The Prosecution of Homicide in Athens:
A Reply

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In GRBS 20 Michael Gagarin published a penetrating and stimulating article about the prosecution of homicide in Athens. After a long discussion of the dike phonou, he devotes two shorter sections to the apagoge phonou and the graphe phonou. In both sections he agrees with MacDowell and rejects my interpretation of the procedures. I am not persuaded, however, and in this article I shall offer new arguments in support of my views. After a brief discussion of one of the major problems raised by the dike phonou I shall examine further the graphe phonou and the various forms of apagoge used against homicides. Let me add in advance, however, that I fully accept one of Gagarin's objections: the evidence is not sufficient to support my opinion that the so-called apagoge phonou (Dem. 23.80) was introduced as late as in the first half of the fourth century B.C., and so I retract the view.

I. The δίκη φόνου

In a judicious account of the dike phonou Gagarin discusses, inter alia, whether the provision that the relatives are to prosecute implies a negative rule that other persons are prevented from prosecuting. He concludes that the law was not explicit, and I agree. Nevertheless, although there is very little evidence to go on, he prefers the view that 'relatives are to prosecute' is a rule which does not absolutely prohibit non-relatives from prosecuting (304). Here I disagree for the following reason.

The rule that prosecution in a dike phonou rested with the family of the victim is in fact a necessary corollary of the general...
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rule that prosecution in a *dike* rested with the wronged person. And so Gagarin’s view that non-relatives were not absolutely prohibited from bringing a *dike phonou* implies that other persons than the wronged person were not absolutely prohibited from bringing an ordinary *dike*, e.g., a δίκη αἴκειας, a δίκη κακηγορίας, etc.3 Now this implication would entail a correction of the accepted view about the distinction between private and public actions in the Athenian administration of justice: “a δίκη in the narrower sense could only be initiated by the wronged person, or his or her κύριος, or in homicide cases by the dead person’s relatives in an elaborately prescribed order.” This is Harrison’s statement of the accepted view, and MacDowell writes in his recent manual that, in a *dike idia*, “only the person who claimed that he suffered some wrong or deprivation could be the prosecutor.”4 But is the accepted view correct?

MacDowell and Harrison state the rule as a simple fact without reference to the sources or to other scholars. Bonner and Smith and Busolt/Swoboda both refer to Lipsius,5 and his chapter “Einteilung der Klagen” is in fact the foundation upon which all other scholars dealing with the Athenian administration of justice have based their accounts of *dike* and *graphe*.6 On page 239 Lipsius states: “Im engeren Sinne aber heisst δίκη der Rechtsstreit oder die Klage, die ein ausschliesslich privates Interesse verfolgt und darum nur von dem Verletzen angestellt werden darf. Mit genauem Ausdruck aber wird sie δίκη ἰδία genannt und der δημοσία δίκη gegenübergestellt, die von jedem vollberechtigten Athener anhängig gemacht werden kann,” and in notes 6 and 7 Lipsius adduces some twenty references to the sources in support of the distinction drawn

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3 Gagarin has argued (in conversation, December 1980) that this implication is not necessary: in an ordinary *dike* there was always a wronged person who could prosecute, whereas in a homicide case there may have been no living relative, in which case there was no one to prosecute except outsiders. I suggest, however, that in this situation the right to prosecute would pass to the *phrateres* (IG I 115.22–23), so that in homicide cases as in all other *dikai* there was always some person specifically entitled to prosecute.


6 Lipsius (supra n.5) II 237–62. In works older than Lipsius’ manual the rule is stated with no references to the sources or with references pertaining only to the *dike phonou*, e.g., G. Gilbert, *Handbuch der griechischen Staatsalterthümer* I (Leipzig 1893) 454; M. H. E. Meier and G. F. Schömann, *Der attische Process* (Berlin 1883–87) 199 with n.10.
between dike ‘im engeren Sinne’ and demosia dike = demosios agon, graphe, etc. But checking the references one has to admit that all the sources adduced are inadequate. They prove only that a graphe might be brought by any citizen or that a dike phonou was initiated by the family: none shows that the right to bring an ordinary dike was restricted to the wronged person. Does that mean that we shall have to give up the basic assumption made by all scholars about the classification of actions in Athens? Are we to assume that an ordinary dike might be brought (e.g.) by the wronged person’s relatives or even by one of his friends? To the contrary, Lipsius was right, but he must have forgotten to quote the crucial source, Isocrates 20.2: εὐρήσετε δὲ καὶ τοὺς θέντας ἡμῖν τοὺς νόμους ύπὲρ τῶν σωμάτων μάλιστα σπουδάσαντας. πρῶτον μὲν γὰρ περὶ μόνου τοῦτον τῶν ἀδικημάτων καὶ δίκας καὶ γραφάς ἀνευ παρακαταβολῆς ἐπούσαν, ... ἐπείτα τῶν μὲν ἄλλων ἐγκλημάτων αὐτό τῷ παθόντι μόνον ὁ δράσας ὑπόδικος ἐστιν περὶ δὲ τῆς ὑβρεως, ὡς κοινοῦ τοῦ πράγματος ὄντος, ἐξεστὶ τῷ βουλομένῳ τῶν πολιτῶν γραφαμένῳ πρός τοὺς θεσμοθέτας εἰσελθείν εἰς ύμᾶς. This passage proves that a dike could be brought only by the wronged person, and accordingly I favour the traditional view of the dike phonou, that it could be initiated only by the relatives of the victim. I agree with Gagarin that the evidence concerning prosecution in a dike phonou is inconclusive. And so the best foundation for an interpretation is the analogy to an ordinary dike, which could be brought only by the wronged person. Similarly, the bringing of a dike phonou was probably restricted to the relatives. If other persons were to prosecute on behalf of the victim they would have to avail themselves of some kind of public action, either an apagoge or a graphe, to which procedures I now turn.

II. The Use of γραφή in Homicide Cases

In Apagoge 108–12 I demonstrated the existence of a γραφή τραύματος ἐκ προνοίας heard by the council of the Areopagus and,

7 Gagarin’s interpretation of what the law implies (303–04) is not cogent. His argument is that the rule ‘relatives are expected to prosecute’ implies as its opposite rule ‘non-relatives are not expected to prosecute’, and so there was no prohibition of a dike phonou brought by non-relatives. Admittedly this is a possible interpretation of the law, but it is based on a paraphrase, and the rule may just as well be paraphrased ‘relatives are allowed to prosecute’, in which case the opposite rule implied is ‘non-relatives are not allowed to prosecute’, and so non-relatives are in fact prohibited from bringing a dike phonou.
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to the best of my knowledge, no scholar has attempted to challenge this part of my argument. Next, I suggested that a γραφή τραύματος ἐκ προνοίας implies a fortiori the existence of a γραφή φόνου. In order to evade the unpleasant recognition of γραφαί in homicide cases Gagarin follows MacDowell in rejecting my inference: “the fact that the graphe procedure was used for τραύμα ἐκ προνοίας does not prove that it was used for homicide too.”

