Why Was Lycophron Prosecuted by *Eisangelia*?

*David D. Phillips*

I

In *Hyperides* 1,¹ a defense against an *eisangelia* (impeachment) for seduction brought by one Ariston (*Pa* 2140) with the cooperation of the prominent politician Lycurgus, the speaker Lycophron (*Pa* 9255) contends that he has been brought to trial by an improper procedure which his prosecutors have chosen in order to minimize the risks to themselves and exaggerate the nature of the alleged offense (Hyp. 1.12):

And you accuse me in your impeachment (*eisaggelía*) of subverting the democracy by violating the laws (*katalágnen tōn dýmon paraβαινοντα τοῖς νόμοις*); but you yourself have taken a flying leap over all the laws and handed in an impeachment concerning matters for which there are *graphai* before the *thesmothetai* provided by the laws. You did this, first, so that you might go to trial without risk (*ákhínðonos eisíthēs eis tôn ágyōn*); and second, so that you might write into the impeachment tragedies of the sort you have presently written: you accuse me of making numerous women grow old, unmarried, in their houses, and of making many others cohabit with unsuitable men in contravention of the laws.²

Scholars have traditionally privileged and accepted at face

¹ The numbering of speeches adopted here is that of F. G. Kenyon, *Hyperidis orationes et fragmenta* (Oxford 1906); the fragments of Hyp. 1 from the Harris papyrus are numbered as by C. Jensen, *Hyperidis orationes* (Leipzig 1917), who transcribes them more fully than either Kenyon or G. Colin, *Hyperide: discours* (Paris 1946). The fragments of and testimonia to Lycurgus’ two prosecution speeches against Lycophron are cited as by N. C. Conomis, *Lycurgi oratio in Leocratem* (Leipzig 1970).

² For the description of *eisangelia* as “risk-free” cf. §8; for the objection to the prosecution’s choice of procedure (common in Athenian defense speeches: e.g. *Ant*. 5.9) cf. fr.3 *ad fin.*
value the first motive attributed to the prosecution by Lyco-
phron; namely, that proceeding by *eisangelia* was “risk-free.” Yet
a closer examination of the speech reveals that additional fac-
tors not identified by Lycophron contributed to the choice of
*eisangelia*; and that, in fact, the degree of risk may have been less
important to the prosecution than the second motive which
Lycophron ascribes to them; namely, the opportunity to hyper-
bolize the offense with which he was charged.

I. The “risk-free” topos and the date of Hypereides 1

The present communis opinio places Hypereides 1 in 333, a
date calculated by adding the three years Lycophron spent on
Lemnos before his trial (Hyp. 1.17) to (August) 336, when
Dioxippus (*PA* 4529) won the Olympic pancration (*P.Oxy. XIII*
1607 fr.13). A date of 333 for Lycophron’s trial accords with
the independent terminus ante quem of July/August 330, when
Demosthenes (18.250) indicates that *eisangelia* prosecutors who
garnered less than one-fifth of the jury’s votes were fined 1000
dr., which would appear to rule out a characterization of *eis-
angelia* as “risk-free.” Yet it is important to realize that, accord-

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dating controversy before Körte.

4 *P.Oxy. 1607* contains fragments of a second defense speech for Lyco-
phron, which may also be plausibly attributed to Hypereides (see Cooper, in Worthington et al., *Dinarchus* 69, for a summary of arguments pro and con). For Dioxippus’ Olympic victory see G. H. Förster, *Olympische Sieger* (Zwickau 1891) no. 318; Moretti, *Olympionikai* no. 458; S. G. Miller, *Ancient Greek Athletics* (New Haven 2004) 164.

5 For the date of Dem. 18 see H. Yunis, *Demosthenes: On the Crown* (Cam-
bridge 2001) 11 with n.44.
ing to this scheme, 333 is not a definite date but a terminus ante quem non: nowhere in his defense does Lycophron state that he departed for Lemnos immediately after the wedding, and we have no reason to presume that he did so. While accepting 333 as “probably correct,” David Whitehead has recently called into question both the identification of Dioxippus’ victory mentioned in the Oxyrhynchus papyrus and the validity of 330 as a terminus ante quem. Grenfell and Hunt’s restoration εἰς [Ὁ]λυμπ[ίαν] is admittedly conjectural, as Whitehead observes, but it has been accepted by all subsequent editors and accords with the independent testimony for Dioxippus’ Olympic victory. However, the implications of the fragment’s opening lacuna have been overlooked. The fragment places the wedding of Lycophron’s alleged lover in proximity to Dioxippus’ victory: … τῷ Χα[ρὶ]π[η]ς τὴν [ὁ]δελφ[ὴν ε]ῖς [Ἠ]λυμπ[ίαν] ἀποδημήσα[ί] τὸν Δ[ιο]ππ[ό] ἀστεφανώ-σ[θ]ν τὴν πόλιν, “… his sister to Charippus, Dioxippus left town for Olympia to win a crown for the city.” Colin, followed by Arapopoulos and tentatively by Burtt, supplements the beginning of the sentence with the phrase ἀντὶ ἐμελλόν τε ἐγδούναι, “when he was about to marry,” which would place Dioxippus’ victory soon before his sister’s wedding; but the correct supplement could just as well be ἐγδόντα vel sim., which would reverse the order of events. If the Olympic festival followed the wedding, we can safely presume that the wedding fell in 336; but if, as Colin presumes, the games preceded the wedding, the wedding may have occurred in early 335, and accordingly the terminus ante quem non for Hypereides 1 should be stated as 333–332.

