The Athenian Law of Adultery

by David Cohen
(*University of California*)

Since the accounts of Lipsius and Thonissen in the nineteenth century, adultery has received considerable attention in the modern literature on Greek law (1). Lipsius seems perhaps to have felt slightly uneasy about what might be regarded as certain anomalies in the law of adultery, but if he did, he passed them over with the explanation that the original meaning of the statutory language must have been expanded in actual practice (2). Modern treatments seem to regard the topic as essentially unproblematic, and, indeed, there is surprising unanimity of opinion on the main contours of the law. The purpose of this paper is to muddy these clear waters, suggesting that the generally accepted interpretation is based upon certain incorrect premises, and proposing an alternative hypothesis based upon an approximate reconstruction of what I believe to be the actual statute which governed the offense of adultery in classical Athens.

The starting point of all modern discussions of the scope and meaning of the words μοιχεία and μοιχός in Athenian law is the statute quoted in Demosthenes 23,53: ἐάν τις ἀποκτείνῃ ἐν ἄθλοις ἄκων, ἢ ἐν ὁδῷ καθελών, ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ' ἀδελφῇ ἢ ἐπὶ θυγατρί, ἢ ἐπὶ παλλακῇ ἣν ἂν ἐπ' ἐλευθέροις παισὶν ἔχῃ, τούτων ἕνεκα μὴ φεύγειν κτείναντα. This law

(1) H. Lipsius, *Das Attische Recht und Rechtsverfahren* (Hildesheim 1966) 429-435; J. Thonissen, *Le Droit Pénal Athénien* (Brussels 1875) 312-319.

(2) Lipsius, *supra* note 1, 429.

is treated by some as the actual adultery statute (3), but most scholars, noting that it is a law concerning justifiable homicide, view it as providing the basis of the law of adultery. Thus, as Kenneth Dover puts it, in what I believe to be a representative formulation, "It was moikheia, 'adultery', to seduce the wife, widowed mother, unmarried daughter, sister, or niece of a citizen; that much is made clear from the law cited by Demosthenes 23,53-5. The adulterer could be killed, if caught in the act, by the offended head of the household; or he could agree to pay compensation; or he could be prosecuted or maltreated or injured..." (4). This, in a nutshell, is the generally accepted view, adhered to by Wolff, Latte, Harrison, Paoli, Cantarella, Lacey, Erdmann, Ruschenbusch, and MacDowell, with some differences of opinion as to the details, but not as to the extension of μοιχεία beyond the marital relationship (5). Before discussing the inadequacies of this interpretation, however, I will first attempt to make as strong a case for it as possible, so that the elements of the argument on which it is implicitly or explicitly based are clearly articulated. Since most scholars have assumed that this is the only possible interpretation of the legal range and meaning of μοιχεία the accepted position is usually sketched or referred to, rather than defended. For this reason, rather than attacking the case as presented by any particular scholar, it seems preferable to begin by presenting the evidence and argument in its most favorable light.

The starting point, of course, is the statute quoted above,

(3) W.K. LACEY, *The Family in Classical Greece* (London 1968) 114; H.J. WOLFF, "Die Grundlagen des griechischen Eherechts", *Zur Griechischen Rechtsgeschichte* (Darmstadt 1968) 642; E. RUSCHENBUSCH, *Untersuchungen zur Geschichte des Athenischen Strafrechts* (Köln 1968) 35.

(4) K. DOVER, *Greek Popular Morality* (Oxford 1974) 209; where DOVER finds the reference in the text to nieces is not apparent to me.

(5) K. LATTE, 'μοιχεία', *RE* 2446-2449; A.R.W. HARRISON, *The Law of Athens*, vol. 1 (Oxford 1968) 33-36; U.E. PAOLI, *Altri Studi di Diritto greco e romano* (Milano 1976) 252-307; E. CANTARELLA, *Studi sull'omicidio in Diritto greco e romano* (Milano 1976) 131-159; W. ERDMANN, *Die Ehe im Alten Griechenland* (New York 1979) 286 ff.; D. MACDOWELL, *The Law in Classical Athens* (London 1978) 124-125.

referred to by Hans Julius Wolff as the Athenian Ehebruchsgesetz (6). The application of this statute in an actual case of adultery is demonstrated by the argument in Lysias' *On the Murder of Eratosthenes,* where the speaker has the statute read to the jury (30-31) as part of his plea that he justifiably killed the man he found with his wife. Although the oration does not reveal the wording of the statute, the speaker does use the words ἐπὶ δάμαρτι (and also refers to concubines) in his summary of it, confirming that this is, in fact, the same statute cited by Demosthenes. Further confirmatory evidence of the statute referred to by Lysias is provided by Aristotle (*Ath. Pol.* 57,3), in his summary of the law of justifiable homicide: ἐὰν δ' ἀποκτεῖναι μέν τις δμολογῇ, φῇ δὲ κατὰ τοὺς νόμους, οἷον μοιχὸν λαβών, ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐν ἄθλῳ ἀγωνιζόμενος... In addition, the oration *Against Neaera* provides evidence of a charge of adultery based upon intercourse with an unmarried woman. Taking these four passages together it seems plausible to conclude that in Athens, μοιχεία did, in fact, mean, "to seduce the wife, widowed mother, unmarried daughter, sister, or niece of a citizen..." (7).

