

Publicity and the Courts of Classical Athens

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This Essay explores the role that public legal proceedings played in the classical Athenian democracy of the fifth and fourth centuries B.C.E. The courts in classical Athens enjoyed a larger market share of cultural communicative space than any modern court could hope to achieve: trials were held in the presence of hundreds of jurors and were watched by local and foreign spectators. The publicity surrounding the Athenian courts was vital to the operation of the Athenian democracy in several respects. First, publicity helped to provide accountability for jurors by exposing their decisions to public scrutiny. Second, public legal proceedings promoted truth by inhibiting litigants from making baseless accusations or misstating the law. Third, public trials provided a form of democratic education vital to the functioning of Athens's direct, participatory democracy. Fourth, publicity provided accountability for litigants' out-of-court behavior: the courts provided a venue for litigants publicly to shame their opponents for wrongdoing. This informal enforcement of norms was important to maintaining order in Athens because it compensated for systematic under-enforcement due to the absence of state prosecution and enforcement mechanisms. Fifth, the public, participatory nature of the Athenian courts assured that the courts were a site of popular norm elaboration. And finally, publicity helped to ensure that court sessions were a form of democratic practice that fostered a sense of civic identity.

In this way, Athenian public trials exemplified Bentham's notion of publicity by fostering truth, civic education, and, above all, accountability.¹ The Athenian courts also implemented some of the more ambitious goals of public court proceedings envisioned by Curtis and

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1. JEREMY BENTHAM, *Rationale of Judicial Evidence*, in 6 THE WORKS OF JEREMY BENTHAM 351, 354-57 (John Bowring ed., 1843) [hereinafter BENTHAM, *Rationale*]. For a discussion, see JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 295-301 (2011).

Resnik in *Representing Justice*² by providing a process for participatory norm elaboration and by publicly enacting the democratic ideal of popular sovereignty.³ At the same time, the public nature of Athenian trials was intimately linked to the unique elements of the Athenian legal system. Examinations of publicity and accountability in modern courts assume a disconnect between government power, which is wielded by expert judges, and the people—a gap that publicity helps to bridge.⁴ By contrast, in Athens's wholly amateur, highly participatory system, the popular jury itself fulfilled some of the functions of the modern public, while at the same time being subject to scrutiny from court spectators.

I. ATHENIAN COURTS AS PUBLIC SPECTACLE

The Athenian legal system provided for an extraordinary level of public participation, both because it featured amateur, popular procedures and because the courts were a major form of public entertainment. In this Part, I first describe the major features of Athenian legal procedure. I then discuss how the location and architecture of Athenian courts promoted public viewing of trials. Finally, I offer literary evidence indicating that Athenian and foreign spectators regularly attended both high-profile and ordinary court cases.

A. A Popular Procedure

It is important to note at the outset that when characterizing the Athenian legal system as open, accessible, and participatory, I mean that it was open, accessible, and participatory for the privileged group of male citizens. The court system largely excluded the rest of the Athenian population. Foreigners and resident aliens were permitted to litigate only in limited circumstances, most notably in commercial suits.⁵ With a few exceptions, slaves could serve neither as plaintiffs nor defendants.⁶ When a slave was involved in a dispute, the case was brought by or against the slave's owner. Similarly, women were forced to depend on their male legal guardians to act on their behalf in court.⁷

The most distinctive feature of the Athenian system is its amateurism. At nearly every stage in the legal process, the functioning of the system relied on private initiative. There was no police force to maintain public order or investigate crime, and successful litigants were left on their own

2. RESNIK & CURTIS, *supra* note 1, at 14, 288, 295-97.

3. *Id.* at 301.

4. *See, e.g., id.* at 12, 14, 301.

5. *See* DOUGLAS MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 221-24 (1993).

6. STEPHEN C. TODD, *THE SHAPE OF ATHENIAN LAW* 187 (1993).

7. *Id.* at 208.

to enforce judgments.⁸ With few exceptions, litigants were required to deliver their own speeches to the jury.⁹ A litigant could hire a speechwriter to write his speech for him, but court speakers never mentioned their speechwriter and generally pretended to be speaking extemporaneously in court. In fact, speakers often boasted of their inexperience in public speaking and ignorance of the law.¹⁰

Each Athenian litigant was allotted a fixed amount of time to present his case. Some private cases were completed in less than an hour, and no trial lasted longer than a day.¹¹ Although a magistrate chosen by lot presided over each popular court, he did not interrupt the speaker for any reason or permit anyone else to raise legal objections, and did not instruct the jury as to the relevant laws.

The laws were inscribed on large stone blocks in various public areas of Athens. Litigants were responsible for finding and quoting any laws they thought helped their case, though there was no obligation to explain the relevant laws, and in some cases litigants cite no laws at all. Litigants often discuss a variety of issues, most notably character evidence and appeals to equity and pity, that would be considered inadmissible in a modern courtroom. As a result Athenian popular juries wielded a great deal of discretion in their decision-making.¹²

Juries were chosen by lot from adult male citizens and generally ranged from 201 to 501 in size.¹³ A simple majority vote of the jury, taken by secret ballot and without formal deliberation, determined the outcome of the trial. No reasons for the verdict were given, and there was no provision for appeal.¹⁴

B. Court Architecture

The location of trials facilitated popular participation in the Athenian legal system. There was no standard plan for Athenian court, and in fact cases could at times be heard in non-judicial buildings such as the Stoa

8. On the importance of private initiative in the Athenian legal system, see generally VIRGINIA HUNTER, *POLICING ATHENS* (1994).

9. A litigant could donate some of his time to another speaker. For an in-depth study of the use of supporting speakers, see LENE RUBINSTEIN, *LITIGATION AND COOPERATION* (2000).

