

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.¹ 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.²

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

¹ The following works will be cited by author's name alone: M. GAGARIN, "The Prosecution of Homicide in Athens," GRBS 20 (1979) 301–23; M. H. HANSEN, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense 1976); D. M. MACDOWELL, *Athenian Homicide Law in the Age of the Orators* (Manchester 1963).

² Hansen 102–03; Gagarin 320 n.59.

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 αικείας*, 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 Verletzten angestellt werden darf. Mit genauerem Ausdruck aber wird sie *δίκη ιδία* 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

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 I² 115.22–23), so that in homicide cases as in all other *dikai* there was always some person specifically entitled to prosecute.

⁴ A. R. W. Harrison, *The Law of Athens* II (Oxford 1971) 76; D. M. MacDowell, *The Law in Classical Athens* (London 1978) 58.

⁵ R. J. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle* II (Chicago 1930) 7; G. Busolt and H. Swoboda, *Griechische Staatskunde* II (Munich 1926) 1176; J. H. Lipsius, *Das attische Recht und Rechtsverfahren* I–III (Leipzig 1905–15).

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* I² (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 ὑπὲρ τῶν σωμάτων μάλιστα σπουδάσαντας. πρῶτον μὲν γὰρ περὶ μόνου τούτου τῶν ἀδικημάτων καὶ δίκας καὶ γραφὰς ἄνευ παρακαταβολῆς ἐποίησαν, . . . ἔπειτα τῶν μὲν ἄλλων ἐγκλημάτων αὐτῶ τῶ παθόντι μόνον ὁ δράσας ὑπόδικός ἐστιν· περὶ δὲ τῆς ὕβρεως, ὡς κοινού τοῦ πράγματος ὄντος, ἔξεστι τῶ βουλομένῳ τῶν πολιτῶν γραψαμένῳ πρὸς τοὺς θεσμοθέτας εἰσελθεῖν εἰς ὑμᾶς.* 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.⁷ 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 *γραφὴ* in Homicide Cases

In *Apagoge* 108–12 I demonstrated the existence of a *γραφὴ 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*.

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 *τραῦμα ἐκ προνοίας* does not prove that it was used for homicide too.”⁸ This objection is based on the assumption that a prosecution for *τραῦμα 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 *τραῦμα* and *πυρκαϊά* from *φόνος* and *φαρμακεία*; 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 βουλὴν τὴν ἐν Ἀρείῳ πάγῳ φόνου καὶ τραύματος ἐκ προνοίας καὶ πυρκαϊᾶς καὶ φαρμάκων, εἴαν τις ἀποκτείνῃ δούς*. Now the heading of this and the following quotations from the law is *νόμος ἐκ τῶν φονικῶν νόμων τῶν ἐξ Ἀρείου 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 οὗτος Δράκοντος, ὃ ἄνδρες Ἀθηναῖοι, καὶ οἱ ἄλλοι δὲ ὄσους ἐκ τῶν φονικῶν νόμων παρεγραψάμην*. The implication is that both *τραῦμα* and *πυρκαϊά* 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 *τραῦμα*. The text runs *εἰσὶ δὲ φόν[ου] δίκαι καὶ τραύματος, ἂν μὲν ἐκ προνοίας ἀποκτείνῃ ἢ τρώσῃ, ἐν Ἀρείῳ πάγῳ, καὶ φαρμάκων, εἴαν ἀποκτείνῃ δούς, καὶ πυρκαϊᾶς*. 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-

⁸ Gagarin 322; D. M. MacDowell, review of M. H. Hansen, *Atimistrafen i Athen i Klassisk Tid* (Odense 1973), in *JHS* 96 (1976) 228; review of Hansen in *CR* 28 (1978) 175. Cf. also G. V. Lalonde, review of Hansen in *AJP* 99 (1978) 133.

cates that the law dealing with *τραῦμα* and the prosecution of *τραῦμα* was simply a subsection of the Athenian homicide law. According to Aristotle (*Ath. Pol.* 39.5) the amnesty included the provision that τὰς . . . δίκας τοῦ φόνου εἶναι κατὰ τὰ πάτρια, εἴ τις τινα αὐτοχειρία ἔκτεινεν ἢ ἔτρωσεν.

