

# Is Ancient Democracy Quasi-liberal?

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The question of the relationship between ancient and modern liberal democracy has attracted considerable scholarly attention in the last few years. Although it is not entirely clear how this discussion has taken us beyond Constant's realization that ancient democracy is based on the positive notion of participation and the modern one on the concept of negative rights<sup>1</sup>, many different views have been expressed on the subject. In one of his articles, Josiah Ober has argued for a connection between ancient participatory democracy and constitutional liberalism, based on the assumption that the former led to the development of "legally enforced immunities from coercion", which he calls "quasi-rights"<sup>2</sup>. If he is right in his contention, and given the centrality of rights theory for modern liberal democracy, then ancient democracy has a strong link with modern liberal democracy. In fact, it has a notable liberal dimension.

On this interpretation, the experience of Athenian democracy indicates that there is a connection between participatory democracy and liberal values, because in its case the advance of democratic institutions as well as of what may be described as democratic "ideology" led to the protection of "quasi-rights". Moreover, these

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<sup>1</sup> B.CONSTANT, *The Liberty of the Ancients Compared to that of the Moderns*, in *Political Writings*, translation B.FONTANA, Cambridge 1988.

<sup>2</sup> J.OBER, *Quasi-Rights: Participatory Citizenship and Negative Liberties in Democratic Athens*, *Social Philosophy and Policy* 17 (2000), p.27–61 at p. 27.

“quasi-rights” were bestowed not only to citizens, but also to all non-citizen groups: women, children, metics and slaves<sup>3</sup>. Despite the fact that he concedes that no historical analysis can ever prove the logical necessity of such a connection in itself<sup>4</sup>, Ober maintains that if a participatory democracy like ancient Athens promoted some form of rights, then this would substantially strengthen the case for “deriving liberalism from democratic participation<sup>5</sup>”. This argument is directed against political theorists who claim that if a non-democratic, autocratic regime works better in protecting individual rights, this regime ought to be preferred to democracy.

We argue that the extant historical evidence does not warrant the conclusion that ancient democracy recognized anything which could be described as a negative right to citizens, and, *a fortiori*, to non-citizen groups. Although it may well be correct that participation in the political process is the best way for citizens to secure their individual rights in a modern democracy,<sup>6</sup> and in this sense there is a connection between participation and the protection of negative rights, the example of classical Athens cannot be cited to support such a link.

The question whether the experience of ancient democracy points towards a relationship between participatory democracy and liberal ideals or not is critical to our understanding of this democracy. There are several issues which have to be addressed in this context:

a) Is the protection of low-class citizens and possibly non-citizens from physical or verbal abuse the result of the development of democratic habits and practices, or more generally what may be called “democratic ideology”, or could it be also - and maybe better - explained by the curtailment of the power of the landowning aristocracy which occurs from the early sixth century BC, if not

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<sup>3</sup> OBER (as in note 2) p.27 and p.31.

<sup>4</sup> OBER (as in note 2) p.29. Whether some other type of argument can prove such a connection or not is a different matter. Ober (p.27, note 1) mentions Weingast’s attempt to argue for such a connection using rational choice theory. If our interpretation is correct, however, there is at least one participatory constitution which did not produce a theory of rights and did not consistently promote liberal values.

<sup>5</sup> OBER (as in note 2) p.27.

<sup>6</sup> This is a position with which we agree, but defending it would go far beyond the scope of this paper.

earlier<sup>7</sup>? To propose the latter is not to deny that democratic ideology did promote protection from abuse by one's social superiors. It is to claim, however, that to single out "democratic ideology" as the main source of such protection does not go deep enough and does not tell the whole story. Moreover, the development of the ideology and the institutions of democracy could themselves be viewed as the result of the decline in the economic and social power of the aristocracy.

b) Does the historical evidence that we have, including texts such as the *Old Oligarch* and Demosthenes' *Against Meidias*, support the assumption that Athenian democracy recognized some form of negative liberties?

c) Even if one conceded that it is legitimate to talk about negative rights in this context, do these rights really extend beyond the citizen-body, and how realistic would it be for residents of Attica who are not citizens to expect protection from abuse? Evidently, the analogy between ancient negative liberties and modern rights would work better if the former were, like the latter, universal rather than restricted to the minority of adult male citizens.

Let us begin with the first of these questions.

According to Ober, "quasi-rights" are developed as a result of democratic institutions, but also as a result of democratic habits and practices which form part of "democratic ideology". On this point he is explicit:

...the development of institutions, behavioral habits, and social values centered on the active participation of free and equal citizens in democratic politics can lead to the extension of legally enforced immunities from coercion to citizens and noncitizens alike<sup>8</sup>.

...habits associated with the practice of democracy have a lot better chance of leading in those desirable directions [constitutional liberalism, including negative liberties] than do the habits associated with autocracy<sup>9</sup>.

...this 'liberalising' tendency to extend immunities beyond the boundary of the citizen body ... was an unintended effect of ideological

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<sup>7</sup> Solon's laws, which transform Athens from an aristocracy to a timocracy, reflect this curtailment.

<sup>8</sup> OBER (as in note 2) p.27.

<sup>9</sup> OBER (as in note 2) p.30.

complexity ... the practice of participatory democracy itself can foster liberal practices and values<sup>10</sup>.

The story of the development and manifestation of quasi-rights in democratic Athens can be told in terms of the concurrent development of a strong civic identity among the members of the *dêmos*, the elaboration of a popular and political ideology to explain that identity, the creation of governmental and legal institutions to defend this ideology, and the evolution of self-conscious habits of employing democratic ideological and institutional powers<sup>11</sup>.

But even if democratic ideology is part of the explanation for the protection from abuse that the socially inferior enjoy in Athens, is it the whole explanation?

The notion of ideology is crucial not only for Ober's defense of "quasi-rights" enforced by the Athenian democracy, but for his interpretation of this democracy throughout his work. One of his greatest strengths is the groundbreaking way in which he mines a variety of texts from different literary genres for their "ideological" wealth. In the process, Ober offers both some brilliant analyses of individual works and a highly original overall exegesis of the phenomenon of Athenian democracy.

Nevertheless, the same concept of ideology which makes these remarkable achievements possible also demarcates the limits of this interpretation. Although recognizing that there are social, political and - to a lesser degree - economic factors which may influence the way people think and act, Ober tends to de-emphasize them and to treat "ideology" as by and large independent from these factors; for example, he places a lot of emphasis on the role that public performances, speeches and actions play in shaping people's ideas. As Rose rightly remarks, however, "[b]y concentrating heavily on forensic rhetoric and limiting his discussion of overtly political deliberative rhetoric to the tropes of self-presentation, Ober studiously avoids any discussion of the class content of the specific issues that were debated by the orators<sup>12</sup>".

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<sup>10</sup> OBER (as in note 2) p.31.

<sup>11</sup> OBER (as in note 2) p.32.

<sup>12</sup> P.W.ROSE, *Divorcing Ideology from Marxism and Marxism from Ideology: Some Problems*, *Arethusa* 39 (2006), p.101–136 at p.107.

This approach raises the question: are there not social and economic factors which considerably influence people's values and beliefs? To acknowledge these factors as significant is not necessarily to fall into a crude Marxist determinism. If accepting such a determinism, agreeing with the notion that a person's economic class inescapably determines their system of values, is one mistake, thinking of ideology as having little to do with an individual's social and economic background could be another. Therefore, treating democratic ideology along with democratic institutions as the main - indeed, practically the only - cause of the immunity from abuse that low class citizens achieve in classical Athens can be equally misleading with completely ignoring the ideological factors involved.

This becomes all the more important in Ober's case, because the author accepts a fairly popular - and, we believe, convincing - account of the development of Athenian democracy as involving the gradual curtailment of aristocratic privilege by a "middling" *hoplite* class and, eventually, by the whole *demos*<sup>13</sup>. If this is true, is it not then the case that the lower-class citizens' protection from maltreatment can be explained by this decline of aristocratic power, and that it is this decline which is reflected in both the democratic ideology prohibiting such maltreatment and its legal codification? In fact, this picture is decisively confirmed by Pseudo-Xenophon's (also known as the *Old Oligarch*) *Constitution of the Athenians*, a text obviously crucial for the issue at hand. When the author of this fascinating treatise laments the fact that striking one's social inferiors is not permitted any more, he does not refer to complex ideological factors involved, but rather to the plain fact that lower-class citizens and slaves are now dressed identically, which makes it impossible to tell them apart. If one stretches this line of reasoning a little more, it could come out that another reason that the traditional upper classes cannot entertain their ancient prerogative of publicly beating their social inferiors<sup>14</sup> may be that at least some of them are now rich enough to look like aristocrats. It is this blurring of the traditional class divide in Athens which the

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<sup>13</sup> OBER (as in note 2) p.37-38. The relationship between the "middling" and the "democratic" mentality is, as Ober rightly notices, a complex one. It should be born in mind, however, that the democrats could not have prevailed politically in Athens without the support and the devotion to democracy of the middling class.