More significant is the question whether Hypereides might

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6 Cf. N. C. Conomis, “Notes on the Fragments of Lycurgus,” *Klio* 39 (1961) 72–152, at 130: “since the case took place at least three years after the marriage as can be deduced from [Hyp.1.17, it must be dated to 333 the earliest.”

7 Lycophron might have had a compelling reason to quit Attica soon after the wedding if, as his prosecutors maintain, he disrupted the proceedings in an insulting manner; but he forcefully denies the allegation (Hyp. 1.3–7).

describe eisangelia as “risk-free” (1.8, 12) even after the adoption of the thousand-drachma fine for malicious prosecution; if the answer is positive, 330 no longer stands as a lower limit for Hypereides 1. In §8, Hypereides characterizes eisangelia as risk-free for the prosecution in comparison with the risks faced by the defendant Lycophron; this observation is self-evident, an example of the standard “prosecuting is better than defending” topos, and useless for our purposes. In §12, however, the comparison is between eisangelia and other methods of prosecution. Here Lycophron asserts not simply that prosecuting is better than defending, but that prosecuting by eisangelia is better than prosecuting by graphe. Even after 330, this argument might be defensible, but just barely. Traditionally, prosecutors by graphe who received less than 20% of the jurors’ votes were fined 1000 dr. (e.g. Dem. 21.47) and incurred a form of partial atimia which barred them, to some extent, from initiating future prosecutions. But when the thousand-drachma fine was adopted for impeachments, the bar on prosecution was not. It is unlikely that an Athenian jury would regard the difference between the fine alone and the fine plus partial atimia as

9 “I think, men of the jury, that prosecutors in lawsuits have many advantages over defendants: since the lawsuit is risk-free for them (δὲ τὸ ἐξίνδυον, τὸν ἐξίνδυον, εἰρεῖ τὸν ἐξίνδυον), they say whatever they want and tell lies, while the men on trial, because of their fear, forget to say many things, even about what they themselves have done.”

10 Whitehead, Hypereides 124, with comparanda.


12 Poll. 8.52, citing Theophrastus Laws fr.4b Szegedy-Maszak. Notably, Pollux glosses Hypereides’ “risk-free” (ἐξίνδυον) as “non-fineable” (ἀξίνδυον), and thus supports the Crown case (Dem. 18) as the terminus ante quem for Hyp. 1: “Hypereides says in the For Lycophron that the person who brought an eisangelia and did not secure a conviction was not subject to a fine (ἀξίνδυον ἵνα). Yet Theophrastus says that those who brought other graphai were fined 1000 (drachmas) if they did not receive one-fifth of the votes, and incurred atimia besides; while those prosecuting by eisangelia did not incur atimia but were fined the thousand; it is likely that this was added later because of people who brought eisangelai lightly.”
sufficiently great to regard the former as “risk-free” compared
with the latter, and the plausibility of this interpretation de-
creases further when we compare the arguments used in
Hypereides 1 with those used in Hypereides 4.

Hypereides 4, like Hypereides 1, was delivered for the de-
fense in an eisangelia. Hypereides himself gave this speech as
synégoros (advocate) for Euxenippus (PA = APF 5886 [=5888]),
who had been impeached by Polyeuctus (PA 11947) for sub-
mitting to the Assembly a false report of a dream he had while
incubating in the temple of Amphiaraus at Oropus on assign-
ment from the dēmos (Hyp. 4.14–15). Scholarly consensus
places Euxenippus’ trial between 330 and 324,13 and thus it
almost certainly postdates, and cannot significantly predate,
Demosthenes 18. Owing to the similar circumstances of the
respective defendants, and especially to the fact that they were
both tried by eisangelia, Hypereides reprises in his defense of
Euxenippus many of the arguments employed in the speech for
Lycophron. These include the appeal to the jury to hear both
sides of the case in order to judge fairly and in accordance with
the law (4.4, 40 ≈ 1 fr.r.1, 2); the inapplicability of eisangelia
to the charged offense, which should be prosecuted by means of
the available dedicated procedures established by law (4.5–6,
30 ≈ 1.12; cf. 1 fr.3 ad fin.); attempts by the prosecution to
distract and subvert the defense and to obstruct the defendant’s
right to call synégoroi (4.10–11, 19–20, 31–32 ≈ 1 fr.3 ad init.,
§§10–11); exaggeration of alleged offenses to the level of trag-
edy (4.26 ≈ 1.12); and allegations of prosecutorial sycophancy
(4.27, 33–36 ≈ 1.1–2).

Amidst all these points of connection between the speeches
for Euxenippus and for Lycophron, conspicuously and sig-
ificantly absent from Hypereides 4 is any discussion of the risks
incurred by Polyeuctus in prosecuting Euxenippus. In vacuo,
commentary on this point would suit Euxenippus’ defense as
well as it did Lycophron’s; and indeed, Hypereides repeatedly
mentions considerations of risk in For Euxenippus. The Athen-
ians did well to compose the eisangelia statute as they did, since
it would have been senseless to allow politicians to reap the

13 Whitehead, Hypereides 156 with references.

14.4.18, καὶ σοὶ μὲν τῷ τοιούτῳ ψήφισμα γράφαντι πέντε καὶ έίκοσι δραχμῶν έτιμήθη, τὸν δὲ κατακλιθέντα εἰς τὸ ιερὸν τοῦ δήμου κελεύσαντος μηδ’ ἐν τῇ Ἀττικῇ δεῖ τεθῆκαταί; “And you, who composed a decree of this sort, were fined 25 drachmas, but the man who incubated in the temple on the people’s order should not even be buried in Attica?”
peachments, and the terminus ante quem of July/August 330 stands.

