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Danielle S. Allen: The World of Prometheus □ □

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INTRODUCTION

ONE OF THE most important but least acknowledged features of the modern world is that individuals no longer punish for themselves. By this I do not suggest, as so many have, that over time a dark Dionysiac and ancient age of mad blood vengeance has ceded to an era of rational, legally based state punishment and Apolline brightness. I refer rather to the quite specific fact that the modern age has produced the public prosecutor to replace the lay prosecutor as the person responsible for seeing that wrongdoing is dealt with. In the ancient world the victims of wrongs had to enter into judicial processes in order to prosecute their own cases. The modern age has produced the state representative who acts on behalf of wronged individuals and who is supposed to prosecute impartially, disinterestedly, and dispassionately. The invention of the public prosecutor is a small historical detail—small enough to slip out of most history books—but its consequences have been great and systematic.

Prior to the modern age, private prosecution was the norm in the ancient Greek *polis*, in the Roman Republic and Principate, in the pre-sixteenth-century French and Prussian monarchies,¹ and in the pre-eighteenth-century English monarchy. The use of public prosecution in modern states has come about more by evolution than by design. In Britain the attorney general prosecuted only cases that applied directly to the king until the end of the seventeenth century, and the justice of the peace prosecuted only cases without a private prosecutor.² Both types of official began to assume more power in the eighteenth century and the Crown Prosecutor's Service was introduced only in the 1980s. This office expands the state's prosecutorial powers to its greatest levels ever, but even so it remains institutionally possible in Britain for private individuals to bring criminal cases to trial. Witness the recent Stephen Lawrence case in which the family of a murdered youth brought several defendants to trial after the Crown Prosecutor's Service had dropped the case.

The use of public prosecution in the United States has had a rather different history. Public prosecution came into use during the colonial period despite the fact that the mother country, Britain, had no such system. Historians have not been able to determine why the colonists adopted this institution, but whatever the case the public prosecutor was incorporated into the institutional structure of the United States at its founding.³ To the best of my knowledge, the United States is the only pre-twentieth-century Western political regime to have come into being with the institution of the public prosecutor already in place. Moreover, in the United States private individuals cannot prosecute criminal proceedings. The public prosecutor (or district attorney) has jurisdiction over criminal cases to the point of a *de jure* exclusion of private individuals from the prosecutorial arena.⁴ The U.S. public prosecutor, also often known as the district attorney, is therefore something of a historical anomaly, a curious product

of colonial times. Whatever the reasons for its invention, the institution models a different understanding of the relationship between citizens and their government and of the use of political power than had been customary in the English-speaking world up to that point.

This is an important fact. The premodern citizen around the globe, including the ancient Athenian, was obliged, for safety's sake, to understand punishment: what it was, how it worked, how one "did" it. Athenians of democratic Athens who thought that they had suffered wrong usually had to be able to deal with that wrong for themselves. They themselves had to be able to bring the apparatus of authoritative political power to bear against the person who had wronged them. They had to see an act of power through from initiation to conclusion and carry out the process of punishing.

In contrast, the modern citizen generally has the luxury of being able to ignore the processes of punishment after he or she has memorized the emergency telephone number of the police department. In the age of democracy when "the people" hold political power, citizens have been insulated from considering what holding and using that power mean in practical terms. The degree to which modern democrats are content to pay little heed to the process of punishing is especially interesting, given that every step along the way to the institution of the public prosecutor was resisted as an erosion of the power of the citizenry.⁵

I do not mean with my claim that modern citizens do not punish to ignore the fact that modern parents punish, schools punish, and private institutions like clubs and sports teams set up systems of fines and mulcts to keep the behavior of members in line (although modern theorists often define these forms of punishment as "substandard" types of punishment).⁶ But it is notable that the use of corporal punishment in these arenas has become increasingly limited with the growth of the modern liberal-democratic state and it is equally notable that corporal punishment (I include imprisonment in this category) is a prerogative that is now on the whole reserved for the state. In other words, the full power of punishment—the power to touch the body—resides only in the state. Despite much obvious good in these developments, one wonders too about the dangers that follow from changes that encourage citizens to think less about how the power to punish is used or should be used.