<sup>14</sup> The literary archetype of the exercise of this prerogative is probably Odysseus' beating of Thersites in the *Iliad*.

author blames for the loss of aristocratic privilege. The author of the *Old Oligarch* is patently not a Marxist, but he plainly recognizes that the immunity of low class citizens from abuse is related to the balance of power between striving social classes.

The protection from abuse that citizens and possibly non-citizens enjoyed in Athens can be explained, then, at least to a large extent, by the social and political changes which took place from the early sixth century BC onwards, if not earlier. Losing the prerogative of freely striking one's social inferiors was part and parcel of the privileges that the traditional Athenian landowning aristocracy lost between the early sixth and the mid-fifth century, between Solon's reforms and the fully fledged Periclean democracy. This loss of authority provides a large part of the explanation of why it would no longer be socially or legally acceptable for the powerful to abuse the less privileged. If "quasi-rights" do exist in classical Athens, then, their emergence cannot be explained as the result of purely ideological factors.

Even keeping this in mind, however, the argument for a connection between participatory democracy and constitutional liberalism could still work. If Athenian democracy recognized negative liberties, "quasi-rights", this would provide a strong indication for such a connection<sup>15</sup>. But did classical Athens acknowledge such rights?

We will begin our examination of "quasi-rights" in Athens with a general discussion of rights in order to have a working minimal notion of rights which most people would accept. Rights, minimally defined, are expectations of treatment that benefit a rights-holder. There are several kinds of rights<sup>16</sup> - the expected treatment could be an immunity (the rights holder expects others to refrain from certain actions in regards to him), or the rights-holder may expect others to perform certain actions in regards to him or he may expect that he has a claim to property. As they are usually understood, rights are correlated with obligations - the rights-holder obligates others to treat him in a certain manner. This obligation follows *because* he is a rights-holder. Thus every right can be correlated with an obligation on the part of persons other than the rights-holder; i.e., it is because of

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<sup>15</sup> Although it would not prove the connection. See note 4.

<sup>16</sup> W.N.HOHFELD, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, New Haven 1964.

the fact that  $x$  has a right to  $P$ , that  $y$  must give  $P$ <sup>17</sup>. Notice that there are two essential features of rights on this general account, a directional element and a modal element<sup>18</sup>. They are directional because rights directionally generate duties; but it is easily shown that duties do not generate rights<sup>19</sup>. The directional element points to an essential component of a right - rights are prior to the duties that they generate in others. The modal element is deontic - the rights-holder's rights generate an obligation in others.

It is a characteristic feature of modern liberal legal institutions that they are formulated to preserve the rights of citizens - in the modern liberal institution citizens' rights are *prior* to legal and moral duties. Later we will consider both legal and moral obligations in the context of Demosthenes and the Pseudo-Xenophon keeping in mind this fundamental feature of the modern notion of rights: that they are prior to legal and moral obligations.

Let us consider a case that illustrates what is unique about modern liberal legal institutions. Imagine a monarchy in which the king owns everything. He orders (which has the force of law) that no one be killed by anyone else; for when one of his subjects is killed, his property is destroyed. This means that for any two subjects, call them  $S_1$  and  $S_2$ ,  $S_1$  is legally bound to not kill  $S_2$ . It in no way follows that  $S_2$  has a correlative right to live, for he is the king's property, and the king can destroy him at will. The same can be true of *entitled* persons in a democracy - *entitled* persons have protections which stem from the fact that they are members of the entitled class. We shall claim that this is the case with democratic Athens - persons enjoy legal protections only insofar as they fulfill one of two criteria: either they are members of the narrow entitled class *or* they are members of the non-entitled class but their protection benefits the entitled class.

Ober intends to show that:

... the development of institutions, behavioral habits, and social values centered on the active participation of free and equal citizens in

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<sup>17</sup> On this formulation, rights are only liberties, but we can also adjust our formulation to account for a claim, a power or an immunity.

<sup>18</sup> J.FEINBERG, *Rights, Justice, and the Bounds of Liberty*, Princeton 1980.

<sup>19</sup> A concise argument for the directionality of the correlativity of rights and duties is given by FEINBERG (as in note 18) p.146-147.

democratic politics can lead to the extension of legally enforced immunities from coercion to citizens and non-citizens alike<sup>20</sup>.

In order to achieve this, he argues that one can find burgeoning rights even in the scathingly anti-democratic pamphlet *The Athenian Constitution*, attributed pseudonymously to Xenophon, and to Demosthenes' *Against Meidias*. Ober explicitly states that he does not intend to show that there is a robust modern notion of rights to be found in these ancient texts: "...the rights which were guaranteed by the Athenian regime never had the ontological status of inherent or universal human rights<sup>21</sup>". In ancient Athens, there were only "quasi-rights", that is "legally enforced immunities from coercion" which do not have the full ontological status of modern rights. Further, "quasi-rights" are genuine "negative liberties", as opposed to mere positive liberties. Positive liberties are specifically contingent upon participation and political shareholding, while negative liberties are stronger because they embody a freedom from interference in personal choice-making<sup>22</sup>.

Let us now compare the negative/positive liberty distinction with the modal and directional element of rights mentioned above. Notice that a positive liberty is contingent upon political participation—one can only be protected by law *if* one satisfies certain social and political conditions; i.e., other people have a duty to the alleged rights-holder only because there is a positive legal duty to not interfere with the claims, liberties, immunities and powers of persons who have a sufficient social and political status. Notice the direction of the modal notion: in positive liberties, persons are protected *on the grounds that* there exists a positive legal duty. The protections

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<sup>20</sup> OBER (as in note 2) p.27.

<sup>21</sup> OBER (as in note 2) p.30.

<sup>22</sup> OBER (as in note 2) p.28. The distinction between negative and positive rights is Constant's. CONSTANT (as in note 1) p.311, writes that the liberty of the ancients "...consisted in exercising collectively, but directly several parts of the sovereign... [but] no importance was given to individual independence, neither in relation to opinion nor to labor, nor, above all, to religion." Further, "the liberty of the ancients... consisted in active and constant participation in collective power. Our freedom must consist in peaceful enjoyment of private independence" (p.316). Constant thus contrasts the active participatory liberties of the ancients with the personal choice-making liberties of the moderns—while the ancient native adult male could make executive decisions for his state, he had no personal independent rights against that state.



guaranteed by positive liberties are not derived from a prior notion of rights. However, in the case of a negative liberty, we see the direction of the modal claim is the same as that for our standard notion of rights - rights-holders' protections are prior to the law. In negative liberties, individual freedom and personal choice-making are the bedrock of the protection. Thus a society which possesses mere positive liberties is one *without* a notion of rights in the modern liberal sense explained above, while a society with the stronger notion of negative liberties does have the stronger, modern liberal notion of rights.

If "quasi-rights" are negative liberties, however, they must have the directional and modal element of negative liberties. This means that, if one argues for "quasi-rights" in Athens, one must argue that there is in Athenian law, oratory, or public opinion, a belief that rights are prior to the law. In other words, one must not merely demonstrate that legal protection is granted to non-native adult males (NAMs<sup>23</sup>), but that legal protection is granted to non-NAMs *because they have rights*. In what follows we show that there is no evidence for this claim in the writings of the Pseudo-Xenophon, nor in Demosthenes' *Against Meidias*<sup>24</sup>.

Pseudo-Xenophon's *Athenian Constitution*<sup>25</sup> mentions laws that forbid upper class Athenian aristocrats to strike lower class individuals. Ober admits that the explanation for the existence of this law is self-interest, not rights-protection; Athenians were concerned because *metics* and slaves look no different from aristocrats. "Hence if an elite gentleman were allowed free license to strike slaves at will, he might well strike an Athenian citizen mistaking him for a slave... it was in order to ensure their own physical security that the demos forbade the casual beating of slaves<sup>26</sup>". Slave labor was important for Athenian naval power. Because of their importance, slaves needed to be protected.

