

A Review of the Traditional Practice of 'Self-Help' in Lysias' Oration, 'On the Murder of Eratosthenes'

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Herman suggested that Euphiletos' murder of Eratosthenes in Lysias' 1st Oration, "On the murder of Eratosthenes" was an exception from the common practice of self-help in Mediterranean societies. Even if he admitted killing Eratosthenes who committed adultery with his wife, Euphiletos maintained that he should be acquitted of the crime of murder. For this, Herman explained that Euphiletos tried to persuade the judges that he should be found innocent, as he did not, in fact, kill Eratosthenes, but executed him in the name of the law of the city-state. And the fact that Euphiletos put great emphasis on Eratosthenes' insolent trespass into his territory, proves that he wanted to dispel the impression that his killing of Eratosthenes was an act of private vengeance by a betrayed husband. Herman defined Euphiletos' principle of behavior as 'rather dishonor than death', which was an exception from the common practice, 'rather death than dishonor', in the Mediterranean societies. In my opinion, however, the key point which needs to be judged in Euphiletos' case was whether he killed Eratosthenes premeditatedly or not. So it has absolutely no relation with whether his act of killing was an execution performed in the name of law of the city-state or an act of vengeance committed by a betrayed husband. As he himself insists, Euphiletos could simply be a killer, and not a culprit of 'phonos', as the law acquitted the killer of an adulterer, provided that he did not premeditatedly devise the murder. Euphiletos insisted that he was innocent, as he did not set up the situation, but Eratosthenes made himself vulnerable by trespassing on Euphiletos' territory. Related to this issue, it should be noticed that there is a difference between the concepts, killing (kteinai, apokteinai) and 'guilty murder' (phonos). The former does not always include the meaning of culpability, but the latter refers to anyone suspected of or found guilty of the crime.

Keywords: *Lysias, Euphiletos, Eratosthenes, Athens, Mediterranean societies, self-help, killing (apokteinai, kteinai), guilty murder (phonos)*

Introduction

Lysias' first speech, "On the Murder of Eratosthenes", was written for the defendant, Euphiletos, by a professional speechwriter (presumably by Lysias). Having killed Eratosthenes in the act of adultery with his wife, Euphiletos was prosecuted by Eratosthenes' family. Euphiletos admits killing Eratosthenes, but denies his guilt, pleading that this was a case of justified homicide. The speech

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was delivered before a court of 51 judges.¹ It is not known if Euphiletos was found guilty or not.

According to G. Herman, Euphiletos' case might appear to be trivial, as there is nothing in the speech to suggest divergence from such commonplace occurrences in the Mediterranean societies (Herman, 1993, p.406f.). However, he insisted that scholars did not notice anything peculiar about it, and brushed aside the apparent oddities which its arguments evince concerning social values, patterns of honor and shame, as an exception to the universal Mediterranean societies' conventions. Furthermore, he says, the speech cast light on the subtle interplay between the internal workings of the democratic polis and the internal universe of the Athenian citizen.

Actually Euphiletos admits having killed Eratosthenes, but he claims that he should not be found 'guilty of murder (phonos)' as he killed one who committed adultery with his wife, being caught in the act (Lysias, 1930, 1.30.). Herman regarded Euphiletos' arguments as rhetorical tricks to validate an extraordinary claim. According to him, Euphiletos tried to dispel the impression that the killing of Eratosthenes was an act of private vengeance, and claimed to impersonate the values of the city-state rather than infringing upon them. That is, Euphiletos wanted to prepare the ground for the central paradox of his rhetoric, namely, that 'he did not, in fact, kill Eratosthenes, but executed him'. Herman argues that Euphiletos did not treat Eratosthenes violently merely to vent his anger, but, quite the contrary, he applied self-restraint, controlled violence in a dispassionate effort to enforce civic justice,² and he asserted that communally sanctioned violence is no violence at all. And, according to Herman, the chief excuse for killing, refers to Eratosthenes intrusion into his house³ rather than adultery, which makes his killing not a private vengeance of the betrayed husband but a public punishment.

Herman continues to argue that perceptions of honor and shame are correlated with degrees of political centralization and social structure, and their sway appears to be inversely related to the potency of state power and law enforcement (Herman, 1996, p.36). According to him, the Athenian society was located inbetween the two poles. The state was devoid of the ultimate coercive power enforcing the law, and allowed the practice of self-help. In certain situations, the individual citizen was authorized and indeed required to take the initiative and carry out a whole series of coercive acts in the name of the community (Herman, 1996, p.11). Herman says that Euphiletos' rational punishment reveals the pattern of honor and shame which is totally unlike those postulated by the Mediterranean paradigm. Euphiletos avoided the

¹The opinions differ on whether the court was the Delphinion or the Areopagos. Whoever prefers the former bases this on the fact that the Delphinion judged cases of justified homicide, such as the killing of an adulterer caught in the act. The situation however gets confusing as the Council of Areopagos is referred to in the speech (Lysias, 1930, 1.30).

