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DID THE ATHENIANS REGARD SEDUCTION AS A WORSE CRIME THAN RAPE?

Λυσίας ... ὁ σοφιστής ... (Demosthenes 59.21)

One of the most ingenious arguments in all of Attic oratory is to be found in the speech Lysias wrote for Euphiletus to deliver at his trial for the murder of Eratosthenes (Lys. 1.30–5). In his speech Euphiletus first describes to the court how his wife was seduced by Eratosthenes, then recounts how he discovered the affair, caught the adulterer in the act, and, despite an offer to pay compensation, slew him. Euphiletus defends his action by citing the law of the Areopagus that whoever kills an adulterer caught *in flagranti* with his wife cannot be convicted of murder. Euphiletus further points out that the same exemption applies to the man who catches someone seducing his *pallakē*. If the lawgiver regarded the seduction of a *pallakē* as so serious that it merited the death penalty, Euphiletus argues, he must have regarded the seduction of a wife as even more reprehensible, deserving a penalty worse than death.

Euphiletus then proceeds to claim that the lawgiver considered rape a far less serious crime than seduction. In support of his point, he has the clerk of the court read out a section from another law.[1] He singles out two provisions from this law, first, that the man who rapes (*αἰσχύνῃ βίᾳ*) a free man or a child shall pay only damages, and, second, that the man who rapes a woman shall be liable to the same penalty. From these provisions he concludes that the lawgiver thought that rapists merited a less severe penalty than did seducers for he punished the former merely with a fine, but the latter with death. Euphiletus' explanation for the difference between the penalties for the two offences is that while the rapist incurs the hatred of his victim, the seducer corrupts the very soul of the woman and gains greater control over her (*οἰκειοτέρας αὐτοῖς ποιεῖν*) than her husband has. The seducer thus gets the entire household under his control, making it impossible for the husband to know who is the father of his wife's children. The lawgiver obviously reasoned that such an atrocious crime deserves capital punishment.

We do not know if Euphiletus' argument convinced the court, but several modern scholars have judged it sound and have endorsed his conclusion that the laws of Athens regarded seduction as a crime more heinous than rape.[2] Such a verdict is

[1] It is uncertain what law Euphiletus cites in this passage. It may be the *dikē blabēs* (Dem. 21.43) or the *dikē biaion* (Harp. s.v. *βιαίων*).

[2] E.g. A. R. W. Harrison, *The Law of Athens* i (Oxford, 1968), p. 34 ('we can accept the broad point that paradoxically seduction was more severely dealt with than rape...'); S. Pomeroy, *Goddesses, Whores, Wives, and Slaves: Women in Classical Antiquity* (New York, 1975), pp. 86–7 ('Seduction was considered a more heinous crime than rape'); D. M. MacDowell, *The Law in Classical Athens* (London, 1978), p. 124; S. G. Cole, 'Greek Sanctions against Sexual Assault', *CP* 79 (1984), 97–113, p. 103 ('...it was believed that *moicheia* could be punished more severely than sexual assault'); F. Salviat and C. Vatin, 'La repression des violences sexuelles dans la convention entre Delphes et Pellana, le droit d'Athènes et les lois de Platon', in *Inscriptions de Grèce centrale* (Paris, 1971), 63–75, p. 75 ('la loi attique du IV^{e} siècle était plus dure contre la *μοιχεία* que contre le viol'); C. Carey, *Lysias: Selected Speeches* (Cambridge, 1989), p. 80. Several of these authors detect flaws in Euphiletus' argument, but none questions his overall conclusion. Cf. J. H. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig, 1905–15; repr. Darmstadt, 1966), pp. 432–3. L. Beauchet, *Histoire du droit privé de la république athénienne* i (Paris, 1897), p. 239, and D. Cohen, 'The Athenian Law of Adultery', *RIDA*^{3} 31 (1984), 147–65,

unwarranted. The argument presented by Euphiletus contains strong doses of both *suppressio veri* and *suggestio falsi*, and his conclusion is contradicted by several pieces of evidence.