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<sup>23</sup> Hereafter we shall use "NAM" for "native adult male."

<sup>24</sup> F.D.MILLER JR., *Freedom Community and Law in Democratic Athens, Philosophical Inquiry* 27 (2006), p.27-60, argues that Athenians distinguished four kinds of rights on the basis that they used a terminology when they spoke of personal protections that matches Hohfeld's four-part distinction in types of rights. However, Miller does not argue that these rights are negative as opposed to positive liberties.

<sup>25</sup> H.FRISCH, *The Constitution of the Athenians: A Philological Historical Analysis of Pseudo-Xenophon's Treatise De Re Publica Atheniensium*, Kobenhavn 1942.

<sup>26</sup> OBER (as in note 2) p.47.

On this interpretation of the *Athenian Constitution*, self-interest was initially the motivating goal to protect slaves, but eventually slaves developed negative liberties in the form of property rights and protection from physical mistreatment - that is, they developed “quasi-rights”. Yet, the Pseudo-Xenophon tract fails to provide evidence for this. In fact it seems to do quite the opposite. Protecting people from the motivation of self-interest is fundamentally different from protecting them on the grounds that they have prior rights. Negative liberty is specifically an “individual freedom from the interference of others in the process of personal choice-making”, while a positive liberty is related to “participatory political community-building or political share-holding<sup>27</sup>” Supporting his interpretation, Ober writes:

For Pseudo-Xenophon the underlying premise [for protecting slaves] is self interest. The Athenian demos protected slaves and metics from physical mistreatment first because they feared being mistaken for slaves or metics. Athenians next protected the property *rights* of slaves and metics because they believed they could profit from the willing labor of slaves and metics...<sup>28</sup>

We agree in general with this analysis, but what sense of “rights” does Pseudo-Xenophon employ here? Notice that the laws against striking slaves are meant to protect *the common good of enfranchised native adult males* - one refrains from striking people because it would disrupt the community at large either in the form of potential injury to an enfranchised NAM or greater harm to Athenian naval power (which would ultimately jeopardize the security of all NAMs). At no point in the Pseudo-Xenophon tract is protection extended to slaves *so that* they might have freedom to make their own choices and determine their own preferences. Thus, slaves’ protections are not prior to the law - the laws are not created to protect slaves’ rights, but to protect NAMs’ interests. The protections extended to slaves, as discussed in Pseudo-Xenophon are thus positive liberties, not negative liberties. We must now turn to Demosthenes’ forensic oratory to see if we can find a genuine negative liberty there.

Demosthenes in *Against Meidias* persuades an Athenian jury to find Meidias guilty of *hubris* and *probolē* because Meidias struck

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<sup>27</sup> OBER (as in note 2) p.47.

<sup>28</sup> OBER (as in note 2) p.46, emphasis ours.

him at a religious festival<sup>29</sup>. ‘*Hubris*’ is famously hard to define, however, it is used throughout Greek epic, history, poetry, tragedy and philosophy to indicate an indulgent misuse of one’s abilities or authority<sup>30</sup>. Demosthenes never quotes the hubris law, but he states to the jury that Meidias’ *hubris* is “...known to all of you and to every Athenian<sup>31</sup>”. Demosthenes then characterizes Meidias as the hubristic type; there are “...other cases in which they [Demosthenes’ supporters] had observed that he [Meidias] was audacious, disgusting and out of control<sup>32</sup>”. The *hubris* law is known well by all and applies simply because Meidias hit Demosthenes in an insolent manner. However, the event took place during the Dionysia - a cult religious event which takes the form, in part, of a drama competition. *Probolē* prevents disruptions (including legal business) from occurring during sacred festivals, and so Meidias’ punch violates this law as well<sup>33</sup>.

Now, Ober contends:

Demosthenes argues that, in the face of destabilizing economic inequalities among the citizens, the maintenance of liberty (qua the right to do what one wishes and especially to speak out in public), equality (of opportunity and political voice), and individual personal security (living without fear of being constrained by the actions of stronger persons within one’s own society) are functionally essential components of democratic culture. For him the maintenance of these quasi-rights was among the primary purposes of democracy...<sup>34</sup>

If these “quasi-rights” are to be generated from Demosthenes’ speech, it must be shown that Demosthenes employs the notions of freedom, equality, and individual security in a “negative rights” sense. In other words, it must be shown that the *hubris* and *probolē* laws are premised on the *prior* belief in individual freedom from the

<sup>29</sup> Demosthenes, *Against Meidias on the Punch*, translation D.M.MACDOWELL, Oxford 1990, 21.18.10.

<sup>30</sup> D.M.MACDOWELL, “*Hybris*” in *Athens, Greece and Rome* 23 (1976), p.14–31 at p.21 offers this general definition of *hubris*: “having energy or power and misusing it self-indulgently”. However, for our purposes we need only consider Demosthenes’ forensic use of the term.

<sup>31</sup> Demosthenes (as in note 29) 21.1.1.

<sup>32</sup> Demosthenes (as in note 29) 21.1.1.

<sup>33</sup> The law is quoted by Demosthenes (as in note 29) at 21.10. It prevents legitimate seizure from debtors during religious festivals. The offense could result in prosecution by the victim.

<sup>34</sup> OBER (as in note 2) p.47.

interference of others in the process of personal choice-making. We now argue that there is no textual evidence that shows that any of these laws are so premised.

Let us begin with Demosthenes' stated intentions. He states that he is bringing suit against Meidias for hitting him at the Dionysia in order to "preserve all of your rights"<sup>35</sup>. Here, *dikaiōs*, while translated as "rights" by MacDowell, does not necessarily connote a negative right, rather we can see it as connoting a positive right. It is perfectly consistent with the text that Meidias, by breaking *probolē* and *hubris* laws, offended the state and anyone in it in a positive rights sense: Meidias broke the laws that protect people *actively participating* in the political and religious life of Athens. Let us look in detail at Demosthenes' accusations:

...the insolence and assault were directed at me and my person [*sōma*] that day, but the question that will be contested and decided is whether it should be permitted to do this sort of thing and to behave with insolence [*hubris*] toward any of you with impunity or not. Therefore if any of you did suppose previously that this case arose from a private motive, you should now bear in mind that it's not beneficial to any member of the public [*dēmosios*] for such an act to be committed<sup>36</sup>.

Notice, Demosthenes states that the laws on *probolē* and *hubris* have been violated, and allowing Meidias to do so with impunity would empower others to commit *hubris* against any member of the jury. While it may look like he is saying that any *dēmosios* has a right not to be hit in public, he really is only contrasting 'private motive' with 'public benefit' in order to persuade the jury that the private feud between Meidias and himself is not the reason for the indictments<sup>37</sup>. He does so by arguing that participating in the political community is impossible for NAMs if Meidias' offenses go unpunished. Demosthenes argues on the basis that his positive rights, guaranteed to all enfranchised NAMs, have been violated. This is markedly different from acting to preserve his negative rights, which the laws are supposed to protect. In fact, nowhere does Demosthenes argue that he has a *dikaion* upon which *probolē* and *hubris* laws are based. The force of the opening passage is "protect society from barbarous

<sup>35</sup> "... *panta dikaiōs humin tetraita...*"

<sup>36</sup> Demosthenes (as in note 29) 21.7–8; emphasis ours.

<sup>37</sup> On this feud see MACDOWELL (as in note 29) p.1–10.

behavior”, not “protect individuals from assaults against their dignity”. While Ober states that Demosthenes argues that the liberty, equality, and individual personal security are at issue here, what Demosthenes really argues is that NAMs have positive protections under the laws, and that violations of these laws deserve punishment, or no NAM is safe. The force of Demosthenes’ rhetoric is defense of enfranchised NAMs. His notion of rights is a positive notion - “rights based on positive performance”, not “rights based on inherent freedom”.

In fact, Demosthenes states that *his own personal* indignation should be put aside:

I’m well aware that although I, who suffered the obstruction and insolence [*hubris*] at that time, felt the same anger at each of those actions as at any other really serious one, to the rest of you who weren’t involved they would perhaps not appear worth a trial in themselves. But, I’ll tell you about what will make you just as indignant as me<sup>38</sup>.