4. Now if *τραῦμα* was a subspecies of *φόνος* the implication is that *τραῦμα* 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 *τραῦμα*. In Lysias’ speech *Against Simon* (3.41–43, cf. 28) the defendant pleads: ἔπειτα δὲ καὶ οὐδεμίαν ἠγούμην πρόνοιαν εἶναι τραύματος ὅστις μὴ ἀποκτεῖναι βουλόμενος ἔτρωσε. . . . ἀλλ’ ὅσοι ἐπιβουλεύσαντες ἀποκτεῖναι τινὰς ἔτρωσαν, ἀποκτεῖναι δὲ οὐκ ἐδυνήθησαν, περὶ τῶν τοιούτων τὰς τιμωρίας οὕτω μεγάλας κατεστήσαντο, . . . καὶ ταῦτα ἤδη καὶ πρότερον πολλάκις ὑμεῖς οὕτω διέγνωτε περὶ τῆς προνοίας. And similarly in Lysias 4.5–11 the defendant raises the same objection against the type of action applied: a *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.⁹ Now it is apparent from Lysias’ speech *Against Simon* (1, 4, 21) that the oath to be taken in a *δίκη τραύματος ἐκ προνοίας* took the form of a *διωμοσία* and was not an ordinary *ἀντωμοσία*.

6. Similarly, *πυρκαϊά* 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: ἐὰν δὲ αὐτόχειρ μὲν, ἄκων δὲ ἀποκτεῖνη τις ἕτερος ἕτερον, εἴτε τῷ ἑαυτοῦ σώματι ψιλῶ εἴτε ὀργάνῳ ἢ βέλει ἢ πώματος ἢ σίτου δόσει ἢ πυρὸς ἢ χειμῶνος προσβολῇ ἢ στερήσει πνεύματος, αὐτὸς τῷ ἑαυτοῦ σώματι ἢ δι’ ἐτέρων σωμάτων, πάντως ἔστω μὲν ὡς αὐτόχειρ, δίκας δὲ τινέτω τὰς τοιάσδε.

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

⁹ The only thorough discussion of *διόμνησθαι* 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 προνοίας*.

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 *απαγογή* in 23.80" (n.66).

I believe this objection invalid. The *απαγογή φόνου* 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 προνοίας*, 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: *ὁπόσοι νόμοι περὶ τῶν φονικῶν δικαστηρίων εἰσὶν . . . ταῦτα πάντ' ἐπὶ πέντε δικαστηρίοις γίνονται.* 65: *τὸ ἐν Ἀρείῳ πάγῳ δικαστήριον.* 71: *δεύτερον δ' ἕτερον δικαστήριον . . . τοῦπὶ Παλλαδίῳ.* 74: *τρίτον δ' ἕτερον πρὸς τούτοις δικαστήριον . . . τοῦτο δ' ἐστὶ τοῦπὶ Δελφινίῳ.* 76: *τέταρτον τοίνυν ἄλλο πρὸς τούτοις τοῦπὶ Πρυτανείῳ.* 77: *ἔτι τοίνυν πέμπτον δικαστήριον . . . τὸ ἐν Φρεαττοῖ.* 80: *ἔτι τοίνυν ἔσθ' ἕκτη τιμωρία πρὸς ἀπάσαις ταύταις. . . ἀπάγειν ἕξεστιν εἰς τὸ δεσμωτήριον.* 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*, *ἐπί*, *ἔδοι*, 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 *απαγογή* was, of course, the *δεσμωτήριον* 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 *τοσούτοις δικαστηρίοις*, a legitimate *zeugma* covering the five *δικαστήρια* and the *δεσμωτήριον*.

