

*The Legal Regulation of Private Conduct at Athens:
Two Controversies on Freedom*

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ABSTRACT

Despite the Athenians' pronounced ideology of personal freedom ("living as you like"), many scholars deny that they enjoyed either positive freedoms (in particular to speak free of interruption in the Assembly) or negative freedoms, where the state could intervene as it wished, as against Sokrates for his religious views. The current essay argues that in their personal lives the Athenians were entirely free, except when speech or action materially harmed the community. A second ideology that community welfare superseded the wishes of any citizen was both universal and paramount – even for Plato's Sokrates.

How far did Athens' laws permit Athenians to live their personal lives as they wished? Although it was a cardinal ideology of the democracy that people might "live as they liked" (see e.g. Arist. *Pol.* 1317a 40-b 14),¹ many scholars have judged that various legal provisions in particular against "idleness", homosexuality, prostitution, and marrying a non-citizen were inconsistent with personal freedom. They point out that the polis could make inroads against citizens' personal freedoms whenever it wanted, as for example when it prosecuted Sokrates for his religious beliefs. In addition, the democracy imposed on citizens many burdensome civic obligations, such as military service through the age of 60. No contemporary state making such demands on its citizens could be considered liberal. How did the Athenians view the laws and obligations that constrained their personal lives? How extensively did the polis intervene in people's lives? And do these con-

¹ See also Lys. 26.5 and other passages cited in my essay, "Law, Freedom and the Concept of Citizens' Rights in Democratic Athens", in *Demokratia: a Conversation on Democracies, Ancient and Modern*, eds. J. Ober and C. Hedrick, Princeton 1996, p. 105. The *locus classicus* is Perikles' Funeral Oration, Thuc. 2.37.2-3: "As for suspicion about each other in our day-to-day lives, we are not angry with our neighbor if he does something according to his pleasure, nor do we give him those black looks which, though they do no real harm, still are painful. In our private lives we live together in a tolerant way, while in public affairs we do not transgress the laws".

straints and interventions mean that, notwithstanding their ideologies of freedom, in their personal lives the Athenians should not be considered free?

In his famous 1958 essay “Two concepts of liberty” Isaiah Berlin distinguished between negative freedom – the absence of obstacles or constraints, typically imposed on individuals, and positive freedom – the possibility or fact of acting, typically by collectivities or by individuals in the context of collectivities.² The first of our two controversies concerns positive freedoms at Athens. While no one disputes that Athens’ adult male citizens enjoyed many positive freedoms, in particular “to share in” (*metechein*) most functions of citizenship and government – in fact, the phrase “to share in the polis” often served to define citizenship³ – many have believed that the Athenians’ freedom of public speech was often violated especially in the Assembly, a key locus as the center of government. Paradoxically, of course, Athens’ Assembly which was open to all adult male citizens was in most ways a far greater venue for free speech (*isêgoria* [equal speech], *parrhêsia* [frank speech]) than is available in any modern representative democracy. At least four times a month, thousands of Athenians – every citizen who wished – assembled on the Pnyx hill and, when the herald called “Who wants to speak?”, felt free to address their fellow citizens. Even in the fourth century during the so-called “period of the *rhetores*” when politicians tended to dominate discussion, Isokrates notes that sometimes the wisest speakers miss the point and an ordinary person, “deemed of little account and generally ignored”, comes up with a good idea and “is judged to speak the best” (12.248). However, in contrast to modern liberal societies, Assembly speakers at Athens were often shouted down by the crowd, and might even be dragged off the speaker’s platform. According to Xenophon (*Mem.* 3.6), while attempting to become leader of the city although not yet twenty, Plato’s brother Glaukon was more than once dragged from the platform “an object of ridicule”, because he insisted on speaking. Plato’s Sokrates remarks that if a non-expert tries to advise the Assembly on technical matters,

however handsome or wealthy or nobly born he may be, it makes no difference. The members reject him noisily and with contempt, until he is either shouted down and desists, or else is dragged off or ejected by the police on the orders of the presiding authority (*Prot.* 319c).

Shouting speakers down was effected by *thorubos*, “hubbub”, and was quite common. Does *thorubos* mean that in the Assembly the Athenians did not enjoy free speech? In making this claim, scholars view *thorubos* from modern rather than Athenian perspectives. In the United States, guarantees of free speech are in the first instance directed against the suppression of speech by the government or other authorities. The First Amendment to the Constitution specifies, “Congress

² I. Berlin, *Four Essays on Liberty*, Oxford 1958 [1969].

³ See especially M. Ostwald, “Shares and Rights: ‘Citizenship’ Greek Style and American Style”, in Ober and Hedrick (n. 1 above), pp. 55-58.

shall make no law . . . abridging the freedom of speech". The freedoms associated with modern liberal societies emerged in the seventeenth and eighteenth centuries in reaction to what has been called the heavy bureaucratic state. Although free speech at Athens is one source of modern democratic ideals, at Athens the concept of free speech functioned very differently from ours. For the Athenians, *isêgoria* and *parrhêsia* included the power (*exousia*) to speak in public, to participate frankly and openly in civic debate, and to say what one wanted, including insults. But Athens' democracy was no oppressive "heavy state". It was a community of citizens, governing themselves in their own interests. Assembly *thorubos* had first the practical purpose of regulating debate, as the Athenians set no official time limits for Assembly speeches. More importantly, *thorubos* was a negative vote by the community, constituting its fundamental power to decide what it would listen to. All citizens could freely address the Assembly. None could demand to be heard for as long as he wanted to speak. The obligation to sit quietly without speaking, to listen silently to whatever someone said, was considered a hated characteristic of oppressive regimes: monarchy, tyranny, and oligarchy. For example, in Sophokles' *Antigone* Kreon's son Haimon tells his increasingly tyrannical father, "your presence frightens any man of the people / from saying things you would not care to hear. But in the dark corners I have heard them say . . . You expect to be listened to, but not to listen" (lines 690-92). Thucydides reports that during the oligarchic coup of 411, all the speakers in the Assembly and Council came from the oligarchs. "People were afraid when they saw their numbers, and no one now dared to speak in opposition to them. If anyone did venture to do so, some method was soon found for having him killed . . . Instead the people kept quiet" (8.66.1). In 404, the ardent democrat Lysias wrote that after the Assembly "raised a *thorubos*"

