WAS THE *GRAPHE PARANOMON* A FORM OF JUDICIAL REVIEW?

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INTRODUCTION

The Athenian *graphe paranomon* has long served as exhibit A in the democratic defense of judicial review. The *graphe paranomon* was a mechanism by which the proposer of a decree (*psephisma*) could be subject to public prosecution on the grounds that the decree was contrary to the laws in force, hostile to the interests of the people, or procedurally invalid. Because the *graphe paranomon* served to ensure that a decree did not conflict with an existing law (*nomos*), it constituted a key mechanism by which the hierarchy of norms could be secured. In turn, since the hierarchy of norms constitutes a defining feature of a constitutional order, it is thought that the *graphe paranomon* and the

† Melissa Schwartzberg is Associate Professor of Political Science at Columbia University. I am grateful to Arthur Jacobson for the invitation to present this paper at the Constitutionalism, Ancient and Modern symposium at the Benjamin N. Cardozo School of Law, and regret that I was unable to deliver the paper in person and learn from the critical comments that I surely would have received in that setting. A related paper was delivered at the American Society for Legal History, November 12–14, 2009, Dallas, Texas, and at Harvard Law School, and I appreciate comments from commentators and participants at those sessions, especially Adriaan Lanni, Joshua Tate, and Adrian Vermeule, in those contexts.

graphe nomon me epitedeion theinai (by which a proposed law could be challenged as inappropriate) served as the signal mechanisms securing the identity and stability of the Athenian constitution.

Since the late nineteenth century, the Athenian use of *graphe paranomon* has been cited to bolster the democratic pedigree of judicial review, with authors drawing explicit parallels between the ancient Greek and American systems.[1] In modern scholarship, distinguished scholars have consistently treated the *graphe paranomon* as a mechanism of judicial review. Most influentially (especially for a non-classicist audience), the great scholar of Athenian democratic institutions, Mogens Herman Hansen, has argued: "Under the democracy the *graphe paranomon* was always regarded as the bulwark of the constitution and the only sure defence of the laws."[2] Hansen compared the *graphe paranomon* to judicial review, both in terms of its function and its justification. The most important reason for the use of the *graphe paranomon*, according to Hansen, was "the respect all Greeks felt for the superior wisdom and experience of age and for the oath sworn by the jurors; but the actual pattern of debate and manner of voting also helped to augment respect for the courts."[3] On this account, the *graphe paranomon* was an authoritative check on the power of the *demos*, which thereby ensured the stability of the law. Indeed, Hansen's account of the *graphe paranomon* as a mechanism of judicial review has become the dominant explanation of the institution, perhaps especially among non-classicist legal scholars and political scientists, even as his view that the jury was sovereign in Athens has been challenged.

Yet the interpretation of the *graphe paranomon* as analogous to contemporary judicial review relies—especially on Hansen's account—on a peculiar logic by which the judgment of the jurors in the People's Court, which conducted the trials, could be deemed superior to the judgment of the citizens in the Assembly. This view too is dominant among legal and political theorists.[4] Here, I shall argue that there is little

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1 For a discussion, see Edwin Carawan, *The Trial of the Arginousai Generals and the Dawn of "Judicial Review,"* 10 DIKE 19 (2007). References include 2 ROBERT J. BONNER & GERTRUDE SMITH, THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE 296–97 (1938); and Thomas D. Goodell, *An Athenian Parallel to a Function of Our Supreme Court*, 2 YALE REV. 64 (1893). For a contemporary example, see Mark J. Sundahl, *The Living Constitution of Ancient Athens: A Comparative Perspective on the Originalism Debate*, 42 J. MARSHALL L. REV. 463 (2009).

2 MOGENS HERMAN HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES: STRUCTURE, PRINCIPLES, AND IDEOLOGY 211 (J.A. Crook trans., Univ. of Okla. Press 1999) (1991); *see also* Hans Julius Wolff, *"Normenkontrolle" und Gesetzesbegriff in der attischen Demokratie*, *in* SITZUNGSBERICHTE DER AKADEMIE DER WISSENSCHAFTEN HEIDELBERG PHILOSOPHISCH-HISTORISCHE KLASSE 1969–1970 (no. 2, 1970).

