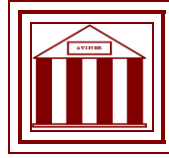


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**The Values of Honor and Shame in
Mediterranean Society and Lysias'
Oration, '*On the Murder of
Eratosthenes*'**

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South Korea**

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The Values of Honor and Shame in Mediterranean Society and Lysias' Oration, 'On the Murder of Eratosthenes'

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Abstract

According to G. Herman, the killing of a paramour by a deceived husband is, in Mediterranean societies, past and present, a commonplace occurrence. And *prima facie* there is nothing in the speech to suggest that Euphiletos' case in the Lysias' 1st Oration, <On the murder of Eratosthenes> diverged from this pattern. Herman suggested, however, that actually Euphiletos was an exception from the common practice of self-help in the Mediterranean world.

Even if he admits killing Eratosthenes, Euphiletos maintained that he should be acquitted of the crime of murder. From this fact, Herman explained that Euphiletos tried to prepare the ground for the central paradox of his rhetoric, namely, that he did not, in fact, kill Eratosthenes, but executed him in the name of the law of city-state. As Euphiletos wanted to dispel the impression that the killing of Eratosthenes was an act of private vengeance.

The assertion of Euphiletos, however, does not refer to legitimate execution in the name of the state law as Herman insisted. Instead, in my opinion, the term killing (*kteinai*, *apokteinai*) does not always include the meaning of culpability, but just when anyone is suspected of or found guilty, then his act of killing is described as 'phonos (guilty murder).' Euphiletos could simply be a killer, and not a culprit of 'phonos', as the law provided for the right to kill an adulterer whom he had surprised in the act, provided that he did not premeditatedly devise the murder.

Thus, the behavior of Euphiletos was not an exception to, but in keeping with, the traditional self-help usage of the Mediterranean world, since he constantly asserted that killing an adulterer caught in the act of intercourse with his own wife was a justified homicide. Different from Herman's view, the killing by Euphiletos does not refer to a public execution authorized by the state authority in the 4th century, but to the customary law of justified homicide which has been sanctioned by the traditional Areopagos council.

Keywords: Mediterranean World, Athens, Honor, Euhyletos, Eratosthenes, Killing (*Apokteinai*, *Kteinai*), Murder (*Phonos*).

Introduction

Lysias' first speech, <On the Murder of Eratosthenes>, was written for the defendant, Euphiletos, by a professional speechwriter, presumably by Lysias. Euphiletos had killed Eratosthenes catching him in the act of adultery with his own wife, and was prosecuted by Eratosthenes' family. Euphiletos admits killing Eratosthenes, but denies his guiltiness, pleading that this was a case of justified homicide. The speech was delivered before a court of 51 judges.¹ It is not known if Euphiletos was found guilty or not.

According to G. Herman, the killing of a paramour by a deceived husband is, in Mediterranean societies, past and present, a commonplace occurrence, and Euphiletos' case might appear to be trivial, such as there is nothing in the speech to suggest that diverged from this pattern.² However, he insisted, modern scholars did not notice anything peculiar about it, and brushed aside the apparent oddities which its arguments evince concerning social values, patterns of honor and shame, as an exception to the universal Mediterranean societies. Furthermore, he says, the speech cast light on the subtle interplay between the internal workings of the democratic polis and the internal universe of the Athenian citizen.

One unique point to remember is that Euphiletos admits having killed Eratosthenes, but he claims that he should not be found 'guilty of murder (phonos)' as he killed one who committed adultery with his wife in the act.³ Herman regarded Euphiletos' argument, as rhetorical tricks to validate an extraordinary claim. According to him, Euphiletos tried to dispel the impression that the killing of Eratosthenes was an act of private vengeance, and claimed to impersonate the values of the city-state rather than infringing them. That is, Euphiletos wanted to prepare the ground for the central paradox of his rhetoric, namely, that 'he did not, in fact, kill Eratosthenes, but he executed him'. Herman says, Euphiletos did not treat Eratosthenes violently merely to vent his anger, but, quite the contrary, he applied self-restraint, controlled violence in a dispassionate effort to enforce civic justice,⁴ and communally sanctioned violence is no violence at all. Euphiletos skilfully avoids the obvious image of the betrayed husband burning with desire to redeem his wounded pride, instead he casts himself in the role of an impartial agent of civic justice. And, according to Herman, the chief excuse of killing refers to Eratosthenes intrusion into his house⁵ rather than adultery. In this way, his killing is not a private vengeance but could be justified as a public punishment.

¹ The opinions differ on whether the court was Delphinion or Areopagos. Whoever prefers the former is based on the fact that the Delphinion judged the case of justified homicide, such as the killing of adulterer caught in the act. The situation however gets involved as the Council of Areopagos is referred to in the speech (Lysias, 1.30).

² G. Herman, 'Tribal and civic codes of behaviour in Lysias I,' *Classical Quarterly* 43 (ii) (1993), p.406f.