When Theramenes proposed that Athens' government be handed over to thirty men, Theramenes replied that he cared nothing about their hubbub because he had the support of Sparta and other Athenians. The demos now realized that a conspiracy was in progress. "All the good men in the Assembly remained and were quiet, or else took themselves off, conscious at least that they had voted nothing harmful to the city" (12.73-75).

None of the speakers driven from the orator's platform mention *isêgoria*, *parrhêsia* or the right to be heard without interruption. On the contrary, Aeschines states that some politicians "shamelessly" refuse to yield to the people's shouting and step down (1.34). Demosthenes reports that when he tried to counter Aeschines in an Assembly in 346, "Aeschines and Philokrates posted themselves on either side of me and kept shouting and interrupting, and finally jeering at me. You were all laughing, you would not listen to me . . . and by the gods I think your feelings were quite natural" (19.23-24). In [Dem.] 45.6-7, the wealthy and prominent banker's son Apollodoros says that at first he was bitter at his treatment by the dikasts [some hundreds of lay judges], but on reflection he thought "there was abundant excuse for those who gave that verdict".

Modern values of free speech guard individuals against society or government. The Athenians did not share this perspective. They had no experience with heavy bureaucratic oppression. They did know about tyranny. While every citizen could exercise the freedom to speak, the community's power to shout down stupid or windy speakers was democratic freedom. The denial of that freedom amounted to oligarchy or tyranny. Free speech in the US sprang from – and in some measure continues to exemplify – a similar value of community good. However, these societies were fundamentally different. Athens was an egalitarian, democratic community, the US is a state where the community is (supposed to be) represented by a government exercising a monopoly of power. In the US neither the government nor any citizen can deprive people of the right to speak in public, especially in the “high value” areas of social, political, and artistic expression. That right is qualified only in cases where the courts have determined that the unrestrained exercise of free speech is detrimental to the common good. Such restrictions apply especially in “low value” areas including deceptive commercial speech, common obscenity, and what the Supreme Court has called “fighting words”. However, the inability to silence speech or other forms of expression means that sometimes we must endure what we find patently offensive. Furthermore, the right to free expression does not mean that all or even many citizens actually exercise that right. By contrast, in Athens the Assembly herald and positive ideologies promoting “free and candid speech” (*parrhêsia*) and “equal speech” (*isêgoria*) directly encouraged all members of the sovereign democratic community to speak before his peers. They in turn had the power to silence what they found objectionable.⁴

Our second controversy concerns the question of how far the Athenians enjoyed “negative” freedoms, to live their personal lives in their own way, free of interference by others or the polis. Few scholars dispute that as a day-to-day reality, Athens' democracy was remarkably tolerant. No laws forbade private citizens from visiting prostitutes, getting drunk in public, or engaging in homosexual relations, even though public standards of morality condemned these practices. During the war with Sparta, a conspicuous number of upper-class Athenians felt free to dress and behave like Spartans, and openly praised the enemy (see, e.g., Aristoph. *Birds* 1280-83, Pl. *Crito* 52e, *Gorg.* 515e, Xen. *Hell.* 2.3.34). The philosopher Diogenes, who “preferred freedom to everything” (Diog. Laert. 6.71), lived naked in the Agora, masturbating and defecating in public (*ibid.* 6.46, 58, 69).

⁴ For further discussion of free speech at Athens, see my essays “The Athenian Laws against Slander”, in *Symposion 1993. Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, ed. G. Thür, Cologne and Vienna 1994, pp. 109-124; “The Power to Speak – and not to Listen – in Ancient Athens”, in *Freedom of Speech in Ancient Athens*, ed. R. Rosen and I. Sluiter, Leiden 2004, pp. 221-32; and “Law, Attic Comedy, and the Regulation of Comic Speech”, in *The Cambridge Companion to Greek Law*, eds. M. Gagarin and D. Cohen, Cambridge 2005, pp. 357-73.

And yet, Diogenes reports, “the Athenians loved him” (6.41). No modern democracy would tolerate such conduct.