10. See, e.g., LYSIAS, *Against Eratosthenes*, in LYSIAS 113, 116-17 (S.C. Todd trans., 2000) [Lys. 12.4]; Antiphon, *On the Murder of Herodes*, in ANTIPHON & ANDOCIDES 48, 51 (Michael Gagarin & Douglas M. MacDowell trans., 1998) [Ant. 5.1].

11. MACDOWELL, *supra* note 5, at 249-50.

12. For further discussion, see ADRIAAN LANNI, *LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS* 41-74 (2006).

13. MOGENS HERMAN HANSEN, *THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES* 187 (1991).

14. TODD, *supra* note 6, at 145.

Poikile¹⁵ or the Odeion of Perikles.¹⁶ Moreover, because Athenian courts were often not monumental buildings, the archaeological evidence is very limited and the conclusions drawn from it often conjectural.¹⁷ Still, what we know of the location and architecture of Athenian court structures suggests that most trial proceedings were easily accessible to the public.¹⁸

Most of the courts were in the agora, the bustling market center of the polis, or city-state. The archaeological remains of one court suggest that the presence of spectators at trials was extremely common. Boegehold has proposed that the four stone benches preserved on the west side of the agora in front of the temple of Hephaestus, together with a fifth bench that is not preserved, may have served as seats for a jury of 501 citizens. He posits that this area may have been one of the regular lawcourts for public trials in the fifth and early fourth century B.C.E.¹⁹ He argues that there was probably a temporary barrier to hold back crowds.²⁰ If Boegehold's identification is correct, it is likely that large crowds of casual spectators would form at cases tried at this location, as it was sited in one of the busiest areas of the agora, not far from the Altar of the Eponymous Heroes, where proposed legislation and other important announcements were posted on notice boards. In addition, the absence of permanent walls or a ceiling would ensure that large numbers of people could have an unobstructed view of the courtroom action. Trials held in the Stoa Poikile would similarly draw crowds because it served as a central meeting place.²¹

In 340 B.C.E., near the end of the classical period, the Athenian popular courts were reorganized into a single complex of buildings that has been associated with the remains of five structures on the east side of the agora beneath the Stoa of Attalos.²² The *Constitution of the Athenians* states that

15. HOMER A. THOMPSON & R.E. WYCHERLEY, *THE AGORA OF ATHENS: THE HISTORY, SHAPE, AND USES OF AN ANCIENT CITY CENTER* 71, 14 *ATHENIAN AGORA* (1972).

16. ALAN L. BOEGEHOLD, *THE LAW COURTS AT ATHENS: SITES, BUILDINGS, EQUIPMENT, PROCEDURE, AND TESTIMONIA* 1, 6, 28 *ATHENIAN AGORA* (1995); DEMOSTHENES, *Against Neaera*, in DEMOSTHENES, *SPEECHES* 50-59, at 151, 170 (Victor Bers trans., 2003) [Dem. 59.52] [hereinafter DEMOSTHENES, *SPEECHES* 50-59].

17. See BOEGEHOLD, *supra* note 16, at 1, 10-15.

18. Cases involving the Eleusinian Mysteries were a notable exception: it seems that only initiates were permitted to judge or observe trials. See BOEGEHOLD, *supra* note 16, at 194 (quoting and translating Pollux 8.123-124) ("[T]he ropes were placed at a distance of fifty feet; Officers kept guard to prevent any of the uninitiated from approaching."); Andocides, *On the Mysteries*, in ANTIPHON & ANDOCIDES, *supra* note 10, at 99, 108, 110, 128 [Andoc. 1.25, 31-2, 105] (indicating that all jurors were initiates).

19. BOEGEHOLD, *supra* note 16, at 95-96; Alan Boegehold, *Philokleon's Court*, 36 *HESPERIA* 111-20 (1967).

20. BOEGEHOLD, *supra* note 16, at 119.

21. R.E. WYCHERLEY, *LITERARY AND EPIGRAPHICAL TESTIMONIA* 31, 3 *ATHENIAN AGORA* (1957).

22. BOEGEHOLD, *supra* note 16, at 10-15.

there were ten entrances to the complex and describes how a selected juror would show his marked acorn to the attendant in order to be admitted into the courtroom area.²³ It seems likely that a light barrier of rope or wicker surrounded the complex and that spectators were not permitted to approach the courts until the jurors were seated.²⁴ A railing at the edge of each courtroom held back the spectators. Enough remains of the structure in the complex known as building C to permit us to describe the arrangement of bystanders in this court.²⁵ The south side of the building is enclosed by a colonnade with a screen wall of mud brick between the columns. A row of postholes, evidently meant to support a railing running parallel to the colonnade at a distance of about three meters, is preserved.²⁶ Thus, spectators at this court could stand behind ropes or insubstantial barriers 3 meters away from the edge of the colonnade and peer over the screen wall between the columns to see the action.

Although most Athenian courts were in the agora, some—most notably the specialized homicide courts—were located in different parts of Athens. Travlos has argued that a classical site to the south of the Acropolis at No. 8 Makri Street represents the remains of the Palladion, the homicide court that handled cases involving unintentional homicide and the killing of non-citizens.²⁷ In the colonnade of this building, we find a row of rectangular sockets that presumably supported either a series of poles connected with rope or light wooden barriers that would separate the spectators from the jury but would not prevent them from seeing and hearing the litigants.²⁸ The requirement that all homicide trials be conducted under the open sky²⁹ may have also made it easier for bystanders to hear the litigants. A court speech of Antiphon that was delivered in the Palladion explicitly refers to bystanders.³⁰ The evidence for spectators at the Palladion indicates that spectators regularly attended private trials at courts outside the city center, as well as high-profile public trials in the agora.