³ Lysias, 1.30.

⁴ Cf. Lysias, 1.25-6; 29; 34.

⁵ Lysias, I.25.

Herman continues to argue that Perceptions of honor and shame are correlated with degrees of political centralization and social structure, and their sway appears to be inversely related to the potency of state power and law enforcement.¹ According to him, the Athenian society was found in the middle of the two poles. The state was devoid of the ultimate coercive power enforcing the law,² and allowed the practice of self-help. In certain situations the individual citizen was authorized and indeed required to take the initiative and carry out a whole series of coercive acts in the name of the community.³ Herman says that Euphiletos' rational punishment reveals the pattern of honor and shame totally unlike those postulated by the Mediterranean paradigm. Euphiletos avoided mindless revenge of 'macho (manlike)' behavior, as Athens was an exceptional Mediterranean society where the private revenge had recently given way to public punishment and the passion for revenge is sacrificed to the higher interest of political.⁴

This paper is to suggest an alternative view to that of Herman, especially to the meaning of Euphiletos' argument that he admits killing but does not accept its guiltiness. Denying Herman's suggestion that Euphiletos assumed his killing as a public punishment instead of city state, it will be suggested that the killing (kteinai, apokteinai) itself is not necessarily brings about conviction and the term 'phonos' is only applied to killing of guiltiness. According to Euphiletos' argument, however, killing is justified as a lawful act against adulterer and does not refer to guilty 'phonos'.

From this point of view, his assertion is nothing to do with political centralization of the Athenian society in the fourth century but to the traditional custom of self-help. Furthermore, Euphiletos' behavior is not an exception but closely related to the values of honor and shame in the Mediterranean society.

A Review on the Argument of Deviated Athens to the Value of Honor in the Mediterranean Society

According to Herman,⁵ ever since the publication of *Honour and Shame: The Values of Mediterranean Society* by J.G. Peristiany,⁶ it has become customary in anthropological literature to regard the countries of the Mediterranean, past and present, as one discrete homogenous cultural entity.

¹ G. Herman, 'Ancient Athens and the Values of Mediterranean Society,' *Mediterranean Historical Review* 11 (1966), p.36.

² Cf. M.I. Finley, *Politics in the Ancient World* (Cambridge, 1983), p.18ff.

³ G. Herman, 'Ancient Athens and the Values of Mediterranean Society,' p.11.

⁴ Cf. M.I. Finley, *Politics in the Ancient World* (Cambridge, 1983), p.18ff.; A. Lintott, *Violence, Civil Strife and Revolution in the Classical City* (London, 1982), p.26]; G. Herman, 'Tribal and civic codes of behaviour in Lysias I,' p.411f.

⁵ G. Herman, 'Ancient Athens and the Values of Mediterranean Society,' p.5ff. Cf. Following discussions of J.G. Peristiany, F. Braudel, D.D. Gilmore, F.H. Stewart, K. McAleer, and S. Brandes recited from this.

⁶ J.G. Peristiany (ed), *Honour and Shame: The Values of Mediterranean Society* (Cambridge, 1965).

This trend gained force from the translation into English of Braudel's magisterial work, which, on account of the special environment and the substratum of Roman imperial rule, postulated certain basic similarities between all Mediterranean cultures.¹ Braudel, however, did not include 'honour and shame' among the features responsible for this alleged unity. That momentous step was taken by Peristiany's followers, who claimed that around the ex-Roman lake the same sublime code of honour prevailed everywhere.² Herman³ argues that the central tenet of the code 'honour and shame' was recently given its supreme expression in a volume edited by Pitt-Rivers and the late Peristiany: 'It is in this sense that a person's honour is said to be sacred, something more precious to him than even his life, of which it was traditionally viewed as the epitome. "Rather death than dishonour" was the ideal expression of this sentiment, whether on the battlefield or in the boudoir'.⁴

However, Peristiany and Pitt-Rivers themselves were careful to point out that their vision of the Mediterranean as one neatly circumscribed unit was more a matter of epistemology than of rigid geographical definition, and the term 'Mediterranean concept of honour' indicated nothing more than 'a tendency to associate masculine honor with female sexual purity only rather vaguely, for there are areas near the Mediterranean where this connection is not made at all.'⁵

Then, two main objections were brought forward against the concept of uniform Mediterranean code of honour: firstly, it was very clear that certain areas outside the Mediterranean basin – in particular, northern Europe – revealed codes of honour remarkably similar to the Mediterranean one,⁶ and secondly, the most trivial experience was sufficient to show that even within the bounds defined by 'Mediterraneity' ideas of honour displayed considerable variation, so that one had sometimes to wonder whether one 'single model capable of capturing local subtleties and complexities'.⁷ Despite criticisms such as these, however, scholars chose not to discard the theory of a unified Mediterranean code of honour wholesale, instead retaining it in a modified form.⁸

On the other hand, Herman maintained that with respect to honour and shame the Athenians entertained ideas diametrically opposed to the view

¹ F. Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II* (London, 1972-73: Dissertation of Sorbonne in 1947; 1st ed. in France 1949).