In certain areas, however, Athenian laws did not permit citizens personal freedom. Perikles himself sponsored a law making it either illegal or virtually impossible for an Athenian to marry a foreigner, and excluding children of such unions from citizenship ([Arist.] *Ath. Pol.* 26.4, Plut. *Per.* 37.3, Ael. *Var. Hist.* 6.10, 13.24). A citizen who discovered his wife in adultery was obliged by law to divorce her ([Dem.] 59.87). In the fifth century a citizen could not bequeath his property as he wished: laws stipulated a fixed group of inheritors.⁵ At several periods during the later fifth century, as we shall see, the Athenians harassed and even prosecuted intellectuals for their beliefs. Despite widespread religious tolerance, the principal legal charge against Sokrates was “refusing to recognize the gods whom the city recognizes, but introducing other new spiritual beings” (Plato, *Apology* 24b). In his famous book *The Ancient City* (trs. W. Small, Boston 1882: 293-98), Fustel de Coulanges listed many kinds of state interference in private life at Athens. These included compulsory military service to the age of sixty; the obligation of the owners of sacred olive trees “to turn over gratuitously the oil which they had made”; a law against idleness; a law forbidding women to travel with more than three dresses; a law permitting no one to remain neutral in political conflicts; and laws forbidding instruction without the magistrates’ approval or the teaching of philosophy – “temporary measures”, Fustel admits, but which “not the less prove the omnipotence that was conceded to the state in matters of instruction”. In addition, the “state system of justice . . . could strike when one was not guilty, and simply for its own interest”. The demos could ostracize a fellow citizen for ten years simply because they thought him undesirable.

Moses Finley⁶ therefore concluded that at Athens,

what was wholly lacking was a conception of precisely those inalienable rights which have been the foundation of the modern libertarian doctrine: freedom of speech, of religion and so on . . . The Athenian state . . . could make inroads into freedom of speech and thought, and did so when it chose . . . Provided the procedures adopted were themselves lawful, there were no limits to the powers of the *polis*, other than self-imposed (and therefore changeable) limits, outside the sphere in which deep-rooted and ancient taboos remained powerful.

⁵ See V. Hunter, *Policing Athens*, Princeton 1994, pp. 11-13 and more generally ch. 1, “*Kyrios*: authority and ambiguity in the Athenian household”.

⁶ “The Freedom of the Citizen in the Greek World”, *Talanta* 7 (1976), pp. 1-23, on 21-22, repr. in M.I. Finley, *Economy and Society in Ancient Greece*, ed. R. Saller, New York 1982, pp. 77-94, on 92-93. For the following quotations: R. Mulgan, “Liberty in Ancient Greece”, in *Conceptions of Liberty in Political Philosophy*, eds. Z. Pelczynski and J. Gray, London 1984, p. 15; J. Ober, *Mass and Elite in Democratic Athens. Rhetoric, Ideology and the Power of the People*, Princeton 1989, p. 15; Berlin (n. 2 above), pp. xl-xli.

Robert Mulgan cites the Athenians' "remarkable freedom of expression", which however "the community could override and punish at any point", as in prosecuting Sokrates. "A society which could unquestioningly tolerate such a vague and general charge against one of its citizens can hardly be said to have believed in any fundamental right of free expression". In *Mass and Elite*, Josiah Ober remarks, "The Athenians never developed the principle of inalienable 'negative rights' (freedom from governmental interference in private affairs) of the individual or of minorities vis-à-vis the state — a central tenet of modern liberalism", despite their ideology of citizens' freedoms. In *Four Essays on Liberty* Isaiah Berlin wrote,

I have found no convincing evidence of any clear formulation of [the notion of individual freedom] in the ancient world. . . . The issue of individual freedom, of the frontiers beyond which public authority . . . should not normally be allowed to step, had not clearly emerged at this stage; the central value attached to it may, perhaps, . . . be the late product of a capitalist civilization, an element in a network of values that includes such notions as personal rights, civil liberties, the sanctity of the individual personality, the importance of privacy, personal relations, and the like.

Fustel concluded,

At Athens . . . a man's life was guaranteed by nothing so soon as the interest of the state was at stake It is a singular error. . . to believe that in the ancient cities men enjoyed liberty. They had not even the idea of it. . . . To have political rights, to vote, to name magistrates, — this was called liberty; but man was not the less enslaved to the state. The ancients, especially the Greeks, always exaggerated the importance, and above all, the rights of society.

Modern historians have questioned negative freedoms at Athens because the polis had the seemingly untrammelled power to interfere in virtually any aspect of people's lives, by laws, interventions, and sometimes arbitrary punishments.

How are we to reconcile the Athenians' legal violations of individuals' freedoms with their own deeply-felt ideologies and practices of tolerance? Under what circumstances might freedoms be constrained? And did any underlying principles inform community interventions?

Two fundamental historical and conceptual differences between ancient Greek and modern liberal democracies suggest complementary approaches to Athens' infringements of freedom. First, as we have seen in regard to free speech, modern liberal democracies protect and guarantee citizens' freedoms through the mechanism of legal rights. In the US, the Declaration of Independence, the Constitution, and the Bill of Rights extend to all citizens various legal rights which the state cannot infringe, including the rights to free speech, religious choice, public as-

sembly, firearms, and a fair and speedy trial. In this context, “right” is a rigid, absolute term, implying a clear principle of entitlement, and inalienable except under specified circumstances. The Declaration of Independence guarantees the right to life, liberty, and the pursuit of happiness, qualified only by the state’s right to execute or imprison those judged to be criminals after the due process of law.

Finley, Ober and other critics view Athens’ abuses of personal freedom from the modern perspective of rights. Finley notes, “What was wholly lacking was a conception of . . . inalienable rights”. That is correct: an Athenian’s freedoms were not guaranteed by any concept of rights (for which ancient Greek lacked a word). None of Sokrates’ defenders argues that prosecuting him for his religious beliefs violated the Athenian right to free speech or freedom of religion.

Yet how far does freedom depend on rights? In fact, rights prove to be poor promoters of freedom, in comparison with Athens’ alternatives. In Athens, even without the concept of rights, many laws protected important “negative” freedoms against personal interference, by making it illegal for the government or private persons to kill, imprison, enslave, beat, or rob any individual.