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 *τραῦμα 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 example 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 *γραφὴ φόνου* and that *γραφὴ* must have been a possible form of public action in some homicide cases, at least in the case of *τραῦμα 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 *ἐγκλημα* in 3.1, since this term is used only in *δίκαι* and never in *γραφαί*.

from which it follows that the ἀπαγωγή 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: ἔτι τοίνυν ἔσθ' ἕκτη τιμωρία πρὸς ἀπάσαις ταύταις, ἣν ὁμοίως παραβὰς γέγραφεν τὸ ψήφισμ' οὕτοσί. εἰ πάντα ταῦτά τις ἠγνόηκεν, ἢ καὶ παρεληλύθασιν οἱ χρόνοι ἐν οἷς ἔδει τούτων ἕκαστα ποιεῖν, ἢ δι' ἄλλο τι οὐχὶ βούλεται τούτους τοὺς τρόπους ἐπεξιέναι, τὸν ἀνδροφόνον δ' ὄρᾳ περιόντ' ἐν τοῖς ἱεροῖς καὶ κατὰ τὴν ἀγοράν, ἀπάγειν ἕξεστιν εἰς τὸ δεσμωτήριον, οὐκ οἴκαδε οὐδ' ὅποι βούλεται, ὥσπερ σὺ δέδωκας. κἀνταῦθ' ἀπαχθεὶς οὐδ' ὅτιοῦν, πρὶν ἂν κριθῆ, πείσεται, ἀλλ' ἐὰν μὲν ἄλῳ, θανάτῳ ζημιωθήσεται, ἐὰν δὲ μὴ μεταλάβῃ τὸ πέμπτον μέρος τῶν ψήφων ὁ ἀπαγῶν, χιλίας προσοφλήσει. Gagarin is inclined to identify this type of *apagoge*¹³ 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 τις ἀπαχθῆ, . . . προειρημένον αὐτῷ τῶν νόμων εἶργεσθαι, εἰσιῶν ὅποι μὴ χρῆ, δησάντων αὐτὸν οἱ ἔνδεκα καὶ εἰσαγόντων εἰς τὴν ἡλιαίαν, κατηγορεῖτω δὲ ὁ βουλόμενος οἷς ἕξεστιν. ἐὰν δ' ἄλῳ, τιμάτω ἢ ἡλιαία ὃ τι χρῆ παθεῖν αὐτὸν ἢ ἀποτεῖσαι. ἐὰν δ' ἀργυρίου τιμηθῆ, δεδέσθω τέως ἂν 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."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 πυρκαϊᾶς*, 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 *πρόρρησις* 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

¹⁴ It is apparent from Dem. 23.35, 42–43, *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 *εἰ πάντα ταῦτά τις ἠγνόηκεν*, 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 I² 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.¹⁶ Accordingly, I do not share Gagarin's suspicion of the motivation for the *apagoge phonou* in Demosthenes 23.80.

IV. The *ἔνδειξις/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,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: *τούτον (Menestratus) μέντοι οἱ μὲν τριάκοντα ἀφείσαν ὥσπερ Ἀγόρατον τουτονί, δόξαντα τάληθῆ εἰσαγγεῖλαι, ὑμεῖς δὲ πολλῶ χρόνῳ ὕστερον λαβόντες ἐν δικαστηρίῳ ὡς ἀνδροφόνον ὄντα, θάνατον δικαίως καταψηφισάμενοι 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. 47.68ff the *exegetai* are consulted about the interpretation of the rules concerning the *dike phonou*.