3 HANSEN, *supra* note 2, at 209.

4 *See, e.g.*, Adriaan Lanni, *Judicial Review and the Athenian "Constitution,"* *in* DÉMOCRATIE ATHÉNIENNE—DÉMOCRATIE MODERNE: TRADITION ET INFLUENCES 235 (Mogens H. Hansen ed., 2010); Pasquale Pasquino, *Democracy Ancient and Modern: Divided Power*, *in*

reason to think that the authority of the courts with respect to the *graphe paranomon* derived from its superior judgment, nor that the jurisdiction of the courts over these trials was intended to provide an institutional check on the Assembly because of the likelihood that the Assembly would make poor decisions. To the extent that the *graphe paranomon* served a recognizably constitutional function, its true purpose would have been to affirm the ongoing popular capacity for reflective judgment. As such, to the extent that the *graphe paranomon* affirmed the rule of law by checking the decisions of the Assembly, it did so in a distinctively Athenian fashion, grounded on the participation of ordinary citizens in the creation and transformation of law.

Inasmuch as the modern defense of judicial review necessarily rests on the expertise of the judges, the *graphe paranomon* cannot serve as an antecedent. It is certainly possible to defend judicial review on other grounds as well, most notably the justices' insulation from popular pressure. But were the judges' expertise in constitutional interpretation or competence in legal reasoning not the central justifications for judicial review, the power to strike down unconstitutional laws could easily be situated with another unelected body—one chosen from the citizens as a whole, as contemporary defenders of popular constitutionalism might support.[5] As such, the "core of the case" in favor of judicial review, to parallel Jeremy Waldron's critical language,[6] must hinge upon the special competence of the judiciary to assess constitutionality. As I hope to demonstrate, in Athens, no such argument can plausibly be made in favor of the People's Courts.

I. JUDGMENT IN THE COURTS AND THE ASSEMBLY

There are five features that might distinguish the quality of the judgments formed in the People's Courts from those formed in the Assembly: 1) the demographic characteristics of the members; 2) the selection of members by lot for the Courts, whereas attendance at the Assembly was open to all citizens; 3) the oath administered to jurors but not assemblygoers; 4) the use of deliberation in the Assembly and its ostensible exclusion in the Courts; 5) the mechanism of decision: secret and counted ballots in the Courts versus estimated and public hand-counts in the Assembly. Let me take these up briefly in turn.

DÉMOCRATIE ATHÉNIENNE—DÉMOCRATIE MODERNE: TRADITION ET INFLUENCES, *supra*, at 1.

5 Adriaan Lanni argues similarly that Athens provides an example of a democratic form of judicial review along the lines of a popular constitutionalist model, and that its value rested in its role as a mechanism of secondary consideration. I part from her primarily in her view that the jury would have been thought to possess superior wisdom and her sense of the value of the *graphe paranomon* as a check on haste, as such. Lanni, *supra* note 4, at 258, 261–62.

6 Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2006).

A. *Jurors vs. Assembly Participants*

One of the most controversial topics in the study of Athenian institutions is the question of the relative wealth and social standing of jurors.[7] We might bracket this point, because the pivotal piece of evidence Hansen adduces for the higher quality of judgment among the jurors than among the attendees of the Assembly is the relative age of the jury. Whereas all male Athenian citizens over the age of twenty could attend the Assembly, jurors had to be thirty. Hansen argues that this is important, because it ensures that judgment is placed into the hands of the eldest and wisest; on his estimation, it constricts the pool of eligible citizens from 30,000 to 20,000. Evocatively, Hansen describes the jury as composed of grey beards and bald heads, as opposed to the young bucks who populated the Assembly.[8] But a body that has an age minimum of thirty is hardly a council of elders, even given the shorter lifespan of ancient Athenians. There were genuine bodies of elders who sat in judgment in Athens. Most notably, the Areopagus Council, the most significant of the homicide courts, was composed of ex-archons, and its median age has been estimated to lie between fifty-two and fifty-seven years. But these bodies did not conduct the *graphe paranomon*, and it is implausible to hold that the minor increase in the age of the median participant of the jury could support the view that the judgment on courts was substantially superior as a result. It is hard to avoid concluding, with Josiah Ober, that there is little reason to believe the composition of the average Athenian jury would be much different than the average Council or Assembly.[9]