²Herman, 1993, p.409f. Cf. Lysias, 1930, 1.25-6; 29; 34.

³Herman, 1993, p.415f. Cf. Lysias, 1930, 1.25. 'I asked him why he had the insolence to enter my house. He admitted his guilt I replied "It is not I who am going to kill you, but our city's law, you have transgressed and regarded as of less account than your pleasures ..."'

mindless revenge of ‘macho (manlike)’ behavior, as Athens was an exceptional Mediterranean society where private revenge had recently given way to public punishment, and the passion for revenge was sacrificed to the higher interest of politics (Herman, 1993, p.411f.; Cf. Finley, 1983, p.18ff.; Lintott, 1982, p.26.).

Herman’s argument, however, is too general and it is not actually validated. As an alternative view to that of Herman, this paper is to review the meaning of Euphiletos’ argument that he admits the killing but does not accept its guiltiness. Denying Herman’s assertion that Euphiletos’ act of killing was performed as a public punishment in the name of the city state or had something to do with political centralization of the Athenian society in the fourth century, it will be argued that it accorded with the traditional custom of self-help. Furthermore, his behavior was not an exception but was closely related to the values of honor and shame in Mediterranean society.

Herman’s Discussion on the Principle ‘Rather Dishonor than Death’ in Athens and Euphiletos’ Murder as a Calculated Behavior

Herman’s Discussion on the Principle ‘Rather dishonor than Death’ in Athens

According to Herman,¹ ever since the publication of *Honour and Shame: The Values of Mediterranean Society* by J.G. Peristiany (1965), it has become customary in anthropological literature to regard the countries of the Mediterranean, past and present, as one discrete homogenous cultural entity. That momentous step was taken by Peristiany’s followers, who claimed that around the ex-Roman lake (Mediterranean Sea) the same sublime code of honor prevailed everywhere (cf. Gilmore, 1987, p.1f.). Herman (1996, p.6) argues that the central tenet of the code of ‘honour and shame’ was recently given its supreme expression in a volume edited by Pitt-Rivers and the late Peristiany: ‘It is in this sense that a person’s honor is said to be sacred, something more precious to him than even his life, of which it was traditionally viewed as the epitome. “Rather death than dishonor” was the ideal expression of this sentiment, whether on the battlefield or in the boudoir’ (Peristiany & Pitt-Rivers, 1992, p.2).

However, Peristiany and Pitt-Rivers themselves were careful to point out that their vision of the Mediterranean as one neatly circumscribed unit was more a matter of epistemology than of rigid geographical definition, and the term ‘Mediterranean concept of honor’ indicated nothing more than ‘a tendency to associate masculine honor with female sexual purity only rather

¹Herman, 1996, p.5ff (following discussions of J.G. Peristiany, F. Braudel, D.D. Gilmore, F.H. Stewart, K. McAleer, and S. Brandes recited from this). According to Herman, this trend gained force from the translation into English of Braudel’s magisterial work (1949), which, on account of the special environment and the substratum of Roman imperial rule, postulated certain basic similarities between all Mediterranean cultures. Braudel, however, did not include ‘honour and shame’ among the features responsible for this alleged unity.

vaguely, for there are areas near the Mediterranean where this connection is not made at all' (Peristiany & Pitt-Rivers, 1992, p.6) ¹

Herman maintained that with respect to honor and shame, the Athenians entertained ideas diametrically opposed to the view enshrined in Pitt-Rivers' 'epitome'. He says, the Athenian mentality was pervaded by an utterly non-Mediterranean code of honor. According to him, the spirit of these principles is aptly expressed not only by phrases such as 'honor is less precious than one's life', or 'rather dishonor than death', but also by others such as 'honor is less important than social stability', or, better still, 'rather dishonor than social turbulence.'

Eratosthenes tries hard, Herman says, to distance himself from the principles, 'rather death than dishonor' or 'an eye for an eye,' or 'a head for an eye'. To the contrary, exercising self-restraint and avoiding violence, Euphiletos endorses the principle, a nail for an eye!, which was supposed to inform of life in the democratic polis of Athens. And similar examples, according to him, could be found in the cases of Demosthenes 21.71 (1926-1949), Lysias 3.5-9 (1930), and Isaios, 9.19f. (1930). ²

However, in my opinion, the case of Euphiletos as well as other examples cited by Herman does not necessarily refer to the principle, 'rather dishonor than death.'