What are the objections which might be raised against such a well-documented position? To begin with, and this is more of a cautionary note than an objection, such a statutory scheme would make Athens unique among ancient and modern western legal systems. Whether in the ancient Near Eastern or Biblical Codes, in Byzantine, classical Roman, or Canon Law, or, for that matter, in the customary law of groups as diverse as the Nuer or the Sarakatsani nomads of modern Greece, virginity and the marital relation both represent significant categories of sexual prohibition which are carried over into the law (8). This

(6) WOLFF, *supra* note 3, 642.

(7) DOVER (*supra* note 4) 209. These are the only passages in fifth or fourth century sources which seem to offer support for this interpretation. For reasons which I have explained elsewhere (*Theft in Athenian Law,* München 1983, 8-9) my account of the Athenian law of adultery will be based exclusively upon classical Athenian sources.

(8) For Biblical Law see Deuteronomy 22;22, Leviticus 20;10, C. CARMICHAEL, *The Laws of Deuteronomy* (Ithaka 1974) 39 ff., 166 ff.,

is not to say that all societies have legislated against illegitimate sexual intercourse on the part of women, but, rather, that when they have done so such legislation is usually cast in terms of the categories of intercourse with unmarried virgins and intercourse with a married woman. That this is so is not surprising, for the interests at stake are different in each case: The father is concerned with maintaining the qualifications for marriage of his daughter, the husband (among other things) with ensuring that his children are, in fact, his own (9). In addition, both the marital and the virginal state are often invested, whether in pagan, Jewish, or Christian cultures, each with its own particular religious significance. All this does not establish that Athenian law was not different, but simply suggests that caution is indicated before concluding that, for legal purposes, intercourse with a "wife, widowed mother, unmarried daughter, sister, or niece" were all the same, were all covered by the term μοιχεία and were all punished by death.

D. DAUBE, "Biblical Landmarks in the Struggle for Women's Rights", *The Juridical Review* (1978) 177-197; and R. PATAI, *Sex and the Family in the Bible and the Middle East*; for other Near Eastern systems, see the Middle Assyrian Laws sec. 13-16, in DRIVER-MILES, *The Middle Assyrian Laws* (Aalen 1975) 387 ff., and see the commentary at 36 ff., with references to the Babylonian legislation; for Roman and Byzantine law see, D. DAUBE, "The lex Julia Concerning Adultery", *The Irish Jurist* (1972) 373-380; T. MOMMSEN, *Römisches Strafrecht* (Graz 1955) 694 ff., F. GORIA, *Studi sul matrimonio dell'adultera nel Diritto giustinianeo e bizantino* (Torino 1975) and L. BURGMANN, *Ecloga* (Frankfurt 1983) 234-237; for the Nuer, see E. EVANS-PRITCHARD, *Kinship and Marriage among the Nuer* (Oxford 1951) 41-42, 120-122; for the Sarakatsani see J.K. CAMPBELL, *Honour, Family, and Patronage* (Oxford 1964) 193-200; for a acute analysis of the anthropological dimensions of these phenomena, see also J. PITT-RIVERS, *The Fate of Shechem, or the Politics of Sex* (Cambridge 1977), particularly the chapters on Honour and Social Status in Andalusia (including an excellent analysis of sexual transgressions), The Moral Foundations of the Family, and The Fate of Shechem; for the modern period, see L. STONE, *The Family, Sex, and Marriage in England 1500-1800* (New York 1977) Chapters 10-12.

(9) Lysias 1,33-35; for the modern period, see Johnson's repeated assertion of the traditional doctrine that all property depends upon the chastity of women, J. BOSWELL, *Life of Samuel Johnson* (London 1906) vol. I, 347-8, 623-4, vol. II, 287-8.

To turn to substantive objections to the traditional view, it is perhaps advisable to examine more closely the statute, quoted by Demosthenes, which forms the cornerstone of that interpretation. To begin with, the statute is, of course, part of the law of justifiable homicide. As such, it does not define offenses, but rather sets out exculpatory conditions — exceptions to the general prohibition against homicide. This distinction between prohibitory norms and conditions of excuse or justification is fundamental, and the statute quoted by Demosthenes no more proves that adultery was an offense punishable by death than it proves that participating in athletic contests, assault, or fighting in a war were crimes punishable by death. Yet such is the conclusion one would be required logically to adopt if one overlooks this distinction and views the statute as defining offenses and establishing penalties. Thus the statute quoted by Demosthenes cannot contain "das Ehebruchsgesetz", unless, of course one believes that μοιχεία was not an offense at all, but was only subject to extra-judicial self-help (10). There can be no question of this, however, for Aristotle lists a *graphe* for μοιχεία (*Ath. Pol.* 59,3-4), and we know of too much other legislation on the subject (11).

