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RAPE AND ADULTERY IN ATHENIAN LAW

It is a truism of modern discussions of Athenian law and oratory that the Athenians regarded adultery as a more heinous offence than rape. This consensus has been challenged in a valuable paper by E. M. Harris.[1] But although Harris has successfully (at least in my view) placed in question a number of assumptions about this area of Athenian law and ethics, I wish to argue that the traditional position is in its broad outlines correct. In this as in so many aspects of Athenian law it is difficult to make firm statements. Firstly, for the Athenian system as a whole we lack evidence for many issues of legal prescription and procedure for the period before the restoration of the democracy, and our evidence is frequently lacunose even for the period after the restoration. As a result we are presented with a 'snapshot' of the Athenian system at a particular stage in its development and are rarely able to trace chronological developments in detail and frequently unable to trace them in broad outline. A further result of this 'snapshot' effect is a false impression of coherence. Legislative measures belonging to different periods are likely to present themselves as the result of an integrated design rather than the product of accretion. Finally, and most importantly, our sources distort. Occasionally they provide information on the laws and on legal procedure in passing, in order to contextualize an argument or narrative; but in general they are presenting us with information in an attempt to persuade. Their jurisprudence is therefore not objective but designed to produce specific effects as part of the process of persuasion. Nonetheless, a careful scrutiny of such evidence as is available will show that adultery was viewed more seriously than rape.

I begin with definitions. By 'adultery' I mean what the Greeks called *moicheia*. The translation is inexact, since there is good reason to believe that the Greek word was broader in its implications; not in terms of actions committed but in terms of the circumstances under which a sexual act constituted *moicheia*. For the term covered illicit sex with relatives other than a man's wife. This has been denied (by Cohen, followed recently by Todd),[2] but the evidence of [Dem.]59.67 is conclusive:

κατὰ δὴ τοῦτον τὸν νόμον γράφεται αὐτὸν ὁ Ἐπαίνετος, καὶ ὡμολόγει μὲν χρῆσθαι τῇι ἀνθρώπωι, οὐ μέντοι μοιχός γε εἶναι· οὔτε γὰρ Στεφάνου θυγατέρα αὐτὴν εἶναι ἀλλὰ Νεαίρας, τήν τε μητέρα αὐτῆς συνειδέναι πλησιάζουσαν αὐτῶι, ἀνηλωκέναι τε πολλὰ εἰς αὐτάς, τρέφειν τε ὁπότε ἐπιδημήσειεν τὴν οἰκίαν ὅλην· τόν τε νόμον ἐπὶ τούτοις παρεχόμενος, ὃς οὐκ ἐᾶι ἐπὶ ταύτηισι μοιχὸν λαβεῖν ὁπόσαι ἂν ἐπ' ἐργαστηρίου καθῶνται ἢ πωλῶνται ἀποπεφασμένως, ἐργαστήριον φάσκων καὶ τοῦτο εἶναι, τὴν Στεφάνου οἰκίαν...

It was under this law that Epainetos indicated him. He admitted that he had had the use of the woman, but denied being an adulterer; he said that she was not Stephanos' daughter but Neaira's, and that her mother knew that she was having relations with him, that he had spent

[1] See E. M. Harris, *CQ* 40 (1990), 370–77. S. C. Todd, *The shape of Athenian law* (Oxford, 1993) 276 is sceptical.

[2] D. Cohen, *RIDA* 31 (1984), 147ff., *Law, sexuality and society* (Cambridge, 1991) 98ff.; cf. Todd (cited n. 1 above) 277. The view taken in the text is that of U. E. Paoli, *SDHI* 16 (1950), 123–182, esp. 130ff. (= *Altri studi di diritto greco e romano* (Milan, 1976), 251–307, esp. 257ff.). That the effect of the broad definition of *moicheia* is to make the Athenian system radically different from the other systems known to us in its definition of non-violent illicit sex (as Cohen emphasizes), is not a compelling reason for normalizing the Athenian system. Moreover, it is to be stressed that our evidence for the definition of *moicheia* in other Greek states is minimal. The broad definition of *moicheia* in Athens is of a piece with the right which Solonian law granted to a father or brother to sell into slavery a daughter or sister found in illicit sex (Plut. *Sol.* 23).

a great deal of money on them, and that whenever he was in town he used to meet the expenses of the whole household; in addition he cited the law which forbids seizing a man as an adulterer with any women who sit in a brothel or parade publicly, and he said that this was what Stephanos' house was, a brothel...