Before examining the argument in detail, we ought to note the context in which it is found. Lysias did not write a legal textbook for his client; he wrote a speech for a man who was on trial for murder and had to convince the court of his innocence.[3] The best way to win the sympathy of the court was to argue that Eratosthenes had committed a crime so awful that he deserved nothing less than death. It was therefore in Euphiletus' interest to portray Eratosthenes' seduction of his wife as one of the worse crimes imaginable, an offence far more serious than rape because it posed a greater threat to a man's control over his household. The interpretation of Athenian statutes regarding rape and seduction presented in the speech is well suited to the purpose of strengthening Euphiletus' case, but it is obviously the slanted interpretation of an advocate, not the impartial analysis of a legal scholar.[4]

The first piece of sophistry in Euphiletus' argument is his misrepresentation of the import of the law about the competence of the Areopagus. The law is not primarily concerned with seduction and does not lay down penalties for that crime. Rather, it deals with lawful homicide, enumerating the circumstances in which a man kills someone but cannot be condemned for murder.[5] This is clear from Dem. 23.53–4, where the law is more fully discussed. There we learn that the provision pertaining to the man who kills someone caught having intercourse with his wife is only one of several in the law. Other provisions exempt from condemnation those who kill someone during an athletic contest and those who in ignorance kill another Athenian during battle. Although Euphiletus claims that the law imposes the death penalty on an adulterer caught in the act (Lys. 1.33, 47–50), it is obvious that this was not the intent of the law. All the law states is that the man who catches someone having intercourse with his wife and kills him cannot be condemned for murder. The law about the Areopagus does not inflict the death penalty on adulterers; it only specifies what constitutes lawful homicide.[6]

Second, Euphiletus suppresses the fact that the law about the Areopagus also exempted from condemnation for murder the man who killed someone caught in the

p. 153, note Euphiletus' conclusion without explicitly endorsing or rejecting it. J. J. Bateman, 'Lysias and the Law', *TAPA* 89 (1958), 276–85, p. 278 observes 'Lysias' argument ignores the existence of various legal courses and penalties that could be taken against an adulterer, and also the fact that a rapist could be punished by death'. However, Bateman does not analyse the argument in detail and his observation has been ignored in recent scholarship. Plutarch, *Solon* 23, states that the law of Athens treated seduction with greater severity than rape, but his view may be derived from Lysias' speech. Whatever his source, his view is vulnerable to the same objections that can be brought against Euphiletus' argument. Note, however, that Plutarch found this state of affairs paradoxical.

[3] Euphiletus' case was probably tried by the court at the Delphinium (Dem. 23.74; *Ath. Pol.* 57.3). For a discussion of the identity of the *ephetai* who sat in this court, see P. J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford, 1981), pp. 646–8.

[4] For a general treatment of the problems involved in using the Attic orators as sources for Athenian law, see H. J. Wolff, 'Methodische Grundfragen der rechtgeschichtlichen Verwendung attischen Gerichtsreden', *Opuscula Diversa* (Amsterdam, 1974), pp. 27–39. One should note that Euphiletus' case rests on the statute about lawful homicide. The strained interpretation of the law and the misrepresentation of the penalties for rape in 30–5 serve only to blacken Eratosthenes' deed, not to establish Euphiletus' innocence.

[5] For the categories of murder in Athenian law, see M. Gagarin, *Drakon and Early Athenian Homicide Law* (New Haven, 1981), pp. 3–4. I have borrowed the term 'lawful homicide' from Gagarin.

[6] Well argued by Cohen, 'Law of Adultery', pp. 149–50 with references to earlier literature.

act of raping his wife, daughter, mother, or *pallakē*. Euphiletus gives the impression that the law applied only to the murder of adulterers caught *in flagranti*, but such a narrow interpretation of the statute is unlikely to be correct. For, as Harrison observes, if it were permissible to kill the adulterer caught in the act, but not the rapist, 'it would clearly have been impossible for the husband exercising his right of immediate self-help to establish to his own satisfaction and in such a way as to be able to prove it subsequently that his wife had been seduced, not raped.'[7] In fact, Demosthenes' discussion of the law (23.54) indicates that it applied to anyone caught 'on top of' (ἐπὶ) a wife, mother, sister, daughter, or a *pallakē* kept for the purpose of bearing free children. Contrary to what Euphiletus implies, the exemption granted by the law was not restricted to those who killed seducers. It obviously covered the killing of all those, both rapists and seducers, who were caught having intercourse with a female relative of the killer.[8] That this broader interpretation of the statute is correct is proven by the myth of Ares' trial before the Areopagus. According to the myth, Ares caught Halirrhothius raping his daughter and killed him. When Halirrhothius' father Poseidon prosecuted Ares before the Areopagus, the court acquitted him.[9] The myth is clearly designed to illustrate how the provisions of the statute about lawful homicide worked in practice, and thus confirms our point that the statute applied to the murder of men caught raping a wife, daughter, mother, sister, or *pallakē*.[10]

