel certain of this, especially since Athens was anomalous in several respects, and other *poleis*, such as Rhodes, were on some criteria notably more extreme than Athens.[65] However, if we limit our attention to passages where Athens or Athenian

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[63] Cf. P. Cartledge (citing S. C. Todd), *Ancient Greek Political Thought in Practice* (Cambridge, UK: Cambridge University Press, 2009), 50. On the various meanings of "*dēmos*," see M. H. Hansen, "The Concepts of *Dēmos*, *Ekklēsia* and *Dikastērion* in Classical Athens," *Greek, Roman and Byzantine Studies* 50 (2010): 499-536.

[64] M. H. Hansen, *The Sovereignty of the People's Court in Athens in the Fourth Century BC and the Public Action against Unconstitutional Proposals* (Odense: Odense University Press, 1974), 14; E. Garver, *Aristotle's Politics: Living Well and Living Together* (Chicago: Chicago University Press, 2011), 14.

[65] See E. Robinson, *Democracy Beyond Athens* (Cambridge, UK: Cambridge University Press, 2011). Cf. B. Strauss, "Athenian Democracy: Neither Radical, nor Extreme, nor Moderate." *Ancient History Bulletin* 1 (1987): 127-29; K. Vlassopoulos, "Free Spaces: Identity, Experience and Democracy in Classical Athens," *Classical Quarterly* 57 (2007): 33-52.

statesmen are mentioned by name, the democratic significance of the Athenian courts emerges very clearly.

Easily the most significant discussion of Athens in the *Politics* appears in Chapter 12 of Book Two, where Aristotle describes the *politeia* of Solon (the early sixth-century lawgiver) and its long-term legacy.[66] Aristotle's first point is that Solon is commonly regarded as a good lawgiver (*nomothetēs*) because he "put an end to the existing oligarchical government, it being too extreme, and ended the slavery of the *dēmos*, and established the traditional form of democracy (*dēmokratian*) by skillfully blending the political system." Next, he specifies the significant elements of this "blended" form of democracy. "For the Areopagos council was an oligarchic element, the elective offices aristocratic, and the courts (*dikastēria*) demotic (*dēmotikon*)." A modern reader coming to this passage for the first time could not be blamed for having expected to find the assembly listed as the "demotic" element in this system, rather than the courts, particularly since we know from other sources that Solon also allowed the lowest class of Athenian citizens, the *thētai*, to participate in the assembly.[67] Nonetheless, Aristotle concentrates his attention on the courts, and his next line reconfirms their significance. "And though it seems that while, so far as the first two of these are concerned--the council and the elective offices--Solon merely refrained from putting an end to what already existed, he did in fact give the *dēmos* political standing (*ton de dēmon katastēsai*)

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[66] Arist. *Pol*. 1273b35-74a22. Translation mine.

[67] E.g. *Ath. Pol*. 7.3.

by constituting the courts (*dikastēria*) out of everyone (*ek pantōn*)." The assembly is not mentioned at all.

Next follows an extremely valuable passage, worth quoting in full. It concerns the views of those with a negative evaluation of Solon's achievements.

> And it is precisely on this account that he is sometimes blamed: for he effectively demolished the power of the other institutions (*lysai gar thatera*), by making the law-court (*to dikastērion*) supreme overall (*kyrion...pantōn*), it being chosen by lot (*klērōton on*). For as that institution grew stronger, people started to seek the favor of the *dēmos* as if it were a tyrant, and this gave rise to the present democracy; Ephialtes docked the power of the Areopagos council, along with Perikles, and Perikles introduced the system of payments for the courts, and so forth; and every one of the popular leaders (*dēmagōgoi*) continued down this path, to the point of the present democracy.

There are several points worth clarifying here. To begin with, it would seem that, at least in the eyes of Solon's critics, there is a causal connection between the court's being chosen by lot from the population at large and its becoming "*kyrion*," or supreme, in the political system overall. This is initially suggested by the participle "*on*" in the first line, and it is confirmed by the opening clause of the second: "For as that institution grew stronger..." The "for" here has to be explicatory, and "that institution" can only mean the courts. The story that we are about to hear is thus that of the growing power of the *dēmos* as a direct result of the increasing strength of the courts.

Now, the term "*dēmos*" in this passage is (as often) ambiguous. It could denote the assembly: that usage is, for example, commonly seen in the enactment formulae used in the assembly's decrees, "*edoxe tō boulē kai tō dēmō*," "it seemed good to the council

and people," and (less often) "*edoxe tō dēmō*," "it seemed good to the people."[68] Or it could denote the body of ordinary citizens in general, that is, "the people" as distinct from the particular individuals who fawningly seek the *dēmos*'s favor. Later in the passage those fawning individuals are identified as *dēmagōgoi*, "leaders of the people" or "rabble-rousers," as exemplified by Perikles and Ephialtes: "*dēmos*" in this second sense, then, may be said to denote something like "those who are not leaders." Or "*dēmos*" could be referring back to the court: that might be supported by the fact that we have just been told that the court is the chief demotic element in the political system.

On any of these interpretations, however, one point is consistent, though the underlying story varies slightly. We may read: "For as the court grew stronger, demagogues started to seek the favor of the assembly as if it were a tyrant, and this gave rise to the present democracy." Or: "For as the court grew stronger, demagogues started to seek the favor of the mass of ordinary citizens as if it were a tyrant, and this gave rise to the present democracy." Or: "For as the court grew stronger, demagogues started to seek the favor of the court as if it were a tyrant, and this gave rise to the present democracy." On all these readings, the control of the court by ordinary citizens is taken for granted as the foundation of the present democracy, which developed via the ambitions of *dēmagōgoi* who took it in turns to boost the power of the *dēmos* as a way of augmenting their own political fortunes, until the *dēmos* itself reigned supreme. Whether

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[68] E.g. R&O 4, "Rewards for men who had fought for democracy at Athens, 401/0"; R&O 31, "Athenian decrees for Mytilene, 369/8 and 368/7; R&O 41, "Alliance between Athens, Arcadia, Achaea, Elis, and Phlius, 362/1. For discussion, see R&O xvii-xix.

the *dēmagōgoi* themselves acted mainly in the assembly or courts is left uncertain, though the reforms pursued by Ephialtes and Pericles suggest that both venues played a part.

The remaining question is whether or not this account, which Aristotle attributes to those who take a negative view of Solon's accomplishments, is in fact plausible, and the closing lines of the passage, which give Aristotle's own view on the matter, supply an answer to this question.

> But this does not seem to have come about as the result of Solon's intention, but rather on account of circumstances (for the *dēmos* having been responsible for the naval victories against the Persians, it began to think overly well of itself, and adopted low-class *dēmagōgoi* in the face of opposition from the more respectable classes); since it would seem that Solon only gave the *dēmos* the barest minimum power, that of electing officers and holding them to account (for without authority over this the *dēmos* would be nothing more than a slave and an enemy of the state), whereas he gave the power of actually holding the offices to the notables and men of wealth, that is, the *pentakosiomedimnoi*, the *zeugites*, and a third class, those called 'knights'; while the fourth class, the thetes, did not get a share in any office.

What is crucial about this passage is what it does *not* say. For immediately after this Aristotle turns his attention to the projects of other Greek lawgivers; this is his last word on Athens for the time being. And what Aristotle does not say is that the common view of Solon's legacy that he has described--either positively or negatively interpreted--is wrong in the significance it ascribes to the demotic character and power of the courts. Where the standard view is false, Aristotle argues, is in suggesting that the present democracy came about as the result of Solon's *intention*. However, the basic narrative--the increase in the *dēmos*'s power as a result of the machinations of its fawning leaders, backed by the power of the demotic courts--is not disputed at all.

With this in mind, we can turn to the account of Athenian democracy presented in the Aristotelian *Athēnaiōn Politeia*. As several readers have noted, the democratic significance of the courts is a major theme in this text. In the words of Martin Ostwald, the claim that the "mainstay of popular sovereignty in Athens" was the "judicial power of the *dēmos* as vested in the jury-courts" runs "like a thread" throughout its entire historical section.[69] John Keaney went further, arguing that the author saw in the reform of the courts by Solon "not only the most salient characteristic of the developed democracy but also the germ of that element which was to be its *conditio sine qua non*...To him, the courts represented the fundamental element in, and the strength of, the Athenian democracy."[70] Earlier scholars also accepted this view: George Willis Botsford, for example, simply repeated the fourth-century author's suggestion that "it was through the law-courts that the Demus became master of the government."[71] And this position is arguably the key to understanding the author's claim in Chapter 41 of the *Athēnaiōn Politeia* that the power of the multitude kept on increasing throughout the fourth century.

This solution is suggested, to begin with, by the explanation of the claim offered in Chapter 41 itself. "For the people (*dēmos*) has made itself master of everything, and administers everything by decrees and by jury-courts in which the people (*dēmos*) is the

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[69] M. Ostwald, *From Popular Sovereignty to the Sovereignty of Law* (Berkeley, CA: University of California Press, 1986), 5. See also E. Ruschenbusch, "*Dikastērion Pantōn Kurion*," *Historia* 6 (1957): 257-74.

[70] J. J. Keaney, 'The Structure of Aristotle's *Athēnaiōn Politeia*,' *Harvard Studies in Classical Philology* 67 (1963), 115-146, at 122. See also J. J. Keaney, *The Composition of Aristotle's Athēnaiōn Politeia* (Oxford: Oxford University Press, 1992), xi.

[71] G. W. Botsford, *The Development of the Athenian Constitution* (New York: Columbia University Press, 1965 [1893]), 171.

ruling power, for even the cases tried by the Council have come to the people (*eis ton dēmon*)."[72] The assembly certainly plays a significant role here, since it is the agent responsible for all decrees. But the rest of the sentence suggests that the author was considerably more impressed by the activity of the *dēmos* in the courts. Indeed, he even uses the word "*dēmos*" as a stand-in for the word "courts" in the final clause.[73]

Yet the suggestion that the courts might be the primary instrument of the *dēmos*'s rule is only a continuation of what has been, up to this point in the text, a recurrent theme. The first highly arresting comment is the author's description of the three "most demotic" (*dēmotikōtata*) reforms of Solon: an end to debt slavery, the right of any individual to seek legal redress on behalf of one who had been wronged, and finally, "that which more than anything else is said to have strengthened the position of the majority," the right to take disputes to a jury-court (*dikastēria*).[74] Not only do two of these three reforms specifically concern ordinary Athenians' access to justice as both litigants and decision-makers (while the right to attend the assembly, also recently established, is not mentioned), the author also spells out the special significance of the third reform. "For the people, having the power of the vote (*psēphos*), becomes sovereign (*kyrios*) in the government."[75] What is most significant about this claim is the term "*psēphos*," which

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[72] Ps. Arist. *Ath. Pol.* 41.2.

[73] Cf. Ps. Arist. *Ath. Pol.* 45.1.

[74] Ps. Arist. *Ath. Pol.* 9.1.

[75] Ps. Arist. *Ath. Pol.* 9.1.

denoted a voting-pebble of the kind used in the courts, though not (as far as we know) in the assembly, at least in the classical period.[76]

The courts remain frequently in view in the rest of the historical narrative. We learn, for example, that Ephialtes, the "champion of the *dēmos*" in the late 460s, first undermined the power of the Areopagos by bringing its members before the courts.[77] The introduction of jury-pay in the mid fifth-century is presented as another crucial move: the discussion of this initiative, described as a deliberate "popular counter-measure" promoted by Perikles to shore up a base of support against the elite patronage of Kimon, forms the longest single passage in this part of the text, and the measure is specifically said to have enabled the takeover of the courts by "ordinary people" (*tōn tuchontōn*), leading to what some called their "deterioration." [78]

Another striking point is the assumption made by the oligarchical conspirators in 411, and not disputed by the author, that the courts would have to be made politically toothless before oligarchy could be established. This led directly to the first step in their coup, which was to abolish the courts' power to overturn illegal proposals.[79] The oligarchs in 404 did exactly the same thing. In that case, the author reports that this made the oligarchs seem "moderate" (*metrioi*) at the time, which suggests that the courts had come to be regarded as one of the more "extreme" sectors of the democratic system. The

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[76] E. Staveley, *Greek and Roman Voting and Elections* (Ithaca, NY: Cornell University Press, 1972), 73-95, especially 84-6.

[77] Ps. Arist. *Ath. Pol.* 25-6.

[78] Ps. Arist. *Ath. Pol.* 27.2-28.

[79] Ps. Arist. *Ath. Pol.* 29.4.

coda to this episode is that within a few weeks the oligarchs had abolished the jury-courts altogether and moved to judging cases in the council. Intriguingly, they made no attempt to staff the courts with a more select, pro-oligarchical group of judges. It may be that a non-democratic *dikastēria* was effectively inconceivable.[80]

Repeatedly, then, in the historical section of the *Athēnaiōn Politeia*, the courts are singled out as the most important moving element in the story of the rise of democracy. This contrasts strongly with the same author's treatment of the assembly, which appears in a considerably more ambiguous light. Most notably, its actions are three times shown to have resulted in a *reduction* in the power of the *dēmos* rather than the other way around. The first occurred when Peisistratos, in the late sixth century, tricked the assembly into abandoning its arms, which ushered in his reign as tyrant. The second was in 411, when the assembly was manipulated into voting down the democracy in the hope that this would secure them Persian support in the war against Sparta. And the third time was in 404, when the assembly voted to give thirty prominent Athenians the power to produce a new code of laws amenable to the Spartans, which culminated an all-out oligarchical attack on the democratic system and eventually a full-blown civil war.[81] As a result, strange though it may seem, the assembly would appear to be associated rather less with the strength of democracy in Athens than with its weakness.

Finally and perhaps most importantly, the democratic significance of the courts in the *Athēnaiōn Politeia* is shown by their representation in the contemporary section of the

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[80] Ps. Arist. *Ath. Pol.* 35.

[81] Ps. Arist. *Ath. Pol.* 15, 29, 34.

text. An enormous amount of space is devoted to the courts in this section: they are the subject of the final seven of this set of twenty-eight chapters, while there is no equivalent treatment of the assembly.[82] But what is most significant is the role of the courts in the author's account of changes in the political system after 403. Since we know that he believed the power of the *dēmos* to have increased over the fourth century, it makes sense to pay special attention to every change mentioned in this part of the text, and the results of this examination are striking. Altogether, the author lists sixteen changes.[83] Four of these relate to the increased use of the lot,[84] three to increases in the numbers participating in certain executive functions,[85] and three are miscellaneous.[86] The remaining six cases all relate to the administration of justice. Four of these concern a transfer of power to the courts,[87] while two concern increases in the numbers participating in other forms of judicial activity.[88] The use of the lot is commonly regarded

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[82] Given the mutilated state of the end of the manuscript, it is possible that further chapters once existed. However, Rhodes considers it "very probable" that they did not (*Commentary*, 735).

[83] Rhodes, *Commentary*, 34 n. 178 lists 17, including 67.4 and 5.

[84] Ps. Arist. *Ath. Pol.* 54.3, 55.1, 56.4, 62.1.

[85] Ps. Arist. *Ath. Pol.* 51.3, 56.3, 61.1.

[86] One concerns the identification of the citizen body (Ps. Arist. *Ath. Pol.* 53.4), one the addition of a new festival (*Ath. Pol.* 54.7, seemingly a late insertion), and one a reduction in state oversight of the sacred olive trees (*Ath. Pol.* 60.2).

[87] Ps. Arist. *Ath. Pol.* 45.1, 45.3, 49.3, 55.3. There is some debate about the story at *Ath. Pol.* 45.1. Swoboda believed the whole account worthless; Hignett, however, thought that the council might have usurped certain judicial powers after the 403 restoration (*History of the Athenian Constitution*, 242). Hansen accepts the story and posits 403/2 as a possible date for the transfer of powers to the courts. See Hansen, *Athenian Democracy*, 168, with citations. Cf. Rhodes, *Athenian Boule*, 207.

[88] Ps. Arist. *Ath. Pol.* 53.1, 55.4.

as a key element in Athenian democracy, as is widespread participation; on this evidence, transferring power to the courts may well have been seen in the same light.

This conclusion is supported by the writings of the Athenian orators. The approximately one hundred and fifty extant speeches (and pamphlets in the form of speeches) are our single most important source of evidence on Athenian democratic ideology,[89] and the significance of the courts as the ultimate backstop of Athenian democracy comes across overwhelmingly strongly in these texts. We may begin with a quotation from Lykourgos, a prominent statesman, who in 330 acted as prosecutor in a controversial trial for treason.[90] According to Lykourgos, the three things which in the main "uphold our democracy and preserve our city's prosperity" were "first the systems of law, second the vote of the jury (*dikastai*), and third the method of prosecution by which these crimes are handed over to them"--all three relating specifically to the courts.[91] The finality of the judges' authority elicited especially strong language from speakers. "I take it that everybody will agree that to invalidate judicial decisions is monstrous, impious, and subversive of popular government" (*tou dēmou katalysis*), Demosthenes proclaimed confidently in a trial of *graphē nomon mē epitēdeion theinai*, "proposing a disadvantageous law," in 353.[92] In the same speech, he argued that the courts were "the pillars of the constitution," that "laws which are still authoritative have

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[89] Discussed in Todd, *Shape of Athenian Law*, 7-8.

[90] According to Aeschin. 3.252, the case was decided by a single vote. For discussion of the possible political significance of the case, see Allen, *Why Plato Wrote*, 126-33.

[91] Lycurg. 1.3-4.

[92] Dem. 24.152.

given supreme authority (*kyrious hapantōn*) to the gentlemen of the jury," and that he had been told "that in times past, popular government (*tēn dēmokratian*) had been overthrown this way, when indictments for illegal legislation were abolished, and courts of justice (*tōn dikastēriōn*) stripped of authority (*akurōn genomenōn*)." [93]Aischines adopted similar language in a case which indirectly attacked Demosthenes. He freely identified the judges with the *polis* as a whole and democracy in general, and likened their role in defending democracy to that of guardsmen in war: "as each man of you would be ashamed to desert the post to which he had been assigned in war, so now you should be ashamed to desert the post to which the laws have called you, sentinels (*phulakes*) guarding the democracy this day." [94]Like Demosthenes, Aischines also emphasized the historical significance of the courts as the protector of the democratic system: "No one has attempted to overthrow democracy before he has made himself stronger than the courts." [95]

Many similar quotations can be found celebrating the democratic significance of the courts, and in particular the importance to democracy of the supreme authority of the judges.[96] But two passages, one from Demosthenes and another found among his writings although not now attributed to him, deserve special attention. The first concerns a case that appears never to have come to trial, though the aggressively class-conscious contents of Demosthenes' prosecution speech invite the question whether the defendant, a

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[93] Dem. 24.2, 118, 154.

[94] Aeschin. 3.200, 7.

[95] Aeschin. 3.197-8.

[96] E.g. Dem. 24.37, 73, 78, 148, 152; Dem. 20.118; Dem. 39.40; Dem. 57.56; De. 59.91; Din. 1.106, 3.16; Hyp. 1 Fr. 3; Lys. 1.36. Cf. Hansen, *Sovereignty of the People's Court*, 17-18.

fabulously wealthy individual named Meidias, might actually have tried to settle the case beforehand out of fear of what might happen if Demosthenes' remarks were heard by members of the *dēmos* sitting in court.[97] Meidias was accused of violating the sanctity of the Greater Dionysia by punching Demosthenes in the face while the latter had been acting as a *chorēgos*, chorus producer, during the festival of 351/50. Throughout the speech Demosthenes played up the powerlessness of ordinary Athenians in the face of bullying by men of great wealth and influence such as Meidias, but this theme reached its apotheosis in some of its last passages.[98] Focusing on the judges before him, Demosthenes asked them to consider where their own power lay. Not in personal strength, or youth, or arms, he argued, implying coolly that the men before him did not excel in any of these categories. Their power lay exclusively in the laws.

> Do not, gentlemen of the jury (*ō andres dikastai*), do not betray me or yourselves or the laws. For if you would only examine and consider the question, what is it that gives you who serve on juries such power and authority (*pot' eisin humōn hoi dikazontes ischyroi kai kyrioi*) in all state affairs...you would find that it is not that you alone of the citizens are drawn up under arms, not that your physical powers are at their best and strongest, not that you are in the earliest prime of manhood; it is due to no cause of that sort, but simply to the strength of the laws.

The laws, then, were the source of these men's power. But the strength of the laws could in turn be realized only through their own agency:

> And what is the strength of the laws? If one of you is wronged and cries aloud, will the laws run up and be at his side to assist him? No; they are only written texts and incapable of such action. Wherein then lies their

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[97] According to Aeschin. 3.52, Demosthenes accepted thirty minai from Meidias not to pursue the case.

[98] Dem. 21.222-5.

> power? In yourselves, if only you support them and make them powerful enough to help him who needs them.

Thus "the laws are strong through you and you through the laws," Demosthenes concluded. Domineering men such as Meidias might try to bully, hector or buy their way to special treatment in the *polis*, but the laws, as embodied by the judges, were there specifically to defend the "little" man from the "big."[99] The laws were, in effect, a weapon on the side of the *dēmos*--"you"--against the domination of the elite--"Meidias"--perhaps the only weapon the unexceptional "little" men of Athens had.[100]

Since these claims emphasizing the significance of judges and judging appear in speeches made before judges themselves, it is natural to wonder if they represent merely a *captatio benevolentiae*--that is, an attempt to gain the listeners' goodwill. But for one thing, as Hansen has argued, while this may often be true, it is very striking that no similar claims hailing the final democratic power and authority of the assembly feature in our extant assembly speeches.[101] For another, even if litigants *did* often seek the goodwill of the judges by emphasizing their power and significance in the democratic system, the fact that the speakers considered it worth their while to flatter the judges' capacities in this way itself tells us a good deal about the distribution of authority in Athens. Finally, it is worth noting that flattery of the audience is not the dominant note in most of our speeches, either in the assembly or in the courts. More often, the listening voters were berated for their failure to act in the right way or indeed at all.

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[99] Dem. 21.221.

[100] Cf. Dem. 21.129, 210. See also Ober, *Athenian Revolution*, 86-106.

[101] Hansen, *Sovereignty of the People's Court*, 18. The single exception is Dem. 59.88.

This leads us to the second of the two passages from the orators to be considered here. A particularly interesting example of audience-berating appears in a speech given before the assembly around 351, attributed to Demosthenes though most likely not by him.[102] What is most significant about this speech is the claim that Athenian citizens typically put too much stock in the power of their courts to protect them, when they ought to be developing alternative (in this case military) means of defense. According to the speaker, certain "phrases, false and injurious to the State," had entered the Athenians' "common speech," such as "'In the law-courts (*dikastēriois*) lies your salvation' and 'it is the ballot (*psēphos*) that must save the State'." [103]Any mention of a ballot ought to cause readers to prick up their ears, for as we have seen they were a characteristic feature of judicial activity--in the assembly, except in extraordinary circumstances, attendees voted by raising arms.[104] The speaker continued, somewhat testily: "I know that these courts are sovereign (*kyria*) to uphold the rights of citizen against citizen, but it is by arms that you must conquer the enemy, and upon arms depends the safety of the State." [105]Both the accusation that the Athenians were losing the capacity for military action because they relied excessively on their courts and the acknowledgment that the courts were the institution responsible for deciding domestic conflict are very striking.

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[102] Dem. 13.

[103] Dem. 13.16. Translation modified.

[104] See further Staveley, *Greek and Roman Voting and Elections*, 73-95.

[105] Dem. 13.16.

The evidence surveyed so far was all produced in the fourth century. What of earlier sources? Most important for our purposes are the plays of Aristophanes, which alongside the work of Thucydides provide a major insight into Athenian social and political norms before the end of the Peloponnesian War. Both these authors are frequently cited in connection with the political significance of the courts in Athens. Athenian "litigiousness" is brought up as the subject of widespread complaints among Athens' allies in the first book of Thucydides' *History*, while the identification of Athens with judicial activity forms a running joke in Aristophanes.[106] We meet the protagonists in *Birds* (414) fleeing Athens on account of suits launched against them in pursuit of debts, and their description of Athens focuses exclusively on the courts: "A splendid city, Athens, rich and free, / Denying none the right to...pay a fine! ...That stubborn folk will sit / And chirp on legal twigs til kingdom come!"[107] Shortly thereafter, when they identify themselves to Tereus, previously a man, now a hoopoe, as mortals "from the land of lovely triremes," he replies without missing a beat "Jurymen (*ēliasta*)?"[108] Similarly, in *Clouds* (423), Strepsiades is flummoxed when shown Athens on a map: "But it can't be; there are no juries (*dikastas*) sitting."[109] Almost the same joke is repeated in *Peace* (421):

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[106] Thuc. 1.77.

[107] Ar. *Av*. 36-41. Trans. R. H. Webb.

[108] Ar. *Av.* 109. The Elaia (alternative pronunciation: "helaia") was an early name for Athens' largest court.

[109] Ar. *Nub*. 208. Trans. M. Hadas.

in a team of Greeks from multiple *poleis*, the Athenians are criticized for being good for nothing except going to law.[110]

More interesting than the general association of Athens with judges and judging, however, is the specific association of the courts with the supreme power of ordinary (or even specifically lower-class) citizens. This too appears in scattered fashion throughout Aristophanes. A good example is in *Lysistrata* (411), where a husband's demand that his wife "put a stop to your bellowing!" prompts the immediate response "You're not on a jury now, you know."[111] Similarly, in *Assemblywomen* (c. 382), Blepyrus, as soon as he learns that women have taken over the administration of the state, asks: "Then my wife's the *dikastēs* now, not I?"[112]

The most substantial evidence on this point, however, appears in *Wasps* (422). This play revolves around a well-to-do son, Bdelykleon ("Loathekleon") trying to cure his father, Philokleon ("Lovekleon") of his "addiction" to judicial service.[113] Accordingly, it is full of judicial analogy and activity, climaxing in an especially fantastic trial of the family's dog on a charge of cheese-stealing.[114] Yet two issues stand out in relation to the democratic significance of the courts. The first is the expected age and social standing of the judges; they are portrayed as principally the elderly and the poor. Philokleon is an old

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[110] Ar. *Pax* 503-5.

[111] Ar. *Lys*. 379. Trans. J. Henderson.

[112] Ar. *Eccl*. 460. Trans. J. Henderson.

[113] Ar. *Vesp*. 88. Trans. J. Henderson.

[114] Ar. *Vesp*. 835-1008.

man with an upwardly mobile son who feels that his father's constant court-going is beneath him: the implication that he needs the money evidently reflects badly on the family's reputation.[115] The typical (or stereotypical) poverty of judges is also illustrated in a tragicomic conversation between the chorus-leader and his small son, whose request for a present of figs elicits a pathetic response from the father: he is so far from being able to afford figs that he claims not to know how the family will eat if he is not picked to sit in court that day.[116] The second significant issue is the tremendous power wielded by judges. This is developed in a long and rather salacious speech of Philokleon, in which he revels in the groveling behavior of the litigants that come before him and compares himself to a king and to Zeus himself.[117] The implication is clear: if an ordinary citizen wishes to feel like a king, the obvious venue is the courts, not the assembly.

Of course, since the plot of *Wasps* relates directly to the courts, one might expect their significance to be overstated in that work. A more accurate depiction of their character and significance might be expected to be found in a work dealing with political activity more broadly, especially if it gave some sense of the relationship between the courts and the assembly. *Knights* (424) provides this. The main political setting in this play is the assembly. The character Demos is explicitly introduced in association with the assembly's meeting-place on the Pnyx, the hill in the center of Athens, and later he actively refuses to hear squabbling political leaders present their arguments anywhere

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[115] Ar. *Vesp*. 340-1, 503-7, 1003-8.

[116] Ar. *Vesp*. 291-316.

[117] Ar. *Vesp*. 548-630.

else.[118] Yet the democratic significance of the courts also surfaces repeatedly. The main supporters of Paphlagon (i.e. the popular leader Kleon) are identified as "elders of the jury-courts, brethren of the three obols,"[119] and the promise of further jury-pay is represented as a major incentive for their offering him continued support.[120]

Most instructive in this vein is a remarkable exchange between the chorus of knights (that is, cavalrymen, members of Athens' second-highest military and economic class) and Demos that takes place towards the very end of the play.[121] First, the knights accuse Demos of being easily manipulated by political leaders:

> *Chorus*. Demos, you have a fine sway, since all mankind fears you like a man with tyrannical power (*andra tyrannon*). But you're easily led astray: you enjoy being flattered and thoroughly deceived, and every speechmaker has you gaping. You've a mind, but it's out to lunch.

This accurately captures how Demos has been depicted throughout the play. But in the next passage, Aristophanes switches course dramatically, and attributes to Demos rather more cunning than might have been expected. His supposed stupidity is apparently only a guise that allows him to milk his leaders for whatever riches they have amassed in the course of their ascendancy.

> *Demos*. There's no mind under your long hair, since you consider me stupid; but there's purpose in this foolishness of mine. I relish my daily pap, and I pick one thieving political leader to fatten; I raise him up, and when he's full, I swat him down.

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[118] Ar. *Hipp*. 42, 750. Cf. 76. Trans. J. Henderson.

[119] Ar. *Hipp*. 255.

[120] Ar. *Hipp*. 798. Cf. 1089.

[121] Ar. *Hipp*. 1111-50.

The knights accept this and even expand upon the feeding and sacrificing analogy:

> *Knights*. In that case you'll do well; and your character really does contain, as you claim, very deep cunning, if you deliberately fatten these men, like public victims, on the Pnyx, and then when you chance to lack dinner, you sacrifice one who's bloated and have yourself a meal.

A key feature of this passage is the singling-out of the assembly, on the Pnyx, as the location of the "fattening" part of this process. But even more significant for our purposes is that the culmination of this procedure, which confirms the ultimate power of Demos over the political elite that he has "fattened," takes place nowhere but the courts.

> *Demos*. Just watch me and see if I don't ingeniously trick them, those who think they're smart and that I'm their dupe. I monitor them all the time, pretending that I don't even see them, as they steal; and then I force them to regurgitate whatever they've stolen from me, using a verdict-tube as a probe.

The "verdict-tube" mentioned here was a wicker funnel used in the courts in this period: it rested on the neck of the voting urns, allowing the judges to cast their ballots without anyone seeing for whom they were casting their votes.[122] The notion of using this as a "probe" to make the political class regurgitate the objects of their gluttony is arresting, and neatly suggests both the symbiotic relationship of the assembly and courts as democratic venues and the courts' *final* political significance. The "fattening" would be to no avail without some means of recovering the goods; to this extent, the rest of the democratic system can be said to depend on the successful functioning of the courts, and especially on their control by the *dēmos*. Moreover, though it is possible that this interlude is itself no more than an Aristophanic *captatio benevolentiae*, a way of securing

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[122] MacDowell, *Law in Classical Athens*, 252.

the goodwill of his audience at the Lenaia for a play otherwise filled with criticism of the stupidity of the *dēmos* and the cupidity of its leaders, its significance still holds. Flattery is pointless if it is not persuasive, and for that to be the case it has to seem plausible. To the extent that this exchange reveals a plausible account of the relationship between the *dēmos* and its leaders as sketched out in the relative functions of the assembly and courts, it provides important evidence for the way that *dēmokratia* was conceived in Athens.

The foregoing evidence is culled from the most obvious sources. The historical significance of the works of Aristotle and his students, the writings of the canonical orators, and the plays of Aristophanes is fully accepted, though the implications of these works may not have been fully digested. A trickier body of evidence to use for historical purposes are the philosophical writings of Plato, though this source may be the most politically significant of all. As is well known, Plato was a committed anti-democrat, albeit an idiosyncratic one: his advocacy of "philosopher-kings" in the *Republic*, for example, hardly reflected mainstream oligarchical sentiment in Athens.[123] It is less often noticed that the specific venue Plato often has in mind when criticizing either majoritarianism in general or Athenian democracy in particular is not the assembly but the courts. The suspicion of democratic rhetoric in the *Gorgias*, for example, centers on its effects in the courts, while the long "digression" comparing politicians to philosophers in the middle of the *Theaetetus* also presents the courts as the political venue of most concern.[124] Of course, the overwhelming significance of Sokrates's trial and execution in

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[123] See e.g. H. G. Robertson, "Plato as a Critic of Athens," *Classical Weekly* 29 (1936), 145-51.

[124] Pl. *Grg*. 452e, 454b, 454e, 455a; *Tht*., 173cff.

the Platonic worldview plausibly accounts for some of this attention, but the number of allusions and direct references to judicial activity in Plato's works far outstrips what might be expected as a result of that event.

This invites us to reconsider Plato's interest in the theme of justice in connection to its role in Athenian democracy; and here, perhaps, lies the most significant evidence for the supremacy of judicial activity in the conceptualization of democracy in Athens. The centrality of justice in Plato's writings can hardly be doubted: as well as being the only virtue to be given the honor of a treatise in ten books, its literal centrality in his works has recently been demonstrated by J. B. Kennedy, who has found that the cluster "philosophy, justice and God" recurs at the exact center of a large number of his works.[125] Yet when read in the light of the general democratic significance of the courts, this attention to justice comes into a sharp new focus. A new view of the relationship between democracy and the administration of justice in Athens suggests a new understanding of Plato's philosophical project: to undermine, to the fullest extent possible, the conception of justice that formed the chief intellectual bulwark of Athenian democracy.

Plan of This Work

What is exciting about the above evidence presented is not that it shows that the Athenian courts were a thoroughly democratic institution. That point is already widely accepted.[126]

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[125] J. B. Kennedy, "Plato's Forms, Pythagorean Mathematics, and Stichometry," *Apeiron* 43 (2010): 10-13.

[126] See especially MacDowell, *Law in Classical Athens*, 29-40; Ober, *Mass and Elite*, 141-48; Christ, *Litigious Athenian*; Lanni, *Law and Justice*, 31-40.

Nor is it surprising to find that the Athenian courts played a substantial political role. Again, that point is well understood.[127] What is novel is the possibility that the courts were conceived, by democrats and anti-democrats alike, as the most democratic--or "demotic"--space in Athens, the foundation of the *dēmos*'s specific power, and the institution whose continued control by the *dēmos* was deemed most crucial to the preservation and flourishing of *dēmokratia* itself.

This dissertation begins the task of constructing a fresh interpretation of Athenian democracy on the basis sketched above. This interpretation may be called "dikastic democracy," after the citizen-judges, or *dikastai*, who sat at its apex. It is preferable to avoid neologisms when possible, particularly those derived from ancient Greek. But since no currently existing English term is adequate to describe the kind of democracy that the Athenians had, some new coinage is necessary, and the need for it is itself instructive.

The term "dikastic" comes from the Greek "*dikastēs*," which, as Stephen Todd has noted, can with equal accuracy or inaccuracy be translated "judge" or "juror."[128] Like a judge in many legal systems, a *dikastēs* was responsible for interpreting both law and fact and was responsible for deciding on the appropriate sentence, with full discretion over both aspects of his verdict. Like a juror, he was an ordinary citizen with no legal training and usually sat on a panel alongside many other *dikastai*. But the differences between an Athenian *dikastēs* and either a modern judge or juror are perhaps even more

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[127] See especially Hansen, *Sovereignty of the People's Court*; G. E. M. de Ste. Croix, *The Class Struggle in the Ancient Greek World* (Cornell, NY: Cornell University Press, 1981), 96-97, 290; D. Maio, "Politeia and Adjudication in Fourth-Century Athens," *American Journal of Jurisprudence* 28 (1983), 16-45; Cohen, *Law, Violence and Community*; R. Harrison, *Democracy* (London: Routledge, 1993), 20.

[128] Todd, *Shape of Athenian Law*, 82. See also note 15 above.

significant. *Dikastai* did not discuss verdicts before voting; they voted secretly and left no record of their reasoning; they received no legal instruction and were not required to follow precedent; and their verdicts could not be repealed.

Perhaps the most significant difference between an Athenian *dikastēs* and a modern judge or juror concerns the scope and political significance of the *dikastēs*'s role. In modern terminology, the *dikastēs* judged both fact and law; according to the ancient conception, he decided "*to dikaion*," "what is just." Ancient Greek politics revolved around two questions: first, what seemed advantageous for the *polis*, which was typically decided in an assembly or council, and second, what was to count as just within it, which was typically decided in court.[129] In Athens and elsewhere, this latter function involved not only resolving disputes between citizens, but also disciplining politicians, military leaders, and others whom the *polis* had entrusted with responsibility. Hence the *dikastēs* had enormous political power. When this role was played by ordinary citizens, it meant that those ordinary citizens had final authority in the *polis*.

The term "dikastic democracy" is intended to capture this situation. It describes a system of government in which the *dēmos*--defined as the body of ordinary working citizens, those undistinguished by wealth, birth, influence, political prowess, or any other exceptional feature--rules principally through judicial decision-making.[130] This is not to suggest, of course, that the assembly or its equivalent in such a system would play no

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[129] Here, I borrow the framework suggested by Arist. *Rhet*. 1358a-59a.

[130] That is, "people" in the sense of "the common people" (as used synonymously with *to plēthos*, "multitude"). I do not subscribe to the common view that the usual meaning of "*dēmos*" was "entire citizen body," or "whole people" (synonymous with *polis*). However, I will consider this issue in a separate article.

significant democratic role. In Athens at least, the courts and assembly probably developed symbiotically: the final authority of the courts may actually have *enabled* some of the freedoms of the assembly which modern scholars typically identify as "democratic," such as openness to all to attend, speak and vote. Arguably, it was because the Athenian *dēmos* controlled the courts, and used the courts to control its political leaders, that it was able to give those leaders as much latitude as it did to shape policy in the assembly. The main burden of this work, however, will be to investigate the foundations of Athenian democracy from the perspective of the character and functions of the courts. A full account of the relationship between the courts and the assembly will have to wait for a later opportunity.

The dissertation will proceed as follows. The first two chapters are largely critical: their task is to clear away two of the main obstacles in the way of the account of Athenian democracy that I wish to give. The first obstacle is the interpretation of Athenian democracy as "epistemic," that is, centered on maximizing the returns to relevant knowledge. This has recently been argued at length by Josiah Ober,[131] though he builds on the work of various other scholars, most notably Jeremy Waldron, whose interpretation of Aristotle as advancing the "doctrine of the wisdom of the multitude" has had a substantial influence on the conception of ancient Greek democracy held by political theorists and other scholars of the ancient world.[132] In large part, this influence

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[131] Ober, *Democracy and Knowledge*.

[132] J. Waldron, "The Wisdom of the Multitude," *Political Theory* 23 (1995): 563-84; (rev.) *Dignity of Legislation*, 92-123.

stems from the fact that there are very few sustained defenses of mass political activity in our primary sources, and without doubt the most important is the passage of Aristotle that Waldron and others have interpreted along "epistemic" lines. Specifically, it is believed that Aristotle justified Athenian-style democracy by arguing that to combine the ideas and experiences of many people gathered together in an assembly, through discussion, would lead to better decisions being made overall.[133]

If this were right, it would undermine any account of Athenian democracy that sought to emphasize the role of the courts, where no discussion took place. However, I argue that the passage in question has been comprehensively misunderstood. As well as being, almost certainly, neither about Athens nor about *dēmokratia* (at least according to Aristotle's conception of that term), the subject of Aristotle's argument is not wisdom but virtue (*aretē*), and the activities to which he refers take place in both the assembly and the courts, though discussion is not one of them. Of course, if Aristotle is talking about neither Athens or democracy here, one might not want to throw out Ober's account of Athenian democracy along with Waldron's interpretation of Aristotle. Yet the *only* primary source to which Ober refers in his exposition of the significance of the aggregation of knowledge in Athenian democracy is this passage of Aristotle.[134] We ought therefore to remain skeptical of the wider conclusions he draws, at least as they relate to the conception of *dēmokratia* dominant at the time.

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[133] Referring to Arist. *Pol*. 1281a40-b10.

[134] Ober, *Democracy and Knowledge*, 110-14.

The next chapter picks up the theme of discussion begun in Chapter 1. The second major obstacle to my claim that the courts played a central role in Athenian democracy is the interpretation of Athenian democracy as "deliberative": that is, as featuring a key role for discussion and debate as part of the political process. As noted above, there was no discussion at all among judges in the courts, which would seem to put them very far from the heart of Athenian democracy as currently conceived. I argue, however, that the term "deliberation" (*to bouleuesthai*) in Greek has been misinterpreted. Rather than group discussion, or "external-collective" deliberation, to adopt the terminology of Robert Goodin, *to bouleuesthai* referred to individual thought, or "internal-reflective" deliberation, in both the assembly and the courts. The major function of the Athenian *dēmos* was indeed to "deliberate," but this denoted listening to the speeches that came before it and voting on them; the mass of ordinary citizens did not take part in speaking themselves. Rather, one who got up to speak before either the assembly or the courts by that very action placed himself, if only temporarily, outside the *dēmos* and became a "*rhētor*," a "speaker" or "politician." This radically alters our view of Athenian democracy. Among other things, it allows us to redefine at least some aspects of democratic activity in Athens on the basis of the activity of the courts.

The constructive part of the project begins in Chapter 2. Here I take on directly the question of the relative democratic strengths of the assembly and courts and the definition of "*dēmokratia*" that follows from this. I begin with the transfer of key political powers to the courts at the end of the fifth century, as described by Rhodes above. These reforms have been the subject of intense debate in the scholarly literature on Athens in

recent decades. The analysis of Rhodes and others suggests that the reforms were an attempt to "check" the popular will. But I will argue that they were intended to amplify it, because the courts were regarded by the majority of Athenians as a better representative of the *dēmos*, defined as those undistinguished by wealth, birth, influence, political prowess, or any other exceptional feature. Although the assembly was far larger, there is no evidence that the Athenians identified *dēmokratia* with large numbers. Rather, what was significant was how far ordinary citizens were able to participate in decision-making and how well protected they were from manipulation. I will show that in terms of composition and procedure, there were many good reasons, apparent by the end of the fifth century, for the Athenians to think that the courts were a better protector of the interests of the *dēmos* than the assembly could be.

Finally, in Chapter 4, I consider the impact of the Athenians' democratic judicial practices on the conceptualization of justice in classical Athens. Some readers may doubt that the vote of a random assortment of ordinary citizens with no legal training, under no judicial instruction, required to follow no precedent and accountable to no one, not even to one another--in short, possessing absolute discretion over each and every verdict, with no possibility of appeal--could possibly have approximated anything like justice, at least as it is usually understood today. Indeed it could not; but it did accord with the conventional Athenian conception of justice, which was very different from our own. That is not to say that it did not have its merits. Arguably, the most compelling feature of the conventional Athenian understanding of justice is the constructive role it allowed to human agency in arriving at a judgment of "what is just" (*to dikaion*). In disputes

between the members of a political community, the only admissible criterion of justice was understood to be the opinion of other members of the political community--or rather the supreme part of it, in this case that of the *dēmos* as expressed by the vote of a randomly selected, and thus adequately representative, judicial panel. In Athens, the verdicts given by these panels seem to have been treated as defining justice quite literally: there was simply no other measure by which to ascertain what a just outcome might be.

To be sure, this conception of justice may strike many readers as a frighteningly relativistic approach to what they would regard as first and foremost a moral, and therefore absolute, rather than a political, and therefore contingent, function: the task of giving sound judgment. Yet if this is a common response, it is worth bearing in mind that this circumstance is at least partly owing to the enduring success of an alternative conception of justice for which we may also have the activity of the classical Athenian courts to thank: that is, Plato's. Plato's signal achievement, seen most obviously in the *Republic* and *Gorgias* but evident throughout his writings, was to transform the political and philosophical terrain on which justice was conceived; and he did this, I argue, at least partly because he believed that in so doing, he was undermining a central pillar of the Athenian system of government. Against the notion that "what is just" was just solely because the political community held it to be so, Plato developed the concept of justice as a virtue (*hē dikaiosynē*) in order to establish the existence of justice as an eternal or abstract "form," from which it follows that only truly just men can pronounce what is just in accordance with the form of justice itself.

