WHAT COUNTS AS THE *DEMOS*? SOME NOTES ON THE RELATIONSHIP BETWEEN THE JURY AND "THE PEOPLE" IN CLASSICAL ATHENS

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IT IS EASY TO UNDERSTAND WHY SO MUCH SCHOLARLY EFFORT has been invested in defining the relationship between the jury and the *demos* in classical Athens—theoretically, a lot is at stake. Democracy hangs in the balance. The ability for the law-court to strike down decrees passed by the assembly (or approve proposals never voted upon by the assembly) makes it hard to maintain a strong notion of the unfettered power of the Athenian people.[1] Only by seeing them as identical institutions (just convening in different locations) is it possible to remove these restraints. The wider the gap between *demos* and jury, the more moderate and less radical Athenian democracy looks.[2] This relationship has the potential to alter how we view the dynamics of the law-court. Are these places where the elite meet the mass to resolve their underlying tensions and ritually perform the symbolic order?[3] Or are the elites appealing to an entirely different group who would never conceive of themselves as embodying any institution wider than themselves? Ultimately, the relationship determines the register in which we place the normative statements contained in forensic rhetoric. Whose norms do these purport to be?[4]

These questions were initially placed on the scholarly agenda by Hansen in his monograph on the *graphe paranomon*.[5] It was here that he unsettled prevailing opinion and aired his view of a strict separation between the two institutions. In a series of subsequent articles and monographs, he has proceeded to argue that the

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[1] For the role of the *graphe paranomon* in limiting the constitutional power of the people, see Hansen 1974: 59–61; 1987; Sealey 1987: 97; Todd 1993: 159–160, 298–300.

[2] For the narrative of Athenian democracy as one of change from radical to moderate, see Hansen 1979; Ostwald 1986; Sealey 1987. For a more uneven narrative, see MacDowell 1975. On this point, it is worth noting the classification of Athens as a "radical" democracy by Aristotle: see *Pol.* 1274a7–11, 1319b21.

[3] A vision revealed and explored in Ober 1989a.

[4] The normative statements in legal rhetoric have been crucial for modern reconstructions of Athenian popular morality. For the centrality of this material, see Earp 1929: 11 (endorsed and repeated in Dover 1974: 6, n. 5).

[5] Hansen 1974: 19–21.

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jury is almost never addressed as the *demos*, that it is often distinguished from the *demos*, and that it seems to occupy a status more akin to a board of officials than an embodiment of the people.[6] Despite a series of vigorous replies to his critics, the response to these provocative proposals has been overwhelmingly negative.[7] As Todd remarks, "It is notable that practically every subsequent scholar working in the field has rejected Hansen's conclusions, but that hardly any of them have agreed over the reasons for this rejection."[8] The problem with a definitive counter-argument partly lies in Hansen's methodology. Nobody has questioned the large body of evidence that he has collected. It is rather the significance and meaning of this evidence that have caused dispute. Ostwald has argued that the patterns observed by Hansen are not conclusive;[9] Ober that his "evidence" gives a false picture and ignores other interpretative strategies.[10]

It is worth observing at the outset that these constitutional concerns do not seem to have troubled the Athenians.[11] The Athenian discourse about threats to the absolute sovereignty of the people rarely envisages danger deriving from institutional arrangements. Instead, it tends to focus on potential events or actions. Traitorous individuals, the return of exiles, and envious foreign powers always feature as the more likely culprits.[12] The only exception to this state of affairs would appear to be the law against tyranny proposed by Eucrates in 337/6 that singles out the Areopagus as an institution that could be enrolled in support of tyranny.[13] In contrast, the jury is always considered one of the bulwarks of democracy.[14] Similarly, the general unanimity over Athenian values makes jury self-identification less important when discussing morals.[15] However, this does

[6] The argument is made in its most complete form in Hansen 1978. For a discussion of its political implications, see Hansen 1989b.

[7] For the debate and Hansen's response, see Hansen 1989a.

[8] Todd 1993: 299 with summary of the debate.

[9] See Ostwald 1986: 34, n. 131 for his argument on the unpersuasive nature of Hansen's numbers.

[10] Ober (1989b) discusses the implicit ideological bias in Hansen's evidence (322–323) and the relevance of the concept of synecdoche in interpreting the relationship between the courts and the assembly (330–331). For a discussion of Ober's concept of synecdoche, see below, 36–37.

[11] Rhodes (1981: 545) slightly overstates the case when he claims that the Athenians were not conscious of any distinction between *demos* and jury. As we shall see, there are moments where they do make a distinction. Nevertheless the implication that it was not problematic for them remains true.

[12] On the personal and the external posing threats to democracy, see the constant legislative moves against tyranny, discussed in Ostwald 1955.

[13] The law was first published in Meritt 1953: 340–380, no. 5, 355–359. On late-fourth-century concerns about the increasing power of the Areopagus, see Sealey 1958. The removal of the laws of Ephialtes and Archestratus about the Areopagus by the Thirty (*Ath. pol.* 35.2) points to the way in which the institution became increasingly problematised in the fourth century.

[14] On this point, see *Ath. pol.* 9.1 and 41.2, where appeal to the court is identified by some as the reform that most strengthened the power of the people.

[15] As Todd (1990: 164) points out, social values at Athens were "a matter of consensus rather than conflict."

not mean that the Athenians were not intrigued by the relationship between these institutions. As we shall see, a number of different formulations were in circulation. It is a relationship that generates discussion.

In this paper, I wish to argue for a partial rehabilitation of Hansen's views. There certainly seem to be a number of cases where his formulation holds true. However, these moments of clear separation between jury and *demos* exist alongside others where this distinction collapses. Rather than attempting to calibrate precisely the relationship between *demos* and jury, it would appear more profitable to regard these formulations as existing on a spectrum—a range of possibilities where the gap between *demos* and jury widens and narrows. Moreover, it is a spectrum that the Athenians were interested in exploring, and one that finds itself open to rhetorical manipulation. By viewing these positions in a spectrum, we are made conscious of the way in which these institutions were discussed and debated. Each alternative formulation becomes a contribution to a civic conversation conducted across time, place, and genre. Sometimes the institutions are identical. At other times, their relationship seems antithetical. The ascendancy of any one formulation seems, at best, provisional. This spectrum also highlights the extraordinary transformative power of Athenian rhetoric, as well as focusing our attention on the agency of individual speakers. When speakers conflate jury and *demos* we should recognise that these are forced constructions rooted in a political agenda. They require explanation.

