

CIVIC ENGAGEMENT AND THE ATHENIAN JURY

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Summary: Why did hundreds of Athenians show up for jury duty, even though the vote of any one juror was unlikely to affect the outcome of a verdict issued by a 201- or 501-person jury? This paper draws on the extensive political science literature addressing an analogous modern problem – the paradox of voter turnout – to suggest a framework for approaching this puzzle. The modern theoretical and empirical literature suggests several possible factors to explain why people vote, including material incentives, social incentives, a sense of civic duty, and the expressive benefits of voting. This literature tends to focus on a robust sense of civic duty and expressive voting as the primary reasons for modern voter turnout. I argue that expressive voting was likely the most important motivating factor for ancient Athenian jurors, but that the expressive benefits of judging in Athens were specific to the Athenian context. Serving as a juror gave ordinary Athenians the satisfaction of being able to express a judgment about the behavior of wealthy citizens and to make moral judgements about public norms.

Mogens Hansen was the rare classicist who made major contributions to a granular understanding of how Athenian institutions worked while also offering important theoretical insights. He also made judicious use of modern comparisons to shed light on the nature of both ancient and modern democracies.¹ It is in the spirit of Hansen’s comparative work that I offer this small contribution in honor of his memory.

The classical Athenian jury system required massive citizen participation: Hansen estimates that at the time of Aristotle somewhere between 1500 to 2000 jurors would be required on each of the 175-225 days per year when the courts were in session.² As far as we can tell, the Athenians did not struggle to fill the jury benches. The Athenians apparently

1 E.g., Hansen 1996, 2005, 2010.

2 Hansen 1999: 186-87.

did not need to increase jury pay over time to maintain participation. The pay for jury service remained the same throughout the fourth century despite rising daily wages, and in the latter fourth century a full day of jury service on a public case paid less than attendance for a few hours at a meeting of the Assembly.³ Kroll has suggested that the reuse of jury tickets – many of the surviving *pinakia* are palimpsests – indicates that there was competition for spots in the annual jury pool of 6000.⁴ We also have some literary evidence suggesting anxiety among jurors who turn up at the courts that they might not be chosen to serve on that day.⁵

How did the Athenian jury system generate this impressive level of civic participation? This puzzle is all the more striking when we consider that the vote of any one juror was unlikely to affect the outcome of a verdict issued by a 201- or 501-person jury. It is often said that the *demos* exercised its power through the jury, and this is true, but it does not explain what motivated each individual juror to turn up for jury service and cast a vote that was unlikely to determine the verdict. And I deliberately say unlikely rather than impossible: we do have references suggesting that two court cases were decided by a single vote, the most famous of which was Lycurgus' *Against Leocrates*.⁶

There is an extensive political science literature on an analogous modern puzzle, known as the 'paradox of voter turnout': why do people show up at the polls when each individual vote is almost certain to have no effect on the election outcome?⁷ This modern literature may offer a useful framework for approaching the puzzle of Athenian jury turnout. The modern voting literature provides four major types of reasons for voter turnout: material incentives, social incentives, a sense of civic

3 Hansen 1999: 188–99. Of course, because juries met more frequently than the assembly, jury service provided a more reliable and regular source of income than assembly service.

4 Kroll 1972: 69–90.

5 Isoc. 7.54; Ar. *Vesp.* 300–310.

6 Aeschin. 3.252 (Lycurgus' prosecution of Leocrates); Dem. 21.75 (trial of Euaion); cf. Thuc. 3.49.1 (close assembly vote in the Mytilene debate); Aesch. *Eum.* 753, 795 (tie vote in the trial of Orestes). Filonik 2025 catalogues the examples of close votes and points out that speakers' reporting of vote counts may not be reliable.

7 E.g. Gerber et al. 2008; Blais 2000; Blais et al. 2000; Achen & Blais 2019; Campbell 2006; Verba et al. 2005; Brennan & Lomasky 1993; Fiorina & Ferejohn 1974; Downs 1957.

duty, and the expressive benefits of voting (that is, the value a voter places on being empowered to express a preference, even if it has no effect on the outcome).⁸ The literature tends to focus on a robust sense of civic duty and the expressive benefits of voting as the primary reasons for modern voter turnout.⁹ In this paper, I argue that the expressive benefit of voting was likely the most important motivating factor for ancient Athenian jurors.

