**Democratic Justice: The Jury Trial in Ancient Greece and in Modern America**

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It is seldom appreciated that the institution of trial by jury was first developed in robust form in ancient Greece. While the medieval English jury is the direct ancestor of the modern jury in both England and the U.S.A, the theory and practice of the trial by jury were first developed in sophisticated ways under the Athenian democracy (508/7 – 323 BCE). In the first part of this project, I seek to highlight the revolutionary nature of the ancient Greek jury and more particularly to examine the institutional structure and animating principles of its use. I argue that the use of the jury trial reflects a deep appreciation of the importance of the jury to the democratic education and engagement of citizens, as well as - crucially - to the realization of the equal protection of the law.

In the second part of the project, I use the example of the ancient Greek jury trial to think through the strengths and weaknesses of the role of the jury in contemporary American criminal justice. Although the modern American jury differs in many ways from the ancient Greek jury, I suggest that its justification rests on the same principles of democratic participation and equality before the law. Moreover, I contend that consideration of the institutional design and theory of the ancient Greek jury can highlight the ways that the modern American jury is falling short of the principles that justify its use. One of chief reasons for this gap between theory and practice is the increasing role of the plea bargain in deciding cases without a jury trial at all. A second factor is the elimination of the jury’s role in interpreting the law in favor of a strict mandate to judge the facts of the case (guilt or innocence) alone.

Through the example of the ancient Greek jury trial, this project asks, what is lost when the jury trial is circumvented, and what does it mean when legal experts (judges) have sole authority to interpret the law? One conclusion will be that these features of contemporary criminal justice undermine both equality before the law and our democracy itself.

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I suggest that the ancient Greek jury trial is particularly “good to think with” because it is based on the same principles as our own system but also diverges in striking ways that can stimulate our imagination to think critically about our system.

For example, one of the most striking features of the ancient Greek jury is its enormous size by modern standards. Juries in the Athenian democracy numbered anywhere from 201 to 2501 jurors (Hansen 1999, 187). It is obvious that juries of this size required extraordinary engagement by ordinary citizens. Six thousand citizens were impanelled as jurors every year, out of a total male citizen population (above the minimum age of 30) of 20,000 citizens (Hansen 1999, 181). In other words, 30% of the eligible citizens served each year. What is extraordinary, moreover, is that Athenian citizens were not coerced into serving but voluntarily put their names into the pool from which the jurors were randomly selected, and were offered only modest financial compensation for their service if chosen.

Leaving aside for the moment the practical obstacles to convening large juries today, this project considers what is gained by having a large number of ordinary citizens administering justice. The most obvious consequence is that the majority of citizens gained experience in administering justice for a year and sometimes longer. More specifically, such a period of active engagement in the judicial system meant that each citizen gained an education in the norms, rights and laws by which the community was ordered, as well as practical experience in applying community standards to particular circumstances. Moreover, since each citizen knew that he would be judged by the same standards that he applied to others, he had a vested interest in contributing to the construction of norms and values that were fair and equitable. Service as juror, therefore, was one of the instantiations of the slogan of ancient democracy, namely “to rule and be ruled in turn.”

A second consequence of large juries is that decisions are subject to multiple diverse viewpoints. While juries do not always make the right decisions, a good case can be made that they tend to do better on average than panels of expert judges. One reason for this difference is that juries consider evidence from multiple perspectives, whereas judges approach the evidence from a particular (usually elite, legalistic) perspective (Jonakait, 2003, 41-63). Moreover, recent work on decision-making in organizations of all kinds supports the conclusion that teams of diverse decision-makers perform better than teams of expert individuals (Surowiecki 2004; Page, 2007).

Diversity of perspectives is important for another reason, namely in ensuring equal protection of the law for all. Indeed, in ancient Greece, trial by jury emerged as a mechanism for protecting the poor from oppression by elites, since by allowing for appeal to a jury of peers, biased decision-making by individual elite magistrates was checked. Similarly, in revolutionary America, trial by jury was considered vital to prevent oppression by government actors. Article Two of the Constitution established the right to a jury trial, and the Sixth and Fourteenth Amendment affirmed the connection between the jury trial and the equal protection of the law. More recently, the importance of a diverse jury has been reinforced by the “fair cross-section requirement”, namely that juries be representative of the communities in which the crime was committed. While in modern America the goal of a diverse jury is often thwarted in practice through the deliberate exclusion of certain groups from the jury pool or the use of peremptory challenges against certain groups, in ancient Greece the large jury size, its random selection and the lack of vetting ensured a non-biased and diverse jury.

A third consequence of large juries of ordinary citizens is that decisions are made in accord with widely held community standards of justice and for this reason gain legitimacy in the eyes of the community which they regulate. This feature is reinforced by the fact that ancient Greek juries had authority over the interpretation of the law as well as decisions of fact (guilt or innocence). This meant that law was subject to communally understood notions of fairness and equity. By contrast, American juries are constrained to decide only questions of guilt or innocence, and the judge has sole authority over the interpretation of the law. In cases in which the jurors disagree with the judge’s interpretation of the law or think its application in a particular case unjust, explicit or covert jury nullification is the only option.

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