In exploring the case for structured ambiguity in the relationship between the *demos* and the jury, this article wishes to gloss a number of discursive moments. They are drawn from several different genres—epigraphy, comedy, philosophy, and forensic oratory. They illustrate that part of the complexity of this relationship stems from the fact that the formulation of this relationship exists, perhaps solely, in use (i.e., in the practices of jury and speaker). This article concludes with an analysis of similar concerns in democratic thought about the Anglo-American jury. This comparative material is offered to illustrate that such ambiguity is far from rare. The place of every institution is always up for grabs. It also may reassure us that ambiguity is not the product of lack of information. Even in the most studied and well understood of political regimes, definitive answers may prove elusive. Finally, it attempts to show some of the ways in which sensitivity to contemporary political debate can inform scholarship and help develop our critique of both ancient and modern politics.

MIND THE GAP: THE ART OF DISTINGUISHING JURY AND DEMOS

χαλεπὴ γὰρ ἅπασιν ἀόριστος ἀρχὴ καὶ μηδεμίαν ἐξέτασιν διδοῦσα τῶν πραττομένων, ἐξ ἧς φύεται τυραννίς. (Dion. Hal. *Ant. Rom.* 4.74.2)

An official who has no end in his tenure and whose actions are never examined is grievous to all and nourishing to tyranny.

While Lucretia's blood spreads across the floor, Brutus does political philosophy. His model is Athens (ὡς παρ' Ἀθηναίοις γίνεται, *Ant. Rom.* 4.74.2). Its discourse permeates his speech. His invocation of the ἀόριστος ἀρχὴ deliberately recalls Aristotle's *Politics*.[16] His desire for examination finds its expression in the *dokimasia* and the *euthune*. Brutus mimics the issues and concerns that were raised by democratic theorists of the classical period. His target is the institution of kingship, but strikingly, his description could equally have applied to the classical jury.[17] His problem was the rule of the Tarquinii. For the Athenians, their concern lay with the rule of the *dikastai*—a regime they saw as no less authoritarian.[18]

There are a number of clear examples where the gap between the jury and the *demos* seems wide.[19] An interesting, and often overlooked, example is provided by the Athenian regulations for Chalcis (*IG* I^3 40) imposed in the wake of an unsuccessful attempt undertaken some time in the second half of the fifth century by a number of Euboian states to overthrow Athenian hegemony.[20] The inscription details the oaths of mutual obligation that were required to be sworn by both states as well as arrangements for hostages and tax payment by resident aliens. According to this decree (lines 3–4), both the Athenian Council and the jurors promised to be bound by the following oath:

οὐκ ἐχσελῶ Χα-
λκιδέας ἐχ Χαλκίδος οὐδὲ τὲν πόλιν ἀνά-
στατον ποέσο οὐδὲ ἰδίοτεν οὐδένα ἀτιμ-
όσο οὐδὲ φυγεῖ ζεμιόσο οὐδὲ χσυλλέφσο-
μαι οὐδὲ ἀποκτενῶ οὐδὲ χρέματα ἀφαιρέ-
σομαι ἀκρίτο οὐδενὸς ἄνευ τῶ δέμο τῶ Ἀθ-
εναίον, οὐδ' ἐπιφσεφιῶ κατὰ ἀπροσκλέτο
οὔτε κατὰ τῶ κοινῶ οὔτε κατὰ ἰδιότο οὐδ-
ὲ ἑνός, κὰι πρεσβείαν ἐλθοῦσαν προσάχσο
πρὸς βολὲν καὶ δεμον δέκα ἐμερῶν *h*όταν
πρυτανεύο κατὰ τὸ δυνατόν. ταὐτα δὲ ἐμπ-
[ε]δόσο Χαλκιδεῦσιν πειθομένοις τῶι δέ-
[μ]οι τῶι Ἀθεναίον. (lines 4–16)

[16] *Pol.* 1275a22–33 (where the term is used to describe the jury). The phrase is rarely found outside of Aristotle, and only in this section of the *Politics*, to refer to a magistracy.

[17] On immunity from examination and the lack of specificity in tenure as the defining features of jury office-holding, see below, 34–36.

[18] On this point, see Philokleon's description of the office of juror, ὡς οὐδεμιᾶς ἧττων ... βασιλείας (Ar. *Vesp.* 549: "as nothing less than kingship"). The point of the play may be to undermine this conviction. However, in doing so, the author not only seeks to undermine popular conceptions, but expose one tyranny underlying another. The rule of the jury gives way to the rule of the politicians.

[19] The standard collection is provided in Hansen 1978: 132–135.

[20] For discussion of this inscription, see Meyer 1892: 2.141–148 and Meiggs and Lewis 1989: no. 52, 143–144. Most scholarship on the decree has been devoted to dating this Euboian revolt. See most recently Mattingly 2002, which contains discussion of the debate and his latest arguments for a late date for activities in Euboia.

I shall not deport Chalcidians from Chalcis or lay the city to waste or deprive any individual of his civic rights or punish through exile or imprison or kill or confiscate property from anyone without trial without the consent of the Athenian *demos*, nor shall I make a proposal against either the government or any private individual without providing notice to them, and when an embassy has arrived, I shall endeavour to the best of my ability to introduce it to the Council and *demos* within ten days when I hold the prytany. These things I shall guarantee to the Chalcidians if they obey the Athenian *demos*.

Invoked three times during the course of the oath, the *demos* proves to be a live concept in this pledge of imperial restraint. The final rider underlines the political agenda. This oath is all about retaining power for the people—*demokratia*, in its truest sense. Although both the jurymen and the Council seem to take the same oath, only the first section, lines 4–10, seems applicable to activities of the jury. The significant feature of this section is the fact that the jurors promise to refrain from acting ἄνευ τῶ δέμο τῶ Ἀθεναίον. Although it may be read as an explanatory gloss on ἀκρίτο οὐδενὸς, this phrase stands more naturally as a qualification.[21] If this is the case, then the oath clearly envisages a separation between the jury and the people.[22] The *demos* is a larger concept to whom the jury must defer. It is "out there." The one thing that the jury is not is the *demos*. It is worthwhile to stress the performative aspect of this oath. This formulation does not merely exist independently on stone, but attests to a living definition enacted by all participants.[23] The use of the first person singular forms of the verbs personalises the oath. This is no disembodied "we." Each juror defines the obligations that bind him with an emphatic "I." Further, this does not seem to be a unique formulation. Similar oaths were probably sworn with respect to Eretria, and presumably the other Euboian states that were brought to heel by the Athenians.[24]

The notion of the *demos* as a still greater body is significant because the oath was administered to all the jurors. Even *en masse*, the complete complement of jurors cannot regard themselves as equivalent to the *demos*. Such reluctance should not surprise us. The Athenians were uncomfortable with the notion

[21] For a parallel, see the regulations for Erythrai (*IG* I^3 14), lines 26–29.