² Cf. D.D. Gilmore (ed.) *Honour and shame and the Unity of the Mediterranean* [a Special Publication of the American Anthropological Association: n.22](Washington, D.C., 1987), p.1f.

³ G. Herman, 'Ancient Athens and the Values of Mediterranean Society,' p.6.

⁴ J.G. Peristiany & J. Pitt-Rivers (eds.) *Honour and Grace in Anthropology*, p.2.

⁵ J.G. Peristiany & J. Pitt-Rivers (eds.) *Honour and Grace in Anthropology*, p.6.

⁶ Cf. F.H. Stewart, *Honor* (Chicago, 1994), pp.76-7; K. McAleer, *Dueling: The Cult of Honor in Fin-de-Siècle Germany* (Princeton, 1994), p.30f.

⁷ Cf. S. Brandes, 'Reflections on Honor and Shame in the Mediterranean', in Gilmore (ed.), *Honor and Shame*, p.121.

⁸ Cf. The collection of essays edited by Gilmore reveals tentatively a specifically Mediterranean variety of the honour-and-shame syndrome, a substratum of beliefs and attitudes that many peoples in this small, but highly diverse, part of the world share.

enshrined in Pitt-Rivers' 'epitome'. He says, the Athenian mentality was pervaded by an utterly non-Mediterranean code of honour. According to him, the spirit of these principles is aptly expressed not only by phrases such as 'honour is less precious than one's life', or 'rather dishonor than death', but also by others such as 'honour is less important than social stability', or, better still, 'rather dishonor than social turbulence.'

Eratosthenes tries hard, Herman says, to distance himself from the principles, 'rather death than dishonour' or 'an eye for an eye,' or 'a head for an eye', To the contrary, exercising self-restraint and avoiding violence, Euphiletos endorses the principle, a nail for an eye!, which was supposed to inform life in the democratic polis of Athens. And similar examples could be found in the case of Demosthenes in the 21st Oration of Demosthenes, <Against Meidias>¹, the defendant in the 3rd Oration of Lysias, <Against Simon>², and Euthykrates and his son Astyphilos in the 9th Oration of Isaios, <On the Estate of Astyphilos>³.

Herman's Discussion on Euphiletos' Murder as a Calculated Behavior

Lysias I has normally been cited as evidence for such legal matters as homicide and adultery, but Herman attempted to make sense of odd arguments in it and to unravel the underlying scale of values, which could be epitomized to three points of argument.⁴ First, the speech reflects values which were shared by the jury in particular, and by the people of Athens in general, as he was desperate to win the sympathy of the jury. Secondly, Euphiletos insists that the killing of Eratosthenes may better be regarded as an act of punishment than an act of revenge.⁵ This runs contrary to our expectations, Herman says, since the most obvious justification which springs to our mind in a situation such as this is that of *crime passionnel* (passionate crime).⁶ Thirdly, on breaking into

¹ Demosthenes, 21.71. On being provoked, Demosthenes did not retaliate but seek redress from people and from the law.

² Lysias, 3.5-9. **The defendant** claims that Simon (the plaintiff) has broken into his house causing damage, but preferred to go without satisfaction for the offenses rather than be thought lacking in sense by the citizens.

³ Isaios, 9.19f. Euthykrates, the father of Astyphilos, fell ill as a result of the blows made by Thudippos, the father of Cleon. On his deathbed he charged his relatives never to allow any of Thudippos' family to come near his tomb. And, hearing the murder of his father by Thudippos, Astyphilos would just never to speak to Cleon and not further.

⁴ G. Herman, 'Tribal and civic codes of behaviour in Lysias I,' p.406f.

⁵ G. Herman, 'Tribal and civic codes of behaviour in Lysias I,' pp.407, 417.

⁶ Cf. Lysias, 1.25-6. He (Eratosthenes) admitted his guilt; then he begged and besought me not to kill him, but to negotiate a monetary settlement. To this I replied, "It is not I who am going to kill you, but our city's law, which you have transgressed and regarded as of less account than your pleasures, choosing rather to commit this foul offence against my wife and my children than to obey the laws like a decent person:1.29. He did not dispute it, gentlemen; he acknowledged his guilt, and besought and implored that he might not be killed, and was ready to pay compensation in money. But I would not agree to his estimate, as I held that our city's law should have higher authority; and I obtained that satisfaction which you deemed most just

the lover's room, Euphiletos accused Eratosthenes in the first place of intrusion into his house, not adultery.¹