Fascinatingly, in doing this, Plato may have been taking up and amplifying a minor element of the conventional Athenian approach to justice: the notion that in certain cases there was such a thing as a "right answer," independent of the votes of the judges--namely, cases in which the gods were deemed to have a special interest, principally homicide. When faced with the possibility that unexpiated blood-guilt might pollute the city, the Athenians relinquished their right to vote on what was just in the ordinary way. Instead, they passed such cases on to the city's highest magistrates, to be tried in sacred precincts around or outside the city, with much tighter rules governing the kinds of evidence that could be heard. Plato, particularly in the *Laws*, seems to have conceived of something similar, but on a larger scale. In effect, what Plato did was to argue that the gods (or God) were (or was) always watching. He thus arrived at a conception of justice that would hold regardless of who happened to be sitting in court on any particular day, and so undermined what was widely taken to be the foundation of the Athenian democratic system: the right of citizens to decide what was just (*to dikaion*) for themselves.

This was a remarkable innovation, and not the least remarkable thing about it was its long-term success. One indicator of its short-term influence is the fact that, as recorded by Diogenes Laertios, every treatise on justice prior to Plato appeared under the title *Peri tou dikaiou* ("On What is Just," in the sense of an outcome), while those written after him discussed *Peri tēs dikaiosynēs* ("On Justice," in the sense of a virtue)--with the striking exception of Aristotle, who wrote separate works on each.[135] Perhaps the most significant

[135] Diog. Laert. 5.22, 24.

indication of the victory of the Platonic conception of justice over that of the Athenian democrats, however, appears in the extent to which the notion of justice that predominates in much legal and political philosophy and ordinary usage today retains the same basic shape as his. A common understanding of justice is that disputes admit of a "right answer," which is independent of the reasoning of the judges: the most that is normally hoped for is that the judges involved will be able to get relatively close to it. This, arguably, owes a great deal to the conception of justice as an eternal or transcendental "form" that Plato was the first to develop, and that was carried into later Western political thought largely thanks to its congruence with Christianity. A great many modern citizens appear to accept the idea that there is a right answer "out there" in questions of justice, that arriving at this answer is an essentially technical or intellectual task rather than a popular or political one, and that this task is best performed by small bodies of specially trained, professional thinkers—judges or, for that matter, philosophers. This is not to suggest that a majority would claim that such individuals come up with the "right answer" all or even most of the time; but it is to suggest that they suppose that such an answer exists, if only we could reach it. Similarly, many people appear to feel uncomfortable with the idea of putting the ultimate decision of "what is just" exclusively into the hands of ordinary citizens, the role of juries in some legal systems notwithstanding. The thought here is that the chance of such groups systematically coming up with the wrong answer is just too great.

This is an essentially Platonic conception of justice and its execution. Indeed, it is arguable that if Plato were around today, he, perhaps more than any other political

philosopher, would see good reason to be satisfied with the way that political and judicial functions are organized in modern representative democracies, at least at the highest levels. Democratically elected legislative assemblies are common, and separately elected executive officers are also widely seen, so the creation and enactment of laws are certainly, in many cases, democratically controlled. But there is little evidence to suggest that this would have struck Plato (or any other classical Athenian) as particularly significant in the absence of similarly direct democratic control over the interpretation and application of laws once they are made.

Whether or not modern judges decide cases in a manner that Plato would have approved of is, of course, a different question, and there is no reason to think that Plato would have admired the general ethos of most modern regimes. But it is enlightening to think that in the eyes of both pro- and anti-democratic Athenians, it was primarily the power of the *dēmos* to decide "what is just" for itself, in the courts, that served as the supreme guarantee of democracy as they understood it. We may think that they were wrong about this; but it is worth noting that, to an ordinary Athenian democrat, the modern practice of democratizing the creation and enactment of laws, while simultaneously "outsourcing" their interpretation and application to small bodies of professionals beyond the reach of democratic accountability, would have seemed very strange, even dangerous. Such a policy would have been thought to invite the oligarchical capture of the entire political system, whether the majority of citizens realized it or not.

CHAPTER ONE

Aristotle on the Virtue of the Multitude

Almost twenty years ago, Jeremy Waldron published a widely admired account of an argument made by Aristotle in support of the political authority of "the many," as opposed to "the one" or "the few."[1] The key text, from Book 3 of the *Politics*, reads:

> For the many (*to plēthos*), of whom each individual is not a good man (*spoudaios*), when they meet together may be better (*beltious*) than the few good, if regarded not individually but collectively, just as a feast to which many contribute (*ta symphorēta deipna*) is better than a dinner provided out of a single purse (*ek mias dapanēs*). For each individual among the many has a share (*morion*) of excellence (*aretē*) and practical wisdom (*phronēsis*), and when they meet together, just as they become in a manner one man, who has many feet, and hands, and senses, so too with regard to their character (*ta ēthē*) and thought (*dianoia*). Hence the many are better judges than a single man of music and poetry; for some understand one part, and some another, and among them, they understand the whole (*allo gar alloi ti morion, panta de pantes*).[2]

Waldron dubbed this argument "the doctrine of the wisdom of the multitude," or "DWM," and explicated it as follows. Aristotle thought that "the people acting as a body" were "capable of making better decisions, by pooling their knowledge, experience, and insight," than any single member of the body, however excellent, was capable of making

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[1] J. Waldron, "The Wisdom of the Multitude," *Political Theory* 23 (1995): 563-84; (rev.) *The Dignity of Legislation* (Cambridge, UK: Cambridge University Press, 1999), 92-123.

[2] Arist. *Pol*. 1281a40-b10 as quoted by Waldron: trans. Barnes, ed. Everson (Cambridge, UK: Cambridge University Press, 1996). The same argument reappears at 1283a40-b1, 1283b23-25, 1283b30-35, 1286a25-32, 1287b12-15, 1287b24-30, 1332a30-35.

on his own.[3] Mass political activity thus resembled a "potluck dinner"[4] or an audience judging a play: a greater variety of contributions could produce a better result. This reflected decision-making in the Athenian assembly. Debating the invasion of Sicily, Waldron hypothesized, one citizen might know something about the coastline, another Sicilian military capacities, another the costs of such expeditions, and so on. From the diverse knowledge of the whole group there could thus emerge the "widest possible acquaintance with the pros and cons," and hence the best possible decision.[5]

Similar accounts had appeared before,[6] but Waldron's was easily the fullest and most elegant and has continued to influence students of democracy and of Aristotle alike.[7] Certain details remain disputed: for example, whether the aggregation of views was fully

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[3] This is "DWM_1". "DWM_2" suggests that the people acting as a body can make better decisions than any subset. My argument applies to both formulations.

[4] That is, a dinner to which each guest brings a dish of his or her own choosing.

[5] Waldron, "Wisdom of the Multitude," 564-8.

[6] J. Bookman, "The Wisdom of the Many," *History of Political Thought* 13 (1992): 1-12; E. Barker, *The Politics of Aristotle* (Oxford: Clarendon Press, 1962), 126-7; A. Lintott, "Aristotle and Democracy," *Classical Quarterly* 42 (1992): 114-28; R. Mulgan, *Aristotle's Political Theory* (Oxford: Clarendon Press, 1977), 103-5; M. Nichols, *Citizens and Statesmen* (Savage, MD: Rowman and Littlefield, 1992), 66-7; J. Ober, *Mass and Elite in Democratic Athens* (Princeton, NJ: Princeton University Press, 1989), 163-5; A. Saxonhouse, *Fear of Diversity* (Chicago, IL: Chicago University Press, 1992), 182, 222-3. Cf. S. Bickford, *The Dissonance of Democracy* (Ithaca, NY: Cornell University Press, 1996), 33-4.

[7] E.g. D. Estlund, *Democratic Authority* (Princeton, NJ: Princeton University Press, 2008), 209, 229-33, 289; J. L. Wilson, "Deliberation, Democracy and the Rule of Reason in Aristotle's *Politics*," *American Political Science Review* 105 (2011): 263.

"dialectical" or more "mechanical," [8] and whether citizens *themselves* possessed knowledge relevant to the subject at hand or simply knew who did.[9] But Waldron's three core claims are widely accepted. First, that Aristotle's "feast" is a "potluck dinner." This is supported by a later appearance of the same analogy, in which "a feast to which all the guests contribute" (*hestiasis symphorētos*) is contrasted with "a banquet furnished by a single man" (*mias kai haplēs*).[10] Second, that the multitude's contribution to political activity is diverse knowledge, wisdom, insight or expertise.[11] And third, that this reflects debate in an assembly, as in classical Athens.[12]

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[8] S. Agacinski, "Stages of Democracy," in *Public Space and Democracy*, ed. M. Hénaff and T. Strong (Minneapolis, MN: University of Minnesota Press, 2001), 137; R. K. Balot, *Greek Political Thought* (Malden, MA: Blackwell, 2006), 64; J. Roberts, *Aristotle and the Politics* (New York: Routledge, 2009), 92-3; Q. Taylor, "Public Deliberation and Popular Government in Aristotle's *Politics*," *Interpretation* 29 (2002): 244.

[9] J. Ober, *Democracy and Knowledge* (Princeton, NJ: Princeton University Press, 2008), 110-14.

[10] Arist. *Pol*. 1286a27-31. Agacinski, "Stages of Democracy," 137; Balot, *Greek Political Thought*, 64-7; Bookman, "Wisdom of the Many," 9-11; Mulgan, *Aristotle's Political Theory*, 104; Nichols, *Citizens and Statesmen*, 66; Ober, *Democracy and Knowledge*, 110-11; Roberts, *Aristotle and the Politics*, 90; Saxonhouse, *Fear of Diversity*, 186, 222-3.

[11] Balot, *Greek Political Thought*, 64-7; Bickford, *Dissonance of Democracy*, 33-4; F. Peonidis, "Aristotle's Relevance to Democratic Theory," *Archiv für Rechts- und Sozialphilosophie* 94 (2008): 283-94; Nichols, *Citizens and Statesmen*, 66-7; Roberts, *Aristotle and the Politics*, 90-2; S. Skultety, "Competition in the Best of Cities: Agonism and Aristotle's *Politics*," *Political Theory* 37 (2009): 54-7; Taylor, "Public Deliberation and Popular Government," 245. The particular importance of the diversity of contributions is emphasized by Ober, *Democracy and Knowledge*, 113-14.

[12] Balot, *Greek Political Thought*, 64; Bookman, "Wisdom of the Many," 9; Ober, *Democracy and Knowledge*, 109-14; M. Risse, "The Virtuous Group," *Canadian Journal of Philosophy* 31 (2001): 53-84; Skultety, "Competition in the Best of Cities," 54-7.

Accordingly, Aristotle is widely regarded as a moderate supporter of deliberative democracy on epistemic grounds.[13] Yet there are reasons to doubt this view. The "pooling of knowledge" paradigm certainly fits the intellectual aspect of his argument, denoted in the text by "*phronēsis*," "prudence" or "good sense," and "*dianoia*," "thought." But how about its ethical aspect, denoted by "*aretē*," "virtue" or "excellence," and "*ta ēthē*," "moral characteristics"? Also, Athenian assemblygoers seem to have been better known even among democrats for ignorance rather than for knowledge (especially in relation to the invasion of Sicily).[14] Is an epistemic account really likely in this context? What about the second analogy: can an epistemic approach adequately explain audience responses to artistic works? And could Aristotle really have found potluck dinners so appealing? Did the ancient Greeks even *have* potluck dinners?

None of these questions has been fully explored; those who doubt the argument have simply dismissed it as weak.[15] I think we can do better. Aristotle was not interested in the benefits of pooling diverse knowledge, but in the political authority of *aretē*, "virtue," understood in its general sense as a capacity for right action encompassing both ethical and intellectual qualities. He was concerned with the quantity of *aretē* that could

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[13] That is, "knowledge-based." And "moderate," because he also had various criticisms of democracy (*Pol*. 1275a25-1280a7, 1279b5). See e.g. A. Gutmann and D. Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996), 44, 131; Balot, *Greek Political Thought*, 65-6. Note that Waldron's article appeared at a time of rising interest in deliberative democracy, spurred in part by the availability of the work of J. Habermas in English: see e.g. *The Structural Transformation of the Public Sphere* (Cambridge, MA: MIT Press, 1989).

[14] Dem. 19.5; Thuc. 6.1.1, 6.46.2.

[15] Bookman "Wisdom of the Many," 10; Mulgan, *Aristotle's Political Theory*, 105. Cf. W. Newman, *The Politics of Aristotle* (Oxford: Clarendon University Press, 1887), 3:256-7.

be possessed by different agents, and his claim in this passage was that some multitudes, when they act collectively, can exhibit more *aretē* than even highly virtuous individuals. Specifically, I will suggest, he believed that all forms of virtue--perhaps especially courage and justice, the two that he associated most with large numbers--are easier to practice in groups than alone, and this supported the view that a multitude could be an effective political agent.

This account fits recognizably within the familiar framework of Aristotelian "virtue ethics"[16] (albeit with a twist that connects it to wider issues of collective action), which seems preferable to reading the passage as an outlier in Aristotle's writings.[17] But if my interpretation is sound, what explains the staying power of the former account? One factor is the difficulty of the text: it is highly truncated, leading many translators to expand upon it, inserting misleading terms in the process--thus giving false preconceptions to readers who have Greek and precluding understanding among those who do not.[18] Another is the seeming plausibility of the assumption that the contributions made to the "feast" are individual dishes. This naturally suggests a "potluck dinner," valued for its "variety," and the rest follows. A third is the familiarity of epistemic arguments for political authority. Since at least Plato, a leading criterion of fitness for rule has been appropriate expertise; the current enthusiasm for epistemic defenses of

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[16] On the limitations of this label, see M. Nussbaum, "Virtue Ethics: A Misleading Category?" *Journal of Ethics* 3 (1999), 163-201.

[17] As implied, perhaps, by Waldron, "Wisdom of the Multitude," 563.

[18] Barker, *Politics of Aristotle*, iii: "Aristotle is too pithy to be made still pithier. It is expansion, rather than contraction, which the text of the *Politics* needs."

democracy is only the latest incarnation of this approach.[19] That Aristotle should have advanced a similar argument may thus seem unsurprising. If I am correct, however, he was engaged in a profoundly different project, which deserves attention not only for the sake of getting Aristotle right, but also because it provides a way of defending certain forms of mass political activity that may ultimately prove more powerful than the epistemic arguments favored today.

The Conventional Account and its Weaknesses

The core elements of the accepted account are the "potluck dinner" analogy, the claim that the multitude's contribution to political activity is fuller knowledge, and the thought that this reflects decision-making in the Athenian assembly. None of these elements is free from difficulty, however, as an examination of the text and its context reveals.

The essential feature of Aristotle's collectively provided feast is that it is expected to be *better* than one provided by a single man. Yet, as others have noted, this is hardly a common view of potluck dinners.[20] Indeed, in the Straussian tradition, it is precisely the improbability of this depiction (along with the reference to the "one man" with "many feet, and hands, and senses," which is regarded as "monstrous") that is taken to show that

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[19] Pl. *Resp*. 473b-87b. Cf. E. Anderson, "The Epistemology of Democracy," *Episteme* 3 (2006): 9-23; J. Cohen, "An Epistemic Conception of Democracy," *Ethics* 97 (1985): 26-38; J. Suriowiecki, *The Wisdom of Crowds* (New York: Anchor, 2004); H. Landemore ed., *Collective Wisdom: Principles and Mechanisms* (Cambridge, UK: Cambridge University Press, 2012).

[20] Waldron, "Wisdom of the Multitude," 567-8; Nichols, *Citizens and Statesmen*, 66, 195.

the whole argument is ironic.[21] Still, most commentators have proven willing to suspend disbelief on this point, since potluck dinners would seem to have a natural affinity with democracy. Everyone can participate; participation is on equal terms; contributions are small; and the results unpredictable. An analogy between dishes at a potluck and views in political debate is visible even at the linguistic level: in the words of Josiah Ober, benefits arise when different people bring different things "to the table."[22]

Yet no matter how natural the "potluck dinner" analogy may seem today, there is no evidence that potluck dinners existed in ancient Greece. We have plenty of evidence of communal dining[23] but none of dinners where guests supplied dishes of their own choosing, and the idea fits badly with what we know of Greek domestic culture. Gender segregation suggests that any such dinner would have been all-male, yet for the same reason, attendees could not have *cooked* their own contributions; that would have been the task of a wife or slave.[24] So we must imagine a series of Greek men arriving for dinner, each bringing a dish prepared by a dependent--and then suppose that this could have struck Aristotle as analogous to the production of the citizenry's autonomous *political* decisions.

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[21] D. Winthrop, "Aristotle on Participatory Democracy," *Polity* 11 (1978): 159; T. Lindsay, "Aristotle's Qualified Defense of Democracy through 'Political Mixing'," *Journal of Politics* 54 (1992): 101-19.

[22] Ober, *Democracy and Knowledge*, 114.

[23] Examples include the *syssitia* of Sparta and Crete (*Pol*. 1271a25-30, Pl. *Lg*. 625e, Ar. *Eccl*. 715, 835-50, 1164-68) and the Homeric *eranos* (*Od*. 1.226, 11.415).

[24] Thuc. 2.78.3.

If we take the point of the analogy to be "variety," further difficulties arise. Classical Greece was not twenty-first century America; its culinary traditions were not notably diverse. The Greek diet comprised mainly bread, olive oil, garlic, figs and wild greens, with a little cheese, meat or fish. Could a "finer" (*kalliōn*) meal really have been produced by the "potluck" process when the options were anyway so limited?[25] Moreover, on the subject of meat, sacrificing and roasting whole animals was normal procedure--a tricky thing to prepare in advance and take to a neighbor's in a dish.[26] Ancient standards of hospitality present another problem. The guest-host relationship was literally sacred, to Hestia, goddess of hearth and feast, and Zeus Xenios, protector of travelers, strangers, and guests. No self-respecting Greek householder could have proposed an evening's entertainment on the condition that guests help out with the food and drink.[27] Finally, whatever relation this passage bears to potluck dinners, another passage in the *Politics* suggests that Aristotle would have disapproved of them. At least, he disapproved of the Spartan requirement that all citizens, however poor, contribute to its public messes (*syssitia*); he preferred the Cretan system, in which such meals were provided from public funds, to which the poorest did not contribute.[28]

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[25] Pl. *Resp*. 372b-c; Plut. *Lyc*. 12.2. See also M.-C. Amouretti, "Urban and Rural Diets in Greece," in *Food*, ed. J. L. Flandrin, M. Montanari and A. Sonnenfeld (New York: Columbia University Press, 1999), 80-2, and L. Foxhall and H. A. Forbes, "*Sitometreia*: The Role of Grain as a Staple Food in Classical Antiquity," *Chiron* 12 (1982): 74.

[26] P. Schmitt Pantel, "Greek Meals," in *Food*, ed. Flandrin *et al*, 90-5; H. W. Parke, *Festivals of the Athenians* (London: Thames and Hudson, 1977), 18.

[27] Contrast Pl. *Smp*. 174e-f.

[28] Arist. *Pol*. 1271a27-33.

These points raise doubts that a potluck dinner is the relevant paradigm. The text does nothing to dispel them, though that is not obvious from most English translations. Common renderings of the "feast" terms include "a feast [or "feasts"] to which many contribute," [29] "a feast to which all contribute," [30] "a feast to which all the guests contribute," [31] "a banquet to which many contribute dishes," [32] and "potluck dinner" itself.[33] Yet Aristotle says merely that the dinners are "*symphorēta*," "collectively provided" ("*sym*," "collectively" or "jointly"; "*phērō*," "bring" or "provide"). This term is rarely attested: the only examples we have of it in connection with dining are the two under discussion, which brings us to a dead end.[34] Nonetheless, it certainly does not imply that those who eat the dinner also help to provide it, or that the contributions made are individual dishes. All we can say is that Aristotle thinks a better meal will be supplied by more than one person, and that he is concerned with cost: the contrast he draws is with a meal "from a single purse" (*ek mias dapanēs*), not one cooked "by a single chef." [35]

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[29] Arist. *Pol*. 1281b2, trans. Jowett (Mineola, NY: Dover, 2000); trans. Barnes (Princeton, NJ: Princeton University Press, 1984); trans. Barker; trans. Reeve (Indianapolis, IN: Hackett, 1998).

[30] Arist. *Pol*. 1281b2, trans. Sinclair, rev. Saunders (Harmondsworth: Penguin, 1981).

[31] Arist. *Pol*. 1286a30, trans. Jowett; trans. Barnes.

[32] Arist. *Pol*. 1286a30, trans. Rackham (Cambridge, MA: Harvard University Press, 1944).

[33] Arist. *Pol*. 1281b2, trans. Balot, *Greek Political Thought*, 65; trans. Ober, *Democracy and Knowledge*, 110.

[34] Liddell and Scott define "*symphorētos*" in a dining context as "a meal towards which each guest contributes, picnic" (LSJ). However, this is inferred solely from the examples under discussion.

[35] Or, as at Arist. *Pol*. 1286a30, one that is "from one and simple" (*mias kai haplēs*).

The next claim is that the multitude's contribution to political activity is knowledge. The main evidence for this appears in the second analogy, on aesthetic judgment. Most English translations feature the verb "understand" here, though "appreciate" is also seen: *viz*. "some appreciate one part, some another, and all together appreciate all."[36] Both suggest that Aristotle is concerned with some form of critical intellectual comprehension, but in the Greek there is actually no verb here at all. The relevant clause is highly truncated, reading simply "some a certain part, others another, and everyone the whole." An appropriate verb must be supplied by the translator, and while many have opted for "understand" or "appreciate," it need be neither.

The suggestion that Aristotle is interested in the production of better-informed decisions is also doubtful. What is described as "better" in the Greek text are not decisions, but rather the agents who make them and the act of judging itself. Aristotle says that many people can be "better" (*beltious*) than a single man, and that they judge "better" (*ameinon*), but he never describes a decision in this way. This might seem ultimately to come to the same thing,[37] but a deeper issue is also at stake. The word "better" used here is not epistemic but moral: "*beltious*," like the adjective "*spoudaios*" that denotes the "good man" in the preceding clause, is an explicitly ethical term, suggesting "decent" or "morally serious," not "well-informed" or "correct."[38]

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[36] Arist. *Pol*. 1281b30, trans. Barker; trans. Lord (Chicago: University of Chicago Press, 1994).

[37] Roberts, *Aristotle and the Politics*, 88.

[38] LSJ. Cf. the reference to "*tous epieikeis*," the "good" or "respectable" classes, at Arist. *Pol*. 1281a12.

Consequently, there is nothing in the passage to suggest that Aristotle is arguing on epistemic lines.[39]

The final element of the accepted account is the link to the Athenian assembly. The "potluck dinner" paradigm certainly looks plausible here: different people contribute different points of view, and every contribution helps to shape the final decision. But the "potluck dinner" reading is dubious, as we have seen: it remains to consider the political context more closely.

First, there is no reason to think that Aristotle is referring to classical Athens. He was acquainted with hundreds of *poleis*, seldom mentioned Athens directly (as Eugene Garver has observed, he cited Sparta considerably more often)[40] and is here making a general claim.[41] It might be assumed that Aristotle is defending Athens if he is defending democracy, but there were many democracies in the ancient Greek world,[42] and anyway, it is not clear that he *is* defending democracy, at least on his definition of it.[43] He is certainly defending the political authority of a multitude, but this could as easily be a reference to *politeia* (the first of the two types of rule by a multitude that he identifies) as

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[39] The reference to the "wise man" at Arist. *Pol*. 1286a26 in Barnes' translation belies this, but this is an interpolation.

[40] E. Garver, *Aristotle's Politics: Living Well and Living Together* (Chicago: University of Chicago Press, 2011), 14.

[41] See the plurals at Arist. *Pol*. 1281b15, 1282a25-30. Cf. M. H. Hansen, *The Sovereignty of the People's Court in Athens in the Fourth Century BC* (Odense: Odense University Press, 1974), 14.

[42] E. Robinson, *Democracy Beyond Athens* (Cambridge, UK: Cambridge University Press, 2011), finds fifty-four clear examples.

[43] That is, as the rule of the poor in their own interest: Arist. *Pol*. 1275a25-1280a7, 1279ab5.

to *dēmokratia*.[44] And since he supported *politeia*, but not *dēmokratia*, this seems very probable; in which case classical Athens is irrelevant, for he certainly took it as an example of *dēmokratia*, indeed one of the most developed of its kind.[45]

It is thus unlikely that Aristotle was thinking of debates in the Athenian assembly. Indeed, he was most likely not thinking of debates in an assembly at all. He cites three specific examples of political activity in connection with this argument: elections to important offices such as generalships or treasury positions; *euthynai* or "audits," the process of holding office-holders to account for their records; and judging cases in court.[46] All of these tasks were often performed by large numbers of ordinary citizens--assemblygoers, in the case of elections, citizen-judges (*dikastai*) or councilors in the case of audits, and *dikastai* again in the courts--so Aristotle did not need to look to assembly debates for an example of mass political activity. Indeed, the only hint that debates might be relevant here is his use of the verb "*bouleuomai*," usually translated "deliberate" and

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[44] Arist. *Pol*. 1279a20-b20.

[45] T. Samaras, "Aristotle's *Politics*: The City of Book VII and the Question of Ideology," *Classical Quarterly* 57 (2007): 77-89; P. Simpson, *A Philosophical Commentary on the Politics of Aristotle* (Chapel Hill, NC: University of North Carolina Press, 1998), 166. On Athens as an "extreme" democracy, see B. Strauss, "On Aristotle's Critique of Athenian Democracy," in *Essays on the Foundations of Aristotelian Political Science*, ed. C. Lord and D. O'Connor (Berkeley, CA: University of California Press, 1991), 212-33; K. Vlassopoulos, "Free Spaces: Identity, Experience and Democracy in Classical Athens," *Classical Quarterly* 57 (2007): 47-9.

[46] Arist. *Pol*. 1281b30-35, 1282a6-14, 1282a25-35 and 1286a25-28. Cf. M. Lane, "Aristotle on Claims to Rule: The Case of the Multitude," in *The Cambridge Companion to Aristotle's Politics*, ed. M. Deslauriers and P. Destrée (Cambridge, UK: Cambridge University Press, forthcoming); F. Susemihl and R. D. Hicks, *The Politics of Aristotle* (New York: Arno Press, 1976 [1894]), 398.

interpreted as suggesting group discussion.[47] But this term could equally apply to decision-making in elections, audits, and in court, so this does not get us very far.[48]

This leads to a crucial point. As we have seen, the accepted account of Aristotle's argument affords an important role to *speech* as the medium through which diverse knowledge is shared; it is this that enables the best decision to emerge. This comes through especially clearly in Waldron's account: for him, the "doctrine of the wisdom of the multitude" forms "a kind of model or paradigm of our nature as *speaking beings*".[49] If the relevant political context were debate in an assembly, this might seem convincing. However, since Aristotle specifically cites elections, audits, and judging court cases, we need an interpretation that works in these situations, and here the accepted account falls short, since none of these activities--common throughout the ancient Greek world--ever, as far as we know, involved speech-making among the decision-makers. In each case, decisions were made simply by voting, *without prior discussion*. In the case of elections, it is possible, though unlikely, that candidates or their proposers made a short speech before the vote, but it is highly unlikely that anyone else did so.[50] Canvassing occurred, if at all, outside the assembly;[51] at meetings, decisions were made speedily, usually by show

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[47] Arist. *Pol*. 1281b32.

[48] Aeschin. 3.255, Ant. 5.71, Dem. 25.14, Din. 1.98, Lycurg. 1.2, 1.11, 1.15. Cf. Ch. 2.

[49] Waldron, "Wisdom of the Multitude," 576-7. Supported by Bickford, *Dissonance of Democracy*, 1996, 4; Wilson, "Deliberation, Democracy and the Rule of Reason," 261.

[50] Since generals were frequently elected *in absentia*, speeches from candidates were certainly not required. Xen. *Hell*. 1.4.10.

[51] E. S. Staveley, *Greek and Roman Voting and Elections* (Ithaca, NY: Cornell University Press, 1972), 101-8. Cf. Arist. *Pol*. 1271a10, 1303a15-17.

of hands.[52] The situation in the courts is also clear. Aristotle reports that most legislators prohibited consultation (*koinologountes*) among judges prior to a verdict.[53]

Aristotle thus cannot have supported the political authority of the multitude on the basis that it allowed diverse knowledge to be shared through public speech. Further confirmation of this is supplied by the text. Immediately after introducing this argument, Aristotle notes that it "would also apply to animals" (*ta thēria*). He sees this as a problem, and clarifies that the benefits of mass participation will arise only if the individuals involved have already achieved a certain level of virtue (*aretē*).[54] But the striking fact, easily overlooked, is that Aristotle thought that the argument, *as it stood*, could apply to animals.[55] Hence, it cannot depend on something that animals cannot do. Yet the possession of *logos*, "articulate reason" or "speech," was to Aristotle the crucial difference between humans and divine beings on the one hand, and all other living creatures on the other.[56] Under no circumstances could he have supposed that his argument would also apply to animals if speech played any part in it. It follows that speech cannot be a key feature of the political situations that he has in mind.

The accepted account is thus surprisingly insecure. We should return to the analogies on which it rests and try to establish an alternative.

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[52] Staveley, *Voting and Elections*, 73-95. Cf. Arist. *Pol*. 1270b28, 1271a10.

[53] Arist. *Pol*. 1268b9-10.

[54] Arist. *Pol*. 1281b20-82a16.

[55] Nothing about the argument prevents this, since Aristotle attributed various moral and intellectual qualities to animals as well as humans. Cf. Arist. *HA* 488b, *NE* 1141a20-30, *Pol*. 1253a10, *Rhet*. 1406b.

[56] Arist. *Pol*. 1253a1-17, 1332b5.

The First Analogy Reexamined

The "feast" analogy appears twice in the *Politics*, denoted first by "*ta symphorēta deipna*," "collectively provided dinners," and second, "*hestiasis symphorētos*," "a collectively provided feast".[57] Given the context, these terms are presumably intended to be synonymous, yet the second formulation is considerably more informative than the first. "*Deipnon*," "dinner" or "meal," was a common term in Greek, but "*hestiasis*" had a narrower meaning. It indicated a significant event, often privately financed, but held for communal political, diplomatic, or religious purposes.[58] In Athens, "*hestiasis*" had a particularly limited referent: it denoted the tribal dinner enjoyed during a major festival.[59] Providing the dinner was a significant public service (*leitourgia*), akin to sponsoring a chorus or team of athletes, and as with the offices of *chorēgos* and *gymnasiarchon*, each *hestiatōr* ("public host") was nominated from a list of 1200 individuals deemed wealthy enough to cover the event, and was supposed to be gratified by the honor of being asked.[60]

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[57] Arist. *Pol*. 1281b2, 1286a30.

[58] Thuc. 6.46.3, Is. 3.80, Pl. *Hipparch*. 231b, Arist. *Pol*. 1321a38, Dem. 19.234, Plut. *Nic*. 3, Plut. *Per*. 11.

[59] P. Schmitt Pantel, *La Cité au Banquet* (Rome: École française de Rome, 1992), 5, 104, 121-31. Cf. Schmitt Pantel, "Greek Meals," 90-5; G. Gilbert, *Constitutional Antiquities of Sparta and Athens* (London: Sonnenschein, 1895), 358-61; W. Smith et al, *Dictionary of Greek and Roman Antiquities* (London: Murray, 1890), 896; N. F. Jones, *Public Organization in Ancient Greece* (Philadelphia, PA: American Philosophical Society, 1987), 49; R. Parker, *Athenian Religion* (Oxford: Clarendon Press, 1988), 103.

[60] M. H. Hansen, *Athenian Democracy in the Age of Demosthenes* (Norman, OK: Oklahoma University Press, 1999), 110-14.

It is immediately obvious that such an event could not have resembled a potluck dinner. There were ten tribes in Athens, each consisting of several thousand citizens.[61] Even if some stayed at home, inviting culinary contributions from attendees would have been a logistical nightmare, and rather than redounding to the honor of the organizer would have made him look contemptibly cheap.[62] Nonetheless, that Aristotle had a feast of this kind in mind is suggested by three points in the text. First is his mention of cost (*dapanē*), which implies that the event posed a significant financial burden and that funding, rather than culinary excellence, was the crucial factor in its provision.[63] Second is his use of the verb "*chorēgeō*" to describe the act of putting the dinner together.[64] This is derived from the noun "*chorēgos*," "chorus-sponsor," and while it cannot prove that he had festival feasts in mind, it does make it seem likely. The third point concerns the adjective "*symphorētos*," "collectively provided". As we have seen, this term is obscure, yet one possible interpretation suggests itself. We know that during the fourth century, the Athenians moved away from funding public services exclusively through single, very wealthy individuals and began to draw on panels of fifteen or more moderately wealthy individuals instead. Aristotle may be referring to a feast supplied in this way: that is, provided not by a single sponsor (nor by each attendee bringing a dish) but jointly funded by a committee.

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[61] Hansen, *Athenian Democracy*, 90-4.

[62] Dem. 4.35-6. Cf. P. Wilson, "Costing the Dionysia," in *Performance, Iconography, Reception*, ed. O. Taplin, M. Revermann and P. Wilson (Oxford: Oxford University Press, 2002), 88-127.

[63] Arist. *Pol*. 1281b3.

[64] Arist. *Pol*. 1281b3.

Circumstantial evidence provides some support for this interpretation. Joint financing panels, or *symmoriai*, first appeared in Athens in 378/7 as a way of systematizing the payment of the war-tax, which fell only on the richest citizens.[65] From 358 a similar system was used to fund warships.[66] We have no direct evidence that festival feasts were ever provided this way, but Demosthenes floated the idea in 355, and a "great revival and reorganization" of festival ceremonies occurred twenty years later, right around the time that Aristotle returned to Athens and began to teach the material that we now know as the *Politics*.[67] Moreover, not only Athenian citizens but also wealthy foreign residents were liable to the performance of festival offices; Aristotle may even have participated himself.[68]

The major obstacle to this reading is the suggestion of Mogens Hansen that festival offices were always performed by single men.[69] However, the evidence for this is not decisive. Hansen's source, a speech of Demosthenes from 350 or 348 which mentions the relevant nomination procedures, does, to be sure, list each office in the singular, which we might not expect if multiple nominations were the norm.[70] But since Greek lacks an indefinite article, we cannot tell whether "the" or "a" *hestiatōr*, *chorēgos* and

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[65] Isoc. 15.145; Hansen, *Athenian Democracy*, 112-13.

[66] Hansen, *Athenian Democracy*, 113-14. Cf. Dem. 13, Dem. 18.102-8, Hyp. fr. 160, Aeschin. 3.222, Din. 1.42.

[67] Dem. 20.23; Parke, *Festivals*, 47.

[68] Hansen, *Athenian Democracy*, 110-11; Dem. 20.18, Lys. 12.20.

[69] Hansen, *Athenian Democracy*, 114; Jones, *Public Organization*, 49.

[70] Dem. 39.3.

gymnasiarchon are under discussion here, and the appearance of the word "*trierarchon*," "warship-sponsor," *also* in the singular a few lines later--despite the fact that this speech was made several years *after* that office was opened to joint funding--suggests that "a" *hestiatōr* must be a plausible reading.[71] In any case, even if festival feasts *were* sponsored singly down to 348, the reform might have occurred at a later date. On this evidence at least, the possibility that *hestiaseis* were jointly funded in the later fourth century cannot be ruled out.

If this interpretation is on the right lines, two points follow. First, contributions to the collectively provided feast will not have been individual dishes, but rather *money* (or conceivably resources in kind, such as livestock or grain), from which the entire feast was then provided. Just as modern gala events are organized by committees that take joint responsibility for raising and disbursing the entire budget (even if particular individuals take responsibility for specific items), so too a *hestiasis symphorētos* was a collective undertaking performed by a joint agent disposing of common resources. This is significantly different from a "potluck dinner," which is a collective undertaking performed by multiple single agents whose individual contributions remain distinct in the final outcome ("Paula's special pasta salad," and so on).

Second, though it is possible that a collectively provided feast might be preferred because of the greater variety of dishes, it is unlikely in this context. Festival feasts were

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[71] Dem. 39.4; cf. Dem. 14.20.

not especially varied: they chiefly comprised meat and bread.[72] Additionally, collective funding for warships was introduced in order to build *more* ships, not to produce a more diverse fleet, and the goal in this case may have been similar.[73] A collectively provided feast could have been "finer" simply because it was *bigger*.[74] More sponsors could mean more money spent overall, even if each gave considerably less than would have been given a single man under the previous system. In turn, this would mean more animals sacrificed and ultimately more meat to eat, the major attraction of such events.[75] It has been estimated that poorer households in Athens consumed 70-75 percent of their calorie intake in the form of grain; in these circumstances, it may have seemed obvious that what would make a meal "finer" was less "variety" than "abundance," and especially the abundance of meat.[76] The analogy itself supports this reading. A more familiar example of a collectively provided good would have been a warship; why should Aristotle have cited a feast instead? The relative novelty of the funding system may have been a factor, but more important may be the lack of correspondence between the money spent on a ship and the amount of ship produced. Extra resources would go to improving the ship in

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[72] Poll. 3.67. Cf. Wilson, "Costing the Dionysia," 96-9, 116; M. Montanari, "Food Systems and Models of Civilization," in *Food*, ed. Flandrin *et al*, 73-4; Parke, *Festivals*, 46-50.

[73] Dem. 18.104, Dem. 21.155; Hyp. fr. 43.

[74] As suggested by the translation of W. Ellis (London: Everyman, 1912).

[75] Wilson, "Costing the Dionysia," 96-8. Cf. Ar. *Ach*. 1048, 1095-113, Ar. *Eccl*. 305-8, 837-53, 1169-75, *Plut*. 543, 1136, Ar. fr. 128b.

[76] Foxhall and Forbes, "*Sitometreia*," 74.

other ways: sheer size was not a relevant issue.[77] If size *was* the relevant issue for Aristotle, however, we can see why the "feast" analogy might have seemed apt.

The Virtue of the Multitude

"Quantity," not "variety," thus lies at the heart of Aristotle's "feast" analogy and motivates his support for the political authority of the multitude. Many relatively small amounts of something--in the "feast" case, money--can add up to a large total amount, surpassing even what could be provided by a single man or a few with a very large stock.[78] What is contributed in the political context is stated in the next line. Every individual has a "portion" (*morion*) of *aretē*, "virtue" or "excellence," and *phronēsis*, "wisdom," "practical reason," or "prudence," or as Aristotle also puts it, "moral characteristics" (*ta ēthē*) and "thought" (*tēn dianoian*). These "portions" are then united when many men come together, just as their feet, hands and senses are united, making them "better" (*beltious*) than one man or a few.[79]

"*Aretē*," in this context, presents little difficulty. It seems clear that it refers to the complex of moral virtues explored in Aristotle's ethical writings, such as courage, justice,

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[77] Thuc. 6.31.

[78] The account given here thus resembles that known as "summation." However, while "summation" normally involves the aggregation of multiple different things, my account involves the aggregation of many small amounts of the same thing. Hence various objections traditionally made to "summation" will not apply. See Newman, *Politics of Aristotle*, 256-7; E. Braun, "Die Summierungstheorie des Aristoteles," *Jahreshefte des Österreichischen Archäologischen Instituts* 44 (1959): 157–84; Mulgan, *Aristotle's Political Theory*, 103-5; D. Keyt, "Distributive Justice in Aristotle's *Ethics* and *Politics*," *Topoi* 38 (1985): 23-45.

[79] Arist. *Pol*. 1281b10.

moderation, liberality, and so on.[80] "*Aretē*" can also signify virtue in a general sense, including both moral and intellectual qualities, but when these aspects are distinguished, as here, it denotes the moral aspect alone.[81] Additionally, the only moral virtues to feature repeatedly in the *Politics* are courage, justice, and moderation, so we may take these to be central here.[82]

"*Phronēsis*" is trickier to explicate. Though certainly an intellectual quality,[83] it differs from *technē* (skill), *epistēmē* (scientific knowledge), *sophia* (wisdom), and *nous* (intelligence) in also being implicated in ethical activity. Both moral *aretē* and *phronēsis* are necessary for right action: moral virtue "ensures the rightness of the end we aim at," *phronēsis* "the rightness of the means we adopt to gain that end."[84] At a deeper level, *phronēsis* is required to develop full moral virtue, while *phronēsis* without moral virtue is mere "cleverness."[85] Accordingly, when fully developed, moral virtue and *phronēsis* are inextricable,[86] but this connection is difficult to convey in English. "Wisdom" is not an ideal translation, because while that term can signify a faculty of the intellect, which *phronēsis* is, it can also signify "that which is known" (as in, e.g., "a book full of wisdom"), which *phronēsis* is not. Particular knowledge does play a role in *phronēsis*, but

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[80] Arist. *NE* 1107b-1108b.

[81] Arist. *Pol*. 1280b5-10; *NE* 1098a17-18, 1179b30; *Rhet*. 1366b. Cf. *NE* 1106b14-17, 1138b15.

[82] Arist. *Pol*. 1259b20-1260a34, 1277b13-23, 1323a27-34, 1334a20-25.

[83] Arist. *NE* 1139b15.

[84] Arist. *NE* 1144a5-10. Cf. *NE* 1144b30-35, 1145a1-2, 1178a15-20.

[85] Arist. *NE* 1144b1-1145a2.

[86] Arist. *NE* 1145a6-7.

the terms are not synonymous.[87] "Practical reason" is thus a better rendering, since it unambiguously suggests a faculty rather than an item or repository of knowledge, yet it too is not ideal, since the relation between *phronēsis* and *logos*, "reason," is incomplete in Aristotle's usage. Aristotle consistently describes human intellectual (and ethical) capacities as "involving reason" (*meta logou*),[88] but he also ascribes *phronēsis* (or at any rate a form of *phronēsis*) to certain animals, and animals do not possess *logos*.[89] Given this, it seems better to avoid strictly intellectual terms altogether when translating this term and opt instead for "prudence" or "good sense," with "sensible" for the related adjective "*phronimos*." [90]

What a multitude contributes to political activity is thus each individual's "portion" of moral virtue and prudence, or every form of *aretē* (in the general sense) except the higher intellectual virtues. Exactly what Aristotle meant by "portion" is uncertain: perhaps a single element of virtue, such as "courage" or "justice," or perhaps a package of all combined.[91] The analogy drawn between virtues and body parts (*moriōn*) in the *Eudemian Ethics* supports the latter:[92] the correct reading of the reference to "one

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[87] In this respect, *phronēsis* differs from *epistēmē*, *technē* and *sophia*, all of which can suggest not only the relevant intellectual faculty but also the thing known. See further Arist. *NE* 1141b15-23, 1142a12-24 (though contrast *EE* 1246b); cf. *NE* 1095a1-5, Thuc. 6.90.1, 6.91.6.

[88] Arist. *NE* 1140a22, 1140b7, 1140b21; *EE* 1220a8.

[89] Arist. *HA* 488b, *NE* 1141a20-30, *Pol*. 1253a10.

[90] As adopted by Rackham. Cf. C. Lord, "Politics and Philosophy in Aristotle's *Politics*," *Hermes* 106 (1978): 340.

[91] Risse, "Virtuous Group," 62-3.

[92] Arist. *EE* 1220a1; cf. *HA* 486a, 588a; Pl. *Prt*. 392e.

man" with "many feet, hands, and senses" would then be that just as each man puts both his feet, both his hands, and each of his senses at the service of the group, so too he contributes his entire stock of justice, courage, moderation and prudence. This question is relatively unimportant for our purposes, however;[93] the main thing is that the result is clear. What Aristotle is talking about is the coming-together of individual *aretē* when groups act collectively.

We may focus initially on one key point. Aristotle is discussing the aggregation *not* of knowledge but of moral and intellectual capacities such as courage, justice, moderation, and good sense. He is concerned not with what any given agent *knows*, but rather what he is *like*: how brave, just, moderate, sensible, and so on. This is a crucial distinction, because on Aristotle's ethical theory, it is these qualities that determine what agents can do and how well they can do it. Plato argued that virtue *was* knowledge, but Aristotle explicitly rejected that view.[94] To Aristotle, *aretē* was action-centered: it was a "power" (*dynamis*) of "providing and preserving good things."[95] Specifically, it had the "twofold effect" of rendering its possessor "good" (or, we might say, a good specimen of its kind) and causing it to "perform its function well."[96] It followed that an agent with more *aretē* could outperform one with less, and this, I suggest, is the foundation of Aristotle's support for the political authority of the multitude.

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[93] Cf. Risse, "Virtuous Group," 63.

[94] Arist. *NE* 1116b, 1144b25-40; *EE* 1216b3-25, 1230a5-10, 1246b30-7.

