Sometime around the middle of the fourth century, a young man named Ariston was taking an evening stroll with his friend Phanostratus in the agora, the Athenian marketplace. They ran into a group of rowdy drunks who were making their way home from a drinking party. The group included a man named Conon and his sons, who had clashed with Ariston when they were at a military camp together two years previously. The gang pinned down Phanostratus and proceeded to rip off Ariston’s cloak and beat him so savagely that he could not get up. To add insult to injury, Conon stood over him and crowed and flapped his arms like a victorious fighting cock. They left him in the street, where passersby found him and brought him home and called a doctor. When he recovered, Ariston prosecuted Conon for battery.

Notice that no one called the police, and Conon and his gang were never arrested—there was no police force in Athens to arrest criminals or investigate crime. There was also no public prosecutor in Athens: Ariston brings the case on his own behalf. Athens didn’t have a legal category of “criminal” cases: cases were divided into private suits that could be brought only by the victim and public suits that could be brought by any adult male citizen—literally he who was willing (ho boulomenos). In this way, Athens relied on private citizens acting as volunteer prosecutors to bring prosecutions for major crimes against the state such as treason or impiety. It’s important to note that the courts were largely limited to male citizens, though free male foreigners and resident aliens could be sued and could bring private cases in some instances. The distinction between public and private cases doesn’t map neatly onto the modern civil-criminal distinction: homicide was a private case, for example.
As was typical in Athens, both Ariston and Conon delivered their own speeches to the jury. Litigants could hire a speechwriter, but court speakers never mentioned their speechwriter and generally pretended to be speaking extemporaneously in court. We know that Ariston hired Demosthenes as his speechwriter because his speech in this case comes down to us as part of Demosthenes’ corpus. Each speaker was given a fixed amount of time to present his case, measured by a waterclock. Public suits lasted one full day; the length of private suits varied from less than an hour to a few hours. A magistrate without any legal expertise—they were chosen by lot for a one-year term—would preside over the case and keep the time, but wouldn’t permit any legal objections and did not instruct the jury as to the laws.

Ariston’s case was likely heard by a jury of 201 adult male citizens, which was standard for private suits; public suits were generally heard before a jury of 501. Aristotle describes the elaborate procedure of random selection that was used to select jurors. Jurors were buried with their tickets, which suggests a different view of jury service from moderns. Most of the courts were in the agora, mixed in among the market stalls. We know that there were spectators at trials, so the atmosphere was very different from a modern court: with jurors heckling speakers and throngs of spectators treating it like an entertainment.

Several aspects of Ariston’s prosecution speech are bizarre from the perspective of a modern lawyer. First, the treatment of law. The Athenian laws were inscribed on stone stelai in various public areas of Athens. Rather than have a judge instruct the jury about the laws, litigants were responsible for finding and having the magistrate read out any laws they thought helped their case—they would stop the waterclock during their speech to have a law read out. In this way, law was, as Aristotle tells us, treated like a form of evidence, similar to witness testimony. There was no obligation to introduce the relevant laws and some speeches don’t even mention
the law under which the case was brought. Ariston never has the law against battery read out to the jury. Instead, he introduces two criminal laws that he has not charged Conon with—clothestealing and hubris—and focuses his argument on why Conon is guilty of hubris (this is why Conon’s humiliating him by flapping his arms like a cock is important). He barely mentions the official charge of battery. Even when litigants do discuss the specific charge, the jury had a great deal of discretion because Athenian laws were, by our standards, incredibly vague. The laws focus more on procedure and typically don’t define the elements of a crime. The Athenians didn’t necessarily see the vagueness of their laws as a problem: Aristotle reports that some believe the lawgiver Solon deliberately made the laws obscure so that the people would be masters of the decision.