This objection is based on the assumption that a prosecution for τραύμα ἐκ προνοίας was not a homicide trial, a view already taken by MacDowell in his Athenian Homicide Law. Quoting Dem. 23.22 and Arist. Ath.Pol. 57.3, he proceeds (44): “Since I am at present concerned only with homicide, I shall say nothing about the inclusion of arson and wounding in the list. Nor shall I discuss cases of the destruction of sacred olive-trees, which were tried by the Areopagos until some date in the fourth century.” So MacDowell, followed by Gagarin and Lalonde, would separate τραύμα and πυρκαία from φόνος and φαρμάκεια; the result is in my opinion a distorted picture of Athenian homicide law.

1. The crucial source is the law itself, quoted in Demosthenes’ speech Against Aristocrates 22: δικάζειν δὲ τὴν βουλήν τὴν ἐν Ἅρειῳ πάγῳ φόνου καὶ τραύματος ἐκ προνοίας καὶ πυρκαίας καὶ φαρμάκων, ἕαν τις ἀποκτείνῃ δους. Now the heading of this and the following quotations from the law is νόμος ἐκ τῶν φονικῶν νόμων τῶν ἐκ Ἅρειον πάγου. It does not matter very much whether this heading is part of the original speech or was only inserted later in the manuscripts, since it is in conformity with Demosthenes’ own words at 51: ὁ μὲν νόμος ἐστὶν ὁδὸς Δράκοντος, ὦ ἀνδρεὶς Ἀθηναίοι, καὶ οἱ ἄλλοι δὲ ὅσους ἐκ τῶν φονικῶν νόμων παρεγράψαι. The implication is that both τραύμα and πυρκαία were offences dealt with in the Athenian φονικοὶ νόμοι, and this conclusion is confirmed by several other sources.

2. In Aristotle’s paraphrase of the law in Ath.Pol. 57.3, φόνος is again inseparably bound up with τραύμα. The text runs εἰσὶ δὲ φόνοι δικαι καὶ τραύματος, ἀν μὲν ἐκ προνοίας ἀποκτείνῃ ἡ τρώσθη, ἐν Ἅρειῳ πάγῳ, καὶ φαρμάκων, ἀν ἀποκτείνῃ δους, καὶ πυρκαίας. On the other hand, the destruction of sacred olive-trees is treated separately at 60.2.

3. Furthermore, one of the clauses of the amnesty of 403 indi-

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cates that the law dealing with τραύμα and the prosecution of τραύμα was simply a subsection of the Athenian homicide law. According to Aristotle (Ath. Pol. 39.5) the amnesty included the provision that τάς . . . δίκας τοῦ φόνου εἶναι κατὰ τὰ πάτρια, εἰ τίς τινα αὐτοχείρια ἔκτεινεν ἢ ἔτρωσεν.

4. Now if τραύμα was a subspecies of φόνος the implication is that τραύμα was not simply ‘wounding’ but rather ‘assault with intent to kill’, and this is precisely the description of the offence given in both the extant forensic speeches dealing with τραύμα. In Lysias’ speech Against Simon (3.41–43, cf. 28) the defendant pleads: ἐπειτα δὲ καὶ οὐδεμίαν ἠγούμην πρόνοιαν εἶναι τραύματος ὅστις μὴ ἀποκτεῖναι βουλόμονος ἔτρωσε . . . ἀλλ’ ὅσοι ἐπιβουλεύσαντες ἀποκτεῖναι τινας ἔτρωσαν, ἀποκτεῖναι δὲ οὐκ ἐδυνήθησαν, περὶ τῶν τοιούτων τὰς τιμωρίας οὕτω μεγάλας κατεστήσαντο, . . . καὶ ταῦτα ἥδη καὶ πρῶτερον πολλάκις ύμεῖς οὕτω διέγνωτε περὶ τῆς πρόνοιας. And similarly in Lysias 4.5–11 the defendant raises the same objection against the type of action applied: δίκη τραύματος is the wrong action to bring because there was no intention to kill.

5. In every law suit, before the trial both parties had to take an oath usually called ἀντωμοσία. In homicide cases, however, the regular term was διωμοσία and the taking of the oath seems to have been a more solemn ceremony. Now it is apparent from Lysias’ speech Against Simon (1, 4, 21) that the oath to be taken in a δίκη τραύματος ἐκ πρόνοιας took the form of a διωμοσία and was not an ordinary ἀντωμοσία.

6. Similarly, πυρκαία was probably a subspecies of φόνος. The offence was not simply ‘arson’ but rather ‘arson causing loss of life’. And so it is no surprise that arson, together with poisoning, is included in Plato’s enumeration of the various ways of committing homicide in Laws 865b: ἕαν δὲ αὐτόχειρ μὲν, ἀκὼν δὲ ἀποκτείνῃ τις ἔτερος ἔτερον, εἰτε τῷ ἐαυτῷ σῶματι ψιλῶ εἰτε ὄργανῳ ἢ βέλει ἢ πώματος ἢ σῖτου δόσει ἢ πυρός ἢ χειμώνος προσβολή ἢ στερήσει πνεύματος, αὐτὸς τῷ ἐαυτῷ σῶματι ἢ δι’ ἔτερον σωμάτων, πάντως ἓστω μὲν ὡς αὐτόχειρ, δίκας δὲ τινέτω τὰς τοιάσθε.

My conclusion is that τραύμα and πυρκαία were subtypes of homicide falling under the φονικοὶ νόμοι and that the prosecution of these offences resulted in a homicide trial. To exclude τραύμα from a general account of homicide law is in my opinion to give only a partial and consequently distorted picture of the Athe-

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9 The only thorough discussion of διώμοναθαι and διωμοσία as technical terms in law is Lipsius (supra n.5) 832 n.12. Cf. Harrison (supra n.4) 99 and MacDowell 92.
nian administration of justice. Thus, whether or not Gagarin and MacDowell accept a γραφὴ φόνου on the analogy of the γραφὴ τραύματος, one is bound to accept γραφὴ as a proper procedure in connection with at least one type of homicide trial, viz., τραύματος ἐκ προνοιας.

Gagarin’s second argument against a γραφὴ φόνου is based on an argument from silence: “it is almost inconceivable that in his survey of the various types of homicide courts and procedures (23.65–80) Demosthenes would omit mention of a γραφὴ φόνου if it existed” (322). If it had existed it would have been mentioned “either before or after the discussion of apagoge in 23.80” (n.66).