Yet, despite these indications that Lysias' client is being less than truthful, S. G. Cole has come to the defence of Euphiletus' interpretation of the law about the Areopagus. Her argument needs to be quoted in full:

> I would like to suggest that the original law on intentional (*sic*) homicide was stated almost exactly as it stands in Demosthenes' text (23.53), that its intention was not to distinguish between rape and *moicheia*, but simply, as it states, to exonerate a *kyrios* who killed someone caught in intercourse with a woman under his protection. At some time between this law and the speech of Lysias, another law, one on sexual assault, was introduced, whether by Solon, as Plutarch says, or by someone else. This new law encouraged a distinction between rape as an act of violence, and *moicheia* as an act of choice. Because of this distinction, the original law came to be thought of as a law on *moicheia*, and when later writers such as Lysias, Aristotle, and Plutarch, refer to it, they describe it as a law on *moicheia*.[11]

This argument is as flawed as that of Euphiletus. To start off, there is no evidence that the 'original law', that is, the law about the Areopagus, 'came to be known as a law on *moicheia*'. Aristotle (*Ath. Pol.* 57.3) does not refer to it as a law on *moicheia*. All he does is to list some of the cases that come before the Areopagus sitting in the Delphinium. Plutarch (*Solon* 23) only states that Solon allowed the man who caught a *moichos* in the act to kill him. Furthermore, it is not clear how the new law brought about a re-interpretation of the law about the Areopagus. If the law about the Areopagus originally covered the murder of both seducers and rapists, it would have continued to do so unless it was amended or superseded by new legislation. But there is no indication in our sources that this ever happened, and Cole does not explain

[7] Harrison, *Law of Athens*, i. 34.

[8] Cohen, 'Law of Adultery', pp. 151–2. Unlike Euphiletus, whose argument is dictated by the rhetorical strategy of his speech, Demosthenes had no reason to distort the provisions of the law about lawful homicide since the question of rape as opposed to seduction was not relevant to his case against Aristocrates. *Ath. Pol.* 57.3 is not evidence that the law applied only to those who killed *moichoi*: see Cohen, 'Law of Adultery', p. 152 n. 13.

[9] Apollod. 3.14.2 (βιαζόμενος); Paus. 1.21.4 (αἰσχύνοντα). Cf. Hellanicus, *FGrHist* 323a F 22 and Dinarchus 1.86.

[10] Cf. Cole, 'Greek Sanctions', pp. 100–1.

[11] Cole, 'Greek Sanctions', p. 103.

how else such a change might have come about.[12] And if Cole really believes that the law about the Areopagus received a narrower interpretation sometime before Euphiletus delivered his speech, how does she circumvent Harrison's objection to such an interpretation of the law? But the most serious objection to her view, indeed the fatal one, is that it clashes with the evidence of Dem. 23.54, a text from the same period as, if not later than, Lysias 1. Nothing in the discussion of the law found in that passage suggests that the law was at the time known 'as a law about *moicheia*' and applied only to seducers caught in the act. Cole's plea on behalf of Euphiletus' fallacious interpretation of the law must be rejected.[13]

Euphiletus' third rhetorical misdemeanour involves *suppressio veri*. Euphiletus implies that the only legal remedy in cases of rape was a procedure that provided merely for the payment of damages. What he does not say is that rape qualified as an act of *hybris*.[14] Aristotle (*Rhet.* 1373b28–1374a17) informs us that *hybris* was an act of violence that brought dishonour on the victim.[15] The act of rape is in several places referred to by the verbs αἰσχύνειν and ἀτιμᾶν.[16] Since rape was an act of *hybris*, it could be prosecuted by means of a *graphē hybreos*.[17] We know that this action was an *agōn timētos*, in other words, an action where the successful prosecutor could propose any penalty he wished, including capital punishment, for the convicted criminal.[18] Of course, the prosecutor might propose a milder penalty, and the procedure also allowed the defendant to put forward an alternative penalty which would presumably be less severe than the one demanded by his opponent. But that is beside the point. The fact remains that the prosecutor could propose the death

[12] Cole's claim that the law about the Areopagus 'came to be thought of as a law on *moicheia*' conceals a fundamental misconception about Athenian law. In the absence of jurisprudence and a law of precedent, there could be no development of statutory interpretation of the sort she appears to suggest. All the Athenian courts did was to judge; they did not 'make law' by their decisions. In the Athenian legal system there was nothing similar to the *ius honorarium* of Roman law.