[22] As Meiggs and Lewis observe, following Meyer (1892: 2.144–146): "The oath at Athens is to be taken by the Boule and jurors. Do they represent the whole people, or merely themselves? Probably the latter, for they are the two most vital organs of control and the Assembly itself must remain unfettered" (*GHI* 42). Even if one maintains a strong distinction between definitions where *demos* = *ekklesia* and one where *demos* = people, it is hard not to see some slippage between the definitions in this case (esp. as the two definitions seem conflated in the case of *demos* in lines 15–16). For ἄνευ meaning "without the consent of," see *Il.* 15.213 and Soph. *OC* 926.

[23] On the way in which civic oaths are used to formulate and confirm notions of identity, see Cole 1996: 227–32. On the importance of oaths in Athenian interstate relations, see Hirzel 1902: 132–133. For an opposing view, see Lonis 1980: 267–286.

[24] Certainly the obligations that bound Eretria were identical to those imposed on Chalcis: see *IG* I^3 39. There is every reason to suspect that the same promises of Athenian restraint were made in return.

of representation.[25] Franchise was exercised only in the most direct fashion. Sortition was not developed to ensure equality of representation, but equality of opportunity, and to allow fate to take a hand in appointments.[26] Ambassadors were denied the power to conclude treaties, except in the most extreme cases.[27] Oligarchs may have regarded an assembly limited to 5,000 as a democracy (Thuc. 8.92.11). However, the Athenian people were only prepared to tolerate such a constitutional arrangement for a mere eight months after the expulsion of the 400.[28]

The rejection of the competency of even such large numbers makes the concept of individual jury panels embodying the *demos* problematic. Certainly any group numbering less than the quorum of 6,000 regularly required in the fourth-century to validate decisions of the *ekklesia* must *prima facie* have difficulty in claiming to be the *demos*.[29] This does not mean that it cannot, but it does have a hurdle to overcome. Only once is a jury of 6,000 recorded (Andoc. 1.17), and this is almost certainly an exaggeration.[30] Unfortunately, we do not know what was the most common size of jury panels. Our surviving sources, skewed towards the most important public cases which enjoy correspondingly larger juries, give us an unrepresentative picture of the legal landscape.[31] For private cases there was a sliding scale of jury size depending on the amount in dispute (*Ath. pol.* 53.2–3). Cases involving amounts below ten drachmas were decided by the Forty. For amounts up to 1,000 drachmas (a figure well over the annual wage of the majority of the population)[32] juries of 201 were used. For amounts over this, juries of 401 were constituted. We cannot know the frequency of such small juries. Their occurrence will depend on a number of factors—the modal value of economic transaction size, the propensity of economic transactions to evolve into disputes, the effectiveness of alternative dispute resolution procedures, etc. However, our picture of the jury, their status, and the function of forensic discourse may have

[25] On the distinction between representative and direct democracy, see Holden 1974: 26–34.

[26] On the role of fate in sortition, see Bers 2000: 60–62.

[27] For a discussion of the powers of ambassadors and the exceptional cases of *presbeis autocratores*, see Mosely 1973: 30–38 and Harris 2000: 487–497.

[28] The extent to which the rule of the 5,000 was "democratic" is debatable. On this point, see the divergent views of de Ste Croix (1956), Rhodes (1972a), and Gomme, Andrewes, and Dover (1945–81: 5.323–328). The period is summarised in Ostwald 1986: 395–411. For discussion of the specific features of the constitution, see Harris 1990.

[29] On the requirement of a quorum of 6,000, see Hansen 1976: 124–130. The symbolic nature of 6,000 is also attested by the requirements for a valid ostracism. It presumably also explains the creation of a "community" of 6,000 jurors at *Vesp.* 662.

[30] See discussion in Hansen 1982: 20.

[31] Even here, panels of only 500 seem standard (*Ath. pol.* 68.1). Only in the most serious cases are larger juries of 1,000 or 1,500 used. A jury of 2,000 is exceptional and requires an establishment by decree (e.g., Lys. 13.35).

[32] Loomis (1998: 232–239) has rightly questioned notions of a standard fixed wage for the Athenian population. Nevertheless, even if we include the larger wages attested in the fourth-century, the sum still falls well below 1,000 drachmas.

to undergo a change if the most regular formation of the *dikastai* was as relatively small complements. Is it possible to see the *demos* in 201 faces?

A significant silence runs through the regulations for Chalcis. If it prefers to distinguish the jury from the *demos*, how does it conceive of each of them? A clue is provided by the way in which the regulations for Chalcis treat both the jury and the council as subordinate institutions bound to the will of the *demos*. The jury seems to be considered as just another group of officials.[33] This notion of the jury as a board of magistrates (*archai*) is explored by Aristophanes in the *Wasps*—a play that must feature as one of the most engaged reflections on the role and place of the law-court/jury in Athenian society. As always, Aristophanes' wit scrapes the nerves of the *polis*, exposing its concerns, ambiguities, and hypocrisies.[34] In a series of anapaests, Philokleon spells out the unique office occupied by the Athenian jury:

> παίδων τοίνυν δοκιμαζομένων αἰδοῖα πάρεστι θεᾶσθαι.
> κἂν Οἴαγρος εἰσέλθῃ φεύγων, οὐκ ἀποφεύγει πρὶν ἂν ἡμῖν
> ἐκ τῆς Νιόβης εἴπῃ ῥῆσιν τὴν καλλίστην ἀπολέξας.
> κἂν αὐλητής γε δίκην νικᾷ, ταύτης ἡμῖν ἐπίχειρα
> ἐν φορβειᾷ τοῖσι δικασταῖς ἔξοδον ηὔλησ' ἀπιοῦσιν.
> κἄν ἀποθνήσκων ὁ πατήρ τῳ δῷ καταλείπων παῖδ' ἐπίκληρον,
> κλαίειν ἡμεῖς μακρὰ τὴν κεφαλὴν εἰπόντες τῇ διαθήκῃ
> καὶ τῇ κόγχῃ τῇ πάνυ σεμνῶς τοῖς σημείοισιν ἐπούσῃ,
> ἔδομεν ταύτην ὅστις ἂν ἡμᾶς ἀντιβολήσας ἀναπείσῃ.
> καὶ ταῦτ' ἀνυπεύθυνοι δρῶμεν· τῶν δ' ἄλλων οὐδεμί' ἀρχή.
>
> (578–587)

Well now, we're empowered to look at the boys' genitals when they are formally examined. And if Oiagros, defending a charge, comes into court, he's not acquitted until he's chosen the best speech in the *Niobe* and recited it for us. And if an aulos-player wins his case, he straps on his halter and plays out the jurors from court. And if, with the death of her father, a daughter is left as an *epikleros* to someone, we tell the will to get lost, and the same to the shell endorsing the seal, and we give the girl to anyone whose petitions persuade us. And in doing these things we are not called to account—no magistracy holds comparable power.