B. *Lotteries vs. Open Attendance*

Is there any reason to think that the lottery would have systematically produced members with superior judgment? Each day the requisite number of jurors would be selected by lot among those who had taken the heliastic oath for the year (6000), and assigned via an extraordinarily complex, multistage system of lotteries to courtrooms. In Hansen's words, "The process is valuable testimony to the complexity of the democratic constitution: it must undoubtedly have succeeded in its twofold purpose, to ensure a good measure of rotation among the jurors and to foil any attempt to bribe them."[10] The lottery would have

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7 JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY, AND THE POWER OF THE PEOPLE 142–44 (1989).

8 HANSEN, *supra* note 2, at 185.

9 OBER, *supra* note 7, at 144.

10 HANSEN, *supra* note 2, at 183.

equalized the probability of receiving the good of the opportunity to serve among citizens. For some citizens, as Aristophanes famously lampooned in *Wasps*, service would have been intrinsically pleasurable; for others, the primary benefit would have been the payment received for service. In neither case, however, would we expect the judgment of such jurors to be systematically superior to that of attendees at the Assembly. From the perspective of litigants, randomization would have prevented the jury from being stacked either for or against them. However, because the charge of *graphe paranomon* was most often leveled against public figures, it would not have entirely eliminated the possibility that jurors would have had prior beliefs about the litigants that might have constituted sources of bias. This was not problematic from the perspective of Athenians; the courts had no *voir dire*,[11] and the public reputation of litigants was often invoked in trials, perhaps especially in cases of *graphe paranomon* challenging the awarding of honorary decrees. Indeed, *graphe paranomon* cases usually featured both legal and political arguments, as Harvey Yunis has demonstrated;[12] there was certainly no prohibition on extralegal argumentation, and in many cases the juror might be in a position of judging the status of a decree for which he voted. So jurors in such cases and Assembly participants would not have been meaningfully distinguished on the grounds of impartiality or freedom from prior information about the case at hand.

It is also worth noting, as the political theorist Peter Stone has recently argued, that the best grounds for the use of lottery is to "sanitize" a process—to ensure that reasons are not brought to bear for the selection of one option rather than another.[13] As such, to use a lottery as a means of selecting those with superior judgment would be incoherent—if not perverse—and certainly at odds with the Greek conception of the lot as a distinctly democratic mechanism of selection.[14] Indeed, as Bernard Manin has written about the Athenian use of lot: "In the courts, the use of lot to select judges and the complete absence of professionals were intended to guarantee that the voices of experts did not outweigh those of ordinary citizens."[15]

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11 ADRIAAN LANNI, LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS 39 (2006).

12 Harvey Yunis, *Law, Politics, and the* Graphe Paranomon *in Fourth-Century Athens*, 29 GREEK, ROMAN & BYZANTINE STUD. 361 (1988).

13 PETER STONE, THE LUCK OF THE DRAW: THE ROLE OF LOTTERIES IN DECISION MAKING (2011).

14 Most famously by ARISTOTLE, POLITICS bk. 4, § 9, 1294b7–9. *But see, e.g.*, HERODOTUS, HISTORIES bk. 3, § 80; PLATO, REPUBLIC bk. 8, 561b3–5; PSEUDO-XENOPHON, CONSTITUTION OF ATHENS bk. 1, §§ 2–3.