[13] Dem. 23 was delivered in 352/51 (D. H. *Amm.* 1.4). If the work of Lysias himself, Euphiletus' speech must have been composed several years before that. For a convenient summary of what is known about Lysias' life, see Carey, *Lysias*, pp. 1–3. We might also point out that if, as Cole plausibly maintains, the myth of Ares' trial illustrates the provisions of the statute about lawful homicide, then the broader interpretation of the statute was current in the late fifth century when Hellanicus recounted it and also late in the fourth century when Dinarchus alluded to it.

[14] For rape as an act of *hybris*, see Eur. *Hipp.* 1073; Hdt. 6.137; Plat. *Leg.* 874c; Aeschin. 1.15–17 (the law about *hybris* cited in the context of a discussion of sexual offences). Cf. N. R. E. Fisher, 'Hybris and Dishonour', *G&R* 23 (1976), p. 193 n. 44. K. J. Dover, *Greek Homosexuality* (Cambridge, MA, 1978), p. 36, claims that the rapist could not necessarily be prosecuted for *hybris*, but his argument is rightly questioned by Cole, 'Greek Sanctions', p. 99 n. 14.

[15] On this aspect of *hybris*, see Fisher, 'Hybris and Dishonour', *G&R* 26 (1979), 32–47.

[16] αἰσχύνειν referring to an act of rape: Lys. 1.32; Paus. 1.21.4. ἀτιμάζειν referring to an act of rape: Eur. *Hipp.* 885–6.

[17] One cannot argue that although rape was called *hybris* in ordinary language, the crime may have fallen outside the legal definition of the term. The Athenians never formulated such technical juristic definitions: see D. Cohen, *Theft in Athenian Law* (Munich, 1983), pp. 5–7. For a discussion of the nature of the offence subject to the *graphē hybreōs*, see M. Gagarin, 'The Athenian Law against *Hybris*', in G. W. Bowersock *et al.* (ed.), *Arktouros* (Berlin and New York, 1979), 229–36. One should note that rape certainly fits the definition of *hybris* provided by Aristotle in his *Rhetoric*, a work written in part for those composing speeches to be delivered in court.

[18] *Graphē hybreōs* as an *agōn timētos*: Dem. 21.47. On the *agōn timētos*, see Harrison, *Law of Athens* ii (Oxford, 1971), pp. 80–2. Death as a possible penalty for *hybris*: Lys. fr. 44 (Thalheim); Din. *Dem.* 23.

penalty for the convicted rapist, and the court could vote to impose it.[19] Here again we have found Euphiletus guilty on another count of *suppressio veri*. His failure to mention the possibility of prosecuting the rapist by means of a *graphē hybreos*, a procedure that allowed for the death penalty, gives the false impression that the only penalty available in cases of rape was a fine.

On the other hand, we have no certain knowledge about the penalty for conviction on the *graphē moicheias*. Since many *graphai* were *agōnes timētoi*, it is possible that the successful prosecutor on this charge could ask for the death penalty. This inference gains support from a passage in another speech of Lysias (13.68) where it is stated that the penalty for *moicheia* is death. Harrison, however, holds that this passage does not allude to the *graphē moicheias* but to 'the right of the husband to kill when he caught the offender in the act'.[20]