[95] Arist. *Rhet*. 1366a30-35. Cf. *NE* 1098a15-35, 1100b10-15, 1103b1-30, 1105b10-15, 1106a15-25, 1152a5-10; *EE* 1222a5-10, 1223b10-15; Dem. 13.25, Xen. *Lac*. 10.4, Xen. *Cyn*. 12.18.

[96] Arist. *NE* 1106a14-24. Cf. *NE* 1106a25-30, 1098a and 1103a26-1103b25.

The idea that a group of people acting together can outperform even highly capable individuals is relatively common in ancient Greek political thought. Xenophon's Hiero remarks that "nothing equals an organized body of men (*syntetagmenoi*), whether for protecting the property of friends or thwarting the plans of enemies," and one of Aesop's fables suggests the same.[97] Demosthenes also expressed this view. The fabulously wealthy Meidias had "mercenaries to look after him" and "witnesses to come running...when he asks," which was naturally "alarming to the rest of you as individuals, depending each upon his own resources." The solution was then to "band yourselves together" (*syllegesth' hymeis*):

> so that when you find yourselves individually inferior (*elattōn*) to others, whether in wealth or in friends or in any other respect, you may together prove stronger (*kreittous*) than any one of your enemies and so check his insolence.[98]

The obvious arena in which bands of individually inferior men can outperform their superiors is war, and this forms the crucial backdrop to Aristotle's argument. In archaic Greek, "*aretē*" meant above all military prowess, and Aristotle also used it in this sense, as in the suggestion that conquerors possess more "*aretē*" by definition and hence have a just claim to rule.[99] Yet war not only illustrated the link between greater numbers and greater power, it also indicated the greater efficacy achieved when a mass of men acts together. Though the figure of "one man" with "many feet, hands and senses" has been deemed "monstrous" by some, Aristotle may well have been thinking of a body of

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[97] Xen. *Hier.* 10.7; Aesop, "Farmer's Quarreling Sons". Cf. Thuc. 6.18.6, Xen. *Hell.* 2.4.39-41.

[98] Dem. 21.139-40.

[99] Arist. *Pol.* 1255a22.

hoplites, whose strength lay precisely in their capacity to fight as one.[100] Significantly, hoplites also formed the citizen body in a *politeia*, which Aristotle defended on the specific grounds that military virtue, unlike other forms of virtue, could exist in large numbers.[101] Indeed, he even posited an etymological connection between "*politeia*" and "*polemos*" ("war") on this basis.[102]

Even if a mass of men can defeat their superiors in war, however, what does this have to do with voting in elections, audits, and court cases, where more than brute force is required? First, even military virtue, on Aristotle's view, involved more than brute force. It included many elements of *aretē*,[103] particularly justice and courage.[104] More broadly, Aristotle characterized *all* practical virtues--that is, every moral virtue, plus prudence--as useful in both politics and war.[105] Indeed, these virtues sufficed for the "complete fulfillment of man's proper function," that is, the realization of a flourishing life in a *polis*.[106] It is also possible that the moral virtues played a larger part in Aristotle's conception of *mass* political activity. Not only were courage and justice, as key elements in military virtue, particularly associated with large numbers, but Aristotle's confidence in

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[100] Other positive connotations are supplied by Arist. *Pol*. 1287b25-32. See also Wilson, "Deliberation, Democracy and the Rule of Reason," 264-5.

[101] Arist. *Pol*. 1279a39-42; cf. 1265b25-30, 1267a19-22, 1288a6, 1297b15-25, 1326a16. Cf. C. Johnson, "Aristotle's Polity," *History of Political Thought* 9 (1988): 189-204.

[102] Arist. *Pol*. 1279a39.

[103] Arist. *Pol*. 1270a7, 1271b1-7; cf. *Pol*. 1267a19-22, 1325a5-10.

[104] Arist. *Rhet*. 1366b.

[105] Arist. *NE* 1177b5-1178a10; cf. *NE* 1144a5-10.

[106] Arist. *NE* 1144a5-10.

the intellectual capacities of the multitude was typically low.[107] Yet this did not necessarily make men of the multitude bad or useless citizens. Indeed, Aristotle observed that "some people seem to form opinions better, and yet choose the wrong things from wickedness."[108]

The same capacities that made a multitude useful in war could thus be expected to make it useful in politics. But a hard question follows. Even granting that more *aretē* might lead to greater success in these contexts, why should the "portions" of courage or justice or any other virtue of a mass of men be cumulative across a group? Why should a mass prove to be *better* than a single good man, when every individual fell short? Why should the group not prove as mediocre as its median member--or more vicious than any one of them?

This question has long puzzled readers who have seen the role of moral *aretē* in Aristotle's account. Newman, in 1887, spotted that Aristotle's principle would "justify the inference that the larger the gathering is, the greater its capacity will be," and responded: "Aristotle forgets that bad qualities will be thrown into the common stock no less than good...he forgets also the special liability of great gatherings of men to be mastered by feeling."[109] Susemihl and Hicks likewise supposed that crowd emotion would inhibit rather than support virtue.[110] Yet Aristotle *does* seem to have thought that *aretē* and crowd

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[107] Arist. *EE* 1214b28-1215a2, 1226b20-30; *Rhet*. 1354b, 1355a, 1357a. This view is common in our ancient texts: see e.g. Ps. Arist. *Ath. Pol*. 28.3; Thuc. 2.40.2; 6.39; Dem. 19.5.

[108] Arist. *NE* 1112a8-11. Cf. *Pol*. 1309a33-b3.

[109] Newman, *Politics of Aristotle*, 256-7.

[110] Susemihl and Hicks, *Politics of Aristotle*, 397. Cf. Mulgan, *Aristotle's Political Theory*, 104-5.

size were simply correlated. He likens *aretē* as to wealth, strength and weight, all of which increase arithmetically across groups.[111] He states that a mass can be "stronger," "richer" and "better" than a few, apparently all for the same reason;[112] his conviction that *aretē* is purely beneficial may also have persuaded him that it was summative.[113] He also explicitly believed that crowds are *less* likely to be swayed by emotion or other corrupting influences than smaller groups. At the second appearance of the "feast" analogy, he states that crowds make the best judges, both for the "feast-related" reason and because they are more stable: "it is difficult to make a mass of men get angry and go wrong at the same time."[114] To be sure, this view directly contradicts modern notions of "mob justice," but Aristotle's presentation suggests that it was widely accepted among the Greeks.[115]

There is certainly a puzzle here, but a final twist in Aristotle's argument may help to resolve it. Apparently, *aretē* can not only be *aggregated* in group contexts; it can also be *amplified*. Acting alone, Aristotle says, most men's injustice and folly will lead them to behave badly and make mistakes:[116] each is "immature in judgment."[117] But by "mingling with their betters" (*mignumenoi tois beltoisi*), the *same* men will become useful to the

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[111] Arist. *Pol*. 1282a34-43, 1283b32-35, 12844a20-25.

[112] Arist. *Pol*. 1283a40-b1; cf. 1283b34.

[113] Arist. *Rhet*. 1355b. *Contra* Risse, "Virtuous Group," 55-6.

[114] Arist. *Pol*. 1286a31-36.

[115] Ps. Arist. *Ath*. *Pol*. 41.3; Ps. Xen. *Ath*. *Pol*. 3.7; Thuc. 6.39.

[116] Arist. *Pol*. 1281b27-30.

[117] Arist. *Pol*. 1281b38.

polis.[118] This suggests that acting collectively can enable both the aggregation of *aretē* within groups and its amplification within individuals. If so, mass political activity could be expected to produce something *more* than the sum of its parts--just as Waldron himself suggested.[119] In attributing this result to the dialectical quality of debate in the assembly, Waldron merely misdiagnosed the mechanism through which this phenomenon occurs.

One part of the puzzle is thus solved. If acting with others can be expected to increase the *aretē* of each individual, then the sum total of *aretē* across the group will obviously increase when it acts together. Moreover, if this action includes *voting*, as in elections, audits, and court cases, we can even see how the aggregation of *aretē* would occur: the votes are simply added together.

Yet the underlying mystery remains. *Why* should we become more courageous, just, moderate, or sensible when we act with others? Here we must return to the wider intellectual context. The idea that acting with or alongside others can strengthen individual virtue was another relatively common feature of ancient Greek political thought. The effect could be gained in multiple ways: through moral support,[120] emulation,[121] rivalry or competition,[122] the desire to impress an audience,[123] or the fear of

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[118] Arist. *Pol*. 1281b35-38; cf. 1282a16-18.

[119] Waldron, "Wisdom of the Multitude," 569-71.

[120] Thuc. 3.45.6; 7.70.3.

[121] Dem. 20.5.

[122] Thuc. 6.31.4; Xen. *Eq. Mag*. 1.26, 9.3; Xen. *Lac*. 4.2-5.

[123] Xen. *Cyn*. 12.15; Xen. *Hier*. 2.15; Hesychius e.6418.

shame.[124] Each mechanism pointed in the same direction: the presence of others will cause individuals to amplify socially valued characteristics and repress those that are disapproved, leading groups to act better and do more than single men.

Aristotle was an innovator in several respects, but not this one.[125] He saw the value of rivalry and competition: "if all men vied with each other in moral nobility (*pros ton kalon*) and strove to perform the noblest deeds, the common welfare would be fully realized." [126] He recognized the importance of shame, especially for stimulating "civic courage," [127] and that the eyes of others are its "abode." [128] Most significantly, he believed that it was easier to practice *aretē* in groups than alone. This emerges most clearly in his discussion of friendship.[129] The life of virtuous activity ought to be supremely pleasant, "yet a solitary man has a hard life, for it is not easy to keep up continuous activity by oneself; it is easier to do so with the aid of and in relation to other people" (*meth' heterōn kai pros allous*). The life-work of the "good man" (*ho spoudaios*) will thus be more "continuous" if "practiced with friends"; moreover, his society will supply "a sort of training in goodness" for others.[130] This recalls the claim that men become useful by

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[124] Eur. *Heracl*. 236; Eur. *Supp*. 910-15. See further S. Forsdyke, "Street Theatre and Popular Justice in Ancient Greece: Shaming, Stoning and Starving Offenders Inside and Outside the Courts," *Past and Present* 201 (2008): 3-50.

[125] *Contra* Susemihl and Hicks, *Politics of Aristotle*, 397; Roberts, *Aristotle and the Politics*, 88.

[126] Arist. *NE* 1169a5-10. Cf. *Rhet*. 1388a.

[127] Arist. *NE* 1116a15, 1116b20-25, 1179b2-20.

[128] Arist. *Rhet*. 1384a; 1385a.

[129] Further support is available at Arist. *NE* 1177a28-35; 1144a5-10; 1177b5-1178a10.

[130] Arist. *NE* 1170a5-13.

"mingling with their betters": evidently, good models are important, and this is confirmed elsewhere. Friendship between "inferior people" is evil, for they take part in inferior pursuits, but friendship between the good is good, for they "become better by practising friendship and correcting each other's faults, as each takes the impress from the other of those traits in him that give him pleasure." [131]This suggests that the benefits of collective political activity will emerge only if the parties involved have already achieved a certain level of *aretē*--which is precisely the point Aristotle makes about the non-applicability of this argument to animals.[132] Notably, however, this condition is met in a *politeia*, where all citizens possess at least military virtue. In that context, acting "with the aid of others" could certainly be expected to increase *aretē* across the board.

This interpretation may not be self-evident. Yet neither is it particularly far-fetched. Indeed, especially in relation to the positive effects of moral support and the desire to avoid shame, it is arguable that something like Aristotle's reasoning is accepted even today. Courage presents the most obvious example. Individuals are commonly braver in groups than alone: this is frequently observed in wars and revolutions, and the same dynamic can be imagined in the political situations that Aristotle has in mind. Recall that elections in ancient Greece were decided publicly, by show of hands: individuals might well have felt bolder in their choice-making if they could see that others shared their view. Or take the case of a general accused of treason: one-on-one, an ordinary citizen might have felt too awed to demand punishment, though he could do so

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[131] Arist. *NE* 1172a1-15, trans. Rackham, modified.

[132] Arist. *Pol*. 1281b20-82a16.

as one of a crowd.[133] Justice may seem harder to interpret on these lines, given the modern skepticism of "mob justice" (which, as we have seen, however, Aristotle did not share). Yet we should remember that justice, for the ancient Greeks, was intrinsically other-regarding, and that judicial activity concerns what is due the *polis* as a whole; the presence of other members of the community might well have helped individual judges to keep that end in view.[134] Moderation, also, can be boosted by moral support, as anyone who has dieted knows, and its use in the role of wealth could plausibly be enhanced if the eyes of others encouraged self-restraint.[135] Finally, it is significant that Aristotle specifically defines *phronēsis* in the political sphere as the capacity to discern the common interest (*to koinē sympheron*).[136] It is surely easier to focus on what is common, rather than one's private interests, when acting as one of a crowd. Moreover, there may even be an internal connection between *phronēsis* and crowd size: at least, a larger decision-making group will by definition give a better indication of what the whole community takes the common interest to be.

The theme here is thus not the positive effects of diverse knowledge on decision making but rather the benefits of collective activity on individual and group *aretē*. Collective action by sufficiently virtuous individuals can boost each man's stock of courage, justice, moderation, and prudence, thus increasing the effectiveness of the entire

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[133] Cf. Pl. *Lg*. 659a.

[134] Arist. *NE* 1129b25-35, *Pol*. 1253a37-40.

[135] Arist. *Pol*. 1265a35. I owe this point to Eugene Garver.

[136] Arist. *NE* 1140b10-15, 1141a25-30. Cf. *Rhet*. 1358b-59a, *Pol*. 1282b17.

group. As Aristotle notes, this argument will not support men of the multitude acting as generals or treasury officials: those tasks must be performed by single men.[137] But they can certainly participate in any tasks open to collective authorship, such as electing men to office and judging them in court.[138] The only condition is that the *aretē* of the group reaches the necessary standard. A group of animals will never reach it (and, Aristotle asserts, some men are not so dissimilar from animals). Also, if the *polis* includes some man or men of exceptional virtue, the multitude will fall short in comparison (which is why Aristotle turns next to the discussion of ostracism and kingship). But if and when the *aretē* of a multitude exceeds that of other subsets within the polis, Aristotle accepts that it will have a claim to political authority.

It may be asked how the "amplificatory effect" discussed here fits with the interpretation of the "feast" analogy given above. Surely the same dynamic cannot be seen in that case? Actually, it is not implausible that competition for honor might lead each sponsor to contribute more than he had originally anticipated. If so, the superiority of the collectively provided feast would result not only from the fact that the aggregated funds of a group can exceed those supplied by a single man. It would also reflect the increased size of each contribution when men act together.

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[137] Arist. *Pol*. 1281b33.

[138] Arist. *Pol*. 1281b32-38.

The Second Analogy Reexamined

We may now ask how this account fits with the second analogy, that concerning aesthetic judgment. Aristotle says that just as a multitude, when it comes together, becomes "one man with many feet and many hands and many senses," so too it unites its ethical qualities (*ta ēthē*) and thought (*dianoia*), and adds that "this is also why many people judge better of both musical productions and the works of the poets: for some a certain part (*morion*), others another, and everyone the whole."[139]

The idea that a multitude can judge artistic productions better than a small number of men--for instance, the ten men appointed to judge dramatic competitions at the Dionysia--is certainly historically plausible.[140] Aristotle may have been thinking of Euripides, who won few prizes in his own day but was always a great favorite with audiences (especially the poor), and by Aristotle's time was accepted as one of the great tragic poets alongside Aischylos and Sophokles.[141] Or he may have had Aristophanes in mind, whose *Clouds* was placed third by the judges, despite the audience having "noisily demanded that it be put first on the list."[142] How may these cases relate to the account given so far?

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[139] Arist. *Pol*. 1281b8-10.

[140] Cf. C. W. Marshall and S. van Willigenberg, "Judging Athenian Dramatic Competitions," *Journal of Hellenic Studies* 124 (2004), 90-107.

[141] Arist. *Poet*. 52b5, 53b25-30, 58a20-22; *Rhet*. 1404b. Cf. Ar. *Nub*. 1366-72, *Pax* 532-4, *Ran*. 771-8, 948-61.

[142] Aelian *Var*. H. ii. 13, quoted by A. W. Pickard-Cambridge, *The Dramatic Festivals of Athens* (2nd ed., Oxford: Oxford University Press, 1968), 97.

The crux of the matter is how to supply the missing verb in the clause "some a certain part, some another, and everyone the whole." As we saw above, a common solution is "understand," although "appreciate" is also seen; a third possibility is "judge."[143] Of these, "judge" is preferable on syntactical grounds, since this verb appears in the previous clause, and Greek verbs are more commonly ellipsed than repeated.[144] However, another approach is also possible. Arguably the most striking feature of the second analogy is the term "*morion*," "portion" or "part". This term was used in the previous line to describe the "portion" of moral virtue and prudence supplied by each member of the multitude when the group acts together, but in the second analogy it has always been understood to have a different referent: the "parts" or "aspects" of the music or play judged by the multitude. That referent is implied whether the verb supplied is "understood," "appreciate," or "judge": in each case, what is divided into parts is the object of the multitude's attention. The act of judgment is thus conceived in terms of a division of labor: each member of the group understands (or appreciates, or judges) a different part of the work, and as such the whole group understands (or appreciates, or judges) the whole.

An alternative interpretation is that the term "*morion*" may refer to the same thing in both cases. In both, Aristotle may be referring to the "portion" of *aretē* supplied by each member of the group when it acts together. On this reading, a possible rendering of the missing verb would be "supply" or "provide" (taking a cue from "*pherō*," the root of

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[143] As adopted by Rackham.

[144] H. W. Smyth, *Greek Grammar* (Cambridge, MA: Harvard University Press, 1956), 261-2.

the term "*symphorētos*" seen in the "feast" analogy): *viz*. "some supply a certain part [of the *aretē* supplied overall], others another, and everyone the whole". On this view, what is divided into portions is not the object of the multitude's attention, i.e. the work of music or poetry, or (in the political context) the candidate in an election, office-holder in an audit, or litigant in court. That object is always regarded as a whole. Rather, what is in "parts" are the multitude's shares of ethical virtue and prudence, all of which are mobilized in the act of collective judgment.

As far as I know, there is no linguistic or syntactical obstacle to reading the text this way. It could only be ruled out if we knew for certain what the "portion" mentioned in the second analogy is a portion *of*, and we lack that information. Yet this interpretation is not only more parsimonious than the usual approach, it also works better in context. Aristotle's next point is that what distinguishes a good single man from a mass of people is that the good man comprises in *himself* all the parts of *aretē* that, in the mass, are found scattered about. This is often regarded as a new thought, or even an objection to the previous one, but on the view given here it is a continuation of the same reasoning about the "parts" and the "whole" of virtue that governs the rest of the passage. Aristotle's discussion of music in Book 8 of the *Politics* also supports this reading: the argument of that section concerns the importance of moral virtue for judging music correctly,[145] and while a strictly epistemic account of audience response to artistic performance will struggle to draw these two parts of the *Politics* together, on the present interpretation they

[145] Arist. *Pol*. 1339a20-25, 1340a1-b20, 1341a10-b15.

are fully compatible.[146] Even Aristotle's comment on animals makes sense in this light, since he observes that some animals enjoy music.[147]

Most significantly, this interpretation suits the political situations that Aristotle mentions. For one thing, it is not obvious that either voters in elections or judges in court judge purely on the basis of "knowledge" (or even conscious thought), and the ancient Greeks certainly did not think that they did. Judging by "character," which drew on the judge's own ethical virtue and prudence, was entirely acceptable, even expected.[148] For another, it is not clear that a "division of labor" model adequately captures how multitudes judge either political actors or works of art. Certainly, different individuals will weigh different aspects of the judged object differently, but it does not follow that each responds only to a single aspect: more plausibly, each responds to the object as a whole, though in different ways.[149] Certainly, this was assumed in Greek dramatic competitions, where was no tradition of scoring acting, dancing, writing, costumes and so on separately. Rather, productions were judged against each other as wholes.[150]

This reading confirms the interpretation of the "feast" analogy advanced above. If Aristotle was indeed thinking in terms of collective agency, it would logically have been

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[146] Arist. *Pol*. 1340a14-22.

[147] Arist. *Pol*. 1341a14.

[148] Aeschin. 1.117, 1.179; A. Lanni, *Law and Justice in the Courts of Classical Athens* (Cambridge, UK: Cambridge University Press, 2006), 41-73.

[149] The conventional account implies that if everyone in the audience could understand every aspect of the object before them, they would judge identically as to its merits, but there is no reason to think that Aristotle accepted that (Platonic) view.

[150] Marshall and van Willigenberg, "Judging Athenian Dramatic Competitions," 90-107.

impossible for him to draw a strict one-to-one correspondence between each man's contribution to a collective act and a specific "portion" of the task at hand. On the interpretation of the argument offered there, something is *added* when groups act collectively that cannot be traced back to any single individual, but is rather an emergent property of the mass. This is a very different conception of popular political activity from that implied in the usual account of this argument. On that view, the collectively produced outcome can be traced back to individual contributions in a straightforward way: one spectator understands one part of a performance, another another; hence together they understand the whole. Nothing is incorporated into the final outcome that is not already possessed by each contributor, conceived separately. But when Aristotle states the argument, he does not suggest that what happens when a multitude comes together is that each person is individually responsible for a discrete part of the collectively produced outcome. Rather, he says that everyone contributes his "portion" of ethical virtue and prudence to the collective agent, the "one man" with many hands, feet, and senses, by whom the outcome is ultimately produced, and this is a very different idea.[151]

The easiest way to illustrate this difference is to revert to the contrast between a potluck dinner and a collectively provided feast. In the potluck, each part of the dinner--each dish--can be traced back to the individual who originally contributed it: the meal is the sum of numerous distinct acts. In the collectively provided feast, however, the whole feast is the result of a single collective act, enabled by numerous contributions to a single

[151] As Susemihl and Hicks note, this is strikingly similar to Hobbes' "artificial man," the "Leviathan." *Politics of Aristotle*, 398.

fund. It would be impossible to assign any "part" of this feast to an individual sponsor: rather, the whole panel is collectively responsible for the whole. Arguably, Aristotle has a similar conception of political activity. At a fundamental level, he does not imagine that the activity of the *polis* can be broken down into several distinct parts, attributable to each single citizen within the community. Rather, the whole *polis* is ultimately implicated in the flourishing of the whole, because the *aretē* of each part is involved in the successful self-development of the rest.[152]

Conclusion

On the usual account of the argument explored here, Aristotle thought that a multitude can make better decisions by pooling its knowledge than individuals or small groups can make alone. Mass political activity thus resembled a potluck dinner or an audience judging a play: a greater variety of contributions could produce a better result. I have suggested that Aristotle's support for the political authority of some multitudes rested not on their access to diverse knowledge but rather on his belief that the ethical qualities and good sense of single men can be aggregated and even amplified when they act together. A multitude thus has a claim to rule whenever its *aretē* exceeds that of other groups within the *polis*, so long as its acts can be jointly authored.

This account detaches Aristotle from those who would wish to cite him in support of democracy on epistemic grounds. However, it need not diminish his significance for democrats today. I will close by suggesting where this significance lies.

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[152] Cf. Arist. *Pol*. 1276b10-35.

Let us return to Waldron's suggestion that Aristotle's argument "stands as a kind of model or paradigm of our nature as *speaking beings*." As we have seen, this must be false, since speech does not feature in Aristotle's examples of political activity, nor does it fit his contention that his argument would also apply to animals. Yet there is deeper misconception at work in Waldron's interpretation, which takes us to the very heart of Aristotle's political thought. The problem lies in the supposition that Aristotle regarded *logos*, "articulate reason" or "speech," as the defining mark of man's nature as a "political animal".[153] He certainly believed that *logos* made man more "political" than any other animal, but it cannot define political animals as such, because while other animals--bees, ants, and cranes, for example--are also "political" on Aristotle's account, man alone possesses *logos*.[154] What defined a political animal was in fact not the capacity to speak, but being engaged in "some one common activity" (*hen ti kai koinon...to ergon*).[155] In other words, *acting collectively*, not reasoning, was to Aristotle the fundamental political activity.

I suggest that this perspective may prove salutary for contemporary political theory. The current enthusiasm for epistemic defenses of democratic authority faces a potential problem: what if the decisions of the multitude turn out *not* to be "better," on epistemic grounds, after all? What if mistakes are made that could have been avoided under "expert" guidance? Does that mean that ordinary people should be excluded from

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[153] Waldron, "Wisdom of the Multitude," 576-7; Bickford, *Dissonance of Democracy*, 26-7.

[154] Arist. *Pol*. 1253a2-18, 1332b5; *HA* 488a10.

[155] Arist. *HA* 488a8; cf. *Pol*. 1276b28.

political authority? To Plato, the obvious answer to this question was yes, but democrats will find that less appealing. There are ways of getting around this problem in its own terms,[156] but on Aristotle's view, this is simply the wrong way to think about political activity. The great interest of Aristotle's account is that he does *not* base political authority on the contingent possession of potentially useful information but rather on a range of ethical and intellectual capacities that, given the right training and external conditions, can be widely shared.[157] To be sure, the benefits of collective political action will emerge only if most members of a community actually value such qualities as courage, justice, moderation, and good sense; if cowardice, viciousness, intemperance, and folly are widely tolerated, this cannot happen. However, this merely underscores the significance of a point made immediately before the appearance of this argument in the *Politics*, which is that true *poleis* are distinguished from mere "alliances" precisely by their attention to *aretē*.[158] It does not follow that those who participate in political authority on this basis must be a small group; to the contrary, Aristotle's conception of what is politically valuable might well prove more hospitable to democratic aspirations today than the currently admired epistemic approach.

The question remains what this might mean in practice, and here we should reconsider the historical context that Aristotle had in mind. As observed earlier, there is

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[156] One way is to define "knowledge" so broadly that it includes a great variety of human facilities. See Ober, *Democracy and Knowledge*, where knowledge is variously identified with "capabilities" (92), "common sense" (95), and "human capital" (105).

[157] Arist. *NE* 1099a30-b20, 1180a30; *Pol*. 1278a, 1289a34, though cf. 1316a10-11.

[158] Arist. *Pol*. 1281a4-9. Cf. 1252b30, 1278b20-31, 1280a30-81a10; *NE* 1098a16-17, 1102a5, 1103b, 1177a12, 1180b22.

no reason to think that his argument applied particularly to classical Athens. He does, however, link it clearly to Athens in an earlier era, that of Solon in the early sixth century. Solon is cited approvingly as the lawgiver who gave the Athenian *plēthos* the right to take part in elections and audits, while his judicial reforms, which gave ordinary Athenians control over the administration of justice, are discussed elsewhere in a positive light.[159] This ought to be very striking to modern democrats. Aristotle evidently believed that his argument supported the kind of mass political participation introduced by Solon. This system was certainly less democratic than classical Athens: for example, there was no general right to speak in the assembly. Yet it was still considerably more democratic than any modern democracy, judged by the extent of the powers enjoyed by ordinary citizens. Then as now, citizens had the power to elect their leaders, but the Greek practice of routinely holding those leaders to account has no equivalent today, and the fact that supreme judicial power was wielded by large bodies of ordinary citizens without any legal training is also unparalleled. Most people today would probably agree that hearing court cases, pronouncing final verdicts, and setting appropriate penalties requires special knowledge and expertise, and thus cannot be done satisfactorily by a mass of ordinary citizens. This confident sense of the limits of mass political activity was shared by Plato, and is readily justified by an epistemic account of political competence. It was not shared by Aristotle, however, and the failure of some of his recent readers to see this may reveal not only a deficiency in the contemporary interpretation of Aristotle but in the contemporary conception of democracy as well.

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[159] Arist. *Pol*. 1281b30-35; 1273b30-1274a20.

CHAPTER TWO

Deliberation in Classical Athens: Not Talking But Thinking

Deliberative democracy has been a subject of intense interest among political theorists in recent decades.[1] "Deliberation," in this context, implies the group discussion of a public matter, undertaken with a view to making a decision or recommendation on that matter, in which it is hoped that the give-and-take of argument among numerous individuals with different points of view will lead to a better understanding of the issues involved and thus to a better (i.e., more reasonable) outcome.[2] At the heart of this conception is an ideal of dialogue as a process of free and equal exchange that allows for the articulation of a variety of viewpoints and responses to those viewpoints. It is admitted that such dialogue may be difficult to achieve outside small groups, and that even under ideal conditions, many participants may not actually speak. Nonetheless, the ideal remains attractive, and has become the object of not only theoretical interest but also practical experimentation.[3]

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[1] See e.g. D. Held, *Models of Democracy* (3rd ed., Palo Alto, CA: Stanford University Press), 231-55, for brief overview and bibliographical information.

[2] See e.g. J. Habermas, *The Structural Transformation of the Public Sphere* (Cambridge, MA: MIT Press, 1989); A. Gutmann and D. Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996); B. Manin, "On Legitimacy and Political Deliberation," *Political Theory* 15 (1987): 338-68; S. Benhabib ed., *Democracy and Difference* (Princeton, NJ: Princeton University Press, 1996).

[3] R. Goodin, "Democratic Deliberation Within," *Philosophy and Public Affairs* 29 (2000): 81-109; S. Chambers, "Rhetoric and the Public Sphere: Has Deliberative Democracy Abandoned Mass Democracy?" *Political Theory* 37 (2009): 323-50; J. Fishkin, *The Voice of the People: Public Opinion and Democracy* (New Haven, CT: Yale University Press, 1995); D. Thompson, "Deliberative Democratic Theory and Empirical Political Science," *Annual Review of Political Science* 11 (2008): 497-520.

Alongside this understanding of "deliberation" as group discussion, it has not been forgotten that the term carries another meaning: the private weighing up of factors for and against choosing a particular course of action that goes on inside the mind of an individual. This is the sense in which the term appears in Hobbes[4] and Rousseau,[5] though by the late nineteenth century the dialogical sense had become more prominent.[6] These two senses of "deliberation" have been distinguished by Robert Goodin as "internal-reflective" and "external-collective" respectively. Goodin accepts that the internal-reflective variety can be useful; nonetheless, he does not doubt that, from a democratic perspective, it is inferior to its external-collective cousin. "Invariably modeled upon, and thus parasitic upon, our interpersonal experiences of discussion and debate," internal-

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[4] T. Hobbes, *On the Citizen*, ed. R. Tuck and M. Silverthorne (Cambridge, UK: Cambridge University Press), 152: "deliberation is simply weighing up the advantages and disadvantages of the action we are addressing (as on a pair of scales), where the weightier consideration necessarily goes into effect by its own natural inclination." Cf. *Leviathan*, ed. R. Tuck (Cambridge, UK: Cambridge University Press), 44: "the whole sum of desires, aversions, hopes and fears, continued till the thing be either done, or thought impossible, is that we call deliberation."

[5] J.-J. Rousseau, *Du Contrat social*, ed. R. Derathé (Paris: Gallimard, 1964), 193: "Si, quand le peuple suffisamment informé délibére, les Citoyens n'avoient aucune communication entre eux, du grand nombre de petites différences résulteroit toujours la volonté générale, et la délibération seroit toujours bonne." Ed. and trans. V. Gourevitch, *The Social Contract and Other Later Political Writings* (Cambridge, UK: Cambridge University Press, 1997), 60: "If, when an adequately informed people deliberates, the Citizens had no communication among themselves, the general will would always result from the large number of small differences, and the deliberation would always be good." I am skeptical of Manin's suggestion ("On Legitimacy and Political Deliberation," 345) that "deliberation" in this passage is strictly synonymous with "decision." That might be a reasonable interpretation of the noun used in the final clause if it appeared by itself, but the verb "deliberates" earlier in the sentence must denote a continuous action (i.e. that during which no communication takes place), which seems incompatible with the interpretation "decides." However, the account given in this chapter suggests that Manin was certainly right to stress the lack of communication among citizens.

[6] See e.g. J. S. Mill, "On Representative Government," in *On Liberty and Other Essays* ed. J. Gray (Oxford: Oxford World's Classics, 1991), 272: the function of a deliberating body is to "secure hearing and consideration to many conflicting opinions." Here, Mill was no doubt influenced by the activity of the British Parliament, the very name of which, of course, derives from the French "*parler*," to speak.

reflective deliberation cannot "substitute for," but only "supplement," the "exchange of reasons" that is the hallmark of external-collective deliberation.[7]

Classical Athenian democracy plays a small but significant supporting role in this context. Despite being difficult to achieve in large groups, external-collective deliberation is nonetheless believed to have happened regularly in Athens in the fifth and fourth centuries BC. What the Athenians called "*isēgoria*," the equal right of speech, and "*parrhēsia*," "frank speech," are widely regarded as principal elements of Athenian democracy, even synonymous with it.[8] One institution is deemed particularly significant in this respect: the assembly (*dēmos* or *ekklēsia*), which was open to all adult male citizens to attend, speak, and vote.[9] There were around thirty thousand adult male citizens in Athens during most of the classical period, of whom around six thousand were normally present at any given meeting.[10] Debates could be long and energetic,[11] and the

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[7] Goodin, "Democratic Deliberation Within," 81, 84; see also Chambers, "Rhetoric and the Public Sphere," 232.

[8] See e.g. R. K. Balot, *Greek Political Thought* (London: Blackwell, 2006), 62; Held, *Models of Democracy*, 15; A. Saxonhouse, *Free Speech and Democracy in Ancient Athens* (Cambridge, UK: Cambridge University Press, 2006), 7. See also many of the papers in *Free Speech in Classical Antiquity* ed. I. Sluiter and R. M. Rosen (Leiden and Boston: Brill, 2004). Some scholars have gone even further, identifying not only Athenian democracy but politics as such with "the art of reaching decisions by public discussion" after the Athenian fashion: see M. I. Finley, *Democracy Ancient and Modern* (Brunswick, NJ: Rutgers University Press), 19; P. Woodruff, *First Democracy* (Oxford: Oxford University Press, 2005), 1.

[9] M. H. Hansen, *Athenian Democracy in the Age of Demosthenes* (Norman, OK: University of Oklahoma Press, 1999), 125-60.

[10] Hansen, *Athenian Democracy*, 90-4.

[11] E.g. the Mytilenaian debates described by Thucycides (3.36-50), and that on the ten generals after the battle of Arginusae described by Xenophon (*Hell*. 1.7).

Athenians' passion for speech-making was noted by contemporaries.[12] Today, external-collective deliberation is regarded as emblematic of Athenian democracy. In the words of one theorist, "We can picture this regime most clearly when at its most public and dramatic, in the great set-piece debates in the Assembly at which it took its most momentous decisions." [13]

Accordingly, Athenian democracy is often treated as an example of deliberative democracy, frequently with a tinge of regret that Athenian deliberative practices would seem impossible, for reasons of scale, to imitate in modern conditions. A representative example appears in Gutmann and Thompson's *Democracy and Disagreement* (1996). Noting that "genuine public conversation" is difficult to sustain in large groups, they write:

> Aristotle believed that ordinary citizens deciding together could reach a better decision than experts acting alone, but he had in mind a relatively small assembly. He did not imagine a town meeting on a scale that would be necessary to govern a major American city by direct democracy, let alone a state or national government.[14]

We may temporarily leave aside the question of whether a meeting of six thousand people is well described as "relatively small".[15] It is more important to notice the role played by classical Athens in this passage: as a paradigm the necessary conditions for which have

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[12] See e.g. Thuc. 2.40.2. In this the Athenians were regarded as presenting a striking contrast with the Lakedaimonians, who were known for their brevity; for an example, see Xen. *Hell*. 1.1.23.

[13] J. Dunn, *Democracy: A History* (New York: Atlantic Monthly Press, 2005), 38.

[14] Gutmann and Thompson, *Democracy and Disagreement*, 131.

[15] We may also leave aside the question of whether the argument of Aristotle to which Gutmann and Thompson refer had anything to do with deliberation in the Athenian assembly. For an argument that it did not, see Ch. 1.

been lost, but which remains attractive as an ideal. Writing on Athenian democracy is often colored by a touch of nostalgia (once nicely characterized as "*polis* envy"); in the words of Cynthia Farrar, "we admire what we think the Athenians had, we want it, we fear it, we suspect it is unattainable, we are determined to do without it."[16] Many modern democrats envy the capacity of the Athenians to subject their affairs to wide public discussion, and would ideally wish to imitate it; sensibly, however, they recognize that modern society is excessively large and complex, and trim their hopes to experiments involving deliberative "mini-publics" on a smaller scale.[17]

Yet, happily for those who might wish to mine Athenian democratic practices for aids to democracy today, this understanding of Athenian deliberation is almost certainly mistaken. "Deliberation" in classical Athens was not feasible because the assembly was sufficiently small to facilitate mass discussion; assemblygoers did not engage in mass discussion at all. Careful examination of the Greek terms associated with the English term "deliberate" and its derivatives shows that while English translations of debates in the Athenian assembly imply that a single act is taking place, performed by a single agent--that is, the act of external-collective deliberation, performed by the assembly as a whole--our Greek texts distinguish between two forms of activity, performed by two distinct agents. One activity is speaking: typically, arguing for or against a proposed course of action. This is usually denoted by the verb "*symbouleuō*," meaning "advise" or

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[16] C. Farrar, "Power to the People," in K. Raaflaub, J. Ober and R. Wallace eds., *Origins of Democracy in Ancient Greece* (Berkeley, CA: University of California Press, 2007), 170. Cf. M. Ignatieff, *The Needs of Strangers* (London: Picador, 2001), 107.

[17] Chambers, "Rhetoric and the Public Sphere".

"counsel"; occasionally, the verb "*bouleuō*" is also used in this context, but this was more common in the Homeric era. Another useful verb was "*dēmēgoreō*," from "*dēmos*," "people" or "assembly," and "*agoreuō*," "speak publicly": hence "address the people" or, more pejoratively, "harangue".[18] The actions denoted by these verbs are attributed to a small number of individuals, identified by contemporaries as "*rhētores*," i.e. "orators," "public speakers" or "politicians".[19] The other activity consisted in listening to speeches, judging them, and finally deciding, by majority vote, on a course of action. These were the acts attributed to the assembly as a whole. The key verb here was "*bouleuomai*," the middle voice of the verb "*bouleuō*" seen above, though it had a significantly different meaning: on the evidence presented here, in the classical period at least, it typically meant internal-reflective deliberation.

This finding has profound implications for our understanding of Athenian politics. To begin with, it suggests the distinctness of speakers and listeners in the Athenian political system. "The assembly," as a unit, was not conceived as engaging in discussion, even vicariously, through the interventions of relatively few individuals. Rather, the Greek suggests that speakers cast themselves, by the very act of speaking, outside the

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[18] This verb is distinct from "*dēmagōgeō*," "to lead the people" (the root of the English word "demagogue"). While public speaking obviously played a part in "demagoguery," these are different terms with different meanings and connotations ("*dēmagōgeō*" usually pejorative, "*dēmēgoreō*," on my reading, more neutral). See further LSJ.

[19] M. H. Hansen, "The Athenian "Politicians", 403-322,' *Greek, Roman and Byzantine Studies* 24 (1983): 33-55 (among others) avoids using the term "politician" in the Athenian context. I consider that while he is right to emphasize the differences between the lives of political actors then and now, the salient difference is between *politics* then and now. Taking that into account, identifying as "politicians" those who devoted themselves fully to political life is no less appropriate in the ancient context than it is today.

(internally-reflectively) deliberating unit, and into the role of "advisor."[20] These different parties had different tasks, and it was an important feature of Athenian democratic politics that those who heard and judged speeches in the assembly--and still more importantly, in the courts--held final decision-making power.[21] Moreover, far from being regarded as a sign of incomplete participation in politics, listening and judging were regarded as the supreme political functions in the *polis*.

The significance of widespread participation in public speaking in classical Athens thus seems to have been overstated. No doubt it *was* important, from a democratic perspective, that all citizens had the right to speak; certainly it was better than allowing no one but the elite by birth or wealth to do so. However, since it was impossible, in a meeting of six thousand people, for more than a tiny minority of attendees to exercise this right, there had to be--and there were--other ways for the *dēmos*, the mass of ordinary non-speaking citizens, to exercise and preserve their supremacy, including over their self-selected leaders. The importance of the *dēmos*'s rhetorical hegemony as a factor in Athenian democracy has been persuasively argued,[22] but the evidence presented here suggests that the institutional mechanisms used by the Athenians to maintain power over their elite may have been more significant. Particularly important were routine measures such as *dokimasiai* (scrutinies) and *euthynai* (audits), the frequently used *graphē*

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[20] On the role of Athenian politicians as advisors, see M. Landauer, "*Parrhēsia* and the *Dēmos Tyrannos*: Frank Speech, Flattery and Accountability in Democratic Athens," *History of Political Thought* 33 (2012): 185-208.

[21] On the significance of the courts for Athenian democratic politics, see ch. 3.

[22] J. Ober, *Mass and Elite in Democratic Athens* (Princeton, NJ: Princeton University Press, 1989).

paranomōn ("charge against proposing an illegal measure"), and other public charges such as treason, bribery, and impeachment (*eisangelia*). Since all these judicial processes could be initiated by any citizen, and ordinary citizens, as members of large judicial panels, controlled the outcome of all lawsuits, the use of the courts as the final authority in the Athenian political system did not represent a derogation of the powers of the *dēmos*, but rather an amplification of them; and political leaders in Athens expected to spend a good deal of time defending themselves and their actions there.[23]

The major difference between Athenian and modern democracy is thus not that a greater proportion of Athenian citizens participated in political debate, but that a large sample of ordinary citizens voted on every political decision, and that the barriers to public speaking were low, while the risks associated with this activity were high--the reverse of the situation today. Classical Athens was neither an "aristocracy of orators" holding court over a mass of passive listeners;[24] nor the contemporary deliberative ideal of a democracy of orators. Rather, it was a democracy of voters who used a variety of judicial processes, judged by ordinary citizens, to limit and direct the power of a minority of orators. These practices would not be beyond our power to imitate, if we chose.

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[23] Aischines cited the case of the political speaker Aristophon, who had apparently boasted that he had been acquitted in no fewer than seventy-five prosecutions for making an illegal proposal (Aeschin. 3.194). See further Hansen, *Athenian Democracy*, 208-9.

[24] As suggested by Rousseau, "Discourse on Political Economy," *Social Contract*, 16.

Three Terms for "Deliberation"

The most straightforward of the three Greek verbs associated with "deliberation" in English is "*dēmēgoreō*." Derived from "*dēmos*," "people" or "assembly," and "*agoreuō*," "speak publicly" (etymologically, in the *agora*, or public square), this verb unambiguously meant "speak before the people," and was almost always used to indicate speaking in the assembly.[25] Demosthenes, for example, described his career as "*politeuesthai kai dēmēgorein*," "taking part in politics and speaking before the people,"[26] and identified "*to dēmēgorein*," "public speaking," as his special privilege.[27] As a verb, "*dēmēgoreuō*" is in fact never translated "deliberate" or "discuss," since it is clear that the direction of the action is only one-way: even in the plural it indicates numerous individuals speaking *to* an audience, rather than several members of a group speaking to one another. Where a link to the concept of "deliberation" has emerged, however, is in the use of the English adjective "deliberative" to render non-verbal forms derived from this term. The noun "*dēmēgoria*," for example, appears repeatedly in Aristotle's *Rhetoric* and is often translated "deliberative oratory."[28] Similarly, the adjective "*dēmēgorikos*" is

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[25] See LSJ. An extended use is to apply this term to the making of "populist" speeches outside the assembly, e.g. Pl. *Grg*. 482c.

[26] Dem. 18.60.

[27] Dem. 18.236. Cf. Aeschin. 1.40.

[28] E.g. Arist. *Rhet*. ed. and trans. H. Lawson-Tancred (Harmondsworth: Penguin, 1992), at section 1.1.10 (this edition lacks Bekker numbers). The Barnes translation is almost identical.

typically translated "deliberative."[29] Many further examples appear in our extant orations.[30]

What appears to have happened here is that translators, having initially identified public speaking in Athens with external-collective deliberation, have imported the English term "deliberative" into this context without fully investigating whether this might mislead Greekless readers interested in the concept of "deliberation" in ancient Greece. Something similar would seem to have occurred in relation to the second Greek verb associated with the concept of "deliberation," "*symbouleuō*." Normally, this verb is translated "advise" or "counsel," with "*symboulos*" as "advisor" and "*symbouleutikon*" "advisory".[31] A representative example is Euryptolemos' description of himself as "*symbouleusōn*," "about to advise," at the beginning of his speech on the fate of the generals after the battle of Arginousai.[32] Aischines and other orators used this verb in the same context.[33] Yet occasionally, "deliberative" is also used in translation. Again, Aristotle's *Rhetoric* supplies several examples. An assembly speaker, described by Aristotle as "*ho symbouleuōn*," literally "the one advising," is designated a "deliberative

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[29] Arist. *Rhet*. trans. Lawson-Tancred, 3.12.1, 3.14.12.