There Stephanos imprisons and holds to ransom Epainetos of Andros for sexual acts involving a female, Phano, alleged to be Stephanos' daughter. Since the narrator locates the incident after Phano's divorce (as §69 makes clear) and before her (alleged) subsequent marriage (cf. §72), breach of the marriage bond appears to be ruled out.[3] It seems that Stephanos' action is based on his claim to be Phano's father. We are fortunate that the speaker Apollodoros, with the garrulity which makes him an invaluable source of information on some otherwise badly attested aspects of Athenian law, incorporates the details of Epainetos' defence in the private arbitration which led to an extra-judicial resolution of the dispute. Part of his defence is that the female in question is not Stephanos' daughter, the point being (in part) that Stephanos cannot therefore bring an action against him as a *moichos*. The obvious answer to Stephanos, if the law did not recognize sex with a man's daughter as actionable under the law dealing with *moicheia*, would be to insist on this fact. Epainetos' failure to make this obvious riposte suggests that Athenian law did recognize a father's rights as well as a husband's in cases of unsanctioned non-violent sex. Whether this represents a widening of the scope of the definition of and legal provision for *moicheia* with time, as is sometimes assumed, is difficult to say. With the exception of [Dem.]59 all texts which use the term *moicheia* and cognates appear to envisage breach of the marital relationship. None however purports to give the legal prescriptions relating to *moicheia* in their entirety, and it is entirely possible that in concentrating on marriage they are merely reflecting the most common context for *moicheia*. It is also difficult to determine the degree of affinity required for a man to take action under the prescriptions for *moicheia*. The surviving texts which indicate relationships deal with homicide law. Not only is the term *moicheia* not used, with the result, as Cohen[4] has rightly emphasized, that the use of this evidence in the context of definitions of *moicheia* is potentially misleading; in addition, this tells us nothing about other laws dealing with *moicheia*. I shall return to this issue at the end.

Rape differs from adultery in a number of respects. The presence or absence of violence is the most important discriminator. From numerous texts of the classical period it is clear that *moicheia* involves persuasion. Moreover, whereas *moicheia* is always committed upon (though with the consent of) women, rape of both males and females was covered by law (unlike British law, which until recently recognized only the rape of females).

I return to the issue of the seriousness of adultery and rape under the Athenian system. Harris has rightly called into question one of the most important pieces of evidence in support of the traditional view. Euphiletos in Lysias 1 asserts that the law punishes *moichoi* with death, while for rapists the penalty is pecuniary:

ἀκούετε, ὦ ἄνδρες, ὅτι κελεύει, ἐάν τις ἄνθρωπον ἐλεύθερον ἢ παῖδα αἰσχύνῃ βίαι, διπλῆν τὴν βλάβην ὀφείλειν· ἐὰν δὲ γυναῖκα, ἐφ' αἷσπερ ἀποκτείνειν ἔξεστιν, ἐν τοῖς αὐτοῖς ἐνέχεσθαι·

[3] Cohen, 1991 (cited n. 2 above) 108–9 suggests that Stephanos' action could be based on a fraudulent misrepresentation of the divorced Phano as still married. This is unlikely to be the case. In a narrative which emphasizes Stephanos' duplicity, it would be remarkable if this falsehood went unnoted. It is equally surprising that there is no attempt on Epainetos' part to assail the fraudulent claim. Indeed §69 (where Phano's divorce is introduced in a matter-of-fact way) suggests that Phano's situation was familiar to all parties.

[4] Cohen, 1984 (cited n. 2 above) 151, Cohen, 1991 (cited n. 2 above) 104.

οὕτως, ὦ ἄνδρες, τοὺς βιαζομένους ἐλάττονος ζημίας ἀξίους ἡγήσατο εἶναι ἢ τοὺς πείθοντας· τῶν μὲν γὰρ θάνατον κατέγνω, τοῖς δὲ διπλῆν ἐποίησε τὴν βλάβην.

You hear, gentlemen, that it prescribes that if anyone forcibly shames a free man or boy he is liable to double the damages. If a woman, in those cases where it is permissible to kill, he is liable to the same penalty. Which shows, gentlemen, that he considered those who use force deserving of a lesser penalty than those who use persuasion. For the latter he condemned to death, while for the former he doubled the damages.

Though this formulation has been accepted by many modern scholars,[5] including the present writer, at the very least it oversimplifies the picture. That the *dike biaion*, available in cases of rape, prescribed damages for the victim (where this was an adult male) or for *kyrios* if the victim was a female or male minor is incontrovertible. On this Lysias' quotation from the law is explicit. His distortion consists in suppressing less lenient punishments which a rapist might suffer. As Harris notes,[6] the text on which Euphiletos relies for his distinction is not concerned with definitions of *moicheia* but with justifiable homicide. It has been pointed out that it would be difficult on many occasions for the aggrieved party to determine whether rape or *moicheia* was taking place.[7] If a man caught another in bed with a female relative it would be easy to distinguish rape only if physical violence had been used; if only threats of violence had been used, there would be no way to distinguish the rapist from the *moichos*. That a distinction is problematic does not however mean that the law could not draw it. More to the point is Harrison's observation that the law signally fails to distinguish between adultery and rape.[8] The text is cited at Dem.23.53–4. It reads:

ἐάν τις ἀποκτείνῃι ἐν ἄθλοις ἄκων, ἢ ἐν ὁδῶι καθελὼν ἢ ἐν πολέμωι ἀγνοήσας ἢ ἐπὶ δάμαρτι ἢ ἐπ' ἀδελφῆι ἢ ἐπὶ θυγατρὶ ἢ ἐπὶ παλακῆι ἣν ἂν ἐπ' ἐλευθέροις παισὶν ἔχηι, τούτων ἕνεκα μὴ φεύγειν κτείναντα.

If someone kills involuntarily in a contest, or catching him on the road or unwittingly in war, or with his spouse or sister or daughter or a concubine whom he keeps for free children, on these counts he is not to be exiled.

There is here no attempt to define different derelictions. A man may be killed, if he is caught 'with/at'[9] the wife, daughter, mother, sister or concubine of another. It is clear, though not stated explicitly, that what is envisaged by the law is sexual intercourse.[10] The failure to specify the nature of the offence (whether achieved by

[5] See the citations of Harris (cited n. 1 above) 370 n. 2.