On the basis of what is known about the *graphē* for unjust imprisonment of an alleged seducer, Cole has suggested that capital punishment was not available for those convicted on a *graphē moicheias*.[21] If a man accused of seduction brought a *graphē* for unjust imprisonment against the *kyrios* of the woman whom he had allegedly seduced and lost his case, the law allowed the vindicated *kyrios* to do anything he wished to the *moichos* provided he did not use a knife ([Dem.] 59.66). Cole argues that this meant that the seducer could not be killed in this circumstance and has therefrom drawn the conclusion that the *graphē moicheias* is unlikely to have permitted a stiffer punishment. I am not certain that the phrase ἄνευ ἐγχειριδίου in the law about unjust imprisonment of an alleged seducer was inserted to prevent the killing of the adulterer. We should bear in mind that the punishment was to take place ἐπὶ ... τοῦ δικαστηρίου. The phrase may have been aimed at preventing the shedding of blood in the court and thereby incurring pollution.[22] Or it may have been aimed at prohibiting castration of the *moichos*, an act the Athenians considered inhuman and barbaric.[23] But even if the man who brought a suit on this *graphē* and lost could not be punished with death, the inference drawn from this statute about the *graphē moicheias* may not be correct. In sum, we have no reason to rule out the possibility that the man convicted on the *graphē moicheias* might be condemned to death. In fact, the little evidence there is appears to point in the other direction.

We can now present a summation of our case against Euphiletus' view that the laws of Athens treated seduction with greater severity than rape. Euphiletus attempts to mislead the court by claiming that the law of the Areopagus punished adultery with death, but this is not true. This law only pertained to lawful homicide and did not create an action against seducers that provided the death penalty for convicted *moichoi*. Euphiletus also neglects to mention that this law accorded the same exemption from condemnation to the husband who caught a man raping his wife.

[19] Harrison, *Law of Athens* i. 35, recognizes that rape could be prosecuted by means of a *graphē hybreōs*, but claims that the prosecutor in such a case could not demand the death penalty. He cites no evidence for his view which apparently rests on nothing more than an inference drawn from Euphiletus' assertion that seduction was punished more severely than rape. Cole, 'Greek Sanctions', p. 99, is unaware of the possible penalties for *hybris* and consequently does not see their implication for Eupiletus' argument.

[20] Harrison, *Law of Athens* i. 34–5. Harrison nevertheless thinks that the penalty for conviction on the *graphē moicheias* was death.

[21] Cole, 'Greek Sanctions', p. 104.

[22] For concern about avoiding pollution in the courts, see Antiphon 5.11.

[23] Hdt. 8.105–6. This idea was suggested to me independently by Professor R. Billows and Professor W. Greenwalt. For a discussion of other punishments inflicted on the adulterer, see D. Cohen, 'A Note on Aristophanes and the Punishment of Adultery in Athenian Law', *ZSS* 102 (1984), pp. 385–7.

Finally, Euphiletus passes over in silence the possibility of prosecuting a rapist on a *graphē hybreos*, a procedure that permitted the successful prosecutor to demand the death penalty. Contrary to Euphiletus' assertion, the laws of Athens punished rape with no less severity than they did seduction, and possibly more.

A similar attitude toward rape and seduction is evident in the law code of Gortyn.[24] That code imposes a penalty of one hundred staters on the free man who rapes a free person and double the amount on the slave who rapes a free person (column II, 2–7). The penalty for a slave who rapes another slave is five staters (column II, 9–10). The penalties for seduction are the same. If a free man seduces a free woman in the house of her father, brother, or husband, the penalty is one hundred staters (column II, 20–3). For the slave who seduces a free woman, the penalty is double, and for the slave who seduces another slave, five staters (column II, 25–8). The only exception is for the free man who is caught seducing a free woman in a house not belonging to her father, brother, or husband; in this case the penalty is only fifty staters (column II, 23–4). The fines for these penalties may have been less at Athens: Plutarch (*Solon* 23) reports that the penalty in Athens for the rape of a free woman was only one hundred drachmas.[25] Despite the difference in the amount of the fine for rape, both communities appear to have considered rape and seduction equally serious crimes. The evidence from Gortyn thus provides comparative support for the conclusions we have reached about the penalties for rape and seduction in Athens.

The exposure of the fallacies in Euphiletus' argument has methodological implications for the study of Athenian social history. Although scholars have long recognized that the Attic orators are often unreliable sources for contemporary events, they have generally trusted their statements as evidence for popular morality. Yet here too caution is required. Euphiletus' presentation of the Athenian statutes regarding rape and seduction is dictated by the rhetorical constraints of his case. It is not a reflection of widely held social attitudes.