[30] E.g. Lys. 14.45, trans. W. R. Lamb (Cambridge, MA: Harvard University Press, 1930); Dem. 19.15, 22.48 and 23.13, trans. C. A. and J. H. Vince (Cambridge, MA: Harvard University Press, 1935-9); Aeschin. 1.1, 1.195, 2.56, trans. C. D. Adams (Cambridge, MA: Harvard University Press, 1919); Din. 2.15, 2.17, trans. J. O. Burtt (Cambridge, MA: Harvard University Press, 1954).

[31] LSJ.

[32] Xen. *Hell*. 1.7.16.

[33] Aeschin. 1.29, 2.165; cf. Dem. 8.73, Din. 1.31, Lycurg. fr. E1.

speaker";[34] advisors as a body are "*hoi symbouleuontes*," translated "deliberative orators";[35] Isokrates, in a pamphlet written in the form of an assembly speech, is described as "*symbouleuōn*," "deliberating," and the adjective "*symbouleutikon*," modifying assembly speeches, is translated "deliberative."[36] Outside Aristotle, similar renderings appear: in one early speech of Demosthenes, for example, the infinitive "*symbouleuein*" is given as "deliberation".[37]

It is natural to ask why these terms should not be translated "deliberate" or "deliberative" in the external-collective sense. Why should Euryptolemos' statement not be rendered "I am about to deliberate [with you]," rather than "I am about to advise [you]"? An initial answer is that the preposition "with" (*meta*) does not appear, and could not anyway be used with "*symbouleuō*" to produce this meaning: "*symbouleuō meth' humōn*" would mean "I advise [someone else] with your assistance," not "I deliberate with you," or "we deliberate together". However, it *is* possible to use a form of the verb "*symbouleuō*" to describe a situation where two or more people are debating a matter together and mutually advising each other--that is, an external-collective deliberative situation--and this brings us to a deeper answer to this question.

"*Symbouleuō*" can indicate external-collective deliberation if it appears in the middle voice rather than the active voice, which appears in the examples above. In the

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[34] Arist. *Rhet*. trans. Lawson-Tancred, 1.3.5.

[35] Arist. *Rhet*. trans. Lawson-Tancred, 1.3.6.

[36] Arist. *Rhet*. trans. Lawson-Tancred, 3.17.11, 1.3.3.

[37] Dem. 14.8, trans. Vince.

active voice, the subject of a verb performs the action specified (e.g. "I walk"). In the middle voice, however, the action of a verb returns in some way to the subject, perhaps indirectly. Often, the idea expressed is that the action happens "to," "for," or "in the interest of" the subject: a textbook example is that while "*paideuō adelphon*" (in the active voice) means "I educate my brother," "*paideuomai adelphon*" (in the middle voice) means "I have my brother educated," i.e. I do not educate him myself, but I take responsibility for it and in some way benefit from it.[38] Verbs in the middle voice can also suggest reflexive actions (for example, dressing oneself) or otherwise doing something for oneself. In this case, while "*symbouleuō*," in the active voice, suggests "advise" or "counsel," "*symbouleuomai*," in the middle, suggests "consult with," i.e. ask the advice of another or "deliberate" with them.[39]

Many examples of this usage appear in our ancient texts. Those in the lexicon include Herodotos's description of the Egyptian pharaoh Sesostris, who "consulted his wife" (*symbouleuesthai tē gynaiki*) on what to do when he found himself in a burning building;[40] Demodokos's suggestion that he and Sokrates talk over (*symbouleusasthai*) his son's education in the Platonic dialogue *Theages*;[41] Thucydides' claim that Antiphon, the man responsible for planning the oligarchical coup of 411, was the most able man in

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[38] H. Hansen and G. M. Quinn, *Greek: An Intensive Course* (2nd rev. ed., New York, NY: Fordham University Press, 1992), 168.

[39] LSJ.

[40] Hdt. 2.107.

[41] Pl. *Thg*. 122a.

Athens when someone required his opinion on something (*hostis symbouleusaito ti*);[42] Xenophon's description of Cyrus and Cyaxares discussing preparations for war, and deciding to "consider later" (*authis symbouleusometha*) whether they needed more men or not;[43] and the promise of the Chorus to Strepsiades in Aristophanes' *Clouds* that if he learned what they had to teach him, he would find many people wishing to "consult with you" (*symbouleusomenous meta sou*).[44]

Each of these examples indicates external-collective deliberation, though the numbers involved are strikingly small. If the same verb in the same voice were used in connection with the assembly, we could say with some confidence that "deliberation" in the same sense took place there. But I have been unable to find any examples of the middle voice of "*symbouleuō*" used in this context. All the examples of "*symbouleuō*" presented earlier, including those rendered using the English term "deliberative," are in the active voice. Moreover, if indicative verb forms such as *symbouleuō* are normally rendered "advise" or "counsel," participles such as "*symbouleusōn*" and infinitives such as "*symbouleuein*" arguably ought to follow the same pattern. As with "*dēmēgoreō*," what seems to have happened is that translators use the English term "deliberation" in this context simply because there is a connection between the term "deliberation" and public speaking in English usage. However, it is not obvious that an identical connection exists in Greek.

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[42] Thuc. 8.68.

[43] Xen. *Cyr*. 2.1.7.

[44] Ar. *Nub*. 457.

This would not matter if there were not, in Greek, another verb more closely associated with the English term "deliberate." It is perfectly respectable translation practice to use concepts available in English but not in Greek to render Greek thought. (Indeed on one view of translation that is all that is possible.) But another Greek term actually lies behind virtually all the cases where "deliberate" or its derivatives are seen in English translation.[45] This is "*bouleuomai*," the middle voice of *bouleuō*, which is in turn the root of the verb "*symbouleuō*" just discussed.

In the Homeric era, "*bouleuō*" was regularly used to denote "considering" (often in council), "counseling," or "giving advice."[46] In the classical period, however, many of these functions were taken over by "*symbouleuō*".[47] By contrast, "*bouleuomai*" is very common in the classical era, particularly in conjunction with assemblies. Indeed, it is the only one of the three terms discussed here that is used to describe the activity of the Athenian assembly as a unit. When Aischines (in translation) describes the Athenian *dēmos* as "deliberating," this is the verb and voice used.[48] The same usage appears in

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[45] It is also the most common of the verbs presented here in terms of its absolute number of appearances in our surviving sources: a "quick and dirty" search using Perseus gives nearly 1100 appearances for *bouleuō*, compared to only 128 appearances for "*dēmēgoreō*" and 466 for "*symbouleuō*," in classical political, historical, and philosophical prose, including the plays of Aristophanes but not tragedies (http://www.perseus.tufts.edu/hopper/wordfreq?lookup=bouleu/w&lang=greek&sort=max). This search included both middle/passive and active forms of the verb (i.e. *bouleuō* as well as *bouleuomai*), but no non-verbal forms (i.e. nouns such as "*dēmēgoria*" or "*symboulos*," and adjectives "*dēmēgorikos*," "*symbouleutikos*" and "*bouleutikos*," are not included).

[46] E.g. *Il*. 1.531. Indeed, as might be expected, "*bouleuō*" and "*boulē*" (council) share the same root: see further LSJ.

[47] Exceptions to this general rule include the use of "*bouleuō*" to mean "advise" or "give counsel" at Xen. *Hell*. 1.1.31 and Thuc. 6.39.

[48] Aeschin. 1.22, 1.33, 2.50, 2.60, 2.61, 2.67, 2.70, 2.82, 2.120, 3.67, 3.151, 3.251, 3.255, trans. Adams.

Demosthenes.[49] Plato, similarly, used "*bouleuomai*" to describe the activity of the assembly.[50] So did Aristotle. In Book 3 of the *Politics*, for example, where he posits the right to "take part in deliberative and judicial duties"--that is, "*to bouleuesthai kai dikazein*," shortly thereafter expressed as "*archēs bouleutikēs kai kritikēs*" (literally "the deliberating and judging office")--as definitive of citizenship, the venue associated with "*to bouleuesthai*" is specifically an assembly.[51] However, "*bouleuomai*" is almost *never* used to describe the activity of individual speakers engaged in the act of addressing an assembly meeting. This is an intriguing fact, requiring careful examination.

The Meaning of "Bouleuomai"

It should first be said that when "*bouleuomai*" is used in relation to the assembly it is not only translated by "deliberate" and its cognates but also by "discuss" and "debate." On the face of it, rendering "*ho dēmos ebouleueto*" by "the people deliberated" need not imply discussion, since "deliberate," as we have seen, is ambiguous in English. Either external-collective or internal-reflective deliberation might plausibly be meant. Yet the former sense is suggested by alternative renderings of "*bouleuomai*" in the same context. For example, in the Loeb edition of Andokides' speech "On the Mysteries," the term "*ebouleuesthe*" (referring to the Athenian *dēmos* as represented by the judges who made

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[49] Dem. 3.1, 5.2, 6.28, 9.19, 10.30, 18.86, 18.196, 19.96, 23.109, 24.99, 25.14, Ex. 6, trans. Vince.

[50] E.g. Pl. *Prt*. 319a-d.

[51] Arist. *Pol*. 1275b15-20, trans. H. Rackham (Cambridge, MA: Harvard University Press, 1930). Cf. "deliberating or judging," "deliberative or judicial administration," trans. Barnes, ed. Everson (*The Politics and the Constitution of Athens*, Cambridge, UK: Cambridge University Press, 1996).

up Andokides' audience), is twice translated "you discussed," while in the same series' edition of Demosthenes' "First Philippic," the participle "*bouleuomenos*," referring to the *dēmos*, is rendered "debating."[52] Similarly, in Demosthenes' assembly speech on the Rhodians, "*ebouleuesth*'" is translated "you were discussing," while "*tō bouleuesthai*" appears as "debate" in "Against Aristogeiton I," and "*tou dēmou bouleuomenou*" is rendered "when the people are debating" in Theophrastos' *Characters*.[53]

The assumption that "*bouleuomai*" implies external-collective deliberation is thus well-established. Nonetheless, caution is necessary. In none of the above cases is it obvious that the subject of the verb, the *dēmos*, is conceived as engaging in speaking as well as listening, thinking, and making an internal decision. No contextual clues require that reading. In fact, it is entirely possible that the activity implied is purely internal-reflective, that is, that members of the *dēmos* are simply pondering the recommendations put to them by the speaker.

The possibility that "*bouleuomai*," when used to describe the assembly, might indicate internal-reflective activity is supported by its frequent use with this meaning elsewhere. The most obvious example of this is in relation to individual agents, where it quite clearly suggests thinking to oneself and nothing else. The classic text on this point is Book 3, Chapter 3 of Aristotle's *Nicomachean Ethics*, which is typically identified as a

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[52] Andoc. 1.73, 1.82, trans. K. J. Maidment (Cambridge, MA: Harvard University Press, 1941). Dem. 4.39, trans. Vince. Cf. (in the same edition) Dem. 10.1, 15.1.

[53] Dem. 15.6, trans. Vince; Theophr. *Char*. 26.1, trans. J. Rusten (Cambridge, MA: Harvard University Press, 1993). It has been pointed out to me by David Langslow that "debate," like "deliberate," is ambiguous in English, since it can also refer to internal-reflective activity. He is right, of course. Nonetheless, I suspect that the external-collective connotations of "debate" in this context would prove decisive for most readers, unless they were explicitly directed to think otherwise.

discussion of "deliberation."[54] An indication of the precise sense of "deliberation" to be explored features in the preceding chapter, where Aristotle defines "choice" (*prohairēsis*) as a form of voluntary action "preceded by deliberation" (*probebouleuomenon*).[55] Given the range of contexts in which choice-making can occur, we may infer that Aristotle is not thinking exclusively of external-collective deliberation here, and this inference is rapidly confirmed. This might not seem immediately obvious: the statement that "the things about which we deliberate" (*hōn bouleuometha*) must be within our own power to effect, rather than in the hands of others such as the Spartans or Scythians, might suggest that Aristotle has external-collective deliberation principally in mind.[56] But that meaning is excluded when he observes that "a doctor does not deliberate (*bouleuetai*) about whether he is to cure his patient, nor an orator whether he is to convince his audience, nor a statesman whether he is to secure good government."[57] Clearly, these are not matters for collective discussion, but rather for individual thought; and many similar examples of "*bouleuomai*" can be found.[58]

"*Bouleuomai*" thus indicates internal-reflective deliberation when used of individuals. Yet it might be objected that this has no bearing on cases where more than

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[54] As exemplified by Goodin, "Democratic Deliberation Within," 81 (though he mistakenly cites *NE* 4).

[55] Arist. *NE* 1112a15-18.

[56] Arist. *NE* 1112a33-112b1.

[57] Arist. *NE* 1112b13-16, trans. H. Rackham (Cambridge, MA: Harvard University Press, 1934).

[58] For example, Aristotle's observation that one man may arrive at the right conclusion by prolonged deliberation (*bouleuomenon*), while another may do so quickly (*NE* 1142b), or his claim that the only animal which is "deliberative" (*bouleutikon*, trans. Peck) is man, because while many others have the power of memory and can be trained, only man can recall past events at will (*HA* 488b; cf. *NE* 6.1.6). Cf. Pl. *Cra*. 420c, Hdt. 7.10d, Dem. 37.13, and LSJ.

one person is involved. *Of course* individuals reflect internally on issues that concern them; but where there is more than one person, discussion typically takes place. Indeed, as Goodin suggested, the very notion of internal-reflective deliberation is arguably parasitic on its external-collective counterpart. Internal reflection is "deliberative" precisely because it resembles the back-and-forth reasoning that is essentially characteristic of external-collective deliberation involving more than one person. Hence, the fact that "*bouleuomai*" signifies internal-reflective deliberation in individual contexts is irrelevant.

There is certainly something to this argument. However, intriguingly, "*bouleuomai*" is also frequently and unmistakably used to mean internal reflection in *group* contexts in the ancient Greek world. The most obvious example of this is in the courts. "*Bouleuomai*" often appears in connection with Athenian judicial panels, particularly at the end of speeches when the litigants urge their listeners to consider the case carefully, typically using the phrases "*eu bouleuesthe*" or "*bouleuesthe kalōs*," both often translated "deliberate rightly".[59] Readers--Greekless or otherwise--would be pardoned for interpreting these exhortations as a request to discuss the matter carefully, since this would undoubtedly be the expected meaning of such a request to a jury today. But judges in classical Athens (as elsewhere in the ancient Greek *poleis*) were actually *prohibited* from discussing cases among themselves prior to reaching a verdict, so this

[59] See e.g. the Loeb editions (cited above) of Aeschin. 3.255, Ant. 5.71, Dem. 25.14, Din. 1.98, Lycurg. 1.2, 1.11, 1.15; see also Isoc. 15.178.

interpretation is impossible.[60] Rather, internal-reflective deliberation must be what is meant.

The fact that Athenian judicial panels--always a minimum of two hundred judges, five hundred if the case was on a public charge, and sometimes one thousand or more[61]--did not engage in external-collective deliberation, but rather considered the matter internally and communicated their decisions through their votes, and that this practice was denoted by the same verb in the same voice that was used to denote the activity of around six thousand individuals in the assembly, is in itself very arresting. It *proves* nothing, of course: "*bouleuomai*" may still have indicated external-collective deliberation when it was used in relation to the assembly. Yet, strikingly, we also have several examples of "*bouleuomai*" being used to describe the activity of the assembly in situations where external-collective deliberation is ruled out. An important one appears in Aischines' speech "On the Embassy," his defense against a charge of treason brought against him by Demosthenes in 343. The case concerned Aischines' role in the decision to establish peace with Philip of Macedon three years earlier, a decision made in the second of two assembly meetings. At the first meeting, anyone who wished to speak was invited to do so, and both Aischines and Demosthenes came forward. At the second, however,

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[60] Arist. *Pol*. 1268b5-10; Hansen, *Athenian Democracy*, 202. This is not to deny that what we might call "audience participation" frequently occurred during the presentation of cases. On that, see V. Bers, "Dikastic Thorubos," in *Crux: Essays in Greek History*, ed. P. Cartledge and F. D. Harvey (London: Duckworth, 1985). It is also possible that informal conversation took place between judges as they were lining up to vote: e.g. Lycurg. 1. 127, Dem. 47.44, 50.3 and Theophr. *Char*. 7; cf. A. R. W. Harrison, *The Law of Athens: Procedure* (Oxford: Clarendon Press, 1968-71), 39, on the Areopagos. However, there was no opportunity for formal debate of the kind that is understood to constitute external-collective deliberation.

[61] Hansen, *Athenian Democracy*, 186.

speeches were not allowed, but only votes taken on the various proposals concerning the peace and future alliance. What is important here is that the verb "*bouleuomai*" is used to describe the activity of the *dēmos* at *both* meetings, including the one at which no debate was held.[62] It is especially instructive, moreover, that these usages are not merely Aischines' own words. One appears in an enacted decree read aloud by the clerk; the other in a formal affidavit sworn by a witness.[63]

These examples are unequivocal. It is absolutely plain that the appearance of "*bouleuomai*" in relation to the second meeting denotes internal reflection alone. Other examples are more ambiguous, but nonetheless an internal-reflective meaning may be most likely. One such appears in the speech "On the Peace with Sparta" attributed to Andokides, where he observes that "a number of you are anxious to see peace concluded as quickly as possible. In fact, according to those in question, the forty days allowed you for consideration (*bouleuesthai*) are a waste of time and a concession which we delegates have done wrong to obtain..." [64] Forty days of external-collective deliberation are presumably not intended here: at least some internal-reflective deliberation must be meant, and might indeed be all that is meant. A similar example is Demosthenes' sarcastic complaint to the assembly that "you alone reverse the general practice of mankind; for other people deliberate (*bouleuesthai*) before the event, but you after." [65] It is possible that

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[62] Aeschin. 2.60, 2.68, 2.70.

[63] Aeschin. 2.60, 2.67.

[64] Andoc. 3.33, trans. Maidment.

[65] Dem. 10.30, trans. Vince.

Demosthenes might have described external-collective deliberation as the "general practice of mankind," but internal-reflective deliberation seems a more plausible reading.

In various cases involving the two largest and most "demotic" bodies in Athenian politics, then--that is, the assembly and courts--an external-collective reading of "*bouleuomai*" either must be comprehensively ruled out or seems less plausible than an internal-reflective reading. Are there any cases where an external-collective reading must be ruled in? I have been unable to find any involving the assembly. However, an alternative venue where this might be expected is the council (*boulē*), which comprised five hundred citizens selected annually by lot and whose tasks included framing the wording of motions to be voted on by the assembly and planning the assembly's agenda.[66] It is inconceivable that these tasks could have been accomplished without group discussion; moreover, we know that "*bouleuomai*" was used to describe the activity of the council, for Lykourgos and others use the term in this context.[67] However, we do not know whether "*bouleuomai*" was used to describe *discussion* in the council, and we have virtually no primary evidence here.[68] Moreover, we know that many members of the council--quite possibly the majority--did not speak much, if at all. In Demosthenes' speech "Against Androtion," for example, the complaint is made that if Androtion is acquitted, the "talkers" (*tois legousi*) will rule in the council-chamber, but if

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[66] Hansen, *Athenian Democracy*, 243-65.

[67] Lyc. 1.37; 1.126.

[68] Although Ober includes a lengthy account of deliberative activity in the council in *Democracy and Knowledge* (Princeton, NJ: Princeton University Press, 2008), 142-51, he cites no primary sources. Cf. H. Yunis, *Taming Democracy: Models of Political Rhetoric in Classical Athens* (Ithaca, NY: Cornell University Press, 1996), 6.

he is convicted, the "ordinary citizens" (*idiōtai*) will rule instead.[69] It is thus possible that even in relation to the council, "*bouleuomai*" suggested internal-reflective deliberation in the first instance, rather than discussion.

On my survey of the available evidence, I have in fact been able to find only a handful of cases where "*bouleuomai*" appears unequivocally to denote external-collective deliberation. Some of these relate to political activity, though not in the assembly: Demosthenes, for example, used the term to describe the activity of a small group of envoys who met together and considered ("*ebouleuonth*'") which of them should be left behind.[70] A similar usage appears in Thucydides, when Nikias says that he would need to consult (*bouleusaito*) with his colleagues, i.e. the other two generals in charge of Athens' expedition to Sicily.[71] Further examples occur in the works of Plato, in the context of equally small groups. Speaking to Kallias in the *Gorgias*, Sokrates observes that he once "overheard" (*epēkousa*) Kallias and three friends "*bouleuomenōn*," "deliberating," the question of wisdom, during the course of which they "called on each other" not to philosophize to the point of pedantry.[72] Here, "*bouleuomai*" certainly indicates external-collective deliberation. Similarly, in the *Meno*, Sokrates invites Anytos to join him in discussion with the words "*met' emou koinē bouleuesthai*," "consider jointly with me."[73]

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[69] Dem. 22.37.

[70] Dem. 19.122.

[71] Thuc. 6.25.

[72] Pl. *Grg*. 487c.

[73] Pl. *Men*. 90e.

Other interesting examples of this usage appear in the *Critias*, in the description of the ten kings who met every five years in the Temple of Poseidon and there "took counsel (*ebouleuonto*) about public affairs and enquired if any had in any way transgressed and gave judgment." These kings also agreed that "if anyone should attempt to overthrow any city in their royal house, they should all lend aid, taking counsel in common (*koinē...bouleuomenoi*), like their forerunners, concerning their policy in war and other matters."[74]

This last example, along with that from the *Meno*, is particularly interesting, because the qualification "*koinē*," "in common" or "jointly," suggests that by itself, "*bouleuomai*" might not indicate sufficiently strongly that the members of the relevant group were committed to considering the matter *together*, i.e. in this case through joint discussion, as opposed to each of them internally. This kind of clarification in a case of undisputed external-collective deliberation is precisely what we might expect given our examination so far, and it raises a couple of intriguing implications. First, it suggests that the primary meaning of "*bouleuomai*" was internal-reflective, even in relatively small groups: a supporting adjective might be necessary to make the external-collective sense clear. Second, it suggests that at least in the Greek context, Goodin's analysis of the relationship between external-collective and internal-reflective deliberation ought to be reversed. Rather than internal-reflective deliberation being "modeled on, and thus parasitic upon, our interpersonal experiences of discussion and debate," the concept of

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[74] Pl. *Cri*. 119d, 120cd, trans. R. G. Bury (Cambridge, MA: Harvard University Press, 1929). Cf. also the translation by D. Clay in *Plato: Complete Works* ed J. Cooper (Indianapolis, IN: Hackett, 1997), which uses "deliberated" for "*ebouleuonto*" and "deliberate together" for "*koinē...bouleuomenoi*".

external-collective deliberation in Greek (as denoted by "*bouleuomai*" or "*koinē bouleuomai*") may have been modeled on, and hence parasitic upon, the concept of internal-reflective deliberation. Further support for this view is found in Aristotle's discussion of "deliberation" in Book 3 of the *Nicomachean Ethics*. When a matter is important, he says, we sometimes "take others into our deliberations" (*symboulous de paralambanomen*), mistrusting our own capacity to decide (*diagnōnai*).[75] He does not say "*bouleuometha*," "we reflect" (normally rendered "we deliberate" in English), or even "*koinē bouleuometha*". On the account given here, that would have been ambiguous. If group discussion was what was meant, some other locution had to be found.

Listeners and Speakers

It thus seems that of the three Greek terms translated by "deliberative" and its cognates, only two, "*dēmēgoreō*" and "*symbouleuō*," certainly indicated speaking, while the third term, "*bouleuomai*," typically implied internal reflection, at least when applied to both individual agents and large political institutions such as the assembly and courts. The next question, then, is: so what? No one has ever doubted that deliberation, in the external-collective sense, involves both speaking and thinking. While each speaker gives his views, *of course* the other members of the group are engaged in listening and thinking only. Why then should it matter if two of the Greek terms associated with the term "deliberation" in English suggest speaking, and one suggests listening, thinking, and coming to an internal decision? Both activities form part of the deliberative process.

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[75] Arist. *NE* 1112b8-12, trans. Rackham.

The answer to this question is that in the external-collective deliberative situation, group members are conceived as engaging in both speaking and listening by turns: it is the "exchange of reasons" among individuals who play *both* roles sequentially that is supposed to secure the benefits of this form of deliberation.[76] As such, it makes sense to attribute to the decision-making unit, of which all speakers are members, the act of general discussion, whether or not all or even most members of the relevant group actually speak. But in Athens the situation was different. In the Greek texts, these different terms consistently refer to two distinct agents: "*dēmēgoreuō*" and "*symbouleuō*" to a small number of *rhētores*, "orators," who address the decision-making unit, and "*bouleuomai*" to the decision-making unit itself. What is more, these are not merely *ad hoc* designations. The standard use of the second person plural by speakers to address their audience, while typically reserving the first person plural to refer to those who speak, suggests that there was an accepted conceptual distinction between these two groups. Members of the decision-making unit certainly *could* cross the line dividing deliberators and advisors and become advisors themselves: the barrier to entry was low, although not perhaps as low as is sometimes imagined. But the decision-making unit, insofar as it was conceived as a single agent, was not conceived as engaging in discussion.

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[76] It is not necessary that *all* group members should take part in both speaking and listening: on the contrary, as noted above, relatively few may actually speak. However, in order for the description "deliberative" to stick, at least *some* members of the decision-making group must take part in both activities, such that the activity of discussion can be attributed to the group as a whole.

There are numerous examples in the extant Greek literature of "*bouleuomai*" being used to refer to a decision-making unit, that is, an assembly, council, or court. We have seen many already, and more can easily be found.[77] Equally, there are many examples of "*symbouleuō*" and "*dēmēgoreō*" being used to describe the activity of speakers.[78] What are most instructive for present purposes, however, are cases where "*bouleuomai*" and a verb suggesting speaking are juxtaposed, with these two acts being attributed to two different agents at the same time.

A good example features in Aristotle's *Rhetoric*, when he introduces the different issues that arise for decision in assemblies.[79] In the Penguin edition, the line runs: "the most important subjects of deliberation, and those most often discussed by deliberative speakers, are..." In the Loeb, it is: "the most important subjects about which all men deliberate and deliberative orators harangue..." In the Greek, however, the subjects in question are defined as those about which "all men reflect" (*bouleuontai pantes*) and "those who advise speak publicly" (*agoreusin hoi symbouleuontes*). In the English texts, the repeated use of "deliberate" and its cognates suggests that a single act is taking place, performed by a single undifferentiated group. The Greek, however, distinguishes between two separate activities, one performed by "all men" and which does not involve speaking,

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[77] Aeschin. 2.60, Dem. 19.96, Lycurg. 1.37, Thuc. 4.87.

[78] Aeschin. 1.3, Dem. 1.1, Din. 1.31, Pl. *Grg*. 455b-c.

[79] Arist. *Rhet*. 1359b20.

the other performed by "advisors," and which does.[80] The division of labor between listeners and speakers is thus clear.

Similar examples are plentiful. Aischines, in the speech "On the Embassy," quotes Demosthenes as saying that he was "amazed at both parties, as well the listeners as the ambassadors, for they were carelessly wasting time--the listeners (*tōn akouontōn*) wasting the time for taking counsel (*tou bouleuesthai*), the ambassadors the time for giving it (*tou symbouleuein*)."[81] Demosthenes also regularly distinguished between the tasks of speakers and those of the *dēmos*. It was the "duty of all speakers" (*tous legontas hapantas*) to put forward the best counsel, "especially when you are debating (*hymōn bouleuomenōn*) a question of urgent public importance";[82] a speaker (*ton symbouleuonta*) ought to "give the best advice," while the audience ought to "listen to the right sort of arguments."[83] Speakers often "fail to offer advice," but their proper task is to explain what is "most profitable for you who deliberate" (*tois boulomenois*).[84] Plato, similarly, assigned "*to bouleuesthai*" and speaking to two distinct agents,[85] as did Thucydides: speakers speak (*eipon*) while those listening "hear them and decide" (*akousantes bouleusontai*) or "consider" (*ebouleuonto*) what to do.[86] Another rich source on this point

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[80] A nearly identical example appears at Dem. 14.8.

[81] Aeschin. 2.49, trans. Adams.

[82] Dem. 8.1, trans. Vince.

[83] Dem. 10.17, 10.75, trans. Vince.

[84] Dem. Ex.6, trans. Vince. Cf. Dem. 18.86.

[85] Pl. *Prt*. 319d.

[86] Thuc. 3.8, 3.29.

is Kleon's speech in the second Mytilenaian debate. He first criticizes the Athenian *dēmos* for wanting to be like the orators, then tells them that they act more like spectators of sophists than men who take counsel (*bouleuomenois*), and finally presents a striking series of distinctions: between "we" who advise and "you" who give matters only brief consideration, between advisors who are held accountable for their actions and listeners who are not, and between those who give advice and those who follow it.[87]

Some prominent individuals thus identified a clear division of labor in Athenian politics. Yet the different tasks attributed to speakers and listeners did not end there. The roles of both parties were well fleshed out, suggesting that the conception of a division of labor between speakers and listeners was well developed. Orators gave advice, made proposals,[88] took a "broad view" and "explored best policy";[89] their role was to discern the trend of events at the outset, forecast results, and offer warnings when necessary.[90] More extensive, and arguably more important, were the tasks attributed to the *dēmos*. Not only did it listen[91] and reflect (*bouleuomai*);[92] it also judged,[93] voted,[94] and, finally and

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[87] Thuc. 3.38, 3.43.

[88] Din. 1.35.

[89] Dem. 16.1.

[90] Dem. 18.246.

[91] Din. 2.16, Dem. 2.31, Dem. 19.34.

[92] Dem. 19.34.

[93] Arist. *Rhet*. 1.4, Thuc. 6.39.

[94] Aeschin. 2.160, Dem. 8.19.

most significantly, acted.[95] For both good and ill, speakers in the assembly did not identify themselves with the agent responsible for the acts of the *polis*. That agent was rather their audience, those who listened, thought, and voted. Demosthenes once asked: "Who sent reinforcements to Byzantium and prevented the entrapment of the Hellespont?" He answered his own question: "You, and when I say you I mean the whole city (*tēn polin*)."[96] He continued: "Who advised the city, moved resolutions, took action? I did."[97] A similar distinction appears in Aischines' speech "On the Embassy," when he observes that "I propose, I keep laws from being passed, I make covenants," while "you vote."[98] The implication seems clear. Speakers can offer advice and assistance, but the agent that actually decides and acts is the *dēmos*--with whom speakers do not typically identify themselves.

This final point is important and deserves further elaboration. Perhaps the most striking aspect of our extant speeches is the typical use of the second person plural (that is, "you" pl.) by Athenian political speakers to address their audiences, while they use the first person plural ("we") to refer to themselves *and other speakers*, rather than themselves and the rest of the *polis*. In the classic external-collective deliberative situation, the pronoun "we" is typically used to identify the decision-making group as a whole: questions are posed in the form of "What are we to do about *X*?" and responses in

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[95] Dem. 19.34, Dem. 18.88, Hyp. 4.9.

[96] Dem. 18.88, trans. Vince.

[97] Dem. 18.88, trans. Vince.

[98] Aeschin. 2.160, trans. Adams.

terms of "I think we should do *Y*."[99] But in Athens this was almost never the case. There are some exceptions: occasionally speakers do use "we" to include their audience, especially when talking about war or some other external threat to the *polis*.[100] But these cases are greatly outnumbered by those in which a clear line is drawn between "we" the body of advisors to the *dēmos* and "you" the *dēmos* itself. Demosthenes, for example, described those who spoke before the assembly as "all of us who address you,"[101] and complained that "you have a habit of asking a speaker on every occasion, 'What then must be done?'; but I prefer to ask you, 'What then must be said?'"[102] The division between advisors who speak and ordinary citizens who act also emerges in the speeches of Hypereides, especially "Against Demosthenes," in which he identifies "the people" (*ho dēmos*) as "them," while those who speak before the people are described as "us."[103] At the same time the conception of the audience as the agent of deliberation and decision also appears clearly. "You would have been insane if you had framed the law in any other way," Hypereides declared as part of an argument that impeachment was an appropriate threat to hold over political speakers but ought not to apply to non-speaking citizens.[104]

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[99] Cf. e.g. D. Estlund, *Democratic Authority* (Princeton, NJ: Princeton University Press, 2009), 230; J. Mansbridge, *Beyond Adversary Democracy* (Chicago, IL: Chicago University Press, 1983), *passim*.

[100] E.g. Dem. 18.89, Thuc. 3.44; cf. Aeschin. 1.33.

[101] Dem. 14.2, trans. Vince.

[102] Dem. 8.22, trans. Vince.

[103] Hyp. 5, cols. 28, 29.

[104] Hyp. 4.9, trans. Burtt; see also Dem. 25.41, Dem. 21.189-90, Dem. 23.4, Dem. 24.123, Dem. 19.182, Hyp. 4.4, Hyp. 4.27, Hyp. 4.31.

We may infer from these examples, and from many others already quoted, that coming forward as an advisor in Athens had the implied effect of stepping outside the decision-making group. Of course, this was not literally the case: those who spoke in the assembly did not thereby lose their vote. But the difference between voting as one of a group of six thousand or more and having the opportunity to shape the views of that group was so great that it is hardly surprising that speakers spoke as though their identity in one role overwhelmed their identity in the other. The body of regular speakers was relatively tiny: it has been estimated that it consisted of around twenty to forty citizens at any one time.[105] It is true that a larger number of citizens, perhaps some hundreds, occasionally put forward proposals; however, many of these did not actually speak in support of the proposal they advanced, but merely sponsored it as it passed through the council.[106] Moreover, though the barrier to entry as a speaker was low, it was not negligible. Unlike in a modern "town hall meeting" or Quaker meeting-house, for example, speakers had to get up from their seats and walk down to the speakers' platform, where they would wait their turn before addressing an audience of thousands. This took some courage and preparation.[107] Additionally, achieving prominence as a speaker involved significant risks: there was an ongoing possibility of being taken to court for treason, corruption, bribery, or simply being an inappropriate person from whom to take advice. The most common charge of this sort was that of making an illegal or inexpedient

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[105] M. H. Hansen, "The Number of *Rhētores* in the *Ekklēsia*, 355-322," *Greek, Roman and Byzantine Studies* 25 (1984): 123-4.

[106] Hansen, "Athenian 'Politicians'."

[107] Cf. Plut. *Dem*. 6-9, Pl. *Alc*. 2, Xen. *Mem*. 3.6.

proposal, a frequently-used political weapon that, on a third conviction, resulted in the complete loss of citizenship.[108] In contrast to this, as speakers liked to point out, simply listening and voting in the assembly involved no risk at all.[109]

There was thus a significant gulf in Athens between political speakers and ordinary citizens. Paradoxically, however--to a modern audience at least--one thing that "deliberators" in Athens did *not* do was speak publicly. Rather, their task was to listen, reflect, judge, vote, and later, if any one of them so chose, take their political leaders to court for breaking the laws of the *polis*. The Athenian *dēmos* enjoyed real and extensive powers. But what it did, it did not do through talking.

Conclusion

The central implication of this study is that "deliberative" is not an appropriate label for Athenian democracy, unless "deliberation" in the exclusively "internal-reflective" sense is meant. Political activity in Athens involved two distinct tasks, giving counsel and taking it: both were necessary and valuable, but they were performed by two different agents, one of which offered advice while the other listened and determined the issue. There was thus no mass "deliberating" group in the external-collective sense, and this leaves us with a dilemma. Either we must accept that Athenian democracy was not "deliberative" in the sense of the term familiar to contemporary political theorists (and hence lose our only well-attested historical example of that political form), or we accept

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[108] Hansen, *Athenian Democracy*, 203-24.

[109] Thuc. 3.43, Hyp. 4.9.

that only a tiny number of people in Athens took part in such "deliberation," that is, speaking and listening by turns. Neither of these options is likely to seem attractive to today's deliberative democrats. However, the former has the advantage of reflecting the Athenian conception of the matter, and for that reason seems preferable.

The final question we must ask is why it should matter whether the Athenian *dēmos* took part in group discussion of public policy or simply took advice from a small number of speakers who, by the very act of speaking, cast themselves as something other than ordinary members of the decision-making group. We can focus on three reasons. First, the revised view alters our interpretation of several important passages in the surviving literature and thus transforms our understanding of both the idea and practice of democracy in the ancient world. Second, it suggests that the importance of widespread participation in public speaking in Athens (and by extension in other political systems) has been overstated. Third, it suggests that the structure of Athenian politics was significantly closer to that of modern political systems than is commonly allowed. Nonetheless, this does not lessen Athens' usefulness as a political model. To the contrary, it suggests that the strategies adopted by the Athenians to control the minority of active "politicians" in their midst might also be effective today.

On the first issue, we may consider a few representative passages from Aristotle's *Politics*. First, let us recall Aristotle's definition of a citizen, quoted earlier, as one who participates in deliberating (*tou bouleuesthai*) and judging (*krinein*).[110] The usual interpretation of this line is that Aristotle takes the right to participate in discussing policy

[110] Arist. *Pol*. 1275b10.

to be essential to citizenship. On the account given here, however, it would seem that what is essential is rather the right to participate in *considering* the issues prior to voting on them, i.e., effectively, the right to be part of the decision-making unit, rather than the right to speak itself.[111] A similar case is Aristotle's comment that in certain *poleis*, no-one who owns land on the frontier is allowed to take part in deliberating questions of war (*tou bouleusasthai*).[112] If "*tou bouleusasthai*" indicates not speaking but thinking, this suggests a significant limitation on political action: it implies that the citizens in question are not allowed to be part of the decision-making group at all. Finally, we should consider Aristotle's claim that in democracies, citizens of all classes ought to take part in deliberating (*to bouleuesthai*), "for they will advise better (*bouleusontai beltion*) when deliberating jointly (*koinē bouleuomenoi pantes*), the people (*ho dēmos*) with the notables and the notables with the people."[113] It might seem natural to read "deliberating" in this context as "discussing"; but if the reading favored here is right, Aristotle should probably be understood as saying that the outcome will be better when members of both classes listen and vote together, not that they must speak to one another. In other words, Aristotle appears to be pointing to the importance of having both the common people and the notables present as part of the same body and hearing the same advice on the same questions, as opposed to meeting as two separate bodies (like the Spartan *gerontes* and

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[111] Thus classical Athens begins to look more like Republican Rome, in which the plebeians had the opportunity to vote on policy proposals, though not to take part in discussing them. The fact that many Roman writers regarded both Athens and Rome as democracies adds further support to this point: Athens and Rome were believed to be more alike than not in essential respects. I owe this point to Richard Tuck.

[112] Arist. *Pol*. 1330a20.

[113] Arist. *Pol*. 1298b20-25, trans. Barnes.

ephorate, or the English Lords and Commons), or, worse, leaving the *dēmos* to make decisions by itself.[114]

In each of these examples, what emerges is that that the key instrument of self-expression in ancient Greek deliberation was each individual's *vote* rather than his voice; and this points to a second important implication. This is that the importance of widespread participation in public speaking in Athens, and more broadly as an element in any flourishing democracy, may have been overstated. This is not to say that the role of advisors was not important: if anything, the fact that these individuals were in Athens regarded as something of a distinct tribe rather underlines the power and influence that they possessed. But the fact that public speaking was not an activity attributed to members of the *dēmos*--unlike, for example, listening, thinking, voting, and acting--suggests that public speaking was not a major element of democratic activity strictly conceived, i.e. activity conducing to and reflecting the *dēmos*'s own power. The fact that public speaking was *open* to all citizens is undoubtedly significant, but the purported advantages of wide discussion would seem to have been a less important factor in the success of Athenian democracy than is often imagined. Rather than focus on the rights of *isēgoria* and *parrhēsia*, then, which were not taken up by most citizens, more attention ought to be paid to those things that members of the *dēmos* did do, such as listening critically, deciding, voting, and helping to hold speakers to account in the courts.

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[114] A further thought might be that being together in the same place will help to focus the mind on genuinely common interests rather than sectional ones, and thus help to avoid *stasis*.

Especially important here is the idea and practice of judging.[115] Aristotle, in the *Rhetoric*, identified both assemblygoers and jurors (*dikastai*) as "judges" (*kritai*), and this, arguably, was regarded as the core of democratic political activity in Athens.

The third and final implication of note is that the respective roles of the *dēmos* and its advisors in classical Athens as presented here suggests that there may be greater parallels between ancient and modern electoral democracies than is commonly allowed. For in at least one respect modern democracies face the same difficulty as the ancient Athenians. At around thirty thousand adult males during the fourth century, the Athenian citizen body was indeed much smaller than those commonly seen today, but it was still far too large to hold what Gutmann and Thompson call "genuine public conversation." Decisions had to be made by smaller samples of the citizen body: as we have seen, around six thousand in the assembly, and usually between two hundred and a thousand in the courts. Yet even the smaller figure of six thousand in the assembly prohibited public conversation of the kind imagined by many modern scholars. Rather, just like today, the Athenians had to "outsource" much necessary political activity to a relatively tiny number of individuals eager to increase their personal honor and renown. The result was a democracy of almost entirely non-speaking voters whose task, in part, was to prevent the minority of vocal "politicians" in their midst from becoming too powerful--a task for which the *dēmos*' control of the administration of justice was particularly crucial.

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[115] Arist. *Rhet*. 1354ab. See further D. S. Allen, *The World of Prometheus* (Princeton, NJ: Princeton University Press, 2000), esp. 168-196.

In Athens, then, as in modern democracies, an overwhelming majority of non-speaking voters attempted to control a minority of prominent political actors who took primary responsibility for advocating and carrying policies. The key differences between Athenian and modern democracy were thus not that all or even many Athenians took part in political discussion, but, first, that large samples of ordinary citizens had the opportunity to vote on every political decision, and second, that the barriers to becoming politically influential were relatively low, while the risks associated with this position were high. This is the reverse of the situation today, where a high barrier to entry as a politician--often financial--is combined with a low risk of losing one's position once established. To be sure, one can fail to be reelected, but this pales in comparison to the mechanisms of accountability available in Athens, such as routine annual audits (*euthynai*) covering both moral and financial issues. In the modern system, by contrast, a feedback loop is set up in which corruption becomes endemic, since the high costs of running for office are in large part met by supporters whose opportunity to shape policy is then significantly greater than that of ordinary voters, with very little way for those ordinary voters to hold the politician in question to account, either before or after the next election.

Yet the fact that modern states feature a similar distinction between committed political leaders and ordinary citizens to that seen in Athens suggests that the Athenians' solutions to the problem of the political division of labor might also be effective today. Both lowering the initial barrier to entry as a politician (if only by making it less expensive to run for office) and raising the personal risks associated with political activity

would help to strengthen the control of ordinary citizens over those who are more politically active. If this could be combined with giving representative samples of ordinary citizens the power to decide policy issues, so much the better. At any rate, this would be more in tune with the spirit of Athenian democracy and "deliberation" than the kind of deliberative mini-publics occasionally explored today.

