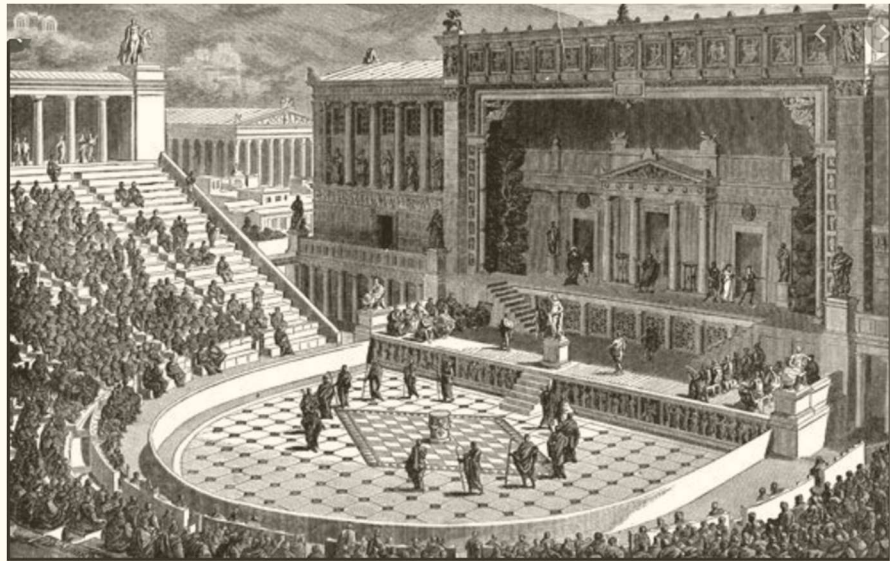


MURDER, REVENGE, JUSTICE: THE JURY AND THE THEATER IN ANCIENT ATHENS



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About the Author

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The right to trial by jury, one of the most time-honored legacies from Chapter 39 of The Great Charter of Liberties, commonly known as *Magna Carta*, guarantees that no free person will be deprived of any liberty except by legal judgment of that person's peers.¹ Sir William Blackstone, an esteemed jurist and the author of *The Commentaries on English Law*, called the jury trial the grand bulwark and the glory of English law.² Indeed, during colonial period, colonists were outraged when they were denied this fundamental liberty, and the result of that outrage caused our founders to enshrine that right in criminals cases in the U.S. Constitution and the Maryland's Constitution.^{3 -4}

Should we attribute this fundamental liberty to *Magna Carta* and English common law, or should we look elsewhere for its antecedents? In answering this question, I found evidence of an early development of this fundamental liberty in Greek myth, legend, and in ancient Athenian history and drama.

The study of fundamental liberties that may be grounded in ancient civilizations is challenging because we only have fragments of primary written sources, and we are forced to rely on secondary written sources for an understanding of those fundamental liberties. Even

¹ William F. Swindler, *Magna Carta: Legend and Legacy* pp. 316 and 317, Bobbs-Merrill Company, Inc. (1965) and Elrod, Jennifer W., *W(h)ither The Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Washington and Lee L. Rev.3 (Winter, 2011).

² Elrod, Jennifer W., *W(h)ither The Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Washington and Lee L. Rev.p.7 (Winter, 2011).

³ Article III, Section 2 of the U.S. Constitution, and the right was expanded to the States by the Sixth and Fourteenth Amendments to the U.S. Constitution.

⁴ Maryland Constitution 5(a)(1) (2018 edition).

historians of ancient Greece do not agree on the cause or the causes which replaced the old law of murder and revenge with a new law of murder and justice. What we do know is the ancient Athenians, who wrestled with this issue, established an assembly to bring order out of the chaos created by the murder-revenge cycle. This assembly was called the Areopagite, and its creation began the process of replacing the murder and revenge cycle by creating a body of free men to insure justice rather than chaos.