23. Aristotle, *The Constitution of Athens*, in ARISTOTLE AND XENOPHON ON DEMOCRACY AND OLIGARCHY 147, 202-04 (J.M. Moore trans., 1983) [Ath. Pol. 63-65].

24. Alan Boegehold, *Three Court Days*, in SYMPOSION 1990: PAPERS ON GREEK AND HELLENISTIC LEGAL HISTORY 178 (Michael Gagarin ed., 1991).

25. R.F. TOWNSEND, THE EAST SIDE OF THE AGORA: THE REMAINS BENEATH THE STOA OF ATTALOS 130-34, 27 ATHENIAN AGORA (1995).

26. *Id.*

27. J. Travlos, *The Law Court Epi Palladioi*, 43 HESPERIA 500-11 (1967).

28. *Id.* at 508.

29. Antiphon, *supra* note 10, at 53 [Ant. 5.11]; Aristotle, *supra* note 23, at 198-99 [Ath. Pol. 57.4].

30. Antiphon, *On the Chorus Boy*, in ANTIPHON & ANDOCIDES, *supra* note 10, at 73, 80 [Ant. 6.14].

C. Spectators in Court

Literary evidence confirms the suggestion from the archaeological evidence that spectators were a fixture in Athenian courts. At least nineteen of our surviving real and imaginary speeches include explicit references to spectators,³¹ and several texts include ambiguous addresses to the audience which might have been meant for the bystanders as well as the jurors.³²

Literary evidence suggests that Athenians were especially eager to attend cases involving prominent citizens; in fact, just over half of the references to bystanders come from speeches delivered by famous politicians, and all but one of the surviving speeches of Dinarchus and Aeschines mention the audience. In his *Life of Demosthenes*, Plutarch describes the excitement aroused by the impending trial: “[T]he lawsuit was eagerly awaited, partly because of the eloquence of Callistratus, who was then at the height of his powers, and partly because of the importance of the issue, which was in the forefront of everyone’s minds.”³³ The famous trial of Ctesiphon in the dispute over Demosthenes’s crown was attended, Aeschines claims, by an unprecedented throng of Athenian and other Greek spectators—“more than anyone can remember attending a

31. AESCHINES, *Against Ctesiphon*, in AESCHINES 159, 168, 184, 235 (Chris Carey trans., 2000) [hereinafter AESCHINES, *Against Ctesiphon*] [Aesch. 3.8, 56,207]; AESCHINES, *Against Timarchus*, in AESCHINES, *supra*, at 18, 50, 63, 81 [hereinafter AESCHINES, *Against Timarchus*] [Aesch. 1.77, 117, 173]; AESCHINES, *On the Embassy*, in AESCHINES, *supra*, at 88, 95 [hereinafter AESCHINES, *On the Embassy*] [Aesch. 2.5]; DEMOSTHENES, *Against Aristogeiton I*, in DEMOSTHENES III, at 517, 575 (J.H. Vince trans., 1935) [hereinafter DEMOSTHENES, *Against Aristogeiton I*] [Dem. 25.98]; DEMOSTHENES, *Against Conon*, in DEMOSTHENES, SPEECHES 50-59, *supra* note 16, at 66, 78-79 [Dem. 54.41]; DEMOSTHENES, *Against Dionysodorus*, in DEMOSTHENES, SPEECHES 50-59, *supra* note 16, at 92, 105 [Dem. 56.48]; DEMOSTHENES, *Against Onetor I*, in DEMOSTHENES III, at 517, 575 (J.H. Vince trans., 1935) [hereinafter DEMOSTHENES, *Against Onetor I*] [Dem. 25.98]; DEMOSTHENES, *Against Leptines*, in DEMOSTHENES, SPEECHES 20-22, at 15, 73 (Edward M. Harris trans., 2008) [hereinafter DEMOSTHENES, *Against Leptines*] [Dem. 20.165]; DEMOSTHENES, *On the Crown*, in DEMOSTHENES, SPEECHES 18 AND 19, at 23, 79 (Harvey Yunis trans., 2005) [hereinafter DEMOSTHENES, *On the Crown*] [Dem. 18.196]; DEMOSTHENES, *On the Dishonest Embassy*, in DEMOSTHENES, SPEECHES 18 AND 19, *supra*, at 114, 206 [Dem. 19.309]; ISAEUS, *On the Estate of Dicaeogenes*, in ISAEUS 76, 86 (Michael Edwards trans., 2007) [Is. 5.20]; LYSIAS, *Against Epicrates*, in LYSIAS, *supra* note 10, at 281, 283 [Lys 27.7]; LYSIAS, *supra* note 10, at 122-23 [Lys. 12.35]; Andocides, *On the Mysteries*, in ANTIPHON & ANDOCIDES, *supra* note 10, at 99, 128 [Andoc. 1.105]; Antiphon, *supra* note 30, at 80 [Ant. 6.14]; Dinarchus, *Against Aristogeiton*, in DINARCHUS, HYPERIDES, & LYCURGUS 45, 50 (Ian Worthington et al. trans., 2001) [hereinafter Dinarchus, *Against Aristogeiton*] [Din. 2.19]; Dinarchus, *Against Demosthenes*, in DINARCHUS, HYPERIDES, & LYCURGUS, *supra*, at 11, 20, 25, 31 [hereinafter Dinarchus, *Against Demosthenes*] [Din. 1.30, 46, 66]; Hyperides, *Against Demosthenes*, in DINARCHUS, HYPERIDES, & LYCURGUS, *supra*, at 115, 122 [Hyp. 5.22]; Plato, *Apology of Socrates*, in THE TRIAL AND EXECUTION OF SOCRATES: SOURCES AND CONTROVERSIES 42, 50 (Thomas C. Brickhouse & Nicholas D. Smith trans., 2002) [Pl. Apol. 24e-25b]. Antiphon refers to the *corona* of previous trials. See Antiphon, *supra* note 30, at 82-83 [Ant. 6.24]. For further discussion, see Adriaan M. Lanni, *Spectator Sport or Serious Politics? Hoi Periostekotes and the Athenian Law Courts*, 117 J. HELLENIC STUD. 183 (1997).