A second, even more important protection also concerns laws. Ancient writers (Thuc. 2.37.3, Hdt. 3.83.3) sometimes said that people were free to live as they liked, provided they obeyed the law. This concept in itself might offer individual citizens little protection, because in principle laws can target any aspect of private life, such as drinking or victimless sexual conduct. However, Athens simply had no laws that regulated private life. Athens’ historical record before 350 B.C. displays a single, unwavering orientation toward the legal regulation of personal conduct. If such conduct did not materially harm others, violate another citizen’s household, or affect community obligations, it was the democracy’s and in fact a general Greek principle not to legislate personal conduct. The freedom to live as one likes is reflected in the total absence of laws governing the personal conduct of private citizens. A canvass of the archaic, mostly fragmentary laws preserved on stone in H. van Effenterre and F. Ruzé, *Nomima* (Paris 1994-95) shows no measure that regulated personal conduct. At Athens before ca. 350, no laws had the primary purpose of preventing so-called self-degradation or self-inflicted harm. Catalogues of Athens’ public and private offenses (for example in Lipsius’s *Attische Recht* [Leipzig 1905-15]), and the many legal cases in the Attic orators and elsewhere, reveal that the great majority of laws regulated interpersonal crimes or disputes concerning matters like theft, inheritance, and adultery, or else relations with the polis, for example citizenship, military service, and taxation. Beyond interpersonal or community issues, the democracy had no laws of a paternalistic or educatory type. The Athenians were conscious of this principle and most of them were proud of it. Laws regarding private individuals should be “gentle and humane”. Demosthenes states (24.193). Aeschines notes, “the law does not investigate private citizens” (1.195). Personal freedoms thrived in the “gaps” of Athenian legislation.

Finally, personal freedoms at Athens were actively promoted by various democratic principles, mentalities, and ideologies, in particular “living as you like”.

Rights, by contrast, can protect freedom but do not necessarily promote it. Although modern Western citizens have the right to vote and to speak freely, these rights are typically invoked only when they are threatened, rather than to encourage their use. At Athens, principles, ideologies, and mentalities contributed to a sense of civic duty, encouraging citizens to use the freedoms that society extended to them.

Furthermore, rights also have major gaps, as American states can and do regulate private life in any area not expressly protected by the Constitution, Bill of Rights, or Declaration of Independence. If an employer dislikes people with big noses or prefers blonds, he is entirely at liberty to discriminate, as these attributes are not a matter of religion, sexual orientation, or other specified “protected” qualities. Such deficiencies, and the need for further supra-legal guarantees, are reflected in the US controversy over the so-called Equal Rights Amendment, to close a “rights gap” on behalf of women’s equality. As Jeremy Bentham pointed out, rights present a fundamental paradox: they purport to be absolute, but they are contingent and arbitrary. Different societies value different qualities and at different times. An advocate of law to regulate relations between community and individuals, Bentham called the rights of man “plain nonsense”, the revolutionaries “*Déclaration des droits de l’homme*” “a metaphysical work – the *ne plus ultra* of metaphysics”.

As a last defect in rights, in the United States at least until recently the citizen privileges of non-whites were routinely flouted despite the paper guarantee of rights.

Athens’ laws, principles, mentalities, ideologies, and the absence of moralizing legislation were all stronger forces for freedom than rights. Finley objects that in Athens “there were no theoretical limits to the power of the state”. True, but as Mogens Hansen points out, theory is not so important as practice.⁷ Britain has no theoretical limits to state intrusion into people’s private lives, but in practice usually respects most freedoms. No supra-legal texts prevented the Athenians from legislating private morality, but they did not. US rights constitute theoretical limits to the power of the state, in all the ambiguity of that qualification. Most Athenians lived much freer – and more actively free – lives than citizens of modern democracies. They also felt little anxiety that these freedoms were at constant risk of being removed.

A further difference between ancient and modern democracies supplies an alternative vantage point to view Athens’ occasional restrictions of personal freedom, regarding homosexuality, idleness, and so forth. Modern liberalism is informed by the notion of the primacy of the individual over the state, and the paramount importance of protecting individual liberties against state interference. This orientation is the product of the continuous struggle against religious oppres-

⁷ *The Athenian Democracy in the Age of Demosthenes*, Oxford 1991, p. 80.

sion since the Roman Empire, and the on-going struggle against so-called heavy states, where regimes or faceless bureaucrats dominate an alienated populace by what Max Weber called a monopoly of legitimate violence: censorship, taxation, and the police. In the 17th and 18th centuries, liberalism itself emerged out of debates over the extent to which any state might restrict citizens' freedoms. For the founding father of modern liberalism, John Locke, freedom meant shielding a realm of private life from interference by government. Although the US Constitution permits states to set aside individuals' rights when "the public safety may require it" (Art. I, sec. 9), the legal system of the United States is so far oriented toward protecting individuals that even known criminals (even if non-citizens) are set free if representatives of the state have inadvertently committed some minor procedural mistake. The American Civil Liberties Union opposes indiscriminate security screening of passengers at airports, and police sobriety checkpoints against drunk drivers. In a famous statement Justice Brandeis of the Supreme Court has written,

Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encounters by men of zeal, well-meaning but without understanding.

Although in many contexts patriotism is not a discredited ideal, many Americans feel entitled to oppose their government for reasons of conscience, through civil disobedience. A significant number refuse to pay taxes in support of the military. A significant number refused induction into the military during the Vietnam War. Mohammed Ali remarked, "I got no quarrel with them Viet Cong". In *What I Believe*, published in 1939, the English writer E. M. Forster observed, "if I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country". Chauvinism, jingoism — Samuel Johnson's *Dictionary* defined patriotism as "the last refuge of a scoundrel".