I believe this objection invalid. The apagoge phonou was opened by taking the offender to the desmoterion and it resulted in a trial before the people’s court, whereas γραφὴ φόνου, on the analogy of the γραφὴ τραύματος ἐκ προνοιας, would have been heard on the Areopagus by the council of the Areopagus (cf. Hansen 110). Now, Demosthenes’ survey (23.63–81) of the administration of justice in homicide cases is organized not according to procedures but according to law courts, and in the sixfold division the emphasis is on the location of the various courts.10 There is no explicit reference to those manning the courts (the council of the Areopagus, the ephetai, the basileis, the dikastai) and only three references to procedures (two to δίκη in 66 and one to ἀπαγωγή in 80). If Demosthenes were to mention the γραφὴ φόνου he should have done so in the section on the Areopagus (65–70); either before or after 80 as suggested by Gagarin would be the wrong place. Furthermore, there is no reason why Demosthenes, in his

10 The composition of the passage is: 63: ὅπωσον νόμοι περὶ τῶν φονικῶν δικαστηρίων εἰσίν... ταῦτα πάντα ἐπὶ πέντε δικαστηρίους γίγνεται. 65: τὸ ἐν Ἀρείῳ πάγῳ δικαστήριον. 71: δεύτερον δ’ ἔτερον δικαστήριον... τοῦπι Παλλαδίῳ. 74: τρίτον δ’ ἔτερον πρὸς τούτοις δικαστήριον... τοῦτο δ’ ἐστὶ τοῦπι Δελφίνιῳ. 76: τέταρτον τοιὸν ἄλλο πρὸς τούτοις τοῦπι Προτανείῳ. 77: ἐπὶ τοῖν πέμπτον δικαστήριον... τὸ ἐν Φρασατοῖ. 80: ἑτε τοῖν ἐνθ’ ἐκτῆ τιμωρίᾳ πρὸς ἀπάγοις ταῦτας... ἀπάγοις ἔξοις εἰς τὸ δεσμωτηρίων. The word δικαστήριον occurs thirteen times in the passage in addition to all the places where it is implied. Similarly the passage bristles with words indicating place, e.g., τόπος, ἐν, ἔπι, ὤς, etc. At 80 there seems at first glance to be a slight deviation from the organization according to courts. Demosthenes mentions a ‘sixth form of revenge’ and not a sixth δικαστήριον. The reason is undoubtedly that the distinctive locality to be mentioned in connection with apagoge was, of course, the δεσμωτηρίον rather than the δικαστήριον in the Agora which might, in the middle of the fourth century, vary from day to day according to the sortition by which different courts were assigned to different magistrates. In spite of the fact that the prison was not a courtroom Demosthenes rounds off his account in 81 with the phrase τὸς οὕτως δικαστηρίος, a legitimate zeugma covering the five δικαστήρια and the δεσμωτηρίον.
description of the Areopagus, should include a specific account of
the γραφὴ φόνου. In 80–81, for example, he mentions only one
form of apagoge against homicides, although the Athenians, as
Gagarin admits, had several different forms. Demosthenes shows
very little interest in procedures in this passage and concentrates
on law courts and localities. Why should he bother about the
γραφὴ φόνου which in any case was the exception and not the rule?
An argument from silence thus carries no weight.

Summing up: the Athenians certainly had a γραφὴ τραύματος
and there can be no doubt that τραύμα ἐκ προνοίας was an offence
dealt with in the homicide law. So the Athenians allowed not only
apagoge but also graphe in their administration of homicide law.
I suggest once more that a γραφὴ τραύματος ἐκ προνοίας implies
a fortiori that it must have been possible to bring a γραφὴ φόνου ἐκ
προνοίας. We have only a single example of the γραφὴ τραύματος in
addition to a general reference to the procedure,11 and there can
be no doubt that a δίκη τραύματος was the regular procedure.12
Hence it causes no surprise that we have not preserved any ex­
ample of a γραφὴ φόνου, which must have been exceptional. I have
never challenged the accepted opinion that a δίκη φόνου was the
regular procedure: I have only pointed out that scholars are too
dogmatic in their rejection of a γραφη φόνου and that γραφὴ must
have been a possible form of public action in some homicide cases,
at least in the case of τραύμα ἐκ προνοίας.

III. The So-called ἀπαγωγή φόνου.

Following MacDowell I distinguished between four different
types of apagoge against homicides: (1) apagoge against persons
accused of homicide (Dem. 24.105), (2) apagoge against persons
suspected of homicide (Dem. 23.80–81), (3) apagoge against
homicides who were specifically kakourgoi (Ant. 5; Lys. 13.56
and 13.85–87; Aeschin. 1.90–91), (4) apagoge against exiles who
had been sentenced for homicide (Dem. 23.28). Gagarin attempts
to simplify the fourfold division by interpreting (2) as a variant of
(1) and by reducing the evidence for (3) to a single case (Ant. 5),

11 The γραφὴ τραύματος brought by Demosthenes against his cousin Demomeles: Aeschin.
2.93; 3.51, 212. The general reference is Dem. 54.18.
12 That Lysias Against Simon, for example, is a δίκη τραύματος is apparent from ἐγκλήμα in 3.1, since this term is used only in δίκαι and never in γραφη.
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from which it follows that the ἀπαγωγὴ κακούργων was an exception and not a regular procedure.

The evidence for the apagoge against persons suspected of homicide, the so-called apagoge phonou, is restricted to a single source, Demosthenes' speech Against Aristocrates 80–81: ἐὰν τοῖς ἐσθ' ἐκτῇ τιμωρίᾳ πρὸς ἀπάσαις ταύταις, ἢν ὁμοιώς παραβὰς γέγραφεν τὸ ψήφισμ' ὀστοσί. εἰ πάντα ταῦτα τις ἤγνωσεν, ἢ καὶ παραπλήθασιν οἱ χρόνοι ἐν οἷς ἐδει τούτων ἐκκατά ποιεῖν, ἢ δὲ ἀλλὰ τι σύχι βουλέται τούτων τοὺς τρόπους ἐπεξείναι, τὸν ἀνδροφόνον δ' ὅρα περιμόντ' ἐν τοῖς ἱεροῖς καὶ κατὰ τὴν ἄγοράν, ἀπάγειν ἐξεστὶν εἰς τὸ δεσμωτήριον, οὐκ οἰκάδε οὐδ' ὅποι βουλέται, ὥσπερ σὺ δέδωκας, κανταθ' ἀπαθείς οὐδ' ὅτιον, πρὶν ἃν κριθῇ, πείσεται, ἀλλ' ἐὰν μὲν ἄλω, θανάτῳ ζημιωθήσεται, ἐὰν δὲ μὴ μεταλάθη τὸ πέμπτον μέρος τῶν ψήφων ὁ ἀπαγωγόν, χιλίας προσφολίσει. Gagarin is inclined to identify this type of apagoge with type (1) by suggesting that Demosthenes in 23.80 gives a paraphrase of the procedure referred to in the law quoted in 24.105: ἐὰν δὲ τίς ἀπαθηθῇ, . . . προειρημένον αὐτῷ τῶν νόμων εἰργεσθαι, εἰσὶν ὅποι μὴ χρή, δησάντων αὐτὸν οἱ ἕνεκα καὶ εἰσαγόντων εἰς τὴν ἡλιαίαν, κατηγορεῖτο δὲ ὁ βουλόμενος οἷς ἐξεστὶν. ἐὰν δ' ἄλω, τιμᾶτο ἡ ἡλιαία δ' ἡ χρή παθεῖν αὐτὸν ἢ ἀποτείσαι. ἐὰν δ' ἁγγαροῦ τιμηθῇ, δεδέσθω τέως ἃν ἐκτείσῃ. Gagarin maintains that the differences between 23.80 and 24.105 are superficial and due to the fact that Demosthenes in his speech Against Aristocrates "may be tailoring the legal evidence to fit his needs" (314).