According to Herman, Euphiletos draws a subtle contrast between two antithetical codes of behavior. The one which he implicitly rejects belongs to the tribal, decentralized and uncivilized world which prevailed before the emergence of the polis. The other, which he explicitly and self-righteously endorses, belongs to the fully-fledged, centralized, democratic polis of Athens.² **Anyway, two different codes of behavior coexisted more or less in the minds of the hearers of court.**

On the other hand, Herman says, Euphiletos is presented as assuming the role of victim rather than offender.³ Further, he is presented as speaking in the name of the supra-personal values of city-state, arguing that the killing of Eratosthenes was perfectly in tune with these values. It was the act of adultery committed by Eratosthenes which constituted, in fact, a breach of these values.⁴ Throughout the presentation, Euphiletos skilfully avoids the obvious image of the betrayed husband burning with desire to redeem his wounded pride: instead he casts himself in the role of an impartial agent of civic justice, whose sole concern is that communal norms should be observed and their violators be punished.

According to Herman, a whole series of acts, which should have been charged with burning passion, are here assigned a kind of mechanistic instrumentality.⁵ When the slave-girl informed Euphiletos that Eratosthenes was in the house, Euphiletos did not recklessly break into the lover's room, nor did he then kill Eratosthenes, overwhelmed by uncontrollable emotions; and the idea of killing his unfaithful wife had not even crossed his mind. Quite the contrary, Euphiletos slipped quietly out of the house, calling on his friends one by one. With self-control he went to the nearest shop to provide himself and his friends with torches; before leaving his own house, he had the self-possession to instruct the slave-girl to wait by the door and to open it at the appropriate moment; as soon as he took the lovers by surprise, he did not kill Eratosthenes but started making preparations for the makeshift trial; and finally, rightly before the execution, he dutifully tried out the option of monetary compensation prescribed by law (Lysias, 1.25. 1.29).

when you imposed it on those who adopt such courses:1.34. Therefore, gentlemen, the laws not only acquit me of my crime, but actually dommand me to exact this punishment (ten diken lambanein): 1.47. I consider this punishment (timorian) not to have been a private one exacted on my own behalf, but on behalf of the whole city.

¹ Lysias, 1.24-25. Pushing the bedroom door open, those of us who entered first saw him still lying beside my wife, and those following saw him standing naked on the bed. I struck him and knocked him down, gentlemen, and pulling his hands behind his back, tied them and asked him why he was committing the outrage of entering my house: 1.29. I asked him why he was committing the outrage of entering my house.

² G. Herman, 'Tribal and civic codes of behaviour in Lysias I,' p.419.

³ G. Herman, 'Tribal and civic codes of behaviour in Lysias I,' p.408.

⁴ G. Herman, 'Tribal and civic codes of behaviour in Lysias I,' p.408. Cf. Lysias, 1.25-6: 29: 34: 47.

⁵ G. Herman, 'Tribal and civic codes of behaviour in Lysias I,' p.410.

In all this Euphiletos' moves, Herman found a curious lack of spontaneity. Herman discusses about two types of aggression: affective and instrumental. The former is aroused by provocation, is guided by anger, and is accompanied by distinctive patterns of activity of the central and automatic nervous system (such as heightened blood pressure and pulse rate). This is an emotional state which aims at inflicting injury at the provocateur. Instrumental aggression, on the other hand, is to a large extent exempt from emotional symptoms. It takes place when a man attacks another man 'in cold blood', without feeling any malice toward him – as a case of hired murderer. According to Herman, the main difference between affective and instrumental aggression is that the latter does not primarily aim at inflicting injury to the victim; the aggression merely serves as a means to some other desired end.¹

Argument between Premeditated, Guilty Murder and Unpremeditated, Justified Murder

Herman suggested, as we have seen, that Euphiletos speech revealed the scale of values surprisingly at variance with the scale displayed by comparable Mediterranean societies past and present, as Euphiletos posed himself as the victim rather than the offender, claimed to impersonate the values of the city-state rather than infringing them, tried to dispel the impression that the killing of Eratosthenes was an act of private vengeance, and put emphasis on the fact that Eratosthenes trespassed on his house avoiding the obvious image of the betrayed husband

In my opinion, however, Euphiletos took Eratosthenes' adultery seriously, and justified his killing. Quite contrary to Herman's view, referring to Eratosthenes' trespass on his house, Euphiletos did **not aim at the fact of trespassing itself, but made good use of it to introduce the fact that Eratosthenes made a confession of his own guilt, which is repeatedly underscored.**

Lysias, I.25, I gave him a blow, sirs, which knocked him down, and pulling round his two hands behind his back, and tying them, I asked him why he had the insolence to enter my house. He admitted his guilt; then he besought and implored me not to kill him, but to exact a sum of money.

Lysias, 1.29. He did not dispute it, sirs: he acknowledged his guilt, and besought and implored that he might not be killed, and was ready to pay compensation in money.

¹ G. Herman, 'Tribal and civic codes of behaviour in Lysias I,' p.410. Here Herman quoted R.G. Green, *Human Aggression* (Milton Keynes, 1990), pp.5-6.