Anti-state sentiment has shaped modern attitudes toward Athens, not least by inducing sympathy for rebellious individuals like Sokrates or subordinated groups such as women and slaves. The sensitivity of modern citizens to any infringement of liberty as first steps on the "slippery slope" to tyranny has sensitized us to any infringement of freedom in Athens, not least because of the continued significance of Athens' democracy in political discourse. From the perspective of history since the Roman Empire, these attitudes are understandable, and these reactions are valid.

The views of most Athenians were different. While questions of loyalty to family or political comrades could sometimes be discussed, it was a basic ideology and also common practice that the community must take precedence over any individual. Athens' democrats supported freedom, but virtually every Athenian

held that the substantive, material interests of the city came before the freedom of any individual. No text, whether conservative or progressive, displays any ambiguity about this value. Ostensibly progressive, Thucydides' Perikles remarks "When the whole polis is on the right course it is a better thing for each separate individual than when private interests are satisfied but the polis as a whole is going downhill" (2.60.2). More cautious and traditional than Perikles, Nikias claims that a person who cares for his own safety and property is still a "good citizen", because in his own interests he "would be most anxious that the city's affairs prosper too" (Thuc. 6.9.2, see also 6.12.2). Thucydides himself remarks that after Perikles' death the city suffered because politicians acted "in accordance with their personal ambition and personal gain" (2.65.7).

In Aristophanes' *Frogs*, Euripides says "I hate the kind of citizen who'll prove to be / Slow to assist his country, swift to harm her greatly / For his own good astute, but useless for the City's" (*Frogs* 1427-29). According to the conservative Xenophon (*Hell.* 1.7.21), Euryptolemos called it "disgraceful" to put the interests of his relatives over the interests of "the whole polis". The democrat Lysias, the oligarch Andokides, the contemporary speech in [Andokides] 4 all proclaim the priority of the community over individual concerns. Demosthenes claims, "if a *rhêtôr* is one of those speakers . . . who are shameless and have grown rich at your expense, I cannot be one, for I have never received anything from you and I have spent on you all but a fraction of my fortune" (21.189). Individuals constantly boast how much more they pay in taxes than required. As K. J. Dover notes, no modern person would do this: we boast of avoiding taxes.⁸ In court, defendants typically plead how much they have served the community. In Lysias a speaker asks the dikasts "to give whatever verdict you choose as to which of the [litigants] behaves better toward your city" (fr. 7 *Against Hippotherses*). Virtually every Greek understood this limitation on personal freedom. The ethical message of the first Greek text lies in the price Achilles pays for putting his own anger at being slighted ahead of his community's welfare. In early sixth-century Athens, the lawgiver Solon proclaimed to fellow citizens, "obey the public authorities, right or wrong" (fr. 30 West), and compelled them to take sides in civil strife. Demokritos wrote (Diels/Kranz *Fragmente* B 252),

One should think it of greater importance than anything else that the affairs of the polis are conducted well . . . For a polis which is conducted well is the best means to success. Everything depends on this, and if this is preserved everything is preserved and if this is destroyed everything is destroyed.

Classical Greece had no "heavy states", oppressing an alienated populace. In fact the anachronistic connotations of the word "state" argue that for classical Greece we should avoid it, in favor of polis or community, acting together in

⁸ *Greek Popular Morality in the Time of Plato and Aristotle*, Oxford 1974, pp. 175-76.

common self-interest. If for us rights are more potent than the state, in ancient Greece nothing was more potent than the community.

The priority of community interests explains not only the Athenians' lengthy obligation to military service, but also Athens' laws against "idleness", marrying a non-citizen, and certain forms of homosexuality and prostitution. A cluster of texts indicate that like modern vagrancy laws, the law against idleness (*argia*) was used against people who lacked any visible means of support and hence were suspected of theft. According to Herodotos, Solon took from Egypt Amasis's provision that "the failure to declare the source of one's livelihood or the inability to prove *that the source was an honest one* was punishable by death" (2.177). Isokrates (7.44) states that "want comes about through *argia*, and crime through want". Plutarch (*Sol.* 22.3) writes that "Solon ordered the Areopagos Council to examine into every man's means of livelihood, and punish the *argoi*". Some fourth-century evidence suggests a second purpose for this measure. As Dreizehnter argues in greatest detail, this evidence supports a link between *argia* and failing to maintain landed property.⁹ From a lost Lysianic speech in a case of *argia*, under the entry *ptômata elaiôn* ("fallen olive trees") the lexicographer Harpokration quotes "the fruit that has fallen from the trees or the trees themselves that have fallen by some chance" (fr. 100 Thal.). In context with *argia*, Diogenes Laertius (1.55) mentions the offense of wasting one's patrimony. *Argia* is linked with *paranoia* in Bekker *Anecdota Graeca* I 310.1, as part of the eponymous archon's judicial competence, which especially concerns the protection of estates. To this same goal, Athenian law specified the order of heirs: property was a family not an individual concern.

Finley and others cite Athens' marriage regulations as a prime example of the restrictions on personal freedoms. "Democracy did not necessarily entail an extension of rights, greater freedom, beyond those existing in oligarchies. On the contrary, Pericles' law of 451/0 . . . was much more restrictive than any other we know, in any Greek community" (Finley [n. 6 above], pp. 21-22 = 92-93). Pericles' law stipulated at a minimum that children from marriages of citizens with non-citizens were not citizens.¹⁰ Whether it outlawed such marriages is debated. At a minimum it made them highly undesirable, and largely unimaginable, as the main purpose of marriage was the production of legitimate heirs and only citizens could own land. By the 340s, an Athenian was fined 1000 drachmas for "living with" a foreign woman in marriage, and the woman was sold into slavery ([Dem.] 59.16).