¹⁷ *Lex.Seg.* 250.4 (ed. Bekker): *ἔνδεκα τίνες εἰσί: κληρωτοὶ ἄρχοντες ἦσαν, ἔνδεκα τὸν ἀριθμὸν, προϊστάμενοι τοῦ δεσμοτηρίου. καὶ τοὺς ἀγομένους ἐπὶ κακουργήμασι παρελάμβανον κλέπτας καὶ ἀνδραποδιστὰς καὶ φονεῖς. καὶ τοὺς μὲν ὁμολογούντας θανάτῳ ἐζημίουν, τοὺς δὲ ἀμφισβητούντας εἰσήγον εἰς δικαστήριον*. Instead of *ἀγομένους* read *ἀπαγομένους*, cf. *Lex.Patm.* (in Dem. 22.49), *Lex.Sab.* 58 (ed. Papadopulos-Kerameus), *Et.Magn.* 338.31 (ed. Gaisford), *Lex.Vind.* no. 257 (ed. Nauck). All five notes are, *via* intermediate sources, derived from Arist. *Ath.Pol.* 52.1. *Lex.Seg.* differs in having a specification of the criminals regarded as *kakourgoi*; in the other four *ἐπὶ κακουργήμασι* (or *κακούργους*) is left unexplained. The note in Poll. 8.102 is probably based directly on Arist. *Ath.Pol.* 52.1.

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*.¹⁸ 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 φανερά ὁδός, δι' ἧς οἱ τὰ μέγιστα κακούργουντες ἀποφεύξονται. τίς γὰρ ἢ τῶν λωποδυτῶν ἢ τῶν κλεπτῶν ἢ τῶν μοιχῶν ἢ τῶν ἀνδροφόνων, ἢ τῶν τὰ μέγιστα μὲν ἀδικούντων, λάθρα δὲ τοῦτο πραττόντων, δώσει δίκην; καὶ γὰρ τούτων οἱ μὲν ἐπ' αὐτοφώρῳ ἀλόντες, εἰάν ὁμολογῶσι, παραχρήμα θανάτῳ ζημιούνται, οἱ δὲ λαθόντες καὶ ἔξαρνοι γενόμενοι κρίνονται ἐν τοῖς δικαστηρίοις, εὕρισκεται 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 *οἱ 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, ὃ οὐδεὶς πώποτ' ἔπαθε τῶν ἐν τῇ γῆ ταύτῃ, καὶ ὡς μὲν οὐ κακούργός εἰμι οὐδ' ἔνοχος τῷ τῶν κακούργων νόμῳ, αὐτοὶ οὗτοι τούτου γε μάρτυρες γεγέννηται. περὶ γὰρ τῶν κλεπτῶν καὶ λωποδυτῶν ὁ νόμος κεῖται, ὧν οὐδὲν ἔμοι προσὸν ἀπέδειξαν. οὕτως εἰς γε ταύτην τὴν ἀπαγωγὴν νομιμωτάτην καὶ δικαιοτάτην πεποιήκασιν ὑμῖν τὴν ἀποψήφισίν μου.* In 17 a reference to *ἐπιμελεῖται τῶν κακούργων* as presiding over the court, and in 85 a further

¹⁸ REG 37 (1924) 261–93, esp. 287–88: “Nous admettons 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' αὐτοφώρῳ, ἀπάγειν*, c'est celui qui concerne les variétés primitives du vol.”

reference to the same law: καθ' οὓς μὲν ἀπήχθην, οὐκ ἔνοχός εἰμι τοῖς νόμοις.

Arist. *Ath.Pol.* 52.1: καθιστάσι δὲ καὶ τοὺς ἔνδεκα κλήρω τοὺς ἐπιμελησομένους τῶν ἐν τῷ δεσμοτηρίῳ, καὶ τοὺς ἀπαγομένους κλέπτας καὶ τοὺς ἀνδραποδιστὰς καὶ τοὺς λωποδύτας ἄν μὲν [ὁμολογῶ]σι, θανάτῳ ζημιώσοντας, ἄν δ' ἀμφισβητῶσιν, εἰσάξοντας εἰς τὸ δικαστήριον, κἄν μὲν ἀποφύγωσιν, ἀφήσοντας, εἰ δὲ μὴ τότε θανατώσοντας, . . .