There is another key difference between what parents, teachers, and soccer coaches do and what prosecutors do. Parents, teachers, and soccer coaches who punish on their own authority only very rarely find themselves having to justify their punishments to the political community as a whole (generally they do not have to as long as they do not use corporal punishment). In contrast, legitimate punishments based on state authority must be justifiable at large within the political community. Punishments that make use of state power (or the power of the *polis* in the ancient Greek case) must be defensible according to definitions of fairness and justice that prevail throughout the polity and that arise from the rules and principles giving legitimacy to the political authority under which the citizens are united into a society. This is true whether the prosecution that leads

to the use of state/*polis* power has been carried out by a private citizen or by an "agent of the state." Those private and public actors who participate in a society's system of public punishment are forced to enter into, to use, and to shape its discourse of justice, desert, and fairness. Modern citizens are no longer obliged to participate in these sorts of discourses.

There is an exception to this. Modern citizens do participate in such conversations when they serve as jurors. The use of trial by jury is one of the key features of both ancient and modern democracy. In modern U.S. democracy, jurors have the final say on acquittal. In ancient Athens, the jurors of the popular courts had the final say on both acquittal and conviction. In both cases the jurors exercise a total power of some significance. But there is an important difference between how the ancient Athenians approached this power and how modern democrats do in the United States and the United Kingdom.

Ancient jurors had and modern jurors still have the power to hand down a decision that contradicts the letter of the law or the law as interpreted for them by judges, magistrates, or "legal experts" (in the modern case). Ancient jurors could not be punished for doing this, nor can modern jurors. In the Anglo-American legal world, juries who decide counter to the letter of the law are said to have exercised "jury nullification." Green organizes cases of jury nullification into three types: (1) systemic nullification in which the jurors acquit because they reject the law that criminalizes the wrong for which the defendant is being tried; (2) systemic nullification in which the jurors acquit because they reject not the criminalization of the act but the level of sanction attached to it; and (3) ad hoc, circumstantial nullification, in which the jurors accept the law and concomitant sanction but simply have no wish to see them applied to the particular defendant on trial.⁷ Both of the first two forms of nullification have had significant impacts on politics.

Seventeenth-century disputes between the Quakers and the British government were significantly altered by the refusal of English juries to convict Quakers charged with violating the Conventicles Act for preaching at large non-Anglican gatherings. Similarly, colonial American juries regularly returned not-guilty verdicts against men like John Hancock and publisher John Peter Zenger, when they were brought to trial as smugglers by the British government during a period of prerevolutionary tensions. The crown responded to these colonial jurors with efforts to control jury selection and other procedures associated with jury decision making.⁸

In the nineteenth century, the U.S. federal government discovered that it could not enforce the Fugitive Slave Act because northern juries refused to return guilty verdicts against those who had helped slaves to escape. The federal government had to change its strategies for dealing with slavery because it could not enforce its legislation.⁹ In the mid-twentieth century, the effect of jury nullification went in the other direction as far as the issue of racial justice is concerned. White juries in the American South practiced jury nullification in favor of white defendants. The southern juries failed to achieve the impartiality necessary for decision making in accord with political principles of the U.S.

government. Their verdicts challenged the federal government's claim to protect the rights of all citizens. The federal government had to intervene in the jury system by assigning new rules for jury selection in order for it to carry out its political goals.¹⁰ Since the late 1960s jury selection has aimed at producing juries that are demographically representative rather than consisting only of the elite or "blue ribbon" members of a given community.

Jury nullification is also having an important effect on the politics of the 1990s. California's "three-strikes" legislation (which mandates a twenty-five-year prison sentence for a third felony conviction—three convictions of possessing marijuana would do it) is proving unenforceable because juries simply will not convict an offender to a twenty-five-year term for a minor felony even if it is the third. Legislators are writing and rewriting bills to deal with the situation.¹¹

These stories of jury nullification teach a relatively simple story: in their modern institutional role, juries are responsible for ensuring the integrity of legislation. They may affirm legislation by deciding in accord with it, or they may challenge it by deciding contrary to the guidelines laid out by the law. We generally take notice that the jury is political, however, only when it decides contrary to the law and highlights the legislative system's lack of integrity. In such cases, juries have an obvious and immediate impact on the political system and legislators scurry to find other means to carry out their projects. The jury is recognized as political precisely by asserting itself in opposition to the legislative power, but its affirmations of legislation are no less political.