[6] Harris (cited n. 1 above) 371.

[7] A. R. W. Harrison, *The law of Athens* I (Oxford, 1968), 34; cf. Harris (cited n. 1 above) 372.

[8] Harrison (cited n. 7 above) 34.

[9] Probably not 'on top of', *pace* Harris (cited n. 1 above) 372, which would effectively narrow the law to cases involving the missionary position. Moreover, it is unlikely that Euphiletos in Lys. 1.24 would tell us so circumstantially that he found the alleged adulterer *lying next to his wife* (*οἱ μὲν πρῶτοι εἰσιόντες ἔτι εἶδομεν αὐτὸν κατακείμενον παρὰ τῆι γυναικί, οἱ δ' ὕστερον ἐν τῆι κλίνηι γυμνὸν ἑστηκότα*, 'those of us who entered first still saw him lying next to my wife, while those who came in after saw him standing naked on the bed'), if one of the laws on which he proposes to base his defence was generally understood to mean that the perpetrator should be *on top of* the female. Better is Paoli's 'presso la moglie' (cited n. 2 above) 127 = 254. I take it that the prepositional phrase expresses the circumstances ('at'), as in *ἐπ' αὐτοφώρωι λαβεῖν*, rather than the position. See also next note.

[10] Interestingly the law does not specify that sex should have been completed or even that it should be in progress when the man is caught. There is moreover no indication that the couple should be naked or partly clothed (though Lysias in speech 1 feels obliged to provide this information; see preceding note). It is of course always possible, since Greek laws notoriously rely on common sense interpretation ('the man on the Clapham omnibus' approach) that sexual

violence or persuasion) means that a defence could probably be offered under this clause of Drakon's law irrespective of whether the dead man was a rapist or a seducer. This remained theoretically true not only in the age of Drakon but also throughout the classical period, since the law remained in force.

It is also probable, as Harris rightly stresses,[11] that the rapist could be prosecuted under a *graphe hybreos*. We have of course no single instance of such a prosecution. But given that the verb *ὑβρίζειν* is used of rape, that with the exception of a single action brought under unusual circumstances and rapidly withdrawn[12] the actual or potential cases of *hybris* known to us involve physical force, and that the *graphe hybreos* appears to have been available for a wide variety of offences, it is exceedingly likely that rape could be pursued as *hybris*. We cannot now gauge the prospects for success. But since the *graphe hybreos* was a *timetos agon*, it was open to the prosecutor to propose the death penalty. If he could convince the jurors, the perpetrator would be killed.

It is reasonably clear therefore that Lysias is guilty at least of a distortion. He also suppresses the alternative remedies available to the aggrieved party in cases of *moicheia*, as has been observed. The aggrieved male could subject the *moichos* to physical abuse, or he could hold him to ransom, or bring a *graphe moicheias*.[13] He was not obliged to kill, as Euphiletos would have us believe. We do not know the penalty under the *graphe moicheias*. But the possibility of financial reparation further erodes the neat distinction between rape and *moicheia* which Lysias creates. This is presumably why he cites the law on homicide rather than the law or laws on *moicheia* to prove his point. The latter would have exposed his distortion of the legal position.

However, to argue that a distinction is exaggerated is not to invalidate the distinction altogether. It can be shown that the extreme position of Euphiletos in Lys. 1 rests on a real distinction drawn by the Athenians. To demonstrate this it will be necessary to examine in greater detail the penalties for the *moichos* and the attitudes to women involved in rape and in *moicheia*.

The law on homicide cited at Lys. 1.30 is not in fact the sole support for Euphiletos' defence. After his account of the capture and evasive reference to the killing of the alleged seducer Eratosthenes, Euphiletos says (1.28): *Πρῶτον μὲν οὖν ἀνάγνωθι τὸν νόμον* ('first of all, read out the law'). That this is the law which justifies his killing of Eratosthenes appears inescapable, from the introduction of 'the law' (*τὸν νόμον*,

intercourse begun or completed is to be understood. More probably in a society which discouraged contact between unrelated males and females the presence of a man alone with a decent woman offers a *prima facie* case for assuming that illicit sex is intended or in progress.

[11] Harris (cited n. 1 above) 373; cf. Todd (cited n. 1 above) 277 and Paoli (cited n. 2 above) 168f. = 294f.

[12] Dem. 45.4, Apollodoros brings a *graphe hybreos* against Phormion for marrying his mother. Since the case never came to court, we do not know how Apollodoros defined the alleged *hybris* and we can only guess at the arguments Apollodoros might have used to induce the jurors to accept his definition of the alleged actions. He does however state that he brought this action because procedures for private suits had been temporarily suspended. The only certain trial for *hybris* known to us, Isai. 8.41 (alleged wrongful imprisonment with the intention of bringing about the disfranchisement of the victim, presumably by preventing him from performing military service or discharging a debt to the treasury) involves the use of force (the treatment of this instance by O. Murray, in *Nomos: studies in Athenian law, politics and society*, Cartledge-Millett-Todd, (ed.), (Cambridge, 1990) 141, places too much emphasis on *atimia* to the detriment of the element of force). For other possible actions for *hybris* (and threats to bring such an action) see N. R. E. Fisher in *Nomos: studies in Athenian law, politics and society* (cited above) 125–6.