CHAPTER THREE

The Most Democratic Branch? The Athenian Assembly vs. the Courts

There is a longstanding puzzle in studies of Athenian democracy. Why, towards the end of the fifth century BC, did the Athenians deliberately increase the political powers of their courts, at the direct expense of those of the assembly? This so-called "era of legal reform" is often interpreted as an attempt at political self-limitation, because the assembly is regarded by modern scholars as the best institutional representative of the popular will, and the courts as a "check" on that will. This view reflects modern expectations of the relationship between legislative and judicial bodies, but there is no evidence that the Athenians saw their courts in this light. In fact, the evidence at our disposal suggests that they regarded their courts as an *even more democratic* institution than the assembly: more reliably on the side of the *dēmos* against the elite, and more crucial to the development and preservation of democracy in Athens.[1]

This suggests an alternative interpretation of the "era of legal reform." The majority of Athenians in the late fifth century may have been glad to give final decision-making power in political matters to their courts because they regarded them as a *better*

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[1] Greek political vocabulary suggests a distinction here that is less natural in English. In ancient Greek terms, the courts were a more "demotic" (*dēmotikon*) institution than the assembly, that is, closer to and more reflective of the interests of the *dēmos*, understood as the mass of ordinary citizens in contradistinction from the elite (in terms of wealth, birth, influence, political prowess or any other grounds). This term is distinct from "democratic," which indicates that the *dēmos* (as defined above) has authority (*kratos*) in the system overall; we might say that "*dēmokratia*" is effected when a "demotic" body rules. The significance of this distinction is lost in most English translations of Greek works, however, since "democratic" is often used to translate "*dēmotikon*" (e.g. at Arist. *Pol*. 1273b42; Ps. Arist. *Ath*. *Pol*. 9-10). This is arguably misleading, but with some reservations I have decided to follow standard practice here.

vehicle for the will of the *dēmos*, defined as those undistinguished by wealth, birth, political prowess, or any other exceptional feature. To be sure, the assembly was the larger and more open body: all citizens were entitled to attend, speak, and vote. However, this very openness rendered the assembly more vulnerable to oligarchical takeover, as was revealed on two separate occasions in the final decade of the fifth century when it was manipulated into voting for the dissolution of democracy. The assembly's weaknesses related to both composition and procedures: ordinary citizens did not necessarily dominate, unscrupulous speakers could wield excessive power, and voting by raising hands invited intimidation and corruption. By contrast, the courts were staffed by random samples of relatively underprivileged citizens, with restrictions on speech and a secret ballot, making them a more secure vehicle of popular rule.

This interpretation challenges the modern account of *dēmokratia* in classical Athens, which holds that the assembly was the single most democratic body in that system. The evidence presented here suggests that this claim is faulty. The Athenian conception of democracy cannot be simply inferred from the activity of the assembly, and this has significant implications for our understanding of the differences between ancient and modern democracy.

The "Era of Legal Reform," c. 420-399

For most of the fifth century, the assembly had sole legislative and policy-making authority in Athens, but by around 420 this had begun to change. The first key development was the introduction of the *graphē paramonōn*, or "indictment for

proposing an illegal measure": this enabled the courts to strike down any proposal advanced in the assembly or council, and punish its proposer, if it was found to be "*paranomōn*" or "beyond the laws," whether or not the proposal in question had been enacted, as well as to enact it, surprising though this may seem, if it was found acceptable by the judges and had not yet been voted on in the assembly.[2] Second, beginning in 410, restarted in 403, and completed around 399, the entire body of laws was revised, recodified, and reinscribed in a prominent position in the centre of Athens.[3] Third, several striking legislative changes appeared in or just after 403/2. For the first time, a formal distinction was established between a *nomos*, a "law," and a *psēphisma*, a "decree," with major institutional ramifications. The power to make *nomoi*, i.e. permanent, general laws, was transferred from the assembly to panels of *nomothetai* ("lawmakers") composed of men who had taken the judicial oath, i.e. the same individuals who staffed the courts. These men made their decision following what was effectively a "trial" of the proposed law, with a small number of pre-selected speakers arguing for and against its enactment.[4] The assembly retained only the power to approve decrees, i.e. short-term policy decisions

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[2] M. H. Hansen, *Athenian Democracy in the Age of Demosthenes* (Norman, OK: University of Oklahoma Press, 1999), 205-12, with citations; J. Ober, *Mass and Elite in Democratic Athens* (Princeton, NJ: Princeton University Press, 1989), 95.

[3] M. Ostwald, *From Popular Sovereignty to the Sovereignty of Law* (Berkeley, CA: University of California Press, 1986), 369-72, 404-9, 414-20, 511-9. Cf. Lys. 30; Thuc. 8.63-99; Ps. Arist. *Ath. Pol*. 29-33.

[4] Hansen, *Athenian Democracy*, 167-9, with citations. Cf. D. MacDowell, "Law-Making at Athens in the Fourth Century BC," *Journal of Hellenic Studies* 95 (1975): 62-74; P. J. Rhodes, "*Nomothesia* in Fourth Century Athens," *Classical Quarterly* 35 (1985): 55-60; P. J. Rhodes, "Sessions of *Nomothetai* in Fourth-Century Athens," *Classical Quarterly* 53 (2003): 124-9; M. Piérart, "Qui étaient les nomothètes à Athènes à l'époque de Démosthène?" in E. Lévy ed., *La Codification des lois dans l'antiquité* (Paris: De Boccard, 2000), 229-56.

of an explicitly lower status than laws. No decree could trump a law, and if a law was found to conflict with a decree, the decree would be abolished.[5] Finally, underlining their commitment to their new two-tier legal system, the Athenians introduced the *graphē nomon mē epitēdeion theinai*, or "indictment for proposing a disadvantageous law." This was the counterpart to the previously established *graphē paranomōn*, which from that point on would apply only to decrees. The new charge allowed the courts to strike down any addition to the laws that they deemed "*mē epitēdeion*," "not beneficial," and if the case was brought within a year of the original vote, the proposer might be liable to the death penalty.[6]

Scholarly accounts of these reforms have fallen into two camps. The first emphasizes their significance, for two reasons: first because they signaled the transfer of ultimate political authority in Athens from the assembly to the courts, and second because this represented a change in the character of Athenian democracy. Mogens Hansen is preeminent here. Beginning in 1974, and continuing to the present with only minor modifications, Hansen has emphasized that in fourth-century Athens, there was nothing that the assembly could do that the courts could not overturn, while the opposite was not the case: the assembly could do nothing to alter a decision made by the courts. As a result, Hansen argues, the courts rather than the assembly ought to be considered sovereign in the fourth century, signifying a shift from radical to more moderate (or at

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[5] M. H. Hansen, "*Nomos* and *Psephisma* in Fourth-Century Athens," *Greek, Roman and Byzantine Studies* 19 (1978): 315-30; M. H. Hansen, "Did the Athenian Ecclesia Legislate After 403/2 BC?" *Greek, Roman and Byzantine Studies* 20 (1979): 27-53. Cf. Pl. *Def*. 415b.

[6] Hansen, *Athenian Democracy*, 212, with Dem. 20 and 24 and Ps-Arist. *Ath. Pol*. 59.2.

least "modified") democracy.[7] Similarly, Martin Ostwald suggests that the reforms marked a move from "popular sovereignty" in the fifth century to "the sovereignty of law" in the fourth; Raphael Sealey that the Athenians abandoned democracy after 403/2 in favor of republicanism and the rule of law; and Walter Eder that the full realization of democracy in Athens included recognition that constitutional limitations on popular sovereignty were an essential part of its very nature.[8]

In the second camp are the many historians and theorists who find these claims overstated. Here, too, two distinct arguments have been made: first that the effects of the reforms were insignificant, and second that the character of Athenian democracy could not anyway have been greatly altered by them. In support of the first argument, it is noted that the effort to maintain a coherent law code proved unsustainable;[9] that the vast majority of political decisions continued to be enacted in the assembly, without being challenged in court;[10] that even when the new legislative procedures *were* used, the

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[7] M. H. Hansen, *The Sovereignty of the People's Court in Athens in the Fourth Century BC* (Odense: Odense University Press, 1974), 7, 17, 59. Cf. M. H. Hansen, "The Political Powers of the People's Court in Fourth-Century Athens," in O. Murray and S. Price eds., *The Greek City from Homer to Alexander* (Oxford: Clarendon Press, 1990), 215-43; Hansen, *Athenian Democracy*, 351-2. Note that Hansen early came under attack for his use of the term "sovereign" in the Athenian context, and since the late 1980s has stuck to the Greek "*kyrios*." However, as Ober has observed, this does not greatly affect his argument. J. Ober, *The Athenian Revolution* (Princeton, NJ: Princeton University Press, 1996), 120 with n. 26.

[8] Ostwald, *Popular Sovereignty*; R. Sealey, *The Athenian Republic: Democracy or the Rule of Law?* (University Park, PA: Pennsylvania University Press, 1987); W. Eder, "Aristocracy and the Coming of Athenian Democracy," in I. Morriss and K. Raaflaub eds., *Democracy 2500? Questions and Challenges* (Dubuque, IO, 1998), 105-40.

[9] A. Lanni, *Law and Justice in the Courts of Classical Athens* (Cambridge, UK: Cambridge University Press, 2006), 142-6.

[10] As Hansen, *Athenian Democracy*, 156, 167, points out, we have over four hundred extant decrees from the fourth century, as against only six examples of laws.

assembly retained ultimate authority, since it was responsible for convening the *nomothetai* and voting their pay;[11] and finally that the *graphē nomon mē epitēdeion theinai* was scarcely ever used.[12] Respecting the second argument, it is said that since both the assembly and courts represented the Athenian *dēmos*, or "people," shifting certain decisions from one venue to another mattered less than one might think. Like the assembly, judicial panels (including the *nomothetai*) were composed entirely of ordinary citizens, several hundred in number: the courts could thus be conceived as virtually a sub-committee of the assembly, or even the *dēmos* itself under a different name, so increasing their political power made no difference in democratic terms.[13] Moreover, the very labels "radical" and "moderate" can be considered anachronistic in this context.[14] Preeminent in this camp are Moses Finley and Josiah Ober, but they are in good company: as Stephen Todd observed in 1993, almost everyone who has written on this subject since Hansen,

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[11] D. MacDowell, *The Law in Classical Athens* (Cornell, NY: Cornell University Press, 1978), 49; R. K. Sinclair, *Democracy and Participation in Athens* (Cambridge, UK: Cambridge University Press, 1988), 83-4.

[12] We have only six examples of this *graphē* (in addition to its mention at Dem. 24.33), compared to around 35 of the *graphē paranomōn*. They are Dem. 24.138 (two examples); Dem. 20 *passim*; Aeschin. 1.34; Dem. 24; Dem. 1.102-7. See further Hansen, "*Nomos* and *Psephisma*," 325-29.

[13] A. R. W. Harrison, "Law-Making at Athens at the End of the Fifth Century BC," *Journal of Hellenic Studies* 75 (1955): 35; M. I. Finley, *Politics in the Ancient World* (Cambridge, UK: Cambridge University Press, 1983), 71, and *Democracy Ancient and Modern* (New Brunswick, NJ: Rutgers University Press, 1985), 117-18; Ober, *Mass and Elite*, 95-103, 299-304, and *Athenian Revolution*, 30, 117-20; M. Christ, *The Litigious Athenian* (Baltimore, MD: Johns Hopkins University Press, 1998), 22-5.

[14] G. E. M. de Ste. Croix, *The Class Struggle in the Ancient World* (Cornell, NY: Cornell University Press, 1981), 76; B. Strauss, "On Aristotle's Critique of Athenian Democracy," in C. Lord and D. O'Connor eds., *Essays on the Foundations of Aristotelian Political Science* (Berkeley, CA: University of California Press, 1991), 212-33; A. Boegehold, "Resistance to Change in the Law at Athens," in J. Ober and C. Hedrick eds., *Demokratia* (Princeton, NJ: Princeton University Press, 1996), 203-14; P. Millett, "Mogens Hansen and the Labelling of Athenian Democracy," in P. Flensted-Jensen *et al* eds., *Polis & Politics* (Copenhagen: Museum Tusculanum Press, 2000), 339-60.

with the significant exceptions of Ostwald, Sealey and Eder, has rejected his conclusions.[15]

There is much to be said for the arguments made by the second camp. Yet they are not in themselves sufficient to undermine the view advanced by the first. Whatever the ultimate effects of the reforms, the Athenians obviously believed that they were doing *something* useful by passing them. We must therefore ask what that was, and to this question one answer currently holds the field, accepted equally by those who emphasize the significance of the reforms and those who doubt it. Tired of the instability of the fifth-century political system, it is said--an instability exemplified above all by the oligarchical coups of 411 and 404, both of which were initially legitimated by a vote of the assembly--the Athenian *dēmos*, once it had returned to power, simply decided to limit what it could do to itself politically. In particular, on this view, the Athenians wished to restrict their capacity to make "hasty decisions".[16] In the words of Josiah Ober, the "errors" made by the assembly during the Peloponnesian War had "brought home to the Athenians the dangers of unrestrained exercise of the popular will"; they therefore "enacted constitutional measures aimed at correcting the problem".[17] Thus, on this

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[15] S. C. Todd, *The Shape of Athenian Law* (Oxford: Oxford University Press, 1993), 299.

[16] Harrison, "Law-Making," 35-6; J. A. O. Larsen, "*Dēmokratia*," *Classical Philology* 68 (1973): 45-6; MacDowell, "Law-Making," 74; P. J. Rhodes, "Athenian Democracy after 403 BC," *Classical Journal* 75 (1980): 322-3; Finley, *Democracy Ancient and Modern*, 140-1; Ostwald, *Popular Sovereignty*, 522-4; Sinclair, *Democracy and Participation*, 83-4; Ober, *Mass and Elite*,301-2; R. Bauman, *Political Trials in Ancient Greece* (London: Routledge, 1990), 77-8; Eder, "Aristocracy," 112; Hansen, *Athenian Democracy*, 151, 303.

[17] Ober, *Mass and Elite*, 301.

account, the reformers wished to use the courts as a "check" on the potential excesses of democratic rule--that is, as a check on themselves.

At first glance, this view seems plausible enough. Certainly it fits perfectly with a familiar claim in modern constitutional discourse: that a key role of the judiciary in democratic regimes is to act as a check on the popular will. Moreover, similar parallels have often been drawn between ancient and modern judicial activity. A. H. M. Jones likened Athens' courts to a Supreme Court, while Josiah Ober, Richard Tuck, Adriaan Lanni, and Edwin Carawan, among others, have all described their powers as a form of "judicial review," in which courts have the power to strike down new legislation in the name of protecting a higher body of law.[18]

But the very ease with which the Athenian political situation has been assimilated to the modern paradigm of the relationship between legislatures and courts should give us pause. In the modern era, the concept of constitutional self-limitation via judicial intervention has had undeniable political and ideological traction: one need only look to the numerous formal constitutions and bills of rights produced since the eighteenth century, not to mention the reams of scholarship devoted to them. Yet no such concept appears in our ancient evidence, and this presents a problem. If the Athenians *had* increased the political power of their courts in order to restrict their capacity to make

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[18] A. H. M. Jones, *Athenian Democracy* (Baltimore, MD: Johns Hopkins University Press, 1980 [1957]), 4; Ober, *Mass and Elite*, 8; R. Tuck "Hobbes and Democracy," in A. Brett ed., *Rethinking the Foundations of Modern Political Thought* (Cambridge, UK; Cambridge University Press, 2006), 171-90; A. Lanni, "Judicial Review and the Athenian 'Constitution'," in M. H. Hansen ed., *Démocratie athénienne - démocratie moderne* (Geneva: Fondation Hardt, 2010); E. Carawan, "The Trial of the Arginousai Generals and the Dawn of 'Judicial Review'," *Dikē* 10 (2007): 19-56.

"hasty decisions," as both sides in this debate agree, we should expect to find some indication that the courts were capable of being conceived as a "limit" on the activity of the Athenian *dēmos*, where the *dēmos* was in the first instance identified with the assembly. But (with the exception of one complicating factor that will require more attention than can be given here[19]), our ancient sources suggest precisely the opposite: that the courts were not only, as is widely known and appreciated, highly democratic and politically significant, but also, and more intriguingly, that they were often conceived as *even more democratic* than the assembly: more reliably on the side of the *dēmos* against the elite, and more crucial to the development and preservation of democracy in Athens as such.

The evidence on this issue is occasionally allusive, but it is consistent enough.[20] Aristotle explicitly attributed the political "founding" (*katastēsai*) of the Athenian *dēmos* and its increasing strength over time to the fact that Solon had opened the law-courts to the lowest class of citizens.[21] The same view appears in the Aristotelian *Athēnaiōn Politeia*, which *inter alia* reports that "the *dēmos*, having the power of the vote"--that is, the *psēphos*, the voting-token used in the courts--"becomes sovereign (*kyrios*) in the

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[19] This is the use of the term "*dēmos*" to mean "assembly," as in the opening formula of the Athenian assembly's decrees: "*edoxe tē boulē dēmō kai tō dēmō*...," "it was decided by the council and assembly..." This question, which involves a reconsideration of the history and functions of ancient Greek assemblies, will be treated in a separate article.

[20] The evidence presented in this paragraph is supplemented and discussed fully in the Introduction, pp. 20-42.

[21] Arist. *Pol*. 1273b36-1274a23; see also 1305b20-40, which mentions instances of the *dēmos*'s control of the courts leading to the establishment of democracy in other *poleis*.

government."[22] Similar claims abound in the oratorical corpus: Lykourgos identified the three main bulwarks of democracy in Athens as the legal system, the vote of the jury, and the procedures by which wrongdoers were handed over to them;[23] Aischines repeatedly equated democracy with the rule of law and Athens' judges as its "guards";[24] and one speaker in the assembly complained bitterly that such "common sayings" as "In the law-courts lies your salvation" and "It is the *psēphos* that must save the State" were hampering Athens' readiness for war.[25] Aristophanes and Thucydides are often cited in connection with the political significance of Athens' courts;[26] Aristophanes' use of judicial analogies to exemplify the power of ordinary citizens is particularly striking, as in the following husband-wife exchange from *Lysistrata* (411): "I'll put a stop to your bellowing!/You're not on a jury now, you know."[27] The author of the *Athēnaiōn Politeia* found among Xenophon's writings also stressed the courts' role in Athenian democracy, even suggesting that their current organization was its *sine qua non*.[28] Finally, Plato's

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[22] Ps. Arist. *Ath. Pol.* 9.1; cf. 25.2, 27.4, 29.4, 35, 63-68. Cf. Ostwald, *Popular Sovereignty*, 5; E. Ruschenbusch, "*Dikastērion Pantōn Kurion*," *Historia* 6 (1957), 257-74; J. J. Keaney, "The Structure of Aristotle's *Athēnaiōn Politeia*," *Harvard Studies in Classical Philology* 67 (1963): 115-146, and J. J. Keaney, *The Composition of Aristotle's Athēnaiōn Politeia* (Oxford: Oxford University Press, 1992), esp. xi; Botsford, G. W., *The Development of the Athenian Constitution* (New York: Columbia University Press, 1965 [1893]), 171.

[23] Lycurg. 1.3; cf. Lycurg. 1.4 and 1.138; Dem. 24.2.

[24] Aeschin. 3.200, 7; cf. Aeschin. 1.4-5, 3.6, 3.23; Din. 3.15.

[25] Dem. 13.16; cf. Dem. 7.7.

[26] Thuc. 1.77, Ar. *Eq.* 1315, Ar. *Nub.* 206, Ar. *Pax* 500-5, and Ar. *Vesp. passim*.

[27] Ar. *Lys.* 379; cf. Ar. *Eccl.* 460.

[28] Ps. Xen. *Ath. Pol.* 3.7-9; cf. 1.16-18.

treatment of democracy supports this picture. Surprisingly often, his criticisms of rule by "the many" have the courts rather than the assembly as their institutional target.[29]

This evidence may be considered inconclusive. The philosophers are often deemed unreliable in relation to democracy, since they did not support it.[30] The same is said of the historians and Aristophanes, while the orators are doubted for a different reason: since most of their speeches were produced for trials, any suggestion that judges had a peculiarly significant democratic role can be interpreted as flattery.[31] These objections are not unanswerable: even an anti-democrat may provide an accurate glimpse of democracy, and even if the orators *were* frequently engaged in flattery, such flattery will have to have seemed plausible to its audience if it was to work, and will have affected judges' beliefs about their roles and hence in turn Athenian democratic ideology. But even if we allow some force to the two objections mentioned above, the accepted explanation of the reforms remains doubtful, for there is no evidence that the courts were conceived as a "limiting" factor in the Athenian system. We may therefore pursue an alternative explanation: ordinary Athenians supported the late fifth-century reforms not because they wished to *restrict* popular rule but because they wished to *deepen* it, by augmenting the powers of what they saw as their most obviously democratic institution: their courts.

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[29] E.g. Pl. *Tht*., 173cff; *Grg*. 452e, 454b, 454e, 455a.

[30] See e.g. M. H. Hansen, "The Concepts of *Demos*, *Ekklesia* and *Dikasterion* in Classical Athens," *Greek, Roman and Byzantine Studies* 50 (2010): 505-7.

[31] Hansen, *Sovereignty of the People's Court*, 18.

This challenges the accepted view of classical Athenian democracy, according to which (as we saw in the Introduction) the assembly was the undisputed "crown" of the democratic system.[32] Of course, as is equally commonly stated, the assembly was not the *only* democratic institution in the *polis*: the council, courts and other bodies also played significant roles.[33] Nonetheless, though it has occasionally been suggested that other institutions were more *powerful* than the assembly--recently, as we have just seen, the courts, at least in the fourth century, and earlier in the twentieth century, the council--it has not been argued that another institution was intrinsically more *democratic*.[34] To the contrary, the assembly's essential compositional and procedural characteristics--openness to all, an equal right of speech, and an equal right to vote--are often regarded as definitive of the idea and practice of *dēmokratia* in Athens.[35] Yet there are reasons to be skeptical of that view.

In the first place, there is some evidence that the post-403/2 political system was regarded by fourth-century Athenians as noticeably more democratic than its predecessors. Aischines described Athenian democracy as taking on "new life and vigor" (*ex archēs ischusantos*) after this date, while Lykourgos and others praised the

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[32] See above, pp. 10-20.

[33] See above, pp. 15-17.

[34] Cf. e.g. Sinclair, *Democracy and Participation*, 84-8; P. J. Rhodes, *The Athenian Boule* (Oxford: Clarendon Press, 1972), 64-81 and 213-23; Finley, *Democracy Ancient and Modern*, 1-12; Ober, *Mass and Elite*, 15. Todd, *Shape of Athenian Law*, 296, and Lanni, *Law and Justice*, 15, come closest to suggesting this. However, they do not explore its implications for the ancient conception of *dēmokratia*.

[35] Finley, *Democracy Ancient and Modern*, 19; A. Saxonhouse, *Free Speech and Democracy in Ancient Athens* (Cambridge, UK: Cambridge University Press, 1996); R. K. Balot, *Greek Political Thought* (Malden, MA: Blackwell, 2006), 65-7; Ober, *Mass and Elite*,163-5.

men of that era as especially noteworthy defenders of democracy.[36] Most striking is the testimony of the Aristotelian *Athēnaiōn Politeia*.[37] According to this text, the Athenian political system had since Solon become gradually more democratic, albeit with occasional setbacks; but it reached new heights in 403/2, when the *dēmos* became fully authoritative (*kyrios*), and since then had only become more extreme.[38] This view is today regarded as "mistaken," [39] but one should perhaps hesitate to reject the view of any ancient author outright, and turning our attention from the assembly to the courts may help here. For the two most prominent changes in the fourth-century political system, according to this author, were the increasing use of the lot and transfers of power to the courts.[40] The former is interpreted today as an obviously democratic move; perhaps the latter should be understood that way as well.

In the second place, there is the history of the two late fifth-century coups. The first, in 411, was orchestrated by leading political figures in Athens and Samos, where the Athenian fleet was anchored, and took place against the backdrop of a campaign of terror

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[36] Aeschin. 2.177; Lycurg. 1.124-127; see also Aeschin. 3.192.

[37] Discussed more fully in the Introduction, pp. 26-31.

[38] Ps. Arist. *Ath. Pol.* 41.2.

[39] P. J. Rhodes, in Aristotle, *The Athenian Constitution*, rev. ed. (Harmondsworth: Penguin, 2002), 18, 85; Rhodes, "Athenian Democracy after 403"; P. J. Rhodes, *A Commentary on the Aristotelian Athenaiōn Politeia* (rev. ed., Oxford: Oxford University Press, 1993), 488.

[40] Rhodes, *Commentary*, 34 n.178, lists sixteen changes. Of these, four relate to the increased use of the lot (Ps. Arist. *Ath. Pol.* 54.3, 55.1, 56.4, 62.1), three to increases in the numbers participating in certain executive functions (51.3, 56.3, 61.1), three are miscellaneous (67.4 and 5, 53.4, 54.7, 60.2), and the remaining six cases all relate to the administration of justice: four to a transfer of power to the courts (45.1, 45.3, 49.3, 55.3), and two note an increase in the numbers participating in other forms of judicial activity (53.1, 55.4). See also Ps. Arist. *Ath. Pol.* 41.2, where the author exemplifies the *dēmos*'s new authority by the fact that even cases tried by the council now come to the courts.

that included the murder of several democratic politicians.[41] The second, in 404, began with the appointment of thirty prominent citizens, backed by Sparta, to construct a new law code for the city, and soon turned extremely violent.[42] Some fifteen hundred supporters of democracy--more than the Peloponnesians had killed in thirty years of warfare--were executed; many others fled.[43] The democrats regrouped, fought back, and recaptured the city within a few months, but the experience remained deeply traumatizing.[44] Now, it is surely right to interpret the bulk of the reforms[45] as a response to these calamities; but the view that the intention behind them was to restrict the capacity of the mass of Athenians to make "hasty decisions" would suggest that the majority of citizens in 410 and 403/2 held *themselves* responsible for these episodes, and there is not a shred of evidence for that. While it is true that both coups were initially legitimated by a vote of the assembly, it was widely agreed that the assembly had been forced by fear and deceit to vote against its wishes, not that it had made an "error" by willfully voting the wrong people into power.[46] Indeed, one of the fundamental tenets of Athenian democratic ideology was that the *dēmos* was always right, and that any fault, when things went wrong, lay not with the voters, but with the speakers who had misled

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[41] Thuc. 8.65-66, Ps. Arist. *Ath. Pol.* 29-33; see also Arist. *Pol.* 1304b10-15, Plut. *Alc.* 26.1, and Xen. *Hell.* 2.3.45.

[42] Xen. *Hell.* 2.3-4; Ps. Arist. *Ath. Pol.* 34-40.

[43] Aeschin. 2.77; Xen. *Hell.* 2.4.20.

[44] Dem. 24.57, 169; Andoc. 1.80; Lys. 12.21; Diod. 14.1-33.

[45] That is, all except the *graphē paranomōn*, which was introduced too early to be explained this way.

[46] Aeschin. 2.176; Ps. Arist. *Ath. Pol.* 29.1, 34.3; Lys. 12.72-75 and 12.90). The only hint of a contrary view that I have been able to find appears in Diod. 13.34, 36, on the 411 coup.

them. There is no doubt that in the case of the Four Hundred in 411, and the Thirty in 404, the blame was lodged firmly at the oligarchs' door.[47]

The case for "self-limitation" is thus faulty. More plausibly, the majority of voters in 410 and 403/2 wished to *strengthen* popular rule, in order to prevent an usurping elite from ever again gaining power through semi-legal means.[48] This intention may at first seem surprising, since the activity of the Athenian assembly has been so closely associated with the practice of democracy in Athens, on the basis of its openness to all. By contrast, a court case on a political charge could be decided by only 500 citizens, and a law enacted by only 500 *nomothetai*. Yet the seeming incongruity of favoring the courts over the assembly as a representative of the Athenian *dēmos* may simply indicate two differences between ancient and modern democratic thinking. First, an implicit assumption of modern democratic ideology is that size matters: all else being equal, the more people involved in making a given decision, the better. However, the Athenians do not seem to have thought this way. Judging from both their actions and their words, what they saw as most crucial to democracy was that final decision-making power should be in the hands of ordinary citizens, those undistinguished by wealth, birth, influence, political prowess, or any other exceptional feature, and that this power should be exercised securely. There was no requirement that all or even most citizens of this description needed to be involved in any given decision: indeed, in some circumstances that might be

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[47] Dem. 23.97; Thuc. 8.1; Ps. Arist. *Ath. Pol*. 28.3.

[48] Cf. C. Farrar, "Power to the People," in *Origins of Democracy in Ancient Greece* ed. K. Raaflaub, J. Ober and R. Wallace (Berkeley, CA: University of California Press, 2007), 177; Christ, *Litigious Athenian*, 32. The decree of Demophantos also supports this view. Enacted in 410, it allowed anyone attempting to suppress democracy to be killed on sight. See Lycurg. 1.124; Andoc. 1.96.

counter-productive.[49] Second, as we have seen, a common view in modern democratic ideology is that the popular will may sometimes need to be "checked" by essentially non-democratic courts in the interests of higher forms of law or justice. But in Athens, direct democratic control of the administration of justice--the "end of the line" in political terms--was regarded as an integral part of popular rule, and arguably more crucial to its preservation than popular control of policy-making. Moreover, both of these lessons were driven home by the events of the late fifth century, as the following pages will show.

The Assembly vs. the Courts I: Composition

The Athenian assembly's openness to all citizens is often regarded as its most democratic feature. There were limits: attendees had to be males over the age of eighteen,[50] and anyone convicted of certain moral offenses, such as neglect of parents or cowardice, or who was in debt to the state, was not allowed to speak.[51] But all who met these criteria--some thirty thousand people in the fourth century, more in most of the fifth[52]--were free to attend, speak, and vote. All they had to do was turn up at the Pnyx, the hill in the center

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[49] A striking example of this way of thinking appears in the speech "Against Alkibiades" found among the works of Andokides. Referring to ostracism, the practice of exiling individuals suspected of becoming too powerful following the vote of at least six thousand citizens, the author writes: "at a time like this, those who have political associates and confederates have an advantage over the rest, because the judges are not appointed by lot as in a court of law: in the present decision every member of the community has a voice" ([Andoc.] 4.4). The thought that "every member of the community" having a voice should be regarded as a *problem* in the Athenian system, because it disadvantaged those without political associates, is of course precisely the opposite of what a modern reader would expect.

[50] Ps. Arist. *Ath. Pol.* 42.1.

[51] Aeschin. 1.28; Andoc. 1.73.

[52] Hansen, *Athenian Democracy*, 90-4.

of Athens where meetings were usually held, before dawn on the relevant day. Regular sessions were advertised in advance; in emergencies, trumpeters were used to gather the populace.[53] The result was that each of at least forty meetings a year was attended by thousands of citizens, probably around six thousand.[54]

These numbers are certainly impressive. Yet there was an underlying problem. Although any citizen could, in theory, attend any meeting, it was impossible for *every* citizen to attend. The estimate of six thousand attendees is based in part on the size of the amphitheater on the Pnyx: it simply cannot have accommodated many more.[55] Consequently, no meeting could represent more than a fifth of the citizen body, and there was no way to ensure that this fifth was a fair sample of the population, that is, that it represented the entire citizen body equally. Indeed, the lack of formal restrictions on attendance, combined with an absolute physical limit, could easily reward organized factionalism.

The most amusing depiction of such manipulation is the opening scene of Aristophanes' *Assemblywomen* (c. 392). The transvestitory takeover of the assembly by Athens' leading ladies is, of course, fictional, but the plot is predicated on a genuine institutional vulnerability: if a large crowd arrived at the assembly before anyone else, other citizens would be unable to get in, and those present would be able to enact

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[53] Hansen, *Athenian Democracy*, 133; Dem. 18.169-70.

[54] Hansen, *Athenian Democracy*, 130-2. In the second half of the fourth century (probably between 338 and 330) the Pnyx was rebuilt and massively expanded. Hansen estimates that the new Pnyx could hold 13,800 comfortably (*Athenian Democracy*, 353-4). My interest is in the period before this expansion.

[55] Hansen, *Athenian Democracy*, 131.

whatever they pleased.[56] But real-life examples of similar distortions are not hard to find.[57] Potential agitators included the *hetaireiai* ("comradeships") of wealthy young men implicated in the mutilation of the Herms and the mocking of the Eleusinian Mysteries in 415: these had an important role in the coup of 411.[58] Another example is the gangs of "three hundred to do the shouting" that Demosthenes identified as part of the entourage of any effective politician.[59] A more *ad hoc* grouping appeared after the battle of Arginousai in 406, when hundreds of sailors drowned following an unexpected victory over the Peloponnesians. It was unclear whether the generals in overall authority, the captains of the ships sent to pick up the survivors and corpses, or the storm that had hindered the rescue should be held responsible for the deaths, but the captains managed to pin the blame on the generals in part by recruiting bereaved relatives to turn up at the assembly, begging for the generals to be punished.[60] The most serious example of such "stacking" occurred in 411, when the government of the Four Hundred was approved. This meeting was held at Kolonos, about six miles outside the city walls, thus disadvantaging not only those who lived in the city or in the Peiraios (the strongly democratic harbor-town), but also anyone who lacked his own shield and spear--i.e. anyone from the lowest property-

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[56] Ar. *Eccl*. 383.

[57] Some distorting effects were a standard feature of the political landscape: for instance, those who lived closest to the city were probably over-represented, as were peasants (as opposed to wage-earners). However, since these can be supposed to have affected both courts and assembly equally, they do not form part of my argument here. See further Todd, *Shape of Athenian Law*, 163, 167-8.

[58] Andoc. 2.8, Lys. 12.44, Thuc. 8.54. Cf. G. Calhoun, *The Athenian Clubs in Politics and Litigation* (Austin, TX: University of Texas Press, 1913).

[59] Dem. 2.29-30, 13.20.

[60] Xen. *Hell* 1.7.8; Hansen, *Athenian Democracy*, 284 with note 185.

class, over two-thirds of the citizen body--since the presence of Peloponnesian forces not far away at Dekeleia put attendees at risk of attack. Since many lower-class Athenians were away manning the fleet during this period, the number of democrats in attendance was further reduced, and the result was the abolition of democracy.[61] As this suggests, a key issue for democrats was simply getting sufficient numbers of the lowest property-class to show up to support the system that empowered them.[62] If they attended in proportion to their size in the population, they would easily outnumber any faction; if not, the elite's strengths in terms of wealth, birth, influence, political prowess, and leisure might easily be deployed against them.[63]

By contrast, the courts were significantly more representative of the *dēmos* in respect of their composition. First, judicial panels were considerably smaller: only two hundred *dikastai* were needed to judge private wrongs, and five hundred for public charges.[64] By the standard of modern juries, of course, these are large numbers; but the significant point is that the courts did not need to attract as *many* lower-class citizens as

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[61] Thuc. 8.67-9.

[62] Pl. *Prt*. 319d, Xen. *Mem*. 3.7.6, and Theophr. *Char.* 26.5 suggest that there was socio-economic diversity in the assembly. However, we lack evidence as to proportion, which is the key issue here.

[63] Presumably some elite citizens were genuine democrats: see e.g. Ps-Xen. 2.19. But it is striking how many leading figures in the 411 coup--almost all prominent politicians--had previously been believed to be committed democrats: see Thuc. 8.68; Andoc. 1.36.

[64] For the most important cases, multiples of these numbers were used. On the distinction between private and public charges in Athens (that is, *dikai* and *graphai*) see Todd, *Shape of Athenian Law*, 99-112; Hansen, *Athenian Democracy*, 192-3; R. Osborne, "Law in Action in Classical Athens," *Journal of Historical Studies* 105 (1985): 40-58.

the assembly, in absolute terms, in order to ensure that this part of the population was adequately represented.[65]

Second, the courts were staffed using random sampling, and the selection procedures became increasingly sophisticated over time. The first step was to get oneself listed on the annual judicial roll: this was limited to six thousand citizens in the fifth century (we lack evidence for the fourth), selected by lot at the beginning of the year.[66] The second was to turn up at the entrance to the courts at dawn whenever the courts were in session, and hope to be selected, again by lot, to judge that day.[67] Selection by lot was a pre-eminent marker of democracy in ancient Greece,[68] and it was brought to a high art in Athens' courts. To facilitate rapid and virtually incorruptible sortition, the Athenians built allotment-machines (*klēroteria*), which used white and black balls to choose or reject each citizen's name-plate (*pinakion*). By the time of the Aristotelian *Athēnaiōn Politeia*, the process included nine separate rounds of sortition, making it impossible to

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[65] The maximum number of *dikastai* that might be called on any one day was 5000 (ten panels of 500). However, the courts cannot have been filled to this capacity every day, because private cases, which were judged by a minimum of two hundred citizens, also had to be heard.

[66] Hansen, *Athenian Democracy*, 181-3.

[67] Actually, at least three different entry systems were used at different points in Athens' history, becoming progressively more sophisticated. The earliest that we know about appears in *Wasps* (425), and did not involve sortition at the entrance to the courts; rather, panels were established at the beginning of the year, and judges knew in advance which cases they would be hearing. This was open to corruption, as illustrated by Anytos' success in 409 at bribing an entire jury (Ps. Arist. *Ath. Pol.* 27.5, Diod. 13.64; see also Ps-Xen. 3.7). By the time of Aristophanes' *Assemblywomen* (c. 392), sortition at the door had been introduced, making this much harder. See E. S. Staveley, *Greek and Roman Voting and Elections* (Ithaca, NY: Cornell University Press, 1972), 61-3, for further details.

[68] Arist. *Pol.* 1294b8-10, 1303a15-20; cf. Eur. *Heracl.* 545.

know in advance who would hear any given case.[69] External manipulation of the voting body may not have been completely eradicated: there was some scope for the *pinakion*-sorter (himself randomly selected) to make the selection of particular individuals slightly more or less probable,[70] and what went on outside the courts could not, of course, be controlled.[71] But it was certainly harder to manipulate the composition of a judicial body than that of the assembly (or council), and the fact that the Athenians continued to refine selection procedures throughout the period suggests that they saw this as a priority.

Third, and perhaps most significant, lower-class citizens were ensured an adequate voice in the courts by the provision of pay. Both democracies and oligarchies made use of financial incentives: according to Aristotle, payment for participation was a standard democratic device, since it increased attendance by the poor, while oligarchies punished non-participants (all of whom were wealthy by definition) with a fine.[72] In Athens, payment was introduced in the assembly from the first decade of the fourth century; yet, strikingly, it was launched for *dikastai* some fifty years earlier.[73] Introduced by Perikles, apparently as a deliberate attempt to shore up support among the lower

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[69] See Ar. *Eccl*. 686. See also Ar. fr. 152, which suggests that *klēroteria* were introduced alongside random seating assignments in the council in 410/09. For a different interpretation of the courts' selection procedures, see V. Bers, "Just Rituals: Why the Rigmarole of Fourth-Century Athenian Lawcourts?" in *Polis & Politics*, ed. P. Flensted-Jensen, T. H. Nielsen and L. Rubinstein, 553-62, 2000, 553-62.

[70] S. Dow, "Aristotle, the *Klēroteria*, and the Courts,' *Harvard Studies in Classical Philology* 1 (1930): 31.

[71] See Aeschin. 3.1, Dem. 19.1 and Dem. 19.332.

[72] Arist. *Pol*. 1297a35-40 and 1300a1; cf. Plut. *Per*. 11.4.

[73] Assembly pay was introduced early in the fourth century at a rate of 1 obol per meeting, and soon reached 2 and then 3 obols (Ps. Arist. *Ath*. *Pol*. 41.3; see also Ar. *Eccl*. 289, 309-10). By the end of the democratic period it had been increased to 6 obols for an ordinary meeting and 9 for an *ekklēsia kyria* (Ps. Arist. *Ath*. *Pol*. 62.2; see Todd, *Shape of Athenian Law*, 172-3, on the possible timing).

classes, it seems to have had the expected effect: according to the Aristotelian *Athēnaiōn Politeia*, there was a noticeable decline in the quality of judicial personnel after this date, "because ordinary persons (*tōn tuchontōn*) always took more care than the respectable to cast lots for the duty".[74] By the mid-420s, the idea that most judges were primarily motivated by money formed a running jibe in the plays of Aristophanes.[75] Such evidence is tricky to interpret, of course, but caricatures have to bear some resemblance to reality in order to be amusing, and the view that the courts were dominated by the relatively poor seems likely, though it has been disputed.[76] Not only was this an easy way to make extra cash, but the introduction of pay for participation will have dishonored the office in the eyes of elite citizens.[77] If it was shameful to be put on a par with a "scrawny, unwashed" man in the normal course of things,[78] it was doubly so if the motive was assumed to be money. This view is supported by the political ambitions harbored, apparently, by elite young men, such as Alkibiades and Plato's brother Glaukon: they dream of shining as speakers before a vast audience in the assembly, not of queueing up

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[74] Ps. Arist. *Ath. Pol.* 27.4; cf. Plut. *Per.* 7.2-3.

[75] Ar. *Eq.* 255-7, 797, 804; Ar. *Vesp.* 251-2, 290-315; Ar. *Plut.* 277.

[76] M. M. Markle, "Jury Pay and Assembly Pay at Athens," *History of Political Thought* 6 (1985), 265-97, reprinted in *Athenian Democracy* ed. P. J. Rhodes, (Oxford: Oxford University Press, 2004), 95-131; S. C. Todd, "Lady Chatterley's Lover and the Attic Orators," *Journal of Hellenic Studies* 110 (1990): 146-173; *contra* Jones, *Athenian Democracy*, 36-7.

[77] See Arist. *NE* 1163b5-10.

[78] Theophr. *Char.* 26.5.

outside the courts to sit as one of several hundred judges, or even of speaking to those judges once assembled.[79]

These are the main arguments supporting the courts' claim to be a better representative of the *dēmos* with respect to composition. However, two further points should also be noted. First, participation in judicial bodies was restricted by age. Men under thirty were excluded, as they were from the council:[80] the most they could do was watch proceedings from the spectators' gallery.[81] On the modern conception of democracy, this would seem inherently anti-democratic; however, it may well have seemed democracy-enhancing to the Athenians, since young men were widely regarded as emotionally unstable and lacking the appropriate temperament to preserve majority rule.[82] Recent events supported this belief: the young were widely blamed for restarting the Peloponnesian War after the Peace of Nikias, which ran from 421 to 415;[83] for intimidating the populace by mutilating the Herms in 415;[84] for laying the groundwork for the oligarchical coup in 411;[85] and for supporting Kritias, the most extreme of the

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[79] Pl. *Alc*. 1 and 2, Xen. *Mem*. 3.6; cf. Plut. *Alc*. 10.2.

[80] Ps. Arist. *Ath*. *Pol*. 63.3.

[81] See further A. Lanni, "Spectator Sport or Serious Politics? Ὁι Περιεστηκότες and the Athenian Lawcourts." *Journal of Hellenic Studies* 117 (1997): 183-89.

[82] Hom. *Il*. 3.107-110; Eur. *Supp*. 230-7; Arist. *NE* 1128b15-20; Hyp. 5, col. 21.

[83] Plut. *Nic*. 11.2; Thuc. 6.12-13; Lycurg. fr. 1.

[84] Thuc. 6.28.

[85] Thuc. 8.65.

Thirty Tyrants.[86] By contrast, middle-aged and old men were regarded as level-headed[87] and especially staunch guardians of democracy.[88] Hence, it thus might well have seemed to a majority of Athenians that the rule of the *dēmos* would be better protected by keeping young men out of relatively small bodies such as the council and courts, where they could wield a destabilizing influence.

Finally, members of judicial panels, unlike assembly-goers, were bound by oath to vote conscientiously.[89] Oaths were regarded as a significant form of protection against corruption; taking them lightly was portrayed as a vice in Theophrastos's *Characters*,[90] and they had prominent political role: the reconciliation of Athens after the 404 civil war was founded on an oath, as was the accession of eighteen-year-olds to the citizen body and their reciprocal commitment to the *polis*.[91] In the courts, the fact that the *dikastai* had sworn to judge in accordance with the laws and their own best judgment was regularly brought to their attention, as was the perceived alignment between their interests, the laws, their oath, and democracy itself.[92] By contrast, the integrity of voters in the

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[86] Xen. *Hell*. 2.3.23.

[87] Aeschin. 1.24; Aeschin. 3.2; Hyp. fr. 14.

[88] Ar. *Vesp*. 223-8; Ar. *Ach*. 376.

[89] A possible version of the oath appears at Dem. 24.149. The standard reconstruction runs as follows: "I shall vote according to the laws and decrees of the Athenian *dēmos* and council, but concerning things about which there are no laws, I shall decide to the best of my judgment, neither with favor nor enmity." See Lanni, *Law and Justice*, 72, with citations. See also Chapter 4, p. 193.

[90] Theophr. *Char*. 6.2, 13.11; cf. Thuc. 5.21; Eur. *Supp*. 1229; Lycurg. 1.20; Aeschin. 3.208.

[91] Andoc. 1.9, 1.36, and 1.90-1; Xen. *Hell*. 2.4.42; Lycurg. 1.74 and 76; Ps. Arist. *Ath. Pol*. 42.1-2.