These objections to the traditional interpretation of the law of justifiable homicide cited by Demosthenes are reinforced by an examination of the language of the statute itself. First of all, it must be noted that there is no reference whatsoever to μοιχεία either in the text itself or in Demosthenes lengthy discussion of it. The statute merely describes sexual intercourse (ἐπὶ δάμαρτι...) and can apply with equal force to rape, adultery, and seduction. It is in such terms that it is discussed by Demosthenes, who speaks of rape (ὑβρίζειν 23,56) and seduction (54-55), avoiding any specific reference to μοιχεία. This, of course, makes perfect sense, for, from the standpoint of the law of homicide it makes no difference whether the offender is a seducer, a rapist, or an adulterer; all may be killed with impunity if

(10) See RUSCHENBUSCH (*supra* note 2) 35, but his account is hopelessly confused (compare the text with the remarks in the footnotes).

(11) As will appear in the discussion below.

caught in the act by certain male members of the family ([12]). It is for this reason, so as to include all three kinds of offenders within its general exculpatory provisions, that the statute enumerates the wife, the mother, the daughter, and so on. Thus, the statute merely includes adulterers as one of the types of sexual offenders whom, along with rapists and seducers, the laws of homicide do not protect. The statute provides no basis for assuming that what is meant in each case is μοιχεία ([13]).

One possible objection to the foregoing, in defense of the traditional view, would be to point out that this statute is read to the judges in *On the Murder of Eratosthenes* (30). This is hardly probative, however, for the statute is, indeed, relevant here, but no more so than in a case where a rapist had been killed. More important, however, is the way in which Lysias describes the statute, for it reveals that he portrays μοιχεία as an offense which by its very nature involves the marital bond. His actual words require careful attention. After the statute is read he says to the judges, "You hear how... [the lawgiver] explicitly states that a man who takes this vengeance on an adulterer whom he takes with his wife (ἐπὶ δάμαρτι τῇ ἑαυτοῦ μοιχὸν λαβών) shall not be convicted of murder" (30-31). The emphasis upon μοιχεία as an offense specifically associated with marriage is made more explicit in the following sentence, which claims that the lawgiver considered this protection of the marital relationship (ἐπὶ ταῖς γαμεταῖς γυναιξί) to be so important that

(12) The contours of the Athenian law of rape and seduction are far from clear, and the treatment of them in the existing literature should not be regarded as definitive. In a forthcoming study of sexual offenses in Athenian law I will delineate the problems in this area.

(13) Nor does the formulation of the statute in the *Ath. Pol.* (57,3). Aristotle is not quoting, but referring in a shorthand manner to the provisions regarding justifiable homicide; accordingly he reverses the order and leaves out the central case of self-defense. The case of the adulterer would, in all likelihood, be by far the most common (seduction of widows was probably not such a problem) and Aristotle avoids the cumbersome formulation of the homicide statute by using the normal statutory formulation referring to the taking of the adulterer in the act — the standard case.

he even extended it to cover concubines (ἐπὶ ταῖς παλλακαῖς). There is no mention of other women, which would have fit his rhetorical purposes well in emphasizing how seriously the lawgiver viewed this offense (so that he extended it to cover mothers, daughters, and sisters as well), but instead, the whole discussion assumes that the offense is defined, like adultery in other legal systems, exclusively with reference to the marital bond. The reason why the relationship of concubinage is included emerges in the ensuing passage, when the purpose behind the legislation is discussed (33-34). Adulterers are worse than rapists, Euphiletus insists, because they cause wives to be more attached to them than to their husbands, and, moreover, they cause uncertainty as to whether or not the children are the husband's or the adulterer's. This, of course, is the classic ground for antipathy towards adultery: a husband can never be sure that the children who are going to inherit his property are indeed his own (14). But all this only makes sense if μοιχεία is, in its very conception, an offense against marital/procreative relations — for which reason the concubine kept for the purpose of having free children is included.

This view of μοιχεία is confirmed by other passages in classical Athenian sources, many of which have been largely ignored because of the assumption that the justifiable homicide statute read by Demosthenes was exclusively concerned with adultery. Xenophon, for example, says that most states allow adulterers to be put to death with impunity because μοιχεία is an offense which destroys the *philia* between husband and wife (*Hiero* 3,3). This is just the point that Euphiletus makes, and it is further confirmed by the law quoted in *Against Neaera* which provides that the man who takes the adulterer must divorce his wife (87). As the speaker puts it, she becomes an outcast from the home of her husband. Aristotle characterizes the μοιχός as one who has intercourse with married women (πρὸς τὰς γαμετὰς πλησιάζειν *Eud. Ethics* 1221b), and, in a number of other passages he presents μοιχεία as an offense which is, by definition, directed against marriage (*N.E.* 1134a 19, 1138a 25, which will be

(14) See footnote 9 above.