The origins of the Areopagite seem to be grounded in part in legend and the writings of Thucydides, the famous Greek historian who lived during the 5th Century, BCE. Thucydides tells us that Theseus, a legendary king, created a single assembly to replace the multiple councils found in Attica, a peninsula which juts into the Aegean Sea and which contains modern day Athens. This assembly, composed of a body of free men, was called the Areopagite. In time, the Areopagite dominated Attica and it possessed legislative and judicial functions. Together with the nine archons or rulers, we begin to see the early beginnings of an executive, legislative, and judicial branches of government.⁵

Over time, the Areopagite elicited allegations of favoritism and corruption. We lack primary evidence to support the commonly held belief that the Areopagite was a bastion of powerful, aristocratic families.⁶ We do know, however, from ancient secondary sources that the reforms initiated by Ephialtes, the commander of the Athens' fleet in the Aegean and a powerful Athenian statesman, in late 460 BCE, and by Pericles, who would give his name to the golden age of Athens and who lived from 495 -429 BCE, were possible because of a failure of Athenian foreign policy. Cimon, a celebrated warrior who had built the Athenian navy and was an

⁵ Raphael Sealey, *The Athenian Republic: Democracy of the Rule of Law*, pp.109-110 (Penn State University Press, 1990). Muse.jhu.edu/book/46939.

⁶ *Supra.*, p.111.

aristocrat, was a member of the Areopagite. He had advocated a pro-Sparta foreign policy, and he lost his influence and was disgraced when Sparta rejected Athenian military aid. Sparta's rejection humiliated Athens and that humiliation weakened the powerful aristocratic faction of the Areopagite. Further, this humiliation increased political and military tension between Athens and Sparta. Ephialtes started reforming the Areopagite by stripping it of all duties except ceremonial, religious and certain homicides.⁷ These reforms intensified the conflict between the aristocratic wing of the Areopagite and the reformers. Ephialtes was assassinated in 461 B.C.E, and Pericles not only continued those reforms, but he prosecuted Cimon for bribery and corruption.⁸

There is no primary evidence to explain how Ephialtes and Pericles accomplished those reforms.⁹ We do know, however, the results of those reforms. Most of the Areopagite's political powers were distributed to the Council of Five Hundred and, depending on which secondary source you choose, most judicial powers were given to the people's courts.¹⁰ In addition, the authority or jurisdiction of the archons was significantly curtailed.¹¹ As a result of these reforms, the archons conducted preliminary hearings, and the popular courts with citizen juries had jurisdiction over most homicide cases.¹² As significant as these reforms may seem, it would be a mistake to characterize these reforms as more than a first step in establishing a democratic form

⁷ <http://www.britannica.com/place/ancient-Greece/The-reforms-of-Ephialtes>

⁸ <http://en.wikipedia.org/wiki/Ephialtes> and <https://www.britannica.com/biography/Cimon>

⁹ <https://www.britannica.com/place/ancient-Greece/The-reforms-of-Ephialtes> and *Ibid.*

¹⁰ Compare <https://www.britannica.com/place/ancient-Greece/The-reforms-of-Ephialtes> with <http://cdn.preterhuman.net/texts/other/crystalinks/greeklaw.html>

¹¹ <https://www.britannica.com/place/ancient-Greece/The-reforms-of-Ephialtes> See also, Raphael Sealey, *The Athenian Republic: Democracy of the Rule of Law*, pp.129-130 (Penn State University Press, 1990). [Muse.jhu.edu/book/46939](http://www.muse.jhu.edu/book/46939).

¹² <http://cdn.preterhuman.net/texts/other/crystalinks/greeklaw.html>

of government that would become the foundation on which later democratic institutions would be built and would flourish.

What did the popular court, which probably evolved over thirty or more years¹³ and known as the Dikastes¹⁴, look like?

- The Dikastes were independent of political influence.
- Only citizens, who were at least 30 years old, were eligible to serve.
- Jurors were selected by lot, and the nine archons supervised the selection. In capital cases, the number of jurors could range between 1,000 and 1,500.
- Jurors took an oath of office, and they were paid for their service.
- There were no judges, prosecutors, or defense counsel.
- The victim or the victim's friend or friends argued his or her case to the jury.
- The assailant or the assailant's friend or friends defended the assailant.
- Jurors voted secretly by using either hollow or whole disks, which were deposited in one of two urns.
- A majority vote determined guilt or innocence.
- There was no right to appeal the jury's verdict.¹⁵

¹³ <https://www.britannica.com/place/ancient-Greece/The-reforms-of-Ephialtes>

¹⁴ Generally, see <http://www.en.wikipedia.org/wiki/Oresteia>

¹⁵ See *Ancient Greek Legal System*,

<http://cdn.preterhuman.net/texts/other/crystalinks/greeklaw.html>.