I agree that Demosthenes is sometimes a most unreliable interpreter of the Athenian laws, but in 23.80 a distorted paraphrase of the law about apagoge would have led to the opposite of what Gagarin suggests. One of the important differences between type (1) and type (2) is that type (1) is an ἀγὼν τιμητός (Dem. 24.105), whereas type (2) is an ἀγὼν ἀτίμητος since the law, according to 23.80, prescribes capital punishment. Gagarin suggests that the law described in 23.80 was in fact an ἀγὼν τιμητός and that Demosthenes "may be stating the regular though not the legally required penalty" (315). But if the apagoge phonou (type 2) was an ἀγὼν τιμητός and the law did not prescribe capital punishment, it

13 Gagarin's position on the relationship between the apagoge in Dem. 23.80 and the apagoge in Dem. 24.105 is very cautious: the differences between the procedures "can be reduced if not completely eliminated" (315), the two passages "refer to the same or very similar types of apagoge" (316). If the two passages refer to the same procedure, any discrepancy between them must be explained away; if they refer to similar procedures, Gagarin admits the existence of two types: but then with what and how many differences?
would undoubtedly have been in Demosthenes' interest to point this out to the jurors, for example by saying: “according to the law regulating apagoge phonou a homicide may escape with a fine but, in his decree for Charidemus, Aristocrates allows even the killing of the homicide without trial.”\textsuperscript{14} Demosthenes is certainly not an advocate who blunts his own arguments, and the implication is that capital punishment probably was a statutory requirement in the law regulating the apagoge phonou.

Secondly, Gagarin suggests that Demosthenes, in his attempt to enumerate homicide procedures contravened by Aristocrates, may have wished to create more procedural distinctions than actually existed, and that Demosthenes in the passage 63–81 “introduces any relevant procedures he can find” (314). Again I am inclined to reject Gagarin’s analysis of Demosthenes. In 23.63–81 Demosthenes shows very little interest in types of procedure, but organizes his account, as we have seen, according to law courts. Each of the six different courts was empowered to hear homicide cases arising out of different procedures. The council of the Areopagus, for example, might hear a δίκη φόνου, a δίκη φαρμάκων, a δίκη πυρκαίας, and a δίκη or a γραφή τραύματος (cf. supra 14–15), but in 65–70 Demosthenes refers only to the δίκη φόνου. Similarly, in 23.80 Demosthenes mentions only one form of apagoge, but MacDowell has reconstructed four different forms, of which Gagarin accepts at least two and perhaps three. Demosthenes leaves out the apagoge kakourgon against homicides and the apagoge against exiled homicides, although both procedures would have been relevant if Demosthenes had intended to enumerate procedures. Demosthenes states both earlier and later in the speech that Aristocrates' decree is in conflict with the law on apagoge against exiled homicides (23.29–36, resumed in 216), but although much of what Demosthenes says in 63–81 is repetition of earlier arguments, the apagoge against exiles is omitted in 80, which shows that Demosthenes does not discuss all possible procedures relevant to the case, but rather enumerates all possible law courts dealing with homicide trials.

Thirdly, the πρόφραταις is emphasized in the law (24.105) but passed over in silence in the paraphrase of the apagoge phonou at 23.80. Gagarin assumes that Demosthenes, accidentally or intentionally, omitted it from his paraphrase (315–16). He may be

\textsuperscript{14} It is apparent from Dem. 23.35, 42–43, \textit{et alibi} that Aristocrates’ decree, according to Demosthenes, allows even the killing of the person who kills Charidemus.
right, but this is of minor importance compared with one fundamental difference which, in my opinion, precludes any identification of *apagoge* types (1) and (2). Even granting that capital punishment as mentioned in 23.80 is only a probable result of a *timesis* and not the obligatory penalty prescribed by law, we must admit that this form of *apagoge* is in any case an alternative to a *dike phonou*. On the other hand, the *apagoge* against a person accused of homicide (24.105) did not replace a *dike phonou*, but was merely a temporary interruption of the *dike phonou* already initiated by the *πρόρρησις*. Otherwise it would have been advantageous for the accused to contravene the restrictions imposed by the *πρόρρησις*: if he was put on trial by an *apagoge* after the *πρόρρησις* he might get off with a fine, whereas the penalty for homicide in a *dike phonou* was invariably death or exile (cf. Hansen 99–100). If we follow Gagarin in minimizing the difference between *apagoge* types (1) and (2), we should have to admit that the *apagoge* paraphrased in 23.80 was not an alternative to the other procedures, but only a preliminary trial dealing with the trespassing but not with the original offence, *viz.*, the killing of another man.

Finally, Gagarin attempts to raise suspicion against Demosthenes' account in 23.80 by questioning the motivation he gives for bringing an *apagoge* instead of a *dike*. Demosthenes opens his account with the phrase *ει πάντα ταὐτά τις ἡγνόηκεν*, and Gagarin asks (314), “Could someone really be ignorant of the regular procedure and yet know how to proceed by means of *apagoge*? It seems unlikely.” I admit that Demosthenes may be exaggerating, but it is not at all unlikely that an Athenian citizen might be ignorant of how to initiate and conduct a *dike phonou*, whereas he might feel that an *apagoge phonou* was a simpler and more familiar remedy. Homicide is not the most common crime, and the *dike phonou* was a complicated procedure framed with archaic formalities. The *dike* had to be initiated with a *πρόρρησις*, the law prescribed that all the near relatives of the deceased had to join in the prosecution,¹⁵ and the case was heard by the Areopagus, a solemn court with which few Athenian citizens were familiar. In contrast, *apagoge* was a public action with few formalities and heard by the people's court, which most Athenian citizens (above age thirty) would know simply by being or having been jurors themselves. We must keep in mind that many Athenians did not know that it was impossible to bring a *dike phonou* during the last

¹⁵ IG F 115.21–23 (Meiggs-Lewis 86) = Dem. 43.57.
three months of the year and that the Athenians had a special board of *exegetai* who expounded the formalities and the homicide law for any Athenian who consulted them.\(^\text{16}\) Accordingly, I do not share Gagarin's suspicion of the motivation for the *apagoge phonou* in Demosthenes 23.80.