Our termini for Hypereides 1 are, therefore, 333–332 and July/August 330. Since we do not know how much time elapsed between the wedding of Dioxippus’ sister and Lycophron’s departure for Lemnos, there are no substantial grounds for favoring 333 over 332, 331, or the first half of 330 (before the Crown case). This observation bears significantly upon the potential motives of Lycophron’s prosecutors.

II. Procedural options for Lycophron’s accusers

The charge which Lycophron’s prosecutors brought in their eisangelia was Lycophron’s alleged seduction of the sister of Dioxippus (Hyp. 1.11–12, 15; Lyc. fr.X–XI.3, 11, cf. test. 3), which he apparently achieved, on at least one occasion, by digging through the wall of her house (P.Oxy. 1607 frs.1–3; ?cf. Lyc. fr.X–XI.14) and publicly manifested by his conduct at her wedding to Charippus (Hyp. 1.3). In characterizing eisangelia as risk-free in §12, Lycophron criticizes his prosecutors for using impeachment to prosecute accusations “for which there are graphai before the thesmothetai provided by the laws” (ὑπὲρ δὲν γραφαί πρὸς τοὺς θεσμοθέτας ἐκ τῶν νόμων εἰσίν). He thus presents the choice of action facing his prosecutors as one between proper and dedicated graphai, which he does not specify, and impeachment, which the prosecution elected to pursue since it presented them with no risk. In fact, at the time

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15 See also Lyc. fr.X–XI.9 = Harp. s.v. πεφασμένης: ὁ κατά Λυκόρυον ἀντὶ τοῦ γεγενημένης. Λυσίας δ’ ἐν τῷ κατὰ θεσμόνθεστοι, εἰ γνήσιος, φησὶ “τὸ μὲν πεφασμένος ἐστὶ φανέρως” (“pephasmenês [‘clear, manifest’]: Lycurgus, in the Against Lycophron, in place of gegenêmenês [‘having become/being’, or perhaps ‘engaged in’ (LSJ s.v. γέγονος II.3.c)]. Lysias in the Against Theomnestus, if genuine, says, “pephasmenês [‘clearly, manifestly’] means phanerôs [‘openly’].” The latter citation is Lys. 10.19, where Lysias quotes from a law the phrase “any women who are clearly for sale” (ὅσα δὲ πεφασμένους πολλοῖσαι). This clause is cited at [Dem.] 59.67 as providing an affirmative defense against a charge of seduction: the law “prohibits the seizure of a [man as a] seducer in the company of any of those women who are located in a brothel or are clearly for sale” (οὐκ ἐὰν ἔπι ταύτης μοιχὴν λαβεῖν υπόσαι ἐν ἐπὶ ἐργαστηρίῳ καθώνται ἢ πολλοίτεροι ἀποκαλομένως); cf. Plut. Sol. 23.1.
of Lycophron’s trial, Athenian law offered four potential remedies against an accused seducer.\footnote{16} 1. \textit{Eisangelia}. Under the terms of the impeachment statute preserved by direct quotation at Hyp. 4.7–8, the persons justiciable by \textit{eisangelia} were those who subverted or attempted to subvert the democratic government of Athens; those who committed specific treasonable acts, including betrayal of a city, army, or navy; and politicians who proposed measures against Athenian interests under the influence of bribery. Thus the original purpose of \textit{eisangelia} was to redress “high crimes and misdemeanors”\footnote{18} bearing directly upon the governmental stability and military security of the Athenian state. Impeachment was an especially valuable weapon against office-holders (including elected military officers: Hyp. 4.27), as would-be prosecutors who did not wish to wait for their targets’ end-of-term review (\textit{euthynai}) could bring an \textit{eisangelia} against a sitting magistrate. During the 330’s, however, thanks in large part to the influence and example of Lycurgus, prosecutors exploited the vague language of the subversion-of-democracy clause in the \textit{eisangelia} law in order to launch impeachments for a number of offenses which the legislator had presumably not envisioned,\footnote{19} including violation of the maximum legal fee for prostitutes and fraudulent deme registration (Hyp. 4.3) as well as Euxenippus’ allegedly false report of his dream and the seduction charged to Lycophron.\footnote{20}

At Lys. 1.25 ff., Euphiletus is similarly selective in presenting the courses of action available to the wronged party in the case of \textit{moicheia}. According to his narrative, upon catching his wife in bed with her lover Eratosthenes, he had only two options: he could either kill Eratosthenes or hold him for ransom (see n.16 above).

16 Three additional remedies would have been available if Lycophron had been caught in the act: summary execution by a qualified relative of his paramour (Dem. 23.53; cf. Lys. 1.30–31); other self-help punishments, including the forcible insertion of a radish into the anus and removal of pubic hair by hot ash (Ar. \textit{Nub.} 1083–1084, Plut. 168, Thesm. 536–538; cf. Xen. \textit{Mem.} 2.1.5); and extortion of ransom (\[Dem.\] 59.41, 65–70).

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18 Cf. U.S. Constitution, Article 2, section 4: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”

19 Hyp. 4.1–3; Humphreys, in Eadie/Ober, \textit{Craft} 219.

20 Lyc. fr.X–XI.2 argues that Lycophron’s acts constituted subversion of the democracy: “for it is not right to let go unpunished a man who transgresses the written laws by which the democracy is kept safe (⟨τοῦτος⟩ τῶς
Lycophron never explicitly protests that his case represents the first application of *eisangelia* to seduction (as, for example, Euxitheus on the use of *apagôgê* to prosecute a suspected killer, *Ant.* 5.9); but the beginning of his speech, where such an objection would naturally occur, is lost, and his vehement complaints about the prosecution’s choice of procedure indicate that this application was at least a relative novelty, if not an absolutely unprecedented maneuver.