At the same time, Euphiletos gave emphasis on the fact that on his own initiative Eratosthenes came to his (Euphiletos) house and fell down in the bedroom. And he continues to discuss that adultery is punished more seriously than rape as follows.

Lysias, I, 32~33. You hear, sirs, how it directs that, if anyone forcibly debauches a free adult or child, he shall be liable to double¹ damages; while if he so debauches a woman, in one of the cases where it is permitted to kill him, he is subject to the same rule. Thus the lawgiver, sirs, considered that those who use force deserve a less penalty than those who use persuasion; for the latter he condemned to death, whereas for the former he doubled the damages, considering that those who achieve their ends by force are hated by the persons forced; while those who used persuasion corrupted thereby their victims' souls, thus making the wives of others more closely attached to themselves than to their husbands, and got the whole house into their hands, and caused uncertainty as to whose the children really were, the husbands' or the adulterers.

Furthermore, according to Euphiletos, the plaintiffs are lying that Eratosthenes was dragged from the street into the house, and took refuge at Euphiletos' estia.¹ Furthermore, the plaintiffs claim that Euphiletos, setting a trap for his wife's lover, ordered the maid-servant to go and fetch Eratosthenes.² The defendant, however, denied deliberate murder. So the issue of dispute between two opponent parties refers to whether the killing was deliberate or not.

Euphiletos made a lengthy excuse for proving the plaintiff's argument to be lie.³ He called on his friends not previously but just after he had known by maid-servant that Eratosthenes intruded into his territory, and he had never seen Eratosthenes before. He justified using any possible means to catch the corrupter of his wife.

On that night Euphiletos met his friend Sostratos who came from the country about sunset, and had dinner with him in his house.⁴ When having made a good meal Sostratos left him and departed. According to Euphiletos, if he had designs on Eratosthenes, it would have been more to his advantage to go and take his dinner elsewhere. This is why Euphiletos being in his house, Eratosthenes would have been less likely to venture on entering his house. And if he had previously known that Eratosthenes would enter his house, he would have sent word to his intimate acquaintances in the daytime, an bidden them assemble at the house of one of his friends living nearest to him, rather than

¹ The estia (hearth) of a house was a retained its primitive sanctity as a center of the family religion, it would be sacrilege to kill anyone there. Cf. W.R.M. Lamb trans. *Lysias* (Cambridge, Mass. 1930), p.17.

² Lysias, 1.37.

³ Lysias, 1.37ff.

⁴ Lysias, 1.39-42.

have waited till the moment of making discovery to run round in the night, without knowing whom he should find at home, and who were away. Actually when he called on some friend who were not in town - of this Euphiletos was not aware, but those whom he could he took along with him. Euphiletos put emphasis on the fact that he did not previously know what was to befall on that night, and that he was justified on calling his friends in order that he might have gone in himself with all possible safety, for he could not tell whether he too had some weapon.

With regard to Euphiletos' preparations before he took lovers by surprise, Herman admired his self-control, the prudent and calculating spirit, and regarded his preparations as for makeshift trial according to the law.¹ We cannot say, however, that Euphiletos assumed the executor of law as Herman asserted, but rather he tried to persuade the judges that should not be judged as guilty of murder as he killed with spontaneity the adulterer in the act and the adulterer himself acknowledged his guiltiness. Euphiletos was desperately making an effort to clarify that his killing was not deliberated.

Actually, however, there are situations enough to be suspected of deliberated murder. Before that night he killed Eratosthenes, Euphiletos had previously known that Eratosthenes might come again to his house and required the maid-girl to show him their guilt in the very act, and he waited the opportunity to surprise the lovers, which Euphiletos himself acknowledged.² Euphiletos denied, however, that on that night he deliberately made a plan to induce Eratosthenes into his territory as his opponents claimed, but gave emphasis several times to the fact that Eratosthenes on his own initiative intruded to his house.³ Thus, Euphiletos' emphasis on the fact that Eratosthenes himself intruded into his house is not to dispel the impression that his killing was an act of private vengeance as Herman suggested, but that he deliberately 'set up the situation to kill Eratosthenes on that night'.

Furthermore, Herman maintained that the alleged 'execution' of Euphiletos in the name of the law refers to the recently developed, centralized state power of democracy. 'But the law, which ordained that whoever takes vengeance on an adulterer caught in the act with his spouse shall not be convicted of murder, does not refer only to the democracy of Athens or political centralization of state power as Herman suggested, but also to the oligarchy.⁴ Furthermore, different from the view of Herman, it did not originate in the recent developed Athenian democracy, but in the authority of the traditional Areopagos Court.

Lysias, I, 30. Read out also, please, that law from the pillar in the Areopagos (*ton nomon ek tis stilis tis ex Areiou Pagou*). "Law" You hear, sirs, how the Court of the Areopagos (*to dikasterio to ex Areiou Pagou*) itself, to which has been assigned, in our own as in our

¹ G. Herman, 'Tribal and civic codes of behaviour in Lysias I,' p.410.