Arche began Philokleon's exposition (περὶ τῆς ἀρχῆς ἀποδείξω, 548). It recurs throughout his explanation (557, 577), and proves the end point of his speech. Jurors are being understood as magistrates. It is a conclusion that we have been anticipating. The vocabulary of the passage has been increasingly peppered with technical terms appropriate to discussion of magistrates. Philokleon opens with a *dokimasia*, continues with testamentary depositions, and concludes with

[33] The idea that the jury occupies a place similar to the Council was proposed by Hansen (1978: 136, with addenda in Hansen 1983: 159–160).

[34] For this tendency in Aristophanes to dance "along the fault lines" of Athenian civic discourse, see Dobrov 1997: xiv–xviii. The political role of comedy, and Aristophanes in particular, is explored in Cartledge 1995: 43–53; Foley 1988; Henderson 1990.

euthunai. For once, Bdelykleon agrees: τουτὶ γάρ τοί σε μόνον τούτων ὧν εἴρηκας μακαρίζω ("Indeed, that really is the only thing that you've said that I can congratulate you on," 588). However, before we can get too comfortable with this notion, we need to remember that, appropriately enough, there is a sting in the tail. In a sequence of spondees, we can savour the jury's immunity from examination. The inevitable concluding anapaest shakes us out of our reverie, and puts us on the march again. The office of juror is unlike the others. Thinking of jurors as office-holders might stick, but not for long. "Magistracy" is only going to prove a very thin concept for understanding this institution. The jury refuses to stay pigeon-holed.

Aristophanes is not alone in his equivocation in the description of the jurors as *archai*. Commentators on this passage have been quick to assemble the authors who pose problems for the certainty of this designation.[35] Plato believes that the juror does not necessarily start out as a magistrate, but momentarily becomes one at the time of judgment.[36] Lycurgus proposes a tripartite division of the polis that has the jurors occupying a middle position between the magistrates (*archai*) and the private citizen (*idiotes*).[37] Naturally, the most theoretical discussion of the issue is found in Aristotle:

πολίτης δ' ἁπλῶς οὐδενὶ τῶν ἄλλων ὁρίζεται μᾶλλον ἢ τῷ μετέχειν κρίσεως καὶ ἀρχῆς. τῶν δ' ἀρχῶν αἱ μέν εἰσι διῃρημέναι κατὰ χρόνον, ὥστ' ἐνίας μὲν ὅλως δὶς τὸν αὐτὸν οὐκ ἔξεστιν ἄρχειν, ἢ διὰ τινῶν ὡρισμένων χρόνων· ὁ δ' ἀόριστος, οἷον ὁ δικαστὴς καὶ ὁ ἐκκλησιαστής. τάχα μὲν οὖν ἂν φαίη τις οὐδ' ἄρχοντας εἶναι τοὺς τοιούτους, οὐδὲ μετέχειν διὰ ταῦτ' ἀρχῆς· καίτοι γελοῖον τοὺς κυριωτάτους ἀποστερεῖν ἀρχῆς. ἀλλὰ διαφερέτω μηδέν· περὶ ὀνόματος γὰρ ὁ λόγος· ἀνώνυμον γὰρ τὸ κοινὸν ἐπὶ δικαστοῦ καὶ ἐκκλησιαστοῦ, τί δεῖ ταῦτ' ἄμφω καλεῖν. ἔστω δὴ διορισμοῦ χάριν ἀόριστος ἀρχή. τίθεμεν δὴ πολίτας τοὺς οὕτω μετέχοντας. (*Pol.* 1275a22–33)

A citizen is simply defined by nothing other than the right to participate in judgment and hold office. Some offices have a time limit so that it is not possible for the same person to hold them twice or only after an interval. Others are without such limitations such as the office of juror or member of the assembly. It might be objected that being one of these is not "holding office" and that one does not do these things by virtue of a magistracy. However, it is ridiculous to deprive the most powerful members of the state of the title of magistrate. In any case, it makes no difference. For it is an argument about a name. There is no common name that is appropriate to apply to both juror and member of the assembly.

[35] Fränkel (1877: 21–22) provided the most influential discussion of the unsatisfactory nature of describing jurors as *archai*. Most major commentators have tended to follow his line of argument and cite the evidence that he assembles: see, for example the entries on 588 in van Leeuwen 1893; Starkie 1897; MacDowell 1971.

[36] Pl. *Leg.* 767a: δικαστὴς δὲ οὐκ ἄρχων καί τινα τρόπον ἄρχων οὐ πάνυ φαῦλος γίγνεται τὴν τόθ' ἡμέραν ἥπερ ἂν κρίνων τὴν δίκην ἀποτελῇ ("A juror even if he is not a magistrate becomes a magistrate, and not a minor one either, on the day that he delivers judgment").

[37] Lycurg. *Leoc.* 79: τρία γάρ ἐστιν ἐξ ὧν ἡ πολιτεία συνέστηκεν, ὁ ἄρχων, ὁ δικαστής, ὁ ἰδιώτης ("The state is composed of three types of individual: the magistrate, the juror, and the private citizen").

For the sake of a definition, let us call these positions "offices without limitation." Citizens are those who participate in these offices.

Once again we see a commentator wrestling with the unique nature of the jury, and the way in which it evades easy categorisation. This time it is not the lack of account that causes problem, but the issue of tenure. Aristotle's formulation of the ἀόριστος ἀρχή marks a unique development in the conception of the jury. Certainly, it is a description found nowhere else. We will have to wait until the speech of Brutus for it to re-enter critical political discourse. However, it is not just a title that Aristotle is coining here, but also a new relationship between the *ekklesia* and the *dikasterion*. Once again we are presented with the problem of the relationship between jury and the people. This time, however, rather than splitting the two concepts apart, Aristotle is keen on unifying them. In a sense, Aristotle has brought us full circle. He rejoins *demos* and *dikastai* not by stripping the jurors of their office, but by awarding a "magistracy" to the *demos* instead. The two are united because they provide the necessary and sufficient conditions for citizenship (πολίτης ... μετέχειν κρίσεως καὶ ἀρχῆς, *Pol.* 1275a22). Citizenship becomes realised only in both places. There is still a gap—the gap between citizen and *demos*. Will *any* group of citizens constitute a *demos*? Probably not, but we are getting closer.