32. See, e.g., Dinarchus, *Against Demosthenes*, *supra* note 31, at 14 [Din. 1.10].

33. PLUTARCH, *Life of Demosthenes*, in THE AGE OF ALEXANDER 191 (Ian Scott-Kilvert trans., 1973) [Plu. Dem. 5.1].

public case.”³⁴ Public suits were given extra notoriety by virtue of being advertised on the notice boards mounted at the Altar of the Eponymous Heroes.³⁵

Our sources indicate that Athenians also regularly encountered ordinary trials as they went about their business in the agora. We have seen that most trials were held in the marketplace, and that spectators could easily drop by to listen to a case without even entering a building. A fragment from the comic poet Eubulus conveys the extent to which the lawcourts and market stalls were intermingled in the Athenian agora: “[A., one of the characters] You will find everything sold together in the same place at Athens: figs, [B., another character] summoners, [A.] bunches of grapes, turnips, pears, apples, [B.] witnesses, [A.] roses, medlars, haggis, pudding, honeycombs, chickpeas [B.]: private lawsuits [A.]: beestings, pudding, myrtle, [B.] allotment devices, [A.] hyacinths, lambs, [B.] waterlocks, laws, indictments.”³⁶

It seems likely that many foreigners and Athenians from the countryside would stop by to watch a trial while they were visiting the city. For the casual spectator, private suits involving small sums of money might be more attractive than public cases, since it would be possible to follow an entire trial in less than half a day, and in some cases in less than an hour.³⁷ The courts were in session every day except those devoted to an annual public festival or a meeting of the assembly, and a visitor looking for entertainment would probably attend whichever of these three forms of public spectacle was scheduled for that day. Alkiphron recreates the wonder of a fourth-century Egyptian visitor to Athens: “Where in Egypt will I observe the Assembly and the vote being given out? Where will I see the democratic mob exercising such freedom? . . . The Kerameikos, the agora, the courts, the beautiful acropolis . . .”³⁸

Foreign visitors would likely be particularly curious to see a trial, since the Athenians were well-known throughout the Greek world for their litigiousness: Thucydides says that the Athenians are known to love litigation;³⁹ the Old Oligarch claims that the Athenians try more cases than all other city-states altogether;⁴⁰ and Athenian litigiousness is the subject of Aristophanes’s *Wasps* and a common source of humor in many

34. AESCHINES, *Against Ctesiphon*, *supra* note 31, at 184 [Aesch. 3.56].

35. See, e.g., DEMOSTHENES, *Against Meidias*, in DEMOSTHENES, *SPEECHES* 20-22, *supra* note 31, at 75, 123-24 [Dem. 21.103].

36. BOEGEHOLD, *supra* note 16, at 157 (quoting and translating Eubulus fr. 74 K-A).

37. HANSEN, *supra* note 13, at 187-88 (1991).

38. BOEGEHOLD, *supra* note 16, at 152 (quoting and translating Alkiphron, *Epistles* II.3.11).

39. THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 81 (Rex Warner trans., 1972) [Thuc. 1.77].

40. Xenophon, *The Constitution of the Athenians*, in ARISTOTLE AND XENOPHON ON DEMOCRACY AND OLIGARCHY, *supra* note 23, at 37, 45 [Xen. *Ath. Pol.* 3.2].

of his plays.⁴¹ Indeed, seven of the surviving court speeches which mention spectators mention that foreigners were among the audience.⁴² Courtroom dramas represented Athenian democracy in action, and visitors' opinions of Athens would certainly be affected by what they witnessed at the lawcourts. In Plato's *Apology*, Socrates scolds litigants who weep and plead with the jury and parade their children in court to arouse sympathy. Prominent Athenians who do so disgrace the city in the eyes of foreigners: "I think they are bringing disgrace to the city, so that a foreigner would suppose that those Athenians who're superior in virtue, whom they judge from among themselves to be worthy of getting offices and other honors, are no better than women."⁴³

Men particularly interested in high-profile cases and casual visitors to the agora were not the only members of the audience at Athenian trials. Some members of the jury pool who reported to the courts but were not selected to judge on a given day may have remained to watch cases. Hansen estimates that between 1500 and 2000 of the 6000-member pool were empanelled on an average day, but it is impossible to know how many prospective jurors normally reported for service.⁴⁴ Besides prospective jurors, professional speechwriters, politicians, and students of oratory appear to have attended trials regularly.⁴⁵ Aeschines remarks that he listens to cases to observe which types of arguments and rhetorical strategies work best: "[W]hen I personally find myself in the courtroom and listen to litigants, I see that the same factor is always influential with you."⁴⁶ Aeschines also states that Demosthenes invited his students to hear him argue in court,⁴⁷ and, according to Plutarch, Demosthenes decided to become an orator after his tutor took him to hear a famous court case.⁴⁸ Interestingly, speakers sometimes address their rhetoric to the audience as well as to the jurors: in *On the Crown*, Demosthenes states, "I intend this entire long discussion for your benefit, jurors, as well

41. See, e.g., ARISTOPHANES, *The Acharnians*, in ARISTOPHANES 1, at 7, 39 (Benjamin Bickley Rogers trans., 1924) [Ar. Ach. 375]; ARISTOPHANES, *The Knights*, in ARISTOPHANES I, *supra*, at 124, 201 [Ar. Knights 798]; see also TODD, *supra* note 6, at 147-54.