15 BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 33 (1997).

C. *The Use of the Dikastic Oath*

In Hansen's view, "it can be argued that the oath was one of the very factors that caused the decisions of the People's Court to prevail over the decrees of the Assembly."[16] The heliastic or dikastic oath reads as follows[17]:

> I will cast my vote according to the laws and decrees passed by the Assembly and by the Council of 500, but if there are no laws, in accordance with my sense of what is most just [*gnome te dikaiotate*], without favor or enmity. And I will vote only on the matters raised in the charge, and I will listen impartially to the accusers and the defendants alike. I swear these things by Zeus, Apollo, and Demeter, and may I have many good things if I swear well, but destruction for me and my family if I forswear.[18]

Hansen speculates that the religious significance of the oath and the curse attached to it would have had considerable importance for jurors. He cites Demosthenes in support of the view that judgments by "sworn jurors" have "greater weight than a decision taken by the people in the Assembly who have sworn no oath."[19] Yet there are two important challenges to the claim that the dikastic oath would have given the judgments of the court special weight. The first is that *nomothetai*, who voted on laws in the fourth century, would also have sworn the dikastic oath. Indeed (as Hansen himself notes), the same individuals who passed the *nomos* as a member of the *nomothetai* could hear the *graphe nomon me epitedeion theinai* as a juror—evidence that the oath itself could not have done the work in elevating the judgment, and of course, direct evidence that there would be little reason to think that the jurors had superior judgment to the legislators, if indeed they were potentially identical individuals. Second and relatedly, members of the Council took the bouleutic oath, which obliged them to "advise according to the

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16 HANSEN, *supra* note 2, at 183.

17 Translation adapted from David C. Mirhady, *The Dikasts' Oath and the Question of Fact*, *in* HORKOS: THE OATH IN GREEK SOCIETY 48, 49 (Alan H. Sommerstein & Judith Fletcher eds. 2007); and HANSEN, *supra* note 2, at 182. There is general consensus about the text of the oath (reconstructed by Max Fränkel), though several of the provisions are controversial. For substantive discussions of the oath, see STEVEN JOHNSTONE, DISPUTES AND DEMOCRACY: THE CONSEQUENCES OF LITIGATION IN ANCIENT ATHENS 33–42 (1999); ADELE C. SCAFURO, THE FORENSIC STAGE: SETTLING DISPUTES IN GRAECO-ROMAN NEW COMEDY 50–51 (1997).

18 It must be noted that David Mirhady has given us reason to question the evidentiary basis for every element in the oath (apart from the opening clause). *See generally* Mirhady, *supra* note 17. Here I will not rehearse or critique his important arguments about the validity of the various passages, nor take up the most controversial dimension of the oath—the proper understanding of the "most just" provision. Instead, I am interested in assessing the causal effect the oath might have had on jurors' private deliberations.

19 HANSEN, *supra* note 2, at 183.

laws,"[20] and indeed all citizens would have sworn the ephebic oath at the age of eighteen, which would have obliged them to obey those who "exercise power reasonably on any occasion and to the laws currently in force and any reasonably put into force in future. If anyone destroys these I shall not give them allegiance . . . ."[21] So there is little reason to think that the dikastic oath would have bound jurors to their duties more stringently than the bouleutic oath would have bound councilors, or the ephebic oath would have bound Assembly participants—and, as such, it is hard to believe that the former oath would have generated any meaningful difference in the quality of judgments rendered by the bodies.

D. *Deliberation*

It might be held that the absence of deliberation on the jury constitutes evidence that the judgment of individual members was considered to be superior on average than the judgment of the typical participant in the Assembly. That is, one might hold that jurors were deemed capable of forming good judgments independently on the basis of the evidence presented without having to assess the claims through discussion and argument with others, whereas Assembly participants needed to hear others' opinions before they were capable of reaching good decisions. Alternatively, one might think that the absence of deliberation improved the impartiality of decision-making on the jury, and the outcomes of such trials were thus decisions of higher quality than those rendered by the Assembly.

One challenge to this logic is that the distinction between the Assembly and the jury on the grounds of deliberation may be overdrawn. The Assembly was not necessarily as robustly deliberative as it is sometimes thought to have been. The massive Assembly had to make many decisions in extremely rapid succession; only a few speakers, typically expert orators, would address the audience as a whole from the speaker's platform.[22] *Thorubos*, or clamor, would constitute a source of public response, and would enable citizens to get a sense both of the general sentiments of the crowd, and the distinct perspectives of those in proximity to them.[23] The real work of deliberation may have

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20 XENOPHON, *Memorabilia* bk. 1.1.18, *in* XENOPHON: MEMORABILIA, OECONOMICUS, SYMPOSIUM, APOLOGIA 10–13 (E.C. Marchant trans., 1923).