[92] Aeschin. 3.8; Aeschin. 3.233; Dem. 20.118; Dem. 18.217; Hyp. *Eux*. 40; Lys. 10.32.

assembly rested only on sacrifice and prayer. Demosthenes took it to be obvious that the public advantage was better served by sworn citizens than by those who were unsworn; hence, oath-taking was identified not as a way to restrict democracy but rather to strengthen it.[93]

The Assembly vs. the Courts II: Speaking

The second reason that the Athenian assembly is generally accounted highly democratic is that anyone who wished to could speak.[94] Once the customary sacrifice and prayers had been made, a herald announced the first item on the agenda and invited speakers to come forward.[95] Those willing made their way to the *bēma*, the speakers' platform at the front of the stage, and the speeches ran until nobody else wished to be heard, at which point any necessary vote would be taken.[96]

Like the assembly's openness to all, however, this seemingly democratic process had certain drawbacks. Just as the assembly could not include *all* citizens at any one time, the fact that *anyone* could step down to the *bēma* and address an audience of thousands did not mean that *everyone* could. Given the restrictions of time, temperament, rhetorical skill, and simply having something to say, only a tiny minority of citizens actually made

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[93] Dem. 24.78.

[94] Balot, *Greek Political Thought*, 62; Finley, *Democracy Ancient and Modern*, 19; I. Sluiter and R. M. Rosen eds, *Free Speech in Classical Antiquity* (Leiden and Boston: Brill, 2004).

[95] Hansen, *Athenian Democracy*, 141-2.

[96] Ar. *Ach*. 45; Aeschin. 1.22-24; Dem. 18.169-73.

use of their right to speak.[97] Hansen estimates that only around twenty to forty speakers were active at any one time.[98] A great deal of power to influence the votes of the citizen body was thus concentrated in the hands of very few individuals, with no way for their hearers to tell in advance if they were basically honest, predominantly self-serving, or absolutely treacherous, as the leaders in the 411 coup turned out to be, though they had long been regarded as committed democrats.[99] The fact that speakers were self-selected also raised problems. Some came forward because they had been appointed to a specific role, such as general, ambassador, treasurer, or architect;[100] but many did so because they sought honor on the public stage, or because they were pushing a private agenda, just as politicians do today--and this did not necessarily guarantee the best advice.

Some efforts were made to control the negative effects of unrestricted speech in the assembly. In 410, after the first oligarchical coup, a law was passed prohibiting those who had remained in the city under the Four Hundred from speaking in the assembly or

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[97] Cf. Plut. *Dem*. 6-8; Isoc. 12.10; Plut. *Alc*. 10.2.

[98] This is a contentious claim. It used to be accepted that very few people spoke, but recently it has been argued that the epigraphical evidence points in the other direction: see Osborne, *Athens and Athenian Democracy*, 5-7, with M. H. Hansen, "The Athenian 'Politicians,' 403-322," *Greek, Roman and Byzantine Studies* 24 (1983): 33-55. However, the addition of seventeen new names from the epigraphical evidence to the list of those who suggested motions strikes me as insignificant in the light of the size of the assembly and the time frame involved. It must also be remembered that Hansen defined *rhētores* to include many who did not actually speak in the assembly, but simply sponsored motions in the council, whereas for present purposes we must restrict ourselves solely to those who spoke in the assembly. Cf. Aeschin. 3.125, Ps. Arist. *Ath. Pol*. 29.1, and Dem. 22.36.

[99] Thuc. 8.68; cf. Andoc. 1.36.

[100] Pl. *Prt*. 319d.

council.[101] Moreover, by at least the later fourth century, it was possible to prevent some dubious characters from taking the stage through the process of *dokimasia*, a judicial screening designed to establish basic moral probity. Every citizen had to pass a test of this sort before taking up any responsible position (including sitting on the council), though the version applied (not consistently, it is true) to speakers was more extensive: it included questions about prostitution and corruption as well as citizenship and care for one's parents and the gods.[102] Some restrictions also applied to the content of speeches: for example, speakers were not allowed to speak off-topic, or on multiple topics at once, or on the same topic more than once per day. They were also prohibited from heckling or shouting down other speakers.[103] Evidently, the Athenians were concerned about the dangers of unscrupulous or abusive speakers, and with reason. Thucydides described Perikles's rhetorical gifts as a major factor in the Peloponnesian War, which turned out catastrophically for Athens.[104] Kleon's powers of persuasion almost led to the execution of hundreds of Mytilenaians.[105] Alkibiades restarted the war against the Peloponnesians by lying to the assembly.[106] Most of the leaders of both the 411 and 404 coups originally

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[101] Aeschin. 1.75. Note, however, that this law was apparently left out of the reconstituted law code in 403/2, presumably because it conflicted with the post-revolutionary amnesty and reconciliation process.

[102] Aeschin. 1.19-20, 28; see also Dem. 22.30-33.

[103] Aeschin. 1.35; cf. Dem. 24.13.

[104] Thuc. 1.29.1, 1.29.5, 1.31.1, 1.30.2, 1.127, 1.145, 2.59, and 2.65; cf. Ar. *Pax* 603-80 and Plut. *Per*. 8.4 and 15.4.

[105] Thuc. 3.49.

[106] Thuc. 5.43-5; Plut. *Alc*. 14; Diod. 13.69.

came to prominence through speech-making,[107] and the main speaker in favor of executing the generals after Arginousai turned out to have been bribed.[108] All in all, though equality of speech in the assembly was an improvement over allowing no one but the elite to speak, the assembly was far from a secure vehicle of popular rule, and the Athenians knew it.[109]

By contrast, though the courts could not avoid these problems altogether, it was possible to do more to limit their effects. First, those who were allowed to speak before judicial bodies had to be specified in advance. Usually, they included the prosecutor, defendant, and any witnesses; co-pleaders were also allowed, presumably to make up for the fact that not all citizens were equally able to speak well; indeed, Hypereides suggested that there was no custom in Athens more democratic than allowing citizens who were capable of public speaking to help those who were not.[110] Similarly, cases heard by the *nomothetai* included as speakers only the proposer of each new law or amendment and five people, elected beforehand, to speak against it. No one else could come forward, and this restricted the opportunity for *ad hoc* manipulation.[111]

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[107] Thuc. 8.68; cf. Lys. 13.9-10. The major exception is Antiphon, the "brains" behind the 411 coup, though not a public man himself; he was, however, notorious as a writer of speeches for others. See Ant. fr. B1.

[108] Xen. *Hell*. 1.7.8.

[109] See further Eur. *Med*. 580-5; Eur. *Supp*. 410; Ar. *Ach*. 376, 625-37; Aeschin. 3.220; Dem.5.12; Thuc. 7.8; Dem. 9.64; Dem. 22.30-33; Aeschin. 3.170.

[110] Hyp. 1.10 and 4.11.

[111] Dem. 24.23.

Second, each side in each case received an equal amount of time, controlled by water clocks.[112] Thus no speaker could monopolize the listeners' attention, and hearing speeches of equal length side by side will have helped the judges to compare them. No attempt was made to restrict the content of speeches; that would have derogated from the judges' authority to decide for themselves which arguments or items of evidence seemed most relevant.[113] This led to some complaints,[114] but the fact that the *dikastai* were under oath to judge the whole issue conscientiously was evidently deemed a sufficient form of protection.[115]

Finally, and most significant, the judges did not confer among themselves prior to reaching a verdict.[116] Once both sides of the case had been heard, they simply voted. This was no accident or oversight but standard practice across ancient Greek *poleis*: Aristotle reported that most legislators specifically *prohibited* joint discussion (*koinologountes*) among judges.[117] To do otherwise would have turned the judge into an "arbitrator," whereas *dikastai* were not meant to forge compromises or triangulate among competing views of each case but rather to reach their own personal decisions, uninfluenced by

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[112] Ar. *Ach*. 692; Ar. *Vesp*. 857. See further D. S. Allen, "A Schedule of Boundaries: An Exploration, Launched from the Water-Clock, of Athenian Time," *Greece & Rome* 43: 157-68.

[113] Different rules applied in the Court of the Areopagos and the maritime courts; see Lanni, *Law and Courts*, 75-115, 149-74.

[114] Lycurg. 1.11-12, Lys. 3.46, Arist. *Rhet*. 1354a.

[115] Though see also Dem. 23.95.

[116] Nor did they have the opportunity to confer with others, since no trial lasted more than a day. For an analysis of the lengths of a variety of cases, see MacDowell, *Law in Classical Athens*, 249-50.

[117] *Pol*. 1268b5-10.

anything other than the speeches that they had all just heard. Thus the possibility that some judges would be able to shape the votes of others through speech was eliminated, and this was a crucial feature of the classical Athenian political system. Undoubtedly it contrasts strongly with modern judicial practice, according to which each body of jurors--or at least a large majority--is supposed to reach a consensus decision following reasoned debate. It also poses a difficult problem for those who would make free speech the centerpiece of classical Athenian democracy. Nonetheless, judicial discussion was avoided in Athens as it was elsewhere.

This is not to suggest, of course, that judges in the Athenian courts were completely silent. What we might call "audience participation" during the presentation of cases was widespread.[118] However, such participation generally took the form of heckling or collective responses to brief questions posed by the speakers: it did not resemble modern judicial deliberation, and it is difficult to attribute this to anything other than a desire that the untrammeled, authentic voice of each judge should be equally represented in the final verdict.

The Assembly vs. the Courts III: Voting

The third reason that the Athenian assembly is generally deemed highly democratic is that all attendees could vote on every motion, simply by raising a hand; the majority

[118] Din. 1.41; Hyp. 1, fr. 2. See also V. Bers, "Dikastic Thorubos." In *Crux: Essays in Greek History*, ed. P. Cartledge and F. D. Harvey (London: Duckworth, 1985), 1-15.

opinion was then ascertained by "tellers" positioned throughout the group.[119] Very occasionally, votes were cast by secret ballot, but this was too time-consuming to be used regularly.[120] If the views of all present were to be taken into account, voting by hand was inevitable; yet this, too, caused problems.[121]

Some of these problems were logistical. When votes were close, it could be difficult to identify which side had a majority, thus raising the risk that a decision might be passed without proper approval: this was the case after the debate between Kleon and Diodotos on the future of Mytilene.[122] Sometimes it became too dark to see the voters, leading decisions to be postponed and providing an opportunity for canvassing and conspiracy in the interim: this occurred in relation to the case of the generals after the battle of Arginousai.[123] But the most significant issue was that public voting opened a path to intimidation and corruption on a massive scale.

The major problem here was clear. Especially in times of crisis, the fear of reprisals for voting the "wrong" way could easily encourage individuals to self-suppress and vote against their real wishes. One such example concerns the lack of support offered to Nikias when he opposed the invasion of Sicily in 415. According to Thucydides, since

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[119] M. H. Hansen, "How did the Athenian *Ecclēsia* Vote?" *Greek, Roman and Byzantine Studies* 18 (1977): 123-37. Cf. Ar. *Eccl*. 260-5.

[120] The major example is citizenship votes, but these were very rare.

[121] A conceivable alternative was the Spartan system of shouting, but that was even more open to distortion. See Staveley, *Voting and Elections*, 73-4.

[122] Thuc. 3.49.

[123] Xen. *Hell*. 7.6-7.

the elderly were sanguine, the young excited, and the great multitude excited by the prospect of profit and dominion, those who opposed the war held their peace, fearing that a contrary vote would seem disloyal to the state.[124] Plutarch added that the well-to-do were worried that they would be suspected of trying to avoid contributing to the war effort if they voted against it, so they held back.[125]

These instances of self-censorship from the Athenian elite may be regrettable, but they are minor compared with those which arose on the part of the *dēmos* out of fear of the elite. In 411, following the murder of several leading democratic politicians, no one voted against the proposal to establish the government of the Four Hundred. According to Thucydides, writing with unusual emotional energy, the audience at Kolonos was simply too terrified.[126] As Thucydides also emphasized, the fact that each individual among the *dēmos* was too afraid to come out openly against the proposals was a major factor in the oligarchs' success, since it led them all to overestimate the extent of the conspiracy against the democratic system.[127] As this suggests, a deep problem with open voting in Athens was that while the elite had many advantages--most important, access to weapons, supporters abroad, and money--the *only* advantage possessed by the lower classes was their numbers, and if they lacked a good sense of one another's views this advantage was lost. This phenomenon stymied opposition to the oligarchs right down to the final days of

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[124] Xen. *Hell*. 7.6-7.

[125] Plut. *Nic*. 12.2.

[126] Thuc. 8.68.

[127] Thuc. 8.66; cf. Andoc. 2.8.

the regime. Those who wished for a return to *dēmokratia* were too afraid to state it openly but instead suggested discreetly that they would prefer the rule of the "Five Thousand."[128] By contrast, a secret ballot earlier in the proceedings would have instructed all Athenians that opposition to oligarchy was actually widespread and boosted the will to fight against it. The situation in 404 was similar. Again the *dēmos*, "terrified" by the oligarchs' show of strength, were "compelled to dissolve the democracy through a show of hands".[129] Lysias described the choice faced by the voters as either to vote in favor of the oligarchs, or to take themselves off, "conscious at least of this, that they had voted no harm to the city."[130] After this, non-secret voting remained characteristic of the Thirty's rule. For example, shortly after they had taken power, they brought potential opponents to trial before the council rather than the courts and instructed the councillors to deposit their ballots on a table in front of the Thirty themselves. As Lysias asked: "What possible chance of escape had any of them?"[131]

The link between public voting and oligarchical capture was not unique to Athens. In Megara, an extreme oligarchy was established by the expedient of "compelling the *dēmos* to take an open vote" concerning the men who had cooperated with the Athenians.[132] Similarly, in Korkyra, the leaders of a coup in the council cemented their

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[128] Thuc. 5.92.

[129] Diod. 14.3.

[130] Lys. 12.72-75.

[131] Lys. 13.33-37; cf. Xen. *Hell*. 2.49.

[132] Thuc. 4.74.

authority by "compelling" the people to ratify their proposal.[133] In Katanaia, during the expedition to Sicily, Athenian soldiers were let into the town by their supporters during an assembly meeting and wandered around the *agora* in full view of the voters; unsurprisingly, partisans of the Syracusans "slipped away," leaving the remainder to vote for an alliance with Athens.[134] Conversely, it was obvious that a secret vote was more suitable when there was a genuine desire to ascertain each citizen's uncoerced will: the Akanthians, for example, took a secret vote in order to decide whether to revolt from Athenian rule.[135]

The huge democratic advantage possessed by the courts was thus the secret ballot. As with random sortition, the system was refined over time. During the fifth century each juror was allotted one voting token, which he deposited into one of two urns while feigning a deposit in the other.[136] By the late fourth century, however, each judge was given two separate ballots, both bronze discs, but one with a hole in the middle (for the plaintiff), the other without (for the defendant). Which disc had the hole was concealed when they were held between forefinger and thumb. Whichever reflected his decision on the case, the judge dropped into a bronze urn. The one he wished to discard went into a wooden one. His vote was thus completely private, and because judicial panels were so much smaller than assembly meetings, the process was neither too onerous to set up nor

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[133] Thuc. 3.70-1.

[134] Thuc. 6.51.

[135] Thuc. 4.88.

[136] Staveley, *Voting and Elections*, 96-7.

too time-consuming to complete. Every *dikastēs* could thus offer his genuine opinion in accordance with his own sense of the laws and of what was just, and the benefits of this were widely recognized. As Demosthenes observed, no suppliant could know the name of the judge who had granted his prayer,[137] thus protecting the judge from both reprisals and the corrupting influence of promised gifts. Additionally, since payment could be linked to proof of voting, this system ensured that the opinion of every judge had to be taken into account, whereas in the assembly participants could easily "slip out" before the vote if they deemed it prudent.[138]

The lack of retrospective personal accountability produced by secret voting caused some anxiety. Lykourgos admonished the judges not to forget that although their votes were secret, nothing was secret from the gods,[139] while Lysias asked his audience to imagine that the dead were observing their actions.[140] The fact that, in important political cases, fellow-citizens were also likely to enquire of judges how they had voted was also brought to their attention.[141] Most often, however, the freedom of the judges to vote as they pleased was treated in a positive light and contrasted favorably with the constraints felt by assemblygoers.[142] Making ordinary people fully, finally, and individually responsible for the administration of justice tasked them with a tremendous responsibility,

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[137] Dem. 19.239; cf. Aeschin. 3.233

[138] Ps. Arist. *Ath. Pol.* 68.

[139] Lycurg. 1.146.

[140] Lys. 12.100.

[141] Aeschin. 3.246.

[142] Lys. 12.90-1; Hyp. 2.5.

to be sure, but it also signified and secured the genuine rule of the Athenian *dēmos*, and this was regarded as the main reason to support it. Moreover, it represented ultimate political power, because the courts, in Athens--not only when they were reconsidering decisions made by the assembly, though most notably then--were the end of the line, in decision-making terms. As Demosthenes emphasized, there could be no appeal against the decision of an Athenian court.[143]

Conclusion

The Athenian assembly had several weaknesses that rendered it vulnerable to oligarchical capture. Being open to all but restricted in size, it did not always represent the mass of ordinary citizens adequately; the equal right to speech was used by only a few individuals, giving them disproportionate power; and open voting could lead to intimidation.

Yet despite these weaknesses, the assembly was a socially necessary institution. Open meetings were essential for organizing the *polis* militarily, and they also fulfilled a vital informational role. Open speaking was useful for bringing a variety of views to public attention and for providing an effective channel through which energetic individuals could make themselves useful; and even open voting was often an efficient way to gauge public opinion and establish legitimacy for the *polis*'s actions. Some such institution was thus both desirable and necessary, and indeed existed in every Greek

[143] Dem. 24.55.

polis, democratic or otherwise.[144] What was additionally desirable in a democracy, however, was to minimize the risks to democracy that this institution presented, if not by tightening controls on the assembly itself, then by making it subject to some other institution that was better able to represent the specific interests of the *dēmos*. In Athens, this institution was the courts.

Ever since the time of Solon, the administration of justice in Athens had been associated with the lower classes rather than the elite. The practice of using small samples of relatively underprivileged citizens as judges was already established and working well by the mid-fifth century; the risks associated with powerful rhetoric could be minimized; and voting could be made increasingly secure. Finally and most important, the courts were the ultimate decision-making body in the system. Every political community features an ultimate authority, from whose judgment there can be no appeal, and the rejection of whose judgment is rightly regarded as an attack on the political system itself. In Athens, this authority was the dikastic courts. They thus served as a powerful weapon for the defense of the entire democratic system.

The potential of this approach was first exemplified early in Athens' history by the practice of *euthuna*, the ethical and financial "audits," controlled by the courts, to which anyone in a position of power was routinely subjected, and second by establishing the right of appeal to the popular courts in every dispute, including those between magistrates

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[144] M. H. Hansen and T. H. Nielsen. *An Inventory of Archaic and Classical Poleis* (Oxford: Oxford University Press, 2004); Sealey, *Athenian Republic*, 93.

and ordinary citizens.[145] The introduction of the *graphē paranomōn* made the Athenians' commitment to the final authority of their courts incontrovertible, and the practical and ideological significance of this move in respect of *dēmokratia* is confirmed by the fact that in both 411 and 404, the oligarchs' first step was to abolish this measure.[146] The perceived superiority of the procedures used by the courts was then reaffirmed by the creation of the *nomothetai* in 403/2, whose composition and procedures mimicked those used in the courts proper. Yet even then, it was deemed most important not to undermine the ultimate authority of the *dikastai*. Though sessions of the *nomothetai* resembled those of a court, the power of these legislators was not allowed to derogate from the authority of the actual judges in the Athenian system: this was the meaning and purpose behind the introduction of the *graphē nomon mē epitēdeion theinai*.

To the extent that Mogens Hansen has always insisted on the significance of the political powers of the Athenian courts, especially in the fourth century, the evidence presented here suggests that he is absolutely right. Where there is room to differ with him is in relation to his supposition that these powers presented a limit on the rule of the *dēmos*, that is, on *dēmokratia* itself. On this point, Finley, Ober, and their supporters are on firmer ground. There was no reduction in the level of democracy in Athens in the late fifth century, at least according to the Athenians' conception of democracy. On the account given here, however, this argument does not go far enough. Not only was there no reduction in the level of democracy in this period, but the rule of the *dēmos* was

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[145] Ps. Arist. *Ath. Pol.* 9.1.

[146] Thuc. 8.67; Aeschin. 3.191; Dem. 24.154; Ps. Arist. *Ath. Pol.* 29.4.

actually strengthened by increasing the authority of the institution that was already regarded as the most specifically democratic in the *polis*: the courts.

This account invites a major reevaluation of Athenian democracy, since it suggests the existence of a significant gulf between what modern observers usually take to be democratic about the Athenian system and what the Athenians themselves did. This raises a great number of important issues; I close by briefly addressing two of the most interesting.

The first question concerns the meaning of "*dēmokratia*." We know that it implied "the rule of the *dēmos*," but how exactly did the *dēmos* rule? Evidently it was not as simple as opening up every instrument of governance to all. To be sure, that was tried initially, but as we have seen, it did not succeed in delivering secure popular control. Rather, other strategies were considerably more successful. First, random sampling, with relatively small sample sizes, proved to be as good or better from a democratic perspective than calling on a large number of citizens in an unrestricted way. This suggests a significant distinction between modern and ancient democracy: where modern democrats seek ideally to have *all* interested parties, or at least as many as possible, participate in decision-making, Athenian democrats came to value wide participation less than equal and effective representation. That is, they cared less that *every* citizen should (in theory, at least) participate than that *any* citizen should have an equal chance of being decisive in the political process. Second, adequate representation of the poor proved imperative, either in proportion to their numbers or in excess of them, to make up for the

fact that the elite possessed advantages that they lacked.[147] In Athens, the domination of the courts by the lower classes gave them final authority in political decision-making, even out of proportion to their numerical weight, and this kept the entire system working in their favor. Finally, and most strikingly, the Athenian experience suggests the significance for democracy of having ordinary citizens in control of the administration of justice. This not only allowed ordinary citizens to rule securely; it may also have facilitated the greater freedoms seen *elsewhere* in the political system. Arguably, with the courts as a supremely powerful and fully democratic backstop, ordinary Athenians could *afford* to allow energetic politicians significant leeway to lead in the assembly, without fearing that the ultimate authority of the *dēmos* might be imperiled.

This suggests a further difference between ancient and modern democratic practice. Since the birth of modern democracy, it has often been claimed that the seemingly superior "ancient liberty" of the Athenians was predicated on the existence of slavery, since this freed the *dēmos* from necessary labor, enabling them to spend more of their time on politics, and hence that the more limited popular participation allowed in modern democracy was a concession both necessary and humane.[148] This verdict on Athenian democracy has been disputed by subsequent studies,[149] but the evidence

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[147] There may be an analogy here between political practice in ancient Athens and the Rawlsian ideal of *maximin*, according to which decisions are made so as to benefit the worst off. See J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), 131-2. Cf. Balot, *Greek Political Thought*, 84-5.

[148] B. Constant, "The Liberty of Ancients Compared with that of Moderns" (1816), in *Political Writings*, ed. and trans. B. Fontana (Cambridge, UK; New York: Cambridge University Press, 1988), 307-28.

[149] E.g. E. M. Wood, *Peasant-Citizen and Slave: The Foundations of Athenian Democracy* (London: Verso, 1988).

presented here suggests a different enabling factor in the Athenian system: the democratic control of the courts. Not only did this allow the equal rights of attendance, speech and voting in the assembly (and council) to be exercised while minimizing their possible dangers; it also freed ordinary citizens from having to devote *too much* time to politics, without thereby relinquishing overall democratic control.

The second question this account raises concerns the concept of political representation. On the evidence presented here, the claim that modern democracies are "representative" while ancient democracies were "direct" seems misleading. Athenian democracy had numerous "representative" features, if we do not restrict the meaning of that term to the delegation of voting power by a constituency to an individual but keep in mind its other sense: to give an accurate sample or portrait. The courts were obviously representative, in that panels of several hundred citizens judged on behalf of the *polis*; but so, of course, was the assembly, though that fact is easily overlooked. Its six thousand attendees were no less "representative" of the *polis* than the hundreds who sat in the courts, though it could often be less accurate in expressing the popular will. The form of representation used in Athens, the selection of a representative sample, is perfectly familiar to modern political science and proved to be an effective way of creating and protecting popular rule in Athens. It would be worth exploring how far it might also be used to benefit modern democratic politics.[150]

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[150] An inspiring starting-point is E. Callenbach and M. Phillips, *A Citizen Legislature* (Berkeley, CA: Banyan Tree Books, 1985), repub. with K. Sutherland, *A People's Parliament* (Exeter, UK: Imprint Academic, 2008).

Finally, the failure of the epithets "direct" and "representative" to capture the difference between ancient and modern democracy suggests that an alternative characterization may be helpful. This article proposes that the preeminent difference between Athenian democracy and its modern counterparts lay in its use of the courts, rather than a legislative assembly, as the chief vehicle of popular rule. If a new terminological distinction can help us to make sense of this difference, we might do worse than to opt for the term "dikastic"--in contradistinction from "ekklesiastic" or "assembly-centered"--to describe the Athenian mode of *dēmokratia*, after the mass of *dikastai*, or citizen-judges, who sat at its apex.

CHAPTER FOUR

Plato and the Construction of Justice

In the study of Plato two points are so obvious as to seem hardly worth restating. One is the special place of justice in the Platonic canon. As Eric Havelock observed in 1978, Plato composed several dialogues dedicated to the topic of a single virtue, but only justice received the honor of a treatise in ten books: the *Republic*, or "On Justice" (*Peri tou dikaiou*), as it was subtitled by its perspicacious first editors.[1] Justice also features prominently in other texts, such as the *Euthyphro*, where it is paired with (and eventually submerges) holiness as the fundamental principle regulating man's relations with the gods, and the *Theaetetus*, an inquiry into the nature of knowledge trained specifically on the question of what is just. Recently, the literal centrality of justice in Plato's writings has been intriguingly demonstrated by Jay Kennedy, who has amassed considerable evidence that Plato's works are structured like a twelve-note musical scale, with "positive" concepts appearing at harmonic intervals and "negative" concepts at discordant ones. Among the many striking results of this investigation is the discovery that the cluster "philosophy, justice and god" recurs at the exact center of many Platonic texts.[2]

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[1] E. Havelock, *The Greek Concept of Justice* (Cambridge MA: Harvard University Press, 1978), 308. See also E. Havelock, "*Dikaiosunē*," *Phoenix* 23 (1969): 49-70.

[2] J. B. Kennedy, "Plato's Forms, Pythagorean Mathematics, and Stichometry," *Apeiron* 43 (2010): 10-13. See further J. B. Kennedy, *The Musical Structure of Plato's Dialogues* (Durham, UK: Acumen, 2011).

If justice was in some sense Plato's lodestar, then Athenian democracy was the port from which he was sailing, and this is the other obvious feature of his philosophical project. Athens is the target of explicit criticism in the *Protagoras* and the *Laws*, but all Plato's writings are shot through with at least implicit resistance to the kind of democratic norms and ideals that most contemporary Athenians took for granted.[3] The trial and eventual execution of Sokrates in 399 provides an obvious occasion for this in the *Euthyphro*, *Apology*, *Crito*, and *Phaedo*, but the perils of Athenian-style majoritarianism are also clearly in view in the *Gorgias*, *Theaetetus* and *Republic*. Emile Faguet characterized this antagonism and its effects in the strongest possible terms: "Sokrates's death inspired all Plato's hatreds. And his hatreds inspired all his ideas ... The foundation of [Plato's] politics is nothing other than a horror of the Athenians."[4] Others are charier of treating Plato's writings as "intellectual biography."[5] Nonetheless, Plato's alienation from the conventions of his native city is an unmistakable force in his work.[6]

These points--Plato's preoccupation with justice and his hostility to Athens--are obvious and well-recognized, yet they are seldom drawn together. Plato's theoretical engagement with the conception of justice is not normally read as a direct political

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[3] *Prt*. 319b-320c; *Lg*. 693d.

[4] Translation mine. Quoted in H. G. Robertson, "Plato as a Critic of Athens," *Classical Weekly* 29 (1936): 145.

[5] E.g. J. Annas, "Politics in Plato's *Republic*: His and Ours," *Apeiron* 33 (2000): 322.

[6] As argued by e.g. J. Ober, *Political Dissent in Democratic Athens* (Princeton, NJ: Princeton University Press, 1998), 157-247; S. Monoson, *Plato's Democratic Entanglements* (Princeton, NJ: Princeton University Press, 2000).

intervention against Athenian democracy.[7] Indeed, for most of the last century Plato has been regarded as uninterested in practical affairs, although the opposite position was once well respected and has recently been revived in a novel form by Danielle Allen.[8] More commonly, Plato's engagement with politics "on the ground" has been deemed to be co-extensive with the institutional proposals put forward in the *Republic* and *Laws* (possibly to be supplemented by the evidence of the dubiously authored "Seventh Letter")--which is to say not very extensive at all, since those proposals are widely (and surely correctly) regarded as flights of more or less utopian fancy designed to serve particular philosophical ends rather than as serious recommendations for reform.[9]

Yet Plato's concrete institutional proposals may be the wrong place to look for evidence of his political activism. The real story lies elsewhere, in his sustained if often unremarked attention to democratic judicial activity.[10] Assembly and council meetings appear frequently in Plato's works, but these appearances are swamped by the steady stream of references to law courts, which in Athens as in many other *poleis* were staffed by vast panels of ordinary citizens who possessed absolute discretion over verdicts with

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[7] J. Dunn, *Democracy: A History* (New York: Atlantic Monthly Press, 2005), 42, apparently presupposes a dichotomy between these two tasks.

[8] D. S. Allen, *Why Plato Wrote* (Malden, MA: Blackwell, 2010). Cf. Robertson, "Plato as a Critic," 151; W. Agard, *What Democracy Meant to the Greeks* (Chapel Hill, 1942), 207; W. Jaeger, *Paideia* (Oxford: Oxford University Press, 1944).

[9] See e.g. P. Cartledge, *Ancient Greek Political Thought in Practice* (Cambridge, UK: Cambridge University Press, 2009), 21; Annas, "Politics in Plato's *Republic*," 303-10, 323; E. M. Wood, *Citizens to Lords* (London: Verso, 2008), 69. Cf. M. Schofield, "Approaching the *Republic*," in the *Cambridge Companion to Greek and Roman Political Thought* (Cambridge, UK: Cambridge University Press, 2000), 199-200.

[10] As noted by G. Morrow, "Plato and the Rule of Law," *The Philosophical Review* 50 (1941): 108-10.

no possibility of appeal.[11] Given the iconic significance of Sokrates' trial in Plato's writings this propensity may seem unsurprising, but his references to judicial practice far exceed what one might expect even in the light of that fateful event. Courtrooms, juries, forensic oratory, criminal charges, possible penalties and final verdicts appear repeatedly throughout Plato's works, whether the topic is ostensibly judicatory or not.[12]

Sometimes these references are easy to miss. "Are we to fix the limits of truth by the clock?" asks Sokrates in the *Theaetetus*, which is unlikely to be understood as a nod to judicial practice unless the reader knows that speakers in Athens' courts (and no other political bodies) were subject to strict time limits.[13] Other allusions may be mistaken for more generic complaints. The line "Are we to count names like votes and determine their correctness this way?" in the *Cratylus* might well be interpreted as voicing skepticism towards majoritarianism in general, unless it is known that *counting* votes (as opposed to estimating a majority from raised hands) was a distinctively judicial practice.[14] But even when several political institutions are discussed, the courts typically come first. The *Gorgias*, for example, begins by identifying the province of rhetoric as "the courts,

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[11] M. H. Hansen, *Athenian Democracy in the Age of Demosthenes* (Norman, OK: University of Oklahoma Press, 1999), 178-224. A. Lanni, *Law and Justice in the Courts of Classical Athens* (Cambridge, UK: Cambridge University Press, 2006), 31-40.

[12] E.g. Pl. *Tht*. 148b-c, 173c, 174c; *Phil*. 20e, 51a, 52e, 60c, 64d, 67d; *Smp*. 189c, 215b, 219c; *Phdr.* 266de; *Hipparch*. 225c; *Lch*. 196b; *Lys*. 222e; *Prt*. 337de; *Criti*. 106b. Cf. A. Bloom on *Resp*. 336c-38b: "The whole scene is a parody of judicial procedures, in which the defendant proposes his own punishment in opposition to the accuser..." *The Republic of Plato* (New York: Basic Books, 1991), 444.

[13] Pl. *Tht*. 158e, trans. M. J. Levett, rev. M. Burnyeat (in Cooper ed., *Complete Works*). Cf. D. S. Allen, "A Schedule of Boundaries: An Exploration, Launched from the Water-Clock, of Athenian Time," *Greece & Rome* 43 (1996): 157-68.

[14] Pl. *Cra*. 437d. See also E. S. Staveley, *Greek and Roman Voting and Elections* (Ithaca, NY: Cornell University Press, 1972), 73-100.

council, assembly and other places," shortly thereafter abbreviates this to "the courts and other places," and ends with an exclusive focus on judicial activity.[15] Another sign of the pre-eminence of adjudication in the Platonic world-view appears in the *Cleitophon*, where Sokrates is portrayed as alleging that the art of politics is identical to judging and justice.[16] This may seem an extreme position, but it finds some support in the *Laws*, for example in the suggestions that a *polis* "would be no *polis* if it had no law-courts properly established" and that those who lack the right to participate in judging are not wrong to feel that they have no share in the *polis* at all.[17]

In the context of ancient Greek politics, such claims are less surprising than they may seem today. As Robert Bonner argued, judicial activity played a much more significant role in Greek *poleis* than it does in modern communities. Characteristically, when the maker of Achilles' shield in the *Iliad* wished to ornament it with "typical scenes of Greek public life," he chose as one of them "not an executive council in session or an assembly legislating, but a group of elders administering justice in the marketplace."[18] At the other end of the period, the early Stoic philosopher Kleanthes revealingly defined the term "*polis*" as "a habitation where people seek refuge for the purposes of the

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[15] Pl. *Grg*. 452e; 454b, 454e, 455a; 466a, 471e-72c, 480b-481a, 486, 508b, 508d, 511b-d, 515e, 516d, 519b, 521e, 522a-27e. Cf. *Hipp. Maj*. 304a, 304d; *Euthyd*. 290a; *Phdr*. 261b; *Tht*. 174c.

[16] Pl. *Clit*. 408b.

[17] Pl. *Lg*. 766d, 768d.

[18] R. J. Bonner, *Aspects of Athenian Democracy* (Berkeley, CA: University of California Press, 1933), 25. Also discussed by M. Gagarin, "Early Greek Law," in the *Cambridge Companion to Ancient Greek Law* (Cambridge, UK: Cambridge University Press, 2005), 83.

administration of justice." [19]As Bonner noted, "the first concern of Greeks in politics was always justice." [20] Concomitantly, the creation and enactment of legislation played a significantly smaller part in political life than it does now.[21]

Judicial activity played an especially significant role in the development of democracy.[22] According to Aristotle, it was through its power in the courts that the Athenian *dēmos* gained control over the entire political system,[23] and to the end of the democratic period the orators regularly referred to the courts as the bulwark of democracy[24]--even complaining that the Athenians' dependence on their courts went too far and was hamstringing their preparedness for war against Philip of Macedon.[25] Most crucially, the Athenians regularly used their courts to discipline politicians. As in any democracy, there was a certain symbiosis between the personal power of political leaders and their capacity to please a majority of voters, but in Athens ordinary voters retained final authority over their leaders through their control of the administration of justice. As Sokrates observed in the *Gorgias*, the careers of Kimon, Themistokles and Miltiades all

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[19] Stob. *Flor*. 2.7.iii (Wachsmuth 208). Quoted in M. H. Hansen and T. Nielsen, *An Inventory of Archaic and Classical Poleis* (Oxford: Oxford University Press, 2004), 39.

[20] Bonner, *Aspects*, 25.

[21] Cf. G. Grote, *History of Greece*, vol. 1 (London: John Murray, 1853), 82: "Zeus or the king is a judge, not a law-maker; he issues decrees or special orders to settle particular disputes, or to restrain particular men..." See also Morrow, "Plato and the Rule of Law," 125.

[22] See Introduction, pp. 20-42.

[23] Arist. *Pol*. 1274a; cf. Ps. Arist. *Ath*. *Pol*. 9.1-2.

[24] Cf. Dem. 57.56: "The courts are the highest organ of the democracy."

[25] Dem. 13.16.

came to an end through judicial punishment at the hands of the *dēmos*, following trials for various forms of corruption.[26] The careers of many other politicians from Perikles to Demosthenes were likewise damaged.[27] In conjunction with the circumstances of Sokrates' death, it seems reasonable that Plato should have focused significant attention on judicial activity, not only because the courts were an effective symbol of the political power of ordinary citizens but also because they did, in reality, often mark the end of the political line.

This essay aims to draw together Plato's theoretical interest in the concept of justice and his aversion to Athenian democracy. It will suggest that Plato's works can fruitfully be read as an attempt to undermine Athenian-style democratic practices by intervening against the standard Athenian conception of justice--a conception that Plato rightly considered the democracy's main intellectual foundation and institutional support.[28] This intervention is most visible in the clash between Thrasymachos and Sokrates in Book One of the *Republic*, but the import of that clash is frequently obscured in English because the conceptual work that Plato is doing disappears when (as often happens) the Greek terms "*to dikaion*," "what is right," and *dikaiosynē*, "righteousness," are both translated by the single English word "justice." Actually, the fact that it is even

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[26] Pl. *Grg*. 516d.

[27] See R. Knox, "So Mischievous a Beast: The Athenian *Dēmos* and its Treatment of Politicians," *Greece & Rome* 32 (1985): 132-61.

[28] Cf. H. T. Wade-Gery, "The Judicial Treaty with Phaselis and the History of the Athenian Courts," *Essays in Greek History* (Oxford: Blackwell, 1958), 196-7: "After 462, Athenian justice was irrevocably unlearned and had the virtues and vices of such. To Plato the vices were most apparent and this is one main cause of his deep quarrel with democracy."

possible to use one English word to denote these two concepts--the first a judgment made by an agent, the second a quality of the agent herself--may well be an effect of Plato's intervention in this field. The consequences for the modern conceptualization of justice in relation to politics and democracy have been profound.

From "To Dikaion" to "Dikaiosynē"

The argument between Thrasymachos and Sokrates in Book One of the *Republic* is one of the most familiar scenes in all philosophy.[29] After listening for some time to the conversation between Sokrates and his companions on the theme of justice, Thrasymachos demands that Sokrates say what he himself thinks justice is.[30] Sokrates, apparently alarmed by Thrasymachos's vehemence, begs his indulgence if the company has erred in their discussion, and likens searching for justice to searching for gold--a lengthy and arduous business.[31] Thrasymachos is then asked to give his own definition, and does so: justice is "nothing other than the advantage of the stronger." [32]Under pressure from Sokrates, he later produces a second definition: justice is "the good of another, the advantage of the stronger and the ruler, and harmful to the one who obeys

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[29] Useful recent discussions of this scene include C. Nederman, "Giving Thrasymachus His Due," *Polis* 24 (2007): 26-42; D. Novitsky, "Thrasymachus and the Relativity of Justice," *Polis* 26 (2009): 11-30; W. Welton, "Thrasymachus vs. Socrates: What Counts as a Good Answer to the Question: What is Justice?" *Apeiron* 39 (2006): 293-317.

[30] *Resp*. 336b-d. In this paragraph I follow the translation of G. M. Grube, ed. C. M. C. Reeve (Indianapolis, IN: Hackett, 1997).

[31] *Resp*. 336e.

[32] *Resp*. 338c.

and serves."[33] In the face of continued challenges, Thrasymachos is eventually brought to blush at the perceived inadequacy of these formulations and effectively drops out of the dialogue.[34] The book closes with Sokrates musing regretfully on his continued ignorance: "for when I don't know what justice is, I'll hardly know whether it is a kind of virtue or not, or whether a person who has it is happy or unhappy." [35]

Sketched in this way, the debate between Thrasymachos and Sokrates seems straightforward. The philosophical claims that arise in the course of Sokrates' interrogation of Thrasymachos may be complex, but the subject of the discussion is clear: they are talking about the nature of justice. Yet if we inquire after the Greek word that lies behind the English translation "justice" here, the picture becomes considerably more complicated, for two different terms are actually in play.

The first, "*to dikaion*," is what Thrasymachos originally wants Sokrates to define and is the subject of his own two definitions.[36] The second, "*dikaiosynē*," is what Sokrates likens to gold--and what, in Book Two, is established as the object of investigation in the rest of the *Republic*.[37] These terms are often treated as though they are synonymous (as in the translation of Grube followed above), but there are good

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[33] *Resp*. 343c.

[34] *Resp*. 350d.

[35] *Resp*. 354c.

[36] As noted by M. Schofield, "Approaching the Republic," in the *Cambridge Companion to Greek and Roman Political Thought*, ed. C. Rowe and M. Schofield (Cambridge, UK: Cambridge University Press, 2000), 204.

[37] *Resp*. 357d.

reasons to think that they are not. For one thing, Aristotle, in the *Rhetoric*, includes "*dikaiosynē*" and "*to dikaion*" as separate entries in his list of human goods (although, confusingly, "justice" is often used to translate both terms in that context as well).[38] For another, Diogenes Laertios tells us that Aristotle wrote separate treatises on both "*dikaiosynē*" and "*ta dikaia*" (the plural of "*to dikaion*").[39]

This evidence from one of Plato's students is enough to recommend caution, and a broader examination of the two terms confirms that they denote two distinct concepts. The notion expressed by "*to dikaion*" is as old as extant Greek literature: it appears twice in the *Odyssey*, for instance, counterposed first with violence, and then with the maltreatment of guests.[40] Another relatively early appearance (c. 500-525) is epigraphical: a bronze plaque laying out rights of pasturage for a newly settled Lokrian community decrees that in the absence of family members closer than brothers who can inherit the right, men may pasture "according to what is just" (*ka to dikaion*).[41] As these

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[38] Arist. *Rhet*. 1362b. J. H. Freese translates: "To enumerate them one by one, the following things must necessarily be good...Justice (*dikaiosynē*), courage, self-control...for they are virtues of the soul (*aretai psychēs*)...Lastly, justice (*to dikaion*), since it is expedient in general for the common weal (*sympheron gar ti koinē estin*)" (Cambridge, MA: Harvard University Press, 1926). H. Lawson-Tancred translates both "*dikaiosynē*" and "*to dikaion*" as "justice" in this passage, identifying them as a "virtue of the soul" and "a kind of communal expediency" respectively (London: Penguin, 1991, 92-3). Note that Aristotle's definition of "*to dikaion*," "a kind of advantage with respect to the community" (my translation) is not all that different from Thrasymachos's, though this is not obvious from either of the above translations.

[39] *Peri Dikaiosynēs*, Diog. Laert. 5.22; *Peri Dikaiōn*, Diog. Laert. 5.24. R. D. Hicks translates these as "Of Justice" and "Of Just Actions" respectively (Cambridge, MA: Harvard University Press, 1972).

[40] Hom. *Od*. 20.322-3, 21.311. Cf. E. Pattaro, *The Law and the Right* (Dordrecht: Springer, 2005), 293-4.

[41] Trans. C. Fornara, *Archaic Times to the End of the Peloponnesian War* (Baltimore, MD: Johns Hopkins University Press, 1977), §33. Original in R. Meiggs and D. Lewis, *A Selection of Greek Historical Inscriptions*, rev. ed. (Oxford: Clarendon Press, 1988), §13. Cf. F. D. Miller, Jr., "Aristotle's Philosophy of Law," in F. D. Miller, Jr., and C.-A. Biondi, eds., *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* (Dordrecht: Springer, 2007), 103.

examples suggest, "*to dikaion*" can denote either an act or an outcome, a form of action or state of affairs: either way it is something external to any given individual and is open to the observation of the community at large.[42] As such, acceptable translations include "the just thing" or "what is just," although as Enrico Pattaro has recently argued, the best translation may be "what is right" or "what is as it ought to be," in line with the significance of the root term "*dikē*" (which he translates "right").[43] Crucially, "*to dikaion*" cannot denote a person: a person can certainly be "*dikaios*" (or "*dikaia*" if female), but the neuter adjective "*dikaion*" has to refer to a thing, and the addition of the article "*to*" produces the idea "thing in general"--hence "what is right" in an impersonal sense.[44]

"*Dikaiosynē*," by contrast, is a much younger term, with a significantly different meaning, at least prior to its appearance in Plato.[45] The first time we encounter it is in the work of Herodotos, written in the last half of the fifth century, and its use there indicates that like other Greek terms ending "*-osynē*" (such as "*sōphrosynē*," "temperance," or "*polupragmosynē*," "busybodiness"), it denotes a personal quality of an agent--that is, an internal property, a virtue or a vice, in this case a virtue. Often the agent in question is a king: "*dikaiosynē*" is the attribute that enables him to judge (and hence rule) soundly.[46]

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[42] "*To dikaion*" is often discussed as though it denoted an act only: see e.g. G. Hourani, "Thrasymachos's Definition of Justice in the *Republic*," *Phronesis* 7 (1962): 110, where it is glossed as "a loose word for just action." However, as the Lokrian example shows, it can also refer to a particular state of affairs, or outcome.