Before we begin, I should say a few words about method. I am using the modern political science literature merely to suggest categories of potential explanations that then need to be independently tested against what we know about the ancient world: the fact that a particular explanation does or does not apply in the modern context tells us nothing about whether it applied to ancient Athens. For example, while the modern literature mentions but quickly discounts material and social incentives for voter turnout, we will see that there are a variety of potential material and social incentives at play in Athenian juror turnout that require careful consideration. Moreover, while expressive voting plays an important role in both the modern literature and in my account, the specific expressive benefits of judging in ancient Athens were unique to the social and political context. My final caveat: multiple motivations likely played a role in juror participation, and it is impossible to quantify the relative importance of each. While I argue that expressive voting was a critical factor, I do not deny that other incentives also played a role in generating juror turnout in Athens.

It may be helpful to briefly review what we know about the jury selection process in classical Athens.¹⁰ Each year a panel of 6000 potential jurors were chosen by lot, likely from a pool of volunteer male citizens aged 30 and over who had put their name forward. On each day that court was in session, some portion of the 6000-person jury panel could choose to show up for jury duty. In the fifth century potential jurors lined up at the courts and were taken in order until the jury benches were full; in the fourth century an elaborate random selection procedure was used to determine who was to serve as a juror on that day and to assign jurors to

8 Achen & Blais 2019.

9 E.g., Achen & Blais 2019; Blais et al. 2000; Brennan & Lomasky 1993.

10 Hansen 1999: 183–88.

courts. Under both procedures we can imagine potential jurors enduring a lengthy wait before finding out whether they would be placed on a jury. Serving on a private case typically meant joining a jury of 201 for a trial that might last between half an hour and a few hours. Public cases lasted all day and were usually heard by juries of 501, though we hear of larger juries – as large as 2501 – being used in important political cases.

Let us begin with material rewards and punishments as potential incentives for jury service. Much has been written about the effectiveness of jury pay as an incentive to participation and practical considerations like traveling distance in the context of discussion of the demographics of the Athenian jury.¹¹ I cannot address all those arguments in this paper. The basic facts are clear: it seems that jury pay was 2 obols in the middle of the fifth century, was raised to 3 obols in 425 BCE, and remained at 3 obols through the time of the *Ath. Pol.*, even as the daily wage rose from 1 drachma (that is, 6 obols) at the end of the fifth century to 9-15 obols (1.5-2.5 drachmas) in the second half of the fourth century and as assembly pay rose from 3 obols in 390 to 6 obols in the 320s.¹² Scholars disagree about the extent to which jury pay could foster participation: some argue that it was barely enough to allow a citizen to support himself; others that by the mid-fourth century it was too low to have much effect with the result that most jurors were middle or upper-class; while still others argue that while the pay was not enough to live on, it would be an attractive bonus to those who had limited alternative sources of cash – particularly farmers and those too old to work.¹³ What is most important for us is that the relatively low jury pay does not seem sufficient to explain the regular participation of thousands of citizens, particularly when we factor in the necessity for some of them to travel some distance to the courts with no guarantee of being assigned to a case on any given day. The fact that jury pay was not raised in the fourth century to keep up

11 E.g., Sing 2021; Hansen 1999: 183-86; Todd 1990; Markle 1985; Jones 1957.

12 Hansen 1999: 188-89.

13 Compare Sing 2021; Todd 1990; Markle 1985; Jones 1957.

with wages and that jurors spent more time but were paid less than assembly-goers in the fourth century also suggests that money was not the sole driver of jury civic engagement.¹⁴