<https://en.wikipedia.org/wiki/Oresteia> and <http://en.wikipedia.org/wiki/Dikastes> . For a more detailed account, see <https://www.britannica.com/place/ancient-Greece/The-reforms-of-Ephialtes>.

The ebb and flow of political reforms was controversial, especially when special interest groups lost power and their political influence. Reformers needed supporters for the reforms they initiated. While there is no evidence that either Ephialtes or Pericles appealed to Aeschylus, the great Athenian playwright, to write the *Oresteia* to support their reforms, one can argue that Aeschylus supported the creation of the popular courts.

Aeschylus's *Oresteia*, a tragic trilogy, addresses the weakness of the old law of murder and revenge, followed by murder and revenge. Secondly, the trilogy demonstrates the strength of the new law which broke the old cycle with a new concept of justice where independent jurors decided if the accused was guilty or innocent.

Aeschylus supported the reforms by using the epic tale of Prince Paris, Queen Helen, and the Trojan War, a tale as ancient as time and well-known to every Athenian, to weave a story of murder, revenge, and justice. The tale is familiar to modern ears because who has not heard or read the story of Helen, whose face launched a thousand ships, or read about the Trojan War?

Almost every Athenian would have known not only this epic tale, but the tragedy of the House of Atreus. The cycle of murder and revenge began with Tantalus, the son of Zeus, who murdered his son Pelops and who attempted to feed him to the gods. Pelops was resurrected and multiple murders plagued the house of Atreus for successive generations. The first play assumes the audience understands the story of Tantalus' grandsons, Agamemnon and Menelaus, two brothers, who had married two sisters. Unless you are a fan of Greek drama, we need context to understand the first play. King Agamemnon had married Clytemnestra and King Menelaus had married the beautiful Helen of Sparta. During a visit to Sparta, Paris, the son of Priam, the King of Troy, captured Helen's heart and they fled to Troy, a rich kingdom that taxed and exerted

other controls over trade passing through the Bosphorus Straits. Agamemnon was named the commander of Attic Army. Menelaus, the King of Sparta with his army joined his brother to rescue Helen, Menelaus's wife, from Paris' clutches, and to destroy Troy's economic and political power. Helen was rescued; Troy was destroyed; and each King returned to his respective palace.¹⁶

The Oresteia opens in the late Bronze Age (circa 1,600 B.C.E.) with a lone watchman standing on a tower of Agamemnon's great palace at Mycenae.¹⁷ His eyes search the dark horizon for a bonfire which will herald the approach of Agamemnon, the victor of the Trojan War.¹⁸ The watchman laments the fortunes of the House of Atreus¹⁹ as if he is predicting another cycle of murder and revenge. A bonfire appears on the horizon announcing Agamemnon's safe return. Upon arriving, Agamemnon, his troops, and Cassandra, a Princess of Troy and Agamemnon's concubine, make a triumphal entry through the Lions Gate into the palace proper. Clytemnestra welcomes her husband with a paean of victory as she spreads a crimson carpet for his feet. Then, she tempts him to leave his chariot and walk upon the crimson carpet as befits a conqueror. At first, Agamemnon resists the temptation which would offend the gods, but he succumbs to the "sins" of pride and glory. During the Agamemnon's grand entrance, we learn that Clytemnestra, who has lived with her lover Aegisthus during ten long years, has schemed how she will murder her husband because he sacrificed their daughter Iphigenia to the gods for a favorable wind to take the Greek army swiftly to Troy. She entices Agamemnon to the bath to rid himself of the grime and dirt of his journey. As he soaks in the

¹⁶ <https://en.wikipedia.org/wiki/Oresteia>, p. 3.

¹⁷ Elsi Spathari, *Corinthia-Argolida: A Guide to the Museums and Archaeological Sites*, pp. 70 et seq. (Hesperos Editions, Athens 2010).

¹⁸ *Ten Greek Plays*, translated into English by Gilbert Murray et al., p.91 (Oxford University Press, 1936).

¹⁹ *Supra*..

bath, Clytemnestra envelops her husband in the web of a net, and then she murders him to avenge the death of their daughter Iphigenia. Not satisfied with one death, she murders Cassandra at the foot of the family altar. The play ends with Clytemnestra and her lover in triumph!