[43] Pattaro, *Law and the Right*, 269-94.

[44] H. W. Smyth, *Greek Grammar* (Cambridge, MA: Harvard University Press 1984 [1920]), §1023, §1153a.

[45] Havelock, "*Dikaiosynē*," 49-51.

[46] Hdt. 1.95-8, 2.141-152, 7.163-4.

However, the same term can also be used to describe the quality of fair-mindedness and trustworthiness in non-ruling individuals.[47] In either case, "righteousness" is the best English translation, since that term too signifies an internal, personal quality, rather than a form of action or state of affairs.[48] Though it is not certain, moreover, it is likely that the term was coined not long before we first see it. While other "*-osynē*" words appear regularly during this period, "*dikaiosynē*" appears just nine times before the end of the fifth century and only becomes common currency by the end of the second decade of the fourth century. Consequently, Havelock suggests reasonably that it may have originated no earlier than 450, "to express a notion that had not hitherto demanded it." [49]

Accordingly, although the English term "justice" can be used to indicate either "what is right" or "righteousness," and "justice" is often used to translate both "*to dikaion*" and "*dikaiosynē*," the terms "*to dikaion*" and "*dikaiosynē*" are not themselves synonymous.[50] And this matters a great deal in the *Republic*, because it suggests that Thrasymachos and Sokrates are interested in two distinct questions. Thrasymachos is interested in the question of "what is right" (*to dikaion*), which calls for a description of an external, impersonal reality: an act, outcome, or state of affairs. Like this question,

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[47] Hdt. 6.73, 6.85-7, 7.44-52.

[48] On "*dikaiosynē*" as a personal quality (i.e. "justice" in the sense of a virtue), see e.g. D. Wolfsdorf, "*Dikaiosynē* and *Hosiotēs* at *Prot*. 320-1," *Apeiron* 35 (2002): 191; J. Annas, *An Introduction to Plato's Republic* (Oxford: Clarendon Press, 1981), 11-12. As Annas notes, "morality" is also a possible translation; however, the correspondence between the root "*dik-*" in Greek and "right-" in English makes the former preferable. See Pattaro, *Law and the Right*, 274-5, with Havelock, *Greek Concept of Justice*, 230-1.

[49] Havelock, "*Dikaiosynē*," 51.

[50] Bloom's translation is scrupulous in this respect, consistently rendering "*to dikaion*" as "the just" and "*dikaiosynē*" as "justice."

both his proffered definitions, "the advantage (*to sympheron*) of the stronger" and "the good (*to agathon*) of another," also feature the substantive use of the neuter adjective and thus make sense linguistically as equivalents, whatever their possible philosophical demerits. However, the terms "*to sympheron*" and "*to agathon*" make much less sense as responses to the question "what is righteousness" (*dikaiosynē*)--which is the question that Sokrates wishes to pursue. This second question calls for a description of the internal state of an agent, rather than an external "thing in general." And such a description is exactly what we get in the rest of the *Republic,* as Sokrates investigates the soul of a righteous individual. Of course, since the state of an individual's soul is difficult to discern from the outside, Sokrates's account of "*dikaiosynē*" includes a description of the activity by which a righteous soul may be known: hence at the end of Book Four, Plato offers a definition of "*dikaiosynē*" in this form, as "doing one's own business."[51] But though "*dikaiosynē*" can be manifested in action, Sokrates's righteous man is righteous both when acting and not. "Doing one's own business" on Plato's account refers first and foremost to the activity of the three parts of the soul, not to the activity of the agent whose soul it is.[52] Righteousness is thus for Plato a permanent psychic state, as opposed, for example, to a human practice (as Aristotle would later characterize it).[53] "*To dikaion*," by contrast, necessarily presupposes action, either directly (by itself denoting an act) or indirectly (as the origin of an outcome that is *dikaion*).

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[51] Pl. *Resp*. 443d.

[52] Pl. *Resp*. 443d.

[53] Pl. *Resp*. 435c-444e.

The difference between Thrasymachos's and Sokrates's accounts is often described as the difference between an act-centered and an agent-centered conception of justice. As the foregoing analysis suggests, this formulation certainly gets at something valuable.[54] Nonetheless, it may be better to avoid it, since it is not at all evident that there exists in these pages a single concept "justice" that the objects of Thrasymachos's and Sokrates's concern can be said to be different conceptions *of*. At this stage in the *Republic*, all we have is one term denoting "what is right" and another denoting "righteousness," and as yet no very clear account of their relationship. Another fact is also plain, and requires elucidation: Plato evidently wishes to turn from discussing the first concept to discussing the second. Why?

Two clues in the text may help to answer this question. One is that, as the contributions of Glaukon and Adeimantos at the beginning of Book Two are designed to suggest (a retelling of myth of Gyges and a sketch of the lives of a righteous man deemed unrighteous and an unrighteous man deemed righteous), he who possesses Sokratic *dikaiosynē* will possess it whether or not anyone else recognizes that this is the case.[55] In this sense, Plato employs "*dikaiosynē*" as a non-evaluative term: that is, it does not express a judgment on the part of any particular agent. It simply denotes an enduring personal attribute, like having blue eyes. "*To dikaion*," however, both within and outside Plato's works, cannot avoid having evaluative force. Its counterposition to violence, maltreatment of guests and wrongful pasturage expresses a judgment on these activities--

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[54] See Annas, *Introduction to Plato's Republic*, 153-69.

[55] Pl. *Resp*. 357a-367e.

and this presupposes the existence of an agent doing the judging. A version of this appears in Thrasymachos's proffered definitions. "What is right," on his account, is right *in relation to* a particular agent: to the stronger, or to another, or to a ruler, a tyrant, an oligarchical elite, or the *dēmos*. What is important here is not who precisely this agent is but that the concept "*to dikaion*" presumes the existence of an agent in relation to whom a given action or state of affairs can be said to be *dikaion*.[56] In the examples from the *Odyssey*, the relevant agent is Penelope and her community; in the Lokrian decree, it is the Lokrians. The right of this agent to effect his or her judgment is not questioned, and the term "*to dikaion*" does not itself tell us anything about the agent involved. Nonetheless, "*to dikaion*" does not only denote a given action or state of affairs: it is itself a judgment on them, which presupposes the existence of a judge.

The other clue appears at the beginning of Book One, when the theme of right action is canvassed for the first time. The conversation begins with the elderly Kephalos worrying, now that he is approaching death, about being required to "pay the penalty" (*didonai dikēn*) in the world below for misdeeds he has committed in this one.[57] The question that he asks is "Have I ever wronged anyone (*ēdikēsen*)?" [58]This leads him to rattle off a list of possible wrongs: cheating another man, "even unintentionally," or

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[56] The equivalence is not exact, since as emerges in response to Cleitophon, Thrasymachos ultimately resists the notion that the ruling agent is himself the final judge of what is right (Pl. *Resp*. 340b-341a). Nonetheless, Thrasymachos's rulers do function as standards or measures of *to dikaion*, which is the key concept explored in this chapter.

[57] Pl. *Resp*. 330d-e.

[58] Pl. *Resp*. 330e.

playing him false, or remaining in debt to a god for a sacrifice or to a man for money.[59] Kephalos is not interested in the question of whether these actions *are* in fact right or wrong, or what the basis for making a judgment of that sort might be: that is, he is not interested in investigating the concept of "right" itself. He cares only about whether *he* has performed these actions: that is, whether or not he possesses "*dikaiosynē*," "righteousness." Sokrates confirms that this is indeed the object of Kephalos's anxiety with his first comment. "But this very thing, *dikaiosynē*, is it really truth-telling and paying back what one has received?" [60]This is the first time that the term "*dikaiosynē*" has appeared in the dialogue. But Sokrates is correct to identify "righteousness," not *what* is right, as the thing on Kephalos's mind.

As the discussion moves away from Kephalos's personal predicament and towards a more general account of *dikaiosynē*, it is easy to lose sight of its origins in this passage. But these origins are highly revealing. As we have seen, Plato is not interested in categorizing different kinds of actions: he wants to consider agents in themselves. Specifically, the Kephalos episode indicates that Plato's interest lies in *judging* these agents. Kephalos expects to be held accountable after death for misdeeds that he may not, at this stage, even know he has committed, and it is this perspective--that of the omniscient, immortal judge--that is developed in the rest of the dialogue. Contrast this with Thrasymachos's approach to defining "*to dikaion*," which incorporates the perspective of a human agent at its foundation. Thrasymachos is not particularly

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[59] Pl. *Resp*. 331b.

[60] Pl. *Resp*. 331c.

interested in the identity of this agent: he seeks only to give a general account of *to dikaion* in relation to it. Certainly no judgment is offered as to the suitability of that agent to function as a standard of right in the first place.

Accordingly, if Thrasymachos can be taken to represent a standard approach to the question of "what is right," we can say that Plato effectively turns the tables on it. Rather than take the relevant human agent for granted and seek to describe only the kinds of acts or outcomes that can be said to be *dikaion* in relation to it, Plato, in effect, turns to the ruling agent and asks: "What *is* this agent's relationship to what is right?" This not only marks a shift from an "act-centered" approach to an "agent-centered" one: it specifically opens up a space from which the ruling agent, whose own character and habits are not scrutinized under the Thrasymachean approach, can be judged and found wanting. And this is a *political* move because the question "what is right," that is, "what is '*to dikaion*'," is the question that ordinary Athenian citizens asked themselves every day in the popular courts when judging the disputes that came before them; whereas the question "what is righteousness," that is, "what is '*dikaiosynē*'," is a lever that Plato can use to deny their right to sit in the seat of judgment at all.

Deciding "To Dikaion" in Classical Athens

In Book One, Chapter 3, of the *Rhetoric*, Aristotle suggests a distinction between two political questions that between them more or less carved up the entire field of ancient political thought and practice.[61] The distinction emerges in the course of his analysis of

[61] Arist. *Rhet*. 1358a-59a.

three kinds of oratory: advisory (*symbouleutikon*), judicial (*dikanikon*), and "exhibitive" (*epideictic*). The last of the three involves the assignment of praise and blame in any context and has no necessary political connotation. The first two, however, correspond to essential political categories. At issue in advisory oratory is what is advantageous (*to sympheron*) versus what is harmful (*to blaberon*). In judicial oratory, the issue is what is just (*to dikaion*) versus what is unjust (*to adikon*). On Aristotle's view, moreover, these are not merely two distinct questions: they also fall to two distinct institutions to decide. Deciding what is *sympheron* is the task of the assembly; deciding what is *dikaion* is the task of the courts.[62]

In classical democratic Athens, what was *dikaion* was decided democratically, by taking the majority view of a large number of ordinary citizens, preselected to act as judges, as the authoritative verdict of the *polis*, following a public trial in which speeches were heard from both sides.[63] Athens was not alone in choosing to decide disputes this way; nor, in all likelihood, was the mode of reasoning about "*to dikaion*" that appears in our Athenian sources unique to Athens.[64] Where Athens stands out is in the quality of evidence that we have relating to judicial decision-making by its citizens, and in the

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[62] Aristotle does not deny that questions of "right" will sometimes be discussed in the assembly, or of "advantage" in court. But he does deny that these considerations are part of the main point. "An advisory orator, although he often sacrifices everything else, will never admit that he is recommending what is inexpedient or dissuading from what is useful; but often he is quite indifferent about showing that the enslavement of neighboring peoples, even if they have done no harm, is not an act of injustice." Similarly, "a man on trial does not always deny that an act has been committed or damage inflicted by him, but he will never admit that the act is unjust; for otherwise a trial would be unnecessary" (Arist. *Rhet*. 1358b).

[63] Hansen, *Athenian Democracy*, 178-224. Lanni, *Law and Justice*, 31-40.

[64] See E. Robinson, *Democracy Beyond Athens* (Cambridge, UK: Cambridge University Press, 2011); Hansen and Nielsen, *Inventory*.

significance of this activity for the history of political thought. On both these counts, classical Athens punches well above its weight.

The basic question decided by judges in the popular Athenian courts (*dikastēria*) was whether or not the defendant deserved punishment for a specified act.[65] At Athens, as often elsewhere, this question was broken down into two parts: first, whether or not some form of punishment was deserved (i.e. whether the defendant should be convicted or acquitted of the charge), and, second, what this punishment should be. In some cases, penalties were fixed by law: for example, the third conviction for proposing an illegal measure in the assembly or council led automatically to loss of citizenship.[66] More commonly, however, once the defendant's conviction had been announced, the prosecutor and defendant in turn proposed what they thought would be a just punishment, and the judges had to choose (they were not allowed to split the difference).[67] In terms of "*to dikaion*," then, resolving a dispute in the Athenian popular courts involved making two distinct judgments: first, whether the defendant's actions had been *dikaia* or *adika*, right or wrong; and second, if wrong, what ought to be done to rectify the situation, that is, how best to re-establish *to dikaion* in the eyes of the community.[68]

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[65] On punishment and its significance in classical Athens, see D. S. Allen, *The World of Prometheus: The Politics of Punishing in Classical Athens* (Princeton, NJ: Princeton University Press, 2000).

[66] Hyp. 4.11-12.

[67] Hansen, *Athenian Democracy*, 202-3.

[68] See e.g. Dem. 20.119: "Is it right (*dikaion*), Athenians, to honor a benefactor? Yes. Well then, is it right (*dikaion*) to allow a man to keep what has once been given him? Yes. Then act on these principles..." Or Dem. 21.21: "Include all offenses in one sweeping penalty: whatever you consider just (*dikaion*)." Cf. Lys. 3.46, 13.97, 14.47, 19.67.

In making these judgments, Athenian judges were subject to two forms of guidance. The first was the dikastic oath. This oath was taken annually by every citizen who wished to be listed on the judicial roll for the year, and no one who had not taken the oath was allowed to act as a judge. There has been some dispute as to the exact content of the oath,[69] but at a minimum it included the following four pledges: first, to vote in accordance with the laws and decrees of the Athenian *dēmos*;[70] second, to vote only about matters pertaining to the charge;[71] third, to listen to both sides impartially;[72] and fourth, to judge (*dikazein*) with one's "most righteous" judgment (*dikaiotatē gnōmē*).[73] Finally, the oath-taker called on Zeus, Apollo and Demeter to witness his oath, and invoked a curse on himself (and his household) should he break it.[74]

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[69] The lengthy version given at Dem. 24.149-51 was inserted by a later editor and is believed to contain several extraneous clauses. See Hansen, *Athenian Democracy*, 182, with citations.

[70] Aeschin. 3.6; Ant. 5.7; Dem. 20.118.

[71] Aeschin. 1.154; Dem. 45.50.

[72] Aeschin. 2.1; Dem. 18.2; Isoc. 15.21.

[73] Dem. 23.96; 57.93. Adapted from E. Harris, "The Rule of Law in Athenian Democracy. Reflections on the Judicial Oath," *Ethics & Politics* 9 (2007): 57. The standard reconstruction runs as follows: "I shall vote according to the laws and decrees of the Athenian people and the Council of the Five Hundred, but concerning the things about which there are no laws, I shall decide to the best of my judgment, neither with favor nor enmity. I shall judge concerning those things which are at issue and shall listen impartially to both the accusation and defense. I swear these things by Zeus, by Apollo, by Demeter. May there be many blessings on me if I keep my oath, but if I break it may there be destruction on me and my family" (Fränkel, 1878, trans. J. F. Cronin 1936; quoted in full in A. C. Scafuro, *The Forensic Stage: Settling Disputes in Greco-Roman New Comedy* [Cambridge, UK: Cambridge University Press, 1997], 50, and in part in Hansen, *Athenian Democracy*, 182). An alternative reconstruction may be found in R. J. Bonner, *Lawyers and Litigants in Ancient Athens* (Chicago: University of Chicago Press, 1927), 73.

[74] Hansen, *Athenian Democracy*, 182-3. Cf. R. J. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle* (Chicago, IL: University of Chicago Press, 1938), 152-6.

The second form of guidance was the speeches given in court. Since judges were not required to have any prior knowledge of cases or of potentially relevant laws or decrees, all the material on which their decisions were to be based had to be provided by the litigants themselves during the trial.[75] And the content of the litigants' speeches depended entirely on what they believed would sway the opinion of the judges: they were free to use the time allotted to them in any way they chose.[76] Inevitably, this meant that speakers presented what Adriaan Lanni has called a "wide-angle" view of the case.[77] This might include the background to the dispute, including any previous legal actions;[78] any extenuating circumstances or aggravating factors;[79] attacks on the character of the opposing party, along with that of his ancestors, family, friends, and associates;[80] discourses on one's own (and one's family's) excellent reputation and history of service

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[75] For discussion of the various protagonists in an Athenian trial (litigants, including sycophants, advocates, speech-writers and witnesses), see S. C. Todd, *The Shape of Athenian Law* (Oxford: Oxford University Press), 91-7.

[76] However, they might be open to charges of false witness or subornation of perjury if anyone wished to press them. See R. Osborne, "Law in Action in Classical Athens," *Journal of Hellenic Studies* (105): 40-58, esp. 57-8.

[77] Lanni, *Law and Justice*, 8, citing K. L. Scheppele, "Foreword: Telling Stories," *Michigan Law Review* 87 (1989): 2096. Cf. C. Carey, *Trials from Classical Athens* (London: Routledge, 1997), 18: "Whereas most modern systems surround the lawsuit with artificial rules and barriers designed to treat the individual case in isolation, the Athenians viewed the trial within the lives of the parties, the judges, and the community as a whole."

[78] Is. 1.17, 4,19, 6.51; Dem. 53. Cf. the discussion in Lanni, *Law and Justice*, 46-8.

[79] Ant. 4.1.6, 4.3.2; Dem. 54.10.

[80] Andoc. 1.100; Lys. 14.25-26; Lys. 30.2; Aeschin.1.153, 1.179, 3.170; Is. 5.46, 8.40; Din. 2.8-13. Cf. Hyp. 4.32.

to the *polis*;[81] and emotional appeals to the judges to consider the effects of their verdict, including bringing weeping children up onto the platform to elicit maximum pity from the judges.[82] Speakers also commonly quoted laws and decrees that they believed to be relevant[83] (although not always the law under which the charge had been brought),[84] discussed decisions given in similar cases,[85] and quoted lines of poetry that they felt provided useful instruction.[86] All these elements were presented in the same light as "evidence" for the judges to consider.[87] But what the judges themselves took to be relevant to their decision was left entirely up to them. Once both sides of the case had been heard and each side had had the chance to respond to the claims made by the opposing party, the judges simply lined up to cast their ballots on the first question before them, i.e. for conviction or acquittal. They neither discussed the case among themselves nor left any record, apart from the vote itself, of what they had found to be persuasive.

This approach to adjudication has traditionally been viewed with extreme skepticism. The evaluation of Henry Maine, first published in 1861, remains

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[81] Dem. 36.54-55; Hyp. 1.14-18. Character evidence is the most common form of "extra-legal" argumentation found in our extant popular court speeches. Lanni (*Law and Justice*, 60) counts that it features in seventy out of our eighty-seven surviving examples.

[82] Lys. 20.34. Cf. Ar. *Vesp*. 562-70.

[83] Aeschin. 1.20-35; Hyp. 3.13-19.

[84] Lys. 30; Hyp. 3; Dem. 54.

[85] Dem. 21.71-6; cf. Lys. 1.34-6, 14.4.

[86] Lyc. 1.100, 103, 107; Aeschin. 1.148-53.

[87] On the classification of laws as "evidence," see Arist. *Rhet*. 1355b. Cf. Todd, *Shape of Athenian Law*, 58-9, with A. R. W. Harrison, *The Law of Athens: Procedure* (Oxford: Oxford University Press, 1971), 134-5.

paradigmatic: "The Greek intellect, with all its mobility and elasticity, was quite unable to confine itself within the strait waistcoat of a legal formula...questions of pure law were constantly argued on every consideration which could possibly influence the mind of the judges. No durable system of jurisprudence could be produced in this way."[88] Lofberg, in 1917, agreed that "a startling amount of all kinds of irrelevant matter was brought into nearly every case."[89] Bonner, a decade later, judiciously drew attention to the more sympathetic account given by Grote,[90] but even he decreed that Grote had gone "too far" and pointed approvingly to the vigorous strictures of B. B. Rogers, who in the introduction to his translation of Aristophanes' *Wasps* had stated, rather downrightly:

> I must record my opinion as an English lawyer, that it would be difficult to devise a judicial system less adapted to the due administration of justice. A large assembly can rarely if ever form a fit tribunal for ascertaining facts or deciding questions of law. Its members lose their sense of individual responsibility to a great extent, and it is apt to degenerate into a mere mob, open to all the influences and liable to be swayed by all the passions which stir and agitate popular meetings.[91]

More recent studies, such as those by Danielle Allen and Adriaan Lanni, have succeeded in showing that the Athenian approach to adjudication at least made sense in its own terms: it was not an anomaly in an otherwise essentially modern legal system.[92] Others, such as Edward Harris, have sought to show that Athenian judges took the

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[88] H. S. Maine, *Ancient Law* (London: John Murray, 1920), 81.

[89] J. O. Lofberg, *Sycophancy in Athens* (Chicago: Chicago University Press, 1917), 12.

[90] Grote, *History of Greece*, vol. 5, 237.

[91] Quoted Bonner, *Lawyers and Litigants*, 1927, 89-90.

[92] Allen, *World of Prometheus*, esp. 168-96; Lanni, *Law and Justice*, 41-74.

constraints of the rule of law more seriously than has been supposed.[93] Yet however we evaluate the Athenian system, one point is clear: Athenian *dikastai* had absolute discretion over their verdicts, both as to what the verdict should be (what we might call a first-order decision) and how it should be reached (a second-order decision).

To be sure, the dikastic oath required that judges judge in accordance with the laws and decrees of the *polis*, but since every judge was free to decide for himself how the laws and decrees applied to any particular case, this effectively left all options open.[94] Equally, though precedents were sometimes cited, there was no requirement that they be followed. Prosecuting Aristokrates on a charge of illegal proposal in 352, Demosthenes readily admitted that similar proposals had previously been allowed. The key question, he argued, was not whether such things *had* happened, but whether they *ought* to have happened. "Do not let them tell you that those old decrees were upheld by other juries," he urged his listeners: "ask them to satisfy you that their plea for this decree is fairer than ours." Failing that, he stated, "I do not think that you ought to give greater weight to delusions of others than to your own judgment."[95] And the judges' power to stick to their own judgment was protected by the strongest possible safeguards. In a political system notorious for holding its officers to account, only judges and assemblygoers were left

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[93] E.g. Harris, "Rule of Law."

[94] That is, both potential verdicts remained open, along with any number of ways of arriving at them. See further Todd, *Shape of Athenian Law*, 49-63.

[95] Dem. 23.98.

unaccountable for their decisions.[96] Judges were also considerably better protected than assemblygoers from pressure to justify themselves informally: the lack of discussion among judges, the secret ballot, and the fact that decisions could not be appealed[97] meant that whatever considerations each judge took to be dispositive remained an entirely private matter.

Such judicial discretion provokes an obvious anxiety. What if judges came up with the wrong verdict? What if innocent individuals were punished for crimes they had not committed, purely on account of the ignorance and prejudices of the judges? In the context of classical Athens, this anxiety is often expressed in the form of a specific question: What about Sokrates? Even those sympathetic to the Athenian mode of adjudication readily describe his execution as an "outrage."[98] Was not his death a direct result of the Athenians' unlearned, populist, and discretionary approach to judicial decision-making?

An important clarification is necessary here. Athenian judges were surprisingly seldom asked to decide the facts of a case: the facts were usually agreed by both sides. Their task was interpretative. In effect, they had to decide if the actions of the defendant had been *dikaia* or *adika*, just or unjust, and this complicates the notion of a "wrong"

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[96] See further M. Landauer, "*Parrhēsia* and the *Dēmos Tyrannos*: Frank Speech, Flattery and Accountability in Democratic Athens," *History of Political Thought* 33 (2012): 185-208.

[97] Though see Osborne, "Law in Action," 52.

[98] Lanni, *Law and Justice*, 1. Those less sympathetic describe it as "judicial murder": e.g. Dunn, *Democracy: A History*, 43, 198; Robertson, "Plato as a Critic," 149.

verdict considerably.[99] For example, when Leokrates was accused of treason by Lykourgos in 330, the relevant fact--that Leokrates had left Athens after the battle of Chaironeia eight years earlier, when the citizenry had been asked to stay in the *polis* to defend it against any further attack--was not disputed. It was admitted that Leokrates had gone abroad with his family and that he had spent the intervening years working overseas as a corn merchant.[100] What the judges had to decide was whether or not this amounted to treason, which was a question of interpretation rather than fact. Or take a case of illegal proposal: the fact that a given defendant had *made* the proposal in question was never at issue--that was a matter of public record. The judges' task was to decide whether the proposal had been *paranomōn*, or "beyond the laws," which was, again, an interpretative task.

Something similar can be said about the charges against Sokrates.[101] Sokrates was accused of impiety (*asēbeia*) for not believing in the gods worshipped by the rest of the *polis* and for corrupting the youth (perhaps a separate charge, perhaps part of the same charge).[102] But not even Plato suggests that Sokrates did *not* hold heterodox religious beliefs. Indeed, his mention of Sokrates' *daimon* and the fact that he leaves open the

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[99] See Arist. *Rhet*. 1354a: "The only business of the litigant is to prove that the fact in question is or is not so, that it has happened or not; whether it is important or unimportant, just (*dikaion*) or unjust (*adikon*), in all cases in which the legislator has not laid down a ruling, is a matter for the dikast himself to decide..." (trans. Freese). Cf. Pl. *Euthphr*. 8b-e; Pl. *Ap*. 18a.

[100] Lyc. 1.55, 59.

[101] R. Bauman, *Political Trials in Ancient Greece* (London: Routledge, 1990), 107.

[102] Bauman, *Political Trials*, 106-7.

possibility that Sokrates was a monotheist rather confirms the case.[103] Equally, it was common knowledge that Sokrates was happy to impart his views to whichever young men cared to listen, and that he did this for free.[104] The question for the judges was whether or not this behavior was impious. A relatively narrow majority decided that it was.[105]

It is true that not all cases in Athens followed this pattern. Sometimes the facts were in dispute, and then the judges' task was trickier: they had to decide who was lying.[106] But most of our surviving cases do conform to this model, and in large part this is because of another frequently noticed aspect of Athenian laws: their vagueness. In a modern legal setting, when faced with a question such as "was this act treason?", "is this proposal illegal?" or "is this teaching impious?", the obvious first step would be to look up the definitions of "treason," "illegality" and "impiety" given in the laws and see if the defendant's actions fell under any of the relevant categories. If they clearly did (or did not), one might want to argue that the verdict was (or should be) a foregone conclusion: as a matter of *fact*, one might be tempted to say, the defendant had (or had not) committed exactly the kind of act named in the law and was thus liable to punishment (or

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[103] Pl. *Ap*. 31d. Cf. T. Samaras. "Who Believes in Sokrates' Innocence?" *Polis* 24 (2007): 5; M. Burnyeat, "The Impiety of Socrates," *Ancient Philosophy* 17 (1997): 4.

[104] See also D. Cohen, *Law, Violence, and Community in Classical Athens* (Cambridge, UK: Cambridge University Press, 1995), 189-90.

[105] According to Plato's *Apology*, if only thirty judges had voted the other way, Sokrates would not have been convicted. Assuming a panel of five hundred judges, then (the minimum necessary to judge a *graphē* or public charge), the numbers must have been 281 votes against the defendant versus 220 for. Cf. Bauman, *Political Trials*, 170-1.

[106] As in e.g. Aeschines' prosecution of Demosthenes on the embassy (Aeschin. 1, Dem. 19).

acquittal), regardless of the wider circumstances of the case. But this step was not available in Athens. Athenian laws were famously unspecific: to borrow the terminology of Robin Osborne, they had an "open texture."[107] Generally, as Lanni writes, they simply stated "the name of the offense, the procedure for bringing the suit under the law, and in some cases the prescribed penalty"; they did not "define the crime or describe the essential characteristics of behavior governed by the law."[108] The law of Kannonos is a typical example. "If anyone wrongs (*adikei*) the people (*dēmos*) of Athens, then that man, while chained up, is to be tried before the people, and if he is found guilty, he is to be killed by being thrown into a pit and his money confiscated and a tithe given to the goddess."[109] Exactly what "wronging the people" meant in this context was not specified: that was left to the judges to decide. And the same was true of almost every other wrong prohibited in Athenian law.[110] What "treason," "illegality" or "impiety" meant was a question for judges, not law-makers, to answer.[111]

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[107] Osborne, "Law in Action," 43-4. Originally H. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 119, 121. See also Cohen, *Law, Violence and Community*, 189; M. Christ, *The Litigious Athenian* (Baltimore, MD: Johns Hopkins University Press, 1998), 25.

[108] Lanni, *Law and Justice*, 67-8.

[109] Xen. *Hell*. 1.7.20. Also quoted Lanni, *Law and Justice*, 68.

[110] Cf. Arist. *Rhet*. 1374a8. An exception is laws relating to family and religion, which were often more substantive in character. See C. Carey, "The Shape of Athenian Laws," *Classical Quarterly* 48 (1998): 93-109.

[111] Aischines suggested intriguingly that co-speakers (in this case, Demosthenes) ought to be disallowed in cases of *graphē paranomōn* on the specific basis that in such cases, "the question of right (*to dikaion*) involved is not an indefinite one (*aoristos*, "indeterminate"), but is defined by your own laws...in indictments for illegal motions there lies ready to our hand as a rule of justice (*kanōn tou dikaiou*) this tablet, containing the measure proposed and the laws which it transgresses." The defendant could therefore "show that these agreed with each other" and then "take his seat" (Aeschin. 3.199-200). Of course, this merely underscores the point that "*to dikaion*" was normally assumed to be indeterminate.

On one view, this vagueness was a major weakness in the Athenian legal system. In the words of Moses Finley, the judges "had too much latitude, in the sense that they could not only decide on a man's guilt but could also define the crime he had committed." Finley added: "When impiety--and this is only an example--is a catch basin, no man is safe."[112] It may be natural to worry that virtually any act might be defined as criminal on this basis. But the possibility that a term such as "impiety" might function as a "catch basin" directs us to think harder about the ways that words acquire and hold onto meaning--and this in turn raises the possibility that the standard Athenian approach to adjudication may not have been quite the recipe for injustice that many have feared.

Arguably, there is a deep analogy between the conventional Athenian conception of "what is right" (*to dikaion*), as revealed in the practices of their popular courts, and an account of *language* that is widely accepted today. The Athenians seem to have assumed that "what is right" is intersubjectively constituted, in the same way as the meaning of any term. That is, they seem to have imagined that there is no "external" or "objective" right answer to the question of whether any given act is *dikaion* or *adikon*, beyond the answer given by the community itself. The only available measure, or standard, for such an answer was thus other members of the same community, and for this reason the decision of a sufficiently representative panel of Athenian citizens could not be "wrong."

To clarify this argument in the linguistic context, consider the word "treason." It would make no sense to claim that "treason" has an objective meaning independent of the

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[112] M. I. Finley, "Socrates and Athens," in *Aspects of Antiquity: Discoveries and Controversies* (New York: Viking, 1968), 72.

way that it is used by the community of English speakers. If that were the case, languages could never evolve, and of course they do. Equally, however, it would make no sense to claim that the meaning of "treason" is wholly subjective, that is, that it can mean one thing for me--"betraying one's country," say--and something else completely for you--"bananas"--with no way to decide which is a better definition. If *that* were the case, all communication would be impossible.[113] A more plausible account starts and finishes at the level of the linguistic community. The meaning of any given term is intersubjectively constructed, through its use by members of this group over time: it is produced, defined, sustained and changed exclusively in relation to the group itself.[114] Accordingly, if one wants to know the meaning of the term "treason," there is nothing for it but to see how it is used by members of the linguistic community in question. And one could not take a single example of its use as sufficient indication, since there is bound to be some disagreement, difference of emphasis, and downright confusion as to possible meanings among various group members. But, given a sufficiently large sample, one would expect to see convergence on a few particular notions, and these notions would form the only right answer available as to what the word actually meant. There is simply no other standard by which to ascertain the meaning of any given word.

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[113] Cf. L. Wittgenstein, *Philosophical Investigations* (London: Blackwell, 2001), §243, where he asks the reader to imagine a particular kind of language: "The words of this language are to refer to what can be known only to the speaker; to his immediate, private, sensations. So another cannot understand the language." The impossibility of this "private language" is explored in §§244-71.

[114] In this sense the "whole" is necessarily prior to the "part," to adopt a formulation of Aristotle (*Pol.* 1253a20).

Arguably, the Athenians conceived the question of "what is right" in the popular courts in a similar way. The question of whether a defendant deserved punishment for a given act was not, for them, one that had an "objectively" right answer, to be deduced either from the laws themselves or in some other way. But equally, they did not think that "what is right" in any particular case was fully subjective, that is, one thing for one citizen and another for another, with no way of choosing sensibly between them. Rather, both the actions and the ideas of the ancient Athenians suggest that, in the normal run of things, they took "what is right" to be intersubjectively constituted: both diachronically, in the sense that the idea of "*to dikaion*" held by each member of the community was tested and refined by his interactions with the rest of the community over time, and synchronically, in the sense that every verdict was a snapshot of the views of a random sample of the community at a particular moment.

Importantly, moreover, it was taken for granted that there would be disagreement over what was *dikaion* in any particular case. Indeed, the *absence* of disagreement was treated as a sign of a frivolous lawsuit: in public cases, prosecutors who failed to win at least a fifth of the judges' votes were punished with a heavy fine.[115] But this merely suggests the significance, on this conception of "*to dikaion*," of not taking the view of any single citizen or small group as decisive, but rather of canvassing the views of a large sample, and the larger the better if a case was particularly important or controversial. And this is exactly what the Athenians did. For cases involving large sums of money, or that

[115] See E. M. Harris, "The Penalty for Frivolous Prosecutions in Athenian Law," *Dikē* 2 (1999): 123-42, with citations.

were especially significant for other reasons, the Athenians doubled (or tripled) the number of judges required to hear the case.[116] It is difficult to attribute this to any reason other than the desire to minimize the chances of getting a freak result. They seem to have aimed to represent as closely as they could the view of the whole community on the matter, congruent with the limitations of space and expense (since judges were paid for their time). There was simply no other way to ascertain what the right verdict should be.

There is an obvious affinity between the conception of "what is right" sketched here and the philosophy of Protagoras, represented by the line "Man (*ho anthrōpos*) is the measure (*metron*) of all things: of those which are, that they are, and of those which are not, that they are not."[117] Moreover, although Plato repeatedly construes this claim as though it referred to a *single* man,[118] thus making Protagoras open to charges of both subjectivism ("all appearances exist") and relativism ("what appears to you is true for you")[119]--and although modern scholars usually follow Plato on the identity of the subject in this line, though not necessarily on the inferences[120]--it is possible that Protagoras's "man" denoted the species or the community rather than a single individual.[121] If that is

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[116] Hansen, *Athenian Democracy*, 187.

[117] Pl. *Tht*. 152a3-8.

[118] Pl. *Crat*. 386a; *Tht*. 160e. Cf. however *Prt*. 328a.

[119] See C. Farrar, *The Origins of Democratic Thinking* (Cambridge, UK: Cambridge University Press, 1988), 49.

[120] E.g. Farrar, *Origins of Democratic Thinking*, 49; P. Woodruff, "Rhetoric and Relativism in Protagoras and Gorgias," in the *Cambridge Companion to Early Greek Philosophy* (Cambridge, UK: Cambridge University Press, 1999), 302.

[121] See H. Segvic, *From Protagoras to Aristotle* (Princeton, NJ: Princeton University Press, 2009), 16, 25-6.

the case, then his teaching will have been very close to Athenian practice as I have described it.

But the idea that human beings could function as "measures" of "what is" and "what is not," in particular what is and is not *dikaion*, was not unique to Protagoras. It is also found in Aristotle. Aristotle's objection to the emotional manipulation of judges by speech-makers rested on precisely this foundation: one ought not to "warp" the "rule" (*kanōn*) that one was going to use.[122] He also believed that it was impossible to lay down laws about things that were subjects for deliberation (*peri hōn bouleuontai*), apparently including the relationship of law to "particular matters" (*hekasta*). On such questions, he said, "men do not deny that it must be for a human being to judge"; they merely dispute how *many* men ought to perform that task.[123] Aristotle also took it for granted that provided certain conditions were met, it was better for a large group of ordinary citizens to produce these kinds of judgments than a single outstanding man, or even a few outstanding ones.[124] Protagoras seems to have suggested the same, albeit with fewer conditions.[125] The Athenian approach to adjudication suggests that, consciously or otherwise, the Athenians held similar views.

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[122] Arist. *Rhet*. 1354a.

[123] Arist. *Pol*. 1287b20-25 with 1286a25-32.

[124] Arist. *Pol*. 1281a40-b10, 1286a25-32.

[125] Pl. *Prt*. 323a-d.

Yet the Athenians seem not to have reasoned this way in all cases. Homicide was traditionally judged very differently, revealing an alternate conception of "*to dikaion*" and its foundation at work. And this is where Plato comes in.

Plato's Intervention

Though most legal disputes in Athens were heard in the popular courts in the manner described above, cases of homicide were traditionally treated differently.[126] To begin with, they were normally judged by a restricted category of people. Altogether there were five distinct homicide courts, although four of these seem to have been subsets of the fifth: the Areopagos, which also gave its name to the homicide courts as a whole.[127] In an earlier era this council had been the aristocratic governing body of the city, but in the classical period it consisted solely of people who had previously been chosen by lot to act as one of the nine chief archons, and its function was almost exclusively to judge cases of homicide. Provided they passed their outgoing "audit" (*euthyna*) and a separate incoming "scrutiny" (*dokimasia*), all ex-archons joined the Areopagos on a permanent basis;

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[126] Commercial maritime suits (*dikai emporikai*) were also judged somewhat differently from ordinary suits, and in a way that supports the idea that *to dikaion* was in Athens assumed to be intersubjectively constructed by members of the community as outlined above. The most significant difference between commercial suits and ordinary suits was the greater attention paid to the precise wording of contracts in commercial suits, in comparison to the usual "wide-angle" approach (see Lanni, *Law and Justice*, 167-71). This seems to be explained by the fact that commercial suits frequently involved metics as well as citizens. Metics were not part of the citizen body, and hence not themselves involved in the construction of norms of justice. For this reason, it may not have seemed important for citizens to produce fully contextualized decisions on each case.

[127] Our sources refer to judges in the smaller courts as *ephetai*, and some have argued that they were not Areopagites but randomly selected citizens. However, this seems an unlikely reading of the surviving evidence. See E. Carawan, "*Ephetai* and Athenian Courts for Homicide in the Age of the Orators," *Classical Philology* 86 (1991): 1-16; Lanni, *Law and Justice*, 84-7, with citations.

Hansen estimates that it probably included around 150 people at any one time, around two-fifths of whom will have been over sixty.[128] The entire council heard cases of intentional killing, including wounding, arson, and poisoning resulting in death,[129] while panels of fifty-one judged cases in the other courts. The Palladion heard cases of unintentional homicide and the killings of slaves, metics, and foreigners; the Delphinion heard cases in which the defendant admitted having killed but argued that he had acted lawfully and therefore did not deserve punishment; the Prytaneion heard cases in which an animal, inanimate object, or unknown agent had caused death; and the court "at Phreatto" heard cases of homicide against citizens who were already in exile for another offense and thus could not re-enter Attika to attend trial. Instead, they were required to argue their case from a boat anchored offshore.[130]

As well as being judged by a select group of people, the procedures in homicide trials differed significantly from those in the popular courts. Three "pre-trials" were held before the trial itself;[131] defendants were banned from public and sacred spaces before the trial;[132] trials were held in the open air;[133] the most solemn sacrifices were made;[134] and

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[128] Hansen, *Athenian Democracy*, 289.

[129] Ps. Arist. *Ath. Pol.* 57.3; Dem. 23.22.

[130] For further details and full citations of our evidence relating to each of these courts, see Lanni, *Law and Justice*, 75-8. Unsurprisingly, cases tried at Phreatto were apparently rare (Arist. *Pol.* 1300b29-30).

[131] Ant. 6.42.

[132] Aeschin. 2.148; Ant. 5.10; Ant. 6.4.

[133] Ant. 5.11; Ps. Arist. *Ath. Pol.* 57.4.

[134] Dem. 23.67.

an elaborate series of oaths was taken. At the start of the trial, the prosecutor swore that the defendant had committed the offense, and the defendant swore that he had not. During the trial, witnesses swore both as to the truth of their testimony and as to whether the defendant had committed the crime. Finally, after the verdict was announced, the winner swore that he had told the truth and that the judges had decided correctly.[135]

The mode of argumentation in homicide suits was also strikingly different from that in other cases. A strict relevancy rule applied: speakers were not allowed to go "outside the issue" (*exō tou pragmatos*),[136] which seems to have ruled out discussions of character and possibly also emotional appeals to the judges.[137] There was also an important discursive difference. In the popular courts, as we have seen, the judges were asked to decide what was "just" or "right": that is, what was "*dikaion*." But another pair of concepts regularly appears in connection with homicide. This is "truth," "*alētheia*," and "what is true," "*to alēthes*."[138] Evidently, in these cases, judges had not only to decide what was right; they also had to decide what was *true*. Antiphon emphasized the distinction that this suggested. "The laws, the oaths, the sacrifices, the public announcements and all the other things that happen in a homicide suit are very different from other procedures because the facts themselves (*auta ta pragmata*), concerning

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[135] Aeschin. 2.87; Ant. 5.11. See also D. M. MacDowell, *The Law in Classical Athens* (Cornell, NY: Cornell University Press, 1978), 119; D. M. MacDowell, *Athenian Homicide Law: In the Age of the Orators* (Manchester, UK: Manchester University Press, 1999), 90-109; R Parker, *Polytheism and Society at Athens* (Oxford: Oxford University Press, 2007), 102-3.

[136] Arist. *Rhet*. 1354a.

[137] Lanni, *Law and Justice*, 96-105. See e.g. Lys. 3.44, 3.46.

[138] Aeschin. 2.87; Din. 1.1, 1.6, 1.57, 1.59; Ant. 3.3.3; Ant. 6.18.

which the stakes are greatest, must be known correctly" (*orthōs gignōskesthai*).[139] Evidently, something was deemed to be at stake in homicide trials that was not at stake in others.

These differences demand an explanation. A significant factor is no doubt the age of the procedures, as Adriaan Lanni has suggested: homicide procedures were the oldest still in use in classical Athens and no doubt represented an old-fashioned way of doing things.[140] Yet the allusions to truth in these cases and the additional note of reverence for the Areopagos that appears in many of our sources suggest that something else is also involved.[141] The severity of the penalties presents a possible solution, since intentional homicide led to automatic execution, burial outside Attika, and confiscation of property, while unintentional homicide resulted in exile.[142] But death and exile were also regularly used as penalties in other cases, so this will not do either.[143]

A better explanation turns on the religious significance of homicide cases. An unnatural or improper death was believed to leave a *miasma*, a polluting stain, on the *polis*.[144] Part of the purpose of homicide trials was thus to attribute responsibility for the

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[139] Ant. 6.6. Cf. Ant. 5.88. Trans. Lanni, *Law and Justice*, 79.

[140] Lanni, *Law and Justice*, 105-7. Cf. Ant. 5.14.

[141] Aesch. *Eum*. e.g. 681-710; Dem. 23.65-7, Lyc. 1.1-12, Lys. 6.14, Ant. 6.51, Xen. *Mem*. 3.5.20. Discussed in Lanni, *Law and Justice*, 78-80.