The second thing that is striking about Ariston’s prosecution speech is the use of arguments that a modern would consider irrelevant to the legal charge. Ariston complains that Conon used delaying tactics and other dirty tricks in the litigation process; and he viciously attacks Conon’s character: he accuses Conon of being a drunkard, a thief, a Spartan sympathizer, a member of an infamous gang in his youth, and being guilty of sacrilege. Ariston also boasts to the jury about all the public services he and his father have performed, including paying for a warship and serving honorably as soldiers. He also anticipates that Conon will beg for the jury’s mercy, parading his wailing children before them. All these moves are standard fare in Athenian speeches: Athenian court speakers regularly provide a highly contextualized picture of the dispute, describing the relationship and past interaction of the parties, how they have conducted themselves in the course of the litigation, and the character, past crimes, and public services of the litigants and their families. Defendants typically plead for the jury’s mercy, detailing the catastrophic effects a conviction will have on their family.
After Ariston and Conon’s speeches, the jury voted. Each juror was given two ballots, one for the prosecution and one for the defense. Jurors deposited their votes into an urn to be counted, and placed their other vote into a discard urn. In this way, they voted in secret, without formal deliberation. A simple majority vote of the jury determined the outcome of the trial. No reasons for the verdict were given, and there was no provision for appeal. If the defendant was found guilty, a second set of speeches would be given in which each side would propose a penalty and the jury would have to pick one or the other—they were not permitted to compromise (it was similar to modern binding-offer arbitration). It is through this practice, known as *timesis*, that Socrates virtually signed his own death warrant. You may remember from Plato’s Apology that after initially suggesting that the state reward him with meals at the public expense, Socrates finally agreed to propose a very small fine as a penalty. The jury, which only narrowly voted for conviction, was thereby induced to vote overwhelmingly for the prosecutors’ proposal of execution.

Did Ariston or Conon win? We don’t know. This is typical. We have about one hundred Athenian court speeches, about 25 of which are related to criminal law. The criminal speeches run the gamut from treason and impiety trials against political leaders to the prosecution of a woman for poisoning her husband and a few cases like Ariston’s arising out of streetfights. The speeches were not preserved as court records, but initially as advertising by speechwriters to get clients, and later as tools for teaching boys and young men the art of rhetoric. As a result, the information a legal historian would most like to know about any particular case is often lost. We almost never have speeches from both sides of a legal contest; we rarely know the outcome of the case. Citations of laws are often omitted from the manuscripts. Most important, any statement we meet in the speeches regarding law or legal procedures may be a misleading
characterization designed to help the litigant’s case. So these are difficult sources, but the upside is that they are real cases—Athenian law is by necessity a study of law in action. If you’re familiar with Hammurabi’s Code or the Digest of Justinian, they provide much clearer statements of legal rules, but the relationship between the legal sources and social reality is highly problematic.

What are we to make of a criminal justice system that produced cases like Ariston’s? Perhaps it isn’t surprising that when moderns talk of learning from the Greeks, we usually mean exploring enduring and universal truths in Greek literature and philosophy. We might think of the court speeches as offering some practical tips in rhetoric, but we don’t tend to think of the Athenian criminal justice system as a model, in no small part because of its most infamous case—the condemnation of Socrates. And even many of those who hold a more positive view of the Athenian legal system tend to see its institutions as too context-specific, too culturally dependent to offer much insight into modern problems. But I want to suggest that classical Athens offers an example of a radically democratic criminal justice system that successfully meted out justice according to its own standards and that enjoyed a high degree of legitimacy. While we of course wouldn’t want to adopt the Athenian system today, studying Athenian institutions can provide a source of constructive imagination for modern policymakers and may challenge us to consider whether a more democratic approach to criminal justice might better reflect our own sense of fairness, justice, and legitimacy.