Euphiletos' Murder as a Calculated Behavior

Lysias *I* has normally been cited as a precedent for such legal matters as homicide and adultery, but Herman attempted to make sense of odd arguments in it and to unravel the underlying scale of values, which could be summarized into three points of argument (Herman, 1993, p.406f). First, the speech reflects values which were shared by the jury in particular, and by the people of Athens in general, as he was desperate to win the sympathy of the jury. Secondly, Euphiletos insists that the killing of Eratosthenes may better be regarded as an act of punishment than an act of revenge (Herman, 1993, pp.407, 417). This runs contrary to our expectations, Herman says, since the most obvious justification which springs to our mind in a situation such as this is that of *crime passionnel* (passionate crime).³ Thirdly, on breaking into the lover's

¹It should be noted that northern Europe revealed codes of honor remarkably similar to the Mediterranean on the one hand (cf. Stewart, 1994, pp.76-7; McAleer, 1994, p.30f.), and even within the bounds defined by 'Mediterraneity,' ideas of honour displayed considerable variation on the other (cf. Brandes, 1987, p.121; Gilmore, 1987).

²Demosthenes, 1926-1949, 21.71. On being provoked, Demosthenes did not retaliate but sought redress from people and from the law; Lysias, 1930, 3.5-9. The defendant claims that Simon (the plaintiff) has broken into his house causing damage, but preferred to go without compensation for the offenses rather than be thought lacking in sense by the citizens; Isaios, 1930, 9.19f. Euthycrates, the father of Astyphilos, fell ill as a result of the blows made by Thudippos, the father of Cleon. On his deathbed he charged his relatives never to allow any of Thudippos' family to come near his tomb. And, hearing of the murder of his father by Thudippos, Astyphilos stated that he would just never to speak to Cleon any further.

³Cf. Lysias, 1930, 1.25-6. He (Eratosthenes) admitted his guilt; then he begged and besought me not to kill him, but to negotiate a monetary settlement. To this I replied, "It is not I who am

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

According to Herman, Euphiletos draws a subtle contrast between two antithetical codes of behavior. The one which he implicitly rejects belongs to the tribal, decentralized and uncivilized world which prevailed before the emergence of the polis. The other, which he explicitly and self-righteously endorses, belongs to the fully-fledged, centralized, democratic polis of Athens (Herman, 1993, p.419). Anyway, he says, the main point is that two different codes of behavior coexisted more or less in the minds of the hearers of the court.

On the other hand, Herman says, Euphiletos is presented as assuming the role of victim rather than offender (Herman, 1993, p.408). Further, he is presented as speaking in the name of the supra-personal values of the city-state, arguing that it was the act of adultery committed by Eratosthenes which constituted, in fact, a breach of these values (Herman, 1993, p.408. Cf. Lysias, 1930, 1.25-6: 29: 34: 47.).

According to Herman, a whole series of acts, for which he should have been charged with as crimes committed with burning passion, are here assigned a kind of mechanistic instrumentality (Herman, 1993, p.410). When the slave-girl informed Euphiletos that Eratosthenes was in the house, Euphiletos did not recklessly break into the lover's room, nor did he then kill Eratosthenes, overwhelmed by uncontrollable emotions; and the idea of killing his unfaithful wife had not even crossed his mind. Quite the contrary, Euphiletos slipped quietly out of the house, calling on his friends one by one. With self-control he went to the nearest shop to provide himself and his friends with torches; before leaving his own house, he had the self-possession to instruct the slave-girl to wait by the door and to open it at the appropriate moment; as soon as he took the lovers by surprise, he did not kill Eratosthenes but started making preparations for the makeshift trial; and finally, right before the execution, he dutifully tried out the option of monetary compensation prescribed by law (Lysias, 1930, 1.25. 1.29.).

going to kill you, but our city's law, which you have transgressed and regarded as of less account than your pleasures, choosing rather to commit this foul offence against my wife and my children than to obey the laws like a decent person:1.29. He did not dispute it, gentlemen; he acknowledged his guilt, and besought and implored that he might not be killed, and was ready to pay compensation in money. But I would not agree to his estimate, as I held that our city's law should have higher authority; and I obtained that satisfaction which you deemed most just when you imposed it on those who adopt such courses: 1.34. Therefore, gentlemen, the laws not only acquit me of my crime, but actually command me to exact this punishment (ten diken lambanein): 1.47. I consider this punishment (timorian) not to have been a private one exacted on my own behalf, but on behalf of the whole city.