Lys. 10.7–10: πολὺ γὰρ ἔργον ἦν τῷ νομοθέτῃ ἅπαντα τὰ ὀνόματα γράφειν ὅσα τὴν αὐτὴν δύναμιν ἔχει . . . ἄλλ' οὐδ' ἂν τῶν ἔνδεκα γενόμενος ἀποδέξαιο, εἴ τις ἀπάγοι τινὰ φάσκων θοῖμάτιον ἀποδεδύσθαι ἢ τὸν χιτωνίσκον ἐκδεδύσθαι, ἀλλ' ἀφείης ἂν τὸν αὐτὸν τρόπον ὅτι οὐ λωποδύτης ὀνομάζεται. οὐδ' εἴ τις παῖδα ἐξαγαγὼν ληφθεῖη, οὐκ ἂν φάσκοις αὐτὸν ἀνδραποδιστὴν εἶναι, εἴπερ μαχεῖ τοῖς ὀνόμασιν, ἀλλὰ μὴ τοῖς ἔργοις τὸν νοῦν προσέξεις ὧν ἔνεκα τὰ ὀνόματα πάντες τίθενται.

Dem. 24.113: . . . καὶ νόμον εἰσήνεγκεν, εἰ μὲν τις μεθ' ἡμέραν ὑπὲρ πενήκοντα δραχμὰς κλέπτοι, ἀπαγωγὴν πρὸς τοὺς ἔνδεκα εἶναι, εἰ δὲ τις νύκτωρ ὀτιοῦν κλέπτοι, τοῦτον ἐξεῖναι καὶ ἀποκτεῖναι καὶ τρῶσαι διώκοντα καὶ ἀπαγαγεῖν τοῖς ἔνδεκα, εἰ βούλοιο.

Dem. 54.24: λαβὲ δὴ μοι καὶ τοὺς νόμους, τὸν τε τῆς ὕβρεως καὶ τὸν περὶ τῶν λωποδυτῶν . . . λέγε. *NOMOI*. cf. 1, τῆ τῶν λωποδυτῶν ἀπαγωγῆ.

Isoc. 15.90: καὶ εἰ μὲν τις τοῦτον ἀπαγαγὼν ἀνδραποδιστὴν καὶ κλέπτην καὶ λωποδύτην μηδὲν μὲν αὐτὸν ἀποφαίνοι τούτων εἰργασμένον, διεξίει δ' ὡς δεινὸν ἕκαστόν ἐστι τῶν κακουργημάτων, ληρεῖν ἂν φαίη καὶ μαίνεσθαι τὸν κατήγορον . . .

Aeschin. 1.113: οἱ δὲ νόμοι κελεύουσι τῶν κλεπτῶν τοὺς μὲν ὁμολογούντας θανάτῳ ζημιούσθαι, τοὺς δ' ἀρνούμενους 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 κακούργων referred to in Antiphon 5.9. The term κακούργος is reflected in κακουργοῦντες in Aeschines. κλέπται and λωποδύται 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 κακούργων itself

and, *pace* Gagarin, Aeschines does in fact classify *ἀνδροφόνους* 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' αὐτοφώρῳ* 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' αὐτοφώρῳ* reappears in Photius' note on *οἱ ἔνδεκα: ἄνδρες ὑπὲρ τετταράκοντα ἔτη γεγονότες κλήρω τὴν ἀρχὴν ταύτην ἐλάμβανον. ἐπεμελοῦντο δὲ τῶν ἐν τῷ δεσμοτηρίῳ κλέπτας δὲ καὶ λωποδύτας καὶ ἀνδραποδιστάς, εἰ μὲν ἐπ' αὐτοφώρῳ λάβοιεν ἐκόλαζον θανάτῳ· εἰ δ' ἀντιλέγοιεν εἰς κρίσιν καθίστων.* 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' αὐτοφώρῳ* 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' αὐτοφώρῳ* is connected with *apagoge* against a *kleptes*.¹⁹ Furthermore, the term *ἐπ' αὐτοφώρῳ* 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' αὐτοφώρῳ* 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 δεσμοτήριον ὡς κλέπτης ὢν ἐπ' αὐτοφώρῳ ἀπήχθη*; *Dem.* 45.81, *εἰ κλέπτην σ' ἀπήγον ὡς ἐπ' αὐτοφώρῳ εἰληφώς*.