42. AESCHINES, *Against Ctesiphon*, *supra* note 31, at 184 [Aesch. 3.56]; AESCHINES, *Against Timarchus*, *supra* note 31, at 63 [Aesch. 1.117]; DEMOSTHENES, *Against Aristogeiton I*, *supra* note 31, at 575 [Dem. 25.98]; LYSIAS, *supra* note 10, at 122-23 [Lys. 12.35]; Dinarchus, *Against Demosthenes*, *supra* note 31, at 25 [Din. 1.46]; Hyperides, *supra* note 31, at 122 [Hyp. 5.22]; Plato, *supra* note 31, at 59 [Pl. Apol. 35a-b].

43. Plato, *supra* note 31, at 59 [Pl. Apol. 35a-b].

44. HANSEN, *supra* note 13, at 187.

45. The spectators at trials in republican Rome included aspiring orators and jurists. See BRUCE W. FRIER, *THE RISE OF THE ROMAN JURISTS* 235 n.2 (1985).

46. AESCHINES, *Against Timarchus*, *supra* note 31, at 50 [Aesch. 1.77].

47. *Id.* at 81 [Aesch. 1.173].

48. PLUTARCH, *supra* note 33, at 191-92 [Plu. Dem. 5.2].

as for that of the surrounding audience.”⁴⁹

In sum, classical Athenian legal proceedings enjoyed a remarkable level of publicity. At a minimum, every case involved the participation of hundreds of jurors, and it seems that ordinary cases as well as high-profile trials regularly attracted a substantial crowd. As we will see in the next Part, the publicity of Athenian trials had a profound impact on the working of the courts and the Athenian democracy more generally.

II. THE FUNCTIONS OF PUBLICITY IN THE ATHENIAN DEMOCRACY

Bentham famously advocated for publicity in a variety of public functions, including legal proceedings. For Bentham, publicly accessible courts serve at least three functions: (1) they provide accountability, as judges are themselves tried in the “Public Opinion Tribunal”;⁵⁰ (2) they promote truth since falsehoods can be more easily discovered; and (3) they educate citizens. The classical Athenian legal system illustrates these benefits of public legal processes, though it is worth noting that in Athens it is the popular jury, not expert judges, whose decisions are opened to public scrutiny through publicity. After applying each of Bentham’s three functions of publicity to the Athenian context, I discuss how the public nature of Athenian trials also (1) promoted informal sanctions for litigants’ out-of-court wrongdoing, (2) provided a site for public norm elaboration, and (3) fostered a sense of civic identity.

A. Accountability for Jurors

Perhaps the most important effect of the publicity surrounding Athenian trials was the introduction of a form of informal accountability for the jurors. We have seen that Athenian jurors enjoyed enormous discretion. The decision of a jury could not be appealed and the jurors were the only state officials not subject to a formal accounting procedure following their term of office.⁵¹ Some regarded the lack of accountability of jurors as a flaw in the democracy. Aristophanes has one of his comic characters, an old man addicted to jury service, exult in this feature.⁵² The clear implication is that the lack of juror accountability can be mischievous, particularly since Athenian trials often involved a jury of mostly poor men sitting in judgment of elite litigants. The publicity surrounding Athenian

49. DEMOSTHENES, *On the Crown*, *supra* note 31, at 79 [Dem. 18.196].

50. JEREMY BENTHAM, CONSTITUTIONAL CODE, I THE COLLECTED WORKS OF JEREMY BENTHAM 35 (F. Rosen & J.H. Burns eds., 1983); BENTHAM, *Rationale*, *supra* note 1, at 354-57. For an excellent discussion of Bentham’s theory of publicity as it applies to courts, see RESNIK & CURTIS, *supra* note 1, at 295-99.

51. See HANSEN, *supra* note 13, at 182-83.

52. ARISTOPHANES, *The Wasps*, in ARISTOPHANES I, *supra* note 41, at 408, 465 [Ar. *Wasps* 587].

trials may have helped encourage juror responsibility by exposing jury decisions to public scrutiny and criticism.

Lawcourt speakers regularly call jurors' attention to the impact their decision will have on their reputations. For example, Dinarchus tells the jury that they are on trial before the spectators: "[W]hile you are about to pass judgment on this man, the spectators and everyone else are passing judgment on you."⁵³ Court speakers sometimes ask the jury how they will defend their verdict when questioned by the audience as they leave the courtroom. A speech written by Demosthenes offers the most elaborate example of the type:

[Y]ou will soon be leaving this court-house, and you will be watched by the bystanders, both aliens and citizens; they will scan each one as he appears, and detect by their looks those who have voted for acquittal. What will you have to say for yourselves, Athenians, if you emerge after betraying the laws? With what expression, with what look will you return their gaze?⁵⁴

Speakers also regularly assume that information about court proceedings will reach beyond the immediate courtroom audience. For example, Aeschines reminds the jurors that their fellow citizens will hear about their decision: "And so you should cast your vote not as man giving judgment, but as men under observation, with an eye to your defense before those citizens who are not here but will ask you about your verdict."⁵⁵ In high-profile cases, speakers emphasize the publicity surrounding the trial and claim that the reputation of individual jurors is at stake; for example, the speaker in a prominent treason trial warns that "all mankind will hear the judgment you deliver today; they will take note of you the judges and how you deal with the man who has committed such iniquities."⁵⁶ Of course, true accountability was impossible because the vote of individual jurors remained secret, allowing each juror to plausibly deny that he had been in the majority in an unpopular decision.⁵⁷ But this distinction may not have made much difference in an age where collective responsibility was taken seriously. Indeed, the speaker in one public suit explicitly promises that each juror will receive individual recognition for a just verdict: "[E]ach of you will personally have his own share of the renown gained through your common verdict."⁵⁸