The ancient Athenian jury also had the power to make decisions of great political significance, but the ancient and modern approaches to the ultimate power of the jury are rather different. The Athenian jurors were the same people who sat in the legislative assembly and made decisions on the laws and decrees that would govern the city. The decisions that they made in the courtroom, when they ran counter to the law, constituted a change of mind on the part of the legislators in a particular circumstance rather than a challenge to a separate legislative body or act of "nullification." Litigants in the Athenian courtroom regularly acknowledged the ultimate power of their jurors to decide even against the law and their complete authority as decision makers in the realm of prosecution. Modern jurors, in contrast, are encouraged to think of a decision to "nullify" as a violation of their assigned duty of adherence to the law. For that matter, the "principle of jury nullification" is not so much a principle as it is a statement of the fact that jurors cannot be punished for their decisions and therefore do exercise an ultimate power in the realm of judicial decision making. The Athenians stared this fact in the face, made no efforts to hide or to obscure the power of the jurors by encoding it in a legal formula, and breathed the bracing air of a world where people had to recognize themselves as the source of the authority by which they were to be governed.

The Athenian jury came into being with the right not to be penalized for its decisions. The same is not true of the Anglo-American jury. The principle of jury nullification was established in England in 1670 after a long struggle about whether juries could be punished for deciding contrary to the law as interpreted

for them by the judge.¹² Until the late 1100s the Anglo-Saxon judicial system relied on trial by ordeal in order to determine guilt and innocence and to provide for the enforcement of community norms. In the early 1200s the English king organized the most notable men of local communities throughout England into "hundreds" in villages. These "hundreds" were called before the king's circuit court judges twice a year and were asked to report all of the criminals in the area who had violated the "King's peace" that year; judgments were made and punishments were imposed on the basis of the knowledge of these hundredmen.¹³

These groups of prestigious community members were the first criminal juries. They were self-informing, which is to say that they did not hear witness testimony, and they were not guided by instructions from a judge.¹⁴ They were said to "speak the truth" (*vera dicere*), and hence their decisions were called verdicts. There could be no disagreement about the truth and so by the late fourteenth century, the verdict had to be unanimous.¹⁵ Until the late seventeenth century judges used methods of coercion—restriction of food, inadequate accommodations—as means of forcing a stubbornly hung jury to come to a unanimous decision.¹⁶ The institution of the jury thus arose from a combination of the king's desire to consolidate authority in the countryside and the country dwellers' desire to have some legal authority to enforce injunctions against thieves, murderers, arsonists, and the like.

In the sixteenth and seventeenth centuries, the jury took several significant steps toward its modern form. Before this period local justices of the peace had merely presided at the trial. The Marian Statutes, promulgated by Queen Mary in 1554, granted the justices of the peace the additional powers to investigate accusations, to take statements from the accused and any accusers, and to make indictments. The investigations carried out by the local justices of the peace and the knowledge that they produced began to preempt the local knowledge of jury members. Justices of the peace had to present evidence at trials, which afforded them the institutional latitude to advise juries on how to proceed. This advice was the forerunner to the "jury instructions" that the judge now provides at the beginning of a trial in order to explain to the jurors what their role is in relation to the law and judicial decision making.¹⁷

In the sixteenth century the Tudor royal house used the Star Chamber to extend control over juries even further. Individual jurors, or entire juries, could be bound over to the Star Chamber for corrupt judgments, with "corruption" being defined rather broadly.¹⁸ A 1534 statute relating to the Welsh Marches (26 Hen. 8, c. 4) mandated fines for verdicts against "good and pregnant evidence." The statute "seems to [have] presumed subornation of perjury or browbeating of jurors by friends or relatives of the accused" as cause for the false verdict.¹⁹ But examples of cases in which jurors were fined for false verdicts include those that, on the face of it, did not involve bribery or corruption.²⁰