Demosthenes then tells the jury about Meidias’ previous impieties. In this passage Demosthenes argues that even though it was only he who was violated, there is still reason to punish Meidias. The passage suggests that if Meidias had not broken *probolē* and *hubris* laws, then there would be no publicly punishable offense - perhaps there would only be private retribution, something which was often done<sup>39</sup>. If Demosthenes and the jury had a notion of negative liberties he would not say these things. He would merely have to say that *he* was violated by the actions. In a society where people hold and cherish negative liberties, assaults upon the person are reason enough to punish the offender. But in a society where merely positive liberties hold one has to justify that one’s personal offense warrants public punishment. While it is true that Demosthenes states that his own person [*sōma*] was treated with *hubris*<sup>40</sup>, he only says this because he was working for the public. He wants to make sure that the *probolē* accusation is taken seriously as an offense against *everybody*, not just against him personally: “...all his [Meidias’] insolent offences were committed against me while I was *your* chorus producer, and at a

<sup>38</sup> Demosthenes (as in note 29) 21.15–16.

<sup>39</sup> Demosthenes (as in note 29) 21.32–33 states that private individuals have the option to bring private prosecution, and that he could have done this.

<sup>40</sup> At Demosthenes (as in note 29) 21.18 and 21.25.

sacred season, he deserves public anger and punishment<sup>41</sup>”. Demosthenes places emphasis on the harm that would be done to other NAMs if Meidias goes unpunished; his emphasis is not on anyone’s individual protections. We thus have a piece of textual evidence from Demosthenes that Athenians had a notion of positive, and not negative, liberties.

Let us look now at a passage where Demosthenes refers to his own rights. He reminds the jury that there are cases where people were subjected to abuses like his own. These people chose to settle out of court rather than prosecute in court<sup>42</sup>. Demosthenes says that, in regards to his own case, rather than settle out of court “... [I have] justly (*dikaiōs*) preserved the opportunity for retribution on behalf of the laws and the god and yourselves, and now I have delivered it to you<sup>43</sup>”. Notice that he admits that he *could* have, had he wished, not prosecuted Meidias according to the laws, and taken money instead. There is no evidence here, where Demosthenes refers to his own rights, that any person to whom he is addressing his speech, understands *hubris* and *probolē* laws as protecting Demosthenes’ non-participatory negative liberties. The passage shows Demosthenes clarifying and justifying his *graphai* by appealing to his positive, participatory rights as an enfranchised NAM. We must conclude then that Demosthenes’ text does not establish that he or the Athenians held a notion of “quasi-rights” in the sense of negative liberties<sup>44</sup>.

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<sup>41</sup> Demosthenes (as in note 29) 21.33–34, emphasis ours.

<sup>42</sup> Demosthenes (as in note 29) 21.40.

<sup>43</sup> Demosthenes (as in note 29) 21.41.

<sup>44</sup> One important distinction between the protection afforded by modern rights and the protection extended by the *hubris* law is that the former protect the individual against the state, whereas the latter against other, more powerful individuals. Actually, the notion of *hubris* in earlier Greek sources shows that only individuals can commit the act of *hubris* [for a concise reference to a number of uses of the term, see MACDOWELL (as in note 30)]. It may be the case that Athenians felt they could live as they liked, but as we can see in examples of ancient legal decisions, ancient Athenians generally felt that the good of the community came before the good of the individual and this is reflected in the fact that Athenian laws exist to protect the community first; by extension, they protect the individuals. In contrast, many of our modern laws exist to protect our prior rights. For a recent defense of the view that individual protections were overridden in favor of the good of the *polis*, see R.WALLACE *Freedom, Community, and Law in Democratic Athens, Philosophical Inquiry* 27 (2006), p.61–78.

But what about the claim that even non-citizens had “quasi-rights” in classical Athens? Ancient democracy has been criticized, often and from different quarters, for employing an uncompromising distinction between the minority of the overall population who had citizen privileges and the rest of society. If democracy secured some kind of rights for non-citizens, however, then this distinction is not as rigid as usually assumed. Moreover, in this case, women, metics and slaves living under a democratic regime would be better off compared to their counterparts living under a non-democratic one.

Were they better off? If they were not, one of these two is true: either these groups had “quasi-rights”, but they were merely formal and hardly affected their social standing and their everyday lives, or they did not have them at all.

Let us begin with the metics. Was the distinction between native and foreign free-born individuals an inelastic one, both practically and ideologically, or was the demarcating line to some extent blurred?

Ober finds evidence “for the formal or informal application of negative liberties to metics and slaves<sup>45</sup>” in the following: that “the Athenians sometimes granted metics the right to own real estate (*enktêsis*<sup>46</sup>)”; that “others were granted remission of the head-tax ordinarily paid by resident foreigners (*isoteleia*<sup>47</sup>)”; that “in certain sorts of civil lawsuits (*dikai*) concerning property, metics and even slaves could represent themselves rather than depending on legal representation by an Athenian citizen<sup>48</sup>”; that they had religious freedom<sup>49</sup>; that “*some* metics and even former slaves were enfranchised [by decree of the Assembly<sup>50</sup>]. Moreover, there is the metics’ “regular” military service, the attempts to massively enfranchise metics and slaves after periods of serious political crisis<sup>51</sup> and the informal, through the cracks, enfranchisement of some metics<sup>52</sup>.

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<sup>45</sup> OBER (as in note 2) p.50.

<sup>46</sup> OBER (as in note 2) p.50.

<sup>47</sup> OBER (as in note 2) p.50.

<sup>48</sup> OBER (as in note 2) p.50–51.

<sup>49</sup> OBER (as in note 2) p. 51.

<sup>50</sup> Emphasis ours.

<sup>51</sup> OBER (as in note 2) p.52.

<sup>52</sup> OBER (as in note 2) p.52.

But does this evidence suggest that the citizen-metic line was not as difficult to cross as ordinarily assumed? The answer is that, when carefully examined, this same evidence indicates how unyielding the distinction between citizen and metic was rather than the opposite<sup>53</sup>. The right of *enktêsis* and the remission of *isoteleia* were bestowed only on the most exceptional circumstances and ownership of land essentially remained the exclusive prerogative of Athenian citizens<sup>54</sup>. Metics were subject to a head tax<sup>55</sup> and, with very few exceptions, had to be represented in court by an Athenian citizen. Religious freedom in a tolerant<sup>56</sup> polytheistic culture is hardly a crucial negative liberty. Whether metics saw military service as a move that would enhance their social status or simply as a way to earn a wage is unclear. Finally, naturalization of metics was so extremely rare that it cannot plausibly support the assumption that metics, as a social class, enjoyed “negative liberties”. Actually, the strongest evidence for the inflexibility of the citizen-metic distinction comes from the fact that the Assembly never massively enfranchised metics or slaves, even in cases where they had risked their lives fighting for the democracy, and that the only way that some of them could achieve citizenship was by somehow having their names improperly written in the citizen catalogues - that is illegally<sup>57</sup>.

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<sup>53</sup> The importance of this distinction is further underlined by the fact that propertyless NAMs were often prepared to fight and risk their lives to claim or to protect their citizen privileges.

<sup>54</sup> OBER (as in note 2) p. 50.

<sup>55</sup> This tax was called the *metoikion*. It was a fixed 12 drachmae per annum tax, an amount hardly negligible for someone on a low income: see M.N.TOD, *The Cambridge Ancient History*, Vol. 5, *Athens 478–408B.C.*, Cambridge 1927, p.22 and K.KAPPARIS, *Immigration and Citizenship Procedures in Athenian Law*, RIDA 52 (2005), p.71–113 at p.108.

<sup>56</sup> Although there were prosecutions and at least one execution on religious charges, that of Socrates, the charges were always essentially political and had to do with disrespect to the ethos of the democratic *polis* rather than to any specific god. For the political essence of the charges against Socrates see M.F.BURNYEAT, *The Impiety of Socrates*, *Ancient Philosophy* 17 (1997), p.1–12, R.GARLAND, *Introducing New Gods*, Ithaca 1992, p.148–49, I.F.STONE, *The Trial of Socrates*, London 1988), p.115, and D.FREDE, *Plato, Popper and Historicism*, *Proceedings of the Boston Area Colloquium in Ancient Philosophy* 12 (1998), p.247–76 at p.274. For a variety of views on the matter, see N.D.SMITH and P.B.WOODRUFF (eds.), *Reason and Religion in Socratic Philosophy*, Oxford 2000.