² Lysias, 1.21-22.

³ Lysias, 1.38.

⁴ Lysias, 1.2.

fathers' time, the trial of suits for murder, has expressly stated that whoever takes this vengeance on an adulterer caught in the act with his spouse shall not be convicted of murder.¹

We could refer also to Lysias' 6th Oration which says that that in a trial before the Areopagos(the court in the Areopagos), the most august and equitable of courts, a man who admits his guilt suffers death, while if he contests the charge he is put to the proof, and many have been found quite innocent.²

Euphiletos claimed his innocence according to the laws as follows:

Lysias, 1.37. Now I, sirs, could have held myself justified in using any possible means to catch the corrupter of my wife..³

Demosthenes refers to the killer of adulterer caught in the act not to be accused:

Dem. XXIII, 53, If a man kill (apokteinei) another unintentionally (akon) in an athletic contest, or overcomes him in a fight on the highway, or unwittingly in battle, or in intercourse with his wife, or mother, or sister, or daughter, or concubine kept for procreation of legitimate children, he shall not go into exile as a manslayer (me pheugein kteinanta) on that account...

Furthermore, Demosthenes refers to the Council of Areopagos as a protector against vengeful murders, and says that Draco defined the circumstances that make homicide justifiable and proclaimed the accused in such case free from taint.

Dem. XX, 158ff. What do all our laws most carefully guard against? What but these vengeful murders against which our especially appointed protector is the Council of the Areopagos? Now Draco, in this group of laws, marked the terrible wickedness of homicide (*autocheir*) by banning the offender (*androphonon*) from the lustral water, the libations, the loving-cup, the sacrifices and the market-place ; he enumerated everything that he thought likely to deter the offender ; but he never robbed him of his claim to justice ; he defined the circumstances that make homicide(*apoktinnynai*), even if he acts(i.e. does injury)(*drasēi*), justifiable and proclaimed the accused in such case free from taint(*katharon einai*).⁴

¹ Cf. Aristoteles, *Athenaion Politeia*, 57.30.

² Lysias, 6.14.

³ Cf. Lysias, 1.29ff.

⁴ Cf. Lysias, VI, 14-15 Moreover, they deny the acts for which they have been denounced, whereas he admits those reported of him. And yet, in a trial before the Areopagos (in the court

On the other hand, according to Aristotle, the dicast is to judge whether the fact in question is just or unjust.

Aristoteles, *Rhetorike*, 1354a 26-31 ... it is evident that the only business of the litigant is to prove that the fact in question is or is not so, that it has happened or not; whether it is important or unimportant, just or unjust, in all cases in which the legislator has not laid down a ruling, is a matter for the dicast himself to decide; it is not the business of the litigants to instruct him.

And, as Euphiletos asserted his killing to be justified as it was without deliberation, the point of disputes between two opposed parties was to be whether the killing had been done deliberately or not. Demosthenes says that it is most outrageous to define a man to be guilty, his act still not having been decided whether it was involuntary or willful.

Demosthenes, XXIII, 79. surely it is most outrageous to provide that a man who has not yet been found guilty (*healokos*), and of whom it is still undecided whether he committed the act or not, and whether the act was involuntary or willful, should be handed over to the mercy of his accusers.

In Harpocraton, too, it is questioned if a death has been caused by deliberation or not.

Harpokration, s.v. bouleuseos, Two kinds of definitions for crime. One is that someone deliberately makes (*kataskeuasei*) a situation, which brings about the death of someone else. The point at issue in that case is whether the death has been caused by a situation deliberately made or not.

Thus the court is to judge if a death has been deliberated or not, which corresponds to the case of Euphiletos. If the plaintiff's claim that Euphiletos deliberately killed Eratosthenes prevailed on among the judges, Euphiletos' killing, even if he killed the adulterer in the act, lost its justice.

in the Areopagos [en Areio Pago ... dikasterio]), that most august and equitable of courts, a man who admits his guilt (*adikein*) suffers death, while if he contests the charge he is put to the proof, and many have been found quite innocent. So you should not hold the same opinion of those who deny and of those who admit the charge. And this, to my mind, is a strange thing ... whoever wounds a man's person, in the head or face or hands or feet, he shall be banished, according to the laws of the Areopagos (*kata tous nomous tous ex Areiou Pagou*), from the city of the man who has been injured (*ten tou adikethentos polin*), and if he returns, he shall be impeached and punished with death

‘Phonos’ (Guilty Murder) and ‘Apokteinai’ or ‘Kteinai’ (Simple Killing)

As has been discussed above, Euphiletos admits having killed Eratosthenes, but he claims that he should not be convicted of murder (phonos).¹ With regard to Euphiletos’ argument, Herman suggested that ‘he did not, in fact, kill Eratosthenes, but he executed him’, setting ‘kill’ being opposed to ‘execute’. That is, the killing of Eratosthenes was not an act of private vengeance, and claimed to impersonate the values of the city-state rather than infringing them. Euphiletos is innocent of the crime of murder as his killing could be justified as a public punishment.