discussed below, and cf. *Rhetoric* 1375a which must refer to adultery with 'violation of πίστεις ἐπιγαμίας'). All this confirms the way in which μοιχεία is presented in *On the Murder of Eratosthenes*, and this view is supported by that genre of classical Greek literature in which references to adultery are most frequent — Aristophanic comedy. Although it is often stated that the range of μοιχός in ordinary language is quite wide and that it is used as a general term of derogation, a careful study of all usages of the word in extant classical authors reveals that this is not true. In Aristophanes the use of μοιχεία and μοιχός is generally confined to accusations or descriptions of intercourse with a married woman. In Aristophanes the μοιχός is consistently presented as the rival of the husband — just as in the sources described above. This is perhaps most neatly put in *Lysistrata* when the women swear an oath to have intercourse neither with their husbands nor their lovers: οὔτε μοιχὸς οὔτ' ἀνήρ (212, and cfr 107). In the *Thesmophoriazusae* men are said because of Euripides to shut up their wives to keep them from the μοιχοί (410 ff., and cfr 339-345, 397 ff., 478-519). Of course these passages are all comic, but the point is that the μοιχός is always the rival of the husband, always the lover of a married woman. Lovers of unmarried girls are not described in this way (see *Ecclesiazusae* 224 ff., 519 ff., and 912 ff.). The only seemingly explicit reference to an unmarried woman as a party to μοιχεία is in *Against Neaera* and, given the context of the accusation and the general nature of that oration, I believe that there are sufficient grounds for not taking that particular usage too seriously ([15]). Both the weight of general usage and,

(15) There are, to begin with, some fundamental problems with the narrative of the events described in this oration. It is entirely implausible to believe that Neaera's daughter could have been married, scandalously divorced, a party to another very public scandal concerning the status of her children, then a party to a lawsuit concerning a fraudulent accusation of adultery, and, after all this, be foisted off on an unsuspecting man from a good family who had no idea of her background and believed that she was an Athenian citizen. Clearly, the account of her activities is grossly exaggerated and is not to be trusted.

Secondly, there is the particular problem of the accusation of adultery against Epaenetus, where Epaenetus claims that she is not Stephanus's

more importantly, the rationale which is consistently seen to underly the antipathy towards the μοιχός, point towards a conceptualization of μοιχεία as an offense against the husband-wife relation. How, if at all, was this conceptualization reflected in the law, or was the general law of justifiable homicide the only statute governing adultery?

That there was an adultery statute(s) apart from the exculpatory provisions of the law of homicide, and that this statute was cast in terms of μοιχεία as *Ehebruch,* we know from the statute discussed in *Against Neaera* (85-88, cited above p. 153, and cf. Aeschines 1,183). The statute as cited in that oration seems incomplete, for it mentions only the provisions that apply to the husband and wife (mandatory divorce and exclusion of the wife from public religious life), but leaves out the treatment of the adulterer, which is not relevant in that particular rhetorical context (note also the way it begins: Ἐπειδὰν δὲ ἕλῃ...). What were the provisions of the part of the law which seems to be missing, and how do they relate to the law of justifiable homicide? For an answer to these questions it is necessary to turn again to *On the Murder of Eratosthenes.*

What has been generally overlooked in discussions of the law of adultery is that another statute is read to the judges *before* the law of justifiable homicide. This law is introduced by Euphiletus as the law which commanded him to kill the adulterer: "It is not I who am going to kill you, but the law of the city..." (26, and repeated later). What law was this first statute,

daughter, but Neaera's (66 ff.). Epaenetus had been tricked into being taken as an 'adulterer'. What is important to see is that this accusation against Neaera and Stephanus is simply a repetition of another accusation earlier in the oration. There, Neaera herself poses as a respectable woman living with her husband. Stephanus pretends to discover her adultery, and they blackmail the unlucky victim (41 ff.). The accusation against Neaera's daughter (who, it is argued, is just as wicked as her mother) is a repetition of this scheme. It may also be connected to the fact that Neaera's daughter was, in all likelihood, the legal concubine (παλλακή) of her ex-husband as is shown by his adoption of their children (55 ff.). The account of this is distorted by the speaker, who, for his own rhetorical purposes, does not want to acknowledge the relationship of concubinage.

and why were *two* statutes read concerning the killing of the adulterer? To answer the question it is necessary to examine closely the precise words used after the law has been read. Now, the first thing which Euphiletus says after the reading of the statute is: οὐκ ἠμφισβήτει, ... ἀλλ' ὡμολόγει ἀδικεῖν... (29). This, of course, closely parallels his previous description of his confrontation of the adulterer, where he used much the same words: κἀκεῖνος ἀδικεῖν μὲν ὡμολόγει, ἠντεβόλει δὲ καὶ ἱκέτευε μὴ ἀποκτεῖναι ἀλλ' ἀργύριον πράξασθαι. Why is Euphiletus so anxious to show that the adulterer did not dispute the charge, but admitted his wrongdoing, and why did he use the precise words that he does?