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 *kyrios* was entitled to kill the adulterer on the spot on condition that he was caught ἐπ' αὐτοφώρῳ.²⁰ 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;²¹ 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

²⁰ Lys. 1.21 (Euphiletus to the slave girl), ἀξιώ δέ σε ἐπ' αὐτοφώρῳ ταῦτά μοι ἐπιδείξαι ἐγὼ γὰρ οὐδὲν δεόμαι λόγων, ἀλλὰ τὸ ἔργον φανερόν γενέσθαι, εἴπερ οὕτως ἔχει; cf. 36, where adulterers and thieves are juxtaposed. Cf., moreover, Men. *Misoumenos* 216ff (οστ).

²¹ Nocturnal thieves: Dem. 24.113. Exiled homicides: Dem. 23.28. Highwaymen (*λησταί*, *λωποδύται*, etc.): Dem. 23.53. Cf. Harp. s.v. ὁδός, *Suda* s.v. κακούργος, Pl. *Leg.* 874c, Lys. 13.78, and (for *lopodytai*) the νόμος τῶν κακούργων (sources quoted above).

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*.²² 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 biased 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 ἀδικούντων λάθρα δὲ τοῦτο πραττόντων is a simple repetition of οἱ τὰ μέγιστα κακούργοῦντες 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> δυσχυρίζεσθαι, ὅτι 'ἐπ' αὐτοφώρῳ' τῇ ἀπαγωγῇ ἐπιγέγραπται, ὃ πάντων ἐγὼ οἶμαι εὐηθέστατον· ὡς εἰ μὲν τὸ ἐπ' αὐτοφώρῳ μὴ προσεγέγραπτο, ἔνοχος <ἄν> ὦν τῇ ἀπαγωγῇ· διότι δὲ τοῦτο προσγέγραπται [ἔνοχος ὦν] ῥαστώνην τινὰ οἶται αὐτῷ εἶναι. τοῦτο δὲ οὐδὲν ἄλλο ἔοικεν ἢ ὁμολογεῖν ἀποκτεῖναι, μὴ ἐπ' αὐτοφώρῳ δέ, καὶ περὶ τούτου δυσχυρίζεσθαι, ὥσπερ, εἰ μὴ ἐπ' αὐτοφώρῳ μὲν, ἀπέκτεινε δέ, τούτου ἔνεκα δέον αὐτὸν σφάζεσθαι. δοκοῦσι δ' ἔμοιγε οἱ ἔνδεκα οἱ παραδεξάμενοι τὴν ἀπαγωγὴν ταύτην, <οὐκ> οἰόμενοι

²² Similarly, we have several instances of the term ἐπ' αὐτοφώρῳ being used in descriptions of homicides caught in the act: Ant. 1.3, εἰάν ἀποδείξω . . . τὴν τούτων μητέρα φονεῖα οὖσαν . . . καὶ μὴ ἄπαξ ἀλλὰ πολλακίς ἤδη ληφθεῖσαν τὸν θάνατον τὸν ἐκείνου ἐπ' αὐτοφώρῳ μηχανωμένην, cf. 9. Ant. 5.48, καίτοι οὐδὲ οἱ τοὺς δεσπότας ἀποκτείναντες, εἰάν ἐπ' αὐτοφώρῳ