21 GREEK HISTORICAL INSCRIPTIONS 404–323 B.C., no. 88 (P.J. Rhodes & Robin Osborne eds., 2004) (also referenced as *Tod* 204).

22 OBER, *supra* note 7, at 105–18, ch. 3 *passim*.

23 JOSIAH OBER, DEMOCRACY AND KNOWLEDGE: INNOVATION AND LEARNING IN CLASSIC ATHENS 163 (2008) (using the example of a young member of tribe Pandonius spotting Poseidippos VI and deciding to follow his lead).

occurred, then, in the informal responses to speakers among those in close proximity. Yet, as *thorubos* might often have taken the form of catcalls or heckling rather than argumentation, one might wish to distinguish the speech in the Assembly from deliberation as such. Both the speeches as such and the *thorubos* they engendered may actually have been a means of aggregating information about group preferences prior to voting, rather than of eliciting new information or transforming perspectives through persuasive arguments.

Though the Assembly may have been less deliberative than it is sometimes considered to have been, the jury may have been more so. Some exchange of private information among jurors was inevitable and, indeed, sometimes encouraged. In *On the Mysteries*, Andocides instructs the jury: "So first, gentlemen, those of you who were present should recall what happened and tell the others about it."[24] As one scholar has recently suggested, jurors could have discussed the case with those seated near them while they listened to the litigants and, as they stood in line to cast their votes, one by one.[25] Further, the jurors and, especially, the spectators did not listen to the trial in silence: *thorubos* was common in trials, used to interrupt or respond to litigants.[26] The Athenian Stranger in the *Laws* criticizes the use of *thorubos* and secret ballot alike in the jury: "[S]ometimes we find in a state that the juries are useless, dumb things; the individual jurymen keep their opinions a mystery known only to themselves and give their decisions by secret ballot. It's even more serious when so far from keeping silent when they hear a case they make a tremendous disturbance as though they were in a theatre, and hurl shouts of applause or disapproval at the speaker on either side in turn."[27] As Adriaan Lanni has argued, in the absence of formal accountability mechanisms for jurors, *thorubos* of the bystanders helped to constitute a set of implicit social sanctions for juries thought to have rendered wrong verdicts.[28] This, of course, is at odds with the view that the jurors voted independently; though the secret ballot would enable them to evade individual-level responsibility for their actions, the eyes of the bystanders certainly might have affected their judgment despite the presence of the oath.

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24 ANDOCIDES, ON THE MYSTERIES bk. 1.46, *in* ANTIPHON AND ANTOCIDES 114 (Michael Gagarin & Douglas M. MacDowell trans., 1998); *see also* V. Bers, *Dikastic Thorubos*, *in* CRUX: ESSAYS PRESENTED TO G.E.M. STE. CROIX ON HIS 75TH BIRTHDAY 1, 9 (P.A. Cartledge & F.D. Harvey eds., 1985) (citing *Isaeus* 5.20 and *Dinarchus* 1.41–.43, as well as *Dem.* 18.10, 44.79, 47.44, 50.3).

25 MATTHEW CHRIST, THE LITIGIOUS ATHENIAN 40 (1998).

26 *See* Bers, *supra* note 24; Adriaan M. Lanni, *Spectator Sport or Serious Politics?* οἱ περιεστηκότες *and the Athenian Lawcourts*, 117 J. HELLENIC STU. 183 (1997); *see also* JAMES FARLEY CRONIN, THE ATHENIAN JUROR AND HIS OATH (1936).