In my opinion, however, when Euphiletos insists that whoever takes vengeance (timorian poiesetai) on an adulterer caught in the act with his spouse shall not be convicted of murder (phonos), the opposite of ‘murder (phonos)’ is not ‘execution’ carried by the name of the law of city-state. To the contrary, the meaning should be that, even he killed Eratosthenes, Euphiletos is innocent of ‘guilty of murder (phonos)’. So the opposite of ‘kill’ is ‘phonos’, the latter is different from the former, as including the meaning of culpability. That is, Euphiletos says that he should not be convicted of a murder (phonos), even if he killed another.

Not only in Lysias I.30 for the case of Euphiletos but in others, the terms, ‘phonos (murder [noun])’, ‘phoneus (murderer)’, ‘phoneuo (murder [verb])’ are opposed to ‘anthropoktonos (killer)’, ‘apokteino (kill)’, ‘kteino (kill)’. In the law of Draco, the former refers to the meaning of guilt and the latter simply the fact of killing which could be found innocent of guilt.

In Draco’s Law, we can see the distinction between ‘[guilty] phonos’ and ‘akon (unvoluntarily [killing])’ or ‘kteino (kill)’, as follows:

*IG, I², 115, (l. 13ff.) [l. 13 ff.] ... If there is father or brother or sons, pardon is to be agreed to by all, or the one who opposes is to prevail. But if none of these survives, and if there is cousin and cousin’s son, pardon is to be agreed to by all, or the one who opposes is to prevail. But if none of these survives, and if he killed unintentionally (akon) and the fifty-one, the *ephetai*, decides that he killed unintentionally, let ten *phratry* members admit him to the country and let the fifty-one choose these by rank (aristinden). And let also those who killed (ktenantes) previously be bound by this law. A proclamation is to be made against the killer (ktenanti) in the market place by the victim’s relatives as far as the degree of cousin and cousin’s son [...anephsiotetos...] and by son-in-laws, father-in-laws, and phratry members.....*

[l. 23ff.] If anyone is suspected of murder (aitios [ei] phono), 51 Ephetes judges to be guilty of murder (phono helos[i]). If anyone kills (ktenei) the killer or is responsible for his death (aitios ei

¹ Lysias, 1.30.

phono), as long as he stays away from the frontier markets (agora ephoria), games, and Amphictyonic sacrifices, he shall be liable to the same treatment as the one who kills (ktenanta) an Athenian; and the *ephetai* are to judge the case.

[l. 37] whoever have killed to defend himself (amynomenos ktenei) another who violently and unjustly snatched something or abducted is not to be punished (nepoine tethnanai).

In the 17th line of Draco's Law above, 'involuntary (akon) killing' is referred to, and from the 25th line '(guilty) murder (phonos)'. In the former, it is simply said that 51 ephetes judged 'involuntary (akon) killing', while in the latter, two different cases are referred to, as simple 'killing (ktenei)' and the 'suspicion of murder (aitios ei phono)' [If anyone kills (ktenei) the killer or is responsible for his death (aitios ei phono)]. On the other hand, in line 37, for whoever killed another to defend himself the term 'kteinei' is used, and not 'phonos'.

In Antiphon, too, 'phoneus' or 'phonos' differ from 'apokteinantos' or 'apokteino', as follows:

Antiphon, IV, c, 4. He further dared to assert that he who struck the first blow, even though he did not slay, is more truly the murderer (phoneus) that he who killed (apokteinantos); for it is to the aggressor's wilful act that the death was due (bouleuten tou thnatou genesthai), he says. But I maintain the very opposite

Antiphon, VI, 46 ... they did not think that I had either killed (apokteinai) the boy, neither I was guilty of murder (enochon einai tou phonou), or had any part in the affair at all.

According to Gagarin, the term 'phonos' refers to all the kind of murder, but chiefly to deliberated murder, while undeliberated murder the term 'akousios phonos' tended to be used.¹ However, different from Gagarin's opinion, the word 'phonos' is used for not only 'deliberated' but 'undeliberated' murder. Not to speak of deliberated or not, killing could be convicted as guilty 'phonos'. Draco's Law is well known to deal with involuntary murder, but 'guilty murder (phonos)' is referred to, as discussed above. It proves that, even if one is acknowledged to have killed another involuntarily, he was not always acquitted but could be judged as guilty.

On the other hand, it is not so simple to discern whether a murder which has been done was voluntary or involuntary. Even if a moment, there could be an intention of killing. So, according to Plato, in case of murder motivated by

¹ M. Gagarin, *Drakon and early Athenian Homicide Law* (New Heaven/ London, 1981), p. 106. Cf. Dem. XXIII, 71.

passion, it is more convenient to divide on the criterion if it is deliberated or not.