BRIDGING THE GAP: THE TRANSFORMATIVE POWER OF RHETORIC

At some point in the late fourth century, the forum for making decisions about public works and the *peplos* for the Panathenaea was transferred from the Council to the jury-court (*Ath. pol.* 49.3).[38] For scholars interested in the issue of sovereignty, this transfer is intriguing. Prior to its administration by the Council, these duties had been administered by the Assembly. How then should we interpret the transfer from Assembly to Council to jury-court? Is power coming back to the people? Or is this merely a transfer from one board of magistrates to another one whose random composition and greater size make them less susceptible to bribery? Or does the jury occupy an intermediate position between Council and Assembly (a position for which our vocabulary fails us)?

Aristotle saw the problem as one of classification. There was no word that accurately describes the curious position of membership of the jury or the *ekklesia*. Taxonomies of governmental institutions are unable to see the potential of the jury to embody the *demos*.[39] Such taxonomies are uncomfortable with ambiguity and overlapping function and identity. In order to express the simultaneous nature of *demos* and jury a more profitable path has been to resort to the processes of language—the art of metaphor (one thing is another thing) and synecdoche

[38] For discussion, see Rhodes 1972b: 122–127 and 1981: 568–569.

[39] As Hansen (1989a: 103) observes, the fundamental difference between those who see a distinction between the *demos* and the jury and those who do not is the importance that each side attaches to "institutional thinking."

(the part stands for the whole). Synecdoche is crucial in Ober's account of the relationship between the *demos* and jury. "Each of the various institutional 'parts' of the citizen body . . . could stand for and refer to the whole citizen body . . . . Synecdoche takes us from the vocabulary of constitution to that of signification" (Ober 1989b: 330–331). The symbiotic relationship between signifier and signified narrows the gap between *demos* and jury.

As a supplement to Ober's account, I would like to explore a distinction in these moments of proximity—a distinction between representation and embodiment.[40] Both methods of understanding the jury exist (and can even co-exist within the same account).[41] The choice between these two positions is ultimately driven by personal politics. Orators may pretend that the descriptions of the jury that they offer are natural and obvious. However, we must not forget the artfulness of such descriptions. The extent of the collapse between jury and *demos* is never accidental. It is always strategic. From the subtle use of vocatives reminiscent of the assembly (ὦ ἄνδρες Ἀθηναῖοι) to more blatant conflations, each juxtaposition of these two groups amounts to a deliberate political re-positioning on behalf of the speaker. In conflating *demos* and jury, we are presented with a reading position for forensic rhetoric.[42] Three passages are commonly cited as evidence of the jury's embodiment of the *demos*.[43] In each case, politics, agency, and rhetoric conspire to develop new modes of civic discourse.

It is no accident that self-consciously political cases bring these manipulations to the fore. The case against Timarchus is one such case. Set in the turbulent period surrounding the rise of Philip, it marks another stage in the political battle between Aeschines and Demosthenes for the hearts and minds of the people.[44] Aeschines has a particular vested interest in making the courtroom a symbolic representation of the wider political stage in which he competes with Demosthenes. His prosecution of Timarchus is a pre-emptive strike in the face of the impending prosecution arising out of his *euthune* for his conduct on the embassy to Philip. It represents his opportunity to test his popularity and warn off his opponents.[45] He *needs* this case to have wider repercussions. The matter

[40] A distinction between the jury acting ὑπὲρ τοῦ δήμου (e.g., Din. 1.84) as opposed to ὡς ὁ δῆμος.

[41] For example, in Dem. 21, Demosthenes conflates the jury and the *demos* when he reminds them how *they* acted previously in a meeting of the assembly (214–216), but later he sees the jury as acting on the *demos*' behalf when he invites "you who have been selected as judges" (δικάσοντες εἰλήχατε) to act on the *demos*' behalf and return a verdict to please it (τῷ δήμῳ χαιρίσασθαι).

[42] Interestingly the conflation between *demos* and jury is not merely a democratic reading position. Anti-democrats are equally happy to be complicit in this fiction. For example, see ps.-Xen. *Ath. pol.* 1.18.

[43] These passages are derived from Hansen 1978: 131. As Ober (1989a: esp. 145–148) has shown, these are not the only moments.

[44] For the political background to the Timarchus case, see Harris 1995: 78–101.

[45] On Aeschines' attack as a pre-emptive strike against his opponents and a reflection of his popularity over the punishment of Phocis, see Harris 1995: 151.

cannot just rest with this jury. In a marked dramatisation of the *dikastai*, the jury members become symbolic of the people. They are identical with the group that laughed at Timarchus in the *ekklesia* (1.81–85) and they are synonymous with the group that Aeschines' opponents hold in open disdain.

Ἐπειδὴ δὲ Ἀχιλλέως καὶ Πατρόκλου μέμνησθε καὶ Ὁμήρου καὶ ἑτέρων ποιητῶν, ὡς τῶν μὲν δικαστῶν ἀνηκόων παιδείας ὄντων, ὑμεῖς δὲ εὐσχήμονές τινες προσποιεῖσθε εἶνας καὶ ὑπερφρονοῦντες ἱστορίᾳ τὸν δῆμον, ἵν' εἰδῆτε ὅτι καὶ ἡμεῖς τι ἤδη ἠκούσαμεν καὶ ἐμάθομεν, λέξομέν τι καὶ ἡμεῖς περὶ τούτων. (1.141)

But since you mention Achilles, Patroclus, Homer, and the other poets (as if the jury had never heard of culture, while you give yourself airs and pretend to surpass the *demos* in knowledge), so that you know that we too have heard and learnt a little, we shall speak about these matters.