Early in the seventeenth century the courts under Chief Justice Hyde began to fine jurors more frequently (Green 1985, 209–10).²¹ The matter was brought to a pass under Chief Justice Kelyng who began fining juries when they re-

turned verdicts of manslaughter in cases where he had advised them to rule for murder. A member of Parliament was among the jurors named by Kelyng. When the Parliamentarian protested, he was told by Kelyng "that he [Kelyng] would make him know that he was now his servant and that he would make him stoop" (Green 1985, 214, quoting *Diary of John Milward*, 162±63). Kelyng was brought before the House of Commons on charges of "introducing an arbitrary government" but was dismissed without further charges (Green 1985, 214). Nonetheless, Parliament decided to draw up a bill prohibiting further naming.²² Future chief justice John Vaughan was on the committee for the bill and spoke to it in February 1668, but the bill was lost in a flurry of parliamentary business and died in committee (Green 1985, 220).

The matter came to a head in the 1670 trial of William Penn and a codefendant on charges of violating the Conventicles Act with their public preaching. Penn had been preaching to a gathering of Quakers, a fact that he openly admitted. Penn urged the jury, however, to recognize that the law according to which he was charged was itself illegal and to acquit him on those grounds. The jury acquitted the men, contrary to the advice of the judge on how the law stood, and all twelve jurors were named. One of them, Juryman Bushel, refused to pay the penalty. Bushel's case landed in the court of Chief Justice Robert Vaughan, who decided in his favor and wrote an opinion protecting juries from being penalized for giving verdicts according to their conscience. Vaughan thereby institutionalized the jury as being the body that has final say on matters of acquittal, even if jurors should stand counter to the law.²³

The Athenians never questioned the right of jurors to have final say on a matter, and even to decide counter to the law, but the power of the modern Anglo-American jury had to be carved out against efforts to keep the jury from having final say. Nor does the modern jury's power remain untrammled or receive forthright acknowledgment. The 1992 Federal U.S. criminal jury instructions read: "You will . . . apply the law which I will give you. You must follow that law whether you agree with it or not."²⁴ And in forty-eight U.S. states judges and lawyers are not allowed to tell the jury that they have the power and legal right to set aside the law when they make decisions according to this principle of jury nullification.²⁵ Modern citizens typically do not punish within the public and political arena except as jurors, and as jurors they are sheltered from an awareness of how much power they may in fact exercise. Our practices in this regard disincline us from reflection on the relationships between punishment, power, and politics.

Many of us are lucky enough to be able to avert our attention from the question of how punishment is experienced by the individual actors (prosecutors and defendants) who must try to bring complex institutional and cultural phenomena under their control in their efforts to designate a wrongdoing and respond to it (or to deny and repudiate an accusation). From the perspective of such actors, the process of punishment always starts from a disruption in the flow of otherwise relatively stable social interactions. The disruption is followed by some contest or struggle that must be started, carried out, and finally

brought to a conclusion in order to restore social peace. Prosecutors and defendants who have to deal with social disruption are situated within a whole "world" in an institutional, political, and social context that they must understand how to "use" in order to produce an act of power. The story of punishment is in part the story of the nature of their efforts to use their "world" to carry out an act of power. Modern citizens are not obliged to consider directly and personally the implications of using power, of wielding cultural and institutional tools, in order to punish. Nor are we obliged to consider the components of the "world" or context within which punishment occurs and power is used. We have not been obliged (before Foucault) to notice that the institutions of punishment combine with a normative discourse that makes punishment a central component of sociopolitical order.²⁶

What necessarily follows from these omissions is the further failure to ask questions about the *nature* of the concepts that constitute the system of value that underlies penal decisions. It is not only "political" concepts such as "justice," "fairness," "desert," and "law" that structure the realm of punishment and the system of value undergirding it. Concepts like passion, reason, anger, pity, free will, and necessity are also relevant although they are "ethicopsychological" and ostensibly nonpolitical. Ethicopsychological concepts are relevant to the system of value expressed by punishment because the *people* who initiate, carry through, and/or attempt to thwart a punishment are central to the process of punishing. Ideas about who can punish, about how they should behave and feel, about what kinds of knowledge they should use in the process, and about how they should structure arguments about desert are embodied in practices of punishment. If a punishment is successfully carried out, certain people and their forms of behavior have contributed to making that punishment a success. The norms governing their behavior are part of the punitive process. Punishment involves much more than penalties. We must also reflect critically on the sort of world and system of value that are constituted by the acts of power imposed with punishments.