### IV. The ἐνδείξις/ἀπαγωγή κακούργων against Homicides

The *endeixis/apagoge kakourgon* against homicides is accepted by Gagarin in so far as he admits the application of the procedure in the case of Euxitheus for whom Antiphon wrote the speech *On the Murder of Herodes*. However, I cannot follow Gagarin (317–22) in dismissing all the other sources I adduced in support of this type of *apagoge* (103–07). I admit that a passage in the *Lexica Segueriana* carries little weight,\(^\text{17}\) but I shall dispute his omission of the trial of Menestratus (Lys. 13.56), his rejection of Aeschines 1.90–91 as a relevant source for *apagoge kakourgon* against homicides, and his classification of the *apagoge* against Agoratus (Lys. 13.85–87) as an *apagoge phonou* type (1) or (2).

1. In the speech *Against Agoratus* (13.56) Lysias refers to the trial of Menestratus as a precedent for the trial of Agoratus: τούτων (Menestratus) μὲντοι οἴ μὲν τριάκοντα ἀφείσαν ὡσπερ Ἀγόρατον τοινῦι, δόξαντα τάλθη εἰσαγωγέλαι, ύμεις δὲ πολλῷ χρόνῳ ὑστερον λαβόντες εὖ δίκαιατηρίῳ ὡς ἀνδροφόνον ὄντα, θάνατον δίκαιως καταψηφίζεσαμενοί τῷ δημίῳ παρέδοτε καὶ ἀπετυμπανίσθη. At first glance Lysias' description seems too vague to allow any identification of the procedure employed, but a closer examination points to an *apagoge kakourgon*. First, Menestratus is charged with homi-

\(^{16}\) In Ant. 6.41–43 the speaker has to explain to the jurors which obligations the king archon had in connection with the bringing of a *dike phonou*. In Dem. 47.6Bff the *exegetai* are consulted about the interpretation of the rules concerning the *dike phonou*.

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cide, but the case is heard by the jurors (ὑμεῖς) and not by the Areopagus. So the procedure employed cannot have been a dike phonou. The apagoge is the only known homicide trial heard by the people's court, and so the simplest explanation is to assume that Menestratus was put on trial by an apagoge (cf. MacDowell 137–38). Furthermore, Lysias provides us with the important piece of information that Menestratus was executed by means of ἀποτυμπανισμός. In his seminal article “Sur l’exécution capitale” Louis Gernet demonstrated that ἀποτυμπανισμός is a method of execution principally applied to kakourgoi and closely connected with apagoge. The reasonable inference is that Menestratus was put on trial by an apagoge kakourgon heard by the people's court.

2. In the speech Against Timarchus (1.90–91) Aeschines argues that if the jurors will condemn only persons convicted by testimonies given by eyewitnesses the result will be the acquittal of many dangerous criminals: δέδεικται φανερὰ ὅδος, δι’ ἑκάτερον τὰ μέγιστα κακουργούντες ἀποφεύγονται. τις γὰρ ἡ τῶν λωπόδωτων ἡ τῶν κλεπτῶν ἡ τῶν μοιχῶν ἡ τῶν ἀνδροφόνων, ἡ τῶν τὰ μέγιστα μὲν ἀδικούντων, λάθρα δὲ τούτο πραττόντων, δόσις δίκης; καὶ γὰρ τούτων οἱ μὲν ἐπ’ αὐτοφόρῳ ἀλόντες, ἐὰν ὀμολογοῦσιν, παραχρῆμα θανάτῳ ξημιοῦνται, οἱ δὲ λαβόντες καὶ ἔξαρνοι γενόμενοι κρίνονται ἐν τοῖς δικαστηρίοις, εύρισκεται δὲ ἡ ἀλήθεια ἐκ τῶν εἰκότων. Against my interpretation of this passage (Apagoge 104ff) Gagarin maintains (n.60) that Aeschines “does not say explicitly or even imply that adulterers, killers and oi τὰ μέγιστα ἀδικούντες are all legally classified as kakourgoi.” I shall counter this interpretation of Aeschines by attempting to reconstruct the nomos ton kakourgon; in order to facilitate the account I begin by quoting the other sources:

Ant. 5.9: πρῶτον μὲν γὰρ κακούργος ἐνδεδειγμένος φόνου δίκην φεύγω, ὁ οὖν οὗτος πόσοτ’ ἐπαθε τῶν ἐν τῇ γῇ ταύτῃ, καὶ ὡς μὲν οὐ κακούργος εἰμι οὔδ’ ἄνοχος τοῖς τῶν κακούργων νόμοι, αὐτοὶ οὗτοι τούτοι γε μάρτυρες γεγένηται. περὶ γὰρ τῶν κλεπτῶν καὶ λωποδώτων ὁ νόμος κεῖται, ὃν οὐδὲν ἐμοὶ προσόν ἄπεδειξαν. οὗτος εἰς γε ταύτῃ τῇ ἀπαγωγῇ νομμωτάτην καὶ δικαιοτάτην πεποίηκασαι ώμιν τὴν ἀποψήφισιν μου. In 17 a reference to ἑπιμεληταὶ τῶν κακούργων as presiding over the court, and in 85 a further

18 REG 37 (1924) 261–93, esp. 287–88: “Nous admettrons donc, finalement, que parmi les systèmes d'abord plus ou moins isolés et indépendants qui se sont intégrés dans le droit pénal de cité, il en est un qui comprend l'ἀποτυμπανισμός comme mode d'exécution spécifique: c'est celui que caractérisent toutes ces notions, elles-mêmes spécifiques et qui s'appellent l'une l'autre, κακούργος, ἐπ’ αὐτοφόρῳ, ἀπάγειν, c'est celui qui concerne les variétés primitives du vol.”
reference to the same law: καθ’ οὐς μὲν ἄπήχθην, οὐκ ἐνοχὸς εἰμι τοῖς νόμοις.