The answer to this question has to do with the law of *Kakourgoi,* for it is the law pertaining to this class of offenders which Euphiletus' words clearly echo. This question has not been taken seriously enough by scholars, perhaps because it would necessarily have required a revision of the prevailing interpretation. Hansen, in his definitive study of *kakourgoi*, concludes that adulterers were one of the classes of offenders who fell within the scope of this legislation which provided summary procedures for certain wrongdoers taken ἐπ'αὐτοφώρῳ (16). As Hansen notes, an unambiguous passage in Aeschines specifically lists μοιχοί as falling under this law, and there is no reason to doubt the accuracy of Aeschines' account: τίς γὰρ ἢ τῶν λωποδυτῶν ἢ τῶν κλεπτῶν ἢ τῶν μοιχῶν...λάθρᾳ δὲ τοῦτο πραττόντων, δώσει δίκην; καὶ γὰρ τούτων οἱ μὲν ἐπ' αὐτοφώρῳ ἁλόντες, ἐὰν ὁμολογῶσι, παραχρῆμα θανάτῳ ζημιοῦνται, οἱ δὲ λαθόντες καὶ ἔξαρνοι γιγνόμενοι κρίνονται ἐν τοῖς δικαστηρίοις... (1,91). If we compare this passage with Aristotle's description of *Kakourgoi* being brought by *apagoge* to the Eleven, we can see that Euphiletus was probably using the language of the statute: ἂν μὲν ὁμολογῶσι θανάτῳ ζημιώσοντας, ἂν δ' ἀμφισβητῶσιν εἰσάξοντας εἰς τὸ δικαστήριον (*Ath. Pol.* 52,1). In other words, adulterers fall within the provisions of the law of *Kakourgoi* and are subject to the summary procedures which it establishes. This law

(16) M. HANSEN, *Apagoge, Endeiwis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense 1976) 44-45.

provides the death penalty upon conviction (note Lysias' discussion of the death penalty for adultery in 14,68), provided that its requirements are met. Above all, the wrongdoer must be taken in the act, ἐπ' αὐτοφώρῳ, and Euphiletus goes to some lengths to show that he has done so (23-28, and also note that he tells his wife's slave-turned-informer that he must catch Eratosthenes ἐπ' αὐτοφώρῳ 21). The fact that Euphiletus' words immediately after the reading of the statute are practically a paraphrase of the law as we know it from Aristotle seems to confirm that it was a portion of the law of *kakourgoi* applying to adulterers which was first read as the law governing the case.

Given this hypothesis that the μοιχός is a *kakourgos* and subject to the capital penalty and summary procedures which that law provides, why was the second statute read? There seem to be two possibilities: (1) The statute which is read is not the justifiable homicide statute cited by Demosthenes, as has always been assumed. Although this may seem unlikely, there is no real evidence that there was not a new statute specifically relating to adulterers. This view is supported by the discrepancies betwen the wording of the statute quoted at Dem. 23,55, and the summary of the statute referred to by Lysias (see above p. 152). Plato's law of justifiable homicide in his *Nomoi* (874c) may either reflect other Athenian legislation, or, as is more likely, reflect the need for such legislation to clarify exactly what is meant by the rather vague statute attributed to Drakon. (2) Although this first alternative is logically possible, what is more probable is that the second statute referred to by Lysias was, in fact, the law of justifiable homicide quoted at Demosthenes 23,55. If this is the case, however, why was it quoted by Lysias after the first law which specifically applied to adultery and provided for summary redress? It may be that the law of *kakourgoi* set some limitations on the husband's right to kill the adulterer, and Lysias appeals to the older, more general statute with its unqualified right to kill certain sexual offenders taken in the act ([17]).

(17) It should be noted that Plato excludes adulterers from the class of those who may be killed with impunity if taken in the act. Moreover,

If there was such a limitation on the right of the husband to kill the adulterer taken in the act, what was its nature? There are two factors which may play a role here, but there is no ground for certainty; the evidence we have can only be suggestive. First of all, the language with which Lysias describes the statute regarding treatment of the adulterer is significant. He states that the laws bid a man, ἐάν τις μοιχὸν λάβῃ, ὅ τι ἂν οὖν βούληται χρῆσθαι... (49). This seems to be a close paraphrase of the statutory language (from the first law, cited at 28-29) ([18]), but it is unclear what it means that the husband can do whatever he wishes. One further passage is perhaps relevant. In the statute cited in *Against Neaera* (66-67), which provides that if a man is found guilty of adultery in the trial brought about by the procedure used when one claims to have been wrongly held as an adulterer, he is turned back over to the husband, who, before the court, ἄνευ ἐγχειριδίου χρῆσθαι ὅ τι ἂν βουληθῇ (66-67; note also the provision in regard to the adulteress who attends religious festivals, who may be mistreated but not killed, 86-87). Giving the adulterer back to the husband is simply to re-establish the status quo ante — subject to the proviso ἄνευ ἐγχειριδίου. What may be going on here is that the statute concerning treating the adulterer as a *kakourgos* limited the *husband's* actions to mistreatment and ransom; if the husband wanted the adulterer put to death he would have to take him to the Eleven for summary execution, by *apagoge*. In this case, it would be clear why Euphiletus would omit reference to this clause and appeal to the second, conflicting law concerning

the exactitude with which Plato specifies exactly what sorts of offenders may be killed seems to indicate that he was trying to remove the ambiguity of the Athenian legislation. It would be rash, however, to conclude too much from his exclusion of adulterers. This is most likely due to his attempt to reform the criminal law, and he clearly views adultery as a less serious offence than was the case in contemporary Athens. See my "Theft in Plato's Laws and Athenian Legal Practice", *RIDA* (1982) 121-143, for a general discussion of these problems of interpretation of the *Nomoi*.