Let me first say a few words about the Athenian system. Fairness for the Athenians did not mean elaborate procedural protections, evidentiary rules, or layers of review; fairness meant preventing corruption on the part of jurors or magistrates and giving both prosecutors and defendants an equal amount of time to argue to the jury that justice, in the broadest sense, was on
their side. The Athenian jury played a much broader role in Athens than it does today. Athenian juries did not simply determine whether the factual elements of the charge were met, but rather aimed at reaching a just resolution that incorporated the broader context of the dispute, general notions of fairness, and sentencing considerations. The lack of evidentiary rules may have helped foster a sense of procedural justice for both volunteer prosecutors and defendants. While procedural justice can be achieved in a variety of ways, litigant participation, including a sense that litigants are able to tell their story in court and control how their stories are told and how their case is litigated, has been shown to enhance satisfaction. Unlike modern crime victims, Athenian private prosecutors enjoyed complete control over their cases: they could choose the charges and procedure, and once in court they were free to tell their story as they wished without having to distort their experience by fitting it into rigid legal categories or worrying about legal technicalities. Defendants also enjoyed wide latitude to tell their story and to make arguments beyond mere refutation of the charges, including appeals to pity, challenging the normative underpinnings of the criminal law or proposed sentence, and discussing the effect a guilty verdict would have on the community at large. This approach produced a criminal justice system that, despite all its faults, enjoyed widespread legitimacy and a society in which violence and criminal disorder seem to have been relatively infrequent by both ancient and modern standards. Interestingly, this system seems to be the polar opposite of our own, with its precisely-defined offenses (many of them victimless), extensive procedural protections for the accused, and mechanical formulas and guidelines for doling out punishment.

Is it possible that we can learn something from a system so different from our own? The value of studying the Athenian criminal justice system is as a source of imagination, a mechanism for sparking the mind to think of potential alternative modern institutional
arrangements, though the ancient examples may offer little if any insight into whether or how they might work today. One example is the very different role played by the Athenian jury. As I mentioned, the Athenians did not clearly bifurcate the guilt and sentencing stages of the trial--instead, Athenian jurors regularly considered both guilt and sentencing issues together at the trial phase. Moreover, in reaching their verdict Athenian juries were encouraged not just to find the truth or determine the rights and responsibilities of the parties under the law, but also to consider the broader implications a given verdict would have on the parties and the community at large.

We can’t, and wouldn’t want, to directly import the Athenian jury into our system. But the Athenian example may lead us to think about the jury not merely as a factfinder but as a mechanism to better arrive at a democratically-derived criminal justice policy. And I’m thinking here particularly about how an expanded role for the jury might address some of the problems of the American criminal justice system that I know best. I’ll also provide some more general suggestions about democratizing criminal justice that is potentially applicable beyond the American context, though compared to the US, Australia is already doing pretty well along this dimension.

Studying the Athenian jury got me thinking about whether modern American juries could also have a broader role, and I wrote a series of papers suggesting that modern juries should be drawn from the local community like a neighborhood, and should be permitted to impose sentence in non-capital cases. I also proposed a neighborhood grand jury that would not simply determine whether the prosecutor had probable cause for her proposed charge, but would play a more active role in charging decisions.¹ I never mentioned Athens in these papers, and the goals

of these institutional proposals were completely removed from the ancient context. The basic idea was that permitting local community members to play an active role in criminal justice decisions would better align criminal justice policy with local community sentiment and thereby help alleviate some of the political pathologies that have led to the crisis of legitimacy currently facing the American criminal justice system. Let me unpack that a bit to make it a bit clearer how these ideas are linked to the ancient Athenian notion of democratic justice, while at the same time being firmly rooted in the modern context and modern concerns.