[13] See Harrison (cited n. 7 above) 32f. Whether the *graphe hybreos* was also available in cases of *moicheia* (as Harrison 35 supposes) is not clear.

not τοῦτον τὸν νόμον), which suggests that its authority in this context is self-evident, from the position of the citation immediately after the narrative, and from the fact that the speaker goes on immediately afterward (§29) to state that death is the statutory penalty for adultery. This is almost certainly not the same law which is quoted in §30. Firstly, the law in §30 is introduced with the words ἀνάγνωθι δέ μοι καὶ τοῦτον τὸν νόμον ⟨τὸν⟩ ἐκ τῆς στήλης τῆς ἐξ Ἀρείου πάγου ('please read out this law too from the column on the Areopagos'). καί indicates that this law is cited in addition to that cited in §28; this is not a repetition (a very rare event in the orators in itself). The specification of the location of the law points in the same direction, since one expects further details of a law to be given at the time of its first citation, as is normal practice. The only alternative is to suppose that the word νόμος is used in §§29 and 30 of two distinct clauses in the same law. But since, as we know from Demosthenes 23.53–4, the reference to the killing of a man caught with a female relative was a single brief mention in the homicide law, not a feature developed over several clauses, this alternative appears to be ruled out.

If the law cited in §28 is not the homicide law, what is it? It has been suggested, and is still suggested by Todd,[14] that the law is that dealing with *kakourgon apagoge*. Harris seems to me to have disposed conclusively of the possibility that *moichoi* were classed as *kakourgoi*.[15] The only passage which can plausibly be cited in support of this view is (Aischin. 1.90f.). The text reads:

δέδεικται φανερὰ ὁδός, δι' ἧς οἱ τὰ μέγιστα κακουργοῦντες ἀποφέυξονται. 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.

A clear way has been revealed whereby those guilty of the greatest wrongs will escape punishment. For what mugger or thief or adulterer or killer or any other of those who commit the most serious wrongs but do so in secret will be punished? For any of these who are caught in the act are punished with death at once if they confess, while those who go undetected and deny their guilt are judged in court and the truth is discovered on the basis of probability.

That it lists the *moichos* along with thieves and *lopodytai*, who were certainly classed as *kakourgoi*, is of doubtful significance, since it makes no mention of *apagoge* and does not use the term *kakourgos*. Since it is unlikely that the law dealing with *kakourgoi* listed all categories of *kakourgos*,[16] in principle there is no reason why *moichoi* could not be included in the term. However, it is also likely that there was a general understanding of the types of malefactor who could be so classified, and as Harris stresses no text which explicitly speaks of *apagoge* or *kakourgoi* ever mentions *moichoi*. In support of the view that Aischines' discussion may be taken as a reliable statement on the categories of offender covered by the term *kakourgos*, Hansen has stressed Aischines' knowledge of Athenian law.[17] But in fact the passage is inaccurate in at least one important respect. Although some of the malefactors who were classified as *kakourgoi* could be killed with impunity under Drakon's provision for justifiable homicide,[18] not all could. Moreover, whereas *moichoi* could be killed on the spot, the *Ath. Pol.* tells us that as a class *kakourgoi* were liable to summary arrest and referral to the Eleven; if they then confessed, they were liable to summary execution.[19] Clearly the law or laws dealing with *apagoge kakourgon* did not empower the

[14] D. Cohen, 1984 (cited n. 2 above) 155ff., Cohen, 1990 (cited n. 2 above) 110ff., Todd (cited n. 1 above) 276.
[15] Harris (cited n. 1 above) 376f.
[16] M. H. Hansen, *GRBS* 22 (1981), 22f.
[17] M. H. Hansen, *GRBS* 22 (1981), 26.
[18] See [Dem.] 23, quoted above.
[19] Arist. *Ath. Pol.* 52.1.

individual who seized a *kakourgos* to kill him as an alternative to handing him over to the Eleven. Aischines' παραχρῆμα θανάτωι ζημιοῦνται is therefore at best misleading.

However, even if we accept that *moichoi* were subject to the procedure of *kakourgon apagoge*, it is exceedingly unlikely that the law governing this procedure is cited in Lys. 1. Since Euphiletos' point is that in killing Eratosthenes he acted as required by law, and since he cites the law which authorized his action, it is most unlikely that he is referring to the law on the *apagoge* of *kakourgoi*, which neither required nor permitted the killing of *kakourgoi*.