(18) Note the phrase μοιχὸν λαβών in Aristotle, *Ath. Pol.* 57,3, Lysias 1,30; 14,68, Isaeus 8,44.

justifiable homicide — a law originating from the period when self-help had not yet been limited by the law of *kakourgoi*. A less radical interpretation, however, would be that there simply was confusion in contemporary society about what the phrase ὅ τι ἂν βούληται χρῆσθαι legitimated. This is particularly true in that there is fourth century evidence which indicates that it was not customary to kill the adulterer (19). Euphiletus is pleading for his life and wants to establish that adultery must be punished by death; this is his rhetorical position. For this reason he claims that the laws command him to kill the adulterer, which they certainly do not do — they merely hold him guiltless *if* he does so (20).

To summarize this first factor which probably played a role in limiting the right of the husband in regard to the adulterer may be useful at this point. The statutory language treating the adulterer as a *kakourgos* probably included the provision that the husband, taking the adulterer in the act, could do with him what he wanted or take him to the Eleven. What is unclear is whether or not this clause provided that he could only do as he pleased without *killing him*. In any event, whether due to such a specific explicit limitation, or to uncertainty as to the scope of the words on account of the fact that, according to custom, adulterers were normally maltreated but not put to death on the spot, there does seem to have been some conflict between the newer law of *kakourgoi* and the older justifiable homicide statute. That such conflicts did occur in just this area is attested by the discrepancy between the unrestricted right to kill a thief, afforded by the other law of justifiable

(19) E.g. Xenophon, *Memorabilia* 2.1.5; Isaeus 8,44; Plato *Nomoi* 874c (on which see note 17 above), and Aristophanes always refers to mistreatment rather than death, but his references to ῥαφανίδωσις and παρατιλμός should not be taken literally, as has too often be the case; on this see my forthcoming paper "A Note on Aristophanes and the Punishment of Adultery in Athenian Law", ZSS 1984.

(20) For this same rhetorical reason he resorts to the specious argument about rape being a lesser offence. He is comparing two things which are not comparable since they reflect different legal categories — justifiable homicide as opposed to a penalty in a lawsuit.

homicide quoted by Demosthenes in *Against Aristocrates* (60-61) with the provisions of the law of *kakourgoi,* which only allow the nocturnal thief to be killed if taken in the act (Dem. 24, 113) ([21]). Here we can perhaps imagine an analogous case to the one in Lysias, where a man who killed a daytime thief making off with his property would appeal to the older law in just such terms, claiming that it required him to act as he did. Aristotle in his *Rhetoric* (1375b) considers the kinds of arguments that can be made in such cases of statutory conflict where one law has become obsolete. The details remain unclear, but some such problem seems to underlie the citation of both the law of *kakourgoi* as well as the law of justifiable homicide. The desperation with which Euphiletus pleads that *he* did not kill Eratosthenes, but rather the laws did perhaps bears witness to this uncertainty. It may also be relevant here, and this is only a suggestion, that despite the minutely detailed description of the events leading up to the apprehension of Eratosthenes, Lysias does not mention the *manner* in which the killing was accomplished. Is this perhaps related to the limitation ἄνευ ἐγχειριδίου in the other adultery statute?

The second factor which may play a role in the problem described above stems from the nature of the law of *kakourgoi* and the manner of its application. As I have shown elsewhere ([22]), the law of *kakourgoi* normally requires that the thief, or adulterer, taken in the act be given an opportunity to deny the validity of the charge (see the summaries of the law on p. 156 above). The crucial issue in regard to μοιχεία is *when* the adulterer must be asked if he denies the charge. In other words, did the statute provide that the husband (probably in the presence of witnesses) could ask the question and put the adulterer to death if he did not deny the charge (or take him to the Eleven; this question is also implicit in the treatment of the nocturnal thief)? Or did the law rather ordain that only the Eleven could ask the question (as is implied by Aristotle, *Ath. Pol.* 52,1)? In this case it would seem likely that