2. *Graphê moicheias*. Lycophron’s reference to suitable “graphai before the *thesmothetai*” (§12) certainly includes an allusion to the *graphê moicheias*, a dedicated public action for seduction which fell under the jurisdiction of the *thesmothetai* ([Arist.] *Ath.Pol.* 59.3–4; [Dem.] 59.87; ?cf. *Lys.* frr.18–21 Thalheim = fr.IX Gernet-Bizos *Against Autocrates for seduction* [κατ’ Αὐτοκράτους *μοιχείας*].

Athenian law empowered any willing citizen (baring specific ineligibility: above, 378) to mount a *graphê*, and so both Ariston and Lycurgus were presumably competent to prosecute Lycophron by this procedure irrespective of their relationship to the wronged party, whether defined as Dioxippus’ sister or her *kyrios*.

The penalty upon conviction in a *graphê moicheias* is not attested. The mandatory death sentence posited by Harrison is highly improbable, but prosecutors may have been able to propose capital punishment if, as Harris suggests, the *graphê moicheias*, like many other

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21 See especially fr.3 ad fin.: “or betrayal of dockyards or arson of government buildings or seizure of the Acropolis” (νεστρίων προδοσίαν ἢ ἀρχείων [ἳσον ἴναρμον ἢ κατάληψιν ὀρκας]). Presumably Lycophron offered this paraphrase of the *eisangelia* statute in order to demonstrate that its terms did not include allegations of seduction (M. Marzi, in M. Marzi, P. Leone, E. Malcovati, *Oratori attici minori* I [Turin 1977] 148).


23 Harrison, *Law* I 35; he notes (rightly, in my opinion) that *Lys.* 13.66 (“he was caught as a seducer, and the penalty for that is death,” ἔληφενς ἑαυτός καὶ τοῦπο θάνατος ἢ ἥμαρτε ἢ σιστί) refers not to the penalty in a *graphê moicheias* but to the Draconian law (Dem. 23.53) which permitted the killing of a seducer caught in the act by specified relatives of his paramour.
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graphai (including the graphê hybreôs: see below), was an agôn timêtos featuring unlimited penal assessment, up to and including a sentence of death.24 Omitowoju, however, argues that the defendant convicted in a graphê moicheias faced the same penalty as the unsuccessful prosecutor of a graphê adikôs heirchthênai hôs moichon (action for wrongful detention as a seducer).25 In this case, the death penalty will have been unavailable, as in this procedure the defendant who proved that he had detained a seducer rightfully was entitled to punish the seducer in the presence of the court according to his own discretion, with the restriction that he not use a dagger.26

3. Graphê hybreôs. If the plural graphai (§12) indicates that Lycophron has in mind more than one specific graphê before the thesmothetai, then he is presumably referring to the graphê hybreôs in addition to the graphê moicheias.27 This too came under the supervision of the thesmothetai (Isoc. 20.2; Dem. 21.47, 37.33) and could be prosecuted by any willing Athenian citizen (Isoc. 20.2; Dem. 21.45, 47). The action was an agôn timêtos without penal limit, and therefore prosecutors could seek the death penalty (Dem. 21.47; Lys. fr.44 Thalheim = fr.XVI Gernet-Bizos; cf. Dem. 54.1); if a monetary fine was levied, it was paid not to the prosecutor or the victim but to the Athenian state (Dem. 21.45).

4. Apagôgê. Summary citizen arrest (apagôgê) was available against certain classes of offender apprehended in circumstances of manifest guilt. Upon arrest, the accused was haled before the Eleven; if he

24 Harris, CQ 40 (1990) 374. By contrast, some agônes timêtoi involved a limited penal assessment: in the dikê aikeias, for example, convicted defendants were liable only to an assessable monetary fine (Lys. fr.44 Thalheim = fr.XVI Gernet-Bizos; cf. Harp. s.v. afik€aw).


26 [Dem.] 59.66. The proviso “without a dagger” must imply a bar on capital punishment (cf. S. G. Cole, “Greek Sanctions against Sexual Assault,” CP 79 [1984] 97–113, at 103–104; contra, Harris, CQ 40 [1990] 374): surely the detainer was not forbidden to kill the seducer with a knife but permitted to do so with a rock, a club, or his bare hands. Note also the provision that a woman apprehended in moicheia who attends publicly funded religious rites “shall suffer with impunity whatever she suffers, except death” (πλήν θανάτου, [Dem.] 59.87).

confessed his guilt, he was summarily executed, while if he maintained his innocence, he received trial in a dikastērion and faced a statutory death sentence if convicted ([Arist.] Ath. Pol. 52.1). Aeschines 1.90–91 shows that seducers were included among the kakourgoi (“malefactors”) who were subject to apagōgē provided that they were apprehended ἐν οὐτοπαροίᾳ.28 The allegations raised by Lycophron’s prosecutors indicate that Lycophron could also have been summarily arrested on other grounds. Digging through walls (toichōrychia), as a means of breaking and entering, qualified the doer as a kakourgos and served as grounds for apagōgē.29 According to his prosecutors, Lycophron did this on at least one occasion in order to conduct an assignation with Dioxippus’ sister;30 the accusation is rebutted three times by Lycophron’s synēgoros (P.Oxy. 1607 fr.1 cols. 1–3). Yet evidently no apagōgē was ever initiated against Lycophron, either for seduction or for toichōrychia.