What about social incentives? One thing that set Athenian jury duty apart from the other forms of political participation like service on the council or deme magistracies was that jurors did not face an accounting and did not risk being prosecuted based on their conduct in office. But that is not to say that there were no risks associated with jury service: several passages attest that jurors could be criticized by court spectators, fellow citizens, and even female members of their families who disagreed with their verdict. One passage imagines spectators, both foreigners and citizens, berating jurors as they leave the courtroom.¹⁵ Typical is Aeschines' admonition to the jurors that their fellow citizens will hear about their decision: "Vote in this way, not only as judges but as men being watched, anticipating the judgement of citizens, who though not now present, will ask you what verdict you have given."¹⁶ I have argued elsewhere that the presence of bystanders and the publicity surrounding trials may have served as an informal *euthyna* for jurors, partially compensating for the lack of formal accountability for their verdicts.¹⁷ Dinarchus suggests as much when he tells the jury that they are on trial before the spectators: "While you are about to render judgment concerning the defendant, the bystanders and all the others are judging you."¹⁸ Given the importance of reputation and honor in Athenian society, the reputational risks and social sanctions associated with participating in a controversial jury verdict should not be underestimated.

If jury duty entailed a risk of social and reputational sanctions, were there social rewards to serving on a jury that might have helped encourage participation? Here again jury duty is distinct from serving as a councillor or magistrate in that jurors did not receive honors for their service:

14 Cf. Sing 2021, who argues that pay was the primary incentive for jurors, and that the decreasing real value of jury pay made the jury less diverse, but did not reduce participation sufficiently to require a pay increase.

15 Dem. 59.109.

16 Aeschin. 3.247.

17 Lanni 1997.

18 Din. 2.19.

jurors were not awarded crowns and could not lend their name to legislation or receive other forms of public recognition. Moreover, serving on a jury was not treated as a public service meriting honor and *charis* in the same way as performing liturgies or even routine military service: in our court speeches orators do not include jury service when listing their various state services to demonstrate their good character and to request favor from the jury. Liddel has also pointed out that jury service is not included on any surviving funerary reliefs.¹⁹

There is, however, some indication that jurors took pride in their service on the jury, as evidenced by the presence of jury tickets in graves.²⁰ And in the *Wasps* Philocleon purports to enjoy a certain amount of deference from powerful men while serving as a juror: he describes litigants begging and groveling as jurors approach the courts, and later brags,

So don't I wield great authority, as great as Zeus? I'm even spoken of in the same way as Zeus. For instance, if we're in an uproar, every passerby says "Zeus Almighty, the jury's really thundering!" And if I look lightning, the fat cats and the VIPs say a prayer and shit in their pants.²¹

In this way, while jury service did not confer civic honors or public recognition, it seems that jurors derived satisfaction from being in a position to sit in judgment on wealthy and powerful individuals. We will see that this satisfaction is one aspect of the expressive benefits of jury duty in Athens.

The explanation that dominates the literature on modern voter turnout is a robust sense of civic duty: the primary reason people vote today is that they have internalized a norm that one's duty as a citizen includes

19 Liddel 2007: 259.

20 Kroll 1972.

21 Ar. *Vesp.* 619-30 (transl. Henderson 1998). See also Ar. *Vesp.* 550-55 (transl. Henderson 1998): [Phil.] What living thing is there today more fortunate and felicitated than a juror, more coddled or commanding, oldster though he is? To begin with, I crawl out of bed to find big men, six-footers, watching for me at the court railings. As soon as I approach, one of them gives me his soft hand, fresh from stealing public money. They beg and they grovel, pitifully pouring out their pleas.

voting.²² Did the Athenians have a similar attitude toward jury duty? Did they view jury duty, for example, as analogous to military service, or the assembly, that is, something that every good citizen was obliged to participate in? While we do not have direct evidence on this question, I tend to think that the answer is no. There was of course no formal obligation to participate on a jury. Both putting one's name forward to be selected to the annual jury pool and showing up on any given day at the courts appear to have been entirely voluntary; there is no hint in our sources that members of the jury panel were expected or encouraged to turn up to serve on a certain number of days or at all. The famous statement in Pericles' funeral oration that Athenians were obliged to take an interest in politics seems to refer to deliberations in the assembly rather than jury service.²³ Perhaps most telling is the sense we get from some of our literary sources that Athenian jurors were overwhelmingly poor and elderly: whether or not this is an accurate description of juror demographics throughout the fourth century, these statements suggest that Athenians of all qualified ages and of all social statuses did not – and likely were not thought obligated to – volunteer for jury service on an equal basis.²⁴ For all these reasons, it seems unlikely that a sense of civic obligation was the primary motivation for Athenians to participate on juries.