If the law cited at Lys. 1.28 is not that which deals with *kakourgoi*, the only obvious alternative is a citation from the law (or a law, if there was more than one) specifying procedure in cases of *moicheia*. That the law (or laws) dealing with *moicheia* specified procedures to be taken by the aggrieved party, as was the case with most Athenian laws, is clear from [Dem.] 59.87, which lays down the action to be taken by a husband after catching his wife with a *moichos*. If we are correct in detecting a reference to *mocheia* law at Lys. 1.28, then we can be sure that it did specify killing as an option open to the aggrieved party. This agrees with the evidence of Plutarch *Sol.* 23, who states that Solon gave the aggrieved party the right to kill the *moichos* (μοιχὸν μὲν γὰρ ἀνελεῖν τῶι λαβόντι δέδωκεν). We can also be sure that *moicheia* law specified other penalties, which Lysias elects not to mention. However, the important point is that homicide was explicitly allowed as a legitimate procedure in the case of *moicheia* (parallel to abuse, prosecution etc.), not merely as a defence under homicide law. From Euphiletos' insistence in §29 that Eratosthenes confessed to being a *moichos* immediately after the citation of the relevant clause of the law, we should probably conclude[20] that it was a precondition for the exercise of this right under the *nomos moicheias* that the individual apprehended should not only be taken in the act but should also admit to the charge. This would explain the inclusion of *moichoi* among those who could be killed if they confessed in Aischin. 1.90. In this respect Aischines is right to include *moichoi* along with *kakourgoi*. Both categories were subject to execution without trial if they admitted their guilt. Aischines distorts only in combining summary execution under the self-help procedure allowed under *moicheia* law (and under the homicide laws of Drakon) with that carried out by the Eleven in the case of *kakourgoi* who confessed after being caught in the act.

There is thus a significant difference between *moicheia* and rape in post-Drakonian legislation. With *moicheia*, the right to a defence allowed under homicide law was further reinforced by subsequent legislation, which listed the right to kill alongside other remedies available to the aggrieved male. In contrast, Solonian legislation dealing with rape specified damages to be paid to the victim or the *kyrios*. There was no supplementary enactment specifying the right to kill. In this respect post-Drakonian legislation did treat *moicheia* as a more serious crime. It is particularly important in this context to differentiate between the possibility of execution resulting from prosecution for rape under the *graphe hybreos* (conditional upon the jury accepting the extreme sanction proposed by the prosecutor), and the formally granted right to kill *without trial* and without reference to any state official or body in the case of the *moichos*.

Probably the right to kill the rapist was still available under the letter of the homicide law of Drakon. But was this a realistic option in the classical period? It is

[20] *Pace* C. Carey *Lysias, selected speeches* (Cambridge, 1989) 75, who errs in concentrating on the law of justifiable homicide, not the law on *moicheia*.

important to note the line of defence taken by Euphiletos in Lys. 1. The law on *moicheia* is given pride of place, while the homicide law is cited by Euphiletos only as a supplementary proof of his right to kill, and to emphasize the seriousness of *moicheia*. This suggests that a defence based on homicide law, together with a claim that the dead man had committed rape, would be unlikely to succeed in practice. Even in the case of *moicheia*, the killer may have found the jury lukewarm in its sympathy, since it would appear that by the classical period the use of ransom had become the most common remedy against *moichoi*.[21] But the claim that the dead man was a *moichos* evidently offered firmer ground for a defence. We may perhaps go further. We have no text from the classical period, beyond the homicide law, which speaks of the right to kill the rapist. In contrast, we do have references to the right to kill the *moichos*. Sometimes the *moichos* is merely cited *exempli gratia* with reference to justifiable homicide.[22] Sometimes a specific point is being made which could not be applied to the rapist.[23] But it is striking that it is the *moichos*, never the rapist, who is cited. Nor, with the exception of the text of Drakon's law, do we get vague references to the right to kill someone caught 'at/with' one's wife etc. in the classical period. It would seem therefore that the homicide law was generally taken in practice as enshrining the right to kill *moichoi*. In this respect the impact of the post-Drakonian legislation dealing with *moicheia* and rape was probably to narrow the definition of the phrase *ἐπὶ δάμαρτι*. An alternative explanation is simply that the code of Drakon acknowledged no distinction between adultery and rape, and that this distinction begins with the code of Solon. At any rate, the letter of the law would still allow a defence on the generic ground that a man was caught 'at/with' one's wife etc. But in the Athenian context a defence based on the letter of the law was not necessarily a strong defence.

The impression that *moicheia* is regarded as a more serious offence is reinforced by a consideration of the alternatives to homicide allowed under the *nomos moicheias*. One of these, it appears from Lys. 1.48, was to abuse the *moichos*.[24] As an alternative to death this was probably not without its attractions to the *moichos* caught in the act. But it was not a light penalty. In a society like our own which places less premium on public face it is difficult to grasp the severity of this sanction. But the effect of this clause in the law was to deprive the *moichos* of the sanction of the *graphe hybreos* when subjected to acts which normally would be classed as *hybris* and which were

[21] Cf. Carey (cited n. 20 above) 60 n. 5.

[22] Cf. Arist. *Ath. Pol.* 57.3 *ἐὰν δ' ἀποκτεῖναι μέν τις ὁμολογῇ, φῇ δὲ κατὰ τοὺς νόμους, οἷον μοιχὸν λαβὼν ἢ ἐν πολέμωι ἀγνοήσας ἢ ἐν ἄθλωι ἀγωνιζόμενος, τούτωι ἐπὶ Δελφινίωι δικάζουσιν.*

If someone admits homicide but claims that he killed legally, for instance having caught a *moichos* or in war through ignorance or in an athletic competition, he is tried at the Delphinion.

[23] Cf. Xen. *Hieron* 3.6 *οὐ μὲν δὴ λέληθεν οὐδὲ τὰς πόλεις ὅτι ἡ φιλία μέγιστον ἀγαθὸν καὶ ἥδιστον ἀνθρώποις ἐστίν· μόνους γοῦν τοὺς μοιχοὺς νομίζουσι νηποινεὶ ἀποκτείνειν, δῆλον ὅτι διὰ ταῦτα ὅτι λυμαντῆρας αὐτοὺς νομίζουσι τῆς τῶν γυναικῶν φιλίας πρὸς τοὺς ἄνδρας εἶναι.*

Not even cities are unaware that friendship is the greatest boon and pleasure for mankind. At any rate, they see fit to kill only *moichoi* with impunity, evidently because they consider them defilers of the affection of wives for their husbands.