Ἀγοράτῳ συμπράττειν καὶ τότε δισχυριζομένῳ, σφόδρα ὀρθῶς ποιῆσαι Διονύσιον τὴν ἀπαγωγὴν ἀπάγοντ' ἀναγκάζοντες προσγράψασθαι τό γε ἐπ' αὐτοφώρῳ ἢ πῶς οὐκ ἂν εἶη (ὄς) πρῶτον μὲν ἐναντίον πεντακοσίων [ἐν τῇ βουλῇ], εἶτα πάλιν ἐναντίον Ἀθηναίων ἀπάντων [ἐν τῷ δήμῳ] ἀπογράψας τινὰς ἀποκτείνειε καὶ αἴτιος γένοιτο τοῦ θανάτου; οὐ γὰρ δήπου τοῦτο μόνον οἶει τὸ ἐπ' αὐτοφώρῳ, εἴαν τις ξύλῳ ἢ μαχαίρᾳ πατάξας καταβάλλῃ, ἐπεὶ ἕκ γε τοῦ σου λόγου οὐδεὶς φανήσεται ἀποκτείνας τοὺς ἄνδρας οὓς σὺ ἀπέγραψας· οὔτε γὰρ ἐπάταξεν αὐτοὺς οὐδεὶς οὔτ' ἀπέσφαξεν, ἀλλ' ἀναγκασθέντες ὑπὸ τῆς σῆς ἀπογραφῆς ἀπέθανον. οὐκ οὖν (ὄ) αἴτιος τοῦ θανάτου, οὗτος ἐπ' αὐτοφώρῳ ἐστί; τίς οὖν ἄλλος αἴτιος ἢ σὺ ἀπογράψας; ὥστε πῶς οὐκ ἐπ' αὐτοφώρῳ σὺ εἶ ὁ ἀποκτείνας; 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 ἐπ' αὐτοφώρῳ being added to the indictment. MacDowell is certainly right in pointing out (133) that “the reason why they [the Eleven] required ‘manifestly’ [ἐπ' αὐτοφώρῳ] 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 ἐπ' αὐτοφώρῳ.

The adjective αὐτόφωρος is related to the nouns φῶρ, ‘thief’, and φωρά, which means either ‘theft’ or ‘discovery of theft (by search)’, *cf.* φωρᾶν (*cf.* Hansen 48–53). The same ambiguity applies to the adjective, and ἐπ' αὐτοφώρῳ may therefore mean either ‘to catch the thief *during the theft*’ or ‘to unmask the thief *by clearing up the theft*’.²³ Metaphorically ἐπ' αὐτοφώρῳ may be used of other crimes than κλοπή, 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.*, κλοπή in the wider sense of the word.²⁵

ληφθῶσιν, οὐδ' οἱ τοὶ ἀποθνήσκουσιν ὑπ' αὐτῶν τῶν προσηκόντων, ἀλλὰ παραδιδόασιν αὐτοὺς τῇ ἀρχῇ κατὰ νόμους ὑμετέροισι πατρίους.

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;

In the forensic speeches this double meaning of the term is reflected in its construction. *ἐπ' αὐτοφώρῳ* is either dependent on the verb *λαμβάνειν/ἀλίσκεσθαι*²⁶ or construed with a verb meaning 'to demonstrate' (*ἐξελέγχειν, ἐπιδεικνύναι*).²⁷ Furthermore, either the meaning is 'to catch in the act', in which case the scene is usually the place where the crime is committed;²⁸ or *ἐπ' αὐτοφώρῳ* is used more or less synonymously with *φανερῶς*,²⁹ and the place where the offender is unmasked and convicted of his crime is regularly the law court itself.³⁰ It is only in the sense 'to catch in the act' or 'during a search' that *ἐπ' αὐτοφώρῳ* 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' αὐτοφώρῳ* was explicitly used in the *νόμος τῶν κακούργων*, and it is frequently used in connection with criminals to be prosecuted by an *apagoge kakourgon*.³¹ On the other hand, there is not a single source linking *ἐπ' αὐτοφώρῳ*, not even in its metaphorical sense, with the *apagoge* or *endeixis* against *atimoi* or other persons who did not abide by a loss of rights. So an inspection of the meaning and uses of *ἐπ' αὐτοφώρῳ* leads to the conclusion that the *apagoge* against Agoratus must have been an *apagoge kakourgon* and not an *apagoge 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' αὐτοφώρῳ* itself and not

2.6. Furthermore, *ἐπιτορκία* (Dem. 45.59, 70) and *συκοφαντία* (Dem. 39.26) are offences committed *animo lucrandi*.

²⁶ Ant. 1.3, 9; 5.48; Isoc. 18.53; Aeschin. 1.91; Dem. 19.132; 26.24; 45.59, 70, 81; Din. 1.29, 53, 77; 2.6.