53. Dinarchus, *Against Aristogeiton*, *supra* note 31, at 50 [Din. 2.19].

54. DEMOSTHENES, *Against Aristogeiton I*, *supra* note 31, at 575 [Dem. 25.98].

55. AESCHINES, *Against Ctesiphon*, *supra* note 31, at 247 [Aesch. 3.247].

56. Dinarchus, *Against Demosthenes*, *supra* note 31, at 17 [Din. 1.22].

57. For a thoughtful discussion of jury secrecy and accountability in the modern context, see Jon Elster, *Preventing Mischief in Juries, Assemblies, and Elections* (unpublished manuscript) (on file with author).

58. DEMOSTHENES, *Against Leptines*, *supra* note 31, at 73 [Dem. 20.165].

Plato appears to have understood that the audience performed an important function in regulating the jurors. In the *Laws*, his legal blueprint for the imaginary society of Magnesia, he requires maximum attendance at capital trials: “[L]et all the citizens, as many as are at leisure, stand as serious listeners to such trials.”⁵⁹ In connection with certain other trials, he makes attendance compulsory for the members of the Council and the magistrates who appointed them, and permissible for all others.⁶⁰ Unlike classical Athens, Plato’s imaginary Magnesia had no secret ballot and the spectators could prosecute the jurors.

Even without legal enforcement, though, we should not underestimate how powerful a deterrent the prospect of embarrassment before the spectators and greater Athenian public might be. This is particularly true when we remember that in the absence of public services the average Athenian was dependent on the goodwill and generosity of his fellow citizens, particularly in times of crisis and shortage. Athenian jurors, though formally unaccountable, were subject to constant public scrutiny and criticism for their decisions through the mechanism of publicity.

B. Promoting the Truth

The public nature of Athenian trials provided a measure of accountability for litigants as well as jurors by deterring them from misleading the jury. At first glance, the Athenian system would seem to invite rampant misrepresentation of laws and facts by litigants. Litigants were solely responsible for informing the jury about the laws implicated in a dispute. Litigants submitted their own copies of laws that they thought helped their case, and a litigant directed the court clerk to read out his submissions at various points during his speech. In addition to the outright invention or misquoting of a law, there was always the possibility that a litigant might offer a selective or misleading discussion of the laws relating to the dispute. Similarly, the absence of systematic record-keeping and documentation made it very difficult conclusively to disprove even outrageous accusations about a speaker’s citizenship, debt, public service, or criminal record.

The presence of hundreds of jurors and spectators, some of whom were bound to know the litigants, must have helped discipline speakers by giving them reason to avoid wild exaggerations and lies.⁶¹ Speakers often asked the jury to shout down their opponent if he misrepresented the laws or facts of the case; in fact, the Athenians had a term for this form of

59. PLATO, *LAWS* 248 (Thomas Pangle trans., 1988) [Pl. *Laws* 9. 855d 6-8].

60. *Id.* at 155 [Pl. *Laws* 7. 767e 3-4].

61. *Cf.* BENTHAM, *Rationale*, *supra* note 1, at 355 (arguing that publicity would uncover and deter lies by witnesses).

audience intervention, *thorubos*.⁶² In a few passages, a speaker explicitly invited the bystanders to shout out if they were aware that he is misstating the facts.⁶³ Litigants must have been particularly wary of misrepresenting the law given the regular presence of professional speechwriters and their students in the audience.⁶⁴ In this way, the publicity of Athenian trials provided an informal check on the veracity of speakers' claims.

C. Democratic Education

Public trials also served a vital role in educating Athenian citizens in the ways of the participatory democracy. With the notable exception of the generals, most public officials were selected by lot to serve one-year terms, a time period that did not permit the development of specialized expertise.⁶⁵ We have seen that litigants were expected to represent themselves in court, and jurors were responsible for deciding disputes without the benefit of judicial instruction as to the laws. Citizens in the Assembly debated and then voted on all public business. Athens' survival and success depended on the ability of ordinary citizens to take an active role in governing the state.

Observers at Athenian trials could learn many skills vital to active participation in the democracy. By watching cases in the agora, most Athenians became familiar with the procedures of the courts, the method of argument, and even some of the city's laws long before they were expected to serve as a juror or court magistrate or participate as a litigant. The speaker in one case notes that his upbringing was highly unusual because he never went to the courts to watch trials.⁶⁶ The speaker in *Lysias 10*, a speech involving the interpretation of the Athenian law against slander, berates his opponent for his failure to attend the Areopagus, a homicide court, to learn about the city's laws and goes on to state: "I would like to clarify the point for him on the basis of other laws as well, in the hope that he may receive an education now at any rate on the speaker's rostrum, and not cause us trouble in the future."⁶⁷ The implication is that citizens should learn the ways of the Athenian legal system as bystanders before undertaking jury service or taking on a case.

62. See Victor Bers, *Dikastic Thorubos*, in *CRUX: ESSAYS IN GREEK HISTORY PRESENTED TO G.E.M. DE STE. CROIX 10* (P.A. Cartledge ed., 1985).