[24] Lys. 1.48 *[οἱ νόμοι] κελεύουσι μέν, ἐάν τις μοιχὸν λάβηι, ὅτι ἂν βούληται χρῆσθαι.*

[the laws] prescribe that it anyone catches a *moichos* he should treat him as he pleases.

For punishments see C. Carey, *LCM* 18 (1993), 53ff. It is conceivable, but unprovable, that the right to kill granted under *moicheia* law rested on this clause allowing physical maltreatment at will.

normally actionable even when committed against slaves. The existence of the *graphe hybreos* confirms the impression given by many classical sources that personal *time* was important not only to the individual but also to society at large. But under the *nomos moicheias* one citizen was granted the right to commit *hybris* against another. This would always be done in front of witnesses, and would therefore involve public humiliation. In certain circumstances the degree of publicity was increased. For those who were falsely imprisoned and held to ransom as *moichoi* the law allowed the *graphe adikos eirchthenai hos moichon*, which if successful freed the individual imprisoned from the obligation to pay the ransom agreed. If it failed, the aggrieved male had the right to subject the *moichos* to physical abuse in front of the court.[25] Although the principle of self-help remained firmly rooted in Athenian law (the right to *apagoge* in appropriate circumstances, the right to kill, the right to distrain on property under certain circumstances), only in the case of *moicheia* did this include the right to physical abuse. Equally unusual was the right to hold the wrongdoer to ransom. It would of course be wrong to conclude from this that the Athenians regarded *moicheia* as the most serious offence of all. But it remains significant that no such rights were granted in the case of rape.

It is also important to note the different treatment of women in cases of *moicheia* and rape. In some cultures rape and adultery are regarded as equally damning for the woman involved. A woman who is penetrated by a male outside marriage is unchaste, whether or not she consents. There is no reason to suppose that an Athenian would take this view. We do of course find terms such as αἰσχύνειν used of rape. Rape involves a loss of τιμή. But it is important to bear in mind the difference between the objective sense of τιμή and the ambiguity of our term 'honour', which can be both subjective ('chastity') and objective ('face'). Rape shames in the Greek context, since it involves humiliation. But it does not compromise the subjective chastity of the victim. There is no evidence to suggest that a man felt obliged to put aside a wife who had been raped. Nor do we have evidence for any other sanction against the victim. On the other hand, the penalties for a woman taken with a *moichos* were severe. She was barred from the public temples, and if she ignored the bar could be beaten by anyone with impunity; she was also banned from wearing any kind of ornament.[26] Since religion was the only area of Greek life in which a woman could approach anything like the influence of a man, this was a very severe sanction indeed, the nearest equivalent in female terms to *atimia*. Moreover, where the woman was married her husband was compelled to divorce her on pain of *atimia*. Any attempt to determine the attitudes to adultery and rape must take account of this dimension also.

If we accept that *moicheia* was regarded as a more serious offence than rape, we must attempt to answer the question: *why*? Euphiletos in Lys. 1 offers two

[25] [ὁ νόμος] κελεύει, ἐάν τις ἀδίκως εἴρξῃ ὡς μοιχόν, γράψασθαι πρὸς τοὺς θεσμοθέτας ἀδίκως εἱρχθῆναι, καὶ ἐὰν μὲν ἕλῃ τὸν εἴρξαντα καὶ δόξῃ ἀδίκως ἐπιβεβουλεῦσθαι, ἀθῷον εἶναι αὐτὸν καὶ τοὺς ἐγγυητὰς ἀπηλλάχθαι τῆς ἐγγύης· ἐὰν δὲ δόξῃ μοιχὸς εἶναι, παραδοῦναι αὐτὸν κελεύει τοὺς ἐγγυητὰς τῶι ἑλόντι, ἐπὶ δὲ τοῦ δικαστηρίου ἄνευ ἐγχειριδίου χρῆσθαι ὅ τι ἂν βουληθῆι.

[the law] prescribes that if anyone falsely imprisons another as an adulterer the victim may indict him before the Thesmothetai for false imprisonment, and that if he secures the conviction of the man who imprisoned him and it is decided that he has been the victim of a dishonest plot, he is liable to no penalty and his sureties are quit of their bail; however, if it is decided that he is an adulterer, the law prescribes that his sureties are to deliver him to his captor, who may treat him as he chooses in the court, short of using a knife.