²⁷ Lys. 1.21, 7.42, 13.30; Aeschin. 2.88, 3.10; Dem. 19.121, 293; 23.157; 39.26. The only two passages where *ἐπ' αὐτοφώρῳ* is construed differently are Isae. 4.28, *ἐπ' αὐτοφώρῳ ἀπήχθη*, and Lys. 13.85–87, *cf. infra*.

²⁸ Ant. 1.3, 9; 5.48; Lys. 7.42; Isae. 4.28; Aeschin. 1.91; Dem. 45.81. *Cf.* Lys. 1.21 (anticipating the crime) and Isoc. 18.53 (false accusation, *i.e.*, a crime committed in the court).

²⁹ Din. 1.53, *ὁ δημαγωγὸς ὑμῖν . . . ἐπ' αὐτοφώρῳ χρήματα λαμβάνων εἴληπται*, compared with Din. 1.1, *ὁ μὲν δημαγωγὸς ὑμῖν . . . φανερῶς ἐξελέγεται δῶρ' εἴληφός . . .*

³⁰ Lys. 13.30, *ὡς δὲ ἀπέγραψε τὰ δνόματα, οἶμαι μὲν καὶ αὐτὸν ὁμολογήσειν εἰ δὲ μή, ἐπ' αὐτοφώρῳ ἐγὼ αὐτὸν ἐξελέγξω*. *Cf.* Aeschin. 2.88, 3.10; Dem. 19.121, 132; 26.24; 39.26; 45.59, 70; Din. 1.29, 53, 77; 2.6. In Din. the criminal is unmasked during the preliminary investigation by the report made by the council of the Areopagus. Two passages fall outside this dichotomy, Dem. 19.293 and 23.157. On Lys. 13.85–87 see *infra*.

³¹ *Cf.* the survey in Hansen 53.

any connecting participle such as *ληφθέντα* or *ἐξελεγχθέντα*. The closest parallel is Isaeus 4.28: *εἰς τὸ δεσμωτήριον ὡς κλέπτῃς ὢν ἐπ' αὐτοφώρῳ ἀπήχθη*. 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' αὐτοφώρῳ ἀποκτείναντα Διονυσόδωρον κτλ.* The interpretation was left to the parties and the decision rested with the jurors. Agoratus argues, of course, that *ἐπ' αὐτοφώρῳ* goes with *ἀπάγειν* and that the meaning is *ἐπ' αὐτοφώρῳ λαμβάνειν*. Dionysius, on the other hand, attempts to connect *ἐπ' αὐτοφώρῳ* with the verb *ἀποκτείνειν* and to persuade the jurors that the meaning is 'manifestly', *i.e.*, the metaphorical use of the term. Now it is possible to *ἐπ' αὐτοφώρῳ λαμβάνειν* or *ἀπάγειν* or *ἐξελέγχειν* or *ἐπιδεικνύναι*. 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' αὐτοφώρῳ* has completely lost its original meaning. On reflection, a phrase like *ἐπ' αὐτοφώρῳ ἀποκτείνειν* is a solecism,³² and Lysias seems to admit this: although he repeatedly implies a connection between *ἐπ' αὐτοφώρῳ* and *ἀποκτείνειν* he avoids a direct collocation of the prepositional term with the verb. Either a form of *ἀποκτείνειν* has to be *supplied*, or a collocation is avoided by the periphrastic phrase *ἐπ' αὐτοφώρῳ εἶναι (ὁ ἀποκτείνας)*, 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' αὐτοφώρῳ* be added to the indictment. By the verbs *δυσχυρίζεσθαι* 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' αὐτοφώρῳ* is a legal technical term probably used in the *νόμος τῶν κακούργων* and demonstrably applied regularly in actions against *kakourgoi*. To combine *ἐπ' αὐτοφώρῳ* with the *apagoge* against a homicide

³² A criminal can be convicted of his crime *ἐπ' αὐτοφώρῳ*, but he cannot commit the crime *ἐπ' αὐτοφώρῳ*.

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 *γραφὴ 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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