Why did Athenian citizen men forbid marriages with foreigners, thus restricting their own freedom? The issue was a public one, pertaining to the bloodlines and citizenship of offspring. In Athens and other *poleis* citizenship was a privilege jealously guarded, especially as citizenship was far more participatory than in

⁹ A. Dreizehnter, "Nomos *argias*. Ein Gesetz gegen Müsiggang?", *AAAH* 26 (1978), pp. 371-86; see also A. R. W. Harrison, *The Law of Athens*, I, Oxford 1968, pp. 79-81, and Hunter (n. 5), p. 12.

¹⁰ [Arist.] *Ath. Pol.* 26.4, Plut. *Per.* 37.3, Ael. *Var. Hist.* 6.10, 13.24.

Rome or the modern world.¹¹ In addition, much evidence documents the Athenians' prejudice against foreigners and pride in their own lineage. Politicians are frequently attacked for alleged foreign descent. In Aristophanes' *Birds*, Exekestides insinuated himself onto the citizen rolls although a "Carian slave" (lines 11, 764-65, 1527); Akestor, nicknamed "Sakas" (an Asiatic people), "not being an Athenian, is forcing his way in" (lines 31-32). During the fifth century the Athenians came to think of themselves as autochthonous. The ancient, semi-mythical structures of phratry ("brotherhood") and *genos* ("clan") took their power from supposed blood ties. Perikles' measure did not regulate what adult male citizens could do. It did regulate the civic status of relationships and offspring. Unlike the many US city ordinances that until recently prohibited cohabitation, the Athenians did not outlaw living with or having children with a foreigner. Perikles himself lived and had children with the Milesian Aspasia. Such children, however, could normally not become citizens. Just so, because of the uncertain bloodlines of offspring, a citizen who discovered his wife in adultery was obliged by law to divorce her.

As for restrictions on homosexuality and prostitution, one important qualification to Athens' principle of unregulated personal conduct also serves to confirm it. Athenian law required that citizens selected for public office and also Assembly speakers have maintained certain standards of behavior. They must have performed the military service required of them, they cannot have abused their parents or squandered their ancestral estates, and they cannot have prostituted themselves — that is, as male prostitutes (see, e.g., Aeschin. 1.19). It is immediately apparent that when men guilty of these offenses sought a public role, their behavior ceased to be purely private. Demosthenes and others explain that bad conduct in private life might lead to bad conduct in governing the city.

It is to the advantage of the masses that those laws which are about private citizens are gentle and humane, while those laws regarding public matters are strong and harsh, for thus politicians can do least harm to you the masses (Dem. 24.193).

Even still, we shall see, outrageous personal behavior by politicians was often tolerated.

Finally, I address two issues recently raised concerning the legal regulation of private life at Athens. First, David Cohen has argued that even if Athens' lawcode did not directly regulate personal conduct, the phrasing of some laws was so vague (and, I add, the force of precedent so weak) that these "open-textured" measures

¹¹ See e.g. W. G. Runciman, "Doomed to Extinction: the *Polis* as an Evolutionary Dead-end", in eds. O. Murray and S. Price, *The Greek City from Homer to Alexander*, Oxford 1990, pp. 354, 357.

could be exploited to target it.¹² In the example Cohen discusses, the Athenians criminalized “impiety” (*asebeia*) by a legal statute that did not define that term, thus permitting wide latitude in prosecuting those whose actions or beliefs were inconsistent with community standards. Hence, Sokrates was prosecuted in 399 for “not believing in the gods of the city but in strange new spiritual beings, and in corrupting the youth” (the last charge in particular cannot have reflected statute law). In contrast with the modern liberal state, legally the Athenians could punish anyone whose religious views they found offensive.

But did they? Although Cohen’s general observations are entirely justified, day by day, the record shows, the Athenians never prosecuted anyone for his religious views. Pious but curious, open-minded, and remarkably unparanoid, the demos usually showed a broad tolerance for intellectual speculation, odd beliefs, and even disrespect toward the gods. Even though their commander Alkibiades was directly implicated in parodying the Mysteries in 415, the demos insisted on sailing out on campaign with him against Sicily. Occasional instances of public religious or intellectual anxiety complicate the picture and need to be evaluated.¹³ In several periods popular tolerance and fascination with intellectual innovation were offset by doubt and suspicion. Public attitudes were not always free of contradictions. Yet Sokrates himself provides the clearest indication of Athenian tolerance. For some seventy years the Athenians allowed Sokrates to say what he wanted, freely, in the agora and other public places, despite his open affection for Sparta (during the war with Sparta) and his scorn for Athens’ democracy. But in 404, some of Sokrates’ students helped overthrow that democracy, murdering some 1500 citizens to steal their money, notwithstanding their teacher’s longstanding claim – now patently outrageous – that he only advocated goodness and the highest virtue of the soul. Aeschines stated simply that the Athenians condemned Sokrates because he taught Kritias, one of these murderous tyrants (1.173). Furthermore, as Mogens Hansen has pointed out,¹⁴ even after this brutal regime was overthrown, Sokrates presumably went around Athens saying that democracy was a bad form of government and should be abolished (Plato *Apol.* 29c: “I shall never stop philosophizing and elucidating the truth”; 30b-c: “I am not going to alter my conduct, not even if I have to die a hundred deaths”). After 404 the Athenians realized that Sokrates was a dangerous public menace. However, the general amnesty of 403 forbade his democratic enemies from prosecuting him for complicity in murder. In consequence, he was (justly) convicted of being an impious, corrupting teacher of the type the demos had grown wary of since the 420s. He

¹² *Law, Sexuality, and Society. The Enforcement of Morals in Classical Athens*, Cambridge 1991, see especially ch. 8, “The prosecution of impiety in Athenian law”.