[26] Cf. [Dem.] 59.87, Aischin. 1.183.

explanations:[27] (i) while the rapist defiles only the body of the woman, the seducer corrupts the mind as well; (ii) the existence of a clandestine relationship makes it difficult to determine the paternity of all children of the woman in question. The first of these finds an echo in Xenophon's *Hieron*,[28] where it is claimed that throughout the cities of Greece only *moichoi* may be killed with impunity, the reason being that they corrupt a woman's affection for her husband. This is erroneous of course; in Athens at least justifiable homicide extended to others beside *moichoi*, and not all Greek cities allowed the killing of *moichoi*. But in essence it agrees with Lysias in placing the emphasis on the corruption of the mind of a married woman. As an explanation of Athenian law it has little to recommend it. Firstly, it places too much emphasis on the marital relationship. *Moichoi* were certainly included even under Drakon's homicide code (if not exclusively) which allowed the killing of a man taken 'with'/'at' certain categories of female relative, and this extended beyond the marital bond. Subsequent legislation on *moicheia* certainly, as was argued above, allowed for action to be taken against a man who seduced other relatives besides the wife. Equally important, the explanation is psychologically wrong with reference to the attitude of the Athenian laws to marriage. Although we have evidence from the archaic period onwards that personal relationships between husband and wife could be very warm, the purpose of marriage was not to provide a man with a soulmate but to provide the *oikos* with heirs. The formal treatment of marriage always reflects this. When speaking of decisions to marry Athenian speakers always place procreation to the fore. The betrothal formula which we find several times in Menander likewise emphasizes procreation.[29] Arrangements for marriage reflect this perspective, since the betrothal is treated as an agreement between father and prospective groom. The practice of betrothing dependent females, including wives, by will, though it clearly reflects a desire to provide for such relatives, places the emphasis on the practical, not the psychological well-being of the woman. The laws take the same practical perspective, as can be seen especially in the case of the *epikleros*,[30] where the nearest male relative has the right to marry, and where the process sanctioned by law consists of making a claim before the archon (or the polemarchos in the case of metic women). The law appears to have allowed the nearest male relative to compel the divorce of the *epikleros* in certain circumstances. That legislation should seek to preserve the *philia* of man and wife is inherently implausible. Clearly both Lysias and Xenophon are rationalizing.

[27] *οὕτως, ὦ ἄνδρες, τοὺς βιαζομένους ἐλάττονος ζημίας ἀξίους ἡγήσατο εἶναι ἢ τοὺς πείθοντας· τῶν μὲν γὰρ θάνατον κατέγνω, τοῖς δὲ διπλῆν ἐποίησε τὴν βλάβην, ἡγούμενος τοὺς μὲν διαπραττομένους βίαι ὑπὸ τῶν βιασθέντων μισεῖσθαι, τοὺς δὲ πείσαντας οὕτως αὐτῶν τὰς ψυχὰς διαφθείρειν ὥστ' οἰκειοτέρας αὑτοῖς ποιεῖν τὰς ἀλλοτρίας γυναῖκας ἢ τοῖς ἀνδράσι, καὶ πᾶσαν ἐπ' ἐκείνοις τὴν οἰκίαν γεγονέναι, καὶ τοὺς παῖδας ἀδήλους εἶναι ὁποτέρων τυγχάνουσιν ὄντες, τῶν ἀνδρῶν ἢ τῶν μοιχῶν.*

Which shows, gentlemen, that he considered those who use force deserving of a lesser penalty than those who use persuasion. For the latter he condemned to death, while for the former he doubled the damages, because he thought that those who get their way with violence are hated by their victims, while those who use persuasion so corrupt the minds of the women that they make other men's wives more their own than their husbands', with the result that the whole household is firmly under their control and it is unclear whose the children are, the husbands' or the lovers'.

[28] Xen. *Hieron* 3.6, quoted n. 23 above.

[29] E.g. *Dysc.* 842f. *ἀλλ' ἐγγυῶ παίδων ἐπ' ἀρότωι γνησίων τὴν θυγατέρ'...*

I bestow my daughter for the sowing [lit. ploughing] of legitimate children...

[30] For the *epikleros* see in general Harrison (cited n. 7 above) 132ff.

Lysias' second explanation is the more plausible. Before the advent of blood tests and DNA 'fingerprinting', paternity is impossible to prove with certainty. The only absolutely certain way of ensuring paternity is to restrict the access of other males to one's women. Paternity is important for inheritance purposes in a patrilineal society. In the Greek context, where inheritance involved religious acts, including the cult of the family dead, purity of the blood line was especially important. Rape does not present a significant danger. By avoiding intercourse for the rest of the month (in the case of married women) a husband can prevent confusion about paternity if it should turn out that the wife is pregnant. If she is, the child may then be disposed of by abortion or in due course by exposure. *Moicheia*, because clandestine and difficult to pinpoint precisely in time, raises a doubt about the paternity of any children born to a woman. And since the woman is by definition unreliable, a clandestine affair involving, say, a widow or divorced woman, raises the possibility that any existing children may be the result of an affair, while in the case of an unmarried female it opens the threat of future affairs which will corrupt the bloodline of her future *oikos*; as a result her *kyrios* will be left with a dependent relative for the rest of his life. Thus the position adopted by Paoli,[31] that the gravity of *moicheia* as an offence resides in its implications for the *oikos*, would appear to be correct. Hence the requirement that a married woman caught in adultery must be divorced by her husband. The legislation on *moicheia* is thus of a piece with the protection of orphans and *epikleroi*, and the duty of the archon to take care of *oikoi* in danger of dying out. It reflects the interest of the state in the preservation of the *oikos*. There was more broadly an issue of citizenship. Where paternity could not be determined with certainty, there was a possibility that individuals enjoying citizen rights were the offspring of aliens, a risk which grew with the increase in the metic population in the late archaic and early classical period. The *oikos* perspective best explains the list of females under the Drakonian provision for justifiable homicide. The most puzzling item is the inclusion of the *pallake* which a man has 'for the purpose of free children'. Since personal relationships did not receive legal protection as such, this provision presumably has a practical purpose. The Drakonian provision is most easily understood if we suppose that an Athenian's male bastards enjoyed substantial inheritance rights.[32] In addition, we know that before 451/0 the requirement for citizenship was Athenian paternity. We have no solid evidence to suppose that marriage was a precondition before or after that date.[33] If, as is entirely possible, bastards enjoyed political rights in pre-