The critical distinction between the first three options, which Lycophron acknowledges, and apagōgē, which he suppresses, is that apagōgē contained a flagrancy requirement, embodied in the phrase ἐπ’ αὐτοφόροι. However, the nature of this requirement was arguably flexible,31 and the accusations leveled against Lycophron suggest that his prosecutors could have employed apagōgē. The prosecution portrays Lycophron as a habitual seducer, a repeat offender who has caused “numerous


30 Arist. Eth. Nic. 1138a24–26 also associates toichōrychia with moicheia (as well as theft).

women to grow old, unmarried, in their houses, and many others to cohabit with unsuitable men” (Hyp. 1.12; cf. Lyc. fr.X–XI.2 [above, n.20], which accuses Lycophron of introducing novel and foul customs, thus suggesting multiple instances of seduction). On these grounds, Lycophron could be represented as a “manifest” seducer, and hence liable to apagôgê, just as Agoratus, the defendant in Lysias 13, met the requirements of the Eleven as a “manifest” (ἐπ’ οὐτοφόρῳ) killer despite his not having been apprehended in the act (Lys. 13.85–87). Agoratus denounced his victims in the presence of the Council of 500 and the Assembly; Lycophron, according to his prosecutors, similarly manifested his affair with Diœxippus’ sister before numerous witnesses at her wedding to Charippus. As Lycurgus favored a demonstrably broad interpretation of the eisangelia statute (as evidenced in the prosecutions of Lycophron and Exœnippus), he may well have taken a similarly broad view of the ἐπ’ ἀυτοφόρῳ requirement for apagôgê. Indeed, the surviving fragments of Lycurgus’ speeches for the prosecution explicitly compare Lycophron to offenders of the categories liable to apagôgê, including andrapodistai (Lyc. fr.X–XI.1) and lôpodytai (X–XI.11); this suggests that the prosecution may have considered employing apagôgê against Lycophron.33

32 We should note that, although the Eleven accepted the apagôgê of Agoratus with the proviso that the arrest warrant be amended to include the phrase ἐπ’ οὐτοφόρῳ, the trial verdict is unknown, and hence we do not know how the jury reacted to the prosecution’s interpretation of the flagrancy requirement.

33 It is possible that Lycophron himself refers to the possibility of apagôgê at Hyp. 1.6. In rebutting the prosecution’s account of his interruption of the wedding ceremony (above, n.7), he asks the jury to consider whether he had so lost his mind that “I did not hesitate to say such things about a free woman with everyone listening, nor was I afraid that I would be throttled to death straightaway” (οὐδ’ ἐδείξεν μὴ παραχθῆμαι ἀπόλοιμαι ἵνα ἐπιγύμνησον). Some editors, however, posit ἵππαγγελον (C. Babington, The Orations of Hyperides for Lycophron and for Exœnippus [Cambridge 1853] 2; Colin, Hyperides 132; Arapopoulos, Ύπερειδικὸς λόγος 18), which Colin (131) and Arapopoulos (18 n.1) interpret as a reference to apagôgê. Whitehead, Hyperides 121, favors ἵνα παγγέλοι over ἵππαγγελον on the grounds that apagôgê was not available as a remedy for slander; but if Hypereides wrote ἵππαγγελον, the
One consideration which may have weighed in favor of *apagôgê* and *eisangelia*, and against the *graphai moicheias* and *hybreôs*, was the Athenian statute of limitations (νόμος προ-
θεσμίας), which mandated that litigation be initiated within five years of the *casus litis*.\(^\text{34}\) As the sources present the five-year *prothesmia* as a general principle of Athenian law, we must presume that it governed all legal procedures, absent express evidence to the contrary.\(^\text{35}\) No such exception is attested for the *graphê moicheias* or the *graphê hybreôs*. *Eisangelia*, however, was evidently exempt from the five-year limit, since Lycurgus impeached Leocrates seven years after his alleged treason in the aftermath of the battle of Chaeroneia (Lyc. 1.45); and we have a strong hint that *apagôgê* was exempt as well (Lys. 13.83).\(^\text{36}\) Lycophron stands accused of seducing the sister of Dioxippus during her first marriage (*P.Oxy.* 1607 fr.1 col. 3; Hyp. 1 fr.4) and, presumably, between the death of her first husband—at which time she was pregnant, allegedly by Lycophron (Hyp. 1 fr.4)—and her wedding to Charippus, at which Lycophron urged her to remain faithful to him (Hyp. 1.3). Nowhere does the prosecution allege that Lycophron and Dioxippus’ sister continued their affair after this second wedding, which occurred in 336 or early 335; and Lycophron was brought to trial between 333 and the summer of 330. If Lycophron’s alleged seduction of Dioxippus’ sister occurred more than five years before Ariston and Lycurgus decided to prosecute him, their choice of actions under the statute of limitations will not have

\(^\text{34}\) Dem. 36.25–27; 38.17, 27; cf. [Dem.] 43.16; Isae. 3.58 (as pertaining to the law of inheritance).

\(^\text{35}\) E.g., Lys. 7.17 (no *prothesmia* for violation of sacred olive trees).