27 PLATO, LAWS 876b.

28 Lanni, *supra* note 26, at 188.

Should we regard *thorubos* and informal chatting as the functional equivalent of deliberation? No: it does not require the exchange of arguments, nor may it be wholly public; it may be audible only by those in close proximity. It does suggest that prior to the moment of decision, individuals' judgments are less independent than the prohibition on deliberation might have led us to infer, and that we ought to be skeptical that the Athenians would have regarded such mechanisms of communication as producing systematically superior outcomes to those generated by public deliberation in general. Given that the stake of decisions rendered by deliberation—a decision to go to war, for instance—were far higher for the community as a whole than the outcome of a particular trial, if deliberation was thought to generate inferior outcomes, we would expect that Athens would have abandoned its use. Better, instead, to assume that there were decisions for which formal deliberation was deemed necessary, and ones for which it was thought to be unnecessary or potentially harmful. But to understand why deliberation would not have been thought essential for a *graphe paranomon* trial, it is important to consider the procedures in assemblies and juries more generally.

E. *Decision Procedure*[29]

Here the distinction between the jury and the Assembly is at its most stark. In the early part of the fifth century B.C., voting among jurors was public, but the introduction of the secret ballot gave jurors a degree of privacy in rendering their verdicts, which in principle would have enhanced their ability to form judgments independently. It is true, as discussed above, that if *thorubos* actually occurred among jurors, such independence may not have been as desirable as the absence of deliberation and the presence of a secret ballot might initially suggest. Nonetheless, the introduction of the secret ballot must have reflected some concern about open voting.

One explanation may be that jurors or spectators with a stake in the outcome would seek to distort others' judgments through the use of bribes or threats during the moment of the vote. A vote on a particular individual's status in the community would have affected members of the society unequally, leaving some with an interest in influencing the verdict regardless of the truth or fairness of the charge. The risk of partiality in a jury trial outweighed the informational benefits that might be gained from deliberation or open voting. At least in principle, since jurors were bound by the oath to consider only the facts presented at

[29] This Section is partially adapted from Melissa Schwartzberg, *Shouts, Murmurs, and Votes: Acclamation and Aggregation in Ancient Greece*, 18 J. POL. PHIL. 448 (2010).

trial and the law, one might presume that the jurors were considered relatively equal in their ability to evaluate guilt or innocence. Secret ballot may thus have emerged in Athens to form collective decisions among actors with *equal information but unequal stakes*.

In contrast, virtually all legislative and electoral votes of the Assembly were taken via hand-count, and hands were estimated rather than counted. A counted ballot was used, however, in cases in which the *ekklesia kyria* served a quasi-judicial function: considerations of ostracism, immunity, and the conferral of citizen rights. Why would the Assembly have relied primarily on a public mechanism of decision-making? The public mechanism of the hand count was not strictly simultaneous, enabling individuals to have some causal impact on each other, as Jon Elster has suggested in another context.[30] Although in principle, once the question was posed, those in support or in opposition would raise their hands at the same time, the pause to allow the assessors to estimate the outcome would have permitted some to hesitate and then to raise their hands to accord with others' votes. Each member could gain a sense of where he stood relative to others on a given matter: he could recognize when his position was that of a small minority and alter his vote on the spot, or turn if undecided to those whom he considered knowledgeable for guidance. Whereas one might expect that jurors would have equal access to information necessary to render a verdict, there was little reason to believe that the capacity to judge the best course of action would have been equally distributed among members of the Assembly or council, although at least in principle, each would have had an equal stake in the outcome. However, in matters concerning all members of a society, such as warfare or legislation, every individual would have to live with the consequences of a bad decision. Thus, the creation of legislation is a case in which there might have been *unequal information but equal stakes*, and as such, the vote might have been public.

Interestingly, though, the charge of *graphe paranomon* straddles these two types of decisions. On the one hand, it is set up as a charge against the proposer of the law, and thus the sort of decision for which a secret and counted ballot is used. On the other hand, the consequence of striking down the decree would, at least in principle, affect all members equally, and as such one might expect an open and estimated form of voting. Just as the Athenians made an exception in their standard voting procedure when judicial functions were performed by the Assembly, one might have expected to see a distinction in the procedures of the jury if cases of *graphe paranomon* were aimed primarily at protecting the constitution and only secondarily at assessing the guilt of the

30 *See* Jon Elster, *The Night of August 4, 1789: A Study of Social Interactions in Collective Decision-Making*, *in* REVUE EUROPÉENE DES SCIENCES SOCIALES 45, 71–94 (2007).

proposer. Remarkably, the charge of *graphe paranomon* sometimes resulted in legislation: when a charge of *graphe paranomon* was brought against a proposed rule that had not yet been voted upon, and the proposer of the law was acquitted, the decree was deemed to have been passed. Especially in those contexts in which the *graphe paranomon* would serve a legislative function, exceptions to the jury voting procedure, like the vote for ostracisms in the Assembly, might well have been developed. But they were not.