¹Lysias, 1930, 1.24-25. 'Pushing the bedroom door open, those of us who entered first saw him still lying beside my wife, and those following saw him standing naked on the bed. I struck him and knocked him down, gentlemen, and pulling his hands behind his back, tied them and asked him why he was committing the outrage of entering my house': *ibid.* 1.29.—'And he acknowledged his guilt, and besought and implored that he might not be killed, and was ready to pay compensation in money.'

In all these actions, Herman found a curious lack of spontaneity. Herman discusses two types of aggression: affective and instrumental. The former is aroused by provocation, is guided by anger, and is accompanied by distinctive patterns of activity of the central and automatic nervous system (such as heightened blood pressure and pulse rate). This is an emotional state which aims at inflicting injury on the provocateur. Instrumental aggression, on the other hand, is to a large extent exempt from emotional symptoms. It takes place when a man attacks another man 'in cold blood', without feeling any malice toward him – as in the case of a hired murderer. According to Herman, the main difference between affective and instrumental aggression is that the latter does not primarily aim at inflicting injury on the victim; the aggression merely serves as a means to some other desired end (G. Herman, 1993, p.410. Here Herman quoted Geen, 1990, pp.5-6).

However, it will be discussed below that, different from Herman's opinion, Euphiletos' calculated behavior does not refer to the punishment of supra-personal values in the name of city-state, but, as Euphiletos himself insists, to an inevitable device for self-protection.

Divergence between Premeditated, Guilty Murder and Unpremeditated, Justified Murder

According to Herman, Euphiletos posed himself as the victim rather than the offender, claimed to act in accordance with the values of the city-state rather than infringing upon them, and trying to dispel the impression that the killing of Eratosthenes was an act of private vengeance. He put emphasis on the fact that Eratosthenes trespassed in his house avoiding the obvious image of the betrayed husband

In my opinion, however, referring to Eratosthenes' intrusion into his house, Euphiletos did not really take aim at the fact of trespassing itself, but instead made good use of it to introduce the fact that Eratosthenes made a confession of his own guilt, which is repeatedly underscored.

Lysias, I.25, I gave him a blow, sirs, which knocked him down, and pulling round his two hands behind his back, and tying them, I asked him why he had the insolence to enter my house. He admitted his guilt; then he besought and implored me not to kill him, but to exact a sum of money. (Lysias, 1930)

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

At the same time, Euphiletos put emphasis on the fact that on his own initiative Eratosthenes came to his (Euphiletos') house and was found in the bedroom and killed. And he continues the discussion saying that adultery is punished more seriously than rape, as follows.

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

Furthermore, according to Euphiletos, the plaintiffs are lying that Eratosthenes was dragged from the street into the house, and took refuge in Euphiletos' *estia*.¹ Furthermore, the plaintiffs claim that Euphiletos, setting a trap for his wife's lover, ordered the maid-servant to go and fetch Eratosthenes (Lysias, 1930, 1.37). The defendant, however, denied premeditated murder. So the issue of dispute between the two opposing parties refers to whether the killing was premeditated or not.

Euphiletos made a lengthy excuse to prove the plaintiff's argument to be a lie (Lysias, 1930, 1.37ff.). He called on his friends, not before the time, but just after he had been alerted by his maid-servant that Eratosthenes had intruded onto his property, and he said that he had never seen Eratosthenes before. He justified his actions, using any possible means to catch the corrupter of his wife.

On that night Euphiletos met his friend Sostratos who came from the country at about sunset, and had dinner with him in his house (Lysias, 1930, 1.39-42). After having had a good meal, Sostratos left him and departed. According to Euphiletos, if he had designs on killing Eratosthenes, it would have been more to his advantage to go and have his dinner elsewhere, because, if Euphiletos was in his house, Eratosthenes would have been less likely to venture into his house. Otherwise, if he had previously known that Eratosthenes would enter his house, Euphiletos would have sent word to his intimate acquaintances in the daytime, and bidden them to assemble at the house of one of his friends living nearest to him, rather than wait until he discovered Eratosthenes, to run around in the night, without knowing whom he would find at home, and who would be away. Actually, when he called on some friends, they were not in town - of this Euphiletos was not aware, but he took with him only those who were available. Euphiletos put emphasis on the fact that he did not previously know what was to befall on that night, and that he was justified in calling on his friends in order that he might go in himself

¹As the '*estia* (hearth)' of a house retained its primitive sanctity as a center of the family religion, it would have been a sacrilege to kill anyone there. Cf. Lysias, 1930, p.17.

with all possible safety measures, for he could not tell whether he too had some weapon.