\(^\text{36}\) The speaker anticipates Agoratus’ complaint that he has been prosecuted long after his alleged offense by commenting, “I don’t think there is any *prothesmia* for offenses like this; I believe that, whether someone seeks punishment immediately or some time later, the defendant must demonstrate that he has not done what he is charged with.” This dismissal of the *prothesmia* implies that the *apagôgê* of Agoratus was brought more than five years after the death of Dionysodorus (cf. S. C. Todd, *Lysias* [Austin 2000] 138–139).
been between *eisangelia* and the *graphē moicheias* or *hybreōs*, as Lycophron presents it, but rather between *eisangelia* and *apagōgê*. In this case, Lycophron’s comment about *graphai* may have been a red herring, although his remark about the relative prosecutorial risks remains sound, as the thousand-drachma fine for receiving less than 20% of the votes applied to *apagōgê* (Dem. 22.26) as well as *graphai*.

Another feature of *eisangelia* and *apagōgê* which coincided with the interests of Lycophron’s accusers was the mandatory death penalty imposed upon a convicted defendant. Lycophron maintains that the true impetus for the lawsuit against him is a dispute over succession to the estate of his alleged lover’s first husband. Upon his death, this man left a pregnant wife and a will; at the time his relatives evinced no suspicions regarding the parentage of the unborn child, but now that the child seems likely to survive, they allege that it is Lycophron’s in order to disqualify it from the inheritance, which will then presumably devolve upon one or more of themselves (Hyp. 1 fr.4). The fact that at least three years intervened before Lycophron was prosecuted lends significant credence to his account. In order to obtain the first husband’s estate for themselves, his relatives needed to establish the illegitimacy of his supposed child; in order to keep it, they needed to deter any foreseeable future challenges on the issue. If they prosecuted Lycophron by *graphē* (either *moicheias* or *hybreōs*) and managed to secure a conviction, a capital sentence was far from guaranteed. In a *graphē moicheias*,

37 The extent to which the Athenians complied with the statute of limitations is admittedly a matter of debate. The speakers of Dem. 36 (§26) and 38 (§18), both delivered in counter-prosecutions (*paraphrāi*), complain that the courts have admitted their adversaries’ prosecutions nineteen and more than twenty years, respectively, after the *casus litis*. It may be, though, that enforcement of the *prothesmia* was commonly left to trial juries (cf. Lys. 13.83, where the speaker anticipates that the *prothesmia* will be among his jury’s considerations), and it should be noted that Phormio, on whose behalf Dem. 36 was delivered, triumphed over his would-be prosecutor Apollodorus so decisively that Apollodorus was convicted by over 80% of the jury and fined the *epōbelia* accordingly ([Dem.] 45.6). At the very least, therefore, if time were a factor, Lycophron’s prosecutors could reasonably have decided against prosecuting by *graphē* on the grounds that it would provide Lycophron with an automatic, and possibly conclusive, line of defense.
as we have seen, the death penalty may not even have been possible; and while the prosecutor in a graphê ἱβρεῶς could propose a death sentence, the jury might elect to impose the alternative penalty proposed by the defendant. Lycophron would therefore have had good odds of surviving a conviction by graphê, and might retaliate—for example, by bringing a lawsuit for false testimony (dikê pseudomartyrïôn) against the prosecution’s witnesses—in such a way as to reopen the question of the child’s parentage. Therefore, the best way for the first husband’s relatives to settle this question decisively in their favor was to employ against Lycophron a procedure in which a conviction would not only establish Lycophron as the presumptive father of the child but also insure against legal reprisals. Thus eisangelia and apagôgê for seduction, which removed all penal discretion from the jury, were preferable to the graphai moicheias and ἱβρεῶς.

Lycophron’s prosecutors may, therefore, have had more compelling reasons to proceed by impeachment than the desire to avoid the prospect of incurring a thousand-drachma fine if their case failed miserably. Depending upon the date when they filed suit, the statute of limitations may have disallowed a graphê moicheias or ἱβρεῶς; and, even if these graphai were available, eisangelia presented the advantage of a guaranteed death penalty upon conviction. As apagôgê was equivalent to eisangelia with respect to both of these considerations, we should ask not only why impeachment was preferable to graphai—the question raised (and incompletely answered) by Lycophron—but also why it was preferable to apagôgê. The most likely answer to the latter question lies in the ἐπ’ αὐτοφόροι requirement for apagôgê, which had no counterpart in eisangelia. Prosecution by apagôgê would have invited Lycophron to mount the defense that he had not been caught in the act; and the jury’s verdict, as in Lysias 13, could be expected to depend heavily upon which

If Lycophron had living relatives, they might attempt to clear his name, but this would be much more difficult for them than for Lycophron himself: for example, they could not file a dikê pseudomartyrïôn, which had to be brought by the individual(s) against whom the alleged false testimony had been offered.
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interpretation of ep’ autophôrôi the jurors accepted. Lycophron’s accusers, therefore, had good reason to avoid apagôgê and the attendant problem of flagrancy—however loosely the phrase ep’ autophôrôi might be interpreted—in favor of the impeachment procedure, under which flagrancy was not an issue.

III. The impeachment of Lycophron and the “Lycurgan program”

But the best explanation for the choice of eisangelia lies in Lycurgus’ prominent involvement in the prosecution. Under normal circumstances, an intrafamilial estate squabble is not the type of dispute in which Lycurgus would condescend to involve himself: of his fifteen attested fragmentary speeches, not one is a logos klêrikos (and, of course, his sole complete speech, Against Leocrates, is from an eisangelia); and while the pseudo-Plutarchan vita of Lycurgus (Mor. 841A–844D) mentions his participation in religious and political trials, it makes no mention of inheritance lawsuits.