II. PROCEDURES AND RECONSIDERATION

As we have seen, there is little reason to hold that the *graphe paranomon* was developed to enable a wiser body to check the inferior decision-making of the Assembly. That is, the composition of the jury, though necessarily different from the Assembly, was not so distinctive as to warrant the claim that it constituted a form of expert judicial review. This is especially striking if we consider what might be taken to be the more significant form of *graphe paranomon*, the *graphe nomon me epitedeion theinai.* As Hansen himself suggests, because the pool of *nomothetai*, or legislators, was drawn like the jury from the pool of those citizens who had taken the heliastic oath for the year, whatever made the jury pool distinctive from the body of the citizenry as a whole would also apply to the *nomothetai*. So the issue is quite clearly not one of the relative quality of judgment of the members of the body.

Instead, the important difference between the Assembly and the *nomothetai*, on one hand, and the jury, on the other, lies in their decision-making procedure. But it is not that the public and estimated handcount of the Assembly and *nomothetai* was inferior to the counted vote of the jury. Rather, it is merely that they were distinctive, enabling Athenian citizens to reconsider challenged legislation via a different mechanism. The core aim of the *graphe paranomon* was thus not to implement expert review of ordinary citizens' decisions. Nor was it even to ensure constitutional stability as such, though incompatibility with existing statutes and laws surely played an important role in the prosecution of such *graphai*. Instead, most often, the *graphe* enabled significant political decisions to be given repeated consideration through an alternative set of procedures.

The *graphe paranomon*, then, is best understood as a deliberative mechanism of secondary review by the *demos*, one of several such institutions developed by the Athenians.[31] It is sometimes thought that

[31] Noteworthy among these institutions was *anapsephisis*. *See* K.J. Dover, *Anapsephisis in Fifth-Century Athens*, 75 J. HELLENIC STU. 17, 17 (1955). Jon Elster suggests that the Athenians used *anapsephisis* as a means of countering the risk of passionate decision-making, though he

these institutions aimed at curbing passionate decision-making or reducing the risk of haste. To be sure, the famous use of *anapsephisis,* in the words of K.J. Dover, "to put to the vote for the second time an issue on which a decision has already been taken"—to reverse the Athenian decision to destroy Mytilene—was surely aimed at remedying a passionate action by the Assembly. But there is no reason to think that the use of a secondary procedure need be aimed at checking passion or irrationality as such. On this logic, by empowering the jury to reverse hasty decisions of the Assembly, Athens was able both to stabilize its constitution and to enhance the quality of its judgments. Indeed, critics of Athens regarded this inclination to alter past decisions as evidence of the democracy's inconstancy and fickleness. This perception led Athens to use entrenchment clauses to signal to allies their intention to abide by their commitments.[32]

Yet in the fourth century B.C., the procedure for revision of laws was already quite complex, and it is difficult to argue that *graphai* would be necessary to curb hasty actions as such. As in the fifth century, to adopt or to alter a *psephisma* did only require a vote of the Council and of the Assembly. For *nomoi* in the fourth century, however, a complex process which required someone to propose a revision, the Assembly to decide whether five defenders of the law would be called (and, if so, to be chosen), a proposal publicly promulgated, the Council to prepare the agenda for the Assembly at which *nomothetai* would be established, a discussion of the Assembly's proposal, a decision at a following Assembly to call for *nomothetai*, and then—in a meeting lasting at most one day—the vote of *nomothetai*. To hold that the *graphe nomon me epitedeion theinai* would constitute a check on the whimsical behavior of the Assembly would be to seriously undervalue the deliberations that must have occurred prior even to the vote of the *nomothetai*.