One final question remains: why did Lysias think that Euphiletus could get away with this specious argument? From a woman's point of view, the argument is especially repulsive for it claims that the victim of rape, the woman who against her will is forced to have sexual intercourse, suffers less than the woman who is seduced. But the court that heard Euphiletus' case did not include any women among its members. On the other hand, the men who decided the case may have found his argument compelling. They, like Euphiletus, were the masters of their respective households and were concerned with maintaining control over their wives and children. From their point of view, Euphiletus had a point of sorts: the *moichos* did in a way pose a greater threat to their authority in the household and thereby to their honour, than did a rapist. While the rapist exercised power over a woman's body for just a short time, the *moichos* could win a long-lasting mastery over her soul. To the men who heard Euphiletus' case, this argument may have been quite seductive.

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[24] I cite from R. F. Willetts, *The Law Code of Gortyn* (*Kadmos* Suppl. 1; Berlin, 1967). However, I follow M. I. Finley, *Economy and Society in Ancient Greece* (New York, 1982), pp. 135–7, in seeing no distinction between the terms ϝοικεύς and δοῦλος and translate both as 'slave'.

[25] For a discussion of the various attempts to reconcile Plutarch's information with that found in Lys. 1.30–5, see Cole, 'Greek Sanctions', pp. 102–3.

APPENDIX

D. Cohen, following the lead of M. H. Hansen, has recently argued that *moichoi* were subject to *apagōgē* to the Eleven, a procedure that might result in the death penalty for the offender.[26] Cohen also claims to find an allusion to this procedure in Euphiletus' speech (Lys. 1.29).[27]

The *apagōgē* procedure is described in the *Constitution of the Athenians* (*Ath. Pol.* 52.1):

καθιστᾶσι δὲ καὶ τοὺς ἕνδεκα κλήρῳ, τοὺς ἐπιμελησομένους τῶν ἐν τῷ δεσμωτηρίῳ, καὶ τοὺς ἀπαγομένους κλέπτας καὶ τοὺς ἀνδραποδιστὰς καὶ τοὺς λωποδύτας ἂν μὲν [ὁμολογῶ]σι, θανάτῳ ζημιώσαντας, ἂν δ' ἀμφισβητῶσιν, εἰσάξοντας εἰς τὸ δικαστήριον, κἂν μὲν ἀποφύγωσι, ἀφήσοντας, εἰ δὲ μή, τότε θανατώσοντας...

An entry in Photius (s.v. οἱ ἕνδεκα) adds the qualification that only those caught in the act (ἐπ' αὐτοφώρῳ) were subject to this procedure.[28] Contemporary evidence also links this qualification with the procedure (Is. 4.28; Dem. 45.81). Not all types of criminals are subject to *apagōgē* to the Eleven, but only those classified as *kakourgoi*. The passages that explicitly provide information about this procedure list only three types of criminals under this unsavoury rubric: κλέπται, ἀνδραποδισταί, λωποδῦται.[29]

But Hansen has drawn attention to Aeschin. 1.90–1 and has claimed that it shows that *moichoi* were also categorized as *kakourgoi* and thus subject to *apagōgē* to the Eleven. We need to have the passage in front of us:

δέδεικται φανερὰ ὁδός, δι' ἧς οἱ τὰ μέγιστα κακουργοῦντες ἀποφεύξονται. τίς γὰρ ἢ τῶν λωποδυτῶν ἢ τῶν κλεπτῶν ἢ τῶν μοιχῶν ἢ τῶν ἀνδροφόνων ἢ τῶν τὰ μέγιστα μὲν ἀδικούντων, λάθρᾳ δὲ τοῦτο πραττόντων, δώσει δίκην; καὶ γὰρ τούτων οἱ μὲν ἐπ' αὐτοφώρῳ ἁλόντες, ἐὰν ὁμολογῶσι, παραχρῆμα θανάτῳ ζημιοῦνται, οἱ δὲ λαθόντες καὶ ἔξαρνοι γενόμενοι κρίνονται ἐν τοῖς δικαστηρίοις, εὑρίσκεται δὲ ἡ ἀλήθεια ἐκ τῶν εἰκότων.