Yet Lycurgus was prominently involved in the prosecution of Lycophron from the outset. The first stage of the eisangelia against Lycophron took place in the Assembly, where Lycurgus testified that relatives of Dioxippus’ sister had informed him of Lycophron’s conduct at her wedding to Charippus (Hyp. 1.3). For the resulting jury trial Lycurgus composed two speeches for the prosecution; most likely one was delivered by Ariston, the nominal prosecutor who submitted the bill of impeachment (Hyp. 1 fr.4 ὥσπερ Ἀρίστων ἐν τῇ εἰσαγγελίᾳ γράφει; 1.12, addressing Ariston, ἐμὲ μὲν αἰτία ἐν τῇ εἰσαγγελίᾳ … εἰσαγγελίαν δὲ δόξας), and the other by Lycurgus himself as synêgoros (cf. 1.19).39

39 Hansen, Eisangelia 107 n.12; Whitehead, Hypereides 103. The more common view is that Lycurgus delivered both speeches, the first at the preliminary hearing before the Assembly and the second at trial (F. Blass, Die attische Beredsamkeit III.2 [Leipzig 1898] 67; Colin, Hypereides 111 n.1; Burtt, Minor Attic Orators II 373; S. Salomone, “Osservazioni sull’ orazione iperidea ‘Per Licofrone’,” Maia 25 [1973] 55–63, at 59; Arapopoulos, Ὑπερείδου λόγοι 14 n.1; Malcovati, in Marzi et al., Oratori 814). Whitehead, Hypereides 104, raises the possibility that both were trial speeches delivered by synêgoroi, on the grounds that Ariston, described by Lycophron as a sycophant (Hyp. 1.2), may not have required a speechwriter. However, Athenian speakers so commonly use “sycophant” as a term of abuse against their adversaries that
of his long-term superintendence of the public treasury ([Plut.] V.Lycurgi 2–3), and to his reputation as a dedicated and skillful, if perhaps overzealous, prosecutor (V.Lycurgi 10), Lycurgus was much in demand as a synêgoros: “for his whole life he remained in good repute with the Athenians and was considered to be just, with the result that, even in the lawcourts, a speech by Lycurgus was deemed an advantage to the person he supported” (V.Lycurgi 13). Even Hypereides, when he later crossed swords again with Lycurgus at the trial of Euxenippus, admitted Lycurgus’ reputation for moderation and reason (Hyp. 4.12) while criticizing his use of eisangelia (4.1–3).

Ariston and the cooperating relatives of the first husband of Dioxippus’ sister and of the woman herself, therefore, endeavored to recruit Lycurgus onto the prosecution team because Lycurgus’ presence lent his auctoritas to their allegations and significantly improved their odds of securing a conviction.41

we should not presume that a person who is called a sycophant is necessarily a skilled writer. On the basis of the phrase “when they submitted the impeachment” (ὑπὲ τὴν εἰσαγγελίαν ἐδίδοσαν, 1.3), L. Rubinstein, Litigation and Cooperation: Supporting Speakers in the Courts of Classical Athens (Stuttgart 2000) 240 with n.10, suggests that Lycurgus may have participated in the composition of the bill of impeachment (although elsewhere [51 n.73] she describes Lycurgus as Ariston’s synêgoros). However, as Lycophron credits Ariston with sole authorship of the bill in fr.4 and §12, we should not read too much into this plural (cf. Whitehead, Hypereides 103 n.131), which merely indicates that Ariston had support for his eisangelia; note that the plural subject in the temporal clause ὑπὲ … ἐδίδοσαν parallels, and was probably influenced by, the plural subject immediately preceding: “the accusations which they (scil. Ariston and Lycurgus) brought against me in the Assembly” (τὰς ἀμφίκτιας ἂς ἐν τῇ ἐκκλησίᾳ ἠτύπασαν με).

40 That Hypereides was sincere in this expression of respect for Lycurgus is indicated by his defense of Lycurgus’ sons before the Eleven after their father’s death (Hyp. fr.118; [Plut.] V.Lycurgi 28).

41 Salomone, Maia 25 (1973) 59. Lycurgus may have been content to retain Ariston as the prosecutor of record since he was not personally affected by Lycophron’s alleged actions. Although moicheia was legally a public offense in that it could be prosecuted by uninvolved parties, it was fundamentally a personal affair: note that Euphiletus, while rationalizing his killing of Eratosthenes as a mandate from the law of the city, characterizes Eratosthenes’ seduction of his wife as an offense against “my house” and “my wife and my children” (Lys. 1.25–26). By contrast, no such complica-
Lycurgus accepted because the Lycophron case aided in the pursuit of his own political and social agenda, which featured the use of high-publicity litigation—and particularly eisangelia—as a corrective measure which not only punished the convicted defendant but furthered the moral education of the Athenian citizenry. In so doing, he advanced a reading of the eisangelia statute which ranged from moderate, if controversial, extension (as in the prosecution of Leocrates) to the radical shift in application evidenced in the impeachments of Lycophron and Euxenippus. Lycurgus argued that Lycophron qualified for impeachment because his act of seduction amounted to a subversion of the democracy (above, 382 with n.20); moreover, the correlation of Lycophron’s tenure of an elective archê as hipparch on Lemnos (Hyp. 1.17; [Arist.] Ath.Pol, 61.6) with Lycurgus’ characterization of him as the “legislator” of immoral habits (Lyc. fr.X–XL2) suggests that Lycurgus also cited the clause of the impeachment law which targeted anyone who, “as a politician, does not propose what is best for the Athenian people.” Thus, in sponsoring the impeachment of Lycophron, Lycurgus attempted to assimilate seduction, an act contra bonos mores which he considered “un-Athenian,” to the anti-Athenian

42 For Lycurgus’ view of the didactic function of prosecution see, e.g., Lyc. 1.10, 67; Lycurgus’ general concern with the education of his fellow citizens was most famously demonstrated in his sweeping reform of the ephêbeia (Humphreys, in Eadie/Ober, Craft 206–209). On the use of eisangelia in pursuit of the moral aspects of the “Lycuran program” see A. Petrie, Lycurgus: The Speech Against Leocrates (Cambridge 1922) xxiii–xxiv; Humphreys 217–219; M. Faragna, Atene nell’età di Alessandro (Rome 1992) 280–285; Harris, in Worthington et al., Dinarchus 158.