[31] Paoli (cited n. 2 above) 139/266. His further argument (142/269) that the act must take place *within* the family house to count as *moicheia* is supported by no evidence. It is important to note that the relative seriousness of adultery and rape has nothing whatever to do with the value attached to women as a sex or as individuals, since the penalties for rape are not affected by the sex of the victim.

[32] For the developments in the inheritance rights of bastards see Harrison (cited n. 7 above) 67f.

[33] The issue of the citizen status of *nothoi* with Athenian parentage on both sides is controversial (for a recent discussion which argues against the view taken here, with bibliography of the debate, see C. Patterson *Classical Antiquity* 9 [1990], 40–73) and likely to remain so. There is no reason *a priori* to suppose that adult males in this category were or were not included within the number of full citizens, since practice with reference to the rights of bastards varied from polis to polis (Arist. *Pol.* 1278a29). And ancient evidence is disappointingly ambiguous. My own view, that bastards with an Athenian father before 451/0 or two Athenian parents after 451/50 were entitled to citizen rights, is based on four passages, Arist. *Ath. Pol.* 42.1, [Dem.] 57.17, Isai. 12.7, Hyp. fr. 29. *Ath. Pol.* 42.1 omits legitimacy from the criteria for citizenship. This silence alone is inconclusive, but the conspiracy of silence between *Ath. Pol.* and [Dem.] 57.17, which again ignores legitimacy, is more difficult to dismiss. In particular, the speaker of [Dem.] 57 is facing a potentially hostile jury (as he stresses in the proem) who know the conditions for

Solonian Athens, in Drakon's code too the aim may be to protect both the *oikos* and the state.

We can now return to the question of the degree of affinity required for a man to take action under the law or laws dealing with *moicheia*. If, as was argued above and as is generally believed, the purpose of the *moicheia* law was to protect the *oikos*, it is likely that a man could exercise the right to abuse or to hold to ransom in the case of any relative for whom he stood in the position of *kyrios*. But we have seen that *moicheia* law also enshrined the right to kill. How widely could this right be exercised? There is no certain answer. But since the remedies available after Drakon were enhanced at least by the addition of the *graphe moicheias* (even if we assume, as seems possible, particularly in the light of the Demodokos' song of Ares and Aphrodite in *Odyssey* 8.266–366, that ransom and perhaps abuse were already established practice in pre-Solonian Athens), and since the effect was to increase the emphasis on judicial remedies, it is unlikely that the range allowed under Drakon's homicide code was widened by subsequent legislation. Probably therefore the right to kill was reserved under *moicheia* law for the limited sphere of relationships already allowed under Drakon's homicide law.

This is perhaps an opportune moment to deal with another misunderstanding which has been disseminated recently. Cohen has argued,[34] on the basis of comparative evidence, that *moicheia* was an area in which the Greek competitive spirit came to the fore. It was a source of status to seduce the womenfolk of other men and a source of shame to have one's own women seduced. This view is based on a simplistic model of Greek society which has become all too prevalent in recent decades, a model which emphasizes competitive at the expense of cooperative virtues, which ignores the Greek capacity for compromise and pragmatism. It also runs counter to the evidence. *Moicheia* is certainly a source of humour for the comic poets.[35] But comedy makes a habit of treating in a humorous way topics which in real life are taken in earnest. Non-comic sources which discuss *moicheia* are unanimous in their condemnation of the practice. There is thus no support whatsoever for the competitive picture painted by Cohen.[36]

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citizenship as well as he does and will notice any obvious omission. The MSS. text at Isai. 12.7 says that a man is a citizen because ἡ μήτηρ ἀστή τ' ἐστι καὶ ὁ πατήρ; the reference to marriage in printed texts is modern conjecture. In 338 Hypereides (fr. 29) lists as lacking rights slaves, debtors to the treasury, the ἄτιμοι, the ἀπεψηφισμένοι (under the Demophilos decree) and metics, but not *nothoi*. *Nothoi* of Athenian parentage on both sides cannot be tacitly subsumed as a class under the reference to ἄτιμοι (on the assumption that this category automatically lacked citizen rights), since only someone who had lost his rights would be referred to as ἄτιμος. It would be strange if Hypereides ignored a group with a seemingly better claim to citizenship, while mentioning metics and slaves.

[34] Cohen, 1990 (cited n. 2 above) 168.

[35] E.g. Ar. *Av.* 793–5, *Thesm.* 478ff.

[36] This paper was originally delivered at a seminar at the University of Genoa in February 1994. I wish to record my thanks to my colleague at Royal Holloway, Dr. Isa Busticardi, for correcting the original Italian version, and to the Dipartimento di Archeologia e Filologia Classica at Genoa for their hospitality, in particular to Prof. Umberto Albini. Finally, I wish to thank the anonymous referee for sharp criticisms from which the discussion has benefited.