The Libation Bearers²⁰, the second play of the trilogy, opens several years after Agamemnon's murder, with Orestes, Agamemnon's son, and his sister Electra mourning at Agamemnon's grave. (Orestes does not appear in the play *Agamemnon* because Electra, his sister, had rescued him from his Mother Clytemnestra because she intended to murder him.)²¹ As Electra pours a libation on Agamemnon's grave to end Clytemnestra's nightmares, Orestes, acting at the god Apollo's directive, and his sister Electra vow to avenge Agamemnon's murder by killing Clytemnestra and her lover Aegisthus. Orestes disguises himself as traveler, and he tells Clytemnestra that he has brought Orestes' ashes to her. Clytemnestra immediately sends for Aegisthus, her lover and partner in crime. When Aegisthus arrives without a guard, Orestes murders him, and then he confronts his mother. He hesitates for a moment because matricide, the murder of a mother, was a heinous crime that resulted in the perpetrator's death. Pylades, Orestes' travelling companion, prods him, and Orestes slays his mother. The revenge killing satisfies Apollo's directive, but Orestes is suddenly harried by the Furies, the female spirits of vengeance, who live in the under-world and are part of the order of murder and revenge. The Furies pursue Orestes as he flees the palace.

Murder followed by revenge which is followed by matricide. Can the cycle of murder and revenge under the old law end? *The Eumenides*, the third play, answers that question.²² The

²⁰ *Ibid.* p. 143 *et seq.*.

²¹ *Ibid.*, p. 146.

²² *Ibid.* p. 181 *et seq.*

play opens with Orestes escaping the Furies because they are sleeping. Under the protection of Hermes, the messenger of the gods, Orestes flees to Athena, the goddess of wisdom as well as the goddess of warfare. Even as Orestes pleads for Athena's aid, Clytemnestra's ghost arouses the Furies who continue to torment Orestes.

As Athena ponders Orestes' plea, she acknowledges that both the Furies' and Orestes' arguments have merit. Where does justice lie? In response, Athena speaks: "Yet, seeing fate lays this matter at my door, Myself not judging, I will judges find In mine own City; who will make no blind Oath-challenge to pursuer and pursued, But follow this new rule, by me indued As law for ever. Proof and witnesses Call ye on either side, and set to these Your oaths. Such oath helps Justice in her need. I will go choose the nobles of the freed of Athens, and here bring them to decide...."²³

After both cases are presented, the jurors cast their stones in one of two urns. The votes are tabulated, and the jury is equally divided on the issue of guilt or innocence. After the stones are counted, Athena speaks: "The prisoner, since the stones for ill and good Are equal, hath escaped the doom of blood."²⁴ The trial's outcome angers The Furies. But Athena quells their anger by persuasive arguments. She urges them to become a constructive force for vigilance in Athens, and she changes their name to Eumenides, which means the Kindly Ones. The play closes with Athena abolishing the old law and instituting the new law.

You can argue the Oresteia is a political drama wrapped in an ancient Greek epic myth or legend. Particularly, Aeschylus's *Eumenides* can be read as Aeschylus's support for Ephialtes' reforms that disenfranchised the powerful Areopagite, and which created the popular courts that had

²³ *Ibid.*, pp. 196.

²⁴ *Ibid.* p. 204

jurisdiction over criminal cases. The reforms instituted by Ephialtes and Pericles removed murder trials from the partisan and possibly corrupt venue of the Areopagite and instituted a new system whereby free men, sworn by oath, cast their votes by stones in one of two urns. These reforms can be viewed as the early beginnings of a new system of justice that decides guilt or innocence.

Aeschylus did not use a contemporary drama of murder and revenge that could be understood as supporting Ephialtes's reforms. In my view, he used an ancient, epic tale of murder and revenge that would have been well-known to every Athenian to subtly defend Ephialtes's reform of the Areopagite constitution. With this reform, the old law of murder and revenge truly passed away, and a new law, the justice system envisioned by Athena, the goddess of Wisdom, was the first but important step in establishing trials by jury.

In my opinion, the reforms initiated by Ephialtes and Pericles were an important first step in creating a particularly important liberty: trial by jury. Trial by jury, which would become a bulwark of English liberty,²⁵ and which would be enshrined in our constitutions. That liberty guarantees in criminal cases no person would be deprived of liberty except by legal judgment of that person's peers.

²⁵ Elrod, Jennifer W., *W(h)ither The Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Washington and Lee L. Rev.3 (Winter, 2011).