The final explanation for voter turnout in the modern literature is the expressive benefits of voting – that is, the satisfaction a voter experiences in being able to express a preference, even if their vote will not affect the outcome.²⁵ In the context of modern elections, the expressive benefits of voting are generally described as a function of the voter's strength of preference. In other words, if a voter thinks an election is important and has a strong preference as to the outcome, she will get satisfaction out of being able to express her preference by voting, even though her vote will not affect the outcome. According to the literature,

22 E.g., Achen & Blais 2019.

23 Thuc. 2.40

24 Ar. *Vesp.* 230; 300–14 (jurors poor and elderly); see also Dem. 21.182 (describing poverty as a motivation for jury service); 24.123 (a member of the elite who had fallen into poverty on the jury).

25 Brennan & Lomasky 1993.

these expressive benefits of voting play an important role in modern voter turnout.

I think that expressive voting also played an important role in Athenian juror turnout, but the expressive benefits of judging in Athens were specific to the Athenian context. For one thing, Athenian jurors typically did not know what case they would be placed on, so their decision to show up for court was not related to how important a juror thought a particular case was (except, perhaps, in unusually high profile public cases where jurors might turn up in the hope that they would be seated on that case). On the other hand, we will see that the jurors' sense that many Athenian court cases involved important public norms *did* enhance the expressive benefits of judging.

For an Athenian juror, voting offered two types of expressive benefit. First, as I already mentioned, serving as a juror gave ordinary Athenians the satisfaction of being able to express a judgment about the behavior and character of wealthy and powerful citizens. It is this satisfaction, along with litigants' accompanying fear and deference, that Philocleon revels in in the *Wasps*. The enumeration of votes in jury verdicts (as opposed to the use of acclamation, without a tally of votes, in the assembly) may have both enhanced and detracted from the expressive power of voting: on the one hand in nearly all cases the vote tally reinforced the reality that any one juror's vote was not determinative. On the other hand, the vote ensured that every juror's preference was counted. Even apart from voting, Athenian jurors were able to vocally express their views about litigants' arguments by shouting down speakers during the trial, a practice ingrained enough to merit a term of art: *thorybos* ('clamor').²⁶

The second distinctive aspect of expressive voting in Athens is that Athenian jurors, unlike modern jurors, were often called not simply to determine facts or apply the laws as written, but to make moral judgments about public norms and proper modes of conduct.²⁷ The role of the Athenian courts as a forum for debating and elaborating public norms meant that the satisfaction or expressive benefit of jury service stretched

26 Bers 1985; Thomas 2016.

27 For case studies on the Athenian courts as sites for debating and shaping norms, see Lanni 2016: 150-70.

beyond what United States Chief Justice John Roberts would term ‘calling balls and strikes’ to encompass expressing a preference on the important issues of the day. In fact, I will argue that there may have been more expressive benefit to voting in the Athenian courts than in the assembly because the Athenian court system was a particularly effective forum to elaborate public norms. This may, in part, explain why pay increases were required to keep the assembly at quorum, but the Athenians never seem to have lacked for willing jurors. For the remainder of this paper, I want to flesh out this aspect of the expressive benefits of Athenian jury service.

First, controversies over important public norms were likely to come up more often in the context of court cases than in political assemblies. The assembly rarely revised its statutes related to corruption, treason, citizenship, violence, and contracts, but disputes in court frequently presented an opportunity for jurors to make judgments on these matters. The Athenians’ flexible approach to evidence and laws made the courts a particularly receptive form for debate over important public norms.²⁸ The vagueness of many Athenian laws invited litigants to debate the definition, purpose, and merits of the norm expressed in the law, rather than simply the application of the law to the facts of the particular case. For example, Conover has shown how the broad laws against bribery opened a space for the Athenians to contest and articulate what constituted legitimate and illegitimate political practice as they shifted over time.²⁹ Moreover, because jurors were not bound to strictly apply the law or follow precedent, even where the law was clear, litigants could question the normative underpinning of a particular law and jurors had dis-

28 The Athenian approach to statutory argumentation and relevance has been much debated in scholarship. My own view is elaborated in Lanni 2006. Even scholars who argue that the Athenian system reflected a ‘rule of law’ similar to our own concede that Athens’ vague statutes had an ‘open texture’, leaving room for extensive interpretation by jurors in applying the law to specific situations (e.g. Harris 2000).