Although contemporary democracies have recourse to the use of *anapsephisis* and other mechanisms of secondary review, we have no close analogue of the *graphe paranomon*. Judicial review derives its authority from the expertise of the judges, rather than the repeated nature of the consideration. Adriaan Lanni has correctly suggested that bicameralism is a closer, if still imperfect, analogue insofar as it provides the opportunity for a "second evaluation of the legislation."[33] Yet in defending this view, she also argues that the "virtues of the reviewing Athenian court are similar to those typically attributed to the second chamber in a bicameral system," a "body whose deliberations are

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regards the *graphe paranomon* as an accountability measure rather than an example of *anapsephisis*. *See* JON ELSTER, ULYSSES UNBOUND (2000).

32 *See* Melissa Schwartzberg, *Athenian Democracy and Legal Change*, 98 AM. POL. SCI. REV. 311 (2004).

33 Lanni, *supra* note 4, at 258.

considered more rational and/or whose members are considered wiser or more experienced than the primary, and more representative, legislative chamber."[34]

On the latter, though Lanni cites the advanced age of the jury, as suggested above, this distinction is overdrawn compared with the true elders and relative "experts" of the Areopagus Council and perhaps the other homicide courts (about which she has brilliantly written).[35] On Lanni's former point, is it possible, however, to distinguish between the procedures on the grounds that the jury's "deliberations"—i.e., its decisions—were considered more rational? It is true, as Lanni and others note, that whereas the *nomothetai* could, in principle, pass several laws (and the Assembly several decrees) on a given day, the jurors had a full day to hear trials for *graphe paranomon* or *graphe nomon me epitedeion theinai*, though of course this does not mean that the actual time for (private) deliberation was any longer than that for public deliberation. Nonetheless, if true, this also entails the claim that the important difference between the Assembly or *nomothetai* and the jury was procedural, rather than compositional.

So what is special about the *graphe nomon me epitedeion theinai*, or even the *graphe paranomon*? It is not the *quality* of judgment inherent in the jury as opposed to the Assembly (and surely not as opposed to the *nomothetai*). Nor was it the substantive nature of the charge, which, as Harvey Yunis has argued, would have been both political and legal at trial—just as deliberations may well have been in the Assembly, particularly with respect to proposals to call for *nomothetai*. Nor is it even merely secondary consideration along the lines of *anapsephisis*, given the complexity of the decision procedure for the enactment of law. Instead, it must have been the desire for a distinctive procedural vantage point for reconsideration—one that would have emphasized individual instead of collective judgment. The requirement that the prosecutor receive at a minimum one-fifth of the votes, though surely aiming to reduce frivolous prosecutions, highlights the importance of the judgment of individuals—rendered independently rather than jointly—for the decision: what mattered was the number of individuals who supported the charge, not simply the community's verdict. Rather than consulting each other even at the moment of decision, as in the public hand-waving of the Assembly, each juror was left (not withstanding the presence of *thorubos*) to judge independently the merits of the charge.

Is there good reason to believe that the jury's deliberations—that is, each juror's private deliberation, and the decision as a whole—should have been regarded as more rational than the Assembly's? That is hard to sustain. After all, if there were a measurable improvement in

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34 *Id.*

35 *See* LANNI, *supra* note 11, at 75–114.

judgment in all contexts through the use of a secret ballot or the absence of deliberation we would imagine that the Athenians would have adopted these procedures for legislative decisions more generally. The Athenians certainly had the technical capacity to make the use of the secret ballot relatively efficient, especially if public deliberations were also eliminated, but they did not choose to adopt it even for the most important legislative and political decisions. The value of the jury procedures for the *graphe paranomon* are only visible as part of a mechanism of repetition with variation in the procedure.

Insofar as the *graphe paranomon* and *graphe nomon me epitideion theinai* served to bolster the rule of law, then, it was because it encouraged ordinary citizens to reflect from different vantage points, through distinctive procedures, on the decisions they had made. Far from providing the expert guidance and constitutional stability ostensibly offered by contemporary judicial review, the *graphe paranomon* was democratic decision-making at its most sophisticated and robust.