63. Antiphon, *supra* note 30, at 80 [Ant. 6.14]; Dinarchus, *Against Demosthenes*, *supra* note 31, at 20 [Din. 1.30].

64. The penalty for citing a nonexistent law was death, but there is no evidence of this law ever being enforced. DEMOSTHENES, *Against Aristogeiton II*, in DEMOSTHENES III, *supra* note 31, at 579, 591 [Dem. 26.24].

65. HANSEN, *supra* note 13, at 233-37.

66. ISAEUS, *On the Estate of Cleonymus*, in ISAEUS, *supra* note 31, at 17 [Is. 1.1].

67. LYSIAS, *Against Theomnestus for Defamation*, in LYSIAS, *supra* note 10, at 107 [Lys. 10.15].

Public trials offered lessons for citizens applicable beyond the courts. Spectators could learn how to make persuasive arguments for use in the Assembly and smaller governmental units, as well as more general lessons about the types of persona and self-presentation that garnered respect. And as already noted, the frequent discussion (and contestation) of social as well as legal norms in the courts helped educate citizens about the obligations of citizenship and community life.⁶⁸

D. Promoting Informal Sanctions

So far, the functions of public trials in Athens have closely tracked those outlined by Bentham, with the important modification that the “judges” being held accountable by the public were not elite government officials, but ordinary jurors. Public court proceedings also served a function unique to the Athenian context: publicizing litigants’ past bad acts promoted informal sanctions, which in turn helped to compensate for problems of underenforcement in the formal court system.⁶⁹

In the absence of stringent rules of evidence, Athenian litigants regularly attacked their opponents’ character, by referring to prior convictions and past crimes and bad acts that had not been prosecuted.⁷⁰ Discussions of past crimes were not limited to charges similar to the present case; any prior violation of the law by a litigant could be used against him. For example, when Alcibiades the Younger, the son of the famous general, was charged with deserting the ranks, his prosecutor provides a long list of his past crimes, including adultery and attempted murder.⁷¹ In essence, when a litigant walked into an Athenian courtroom, his entire life was on trial. As a result, litigants had incentives to uncover and then publicize in court any prior bad acts by their opponent, even if they were victimless crimes or crimes committed against someone other than the litigant, and even if they were completely unrelated to the present case.⁷²

Broadcasting these accusations of unprosecuted wrongdoing at a public trial assisted the informal enforcement of legal norms in two ways. First, the trial can be seen as a form of public shame sanction, as litigants were attacked before hundreds of jurors and spectators. Second, news of allegations made during a court case would likely find its way back to a

68. For an excellent discussion of how publicity in public fora, such as the Assembly and religious rituals, as well as in courts, helped build common knowledge, reinforce community norms, and promote coordination, see JOSIAH OBER, *DEMOCRACY AND KNOWLEDGE* 192-94 (2008).

69. For further elaboration of this argument, with citations, see Adriaan Lanni, *Social Norms in the Courts of Ancient Athens*, 1 J. LEGAL ANALYSIS 691 (2009).

70. *Id.* at 706-07 (providing ancient references).

71. LYSIAS, *Against Alcibiades I*, in LYSIAS, *supra* note 10, at 169 [Lys. 14.30-31].

72. *See* Lanni, *supra* note 69, at 710-17.

litigant's local village community, resulting in informal sanctions. Litigants clearly feared the effect that allegations of wrongdoing might have on their reputation. Aeschines states, for example, that, even if he wins his suit, he will consider his life not worth living if anyone is convinced by his opponent's suggestion, unrelated to the charges in the case, that he had committed *hubris* (roughly, "outrage") against a woman.⁷³

The use of publicity to facilitate informal enforcement helped to compensate for difficulties of enforcement stemming from a system that relied on private prosecution and enforcement. Because litigants had incentives to bring up their opponents' unrelated past bad acts, Athenians could not blithely commit victimless crimes or injure those who might be powerless to sue them; these offenses could come back to haunt them if they ever found themselves in court for any reason in the future. Demosthenes is quite explicit about how consideration of unrelated crimes can compensate for problems of underenforcement. He lists the many people his opponent, Meidias, has wronged in the past, noting that most of them did not bring suit because they lacked the money, or the speaking ability, or were intimidated by Meidias.⁷⁴ He then urges the jury to punish Meidias for these unprosecuted crimes: "If someone is so powerful that by tactics like this he can deprive each of us one by one of the right to obtain justice from him, it is the duty of all men to punish him for everyone's sake now that he has been caught."⁷⁵ Demosthenes argues here for the jury to punish Meidias through its verdict, but the recitation of his crimes in open court, when spread through publicity, would also encourage informal sanctions.

E. Norm Elaboration

While Bentham emphasized how public trials can foster truth and legitimacy, Resnik and Curtis focus on how accessible courts can create a dialogue between judges, litigants, and the audience that promotes the democratic elaboration of public norms.⁷⁶ They envision the back-and-forth of courts, legislatures, and the public as resulting in changes to rules and their applications in response to popular input. The Athenian courts represent an extreme form of such a dialogue: public norms were so contestable in court that there is some debate over whether the Athenian system can even be characterized as a "rule of law."⁷⁷ Our surviving

73. AESCHINES, *On the Embassy*, *supra* note 31, at 95 [Aesch. 2.5].

74. DEMOSTHENES, *supra* note 35, at 136 [Dem. 21.141].

75. *Id.* [Dem. 21.142].

