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SPECTATORS AND PUBLICITY IN THE ATHENIAN LEGAL SYSTEM: A RESPONSE TO WERNER RIESS¹

Prof. Riess has presented evidence for an Athenian legal system operating, we might say, in a fish bowl. A fish bowl does allow a close up view of what's swimming around inside, but cannot show us a whole lake.

I think it would be most useful if I concentrated on—and I promise this will be my last animal metaphor—Sherlock Holmes's dog who didn't bark and the fish we can't see. Both this lecture and Riess's impressive book, *Performing Interpersonal Violence*, have set me thinking about what we can only infer about the λεγόμενα and δρώμενα of Athenian law "in action," and the possibility that what we can at least inspect might still mislead us in assessing its atmosphere and preoccupations. These are questions of nuance. In principle it is certainly true, in Riess's words, that "Athenian culture was, in many aspects, a culture of public display," but I think it may be misleading to claim *tout court* that "legal proceedings were public" and "open for bystanders" to observe. To assess the extent of certain behaviors and investigate their mechanisms is not, in my opinion, quibbling around the edges.

In his book (22) Riess includes the judges among the spectators, but in his lecture bystanders are the particular issue. Enlarging on Adriaan Lanni's *erstling*, a study of the περιεσθηκότες, Riess states (n. 43): "without onlookers no ritual was possible. It was the bystanders only that enabled the courtroom ritual to actually take place. The allotment and oath-taking procedure ritually framed the solemn ceremony of rendering justice." Spectators certainly *could* make a difference to the atmosphere of the trial, and *sometimes* to the trial's outcome when they were especially vociferous, but those περιεσθηκότες were not subject to εὔθυναί to determine their status (free or slave), their gender, age, or citizenship, and they were not formally recognized by the court. The impact of literally and conceptually marginalized groups was, I think, of limited significance. And we must distinguish between friends and relatives of the litigants and random passersby, οἱ περιπατοῦντες in a literal, not philosophical sense, whose curiosity, piqued by what they saw and heard in and around a court, turned them into stationary περιεσθηκότες.

I have no quarrel with Hannah Arendt's general assertion that "for us, appearance—something that is being seen and heard by others as well as by

¹ I thank Prof. Riess for his comments *in litteris* on my response. Although I have not in every instance been persuaded, he has helped me clarify my own views.

ourselves—constitutes reality”; and I acknowledge that for the Athenians the *vita activa* demanded seeing and being seen in a public space; but the *official* participants, that is, parties to the case, presiding officers, and the jury (or sometimes members of the βουλή of 500 or the ἐκκλησία sitting in a quasi-judicial capacity) were sufficient and they were numerous: a group of hundreds, sometimes thousands, saw, heard, acquiesced in the procedures, and voted. In Athenian practice there were hardly any *in camera* trials like the prosecution of Andocides for the profanation of the Mysteries. In that case, bystanders must have been kept away when the jury of initiates heard the case (*On the Mysteries* 3).²

As for Alcibiades carrying his wife home, we should remember that in our time paparazzi would have peered into his courtyard and the NSA recorded his e-mail, but sources for the private realm of Athenian life are exiguous. Euphiletus’ self-report of his conversation with his wife in Lysias 1 has very few parallels. Even outside the speeches, it is surprising to read about Ischomachus’ interactions with his wife in Xenophon’s *Oeconomicus*. Since our evidence for what men on the streets made of violent acts spilling out onto the streets is slender and tendentious, I balk even at Riess’s hedged remark (4) that “ideally [the public] would condone, if not legitimate, the violent act and, most of all, would immediately construct meaning and thus make sense of the violence perpetrated.” Surely *some* spectators would just have been perplexed. Apollodorus’ claim that an enemy tried to kill him at night in a remote location ([Dem.] 53.17f.) would certainly have outraged the jury if the attempt were made instead at high noon in the agora and the jury did not believe that this was an act of self-defense. As for that well-known cuckold Euphiletus, who, Riess (20) says, “established a public for his private execution”—true, but he did that just as much to have presumptively friendly witnesses to the supposed circumstances and to his pious and patriotic speech—“not I but the laws will kill you ...” (Lysias 1.26).

The Athenian courts certainly had a heavy workload. Riess (3) points out that the courts were in session more often than the Assembly. But it is one thing to assert that legal proceedings were “accessible to a large and voluble audience,” another to say that an audience of that description actually attended, and that where and when such an audience *was* present, that it made an important difference to the tenor and outcome of the process.³

Is the evidence available to us sufficiently representative? In *Genos Dikanikon* I have argued that the surviving forensic speeches, though impressive for their bulk

² Riess comments: “To the Athenians, trials held behind closed doors, were invalid mock-trials. The death sentences the Thirty issued in the Boule were considered judicial murders, and not just because the Thirty had democrats executed, but also because to the Athenians, non-public trials were a *contradictio in adiecto*.”