Hansen claims that in this passage 'the procedure ἀπαγωγή... is lucidly discussed by Aeschines' and that Aeschines categorizes *moichoi* and *androphonoi* as *kakourgoi*.[30] But nowhere in the passage does Aeschines 'say explicitly or even imply that adulterers, killers and οἱ τὰ μέγιστα ἀδικοῦντες are all legally classified as

[26] Cohen, 'Law of Adultery', pp. 156–7; M. H. Hansen, *Apagoge, Endeixis, and Ephegesis against Kakourgoi, Atimoi, and Pheugontes* (Odense, 1976), pp. 44–5. Hansen's views about *apagōgē* have been criticized by M. Gagarin, 'The Prosecution of Homicide in Athens', *GRBS* 20 (1979), 317–22. Hansen responded in 'The Prosecution of Homicide: A Reply', *GRBS* 22 (1981), 21–30. Cohen's article exhibits no awareness of Gagarin's criticisms nor of Hansen's reply. The view that a *moichos* was a *kakourgos* and was thus subject to *apagōgē* was earlier put forward by Paoli, 'Il reato di adulterio in diritto attico', *SDHI* 16 (1950), 123–70, p. 152, and rejected by Harrison, *Law of Athens* i. 35 n. 1.

[27] Cohen's attempt in 'Law of Adultery', pp. 156–62, esp. p. 157, to detect an allusion to the *apagōgē* procedure in Lys. 1.26–9 must be rejected. Cohen notes the use of the verbs ἀμφισβητεῖν and ὁμολογεῖν in this passage and at *Ath. Pol.* 52.1, but this proves nothing. In the former passage the criminal Eratosthenes admits his offence to Euphiletus, a private citizen, whereas in the latter the criminal confesses to a board of magistrates. Eratosthenes' admission of guilt at Lys. 1.26–9 is a preliminary step in his attempt to convince Euphiletus to accept his offer of compensation. For the use of the verb ὁμολογεῖν in a similar situation, see Ar. *V.* 1417–25. Cohen's reconstruction of the law of adultery is likewise fanciful.

[28] Hansen, *Apagoge, Endeixis, and Ephegesis*, pp. 48–52, attempted to formulate a new definition of the phrase ἐπ' αὐτοφώρῳ, but this has been refuted by Cohen, *Theft*, pp. 52–7.

[29] Antiphon 5.9; *Ath. Pol.* 52.1; Lys. 10.7–10; Dem. 24.113; Dem. 54.24; Isoc. 15.90.

[30] Hansen, 'Prosecution of Homicide', pp. 22–3. The following discussion shows that Hansen's claim 'It is apparent that Aeschin. 1.90–1 and Arist. *Ath. Pol.* 52.1 are interdependent sources' is implausible.

kakourgoi.'[31] The passage hardly qualifies as a 'lucid' discussion of *apagōgē*. Indeed, neither the noun *apagōgē* nor the cognate verb *apagein* occurs in the passage. The technical term *kakourgoi* is likewise absent.[32] The role of the Eleven in the procedure is passed over in silence. And Aeschines omits *andrapodistai* from the list of those subject to the procedure, and does not mention the possibility of submitting a case initiated by *agagōgē* to a court in the event that the defendant denies his guilt. Aeschines' aim in this passage is not to discuss a particular legal procedure, but to make a more general point about the punishment of all types of serious criminals. The language he uses makes this certain: οἱ τὰ μέγιστα κακουργοῦντες, τῶν τὰ μέγιστα... ἀδικοῦντων. While the phrase οἱ μὲν ἐπ' αὐτοφώρῳ ἁλόντες ἐὰν ὁμολογῶσι, παραχρῆμα θανάτῳ ζημιοῦνται might appear to allude to one of the features of the *apagōgē* procedure, the next clause (οἱ δὲ λαθόντες καὶ ἔξαρνοι γενόμενοι κρίνονται ἐν τοῖς δικαστηρίοις) cannot since those who avoid being caught in the act are not subject to the procedure. If Aeschines were a student taking an examination on Athenian law and submitted 1.90–1 as an answer to a question about *apagōgē* to the Eleven, I doubt his examiner would give him even partial credit. Yet what is most striking is that in none of the passages where the procedure is explicitly discussed, sometimes with the accompaniment of the actual text of the law read out by the clerk, are *moichoi* listed as *kakourgoi*. Hansen's argument, resting as it does on no solid foundation of ancient evidence, topples, dragging down with it Cohen's interpretation of Lys. 1.29.[33]

[31] Gagarin, 'Prosecution of Homicide', p. 322 n. 60.

[32] While the noun κακοῦργοι could have a general meaning ('wrongdoers') as well as a narrower one (those subject to *apagōgē* to the Eleven), there is no evidence to show that the participle κακουργοῦντες ever had such a restricted meaning.

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