Arist. Ath.Pol. 52.1: καθιστάσει δὲ καὶ τοὺς ἐνδεκά κλήρω τοὺς ἐπιμελησομένους τῶν ἐν τῷ δεσμωτηρίῳ, καὶ τοὺς ἀπαγομένους κλέπτας καὶ τοὺς ἀνδραποδιστὰς καὶ τοὺς λυσοδῆτας ἢ μὲν [ὁμολογῶ], θανάτῳ ζημιωσοντας, ἢ δ’ ἀμφισβητῶσιν, εἰσάξοντας εἰς τὸ δίκαιότηριον, κἂν μὲν ἀποφύγωσιν, ἀφήσοντας, εἰ δὲ μὴ τότε θανατώσοντας, ... 
Lys. 10.7–10: πολύ γὰρ ἔργον ἦν τῷ νομοθέτῃ ἀπαντὰ τὰ δόνματα γράφειν ὅσα τὴν αὐτὴν δύναμιν ἔχει ... ἀλλ’ οὖθ’ ἂν τῶν ἑνδέκα γενόμενος ἀποδέξαι, εἰ τις ἀπάγω τινά ἁγάκων θοίματιν ἀποδεδόθαι ἢ τὸν χιτωνόσκον ἐκδεδόθαι, ἀλλ’ ἀφείς ἂν τὸν αὐτὸν τρόπον ὅτι οὐ λυσοδῆτις ὄνομάζεται. οὖθ’ εἰ τις παῖδα ἔξαγαγων ληθεῖν, οὐκ ἂν φάσκοις αὐτὸν ἀνδραποδίστῃν εἶναι, εἰπὲν μαρεί τοῖς ὀνόμασιν, ἀλλὰ μὴ τοῖς ἔργοις τοῖς νοῦν προσέεσθαι ἢν ἑνεκά τὰ δόνματα πάντες τίθενται.
Dem. 24.113: ... καὶ νόμον εἰσήνεγκεν, εἰ μέν τις μεθ’ ἡμέραν ὑπὲρ πεντήκοντα δραχμαῖς κλέπτηι, ἀπαγωγὴν πρὸς τοὺς ἑνδέκ’ εἶναι, εἰ δὲ τις νίκτωρ όσιον κλέπτηι, τοῦτον ἐξείναι καὶ ἀποκτείναι καὶ τρώσαι διῶκοντα καὶ ἀπαγαγείν τοῖς ἑνδέκα, εἰ βούλοιτο.
Dem. 54.24: λαβὲ δὴ μοι καὶ τοὺς νόμους, τὸν τε τῆς διβρεως καὶ τὸν περὶ τῶν λυσοδυτῶν ... λέγε. ΝΟΜΟΙ. cf. 1, τῆς τῶν λυσοδυτῶν ἀπαγωγῆς.
Isoc. 15.90: καὶ εἰ μὲν τις τοῦτον ἀπαγαγὼν ἀνδραποδίστην καὶ κλέπτην καὶ λυσοδήτην μηδὲν μὲν ἀποφαίνει τοῦτον εἴργασμόν, διεξεί δ’ ὡς δεινὸν ἐκαστὸν ἢττί τῶν κακουργημάτων, ληθεῖν ἂν φαίη καὶ μαίνεσθαι τὸν κατηγορον ... 
Aeschin. 1.113: οἱ δὲ νόμοι κελεύουσι τῶν κλεπτῶν τοὺς μὲν ἀπολογούντας θανάτῳ ζημιώθας, τοὺς δ’ ἀρνομένους κρίνεσθαι.

It is apparent that Aeschin. 1.90–91 and Arist. Ath.Pol. 52.1 are interdependent sources. It is impossible that Aeschines is derived from Aristotle and improbable that Aristotle is derived from Aeschines. The implication is that both passages are based on a common source, probably a section of the law, but which section? The law in question must deal with apagoge against kleptai and lopodytai, and Aristotle shows that it must be one of the laws administered by the Eleven. So everything points to the νόμος τῶν κακουργῶν referred to in Antiphon 5.9. The term κακουργος is reflected in κακουργοῦντες in Aeschines. κλέπται and λυσοδήται are mentioned in all three sources (Ant., Aeschin., Arist.), and the procedure ἀπαγωγή is explicitly mentioned by Aristotle and Antiphon and is lucidly described by Aeschines (both at 1.90 and later at 113). Other references to the same law can probably be found in Lys. 10.8–10, Dem. 24.113, Dem. 54.24, Isoc. 15.90, and Aeschin. 1.113. The conclusion is that Aeschines 1.90–91 is more or less a paraphrase of the νόμος τῶν κακουργῶν itself.
and, pace Gagarin, Aeschines does in fact classify ἀνδροφόνοι and μοιχοί as kakourgoi, since he explicitly states that both murderers and adulterers are subject to instant execution and are put on trial only if they have the possibility of pleading not guilty when arrested. Aeschines may of course be wrong, and it remains to be discussed whether the νόμος τῶν κακούργων included the phrase ἐπ' αὐτοφόρῳ and whether androphonoi and moichoi were covered by the law. A paraphrase is not a quotation and so we must distinguish between the law itself and Aeschines’ representation of the law.

The phrase ἐπ' αὐτοφόρῳ reappears in Photius’ note on οἱ ἕνδεκα: ἄνδρες ὑπὲρ τετταράκοντα ἔτη γεγονότες κλήρῳ τὴν ἀρχὴν ταύτην ἐλάμβανον. ἑπεμελοῦντο δὲ τῶν ἐν τῷ δεσμωτηρίῳ κλέπτας δὲ καὶ λωποδύτας καὶ ἀνδραποδιστάς, εἰ μὲν ἐπ' αὐτοφόρῳ λάβοιεν ἐκόλαξαν θανάτῳ· εἰ δ' ἀντιλέγοιεν εἰς κρίσιν καθίστον. Photius’ account is related to the notes in Lex.Seg. 310.14ff and Schol. Ar. Wasps 1108 (Rav) and all three notes are dependent upon Arist. Ath.Pol. 52.1, but there are significant deviations from Aristotle, especially in Photius but also in the other two notes. They must depend on some other source as well. Apart from the term ἐπ' αὐτοφόρῳ there is no similarity between Photius and Aeschines 1.90–91 and I suggest that Photius’ account, via one or more intermediate links, is derived from the same source as Aeschines 1.90, viz., the νόμος τῶν κακούργων. This inference receives additional support from two passages in forensic speeches in which ἐπ' αὐτοφόρῳ is connected with ἀπαγογή against a kleptes. Furthermore, the term ἐπ' αὐτοφόρῳ appears in that part of Aeschines’ account which seems to be closest to the text of the law, and I see no reason to doubt that ἐπ' αὐτοφόρῳ is taken verbatim from the law itself.

The second question is whether androphonoi and moichoi were covered by the νόμος τῶν κακούργων, so that they could be arrested and in some cases even executed without trial. In Apagoge (47) I argued that only three types of criminal were explicitly mentioned in the law, andrapodistai, kleptai, and lopodytai. Accordingly, neither moichoi nor androphonoi were expressly covered by the law; but that holds good of ballantiotomoi and toichorychoi as well, and, to the best of my knowledge, no scholar has ever ventured to deny that they were kakourgoi in the technical sense.