29 Conover 2010.

cretion to apply the law in a way that would bring it into line with popular sentiment.³⁰ In addition, the normative debate initiated by individual court cases may have been richer than the discussion over more general laws in the assembly. Court cases invited litigants and jurors to contemplate what constituted proper behavior in the context of a specific situation, with all its complexities and confounding features.

Hyperides, *Against Athenogenes* may offer an example.³¹ In that case, the prosecutor, Epicrates, fell in love with an enslaved boy and offered to buy the freedom of the boy as well as of his brother and father from their owner, the defendant Athenogenes. When they met to conclude the deal, Athenogenes proposed that Epicrates buy the enslaved persons instead, along with the perfume shop they managed. This would mean that Epicrates would become liable for any debts they owed, but Athenogenes assured him that the stock in the shop was worth far more than any debts. Epicrates admits that Athenogenes read out the contract, but he claimed that he was too distracted and eager to get access to the boy to listen carefully. Soon after concluding the deal, he learned that the boy's father had considerable debts and that the contract included a provision that Epicrates would assume responsibility for any debts owed by the father to anyone else.

The applicable law stated simply that any voluntary agreement made between two parties was binding.³² One can imagine that the assembly debate over such a general and seemingly uncontroversial law likely would not generate significant discussion about norms in business transactions, since the lawmakers made no effort to anticipate and provide for circumstances where jurors might consider making an exception to the rule. Epicrates' case, by contrast, invites debate about how to assess the conduct of each party and how the state should react. Certainly, Athenogenes does not come off well, at least in Epicrates' telling. But Epicrates

30 The best example of this phenomenon is Lysias 1: the law clearly stated that a man was permitted to kill an adulterer caught in the act with his wife, yet the defendant is clearly worried that the jury might nevertheless convict him contrary to the law due to changing norms that disfavored lethal revenge in these circumstances (Lys. 1.49).

31 Hyp. 3.

32 Hyp. 3.13; Dem. 42.12; 47.77; 56.2.

is not without fault either: he walked into a deal intending to buy some enslaved persons' freedom and walked out the owner of a perfume shop without doing any due diligence, and he admits that he barely listened to the reading of the contract terms before signing the agreement. Should the court punish the unscrupulous seller even though the contract was in order, or should it take the position that the careless and gullible buyer got what he deserved? One can imagine jurors and court spectators discussing this case, and the broader question of what is and isn't acceptable business behavior, in barbershops and with their neighbors; it is harder to imagine that the passage of the general contract law would have generated as much discussion and debate about business norms. It is precisely the opportunity afforded to jurors to express their preference on what should constitute proper behavior in cases like these that may have encouraged jurors to show up even if their individual vote was unlikely to be determinative.

A final thought: let us consider how this Athenian system compares with modern jury duty. At least in theory, modern juries are not supposed to make decisions about what is right and wrong. Instead, they are supposed to find facts, like human polygraph machines, so that the moral judgments already embedded in highly specific laws can be applied to those facts. And as we all know, when applied to specific situations these detailed and abstract laws often yield surprising and unjust results which modern jurors are all but helpless to avoid. Though modern juries sometimes manage to nullify the law, they often are not given enough information to consider the moral implications of their verdict. In fact American jurors are often prohibited from hearing information, including the sentence attached to the offense, that might lead them to make a moral judgment rather than apply the law: for example, the jurors who convicted Gary Ewing of stealing three golf clubs were not told that their verdict would result in a twenty-five year to life sentence due to the application of California's Three Strikes law.³³ The Athenian experience was different. Jurors applied broad, open-ended rules to simple and competing accounts of wrongdoing. An Athenian juror was there not merely to discern the truth, but to determine right and wrong – to do all the work that today is (for better or worse) divided up among legislators,

33 *Ewing v. California*, 538 U.S. 11 (2003).

regulators, trial judges, and appellate judges. That the Athenians apparently found their job more rewarding than modern jurors find theirs – well, this comparison may trouble us, but it should not surprise us.

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