Hansen dismisses this passage as unimportant for arguments of jury identity. The reference to the *demos* is not to the sovereign people, but rather a case where *demos* means merely "common people."[46] We should not be so certain. The scholiast knew that Aeschines aimed for deliberate effect at this point: ἐνταῦθα συγκρούει αὐτὸν τοῖς δικασταῖς (Schol. Aeschin. *Ag. Tim.* 141 ed. Dilts: "Right here the author dashes against the jury"). As has become apparent from a number of studies, the discourse of education was fundamentally politicised in the classical city.[47] Issues of *paideia*, knowledge, and competence lay at the heart of discussions about the ability of the *demos* to rule.[48] Questioning the education of the *demos* does not strike at just the lowest segment of society, but resonates with all who wish to claim a right to participate in government. In this conscious shift to the first person plural (ἡμεῖς ... ἡμεῖς), Aeschines is not merely siding with the impoverished, but claiming to speak for the whole people. This identification with the jury marks a transition in the speech. Previously, there has been only distance between the speaker and the jury.[49] Now they speak as one, the people. Such identification does not last. At the end of the speech, Aeschines again withdraws to the position of servant of the people.[50] However, for this moment Aeschines aligns himself with the jury, one extra voice helping to make the shift from *dikastai* to *demos*.

[46] Hansen 1978: 131.

[47] See Nightingale 2001: 134–136, 154–156; Ober 1989a: 157–165, 179 (on Aeschin. 1.141); 1998: 170–171, 235–236; Raaflaub 1983.

[48] On the unfitness of the uneducated *banausoi* to rule, see Arist. *Pol.* 1258b20–26, 1278a; Pl. *Resp.* 590c; Xen. *Oec.* 4.2–3.

[49] See, for example, the fictionalised interrogation of Aeschines by the jury (1.80).

[50] 1.196: Τὰ μὲν οὖν παρ' ἐμοῦ δίκαια πάντα ἀπειλήφατε ... Εἰ οὖν βουλήσεσθε, τὰ δίκαια καὶ τὰ συμφέροντα ὑμῶν ποιησάντων, φιλοτιμότερον ἡμεῖς ἕξομεν τοὺς παρανομοῦντας ἐξετάζειν ("You have received from me all the things that justice demands .... Now if you desire it, taking account of justice and your own interests, we shall seek greater honour in your eyes by hunting out criminals").

By expanding the notion of the jury, Aeschines expands the claims and significance of forensic discourse. For an ambitious *rhetor* there is much to be gained from such expansion. However, it is not just politicians who need the law-court to be larger than itself. Sometimes the city requires that the jury speak for it. In a climate of emergency and scandal, there are times when the words of the law-court need special weight. At the right temperature, identity becomes volatile. The events surrounding the Harpalus affair provide such a backdrop. Rightly called the "greatest of all fourth-century scandals," the events surrounding the flight of Alexander's treasurer, Harpalus—and his subsequent refuge in, and escape from, Athens—would cast an indelible smear on the entire political class of Athens and claim the career of a number of Athens' leading statesmen, including Demosthenes.[51]

When Harpalus fled from Alexander in 324 and arrived in Athens with 700 talents, his money was lodged on the Acropolis (Hyp. *Dem.* 8–9; Din. 1.89). When he left for Crete, only 350 talents remained (Hyp. *Dem.* 10). It was inevitable that people would suspect that the money had ended up in the pockets of Athenian politicians.[52] Few seem to have escaped suspicion. Timocles' scatter-gun approach in indicting political figures in his comedy, *Delos*, gives a strong impression of a scandal that attached to all prominent figures.[53] Innovative legal procedures were required to deal with the scandal. Demosthenes suggested an investigation (*apophasis*) by the Areopagus.[54] Their subsequent report formed the basis of the prosecution of a number of leading politicians. State-prosecutors were used to bring the charges.[55]

The *demos* is implicated in all these proceedings. At stake was the rectitude of its most trusted advisers. In appointing prosecutors, the *demos* had declared an interest and given the proceedings special prominence.[56] Further, it was important that the scandal be ended. Athens had been prey to scandalous rumour for months while the Areopagus investigated events.[57] The result of the jury vote must end the matter. Finally, it was important that the people be seen to have a say in the

[51] On the Harpalus affair, see Badian 1961; Blackwell 1999; Bosworth 1988: 215–220; Colin 1925; 1926; Jaschinski 1981; Worthington 1992: 41–77.

[52] Hyp. *Dem.* 7. Accusations of bribery were a common feature of Athenian political discourse: see Harvey 1985; Mitchell 1997: 182–187.

[53] See Timocles *PCG* fr. 4, which actually includes the name of Hyperides, one of the eventual state-prosecutors.

[54] There is no strong evidence for *apophaseis* before 345: see Wallace 1998: 221 (*contra* de Bruyn 1995: 117–119). For the procedure, see Hansen 1991: 292–294; Rhodes 1995: 311–314; Wallace 1989: 113–119; Worthington 1986: 184–186; 1992: 357–362.

[55] On the appointment of state-prosecutors, see Rubinstein 2000: 111–115.

[56] See Rubinstein 2000: 111–112: "More than any other type of public action the procedures ... could be perceived as legal actions in which the community as a whole had a stake ... elected prosecutors ... acted formally as the voices of the people."

[57] The exact timing of events is difficult to determine; see the discussion of Whitehead (2000: 357–358). The performance of Timocles' comedy in either the Lenaia in late January or the City Dionysia in late March attests to the continuing interest in events that had occurred in the previous

affair. The proceedings were dominated by the Areopagus and the *dikasterion*. The distinction between the Areopagus and the *demos* was too large to be bridged. Athens' civic myth-history was predicated on a firm distinction between the *Pnyx* and the Hill of Ares.[58] As Demosthenes realised, it was certainly possible to question the democratic nature of the Areopagus.[59] The *dikasterion* must be beyond reproach. It must be endowed with the will of the people. Hyperides rewrites this conceit into a history of judicial deliberations:

καὶ πρὸς τούτοις ἀγώνων ἡμῖν ὕστερον πολλῶν γεγενημένων [ἐξ ἐ]κείνων τῶν [πραγ]-
μάτων [καὶ αὐτοῦ τοῦ π]ο̣λ̣έμου, οὐδε[πώποτε ἡ]μ[ῶ]ν ο[ὗ]τ̣οι [κα]τ̣[ε]ψηφίσαν̣το, ἀλλ'
ἐκ πάντ̣ω̣ν ἔσωσαν, [ὅπερ μ]έγιστον κ̣αὶ [ἀξιοπι]σ̣τ̣ότατον τῆς [τοῦ δήμ]ο̣υ̣ [εὐ]ν̣οίας
σημεῖον. (*Dem.* fr. vii, col. 29)

And although we were later brought to trial on account of those policies and because of that war, these men never found us guilty, but through all things preserved us, which is the greatest and most trustworthy sign of the *demos*' goodwill.