<sup>57</sup> OBER (as in note 2) p.52, adds to this group those with one citizen parent. These individuals would not necessarily be thought of as metics, and, in any case, they were



Heavily taxed, normally unable to represent themselves in legal settings, and without realistic hope of naturalization, the vast majority of Athenian metics were permanently and hopelessly excluded from the democratic body politic. Their exclusion from citizenship kept them in a vulnerable social and economic position and there is no evidence that the demos ever moved towards changing this. In fact, members of the demos had an obvious interest, both economic and psychological<sup>58</sup>, in asserting the importance of their difference from metics. A final but telling detail is that the murder of a metic was always classified as involuntary homicide or manslaughter, never as simple homicide, which indicates that even the basic humanity of slaves was not uncontroversial in the eyes of the citizens.

As far as slaves are concerned, if the Athenian democracy allowed some negative liberties to them, and if these liberties amounted to anything more than a mere formality, the implication would be that their situation was better in democratic Athens than in other constitutions. But was it?

There is probably no text allowing for a stronger case to be made for slaves' rights in ancient Athens than Demosthenes' *Against Meidias*. The *hubris* law, as far as it can be inferred from the speech, includes the provision that *hubris* even against slaves is a punishable offence. *Prima facie*, the case for assuming that a negative right is here recognized to slaves appears strong.

Nevertheless, the fact that, as already argued, it is law which takes precedence over "rights", and not the other way round, means that even the *hubris* law does not bestow a negative right to slaves. Nor does Demosthenes unequivocally state that any free men were ever convicted and executed for abusing slaves, which would indicate that this law was something more than dead letter<sup>59</sup>. Actually, we have no evidence of this ever taking place, and given the sensational nature of

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not typical metics. They were rather Athenians who lacked citizen ancestry on both sides, and thus could more easily achieve citizenship. But the fact that even individuals with one citizen parent were normally excluded from citizenship underlines the exclusiveness of the Athenian constitution.

<sup>58</sup> Given the metics' heavy taxation, the economic interest is self-evident. The psychological one has to do with the presumed superiority that even the poorest Athenian citizens could feel when comparing themselves to disenfranchised foreigners.

<sup>59</sup> The Greek is ambiguous on this point, but Demosthenes' point can reasonably be taken to be that it was *possible* for this to happen, not that it ever happened.

such a conviction, it is unlikely that no mention of it would have ever been made in the surviving literary sources. In fact, within its context, this claim of Demosthenes looks too much like a rhetorical hyperbole, and it is quite likely that he would expect his audience to take it as such. Nor did the slave have recourse to the judicial system himself or herself. A citizen would have to bring the case to court, indicting a fellow-citizen for the sake of a slave. Finally, as it is almost universally accepted, the idea of “natural”, inalienable rights possessed by every human being is absolutely alien to the Greeks<sup>60</sup>.

Nor is there any reason, as already noted, to assume that concern about slaves lies behind their inclusion in the *hubris* law. Pseudo-Xenophon’s *Athenian Constitution* itself explains why low-born

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<sup>60</sup> The obvious reason is that if they recognized such rights they would have either to allow them to slaves, which would radically undermine their whole way of life, or to completely deny the humanity of slaves. In recent years an attempt to argue that classical Greeks did develop a concept of natural rights was made by F.D.MILLER, JR., *Nature, Justice, and Rights in Aristotle’s Politics*, Oxford 1995, p.108–111, who claims that Aristotle has a concept of natural rights and also attributes a “rudimentary theory of natural rights” to Demosthenes (*The Rhetoric of Rights in Aristotle and Demosthenes, Skepsis* 8 (1997), p.120–32 at p.131). But there are several problems with Miller’s assumption of a Greek theory of natural rights and his interpretation of Aristotle. First of all, the natural rights that Aristotle recognizes according to Miller are restricted to citizens, but the Greeks themselves associated citizenship with “sharing” and “participating” in the constitution, not rights. This point is conclusively argued, mainly on linguistic grounds, by M.OSTWALD, *Shares and Rights: “Citizenship” Greek Style and American Style*, in J.OBER and C.HENDRICK (eds.), *Dēmokratia: A Conversation on Democracies, Ancient and Modern*, p.49–61, p.53–57. In addition, M.SCHOFIELD, *Sharing in the Constitution, The Review of Metaphysics* 49 (1996), p.831–58 at p.836–42, demonstrates that Aristotle thinks of citizenship in terms of “sharing” in the constitution as well. Second, loss of one’s citizen privileges was called *atimia*, literally loss of honor: there is no implication of a theory of rights here, and actually *atimia* was the result of someone’s actions, which indicates that citizens’ rights were thought of as performative, not natural. Aristotle himself writes in *Politics* 1278a35–36 that it is the person who “participates in honors” (*metechôn tôn timôn*) who is most properly called a citizen. Third, citizenship was dependant not only upon one’s status as a free NAM, but also on the type of the constitution: as noticed in the text, *banaisics* and other propertyless citizens were accepted as citizens by democracies, but rejected by other constitutions. But as far as we can tell from the existing literature, the argument that the democrats made for the universal inclusion of all free NAM into the citizen-body was based on their notion of political equality among NAMs, not on their claim to possess a natural right to citizenship. In any case, however, even these supposed natural rights cannot be universal human rights, because then they would have to be given to slaves as well, and Miller sees them as restricted to citizens.

citizens would have reason to make sure nobody was subject to physical abuse by the upper classes - they could be mistaken for slaves themselves. It is self-interest, then, rather than any concern for slaves, which determines their actions. Moreover, in the vast majority of cases, if slaves needed protection from physical or sexual abuse at all, it would be from their master, the *despotēs*. But it is most unlikely that anyone would indict a fellow-citizen for maltreating his own slave<sup>61</sup>.

Therefore, although the *hubris* law explicitly includes slaves in the groups to be protected, it cannot be plausibly claimed that this stems from any interest in the welfare of the slaves themselves. We have no evidence of even a single case of a citizen convicted for mistreating his slave and slaves cannot go to court on their own—at the very best they can resort to a temple, and even then they are unlikely to evade their masters' claim on them<sup>62</sup>. Furthermore, this protection does not, in all probability, apply against the one person who is by far the most likely to abuse a slave, his or her *despotēs*. So, even if one agreed that slaves are bestowed some form of negative liberties, it is difficult to see what this would mean to them in practice.

There is a wider issue at stake here. “Quasi-rights” would have had some importance for their bearers only if they helped them improve their lives. Otherwise, even if they can be identified in ancient democracy, they would not make it more acceptable as a political model. In other words, “quasi-rights” must be of at least some practical relevance to be worth pointing out at all. Moreover, as already noted, the assertion that slaves are given “quasi-rights” is linked to the thesis that in ancient democracy the all important distinction between citizen and non-citizen was somehow compromised. But if the demarcating line between citizen and non-citizen was indeed blurred in Athens<sup>63</sup>, this would have to be reflected

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<sup>61</sup> Euthyphro's indictment of his father for the murder of a slave, in Plato's work of the same name, has a shock value that the dialogue makes explicit.

<sup>62</sup> Y.GARLAN, *Slavery in Ancient Greece*, translation J.LLOYD, Ithaca 1988, p.41.

<sup>63</sup> The assumption of an extremely liberal Athens, hardly distinguishable from modern democracies, led K.POPPER, *The Open Society and its Enemies*, Vol. 1, *The Spell of Plato*, London 1962, p.43, to the incredible claim that Athens came “very close to abolishing slavery”. Interestingly enough, a similar though less extravagant claim is made by G.GLOTZ, *La cité grecque*, Paris 1928, p.279.

in the position of slaves. Plainly put, slaves in a democracy would be in a better position than slaves under other constitutions. Were they?

There are at least two texts which could help make the case for the beclouding of this dividing line. The first is the *Old Oligarch* and the second Plato's *Republic*. Both authors can be described as social conservatives and both commiserate the fact that it has now become next to impossible to tell upper from low-class, free man from slave, or, in Plato's case, man from woman. According to them, democracy collapses all the crucial traditional social - and for Plato even natural - distinctions of the Greek world.