¹³ See my essay “Private Lives and Public Enemies: Freedom of Thought in Classical Athens”, in *Athenian Identity and Civic Ideology*, eds. A. Scafuro and A. Boegehold, Baltimore 1994, pp. 205-238.

¹⁴ *The Trial of Sokrates – from the Athenian Point of View*, Royal Danish Academy of Sciences and Letters, *Hist.-fil.-Medd.* 71, Copenhagen 1995, pp. 1-31.

chose to die, offering only a perverse defense to the charges brought against him, and proposing no serious alternative to the death penalty his prosecutors sought.

Finally, Virginia Hunter ([n. 3 above] ch. 4, “The politics of reputation: gossip as a social construct”) has argued that even if an Athenian was not directly punished for non-standard personal behavior, courtroom allegations of such misconduct could damage him in a case about other matters. Hence, Athenians could be punished for personal conduct, not by law but by the popular courts which thus possessed “censorial” powers.

Even though the Athenians had codes of public conduct which speakers could invoke, how seriously did the dikasts take allegations of bad conduct? Of course such allegations were included because orators hoped they would have an effect. Sometimes there was little else for dikasts to go on. But can we show the effects of this stuff on any convictions? While much gossip is attested in scrutinizes for office (*dokimasia*), trials, and election campaigns, there is reason to conclude that it did not often have serious consequences. In this respect court speeches resembled Athens’ comic theater. Athenians enjoyed hearing insults and scandals against fellow citizens. They voted according to their own sound judgment.

Probably the most dramatic exploitation of gossip occurs in Aeschines’ speech against Timarchos — always exhibit A for the power of gossip in Athens. In 346 the city made peace with Philip of Macedon, an issue over which Demosthenes and Aeschines then divided. Demosthenes’ associate Timarchos began a prosecution of Aeschines for his role in the peace negotiations. Aeschines countered by challenging Timarchos’s fitness to address the Assembly. Aeschines sought to establish that Timarchos had once been a male prostitute and hence was legally disqualified from speaking to the demos. He argues this charge by invoking a full range of disgraceful behavior: fancy foods, music girls, prostitutes, gambling (and thus “devouring his patrimony”), associating with sexual degenerates, refusing his mother a burial plot, failing to support his uncle, embezzlement, theft, bribery, sycophancy, buying offices, perjury, and above all, selling his body to men (e.g., 41-42, 52-57, 67, 95-96, 110-15, 131, 171, 194). As Hunter says (p. 104), the speech “resounds with cries of shame (e.g., 3, 26, 33, 40-42, 54-55)”.

Aeschines is explicit that his principal evidence for these many charges was Timarchos’s public reputation, which he says the dikasts all knew about. His opponents, he claims, “will never hush up the truth nor blot out Timarchos’s reputation (*phêmê*) in the city, a reputation which I did not make for him, but he did himself” (48). Aeschines says repeatedly that the demos had long known of Timarchos’s disgraces, vices, and offenses (e.g., 48, 110-11). He appeals to the dikasts, “remember the *phêmê* which you have been accustomed to hear” about Timarchos (130). A principal argument of the speech is that the Athenians should not necessarily judge Timarchos from what Aeschines says in court, but from their own long-standing knowledge (89-93, see also 152-54):

Let nothing be more credible in your eyes than your own knowledge and conviction regarding this man Timarchos . . . Give the verdict that is demanded by the longer time [than the present trial], and the truth, and your own knowledge.

In the Assembly meeting where an Areopagite discussed a resolution that Timarchos had introduced about the Pnyx, the demos laughed at various unintended double-entendres of a sexual nature, revealing that they knew about Timarchos's reputation (Aesch. 1.81-85).

Of course, Athenian speakers sometimes claim "you dikasts know . . ." not because the dikasts actually do know, but as a rhetorical ploy, to induce people into going along with the argument (see Arist. *Rhet.* 1408a 32-36, Ober [n. 6 above], pp. 149-50). However, Aeschines is so emphatic that the Athenians knew of Timarchos's unsavory past, that it is difficult to imagine that this line of argument was simply a tactic. Hunter must be right: "Aeschines' portrait of Timarchus [was] derived from a wealth of titillating gossip that had been in circulation since his youth" (p. 108). Rumor, gossip, and reputation thus play a major role in Aeschines' speech against Timarchos. And Timarchos was found guilty, reportedly by 30 votes.

Should we conclude that an Athenian's private life was a key factor in public business, and that rumor, gossip, and private reputation were powerful forces in shaping public opinion? Unarguably, Aeschines included this material because he thought it would help his case — indeed, it largely constitutes his case. This conclusion would not conflict with our previous hypothesis that the Athenians especially cared about politicians' personal lives. Just so, the *dokimasia rhêtorôn* was intended to uncover the moral character of public speakers Aeschines was virtually obliged to delve into Timarchos's vicious past.