(21) See my *Theft in Athenian Law* (München 1983), chapter 2.4.
(22) *Ibid.*

the husband could mistreat and ransom the adulterer, but not kill him; the death sentence could only be applied by the Eleven. That either provision is possible is shown by the laws of theft, where the thief taken at night can either be killed on the spot or taken off to the Eleven, but the thief taken by day cannot be summarily executed by the injured party, but *must* be taken to the Eleven (23). In *On the Murder of Eratosthenes* Lysias clearly wants to establish that the proper questions were asked; as was seen above, he twice describes the actions of Euphiletus using exactly the statutory language (pp. 155-156). What remains unclear is whether he immediately thereafter appeals to the law of justifiable homicide because the question *should* have been asked by the Eleven, if the man was to be put to death, or whether the statute allowed the husband to act in place of the Eleven. Although the application of the law of *kakourgoi* to adultery seems certain, this particular detail can simply not be resolved on the basis of the available evidence. Tantalizingly suggestive is a passage from Aristophanes' *Clouds* where the Unjust Argument asks, "If you chance to be taken as an adulterer, what will you say *to him* (πρὸς αὐτόν)?" (1079-1080). "Him" is clearly the husband, and the passage seems to accord with Lysias' presentation of the law requiring the husband to ask the question — but Comedy is hardly sound evidence for details of legal practice. In summary, there definitely seems to be some legal difficulty motivating Lysias' treatment of the two laws he cites and the arguments he develops on the basis of them, but which of the two factors discussed above is at the root of that difficulty must remain an open question.

As seen above, the details are not all clear, but it seems possible nonetheless to reconstruct the main provisions of the law of μοιχεία-ἀπαγωγή. I believe that all the major elements of this law are quoted or closely paraphrased in the various orations of Lysias, Demosthenes, and Aeschines which have been examined, and the law of κλοπή-ἀπαγωγή may serve as a useful model. This is not to claim that the result will be a word for

(23) Demosthenes 23,113-114 and *Theft in Athenian Law* (*supra* note 21) chapter 2.

word replica of the statute; it is rather advanced as a summary of the argument to this point based upon an approximation of the main constitutive elements of the law as reflected in the evidence — a sort of patchwork of the extant fragments.

The starting point must be the phrase quoted by Lysias in his summary at the end of Eratosthenes: ἐάν τις μοιχὸν λάβῃ, ὅ τι ἂν οὖν βούληται χρῆσθαι (49). To this, following the language of the statute cited by Demosthenes (24,113-114), which provides for the treatment of thieves as *kakourgoi*, we may add the phrase, ἢ ἀπαγαγεῖν τοῖς ἕνδεκα. An alternative reading, based upon the possible limitations on the husband's right to *kill* the adulterer (discussed above pp. 157-158) would require the addition of the phrase ἄνευ ἐγχειριδίου (on the analogy of *Against Neaera* 66), giving us: ἐάν τις μοιχὸν λάβῃ, [ἄνευ ἐγχειριδίου] χρῆσθαι ὅ τι ἂν βούληται ἢ ἀπαγαγεῖν τοῖς ἕνδεκα. Given the fact that immediately after the reading of the first statute Euphiletus says, οὐκ ἠμφισβήτει...ἀλλ' ὡμολόγει ἀδικεῖν, it is likely, as was argued above, that this language was incorporated into the statute as well (as formulated in *Ath. Pol.* 52.1). As was seen, however (pp. 160-161), it is not clear precisely under which circumstances the opportunity to deny the charges did or did not have to be given. This results in two possible readings for the first part of the statute:

Ἐάν τις μοιχὸν λάβῃ [ἄνευ ἐγχειριδίου] χρῆσθαι ὅ τι ἂν βούληται ἢ ἀπαγαγεῖν τοῖς ἕνδεκα· ἐὰν μὲν ὁμολογῇ θάνατον εἶναι τὴν ζημίαν, ἂν δ' ἀμφισβητῇ εἰς τὸ δικαστήριον ...

Ἐάν τις μοιχὸν λάβῃ, χρῆσθαι ὁμολογούντῳ αὐτῷ ὅ τι ἂν βούληται, ἂν δ' ἀμφισβητούντῳ, ἀπαγαγεῖν τοῖς ἕνδεκα ...

[Dem. 59.87] ... Ἐπειδὰν δὲ ἕλῃ τὸν μοιχόν, μὴ ἐξέστω τῷ ἑλόντι συνοικεῖν τῇ γυναικί· ἐὰν δὲ συνοικῇ, ἄτιμος ἔστω· μηδὲ τῇ γυναικὶ ἐξέστω εἰσιέναι εἰς τὰ ἱερὰ τὰ δημοτελῆ, ἐφ' ἧ ἂν μοιχὸς ἁλῷ· ἐὰν δ' εἰσίῃ, νηποινεὶ πασχέτω ὅ τι ἂν πάσχῃ, πλὴν θανάτου.