This "accusation" may be correct of differences within the citizen-body, and even then only to a limited extent, but it is hardly true insofar as non-citizens are concerned. Plato's humorous (?) claim that in a democratic city even donkeys refuse to step aside for humans<sup>64</sup> purports to show that even the line separating animals from human beings is erased in a democracy. It is unlikely, however, that many slaves in Athens would agree with his conclusion. Most eminent historians who systematically examine Greek slavery concur that Athenian slaves were worked harder and exploited more than slaves in other kinds of constitutions<sup>65</sup>. The fact that the Athenian upper classes could not, due to the politics of democracy itself, put too much economic pressure on the lower classes of free citizens meant the more intense exploitation of metics and slaves. Most Athenian slaves, including the majority of those employed in the silver mines at Laurion, but also agricultural slaves, would obviously engage in heavy physical labor and, at least the former lived under appalling, inhumane conditions. But perhaps nothing speaks louder to the way that slaves themselves saw their position than the massive exodus of twenty thousand of them during the first Spartan fortification of Deceleia, that is as soon as a good opportunity availed itself<sup>66</sup>.

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<sup>64</sup> *Republic* 563b.

<sup>65</sup> See M.I.FINLEY, *Was Greek Civilization Based on Slave Labour?* in B.D.SHAW and R.P.SALLER, (eds.), *Economy and Society in Ancient Greece*, Harmondsworth 1981, p.97-115 at p. 114, G.E.M.DE STE CROIX, *The Class Struggle in the Ancient Greek World*, London 1981, p.141 and GARLAN (as in note 56) p.38-41. Cf. also Mohammad Nafissi, *Class, Embeddedness, and the Modernity of Ancient Athens*, *Comparative Studies in Society and History* 46 (2004), p.378-410 at p.395.

<sup>66</sup> Thucydides 7.27. V.D.HANSON, *Thucydides and the Desertion of Attic Slaves during the Decelean War*, *Classical Antiquity* 11 (1992), p.210-28, argues that

Finally, there is the protection of women under the *hubris* law. Against the majority opinion that women living under aristocratic regimes possessed more rights and occupied a higher social position than those living in a democracy - a notion which would be fatal to his argument - Ober suggests that this is not the case. He compares the existence of the office of "controller of women" in some aristocratic cities with the Athenian *hubris* law and concludes that whereas some aristocracies viewed women as a threat to public order and tried to forcefully implement the traditional Greek conception of a woman's virtue - essentially, to stay out of the public view under any circumstances - Athenian democracy included women in the groups to be protected under the aforementioned law. From the democratic point of view, the threat to the social order came not from women stepping out of line, but from abusive individuals who might physically or sexually attack women, slaves or weaker citizens. In other words, whereas women in aristocratic cities sometimes had their behavior regulated by an oppressive *polis* institution, women in democratic cities enjoyed negative liberties, "quasi-rights"<sup>67</sup>.

But how did these supposed "quasi-rights" affect the social standing of Athenian women? Can it be plausibly claimed that women in democratic cities, notably Athens, had more freedom or were in a better social position than women living in aristocratic ones?

Even if one conceded that Athenian women enjoyed some form of rights, it would be particularly difficult to see how they could exercise these rights themselves. According to Athenian law, no woman could ever represent herself in court. Women were normally represented by their *kyrios*, and in the exceptional case that their *kyrios*' interests may collide with their own they had to find a volunteer (*ho boulomenos*) who would represent them. Therefore, the lack of legal self-representation, a crucial factor in the exclusion of metics and slaves from the political realm, applies to women too<sup>68</sup>.

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Thucydides assumes one agricultural slave per household and implies that practically all slaves who could fled.

<sup>67</sup> OBER (as in note 2) p.52-57.

<sup>68</sup> According to S.B.POMEROY, *Godesses, Whores, Wives, and Slaves: Women in Classical Antiquity*, New York 1995, p.74, "Athenian law of all periods tended to regard the wife as a veritable child, having the legal status of a minor in comparison to her husband".

Moreover, the historical evidence for the higher position that women occupied in aristocracies is strong. Athenian women in the classical era did not effectively control their own property<sup>69</sup>. If an Athenian citizen died without leaving sons, he could be inherited by his daughter, the so-called *epiklēros korē*, but she had to marry the closest male relative, so that the property would pass down to their sons and remain in the family. This stands in stark difference to what was the case in Sparta, where the *patrouchos*, the equivalent of the Athenian *epiklēros*, inherited herself and was not required to marry a relative. Moreover, women were not allowed to spend themselves anything more than the very low amount of one *medimnos*. Any transaction involving even a remotely significant amount of money could only be entered by men. There is also evidence that in Gortyn, another aristocratic city, women enjoyed the property rights that they lacked in Athens.

One may also note a very interesting passage in the *Laws* where Plato compares the Thracian, the Athenian and the Spartan treatment of women<sup>70</sup>. Thracian women, according to Plato's account, engage in agriculture and the raising of cattle and sheep. They are thus reminiscent of Aristotle's point that poor men use their wives instead of slaves<sup>71</sup>, but in one respect their position is clearly comparable to that of low class Athenian women, who work in the fields or in other areas and contribute to the family income. Athenian women, Plato writes, engage in mainly two activities, managing the family possessions and spinning. Spartan women, however, are educated in gymnastics and music and have a much more active public role than that of their Athenian counterparts.

There is no doubt that Plato thinks that the Spartan system of educating women is substantially superior to the Athenian one. The philosopher claims that even the Lacaedemonian system does not go far enough, because it does not inculcate military virtues in the women<sup>72</sup>, but its superiority to the Athenian one is taken for granted.

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<sup>69</sup> It is also interesting that the property rights of Athenian women increased during the Hellenistic period, when Athens was no longer a democracy.

<sup>70</sup> *Laws* 805d–806c.

<sup>71</sup> Aristotle, *Politics* 1323a5–6.

<sup>72</sup> Plato is probably commenting on the failure of the Spartan women to defend their city in the aftermath of the battle of Leuctra in 371BC, when it was threatened for the

In fact, the way that Plato describes their lives, Athenian women have no public role at all. It is also noteworthy that he calls the lives of Spartan women “not mean (*phaulon*) and cheap (*eutelên*) at all<sup>73</sup>,” which may be taken to imply that the lives of Athenian women are actually “mean and cheap<sup>74</sup>”. Crucially, this implicit but devastating criticism of Athenian gender relations does not come in a passage where Plato’s intention is to glorify Sparta, but in one where he severely criticizes it: actually, the main aim of this part of the text is to condemn the Spartans for not providing full military training to women.

A good - although partial - explanation for the higher social standing of Spartan women comes from the fact that patriarchal family structures were mightier in Athens, as opposed to communal social structures which were more developed in Sparta, and the position of women was worse in societies where the family was stronger. This argument is made by Schaps, who writes: “In Sparta military and quasi-military communal organizations fulfilled many of the functions of the family, so that the family was correspondingly weaker. Removal of children from their mother’s care at the age of seven restricted, to some extent, the gender distinctions brought about by child care. The family was stronger in Athens ...<sup>75</sup>”.

There is one subgroup of Athenian citizen women who did enjoy more freedom: those who belonged to the *banausic* and *thêtic* classes engaged in out of the house economic activities on an everyday basis and had considerable freedom of movement. Given their contribution to the family’s income, it is reasonable to assume that they would also be in a position to preserve some independence vis-à-vis their fathers or husbands, their *kyrioi*. But their freedom is the result of dire economic need, and actually the male *kyrioi* would probably prefer the women of their family to follow the stay-out-of-sight norm, but did not have the luxury to enforce it. From this point of view, underprivileged free Athenian women experienced increased freedom

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first time in its history, and is attributing this failure to their lack of military training. See G.R.MORROW, *Plato’s Cretan City*, Princeton 1960, p.330.

<sup>73</sup> 806d3, translation after T.L.PANGLE, *The Laws of Plato*, Chicago 1980.

<sup>74</sup> For the “waste” of the Athenian womens’ talents, Plato clearly blames their lawgivers, not the women themselves.

<sup>75</sup> D.M.SCHAPS, *What Was Free about a Free Athenian Woman?*, *Transactions of the American Philological Association* 128 (1998), p.161–88 at p.184.

in spite, not because of their gender. The question then becomes, however, why should we assume that some sort of quasi-liberal democratic ideology had anything to do with the freedom of these women? The latter can be explained by much more convincing - indeed compelling - economic factors. Moreover, the case of low-class women working outside of home and enjoying considerable *de facto* freedom of movement because of this activity indicates that, when talking about women's freedom, the determining factor may be social class rather than constitution. In other words, how much and what kind of freedom women have in the classical world may depend more on their social status and economic activities than on the constitution they live under<sup>76</sup>.

Ober recognizes the sociopolitical significance of the economic activities of disadvantaged free women and he even suggests that the greatest liberty which classical women experienced under democracy was a result of the fact that many of them worked for a living and so "the lived and performed Athenian experience of gender roles was otherwise more liberal than the 'official' normative line"<sup>77</sup>.