The move toward harsh mandatory sentencing schemes in the 1980s and 1990s led to dramatic increases in the prison population, with a disproportionate effect on African-Americans. Social science research suggests that the trend toward harsher sentencing policies stemmed in large part from an oversimplified understanding of public attitudes toward punishment. Studies done in the late 80s and 90’s, at the height of the sentencing boom, showed that in general opinion polls, a majority of citizens regularly stated that the current penalties were too lenient, leading politicians to enact harsher sentencing laws. But when given detailed descriptions of specific cases, studies from the same era found that respondents often suggested sentences that were more lenient than the mandatory minimum in their jurisdiction.\(^2\) These trends hold up among real jurors. In 2010, three federal district judges published a small study that revealed a marked disparity between the Federal Sentencing Guidelines and jurors’ recommended sentences. Following convictions in twenty jury trials, the judges gave each juror a sheet listing the defendants’ past criminal convictions and asked the jurors to recommend a sentence. The

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low-end punishment provided for in the Guidelines was in each case almost five times higher than the median jurors’ recommendation. Ninety-two percent of jurors recommended a sentence below the Guidelines’ minimum.¹ These discrepancies appear to result from the lay tendency to assume that the typical fact pattern for a given offense is far more serious than it actually is; citizens commonly believe, for example, that most burglars are armed and that more burglaries result in violence than is actually the case. The more lenient response to specific cases more accurately reflects public views on punishment. Nonetheless, the more general sentiment to “get tough” on crime is the one citizens take with them to the voting booth, and is reflected in politicians’ and prosecutors’ harsh approach to crime.

Sentencing provisions and charging decisions are distorted in another way that particularly affects high-crime communities. High-crime communities have a marginal influence because many entities that influence criminal law administration are controlled at the county level (like juries and prosecutors’ offices) or even at the state level in the case of legislatures. Yet high crime localities are the very communities that have the greatest interest in criminal justice laws and policies. They, far more than other Americans, are the victims of crime. At the same time, high-crime communities are also the chief victims, if you will, of the criminal justice system, in the form of the removal and incarceration of large numbers of male community members. The severity of the current regime has devastating effects on high-crime communities, including reduced employment opportunities, financial hardship, disruption suffered by offenders’ family and children, and the erosion of social capital and organization resulting from the aggregation of these effects over the community.

I think a community justice and restorative justice approach--that is, permitting local, direct participation in charging and sentencing decisions-- might mitigate some of these effects. It’s worth emphasizing again that the Athenian example doesn’t tell us anything about how the institution would fare in the modern world: it simply offers a source of imagination for a different type of jury, and requires a separate analysis for whether this institution might be adapted for use today, and what purposes it might serve in a modern context.

Those are some proposals that are very specific to the American context. But I am also part of a growing movement among legal academics calling for a more democratic approach to criminal justice. A group of us published a white paper last fall—of the authors John Braithwaite is probably the person most familiar to this audience. Some of the recommendations include: an enhanced role for juries in charging and sentencing decisions; a presumption in favor of decriminalizing non-violent behavior and insuring that crimes and sentences reflect the community’s notion of moral blameworthiness; informing trial juries of the sentencing implications of a guilty verdict; eliminating most collateral consequences of conviction; and promoting restorative justice.

I hope I’ve given you one concrete example—an autobiographical one—of how classical Athens can provide ideas for policymakers by exposing us to unfamiliar institutional arrangements. Studying the Athenians’ very different conception of the jury is what led me to explore what truly popular criminal justice might look like in contemporary America. But I think we may be able to draw an even broader lesson from the Athenians. As a law professor, I discuss my ideas mostly with lawyers, not historians or classicists– that is, the people who are

charged with generating ideas about how to improve our legal and constitutional systems. But American lawyers can be parochial, even smug, about our legal system— it is surprisingly hard for even radical American lawyers to shake the idea that we’ve had lightning in a bottle in America since our constitution was ratified in 1789. Scholarship comparing the US to European civil law legal systems often only makes the parochialism worse, not better, because those systems really are more centralized and less accountable than ours; we often see a vindication of American exceptionalism rather than any truly compelling critique. But Athens implicitly offers a point of view that is, strangely enough, much harder to ignore— a system that is both radically LESS bureaucratic, radically MORE democratic, and more practical and flexible in dealing with major new problems. The voices from Athens, once heard, are hard to stop listening to. Thank you for listening to me, and to them.