[142] Defendants in trials of intentional homicide could also choose to go into exile halfway through the trial (i.e. before the verdict), if they thought were likely to be convicted. See Dem. 23.69 and Ant. 5.13; cf. MacDowell, *Athenian Homicide Law*, 113-116.

[143] An obvious example is Sokrates' execution for *asēbeia*, impiety.

[144] Ant. 2.1.3, 2.1.10-11, 4.1.2-3. Cf. Ant. 5.82-3; Pl. *Euthphr*. 4b-c. See also R. Parker, *Miasma* (Oxford: Oxford University Press, 1996), 104-43.

death to the right person in the right way, so that the stain would be removed.[145] Several ancient authors cited pollution as the explanation for the variations in procedure noted above, such as holding the trial outside.[146] Religious significance also helps to explain why these cases remained in the hands of the Areopagites, since the chief archons traditionally had significant religious duties.[147] It also explains the elaborate oath-taking, particularly the final oath sworn by the victorious party: the idea was to transfer any *miasma* resulting from a wrong verdict from the judges to the victorious party himself.[148]

Most important, the religious dimension of homicide can explain the discursive difference between speeches in homicide trials and those in all other kinds. The "stakes" may have been "greatest" in homicide suits because not only other citizens, but also the *gods*, were an interested party. The concern of the gods that their shrines and temples not be polluted suggested that there was an external right answer to the question of what was *dikaion* in cases of homicide in a way that there was not in other cases. In a case of treason or illegal proposal, the only interested parties were other citizens: there could thus be no "right" or "wrong" verdict on these questions beyond what the citizen community itself took to be right. In cases of homicide, however, the supposition that the gods also

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[145] The significance of *miasma* in the development of homicide procedures has recently been downplayed. See Parker, *Miasma*, especially 121-25; I. Arnaoutoglou, "Pollution in Athenian Homicide Law," *Revue Internationale des Droits de l'Antiquité* 40 (1993): 109-37; E. Carawan, *Rhetoric* and *the Law of Draco* (Oxford: Oxford University Press, 1998), 17-19; Lanni, *Law and Justice*, 110. However, while these procedures no doubt had a sociological basis, our sources show that fourth-century Athenians conceived of them in religious terms, and it is this conceptualization that is important here.

[146] e.g. Ant. 1.10, 5.11; Dem. 20.158, 23.65-7, 23.72.

[147] Ps. Arist. *Ath. Pol.* 56.4, 57.1-4, 58.1.

[148] Ant. 2.2.11, 2.3.10; Ant. 3.3.11; Ant. 4.1.4; Ant. 6.6.

had a view of the matter may have significantly altered the nature of the reasoning involved. It meant that in homicide cases (and only homicide cases) Athenian judges could be conceived as struggling to reach a decision which in some sense existed independently of the judgment of the rest of the community, i.e. that reflected an objective truth, a truth beyond their own norms and evaluations.

It is worth clarifying that, just as in other types of suit, the question before the judges in homicide trials was often one of interpretation rather than fact. Again, both sides might well agree on the events leading up to the death; what was at issue was who or what had ultimately been responsible for it (and hence the subsequent pollution).[149] This was a much murkier issue and raised puzzling issues of causation that the Athenians seem to have found fascinating. A famous (though almost certainly fictional) example involved the death of a boy from a javelin thrown by a classmate as he ran across a gymnasium. Was the thrower responsible, or the victim, or even the javelin itself?[150] A modern coroner would have the option of recording a verdict of "accidental death" in these circumstances, but this was not available in Athens, possibly since the problem of *miasma* would remain. Cases of this sort suggest why the court at the Prytaneion was deemed necessary. Even if death had been caused by an inanimate object, it was still important to interpret the chain of events correctly, to ascertain the innocence of any

[149] E.g. Lys. 1, Ant. 1, Ant. 6.

[150] Ant. 3. Perikles and Protagoras are said to have "wasted a whole day" discussing a similar case at Plut. *Per*. 36.

associated human agent, and to cast the offending object beyond the boundary of the *polis*.[151]

Again, as in the popular courts, not all homicide suits followed this pattern. Sometimes the events leading up to the death were uncertain, and then the relevant question was "did the defendant do it or didn't he?"--a factual question of the type familiar from any whodunnit.[152] In such cases, the truth of the matter clearly rested on relevant facts, which existed independently of the views of the judges. In cases such as that involving the javelin, however, the truth of the matter was essentially a question of interpretation. It raised the same issues as deciding "*to dikaion*" in analogous cases in the popular courts--except that in cases of homicide, "*to dikaion*" might be conceived as having a reality beyond the views of the judges, because the gods could also be supposed to care about the result. From the perspective of the judges, the question of what was *dikaion* in a case of homicide could thus be conceived as a question with an objectively correct answer, rather than an intersubjectively constructed one. In effect, the interest of the gods converted a question of "right" into one of "truth" or "fact." It was something that could be *known*, or not known, in a way that "*to dikaion*" in other cases could not be.

Plato's extraordinary political intervention was to suggest that the conceptualization of "*to dikaion*" as existing independently of the norms and evaluations of the political community--the conception that, on the conventional Athenian view, applied in only a small subset of religiously significant cases--actually applied across the

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[151] Aeschin. 3.244; Patmos schol. on Dem. 23.76.

[152] E.g. Ant. 2.

entire spectrum of human experience. There is always an externally or objectively correct right answer to questions of right and wrong on the Platonic view: it is the answer accepted by the gods, who are supremely righteous, and it applies in all cases because the gods have an interest in everything we do. It can only be known, or discerned; it cannot be constructed by any kind of agent, not by a single man, nor by a group, nor even by the gods themselves.[153] And it can be discerned only by a select group of men: those who possess *dikaiosynē*, which, midway through the *Republic*, is identified as the state of having gazed on and internalized the true "form" of "*to dikaion*," "the right" or "the just." This is a state accessed not by ordinary men, but by philosophers alone. And it seems to resemble the kind of knowledge that Athenians were conscious of groping after in homicide trials, but that they do not seem to have imagine existed in any other context, such as cases of treason or proposing a disadvantageous law.

The contours, foundations, and implications of this set of claims are aired and explored in all Plato's works, in ways both large and small. We may note, for example, the transformation, in the *Euthyphro*, of Meletos' claim that Sokrates had corrupted young men into the claim that Meletos "*knows how* the youth are corrupted and who are those who corrupt them": a turn from an interpretive question, the answer to which would depend on an intersubjectively constituted understanding of what it meant to corrupt, to a question of knowledge or fact.[154] Or the distinction drawn between "true" and "false" judges in the *Apology*, where Sokrates explicitly strips the title of "judge" (*dikastēs*) from

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[153] See e.g. Pl. *Euthphr*. 6a-b, 7b-e, 8d.

[154] Pl. *Euthphr*. 2c. Italics mine.

those who failed to find him innocent: being a true judge evidently required coming up with the right answer.[155] Or Sokrates' celebrated acceptance of the laws of Athens in the *Crito*: this is often regarded as a contradiction of his position in the *Apology*, when he defies the Athenian public with the words "Men of Athens, I am grateful and I am your friend, but I will obey the god rather than you..."[156] What is less often recognized is that when, in the *Crito*, Sokrates blames his conviction on the interpretation of the laws offered by the men of Athens rather than on the laws themselves, he thereby rejects the authority of the citizen body to decide for itself what is *dikaion*, which was the foundation of Athenian law.[157] Finally, we should note the connection between the effort to establish objective meanings for words in the *Cratylus* and Plato's consciousness, revealed in two dialogues, that there was an analogy between the formation of language and the construction of "*to dikaion*" on the ordinary conception of that term. Alkibiades, in the first dialogue of that name, stated explicitly that the people who had taught him "*ta dikaia*" were the same who had taught him Greek.[158] The same idea appears in the *Protagoras*.[159] This suggests that Plato understood that the intersubjective construction of language itself had to be denied if his more significant attack on the intersubjective construction of justice was to succeed.

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[155] Pl. *Ap*. 40a.

[156] Pl. *Ap*. 29d.

[157] Pl. *Cri*. 54c.

[158] Pl. *Alc*. 1. 110e.

[159] Pl. *Prt*. 328a.

A full analysis of Plato's works in this light would be of the greatest interest, but for present purposes we may focus on two specific points. The first is Plato's enthusiasm for the idea that the gods care about every human wrong, not merely some discrete subset of wrongs. This thought appears in a variety of places, including the *Republic*: the divine judges (*dikastas*) who reward and punish human beings after death attend to "all the wrongs they had ever done," not merely to certain kinds of wrong.[160] The same perspective features in the *Gorgias*, through the activity of Rhadamanthys, the supremely just judge of the afterlife,[161] and in the *Phaedo*.[162] But it is presented most fully in Book Ten of the *Laws*. First, the argument "that the gods exist, and that they are good and honor justice (*to dikaion*) more than do men" is identified by Klinias as "the best defense of all our laws."[163] The Athenian Stranger agrees: the non-existence of the gods must be disproved as a necessary prelude to obeying the laws. But two further "false notions" about the gods must also be removed: "that the gods exist, but pay no heed to human affairs," and "that they do pay heed, but are easily won over by prayers and offerings."[164] All three propositions--the non-existence of the gods, their lack of interest in the doings of men, and their willingness to transgress justice (*to dikaion*) when paid off--are then comprehensively attacked.[165] One point is especially noteworthy: the argument that "God

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[160] Pl. *Resp*. 615a.

[161] Pl. *Grg*. 523a-27e.

[162] Pl. *Phd*. 113d-115a.

[163] Pl. *Lg*. 887b. Cf. *Lg*. 624a. Trans. T. J. Saunders.

[164] Pl. *Lg*. 888bc.

[165] Pl. *Lg*. 888c-907d.

also cares for the World-All" is wrapped into the argument for his existence in a way that his unwillingness to be "seduced away from justice with gifts" appears not to be.[166] Care for all things would, on Plato's account, appear to be presupposed by God's very existence. The result is that there is *no* sphere in which human beings may decide what is right for themselves. There is always a pre-existing answer, which they may discern successfully, or not.

The second important point is that with which this chapter began: the transition from "*to dikaion*" to "*dikaiosynē*" as the object of attention in the *Republic*, its significance for Plato, and its implications both for his philosophy and for later understandings of justice. From the beginning of Book Two "*dikaiosynē*" is established as the focus of the work,[167] and from Book Four it is formally defined as the state in which the elements of the soul "do their own business." [168] The question we can now explore is what this approach allows Plato to do.

As we have seen, the question "what is *to dikaion*," as raised by Thrasymachos and pondered daily by ordinary Athenian citizens in their popular courts, functions in effect as an open invitation to all comers to exercise their judgment. The question "what is *dikaiosynē*," by contrast, turns attention to the nature of the judging agent. Presumably, this turn would seem desirable if one wished to argue that only someone with *dikaiosynē* can judge correctly what is *dikaion*, although Plato nowhere says this explicitly. What is

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[166] Pl. *Lg*. 902-3, 907a.

[167] Pl. *Resp*. 357d. Cf. e.g. 363a, 368b-c, 392c-d, 427d, 432b-c, 443d, 517d, 545a, 612b.

[168] Pl. *Resp*. 443d.

clear, though, is that directing attention to the question of a judge's personal qualities raises the possibility that not everyone will possess the necessary credentials to judge well--that is, that not everyone will be found to possess *dikaiosynē*. This is not a necessary inference: Protagoras, for example, suggested that a sense of *dikē*, right, was common to all human beings.[169] But asking the question "what is *dikaiosynē*?" does open up a space from which would-be judges can be themselves judged and found wanting. If they are discovered to lack this virtue, their responses to the question "what is *to dikaion*?" might be ruled out--and fairly so, on this approach.

The crucial question then is: who is to be disbarred from judging on this basis? Or, put another way: who possesses *dikaiosynē* and how do they get it? From Book Four, we know that *dikaiosynē* means the possession of a rightly-ordered soul (a condition very close to *sōphrosynē*, a significantly older concept).[170] But Plato goes further. In Books Five and Six, he posits a new notion of "*to dikaion*" that precedes and anchors all particular manifestations of that concept, and he does this explicitly in order to provide an intellectual basis for *dikaiosynē*. The new concept of "*to dikaion*" that he provides is an eternal "idea" or "form" gazed on by a select few, and this act, or state, of gazing is then established as what defines *dikaiosynē* as a human quality.[171]

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[169] Pl. *Prt*. 323a-e.

[170] See further C. W. R. Larson, "The Platonic Synonyms, *Dikaiosynē* and *Sōphrosynē*," *The American Journal of Philology* 72 (1951), 395-414.

[171] That access to the "forms" is limited to only a select few is generally asserted in Plato's works, rather than argued for. Pl. *Resp*. 493e-494a, 503b; cf. Pl. *Pol*. 297c.

It is important to notice that the existence of "*to dikaion*" as an ideal form is not intrinsically presupposed by the concept of *dikaiosynē* in its ordinary meaning. As we have seen, that concept pre-existed Plato's employment of it. Rather, the existence of the form "*to dikaion*" is brought in by Plato as a way of demarcating clearly the difference between those who possess *dikaiosynē* and those who do not.[172] Yet equally, it is crucial to note that Plato arrives at the existence of the form "*to dikaion*" via his investigation of the concept of *dikaiosynē* rather than as a direct response to Thrasymachos's original question, "what is *to dikaion*?" This is because, without being channeled through specific human agents, the existence of "*to dikaion*" as an eternal form would be nothing to us. Just as the existence of the gods can mean nothing to us without their intervention in human affairs, the existence of an eternal form would be irrelevant to human society without some mediating channel. If no human being can *get* to the forms, they might as well not exist, or, at least, we would have no option but to act as though they do not. Thus the realization of the form "*to dikaion*" in a human being is a critical step in Plato's account. This is where *dikaiosynē* comes in. He who has *dikaiosynē* is the philosopher, who gazes on eternal realities, including "*to dikaion*" in its true, timeless form.[173]

This is a critical move in Plato's argument for two reasons. The first is political. As we saw above, judicial activity was of supreme political significance in the ancient Greek *poleis*, and it formed a major theme in Plato's works. But it is especially important

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[172] As the analogies of the divided line and the cave show, Plato envisaged a graduated series of steps as people approached the forms. "Right opinion," for example, was a possible state; true knowledge was not necessary in order to act well. However, the boundary between right opinion (*orthē doxa*) and knowledge (*epistēmē*) was nonetheless clearly marked.

[173] Pl. *Resp*. 500c.

in the *Republic*. This is presaged in an illuminating way during the search for *dikaiosynē* in Book Four. Sokrates has just "caught sight of something," though Glaukon has yet to see it.[174] To help him, Sokrates returns to the theme of "everyone doing one's own work," and poses the question: "Look at it this way if you want to be convinced. Won't you order your rulers to act as judges in the city's courts (*tas dikas...dikazein*)?" "Of course," Glaukon replies.[175] Sokrates goes on to establish that the judges will aim for no citizen to have what belongs to another or to be deprived of what is his own, which leads directly to the discovery of *dikaiosynē*. But what is arguably most significant about this exchange is the apparent naturalness of the assumption that the rulers of a *polis* and its judges will be identical. Later, this equation is confirmed in a considerably showier way with the establishment of the philosopher-rulers, but its seeds are already present. Judging has already been identified as a constitutive function of a ruler. Hence, in Plato's ideal *polis*, the rulers must be those who know what is truly just, which is to say the philosophers.

From the democratic Athenian perspective, what is significant about this result is that it mirrors exactly the way that the Athenian *dēmos* ruled: by virtue of its control of the courts. It thus makes transparent the connection between Plato's preoccupation with the theme of justice and his hostility to Athenian democracy with which this chapter began. If there is a right answer to questions of justice that only the philosopher can see, there is no way that anyone else can legitimately act as a judge, and hence, on the standard Greek conception, rule.

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[174] Pl. *Resp*. 432d.

[175] Pl. *Resp*. 433e.

The *Republic* embraces this result directly: the philosophers will both judge and rule.[176] In the *Laws*, Plato's position softens. Taking into consideration the significance of participating in judging for acquiring the feeling that one is a real citizen of a *polis*, which he admits to be beneficial, Plato allows some space for democratic judicial activity in the ordinary Athenian way.[177] But he radically alters the political consequence of this activity by stripping the democratic judges of *final* judicial authority. All cases will be open to appeal to a higher court, composed of men elected for the task, and it is they who will hold supreme authority.[178] As in the *Crito*, Plato denies the right of ordinary citizens to interpret their laws for themselves. Yet this was not only the foundation of the administration of justice in Athens; it was arguably the foundation of the rule of the *dēmos* overall. Plato's philosophical intervention thus justified a radical reduction in the strength and extent of *dēmokratia* in Athens.

We may therefore offer another answer to the question recently posed by Danielle Allen: "What did Plato do?" [179] What Plato did was to resist Athenian democracy by formulating a new conception of justice and its administration that was not open to being controlled by ordinary citizens, hence weakening their grip on political rule itself.

The second reason that the realization of "*to dikaion*" in a human being proves a critical move in Plato's argument is conceptual. I suggested above that the *dikaiosynē* of

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[176] Pl. *Resp*. 473d.

[177] Pl. *Lg*. 766d, 768a.

[178] Pl. *Lg*. 767d-67e.

[179] Allen, *Why Plato Wrote*, 141.

the philosopher functions as a channel through which "*to dikaion*," the form, can be made active in human society. It would be equally accurate, on Plato's account, to say that the philosopher embodies "*to dikaion*." The philosopher not only gazes at the eternal realities, he also "endeavors to imitate them," and "as far as may be, fashions himself in their likeness and assimilates himself to them."[180] Indeed, not only does he attempt to fashion himself in their likeness, he is also required to reproduce their likeness in others. He must "stamp on the plastic matter of human nature in public and private the patterns (*paradeigmata*) that he visions there."[181] The philosophers will "glance at" *to dikaion*, *to kalon* and *to sōphron* "in the nature of things," and "alternately at what they are trying to reproduce in humankind,"[182] and there will be no "better craftsman" of *sōphrosynē* or *dikaiosynē* or any other form of virtue.[183]

This process of "assimilation" and "reproduction" may sound straightforward, yet it has a profoundly important result. In the soul of the philosopher, the distinction between "*dikaiosynē*" and "*to dikaion*," the virtue within and the state of affairs without, itself collapses. As in the case of the judge-rulers, this collapse is presaged in an illuminating way earlier in the *Republic*, in the analogy that Plato posits between the city and the soul. When both "*dikaiosynē*" and "*to dikaion*" are translated "justice," the significance of this analogy and of the later collapse of the two concepts into one in the

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[180] Pl. *Resp*. 500c.

[181] Pl. *Resp*. 500d.

[182] Pl. *Resp*. 501b.

[183] Pl. *Resp*. 500d.

person of the philosopher is entirely lost. But this significance is in fact enormous. We ought to feel that it is as strange to seek for "*dikaiosynē*" in a *politeia*, a "political system" or "structure of a political body," as it would be to seek for "courage" or "moderation" in that structure. That is, the search for such virtues among the members of the body would not be strange; what is strange would be the search for them among the relations of the members of the body to one another. Similarly, it would not be strange to suggest that "*to dikaion*" can be found among members of a political body. That was an entirely standard conceptualization: "*to dikaion*," "what is right" was regularly identified as a way of marking out the relations between citizens.[184] But Plato takes neither of these options. Instead, he explicitly sets out to discover "*dikaiosynē*," the virtue of righteousness, in the relations between individuals in a *politeia*, rather than in those individuals themselves.

The remarkable significance of this move is that, conjoined in the person of Plato's philosopher, the concepts "*to dikaion*" and "*dikaiosynē*"--once so clearly demarcated as "what is right" and "righteousness" respectively--become effectively interchangeable. This interchangeability surfaces clearly in Book Seven of the *Republic*, in the course of the analogy of the Cave. The philosopher leaves the cave to gaze at the forms, including "*to dikaion*"; when he returns, however, the object of his attention is identified not as "*to dikaion*," but as "*dikaiosynē*." [185]

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[184] See especially Arist. *NE* Book 5.

[185] Pl. *Resp*. 517d.

It also presaged at the end of Book One. When, following the failure of his discussion with Thrasymachos, Sokrates muses regretfully on his continued ignorance of what *dikaiosynē* is, Plato has him say something that, to a Greek, must have sounded very strange indeed. "Now I know nothing," Sokrates says: "for if I don't know what *to dikaion* is, I shall hardly know if it is a virtue (*aretē*) or not." [186] Most Athenians would surely have found it very difficult to understand how "*to dikaion*," "what is right" in the sense of an outcome, could possibly be construed as a virtue, as if it were equivalent to "*dikaiosynē*," "doing what is right." Yet Plato, in the *Republic*, actually does provide the conceptual basis necessary to equate the two.

The dramatic and profoundly influential result of this move is that a concept of "justice" that can encompass both "righteousness" and "what is right" becomes thinkable for the first time. Yet this new concept of "justice," connoted by Plato as *dikaiosynē* / *to dikaion* used interchangeably, is not equally constituted by the prior notions of "what is right" and "righteousness." Rather, "righteousness," as a form of human activity, becomes, in Plato's account, the handmaiden of an intellectual conception of "what is right" as a form of knowledge that exists independently of human agents.

Strikingly, the most incisive articulation of this thought may in fact precede Plato. It is arguably Sokrates' celebrated dictum, "*aretē* is *epistēmē*." If "virtue" is indeed "knowledge," then the distinction between human activity and outcomes or states of affairs may already, at some level, be conceived as dissolved. Moreover, some such dissolution may indeed be necessary if "what is right" is to be conceived as having

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[186] Pl. *Resp*. 354b.

objective reality, rather than being intersubjectively constituted as the Athenians seem to have believed. It was left to Plato, however, rather than Sokrates, to show in writing how this might be done. And to the extent that we remain in thrall to a conceptualization of justice as a form of knowledge, developed by experts, that governs human activity--as opposed to a form of human activity, developed by all members of the community, that itself constitutes what is known--we may have Plato to thank for getting us here.

Conclusion

While none of Plato's institutional suggestions--"philosopher-kings," "nocturnal councils" and so on--were to gain long-term ideological traction, his effect on the conceptualization of justice has been profound. To be sure, the immediate context was not propitious. The one possible foothold of an "objective" conception of "*to dikaion*" in Athens, i.e. the special treatment of homicide cases, began to be eroded in the late fifth century. Rather than being heard by the Areopagos in the traditional way, an alternative procedure known as *apagōgē*, previously used for offenses including theft, highway robbery, and seizure of persons, began to be used to bring cases of homicide before the popular courts.[187] There they were tried in the ordinary way, using the ordinary package of oaths, procedures and rhetorical strategies.[188]

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[187] See M. H. Hansen, *Apagōgē, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense: Odense University Press, 1976); E. Volonaki, "*Apagōgē* in Homicide Cases," *Dikē* 3 (2000), 147-76; Lanni, *Law and Justice*, 103-105, 112-13.

[188] See e.g. Ant. 5, Lys. 13. Discussed in Lanni, *Law and Justice*, 103-105.

The significance of the Areopagos as a vehicle for ascertaining correctly both "what was right" and "what was true" thus seems to have begun to wane (though the traditional homicide procedures continued to be used). To be sure, from the 340s the Areopagos could be said to be gaining political power in another way, through the procedure of *apophasis*.[189] This special procedure cast the Areopagos in the role of an apparently neutral fact-finding institution: its task was to produce a preliminary report, most commonly in charges of treason, corruption and official misconduct, to establish the facts of a case before it passed to the popular courts for a final decision.[190] Yet if this new role can be construed as political, it scarcely helped Plato's cause. It certainly reconfirmed the special relationship of the Areopagos to knowledge;[191] yet the fact that the popular courts maintained control over the decision of what was *dikaion*, and were perfectly ready to acquit defendants who according to the Areopagos had committed the acts of which they were accused, rather serves to underline the role of ordinary citizens as the final judges of what was right in the *polis* than otherwise.[192]

In the medium term, however, it is possible to see Plato's innovations, and in particular the new emphasis on *dikaiosynē*, as gaining ground. A useful witness here is Diogenes Laertios. As noted in the Introduction, a comparison of the lists of works that he recorded shows several treatises on what would later be called "justice" written prior

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[189] See e.g. P. J. Rhodes, "Athenian Democracy after 403 BC, *Classical Journal* 75 (1980): 305-23.

[190] See Din. 1, Din. 2, Din. 3, and Hyp. 5. Discussed in Lanni, *Law and Justice*, 57-59.

[191] Cf. Aeschin. 1.92; Dem. 23.25; Ant. 1.22.

[192] Din. 1.55-59. Cf. Lanni, *Law and Justice*, 56-7.

to Plato appearing under the title *Peri tou dikaiou*, while works written after Plato bear the title *Peri dikaiosynēs*.[193] The only exception here is Aristotle, who wrote separate works on each.[194] It is intriguing to to speculate on what Aristotle's texts might have contained, especially given the possible influence on his thought of that of Protagoras.[195] Evidently Aristotle resisted the collapse of the distinction between the concepts "*to dikaion*" and "*dikaiosynē*" that Plato had precipitated; quite possibly he advocated a less intellectualist picture as well. But as Diogenes Laertius also gives us to understand, Aristotle's school was short-lived. His immediate lineage died with his student Theophrastos.[196] Not until the middle ages would he be fully resuscitated, and the Aristotle of the Thomists was a rather different character.

The reception of Plato has been very different. This is not the place to trace the story connecting Plato to the present day, but something significant may be inferred from the simple fact that we actually have all his works. As Diogenes' catalogs suggest, this presents a striking contrast with every other ancient author. The fundamental fact is that Platonism was sufficiently congruent with Christianity for Plato's works to keep on being copied and recopied during the last two thousand years, and the importance of this can

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[193] Cf. Diogenes' accounts of Simon (I and II) and Speusippos, Xenocrates and Aristotle respectively.

[194] Diog. Laert. 5.22, 24.

[195] See Segvic, *From Protagoras to Aristotle*.

[196] Diog. Laert. "Prologue" §15.

hardly be overstated. It means that Plato has been able to exert a more continuous influence on Western political thought than any other ancient thinker.[197]

This influence arguably remains visible today. For though the standard approach to adjudication in Athens may be not only compatible with democratic politics but also philosophically defensible, the dominant conception of justice and its execution today is arguably much closer to Plato's than to that of an Athenian democrat. Of course, we are not obliged to subscribe to Plato's position if we are unconvinced by democratic Athenian practices. It is certainly not obvious that Plato was right about the existence of the forms, though their elaboration might provide a convenient way of limiting political authority to a small number of people. A more plausible but equally "intellectualist" alternative to Plato's approach is that justice is a form of knowledge because the nature of transgressions is defined in the laws. This is the core of the dominant modern view: judicial decision-making requires expertise in *law*. Ordinary people lack this expertise, hence they cannot act as final judges (though they may sometimes participate in judicial activity in a more attenuated way as jurors). This view may look more attractive than Plato's, but it has the same shape and shares some of the same assumptions as the Platonic approach. And it is not at all clear that it is right.

The reason for doubt goes back to the point about language canvassed in this chapter. The core supposition of the modern intellectualist position, if we may call it that, is that the whole body of law considered together is, or would be, effectively self-interpreting. If one had access to all the relevant information given in the laws, one would

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[197] Cf. J. Cooper, "Introduction" to *Plato: Complete Works*, vii.

be able to make a perfect judgment. So Montesquieu: judgments ought to be "fixed" by being "ever conformable to the letter of the law," while judges, in their turn, ought to be "no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or its rigor."An ideally constructed judiciary, on this model, would ultimately become "invisible": all that would remain would be the laws themselves.[198] More recently, these hopes have been echoed by Ronald Dworkin, whose superhero-judge Hercules is able to assume that the laws with which he deals are structured by a coherent set of principles about justice and to apply these in the same way to each fresh case that comes before him, without distortion.[199] Both of these accounts reveal a commitment to the idea that there is a right answer to every legal problem "out there" in the laws themselves, which could be ascertained if only the judges in each case could render themselves sufficiently transparent and disinterested to act as a proper vehicle for it. This is the idea behind the very concept of legal doctrine: the underlying principles of the laws, deemed from the outset to be non-contradictory and assembled piecemeal by attempting to render each particular law compatible with every other.[200]

But an Athenian democrat, could he be brought to understand this view, would be likely to respond that laws are not self-interpreting, in the same way and for exactly the same reason that language is not self-interpreting. The need for human agents to take part in judicial activity does not arise merely because the laws themselves cannot speak.

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[198] Montesquieu, *The Spirit of the Laws* (New York: Hafner, 1949), 153.

[199] R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 239-243.

[200] Contrast, however, the views of e.g. legal realists or of the Critical Legal Studies movement. See e.g. R. M. Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1983).

Human agents--specifically, members of the linguistic community in question--are necessary intermediaries because only they are able to decide on the meanings of the terms laid down in laws and how the case in question relates to them.

According to Aristotle, "men do not deny that it must be for a human being to judge" such matters; they merely dispute how *many* men ought to perform that task.[201] As we know, Plato's preference was for a very limited number, on the basis of an account of justice that rested wholly on the internalization of outside knowledge. Athenian democrats preferred many citizens to undertake this task, and this merely on the basis of their citizenship--that is, their membership of the political community whose judgments were the final measure of what was right for those within it. Looked at in this light, it would seem that many modern citizens remain closer to Plato's position than to that of democratic Athenians.

[201] Arist. *Pol*. 1287b20-25 with 1286a25-32.

CONCLUSION

Democracy Ancient and Modern

In a characteristically spirited essay of 1962 entitled "Athenian Demagogues," Moses Finley laid down four key points concerning Athenian democracy. Each was, he said, "obvious in itself," but he believed that all four taken together seldom received the weight that they deserved, and that no account of Athenian democracy that overlooked them could have "any validity" at all.[1]

The first of these points was that Athens was a "direct democracy," and however much such a system might have in common with representative democracy of the familiar modern kind, the two differed in "certain fundamental respects". One of the most fundamental related to the question with which Finley was, in that essay, chiefly concerned: the relationship between Athens' rhetorically talented political leaders, or "demagogues," and their audience. The second major issue was what Victor Ehrenberg had called "the narrowness of space" of the Greek city-state: an appreciation of this, Finley said, was "crucial to an understanding of Greek political life". The third point, strictly defined, was brief. It was that the Assembly was the "crown" of the Athenian political system, "possessing the right and power to make all policy decisions, in actual practice with few limitations, whether of precedent or scope." The fourth point was in a sense merely an amplification of the third. The Assembly was "nothing other than an

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[1] M. I. Finley, "Athenian Demagogues," *Past and Present* 21 (1962): 3-24. Reprinted in M. I. Finley, *Democracy Ancient and Modern* (New Brunswick, NJ: Rutgers University Press, 1985) and also in P. J. Rhodes ed., *Athenian Democracy* (Edinburgh: Edinburgh University Press, 2004).

open-air mass meeting on the hill called the Pnyx"; Athenian politics thus gave rise to "problems of crowd behavior". The Assembly's "psychology, its laws of behavior, could not have been identical with those of the small group, or even of the larger kind of body of which a modern parliament is an example," although one could do little more today than acknowledge the existence of such problems: exactly how they had affected Athenian politics would remain uncertain.

I said just now that Finley's third point, strictly defined, was brief, and this is true. But it was immediately followed by a much longer parenthetical remark, which is significant for two reasons: first, because this remark raised the possibility of an alternative way of thinking about Athenian democracy, and second, because by including it only as an aside, Finley signaled his unwillingness to pursue it any further. The remark, which qualified his claim that the assembly was the "crown" of the democratic system, ran as follows:

> (Strictly speaking there was an appeal from the Assembly to the popular courts with their large lay membership. Nevertheless, I ignore the courts in much, though not all, of what follows, because I believe, as the Athenians did themselves, that, though they complicated the practical mechanism of politics, the courts were an expression, not a reduction, of the absolute power of the people functioning directly; and because I believe that the operational analysis I am trying to make would not be significantly altered and would perhaps be obscured if in this brief compass I did not concentrate on the Assembly.)

There is much good sense in this passage. But if the work begun in this dissertation is sound, two of Finley's points are dubious. It is surely right that the Athenians regarded their courts as an "expression," rather than a "reduction," of the "absolute power of the people functioning directly". It might also be true to say that

attending properly to the relationship between the assembly and the courts in the confines of this particular essay would have obscured the analysis that Finley was trying to make. Where we may doubt Finley's claim is first in his supposition that the "operational analysis" of Athenian democracy would not look significantly different if the courts were properly taken into account, and second in his implicit assumption that if the courts had not been the "expression" of "the power of the people functioning directly," they must have represented a "reduction" of that power. As we have seen, there is a third possibility: the courts might have served to *amplify* the power of the people functioning directly.

This third possibility significantly challenges the modern view of Athenian democracy. The work begun in this dissertation suggests that the popular courts in Athens, rather more than the assembly, were regarded as the chief organ of democracy in Athens and the vehicle of the *dēmos*'s greatest power, certainly in the fourth century and to a considerable extent also in the fifth. Indeed, it seems likely that it was principally because the Athenian *dēmos* controlled the courts, and used the courts to control its political leaders, that it was able to give those leaders as much latitude as it did to shape policy in the assembly. Without the courts as the backstop of democracy in Athens, that is to say, there might have been little to prevent the rhetorical power and personal influence of its most prominent citizens from betraying the trust placed in them by their hearers, and both democratically minded and anti-democratic Athenians recognized this. That they did so is not surprising: it was the principal lesson they had learned in the last decade of the fifth century, when the Athenian political system had twice proved to be vulnerable to oligarchical takeover precisely because those who attended the Assembly could be

relatively easily terrorized, manipulated, and abused by those in a position of political power.

If this reading is sound, it invites the reconsideration and revision of many aspects of the conventional interpretation of Athenian democracy, including, to begin with, the other three points laid down by Finley in 1962. To be sure, as Finley emphasized, Athens was certainly a "direct democracy": there is nothing to be said against that. Nonetheless, it would be a mistake to infer from this that the Athenian system lacked representative elements. It is true that it lacked *constituents* of the familiar modern sort; those deputized to make decisions on behalf of the rest of the citizenry did not stand for any particular subset of that body. But representative sampling, as we have seen, played a crucial part in Athenian decision-making processes, and the more significance we ascribe to the courts in the management and preservation of the Athenian democratic system, the more striking this feature becomes. Indeed, we ought to remember that the assembly itself was never more than a sample of citizens representing the full body (and one that possibly over-represented the views of the elite). With a quorum of six thousand for certain decisions, and a probable maximum capacity of not much more than that, those attending any particular meeting will have amounted to no more than a fifth of the citizen body at any point during the classical era, which was the same as the proportion of citizens that featured on the jury-roll.

The political significance of the "narrowness of space" of the Athenian city-state also recedes the more we understand and appreciate the role played by the courts. However small the classical Athenian *polis* may seem to us, with three or four hundred

thousand residents, around thirty thousand citizens, and a territory of perhaps 2500 square kilometers, it was one of very largest city-states of the ancient world: far too large, that is, to depend on non-hierarchical modes of political organization or informal methods of preserving political accountability.[2] In this context, it might well be thought that the Athenians had no option but to use the skills of dedicated political leaders (including military generals) to get necessary political work done; but these leaders had to be controlled if the democracy was not to be undermined. Here, arguably, the courts played their most important role--and one that could actually be replicated quite easily in the much larger states of the modern world.

Finally, if it is right to think that the popular courts were in many ways the epicenter of the classical Athenian democratic system, we gain a fresh perspective on the "problems of crowd behavior" that Finley identified as a factor in Athenian politics. We may be no closer to understanding exactly how these problems played out; but we can say that the Athenians themselves saw these problems as troubling and sought to limit their effect on their political system. For the essential difference between the Assembly and the courts was that while in the Assembly the citizenry acted *en bloc*, with public feeling continually manifested through unrestricted speech, freedom of movement, and public voting, in the courts the situation was quite the opposite. There, each citizen, as far as possible, was required to think and act as an individual: allotted to cases at random, prevented from discussing them with others prior to voting, and required to use a secret ballot. If, as I have suggested, these features of judicial procedure played a more

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[2] Hansen, *Athenian Democracy*, 90-4; M. H. Hansen and T. Nielsen, *Inventory*, 72.

important part in the Athenian conception of democracy than has been appreciated, the political significance of the "problems of crowd behavior" raised by Finley diminishes accordingly.

Of course, the views argued against here have been held by many scholars other than Finley. His case is especially interesting because the relevant intellectual "blind spot" (if that is not too aggressive a way of putting it) appears so clearly in his work. But the democratic significance of judicial activity in Athens has been neglected since at least the mid-nineteenth century, and this raises an important question. Why has the assembly dominated the modern understanding of democracy in Athens for so long? If it is true that the democratic significance of the Athenian courts has been insufficiently appreciated, what explains this lacuna?

There are, as we saw in the Introduction, some plausible, or at least understandable, intrinsic reasons for this state of affairs. For one thing, the Athenian assembly was obviously an exceptionally democratic institution, on any interpretation of democracy, especially when its composition, procedures, and powers are compared with those of any modern counterpart. For another, the lack of evidence from the ancient world (less significant for Athens than most *poleis*, but still not trivial) no doubt played a part, and more so before the archaeological discoveries of the nineteenth century, particularly that of the *Athēnaiōn Politeia*. Yet it is also fair to say that the lack of any direct indication that the sheer size of political institutions in Athens was dispositive in terms of their importance to *dēmokratia* should have prompted questions before now. Moreover, even the *Athēnaiōn Politeia* did not deliver radical new evidence so much as a

clear framework in which existing but under-appreciated items of evidence became more clearly placeable within a dikastic democracy story.

We turn then to extrinsic reasons, and here three points stand out. First, the fact that modern electoral democracies have invariably developed through the democratization of legislative assemblies no doubt goes some way towards explaining why scholars have focused on Athenian activity in this area. Second, and concomitantly, the theorization of judicial activity has for several centuries played a relatively minor role in modern Western political thought. Though Montesquieu, for example, identified the judiciary alongside the legislature and the executive as one of the three branches of government, its strictly political significance was minimized, and later theorists have followed the same line.[3] Third, and most interesting, is the way in which the view of ancient Athens has been pressed, consciously and unconsciously, into service in constructing and normalizing the structure of modern politics.

There have been two especially significant historical junctures in which contemporary ideological needs have filtered how ancient Athens was conceived. The first was in the nineteenth century, in the run-up to and during the broadening of the legislative franchise in Britain in particular. In the context of increasing agitation for working-class participation in politics, Athenian democracy proved a handy vehicle for

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[3] Montesquieu, *The Spirit of the Laws* (New York: Hafner, 1949), 151-162.

debating democracy in general.[4] Those in opposition included William Mitford and Benjamin Constant; those in favor, George Grote and John Stuart Mill.

The interventions of Grote and Mill proved particularly significant.[5] Both contributed to the reading of Greek history through the lens of British politics: Grote, for example, referred to the Athenian assembly as the Athenian "Parliament" and described Perikles as Athens' "Prime Minister,"[6] while Mill identified the Spartans as "those hereditary Tories and Conservatives of Greece."[7] As a pedagogical device, such anachronisms can easily be forgiven. But over the long term, the purported equivalence between ancient Greek and nineteenth-century British politics could only prove misleading. In the case of Grote, the importance of the assembly was balanced in his own writings by the equally important place he gave to the courts: indeed, in his view, the popular control of the administration of justice in Athens was nothing less than "the consummation of the Athenian democracy."[8] His analysis on this point was, however,

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[4] See further J. T. Roberts, *Athens on Trial* (Princeton, NJ: Princeton University Press, 1994); N. Urbinati, *Mill on Democracy: From the Athenian Polis to Representative Government* (Chicago: University of Chicago Press, 2002); E. W. Wood, *Peasant-Citizen and Slave* (London: Verso, 1996); P. J. Rhodes, *Athenian Democracy and Modern Ideology* (Bristol: Duckworth, 2003).

[5] An indication of Grote's significance is given by Momigliano: "All the German studies on Greek history of the last fifty years of the nineteenth century are either for or against Grote." A. Momigliano, *Studies in Historiography* (London: Weiden and Nicholson, 1966), 65.

[6] G. Grote, J. M. Mitchell and M. Cary, *A History of Greece* (abridged) (New York: Routledge, 2000), 397.

[7] J. S. Mill, "Grote's *History of Greece* [I] (1846)," in *Essays on Philosophy and the Classics* (London: Routledge, 1996), 303.

[8] "To strip the magistrates of all their judicial power, except that of imposing a small fine, and the Areopagus of all its jurisdiction except in cases of homicide--providing popular, numerous, and salaried dikasts to decide all the judicial business of Athens as well as to repeal and enact laws--this was the consummation of the Athenian democracy." Grote, *History of Greece*, 5:511.

supported by various chronological assumptions which turned out to be incorrect, thus significantly undermining the force of his conclusions.[9] Mill's perceptions have arguably lasted better. The importance he placed on freedom of speech, and particularly freedom of debate in Parliament, led Mill to emphasize far more than Grote the importance of discussion for successful democratic politics, and his epistemic concerns also buttressed the interpretation of Athenian politics he offered.[10] In both these respects he was an important forerunner of epistemic and deliberative democrats today.

The second significant historical juncture is the twentieth-century postwar period, which has been marked by an enormous (and, in historical retrospect, unexpected) globalization of what had up to then been a minority model of judicial politics--the American system of constitutionalism, including a supreme court and system of judicial review. This model has spread rapidly, for complex reasons, and criticisms of the democratic deficit in this model of judicial governance have been widespread.[11] Yet one major element of the ideology of this system, accepted by both supporters and skeptics alike, is that the natural role of courts in democracies is to act as a "check" on the popular will. Those who are skeptical of the democratic character of this role criticize its counter-majoritarian aspects;[12] others seek to defend it by adverting to the necessity of guarding

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[9] For example, that the *graphē paranomōn* and the procedure of *nomothesia* were established by Perikles in the mid-fifth century. Grote, *History of Greece* (abridged), 387-411.

[10] See e.g. J. S. Mill, "Grote's *History of Greece* [II] (1853)," in *Essays on Philosophy and the Classics*, 309-337.

[11] For a critical view, see R. Hirschl, *Towards Juristocracy* (Cambridge, MA: Harvard University Press, 2004).

[12] See e.g. A. Bickel, *The Least Dangerous Branch* (New Haven, CT: Yale University Press, 1962).

against "democratic excess," in particular the "tyranny of the majority," often in the name of some higher democratic law or precommitments.[13] But both sides agree that the key function of the courts is a "self-limiting" one; they disagree only on its evaluation.

The same core conviction, as we saw in Chapter 3, has helped to shape modern scholars' understandings of classical Athens. Perhaps the most explicit reading of classical Athens in the light of this constitutional conception is that of Walter Eder, who as we saw has argued that constitutional self-limitation was embraced in fourth-century Athens as part of the ideology of *dēmokratia*.[14] But even those who, like Finley, have strenuously resisted this notion assume that *if* the Athenian courts could be shown to have been pulling in a significantly different direction from the assembly, it would have been in the direction of less democracy, not more.

Both accounts misconceive the real relationship of the courts to democracy in the Athenian setting. At the same time, the sketch of Athenian democracy to which they give rise serves, if only unwittingly, to bolster the ideological power of the current constitutional moment.

In between these two historical junctures, the *Athēnaiōn Politeia* was discovered, but its significance was not fully appreciated. Nor was its capacity to revise our understanding of numerous other texts that had remained in circulation fully understood. This is regrettable but unsurprising. Indeed, paradoxically, it may underline the relevance

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[13] See e.g. R. W. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977); cf. J. Elster, *Ulysses and the Sirens* (Cambridge, UK: Cambridge University Press, 1979).

[14] W. Eder, "Aristocracy and the Coming of Athenian Democracy," in I. Morriss and K. Raaflaub eds., *Democracy 2500? Questions and Challenges* (Dubuque, IO, 1998), 105-40.

of Athenian democracy today. The fact that the *Athēnaiōn Politeia* failed to spark an immediate reevaluation of the respective roles of the assembly and courts in Athenian democracy may itself testify to the powerful role that Athenian democracy still plays in the modern political imagination. The enduring commitment of modern scholars to the traditional view of Athenian democracy, centered on the assembly, in the face of important evidence to the contrary may reflect above all Athens' continued significance as an ideological anchor against which modern democratic ideas and practices can be tested. The hope of this dissertation is that a renewed understanding of Athenian democracy may yet have the power to change some of those ideas and practices for the better.

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