It is not, of course, *prima facie* implausible to assume that the economic role of Athenian women improved their social position. Nevertheless, freedom of movement dictated by economic necessity does not always lead to increased liberties or any kind of public role.

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<sup>76</sup> Whether the position of aristocratic women deteriorated with the political advance of the lower classes is a difficult question. If one assumes that these women enjoyed considerable freedom and some political power - even if exercised through their ability to influence their husbands - then the progression of democracy must have adversely affected their status. This argument was made in the late 19<sup>th</sup> century AD by J.P. MAHAFFY, *Social Life in Greece*, London 1925, p.146-47; for a short modern version see SCHAPS (as in note 76) p.184, and for the opposing view S.M. OKIN, *Women in Western Political Thought*, Princeton, 1979, p.15-20. Upper class Athenian women in the democratic era stay out of sight and are hardly appreciated as even potentially "political animals", except in their capacity as mothers of future male citizens, as in Aristotle's *Politics* 1260b13-20. Whether this is the result of a deterioration in their position due to the increase of the power of the lower classes or if their political role was always rather minimal is difficult to tell. But either way it is reasonable to say - even with a degree of generalization - that in the fifth and fourth centuries BC upper class Athenian ladies stayed almost completely outside the public sphere. Low class women, on the other hand, spent a lot of time outside their houses because of their role in production. There can be no question that this gave them more *de facto* freedom of movement, but they probably shared the minimal public role of leisured citizen women.

<sup>77</sup> OBER (as in note 2) p.55.



The terrible ordeal of most European women during the Middle Ages<sup>78</sup> may serve here as an example. More to the point, the evidence for the pushing of the “‘official’ normative line” does not come from some tangible improvement in their legal position or their social status (e.g., permission to attend a public event from which they were previously barred), but from the fact that classical drama “famously depicted strong, willful, even overtly ‘political’ women<sup>79</sup>”. But how much did the existence of strong female characters in drama mean something for the Athenian woman on the street—or in the house? Most such characters were aristocratic heroines rather than common women and were played by men, possibly with no female presence in the audience.

In the absence of any corroborating evidence from the social history of classical Athens, the existence of dramatic personae of strong women in tragedy hardly goes a long way towards proving that women enjoyed more liberties in democracies than under other constitutions. Comedy, however, could hopefully provide a better argument for this thesis, especially if used as a basis for the interpretation of the *hubris* law. Ober writes:

How should we read the Athenian legal conflation of women, slaves, and weaker citizens as potential objects, rather than originators, of subversive behavior? In light of the strong women depicted in Attic drama, it seems illegitimate to read the *hubris* law as proof that Athenians saw women as fundamentally “apolitical” or incapable of agency. The women of Aristophanes’ *Ecclesiazusae*, for example, seem to manifest all the characteristics of Aristotle’s “natural citizens<sup>80</sup>”.

The inclusion of women in the *hubris* law, however, cannot be used to determine whether women are viewed by democratic ideology as “political” or not. This law covers both groups whose political role is unequivocally accepted by this ideology, the poorer free citizens, and groups which are excluded, the metics and slaves. But what about the *Ecclesiazusae*?

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<sup>78</sup> Most women during that period had to get involved in heavy agricultural labor as well as shoulder the duties of childbearing. The result was a life expectancy quite shorter than that of men, without the benefits of socially recognized personal autonomy or any kind of public role.

<sup>79</sup> OBER (as in note 2) p.55.

<sup>80</sup> OBER (as in note 2) p.58.

Ober's brilliant analysis of this work in *Political Dissent in Democratic Athens* puts to rest the myth that the *Ecclesiazusae* may be inferior to other Aristophanic plays and actually a "bad" comedy, somehow lacking in coherence or not having a political character. According to Ober, the play "criticizes popular rule" by raising three issues: the role of persuasion in democratic decision-making<sup>81</sup>, the relationship between public and private within the context of democratic politics and, most importantly from our point of view, the matter of gender: the principal question that Aristophanes poses in the play, according to this reading, is whether male and female behavior are determined by nature or by "'politically constructed' social facts<sup>82</sup>". In other words, is the political exclusion of women justified by nature, or is it a political convention, which could be changed by some form of political action, such as a decision of the Assembly?

This interpretation of the *Ecclesiazusae* is not only plausible. It is illuminating. The question is, however, how much does it tell us about the freedom and the control over their lives that non-fictitious Athenian women actually exercised. Does the presence of strong, explicitly "political" women in this play indicate that Athenian democratic<sup>83</sup> ideology went as far as to challenge the traditional justification of the political exclusion of women? And can we infer that under democracy women were freer and less unequal to men than under other constitutions?

In addressing these questions we must keep in mind that asking whether the exclusion of women from politics is *physei* or *nomôi* in a comedy is not the same thing as posing it as a philosophical problem. One should remember that, despite the potential subversiveness of the play, which is discussed in the next paragraph, it is the outrageousness of the assumption that women may actually acquire a political role which makes the play funny in the first place - at least to the all-male Athenian audience - and that many of the individual jokes in this comedy spring precisely from this outrageousness. Aristophanes does not even resist the temptation of making some gross sexist jokes.

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<sup>81</sup> The problem of persuasion within the framework of democratic politics is a constant one in Greek political thought.

<sup>82</sup> J. OBER, *Political Dissent in Democratic Athens*, Princeton 1998, p.134; cf. p.131.

<sup>83</sup> OBER (as in note 82) p.124-26, argues, correctly, that comedy is part of democratic ideology because it is produced and funded by the democratic *polis*. It does not follow that the individual views of any particular dramatist will be pro-democratic.

Because of the nature of the medium of comedy itself, Aristophanes can ask the question what is the “natural” political position of women only by essentially presenting one big joke predicated on the unthinkability of something like women’s government. But this means that the *Ecclesiazusae* can hardly be used as a means to determine Aristophanes’ own views on the subject, let alone make assumptions about the social position of women in democratic Athens.

Moreover, even within the narrow confines of the text of the play Aristophanes does not commit himself to the success of women’s rule. We are never told how the women-organized dinner party at the end of the play goes, or how successful the women actually are in the long-term government of the city. But this ambivalence may well be due to the fact that nobody in the audience really expects an answer from the poet. The implausibility of female government is so absolute that the audience do not have to wonder about its ultimate success or failure.

Are the *hubris* law and some female characters in Aristophanic comedy sufficient to sustain the thesis that women had more rights under democracy than under other constitutions? If we compare their severely limited property rights, their lack of education and their skeletal public role to the substantial property rights and active public role of Spartan women, it becomes clear that this position cannot be maintained. A nominal right that one cannot exercise herself and the existence of some fictional comic characters do not change the reality of the absolute political exclusion of Athenian women. If male Athenian citizens ever thought of women as “political”, they certainly did not treat them as such.

We have already argued that inclusion in the *hubris* law is not the equivalent of being bestowed with a negative right in the modern sense of the word. But even if this was not true, even if metics, slaves and women were allocated negative rights, there is no historical evidence that this somehow correlated to some improvement in their social position or their lives. All these groups remained outside the citizen-body, without realistic hope of joining in. Metics were kept in a permanently precarious legal position and were economically exploited through taxation. Slaves residing in Attica were probably worked harder, on average, than slaves in non-democratic cities, and

those in the silver mines at Laurion encountered some of the most appalling conditions slaves had to endure anywhere in the ancient world. Athenian women had far diminished property rights compared to Spartan ones, received no education and played a negligible public role. Even if these groups had, in theory, some sort of negative liberties in Athens, it is hard to see in what way these liberties would mean something to their bearers.

It is absolutely true that ancient democracy opened up citizenship to the lower strata of landless free NAMs. It is also true, however, that it never went beyond this limit. According to Finley's classical analysis, the Greeks defined themselves as free because they were not slaves: "one aspect of Greek history ... is the advance, hand in hand, of freedom *and* slavery<sup>84</sup>". In other words, it was the existence of slaves which made it possible for Greek citizens to define themselves as free. The myth of *autochthony*, a myth claiming that the original Athenians were literally born from the land, was a quintessential part of Athenian democratic civic identity<sup>85</sup> and secured the perpetual political exclusion of metics. As for women, there can be no real doubt that in real life they were permanently exiled from the political realm. This is how Tolbert Roberts concludes her comprehensive examination of the subject: "[a]s a variety of thinkers have pointed out, the existence of slaves and the exclusion of women from the body politic was not simply the product of the blinders of an earlier era; it was essential to the functioning of the system, which was both psychologically and economically dependent on the labor and suffering of the excluded<sup>86</sup>".