19 Isae. 4.28, εἰς τὸ δεσμωτηρίον ὡς κλέπτης δὲν ἐπ' αὐτοφόρῳ ἀπήχθη; Dem. 45.81, εἰ κλέπτην σ' ἀπήγον ὡς ἐπ' αὐτοφόρῳ εἴληφός.
although the evidence for classifying (e.g.) ballantiotomoi as kakourgoi is weaker than the evidence for moichoi and androphonoi. The list of kakourgoi was certainly not exhausted with the three types of criminal mentioned in the law: andrapodistai, kleptai, and lopodytai are adduced only as examples of kakourgoi. When Aeschines places androphonoi and moichoi side by side with kleptai and lopodytai he is undoubtedly interpreting and not quoting the νόμος τῶν κακούργων. And so we must ask whether he is right or wrong in his interpretation. It is impossible to give an exact answer to this question since, in Athens, there was no authorized interpretation of the law. An interpretation was correct if the jurors were persuaded and voted accordingly. On the other hand, there must of course have been a more or less accepted opinion about which criminals to include among the kakourgoi in the legal sense. Were androphonoi and moichoi regularly classified as kakourgoi? Or only exceptionally? Or is Aeschines simply mistaken? Or is he deliberately misinterpreting the law?

As is well known from Lysias' speech On the Murder of Eratosthenes, the regular way of proceeding against a moichos was self-help. The woman's kyríos was entitled to kill the adulterer on the spot on condition that he was caught ἐπ’ αὐτοφώρῳ. Now, in addition to moichoi, self-help was allowed against three other types of criminal: nocturnal thieves, highwaymen, and exiled homicides. In all three cases the law prescribed apagoge followed by execution without trial as an alternative remedy to self-help; and so it is highly probable, in itself, that moichoi too were subject to apagoge and instant execution. In sum, I can find no reason to strike moichoi from the list of criminals regularly treated as kakourgoi in the legal sense; and secondly, we have now one more example of the close connection between the legal terms κακούργος and ἐπ’ αὐτοφώρῳ.

As far as androphonoi are concerned, we have one unquestionable example (Ant. 5), one probable example (Lys. 13, cf. infra), and one possible example (Lys. 13.56) of homicides being treated as kakourgoi. Furthermore, two sources indicate that the council

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20 Lys. 1.21 (Euphiletus to the slave girl), ἀξίω δὲ σε ἐπ’ αὐτοφώρῳ ταῦτα μοι ἐπιδείξαν ἵνα γὰρ οὐδὲν δεῖμαι λόγον, ἀλλὰ τὸ ἔργον φανερὸν γενέσθαι, ἐπερ οὕτως ἔχα; cf. 36, where adulterers and thieves are juxtaposed. Cf., moreover, Men. Misoumenos 216ff (oct.).

of five hundred was entitled to arrest a homicide and have him executed without a trial before the people’s court. In the 360s Antipatrus of Ceos was brought before the council and executed for the murder of the Athenian proxenos (cf. Hansen 133, no.16), and a few years later Midias attempted in vain to persuade the council to arrest and execute Aristarchus for the murder of Nicodemus of Aphidna (Hansen 135, no.23). Demosthenes refers to this incident as an example of Midias’ outrageous behaviour, but he does not protest against the procedure employed. In both cases we have possible instances of an apagoge / endeixis / ephegesis to the boule instead of to the Eleven or the thesmothetai.

So there is a considerable amount of evidence supporting Aeschines’ classification of androphonoi as kakourgoi. On the other hand, it is most unlikely that he is mistaken, since he usually reveals that he is well acquainted with the law of Athens, and there is no reason to suspect him of giving a biassed account of the criminals classified as kakourgoi (cf. Hansen 45). Whether androphonoi are kakourgoi or not is of no consequence whatsoever for the outcome of his epangelia dokimasias against Timarchus. The section on kakourgoi is a minor digression and it is unbelievable that any of the jurors would have voted differently if Aeschines had omitted androphonoi from his paraphrase of the νόμος τῶν κακούργων. Moichoi and androphonoi were probably accepted as criminals to be treated as kakourgoi, and the phrase τῶν τὰ μέγιστα μὲν ἀδίκουντων λάθρα δὲ τούτῳ πραττόντων is a simple repetition of οἱ τὰ μέγιστα κακουργοῦντες and is a general expression covering other kakourgoi such as ballantiotomoi, hierosyloi, and toichorychoi.

3. The third source is Lysias 13.85–87: ἀκούω δ’ αὐτὸν καὶ τούτῳ διευφρίζεσθαι, ὅτι ἐπ’ αὐτοφόρῳ τῇ ἀπαγωγῇ ἐπιγέγραται, δ’ πάντων ἐγὼ οἴμαι εὐθέτατον ὡς εἰ μὲν τὸ ἐπ’ αὐτοφόρῳ µὴ προσεγέγραπτο, ἔνοχος (ἂν) ὅν τῇ ἀπαγωγῇ διότι δὲ τούτῳ προσ- γέγραπτα [ἔνοχος ὅν] βραστώνην τινὰ οἴτει αὐτῷ εἶναι. τοῦτό δὲ οὐδὲν ἄλλο ἐδικεῖν ἢ ὑμολογεῖν ἀποκτεῖναι, µὴ ἐπ’ αὐτοφόρῳ δὲ, καὶ περὶ τούτῳ διευφρίζεσθαι, ὡσπερ, εἰ µὴ ἐπ’ αὐτοφόρῳ µέν, ἀπέκτεινε δὲ, τούτῳ ἑνεκα δέον αὐτὸν σώζεσθαι. διοκοῦσι δ’ ἐμοι ό γοι οἱ ἐνδεκα οἱ παραδεξάμενοι τὴν ἀπαγωγήν ταύτην, (οὐκ) οἰόμενοι

Similarly, we have several instances of the term ἐπ’ αὐτοφόρῳ being used in descriptions of homicides caught in the act: Ant. 1.3, ἐὰν ἀποδείξῃ ... τῆν τούτων µητέρα φονεὰς οὖσαν ... καὶ µὴ ἄµα ἀλλὰ πολλὰς ἥδη ληφθείσην τὸν θάνατον τῶν ἐκείνου ἐπ’ αὐτοφόρῳ µηχανοµένην, cf. 9. Ant. 5.48, καίτοι οὐδέ οἱ τοὺς δεσπότας ἀποκταίναντες, ἐὰν ἐπ’ αὐτοφόρῳ
In this passage the type of action employed against Agoratus is explicitly described as an *apagoge*, but it is not evident which kind of *apagoge* the prosecutor used. MacDowell (131–33), followed by Gagarin (319–21), suggested an *apagoge phonou* (type 2), whereas I (102, cf. 52) argued in favour of an *apagoge kakourgon* (type 3). The only clue to the problem is the information that Agoratus and the Eleven insisted on the phrase *en' avroqJwpcP* being added to the indictment. MacDowell is certainly right in pointing out (133) that “the reason why they [the Eleven] required ‘manifestly’ [*en' avroqJwpcP*] to be added must have been a technical one; there must have been a legal rule that without it an *apagoge* on this ground could not be accepted.” Accordingly, we must analyse the meaning and uses of the term *en' avroqJwpcP*.