³ Occasional swaying of the dicasts’ vote by noisy spectators is a reasonable inference, but I acknowledge that Riess is correct in pointing out to me that he does “not [in his lecture] say anything about their potential influence on the judges.”

by the standards of classical literary material, constitute a misleading sample. Many amateur litigants had to fend for themselves, and their speeches, even if they were written down, are now irretrievable. I think there were many small cases argued clumsily by amateur speakers. Riess cites some of the most familiar pieces of evidence for the hypertrophy of judicial business in Athens, including the Pseudo-Xenophon *Constitution of the Athenians* (“Old Oligarch”) and Aristophanes’ *Clouds* 206–208, where Aristophanes has Strepsiades dismiss a map of Athens as defective, since he saw no courts in session. Both passages, it should be noted, have to do with the quantity, not only the character, of trials adjudicated in the δικαστήρια—far too many cases, in my opinion, to be exclusively, or even predominantly, manifestations of the legal wrangling of a small elite.

Consider the initial stage in the procedure for private cases, official arbitration. The arbitration requirement must have been intended to reduce the number of cases that went to court; that is why service as an arbitrator was the only civil requirement imposed on male citizens by the city. The penalty for evasion of arbiter service is an impressive, if very rough, index of Athenian litigiousness. Riess could in fact have adduced arbitration as a procedure open to the public since, to my knowledge, there is no trace of public arbitration *in camera*, and speakers do sometimes refer to the process as open to spectators, for instance at Demosthenes 47.12.

If celebrities were involved as parties or as συνήγοροι, some neutral observers with time on their hands might stop to listen; at slack periods in the agricultural year, even poor men with time on their hands might look and listen in. But I find it hard to believe that more than a few arbitration hearings would attract the interest of random passers-by.

Say arbitration failed and the dispute came to trial, or if the process took the form of a γράφή and hence there was no arbitration. Riess asserts: “People knew what was going on before and during a trial.” I ask: how *many* “people”? If the principals were prominent politicians, most likely quite a few male citizens. But if the litigants were obscure, the “people in the know” would only include family, close friends, and a handful of others. When the issues were routine, or technical, for instance a dispute over a bottomry loan, and the principals were, as often in the maritime courts, foreigners, only a few περιεστηκότες—if any.

Inheritance cases probably drew a respectable number of περιεστηκότες, since Isaeus often has a client call on the jury to imagine themselves standing in his sandals. One example: “I think you consider it your right to inherit, and to feel aggrieved if you don’t” (1.44 trans. M. Edwards). But how many περιεστηκότες would sit—or rather *stand*—still for recitations of numbers or complex family trees? In that same speech Isaeus seems to have been dealing with jurors and spectators bored enough that they were rarely, if ever, moved to heckling: his corpus contains, to my knowledge, not a single word built on the root *thorub-*. At §48 of the same speech Isaeus calls on the jury to pay attention. Perhaps he anticipates that even some jurors were dozing off. Bored spectators could, of course, just walk away.

A word on the risk of metaphorical language in our descriptions of Athenian courts. Even when a fourth-century litigant or a συνήγορος delivered a *narrative* about men we can call *actors* as they “*play in a drama*” with a shocking *dénouement* which induces *weeping* and *horripilation*, even when a prosecutor tells us that a supposed victim was displayed to passersby in a market called “Display” (Lysias fr. 279.6 Carey), there was a real-life job to be done. The jurors were in court, having sworn by Zeus, Poseidon, and Demeter to *judge the case at hand*. It is not, I believe, naïve to think that the typical juror remembered what he was there to do—to do for and to real people, even if he sensed an occasional *resemblance* between the case and a tragedy, with victims rolled out on an ἐγκύκλημα before a large audience, and even if he reflected that the many steps of the judicial process were executed in public view, and that he might hear about some actions that were said—or denied—to have occurred in public view.

Last point: “The deposition of a curse tablet—that is, by secret burial—was,” he says, “a highly *performative* act.” To my eyes, it matters that judicial curse tablets were literally out of sight, buried in the soil. In Riess’s *Performing Interpersonal Violence* these curses are the subject of a full, very informative chapter. Now, what I take to be the essential action, the burial of the tablet, requires no human audience other than the person or people doing the burying, i.e., litigants themselves and/or persons in the employ of litigants. To my knowledge, Athenians did not believe that the efficacy of the curse was crucially dependent on a human audience, organized or accidental, comprised of the general public. Concluding this chapter Riess remarks (231): “In the realm of magic, everything depended on one’s point of view.” I agree, and much the same can be said of the operations of Athenian justice, which to my eyes allowed, but did not crucially require spectators.⁴

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⁴ Riess objects, perhaps rightly, to my introduction of material he discusses at length in the third chapter of his book, but did not include within his *Symposion* lecture. Moreover, he remarks that his “vocabulary is derived from [Victor] Turner’s and [Richard] Schechner’s theories of performance [which] ... have found widespread acceptance in the humanities, also in Classical Studies.” I continue to see a danger, to revert to some old-fashioned critical terminology, that a sharing of metaphorical vehicles from different spheres has lead to a misapprehension of radically disparate tenors.