Yet although the demos would have been entirely justified in rejecting any politician for reasons of bad character, Timarchos's career suggests that they often did not do so. Aeschines repeats that the demos had long been aware of Timarchos's disgraceful youth. He also mentions that during some fifteen years before Timarchos's trial in 346/5, he had served as Athens' ambassador to Greece (120), as an auditor (107), as a magistrate on the island of Andros (107), as inspector of foreign troops in Eretria (113), and as a member of the Council of 500 both in 361/0 (109) and in 347/6 when he went on the embassy to Philip. Virtually all of these offices required *dokimasiai*. The hypothesis to Aeschines' speech calls Timarchos "eminent in government, a public speaker (*dêmêgorôn*) and the author of more than 100 decrees". As we have seen, speaking in the Assembly (for example to propose decrees) was subject to a public scrutiny of morals. If Timarchos had led a life of corruption and everyone knew it, why had this not impeded his career? If he was widely known to have been a "male prostitute" did none of his opponents or enemies successfully raise this against him in some earlier scrutiny? In 343 Demosthenes himself notes that Aeschines' prosecution was political only:

As evidence of that, let me ask how long Timarchos had been a public speaker. A very long time; and during all that time Aeschines was in the city; yet he never took offense nor did he think the business terrible that a man of such character speaks, until he [Aeschines] visited Macedon [in 346] and sold himself (1.34).

Of course it is likely that Aeschines exaggerates Timarchos's wicked past and how much the demos knew of it. Yet if we take the orator at anything like his word, it follows that even in deciding questions of direct political concern to the community, most people did not take too seriously the rumors of Timarchos's youthful debaucheries, even while they were happily scandalized to hear them. In 346/5 Timarchos was convicted but a major political issue was at stake: Athens' relations with Macedon. Notwithstanding Aeschines' arguments, did the demos forbid Timarchos to speak because of his youthful sexual indiscretions, or because they were unsympathetic to Demosthenes' and Timarchos's sudden hostility to Macedon when Athens had just made peace? Despite frequent, even standard accusations that one politician or another was a *kinaidos*, a sexual degenerate, such gossip was typically disregarded by a majority of the demos, who went on supporting them.

Other *dokimasia* speeches are also full of shocking detail, as speakers try to show that their opponents were unworthy of public trust, for example by mistreating their parents — a legal offense. We cannot determine how often trials for mistreating parents occurred. However, when candidates for office were accused of this offense, it is never reported that they had previously been prosecuted for it. According to Lysias and his witnesses (31.9, 17-18, 20-22), a certain Philon did not return to Athens to help his city during the tyranny of the Thirty, but became a metic in Oropos, robbing elderly citizens who lived in the countryside. Even his own mother refused to trust him to take care of her burial, paying money to a stranger instead. Yet Lysias nowhere indicates that anyone bothered Philon until he decided to serve in the Council of 500. The comic poets repeatedly ridiculed the politician Kleonymos for throwing away his shield in battle. Despite their relentless pounding, however, this accusation does not seem to have interrupted Kleonymos's career. Isokrates funded only three trierarchies despite being very rich. He mentions no negative consequences at the hands of the demos. Scandalous conduct alleged in *dokimasiai* seems to have gone unregulated. This suggests that at least until a *dokimasia* or trial, gossip and other forms of community pressure were not especially effective means of social control.

The Athenians only became exercised about private conduct when it had significant political consequences. Before the parodies of the Mysteries and mutilation of the Herms on the eve of the Sicilian Expedition in 415, Thucydides says that young men had often defaced statues "when they were enjoying themselves after having had too much to drink" (6.28). We hear of no turmoil as a conse-

quence. The parallel is not inapposite. The demos took action only when offensive behavior was directly linked with major political issues.

The principal argument of my on-going freedom project is that an Athenian's freedoms were almost entirely unrestrained so long as he posed no substantive, material threat to other individuals or the polis. Apparent exceptions to this principle, regarding for example marriage or adultery, are few, and reflect modern perspectives rather than ancient realities which differently demarcated private and public. The Athenians regulated marriage and adultery because they cared deeply about the purity of Athenian citizen blood. They did not care what a person did: he could perfectly well live with a foreigner and have children with her. But those children – and any offspring of adulterous unions – could not be citizens. Athenians active in government were asked five questions about personal conduct that were never asked of private citizens – had they beat their parents, and so forth. To safeguard the community, military service was obligatory, although only by wealthier citizens. Perikles himself boasts how mild military service was. Confronted with substantive, material danger, the demos sometimes intervened, sometimes abruptly and with insufficient deliberation. Yet even those who appear unfairly treated did not challenge the prior interests of the community in which (the Athenians said) everyone shared. Even Plato's Sokrates endorsed the greater claim of the community, at the cost of his own life. In the *Crito* (51a-c) the "Laws" say to Sokrates,

Are you too wise to realize that your fatherland is more to be honored . . . than your mother, father, and other ancestors? . . . You must persuade your fatherland or do what it commands, and endure in silence what it orders you to endure, whether you are beaten or bound, whether you are led into war to be wounded or killed . . . for there justice lies.

Speech, thought, and conduct posing no material threat to the community or other citizens remained unregulated, and in guarding their common interests, the Athenians were much more tolerant of nonconformity than any modern state.

Conservative Athenians objected to the democratic value of "living as you like", without considering the balancing effects of the even more fundamental value that the community's interests must precede an individual's. It is doubly unhistorical to judge the Athenians' infringements on personal freedoms from the modern vantage point of rights and the prior importance of individuals to the state. Their laws protected the substantive, material interests of citizens or the city. Virtually every infringement of individual liberty responded to substantive, material dangers to other citizens or the community. Absent such dangers, the Athenians never doubted that in their private lives they were free, and so they were.