Combining thus the various fragments of the missing first part of the statute with the part preserved in *Against Neaera*, concerning the fate of the woman, we seem to have a coherent

whole. First the statute deals with the adulterer taken in the act, next it turns to the question of the husband and his relation to his wife (he must divorce her so as to prevent fraudulent or lighthearted action) (24), and finally it turns to the penalties, in the form of civic disabilities, which the wife is made to suffer. As stated above, the emphasis here is not upon the reconstructing of the precise wording of the actual statute, but rather fitting together what seem to be close paraphrases of pieces of it in order to show that the general contours of the proposed solution for this legal-historical jigsaw puzzle represent a complete and plausible legislative scheme. If it does, the law of adultery would be built around the *apagoge* procedure for the adulterer taken in the act (ἐπ' αὐτοφώρῳ) and treated as a *kakourgos*. The adulterer not taken in the act would be subject to the *graphe* mentioned by Aristotle (*Ath. Pol.* 59,2-4). As protection for those purported adulterers held by the husband for ransom, the *graphe* discussed in *Against Neaera* (66-67) would afford them the opportunity to prove their innocence (25).

At this point it may be fruitful to turn again to the question of what exactly constitutes μοιχεία; in modern technical language, what is the *Tatbestand*, the elements of the offense? It has been demonstrated that, in all probability, μοιχεία required a transgression of the marital relation (or marriage-like concubinage). In addition, for the treatment of the adulterer as a *kakourgos*, it was required that he be taken in the act, ἐπ' αὐτοφώρῳ — a requirement which applied to all *kakourgoi* (26). But what of the mental element, was one required, or was the simple fact of finding the adulterer ἐπ' αὐτοφώρῳ sufficient? To these questions, several passages from Aristotle provide the key.

(24) Compare the provisions in the Middle Assyrian Laws and the Code of Hammurabi which provide that the adulterer cannot be put to death unless the wife is also put to death. The Athenian legislation must be understood in this light. See DRIVER-MILES (*supra* n. 8) 36 ff., and Tablet A sec. 15.

(25) It has been suggested that adultery was also subject to a private lawsuit, but there is no concrete evidence in any classical source for this.

(26) See *Theft in Athenian Law* (*supra* note 21) chapter 2.4.

A convenient starting point is a passage in the *Rhetoric* (1374a) where Aristotle argues for the necessity of precise definitions of offenses. If there are no such definitions, he reasons, men accused of adultery may admit to having had intercourse, but deny that the intercourse constituted adultery (as, to a charge of *hierosulia*, they may admit that they stole, but deny that the property was consecrated). What does this mean, that one might admit to intercourse but deny that it constituted adultery? What sort of case is Aristotle likely to have in mind here? In a passage in the *Eudemian Ethics* (1221b, discussed above), after having characterized adultery as intercourse with married women, Aristotle says that some men admit to intercourse, but deny that it was adultery since they acted in ignorance or under compulsion. What is meant by acting in ignorance? The context of the passage perhaps suggests that Aristotle means ignorance of the fact that the woman was married, and this supposition is confirmed in two other passages from the *Nicomachean Ethics*. In the first passage, Aristotle, in discussing the question of attribution of wrongdoing to a man's character, says that a man may have intercourse with a woman "knowing who she is" (εἰδὼς τὸ ᾧ), yet not out of deliberate choice (1134a). The phrase "knowing who she is" seems to be the counterpart of the ignorance mentioned in the *Eudemian Ethics*, and probably means "knowing that she is married". The second passage (1138a) confirms the centrality of the woman's marital status as a constitutive element of the offense. Arguing that no one is guilty of injustice without committing an unjust act, he says that thus, "No one can have adultery with his own wife (μοιχεύει δ'οὐδεὶς τὴν ἑαυτοῦ) nor burgle his own house, nor steal his own property" (and cfr *Magna Moralia* 1196a). This interpretation is supported by comparative evidence, for, as Daube has shown, the very earliest extant example of ignorance as a statutory excuse is the Middle Assyrian law of adultery which provides that the adulterer must know that the woman is, in fact, married (27). In Athens, the

(27) Driver-Miles (*supra* note 8) Tablet A, secs. 13, 14, 16, 23, 24, and see Daube's discussion of Abraham and Sarah at Gerar, D. Daube, *Studies in Jewish Law* (Leiden 1981) 56-58.

inclusion of the concubine (παλλακή) within the law of adultery would have made such a condition even more necessary, since in such cases there were even greater opportunities for confusion (28).

This evidence from Aristotle may be connected with the law of *kakourgoi*, which, on my interpretation, included μοιχεία within its scope. The offense was defined as sexual intercourse with a married woman, but it was required that the adulterer be aware of her marital status at the time of the offense. Thus, the adulterer taken in the very act of intercourse (ἐπ' αὐτοφώρῳ), as in Lysias, could admit having intercourse (he could hardly deny it), but could deny having committed the offense because of his ignorance of the marital status of the woman with whom he was found. Whether this claim had to be made before the Eleven or to the husband is still an open question, but what seems certain is that this is the legal context in which we must place Lysias' *On the Murder of Eratosthenes*.

(28) I owe this last point to my colleague Arthur QUINN.

(29) I would like to thank Professor John CROOK, Professor David DAUBE, Sir Moses FINLEY, Professor Richard SALLER, and Professor Gabriel HERRMANN for their helpful comments and criticisms at various times during the writing of this paper.