The link here between the *demos* and the jury is seamless.[60] They are literally of one mind (νοῦς).[61] Sortition may have randomly selected different panels of individuals to judge him. However, such changes are merely cosmetic. It has always been the same institution present. This good favour of the *demos* contrasts with the treatment that Demosthenes has meted out to it by his recent actions. In reworking these previous decisions into a single voice of civic approval, Hyperides constructs a stronger sense of failed obligation. Because it has always been the same body snatching Demosthenes from his opponent's clutches, his betrayal of it is so much stronger. This reciprocity of civic obligation that Hyperides wishes to construct can work only with a continuity of identity.

While Hyperides strategically recasts history, the Corinthian metic Dinarchus, as speech-writer for one of his co-prosecutors, decides to act prospectively. In his prosecution of Demosthenes' co-defendant, Philocles, it is not past judgments that interest him, but the one that the jury is about to make in the near future:

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year. Opponents of Demosthenes were obviously keen for the affair not to fall out of public consciousness.

[58] This distinction is one of the contributing factors to the occasional role of the Areopagus in conservative discourse: see *Ath. pol.* 8.2 and Arist. *Pol.* 1273b (with discussion by Wallace 1989: 190–195). See also Isoc. *Areopag.* with the observations of Too (1995: 212–213) and Ober (1998: 277–286).

[59] For Demosthenes' attacks on the Areopagus, see Hyp. *Dem.* 3; Din. 1.62. The position of the Areopagus was further compromised by its execution of a number of citizens during the emergency of 338. For the unfavourable reaction to these actions, see Lycurg. *Leoc.* 52.

[60] In his review of R. K. Sinclair's *Democracy and Participation*, Hansen (1989c) was keen to stress that this reference to the *demos* is a textual supplement. Although the reference to the *demos* is almost entirely restored and none of the letters is certain, as Whitehead (2000: 451) points out, "an alternative is not easy to find."

[61] On this point it is worth noting the restoration of [δια]νοίας proposed by Blass (1894) and Kenyon (1906). On *eunoia*, see Whitehead 1993: 52–54.

Ἃ χρὴ λογισαμένους ὑμᾶς πάντας, ὦ Ἀθηναῖοι, καὶ τῶν παρόντων καιρῶν ἀναμνησθέντας, οἵ πίστεως οὐ δωροδοκίας δέονται, μισεῖν τοὺς πονηρούς, ἀνελεῖν ἐκ τῆς πόλεως τὰ τοιαῦτα θηρία, καὶ δεῖξαι πᾶσιν ἀνθρώποις, ὅτι οὐ συνδιέφθαρται τὸ τοῦ δήμου πλῆθος τῶν ῥητόρων καὶ τῶν στρατηγῶν τισιν, οὐδὲ δουλεύει ταῖς δόξαις, εἰδότας ὅτι μετὰ μὲν δικαιοσύνης καὶ τῆς πρὸς ἀλλήλους ὁμονοίας ῥᾳδίως ἀμυνούμεθα, θεῶν ἵλεων ὄντων, ἐάν τινες ἡμῖν ἀδίκως ἐπιτίθωνται, μετὰ δὲ δωροδοκίας καὶ προδοσίας καὶ τῶν ὁμοίων τούτοις κακῶν, ἃ τοῖς τοιούτοις ἀνθρώποις πρόσεστιν, οὐδεμί' ἂν πόλις σωθείη. (Din. 3.19)

Athenians, it is vital that all of you take note and remember the present state of affairs. They require steadfastness, not corruption, they require that you hate the wicked and drive such beasts out of the city and show to all men that the bulk of the *demos* has not been corrupted along with the politicians and generals, and is not enslaved by these characters' reputations. They know that with justice and everybody pulling together we can easily, the gods willing, defend ourselves if anybody should unjustly attack us. However, with bribery and treason and all the similar evils that go with these men's activities, no city could ever be saved.

We are clearly in the realm of the figurative here. Fifteen hundred jurors (Din. 1.107) can never literally be τὸ τοῦ δήμου πλῆθος.[62] Moments of peroration give licence.[63] Dinarchus makes explicit the political agenda in this case. The case is not about charges of bribery, but about the safety of the whole state. Just as the jury expands to embrace the whole city, so do the issues. A momentum of escalation has been building throughout the speech. At the beginning of the speech, the notion of personal betrayal provided the interpretative matrix for understanding Philocles' actions (4). The jurors understood his actions by imagining themselves as *individuals* bound in a specific agreement. In this final analysis, Philocles has been assimilated to the group of the political elite. As the jury stands for the people, so he stands for the elite that dominate political life. It is easy to forget in this final moment the journey that the jury has undertaken. They have rarely stood still in this speech. Initially, they stood apart from the *demos*. The people came to the *dikastai* bearing witness against Philocles and demanding punishment (14). Furthermore, the identification with the people may be the jury's final incarnation in the rhetoric of Dinarchus, but it has not been their only one. The jury has stood in various relationships to Philocles. He has been their *hipparchos* and *strategos*. They have been invited to judge him accordingly.[64] They have been made to share the concerns of the horrified parents fearful of entrusting their

[62] Worthington (1992: 55) thinks that the jury size is "not overly large given the gravity of the crime." However, according to the *Ath. pol.* 68.1, only the most serious cases get a jury as large as 1,500; see discussion above, 33. For doubts about the figure of 2,500 jurors in Din. 1.52 (the figure is a manuscript correction), see Jacoby, *FGrH* Supp. 3b.1, 565.

[63] Although the end of the speech is missing, it seems likely that the speech is reaching its conclusion at this point: see Worthington 1992: 332–334.

[64] It was as *strategos* of Munychia and the dockyards that Philocles had allowed Harpalus to enter Athens (1). On the high standards imposed on holders of this office and their liability for prosecution, see Hamel 1998: 118–121, 130–135.

children to him (15). They have been agents of fortune and the gods as much as the manifestation of the people (16).[65]

This constant positioning and re-positioning of the jury attests to the transformative power of rhetoric. *Ethos* is crucial to the function of rhetoric and every participant must have a *persona*, even the audience. The construction, allocation, and transformation of these *personae* lie with the orator. Of course, such dramatisation can happen only with the complicity of the jury. However, as we have seen, the Athenian audience is prepared to tolerate a reasonable degree of flexibility in jury identity. Such flexibility gives the orator purchase to construct their rhetorical disguises. The Athenians were willing to suspend judgment momentarily to see where their disguise might take them.

CONCLUSION: THE JURY, ANCIENT AND MODERN

"The jury is a sort of ad hoc parliament convened from the citizenry at large to lend respectability and authority to the process." (J. Gibbons, *Japanese Electronic Products Antitrust Litigation*, 632 F. 2d. 1069, 1093.)