Platon, *Nomoi*, 866d ff. If a person with his own hand (autocheir) kills a free man, and the deed be done in passion (thymos), in a case of this kind we must begin by making a distinction between two varieties of the crime. For murder is committed in passion by those who, on a sudden and without intent to kill (aprobouleutos tou apokteinai), [866e] destroy a man by blows or some such means in an immediate attack, when the deed is at once followed by repentance; and it is also a case of murder done in passion whenever men who are insulted by shameful words or actions seek for vengeance, and end by killing a man with deliberate intent to kill (tina boulethentes kteinai), and feel no repentance for the deed. We must lay it down, as it seems, that these murders are of two kinds, [867a] both as a rule done in passion, and most properly described as lying midway between the voluntary (hekousios) and the involuntary (akousios). None the less, each of these kinds tends to resemble one or other of these contraries; for the man who retains his passion and takes vengeance, not suddenly on the spur of the moment, but after lapse of time, and with deliberate intent (meta epiboules), resembles the voluntary murderer; whereas the man who does not nurse his rage, but gives way to it at once on the spur of the moment and without deliberate intent, has a likeness to the involuntary murderer; yet neither is he wholly involuntary, but bears a resemblance thereto. [867b] Thus murders (phonoï) done in passion are difficult to define,—whether one should treat them in law as voluntary or involuntary. The best and truest way is to class them both as resemblances, and to distinguish them by the mark of deliberate intent (epiboule) or lack of intent (aproboulia), and to impose more severe penalties on those who slay (kteinasi) with intent and in anger (orge), and milder penalties on those who do so without intent and on a sudden.

R. Maschke suggested that undeliberated murder also could be divided to two kinds according to instant intention of murder or not: one is with intention of murder even if instant, and the other is absolutely without it (akon).¹

In case of Euphiletos, it was not with absolute spontaneity to kill Eratosthenes, as previously he called on his friends and got torches from the nearest shop allegedly for his own safety. However, he claimed that did not deliberately set a trap to induce Eratosthenes into his house on that night. So the murder of Euphiletos could be classified as unpremeditated but with intention of murder.

¹ R. Maschke, *Die Willenslehre im griechischen Recht* (Berlin, 1926), pp. 42-53; Cf. R.S. Stroud, *Drakon's Law on Homicide* (Berkeley, 1968), pp. 40-41; M. Gagarin, *Drakon and early Athenian Homicide Law* (New Heaven/ London, 1981), p. 31ff.

Conclusion

Lysias' 1st Oration <On the murder of Eratosthenes> refers to Euphiletos who killed Eratosthenes in the act of adultery with his wife. Euphiletos admits having killed Eratosthenes, but maintained that he should be acquitted of the crime of murder.

According to G. Herman, the killing of a paramour by a deceived husband is, in Mediterranean societies, past and present, a commonplace occurrence. However, the case of Euphiletos was an exception from the common practice of self-help in the Mediterranean world. Even if he admits the act of killing, Euphiletos maintained that he should be acquitted of the crime of murder. From this fact, Herman explained that Euphiletos tried to prepare the ground for the central paradox of his rhetoric, namely, that he did not, in fact, kill Eratosthenes, but executed him in the name of the law of city-state. That is, Euphiletos allegedly punished Eratosthenes' intrusion into his house by the name of the law, dispelling the impression that the killing of Eratosthenes was an act of private vengeance against adultery. In my opinion, however, Euphiletos' emphasis on the fact that Eratosthenes himself intruded into his house is not to dispel the impression that his killing was an act of private vengeance as Herman suggested, but to vindicate that he did not deliberately 'set up the situation to kill Eratosthenes on that night'.

Even if he admits the act of killing, Euphiletos maintained that he should be acquitted of the crime of murder. For this, Herman explained that Euphiletos tried to prepare the ground for the central paradox of his rhetoric, namely, that he did not, in fact, kill Eratosthenes, but executed him. Instead, in my opinion, the term killing (*kteinai*, *apokteinai*) does not always include the meaning of culpability, but just when anyone is suspected of or found guilty, then his act of killing is described as '*phonos* (guilty murder).' Euphiletos could simply be a killer, and not a culprit of '*phonos*', as the law provided for the right to kill an adulterer whom he had surprised in the act, provided that he did not deliberately devise the murder.

In this way, the killing of Euphiletos was not an exception to, but in keeping with, the traditional self-help usage of the Mediterranean world, since he constantly asserted that killing an adulterer caught in the act of intercourse with his own wife was a justified homicide. Different from Herman's view, the killing by Euphiletos does not refer to a public execution authorized by the state authority in the 4th century, but to the customary law of justified homicide which has been sanctioned by the traditional Areopagos council.

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