76. RESNIK & CURTIS, *supra* note 1, at 301, 304.

77. For a summary of the scholarship on this question, see LANNI, *supra* note 12, at 1-3.

inheritance speeches offer perhaps the most obvious example of norm contestation and elaboration in Athenian courts. In these speeches, litigants openly debate what are the most important factors in determining who should inherit an estate, with no clear resolution: the beneficiary named in the will, the person closest in affection to the deceased, the person who cared for the deceased in his declining years, or the person who had paid for his funeral.⁷⁸

Several features of the Athenian legal system made it a particularly successful site for public norm elaboration. First, the courts enjoyed a monopoly of cultural space unparalleled in the modern world, in which myriad sources of information and entertainment vie for citizens' attention. For the Athenians, the primary sources of entertainment and activity were festivals, Assembly meetings, and trials. For the two hundred-odd court days a year, the courts were literally the only game in town. Moreover, each case garnered the attention of a minimum of hundreds of jurors, ensuring that controversial court decisions would be widely discussed. Second, the practice of audience clamor (*thorubos*) in response to specific statements made by litigants and to the verdict provided immediate popular feedback. Third, as already mentioned, Athenian court arguments regularly ranged well beyond the legal issues in dispute to discuss and challenge the normative underpinnings of a particular law or an aspect of social life. Finally, jurors were not bound by precedent, leaving them plenty of discretion to change the law or its application to bring it into line with popular sentiment.⁷⁹

These characteristics helped the courts to set the moral tone for Athenian society much more than our courts do today. But at the same time, there was a key limit to this capability: the absence of written, reasoned decisions prevented Athenian juries from expressing a clear statement of community norms. Because so many legal and extralegal norms might be in play in any given case, it could be difficult to know for certain which arguments had swayed the jury, or even whether there was consensus among the jurors who had voted for the same verdict. Court verdicts contributed to, but did not resolve, the ongoing debate over public norms in forensic discourse.

F. Democratic Practice

Finally, the public nature of Athenian trials ensured that the courts were

78. See *id.* at 51-53. For an excellent discussion of how court rhetoric involved a complex negotiation of tensions between mass jurors and elite litigants, see JOSIAH OBER, *MASS AND ELITE IN DEMOCRATIC ATHENS* (1991).

79. On the lack of binding precedent, see LANNI, *supra* note 12, at 118-28; on the discretion of Athenian jurors, see *id.* at 41-74.

an important site of democratic practice and display. Public trials provided an opportunity for the Athenian polis to define itself and to reinforce and legitimate by ritual the exclusivity of the citizen body. In a discussion of the Athenian Assembly, Strauss has argued that “in symbolic terms, one might say . . . that political assemblies not only *do*, they *are*; simply by meeting, a session of the Assembly (by such criteria as who is and is not permitted to attend . . .) constructs a sense of community and an image of the polity.”⁸⁰ Similarly, the presence of non-voting spectators in the lawcourts, some of whom as foreigners or citizens under thirty were not eligible to judge, highlighted the fact that the mass juries were not just passive spectators but active voting participants.

The elaborate process of jury selection may have reinforced the jurors’ sense of exclusivity. The *Constitution of the Athenians* describes the allotment of jurors to courts in the later fourth century as an elaborate and lengthy process involving twenty allotment machines, a number of marked tickets, ballot balls and staves used to assign jurors at random to different cases.⁸¹ This process was probably designed to prevent bribery of jurors, but a likely side effect may have been to turn this step into a ceremony that would emphasize the importance and seriousness of the jury’s task.⁸² A detail in Aristophanes’ comedy *The Wasps* is revealing: when setting up a pretend court, Philokleon, the inveterate juror, demands most vehemently the railing that defined the boundary between the jurors and the spectators: “O stop, for goodness’ sake! you’ve all but killed me. / What! call a suit with no railing here, / Always the first of our sacred things?”⁸³ The spectacle surrounding the courts seems to have succeeded in fostering a sense of civic identity and pride in participation: burial remains reveal that Athenians were commonly buried with their jury tickets.⁸⁴

III. CONCLUSION

Courts today are run by a cloistered lawyer-elite and operate largely out of sight of the ordinary citizen, with the exception of grudging

80. Barry S. Strauss, *Ritual, Social Drama, and Politics in Classical Athens*, 10 *AM. J. ANCIENT HIST.* 73 (1985). In a similar vein, Simon Goldhill compares the way in which “the polis represents itself to itself” in the Assembly, lawcourts, Dionysia, and Panathenaia. See Simon Goldhill, *Representing Democracy: Women at the Great Dionysia*, in *RITUAL, FINANCE, POLITICS* 347, 368 (Robin Osborne ed., 1994).

81. Aristotle, *supra* note 23, at 202-04 [Ath. Pol. 63-65].

82. See Victor Bers, *Just Rituals: Why the Rigmarole or Fourth-Century Athenian Lawcourts?*, in *POLIS & POLITICS* 555 (Pernille Flensted-Jensen et al. eds., 2000).

83. ARISTOPHANES, *supra* note 52, at 489 [Ar. *Wasps* 829-831]. In fact, Philokleon asks to be buried under the court railing. See *id.* at 443 [Ar. *Wasps* 385-86].

84. See generally JOHN A. KROLL, *ATHENIAN BRONZE ALLOTMENT PLATES* (1972).

participation by jurors in the few cases that make it to trial. The Athenian courts were different: they were a source of power, prestige and identity for the ordinary jurors who were buried with their jurors' tickets; a source of real anxiety for the elite litigant whose conduct over a lifetime was subjected to public censure or praise; a truly dramatic source of entertainment and education for the many spectators who watched; an arena of rhetorical performance for budding politicians; and a form of democratic propaganda for the Athenian state as a whole. The standard Resnik and Curtis sensibly use to evaluate modern courts is whether they "represent justice" as at least the indirect product of a democratic society. While there are obvious disadvantages to the Athenian approach—the potential for caprice, the lack of predictability—the Athenian system was at least in this respect a shining success: popular justice was not merely represented, it was done and it was seen to be done.