It is the nature of institutions to pretend to be unchanging. History always tells us otherwise. Athens teaches us lessons about rhetorical re-positioning and the lack of precision in the definition of the relationship between jury and the people. Analysis of the modern Anglo-American jury only confirms this picture. A look at this modern jury serves to remind us that the association between democracy and the jury is not inevitable, but an artefact of historical circumstance and political rhetoric.[66] There is nothing inherently democratic about the jury; the "ad hoc parliament" is only one manifestation in a series. It further reminds us that, however we construe the relationship between the jury and the wider population (signifier and signified, agent and principal, or collective and representative), there will always be a tension. Between the abstract and the concrete, we can inevitably expect a certain degree of friction.

Re-definition of identity lies at the heart of the development of the Anglo-American jury, an institution whose origins lie not in democracy, but in the feudal battle between king and barons. The devolution of judicial power onto the jury was merely a gambit designed to weaken the power of the ecclesiastical and manorial courts.[67] It was an initiative driven from the top. Local knowledge

[65] The religious dimension has been a constant presence in this speech. For the violation of oaths and the invocation of the gods, see 2 and 15 respectively. This theological dimension seems a particular feature in Dinarchus' rhetoric. Note, for example, the unprecedented and elaborate imprecation against Demosthenes in Din. 1.64. Oaths, curses, and oracles are also regular features of his speech. On legal proceedings performing the will of the gods, see Andoc. 1.113.

[66] Danielle Allen has done invaluable service in showing the way in which Greek critical debate engages with modern political concepts. The following discussion is indebted to her analysis of jury nullification (2000: 5–8) and its implication for Greek forensic practice.

[67] For the standard account of the development of the early jury system, see Green 1907–9: 1.127; cf. Schwartz 1972.

was the commodity that the jurors were supposed to provide, not popular input. Rather than "shields against the State," they were feared by the citizens because of their unfettered power.[68] The only exercise of sovereignty they embodied was royal sovereignty.

It was only with the trials of the religious and political dissenters in the seventeenth century that this notion of jury identity was challenged. It was the Levellers who articulated a different vision of the jury—one not bound up in their local status, but defined by personal conscience and deriving its authority from the principle of universal suffrage.[69] Lilburne's trial in 1649 proves a turning point.[70] In the defendant's plea for the jurors to look to their own consciences and his imposition on them of a duty to justice "as judges of law as well as fact," we see the birth of the modern democratic jury. Once again rhetoric provided the tool for reshaping our understanding of the jury and rewriting its history.[71] This new doctrine quickly took hold. The celebrated resistance of the jury in Bushell's case (1670) to render a guilty verdict despite imprisonment, starvation, and threats can be seen as a struggle between two competing versions of jury identity—on the one hand, there is the State that sees the jury as a tool to implement its laws, and, on the other, there are people who regard themselves as owing a higher allegiance to abstract notions of justice and possessing a right of self-determination.[72]

At every step of the way, the claims made by the jury to an exercise of sovereignty have been contested. Few areas have aroused as much controversy as the issue of jury nullification. The refusal by juries to enforce laws that they deem unjust has simultaneously been celebrated as a sign of grass-roots democracy in action and condemned as a usurpation of the power of the lawfully-elected legislature. In such debates, the notion of the jury as "a body truly representative of the community" is crucial.[73] The degree of similarity between the jury and the community determines attitudes towards acts of jury nullification. As the jury increases in legitimacy, the more representative it is perceived to be. It is this quality that allows critics to condemn the all-white Southern juries (note the qualifying adjectives) that refused to prosecute those involved in racist hate crimes, but celebrate the colonial juries ("an embodiment of the revolutionary fervor sweeping the country") that refused to indict their peers for seditious libel.[74] The ever-present potential for "jury nullification" ensures that the relationship between the jury and the citizenry remains constantly under review. It is a

[68] Green 1907–9: 1.131; Simmons 2002: 6.

[69] Green 1985: 162–170.

[70] For a report of the case, see 4 Howell St. Trials 1269. On the importance of this case, see Green 1985: 153.

[71] For the historical dimension of the Levellers' claims, see Green 1985: 177–182.

[72] The case is reported in 6 Howell St. Trials 999.

[73] See Smith v. Texas, 311 US 128 (1940) 130.

[74] On the reluctance of all-white juries to convict whites of race crimes in the South, see Brundage 1993; Conrad 1997: 19–35; Nossiter 1994; Vollers 1995; Wright 1990: 23, 34–37. For colonial juries, see Levy 1985: 17; Nelson 1959.

peculiarly Anglo-American fixation. The critical discourse surrounding the jury largely revolves around one question, "How like *us* are they?" Critics have been ready to point out the racial bias in jury composition.[75] The validity of this criticism has been endorsed by the court's outlawing of peremptory challenges to juror participation on the basis of race.[76] Popular dissatisfaction with the jury has usually taken the form of "Those bozos don't represent us."[77]

As we observe this frantic, impassioned, and *democratic* debate, some implications for Athens begin to form. The lack of conclusive definitions seems less unusual. If *we* have trouble deciding whom the jury represents, the lack of Athenian consensus should not surprise us. It may also explain why Anglo-American scholarship has been instinctively less amenable to the imposition of the fixed constitutional categories favoured by much Continental scholarship. Such an imposition runs contrary to a tradition rooted in practice rather than dictate. Further, we can observe that this lack of definitive statements is not without benefit. This thriving political and critical discourse can function only because of the gap (real or imagined) between the community and its jury. Criticising others is always much easier than criticising ourselves. How can the comedy of Aristophanes function, if Philokleon is us? There must be times when we stand apart. Once we allow that the jury is not always/inevitably/unreservedly us, then the jury needs an alternative identity. At this moment, the discussion opens up to a range of possibilities. Rhetoric and political philosophy can conspire to promote different versions of the relationship. Constitutional conversation can begin.

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[75] The literature on this topic is voluminous. For discussion of the issues from a variety of perspectives, see Alschuler 1995; Deiss 1996: 323; Domitrovich 1994; Fletcher 1995; King 1993; Petersen 1993; Pomerant 1994.

[76] The lead judgment is Batson v. Kentucky 476 US 79 (1986). For discussion, see Serr and Maney 1988. For a less positive picture of the effect of Batson, see Herman 1993 and Morehead 1994.

[77] Alschuler 1998: 408. For studies of public opinion about the jury, see the analysis of surveys by Sacks (1998).

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