A society's system of value is the dominant conceptual system or normative symbolic order that gives all members of a community some shared reality or habitual way of looking at things. The network of concepts underlying institutional and cultural practice can be given ideational articulation, and such conceptual systems are embedded even in customary linguistic usages (when, for instance, citizens of the United States switched from saying the "United States are" to saying the "United States is," they marked a sizable paradigm shift in the systems of value employed in the country). The central concepts of such systems of value appear in consistent patterns in institutions, cultural practices, and relatively less self-conscious forms of linguistic expression. They will also appear in a society's more self-conscious forms of linguistic expression, that is, in its literary productions, although perhaps with attempts at revision and redefinition. The relationships between the ideas about value found in institutions, cultural practices, and literary productions constitute a conversation about politics and social organization.

To think about punishment is to think about the definitions of justice and fairness that are embodied in institutions, acted out in cultural practices, and explicitly expressed in normative discourses. It is to think about the definitions of desert that sustain the authority that supports the legitimate use of force in a political society. Athens was a society in which, for the most part, citizens and city residents either punished for themselves or did not punish at all. Accordingly, any particular Athenian citizen or resident who wished to respond to a wrongdoing had to take a look around himself or herself, consider his or her social position and the institutional and cultural tools available for his or her use, and then make use of them to the best of that Athenian's ability. To succeed at punishing, Athenians had to understand the system of value employed by and embodied by the successful prosecutor. And then they themselves had to use that system of value. Accordingly, anyone who wished to punish or who tried to punish was forced to confront the nature of the political regime directly. Athenians regularly had to think about the systems of value underlying their political order. Modern citizens can avoid such modes of thought.

In Athens, the tragedians, poets, orators, and philosophers who wrote about punishment were well aware that reflection on punishment required thinking about a whole slew of concepts such as anger, pity, desire, honor, reciprocity, gender, disease, the uses of vision and voice that might well be assigned to private ethics or psychology rather than to politics. Of course the concepts of law, desert, and justice were also recognized as relevant. But all those who wrote about punishment in Athens recognized that one need not begin a discussion of punishment from a political concept like law or justice but could instead use a less obviously political concept as the basis for an examination of the Athenian social order. Those who identified the conceptual patterns structuring their society's system of value (as Plato did; see chapter 10) and self-consciously intervened in the system of value *as expressed linguistically and conceptually* were simultaneously intervening in the system of value as expressed institutionally and culturally.

My research here is essentially phenomenological. I am particularly interested in democratic phenomena ranging from punishment to law to dispute resolution to property to judgment to citizenship identity. These phenomena exist within the context of institutional structures, cultural habits, and customary practices, but no given phenomenon can be split into, for instance, two parts institutional and one part cultural or vice versa. Like other phenomena a political phenomenon is a combination of institutions and culture and rests on an only intermittently stable conceptual system of value—a system by which dos and don'ts are established and particular social roles and places are assigned. In order to understand a political order, one needs to identify that conceptual system and to make the *phenomena* of human practice speak, so to speak.

We are used to reading religious ritual and cult practice and kinship structures but not politics in this fashion. And we are used to reading texts in order to find the conceptual tropes and "mythemes" that were crucial to a society's ways of thinking. I read Athenian politics by focusing on punishing in a

similar manner in order to render audible. Alongside tragedy and philosophy, certain conceptual claims inherent in the practice of Athenian democracy. My objective is to present in conversation a set of concepts like anger, desert, spectacle, and public memory that tragedians, poets, comedians, orators, philosophers, and institutions themselves all speak of as being at the heart of the Athenian system of politics and justice. And to understand the potential uses of this conversation for asking questions about modern democratic practice.²⁷