The adjective *avroqJwpoC* is related to the nouns *fop*, ‘thief’, and *fwpC*, which means either ‘theft’ or ‘discovery of theft (by search)’, cf. *fwpp* (cf. Hansen 48–53). The same ambiguity applies to the adjective, and *en' avroqJwpwC* may therefore mean either ‘to catch the thief during the theft’ or ‘to unmask the thief by clearing up the theft’.23 Metaphorically *en' avroqJwpwC* may be used of other crimes than κλοπη, for example homicide or adultery,24 but the original two meanings are never lost, and the term is usually associated with an offence against property, i.e., κλοπη in the wider sense of the word.25

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23 The meaning ‘in the act’ is attested in Lys. 1.21 and Ant. 1.3, 9; 5.48 (quoted supra nn.20 and 22). The meaning of ‘discovery during a search’ is attested in Dem. 45.81, cf. Soph. Ant. 51 and Hansen 49–50.

24 Cf. supra nn. 20 and 22.

25 Isae. 4.28; Aeschin. 1.91, 3.10; Dem. 19.121 (cf. 132, 293), 45.81; Din. 1.29, 53, 77;
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In the forensic speeches this double meaning of the term is reflected in its construction. ἐπ' αὐτοφόρῳ is either dependent on the verb λαμβάνειν/ἀλλάσκεσθαι or construed with a verb meaning ‘to demonstrate’ (δεξιέλέγχειν, ἐπιδεικνύοναι). Furthermore, either the meaning is ‘to catch in the act’, in which case the scene is usually the place where the crime is committed; or ἐπ' αὐτοφόρῳ is used more or less synonymously with φανερῶς, and the place where the offender is unmasked and convicted of his crime is regularly the law court itself. It is only in the sense ‘to catch in the act’ or ‘during a search’ that ἐπ' αὐτοφόρῳ is a legal technical term, whereas it is used rhetorically and metaphorically when the meaning is ‘to demonstrate manifestly’ or ‘to unmask before the court’. Furthermore, the sources indicate that the term ἐπ' αὐτοφόρῳ was explicitly used in the νόμος τῶν κακούργων, and it is frequently used in connection with criminals to be prosecuted by an ἀπαγογή kakourgon. On the other hand, there is not a single source linking ἐπ' αὐτοφόρῳ, not even in its metaphorical sense, with the ἀπαγογή or ἐνδείξεις against atimoi or other persons who did not abide by a loss of rights. So an inspection of the meaning and uses of ἐπ' αὐτοφόρῳ leads to the conclusion that the ἀπαγογή against Agoratus must have been an ἀπαγογή kakourgon and not an ἀπαγογή phonou against a person who did not respect the prohibition on entering the agora and the sanctuaries.

This conclusion is supported by a closer inspection of the passage Lysias 13.85–87. As far as we can see from Lysias, Dionysius was requested to add only the term ἐπ' αὐτοφόρῳ itself and not
any connecting participle such as ἠφθέντα or ἔξελεγχθέντα. The closest parallel is Isaeus 4.28: εἰς τοὺς δεσμωτηρίους ὡς κλέπτης ὁ ἐπ’ αὐτοφόρῳ ἄπηχθη. The Eleven insisted on the addition of the term itself and did not trouble about the exact interpretation. The text of the writ must have been something like: Διονύσιος Ἀγόρατον ἀπάγει ἐπ’ αὐτοφόρῳ ἄποκτείναντα Διονυσίδωρον κτλ. The interpretation was left to the parties and the decision rested with the jurors. Agoratus argues, of course, that ἐπ’ αὐτοφόρῳ goes with ἀπάγειν and that the meaning is ἐπ’ αὐτοφόρῳ λαμβάνειν. Dionysius, on the other hand, attempts to connect ἐπ’ αὐτοφόρῳ with the verb ἄποκτείναντα and to persuade the jurors that the meaning is ‘manifestly’, i.e., the metaphorical use of the term. Now it is possible to ἐπ’ αὐτοφόρῳ λαμβάνειν or ἀπάγειν or ἔξελεγχθέντα or ἐπι-δεικνύναι. Especially in the two last phrases the term is often used metaphorically. But, to the best of my knowledge, there is no other passage in any classical author where ἐπ’ αὐτοφόρῳ has completely lost its original meaning. On reflection, a phrase like ἐπ’ αὐτοφόρῳ ἄποκτείναντα is a solecism, and Lysias seems to admit this: although he repeatedly implies a connection between ἐπ’ αὐτοφόρῳ and ἄποκτείναντα he avoids a direct collocation of the prepositional term with the verb. Either a form of ἄποκτείναντα has to be supplied, or a collocation is avoided by the periphrastic phrase ἐπ’ αὐτοφόρῳ εἶναι (ὦ ἄποκτείνας), which too is a very odd and unparalleled expression. But the jurors had no time to reflect and they may have been persuaded; we do not know. In sum: the Eleven had to insist that the term ἐπ’ αὐτοφόρῳ be added to the indictment. By the verbs διαφυρίζεσθαι and ἀναγκάζειν Dionysius himself admits that he did not willingly comply with the demand. Second, Dionysius has demonstrably great difficulties in explaining the term; and third, he knows that Agoratus will use the term as his basis for a protest against the procedure employed against him. Dionysius’ argumentation in support of the action applied is as far-fetched as his interpretation of the amnesty in the next section. I am not persuaded, and I maintain my original position that all sources, including Lys. 13.85–87, point to the conclusion that the apagoge against Agoratus was an apagoge kakourgon. ἐπ’ αὐτοφόρῳ is a legal technical term probably used in the νόμος τῶν κακούργων and demonstrably applied regularly in actions against kakourgoi. To combine ἐπ’ αὐτοφόρῳ with the apagoge against a homicide

32 A criminal can be convicted of his crime ἐπ’ αὐτοφόρῳ, but he cannot commit the crime ἐπ’ αὐτοφόρῳ.
who did not abide by a loss of rights is pure speculation without foundation in the sources.

V. Conclusion

I have attempted here to give several new arguments for the following conclusions already made in Apagoge (1976): (a) On the analogy of the rules for prosecution in an ordinary dike I suggest that the right to bring a dike phonou was restricted to the family. (b) The γραφή τραύματος ἐκ προνοίας was a homicide trial and warranted by οἱ φονικοὶ νόμοι. Consequently, we have to admit graphai in homicide cases, and the existence of a graphe phonou is a possibility which cannot dogmatically be ruled out. (c) The apagoge against homicides mentioned in the law at Demosthenes 24.105 did not replace a dike phonou, and so it cannot be identified with the so-called apagoge phonou described by Demosthenes at 23.80–81. (d) The trial of Menestratus (Lys. 13.56) was probably an apagoge kakourgon. (e) In Aeschines 1.90–91 androphonoi and moichoi are classified as kakourgoi in the technical sense and Aeschines is probably right. (f) The apagoge against Agoratus (Lys. 13.85–87) was an apagoge kakourgon and not an apagoge against a homicide who does not respect his temporary loss of rights.

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