43 Lycurgus charged Leocrates under the general treason clause of the eisangelia law (Lyc. 1.1 and passim), but the alleged treason consisted in Leocrates’ flight from Attica in the aftermath of Chaeroneia (16–27). While this action arguably violated an ad hoc decree passed after the battle (16), abandoning Attica does not appear among the examples of (actively) treasonous acts listed in the eisangelia law (Hyp. 4.7–8: above, 382). The acquittal of Leocrates (although by only one vote: Aeschin. 3.252) indicates significant resistance to Lycurgus’ use of eisangelia on this occasion (cf. Burtt, Minor Attic Orators II 10).
offenses specified in, and traditionally prosecuted under, the *nomos eisangelitikos*; hence Lycophron’s observation (Hyp. 1.12)—repeated by Hypereides in his defense of Euxenippus (Hyp. 4.26)—that his prosecutors magnified the charged offense to the level of tragedy (above, 375, 379).

The prosecution of Lycophron, therefore, served as a test case for Lycurgus’ efforts to transform the impeachment procedure into a quasi-catch-all remedy for “un-Athenian” activities.45 For Lycurgus, this prosecution involved risks of a different sort and of greater consequence than the thousand-

44 A. B. Bosworth, *Alexander and the East* (Oxford 1996) 115, suggests that the fame of Dioxippus as an Olympic victor made the seduction of his sister a *cause célèbre* worthy of *eisangelia*. However, if Dioxippus’ prestige had been a factor, we would expect justice to have been sought swiftly, rather than at least three years after the alleged offense, at a time when Dioxippus may no longer have been in Attica: as Bosworth observes, he joined Alexander’s campaign “some time before 327”; cf. Diod. 17.101.2–6. Note, too, the unlikelihood that the *eisangeliai* of Diognides and Antidorus and of Agasicles (Hyp. 4.3) involved any wrongs done to (or by) prominent Athenians—in contrast to the previous impeachments described at Hyp. 4.1, 28–30.

45 In addition to his participation in the *eisangelia* prosecutions of Lycophron, Leocrates, and Euxenippus, Lycurgus is explicitly attested as having impeached Autolycus (338, for dispatching his wife and children from Attica after Chaeroneia, convicted: Hansen, *Eisangelia* no. 113); Lysicles (338, for his role as general in the loss at Chaeroneia, convicted: Hansen no. 112); and Mnesarchus (before 325/4, for impiety, convicted: Hansen no. 126). The strong tradition regarding Lycurgus as a habitual prosecutor (e.g., [Plut.] *V.Lycurgi* 42–46), his participation in the tenuous *eisangeliai* against Lycophron and Euxenippus, and the recent series of impeachments described at Hyp. 4.3 make it highly probable that Lycurgus involved himself in a number of other *eisangeliai*, either as prosecutor of record or as *synêgoros* for the prosecution. In my opinion, the contemporary testimony of Hypereides and Lycurgus decisively refutes the position (based on statements by later lexicographers) that any legislation valid in the fourth century provided for impeachments for novel offenses not covered by written law (*kainon* καὶ *agraphon*): so Hansen, *Eisangelia* 16–17, 19–20, and “*Eisangelia in Athens: A Reply,*” *JHS* 100 (1980) 89–95, at 91–93; contra, R. J. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle I* (Chicago 1930) 295–296; P. J. Rhodes, *The Athenian Boule* (Oxford 1972) 163–164, and “*ΕΙΣΑΓΓΕΛΙΑ in Athens,*” *JHS* 99 (1979) 103–114, at 107–108. At any rate, Lycophron’s objection to the use of *eisangeliai* against him is that it bypasses existing legal remedies for seduction, an offense neither *kainon* nor *agraphon*. 
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drachma fine in *graphai* to which Lycophron alludes. At stake, to some degree, in the trial of Lycophron were the policy, credibility, and reputation of Lycurgus: just as his fellow prosecutors counted on these factors to sway the jury toward a conviction, an acquittal could be construed as a rejection, at least in this instance, of Lycurgus’ broad interpretation of *eisangelia*. As the trial verdict is not known, we have no way to gauge the jury’s reaction to the particular application of *eisangelia* against Lycophron. However, within three years, the Athenian people indicated its general displeasure with the recent abuses of the impeachment procedure symptomatized in Lycophron’s case, and demonstrated its sympathy with Lycophron’s objection to “risk-free” *eisangelai*, by penalizing frivolous impeachment with a thousand-drachma fine. Although the deterrent effect of this measure upon Lycurgus appears to have been minimal, judging from his participation in the impeachment of Euxenippus (Hyp. 4), at least *eisangelia* prosecutors now had to assume the same financial risk as those who employed other public procedures, such as *graphai* and *apagôgê*.

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