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<sup>84</sup> M.I.FINLEY, (as in note 65) p.115. Cf. R.G.MULGAN, *Liberty in Ancient Greece*, in Z.PELCZYNSKI and J.GRAY, (eds.), *Conceptions of Liberty in Political Philosophy*, New York 1984 p.7–26, at p.8–9.

<sup>85</sup> The myth was essentially democratic because, as C.DOUGHERTY, *Democratic Contradictions and the Synoptic Illusions of Euripides' Ion*, in *Dēmokratia* (as in note 60) p.249–70 at p.254, remarks: "[s]ince all citizens are born equally from the earth, all have equal access to political power, and Athenian public discourse linked democracy explicitly to autochthony".

<sup>86</sup> J.T.ROBERTS, *Athenian Equality: A Constant Surrounded by Flux*, in *Dēmokratia* (as in note 60) p.187–202 at p.199. On the exclusion of women and slaves as an essential characteristic of the classical *polis* see also P.VIDAL-NAQUET, *Slavery and the Rule of Women in Tradition, Myth, and Utopia*, in R.I.GORDON, ed., *Myth, Religion and Society: Structuralist Essays*, Cambridge 1981, p.187–200, M.HANSEN, *Was Athens a Democracy? Historisk-Filosofiske Meddelelser* 59, Copenhagen 1989, p. 20, POMEROY (as in note 68) p.78, E.CANTARELLA, *Pandora's*

In conclusion, if non-citizen groups enjoyed any rights in classical Athens, these were not negative rights in the modern sense of the term and they hardly had any positive impact on their social standing, their individual autonomy or the way that they led their lives. In the absence of corroborating evidence from the social history of ancient democracy, the *hubris* law, the complaints of two ultraconservative authors and the presence of strong women in Aristophanes' comedy are clearly not sufficient to demonstrate that the distinction between citizen and non-citizen ever lost its absolute rigidity in Athens.

What does this mean for the question of the potential usefulness of ancient democracy as a partial model for modern constitutions? Fareed Zakaria, following Isaiah Berlin<sup>87</sup>, argues that (participatory) democracy has no intrinsic value and that the fundamental criterion for the desirability of a constitution should be how well it protects (negative) individual rights<sup>88</sup>. Ober responds to this by suggesting that there is a connection between democracy and liberal rights<sup>89</sup> which can be demonstrated historically and he offers Athenian democracy as an example: its history, according to this reading, indicates that there

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*Daughters: The Role and Status of Women in Greek and Roman Antiquity*, translation M.B.FANT, Baltimore 1987, p.38, V.D.HANSON, *The Other Greeks: The Family Farm and the Agrarian Roots of Western Civilization*, New York 1995, p.386 and I.MORRIS, *The Strong Principle of Equality*, in *Démokratia* (as in note 60) p.19–48 at p.23 and p.41.

<sup>87</sup> Isaiah Berlin himself thinks of positive liberty as being self-determination in the sense of self-control rather than having a particularly close relationship to political participation. But our argument is not affected by this.

<sup>88</sup> F.ZAKARIA, *The Rise of Illiberal Democracy*, *Foreign Affairs* 76 (1997), p.22–43. We agree with Zakaria that democracy, in the sense of rule by the people as expressed in free and fair elections, is not intrinsically connected to constitutional liberalism and the protection of negative liberties (p.26). It is also clear that the problem that he identifies is a crucial one for U.S. foreign policy: whereas U.S. rhetoric emphasizes the promotion of both “democracy” and (a presumably liberal notion of) “freedom” as the principal aims of this policy, in practice the two are often incompatible. Whether, however, the U.S. should forget about democracy and support only liberal values, promoting autocratic liberal regimes over illiberal democracies (p.40–43) instead of trying to achieve both aims or a balance between the two, is a difficult question. To treat liberal values as the only values worthy of appreciation is philosophically problematic, as we argue in the text, and indicates a certain lack of historical and cultural sensitivity. Moreover, ignoring the issue of the democratic legitimization or popular support of a foreign government could adversely affect the perception of the U.S. in this particular country - and possibly worldwide.

<sup>89</sup> OBER (as in note 2) p.2, points out that Zakaria is unable to point to a contemporary example of liberal constitutional autocracy.

is an intrinsic link between democracy and liberal rights. In addition, by claiming that ancient democracy expanded these rights beyond the citizen-body and even bestowed them on slaves, Ober removes from the arsenal of the opposition the obvious complaint that such rights were not universal in Athens. His conclusion is that, given this protection of negative liberties, ancient democracy can be regarded as a useful model for contemporary political thought even by strict liberal standards<sup>90</sup>.

But what if it can be shown, as is our contention, that Athenian democracy did not recognize negative rights and did not allocate them either to citizens or to non-citizens<sup>91</sup>? Does this mean that ancient democracy becomes a completely unattractive model for present-day political theory? This is a question which is too wide to be fully answered here<sup>92</sup>, but a few important points may be synoptically made.

First of all, Berlin's assumption that the protection of negative individual rights is by far the most important criterion according to which the desirability of a constitution may be determined is far from self-evident. As critics of the Berlinian position have pointed out, there are many other political values, such as law and order or protection from a terrorist attack, that a rational individual may deem more important than rights. Moreover, to judge ancient democracy exclusively on the basis of its acknowledgement of negative rights entails that, if our argument is correct and it failed to protect such rights, this democracy becomes a political system equally undesirable with oligarchy or even tyranny. There are, however, several achievements of classical democracy which can hardly be questioned and which could inform modern political theory. Greek democracy expanded citizenship to all NAMS, that is to a degree never seen before - and never matched again either in antiquity or the Middle Ages. It strongly encouraged political participation by using methods such as the lot and the public pay for participation in the Assembly

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<sup>90</sup> Ober does not share the view that only its protection of negative rights would make Athenian democracy a desirable political model. Throughout his work he consistently emphasizes the value of political participation.

<sup>91</sup> Since his argument is that ancient democracy recognized negative rights, Ober is justified in not addressing this question.

<sup>92</sup> For an extended discussion of this subject see P. WOODRUFF'S recent *First Democracy: The Challenge of an Ancient Idea*, Oxford 2005.

and the law courts<sup>93</sup>. It promoted what Robert Dahl has called the “strong principle of equality”, that is the assumption that every member of the *demos* is equally qualified with any other to take part in political decision-making and that no individual or group are “so definitely better qualified than the others that they should be entrusted with making the collective and binding decisions<sup>94</sup>”. It elevated accountability to a fundamental political principle<sup>95</sup>. Finally, ancient democracy provided much more substantial opportunity than any other contemporary constitution for the individual’s self-fulfillment or flourishing, denoted by the term *eudaimonia*, a term which plays a crucial role in Greek ethical thought. One has only to compare the literary, artistic, philosophical and even scientific achievements of democratic Athens to the monolithic military oligarchies of the Spartan type to see this difference.

In conclusion, the notion that the only attribute that would make ancient democracy an acceptable political model for contemporary political thought is recognition of negative rights is problematic not only because there are other perfectly legitimate political values, but also because it obliterates the substantial differences that classical democracy had with the other constitutions of its era. There is, therefore, no need to try to show that Greek democracy acknowledged and protected such rights in order to maintain its feasibility as a viable political paradigm. Actually, as we have argued, there is no evidence that ancient democracy recognized negative rights to its citizens, and the assertion that it expanded these rights to women, metics and slaves is incompatible with what we know about the social position of these groups. Despite its failure to acknowledge individual liberties, however, ancient democracy did produce concepts and ideals which remain both relevant and useful to political theory today.

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<sup>93</sup> It is both the meaningfulness of participation and the fact that inclusion in the citizen body conferred specific economic advantages which explain why people were prepared to fight and even die for this privilege. The political power that the lower classes of native free men enjoyed because of their citizen status meant that they were less vulnerable to economic exploitation by the rich, and in Athens in particular the money coming from the Empire entailed all sorts of economic benefits, from public pay for service in the courts or the Assembly to free hand-outs of food.

<sup>94</sup> R.A. DAHL, *Democracy and its Critics*, New Haven 1989, p.98.

<sup>95</sup> For accountability as a fundamental concept of democracy in the fifth century BC see for example Herodotus 3.80.