With regard to Euphiletos' preparations before he took the lovers by surprise, Herman admired his self-control, the prudent and calculating spirit, and well regarded his preparations for a makeshift trial according to the law (Herman, 1993, p.410). In my opinion, however, Euphiletos' prudence does not necessarily lead to a vindication of Herman's conclusion that he executed Eratosthenes in the name of the city-state. This is because the point of Euphiletos' earnest argument, was the fact that he should not be judged to be guilty of murder, as he killed with spontaneity the adulterer who was caught in the act and the adulterer himself acknowledged his guiltiness. That is, his act of killing was not premeditated, and the calculated preparation he did before attacking the lovers' scene was an inevitable, justified measure of self-defense.

However, there are some points by which Euphiletos could not be absolutely absolved of the suspicion of committing premeditated murder. Before the night he killed Eratosthenes, Euphiletos had previously known that Eratosthenes might come again to his house and required the maid-girl to show him their guilt in the very act, and he acknowledged that he waited for the opportunity to surprise the lovers (Lysias, 1930, 1.21-22). Nevertheless Euphiletos denied that on that night he deliberately made a plan to tempt Eratosthenes into his territory as his opponents claimed, but instead placed emphasis desperately, several times, on the fact that Eratosthenes on his own initiative intruded into his house (Lysias, 1930, 1.38). Thus, Euphiletos' emphasis on the fact that Eratosthenes himself intruded into his house is not to dispel the impression that his killing was an act of private vengeance as Herman suggested, but to dispel the notion that he deliberately 'set up the situation to kill Eratosthenes that night'.

Furthermore, Herman maintained that the alleged 'execution' of Euphiletos in the name of the law refers to the recently developed, centralized state power of democracy. But the law, which ordained that whoever takes vengeance on an adulterer caught in the act with his spouse shall not be convicted of murder, does not refer only to the democracy of Athens or political centralization of state power as Herman suggested, but to whichever kind of polities including oligarchy (Lysias, 1930, 1.2). This is because, different from the view of Herman, the law did not originate in the recently developed Athenian democracy, but under the authority of the traditional Areopagos Court.

Lysias, I, 30.

Witnesses: Read out also, please, that law from the pillar in the Areopagos (*ton nomon ek tis stilis tis ex Areiou Pagou*).

"Law": You hear, sirs, how the Court of the Areopagos (*to dikasterio to ex Areiou Pagou*) itself, to which has been assigned, in our own as in our fathers' time, the trial of suits for murder, has expressly stated that whoever takes this vengeance on an adulterer caught in the act with his spouse shall not be convicted of murder (Lysias, 1930. Cf. Aristoteles, 1952, 57.30).

We could refer also to Lysias' 6th Oration which says that in a trial before the Areopagos (the court in the Areopagos), the most august and equitable of courts, a man who admits his guilt suffers death, while if he contests the charge he is put to the proof, and many have been found quite innocent (Lysias, 1930, 6.14).

Euphiletos claimed his innocence according to the laws as follows.

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

Demosthenes refers to the killer of an adulterer caught in the act, not to be accused.

Dem. XXIII, 53, If a man kills (*apokteinei*) another unintentionally (*akōn*) in an athletic contest, or overcomes him in a fight on the highway, or unwittingly in battle, or in intercourse with his wife, or mother, or sister, or daughter, or concubine kept for procreation of legitimate children, he shall not go into exile as a manslayer (*me pheugein kteinanta*) on that account... (Demosthenes, 1926-1949)

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

Dem. XX, 158ff. What do all our laws most carefully guard against? What but these vengeful murders against which our especially appointed protector is the Council of the Areopagos? Now Draco, in this group of laws, marked the terrible wickedness of homicide (*autocheir*) by banning the offender (*androphonon*) from the lustral water, the libations, the loving-cup, the sacrifices and the market-place ; he enumerated everything that he thought likely to deter the offender ; but he never robbed him of his claim to justice ; he defined the circumstances that make homicide (*apoktinnynai*), even if he acts (i.e. does injury)(*drasei*), justifiable and proclaimed the accused in such case free from taint (*katharon einai*).¹ (Demosthenes, 1926-1949)

¹Cf. Lysias, 1930, VI, 14-15. Moreover, they deny the acts for which they have been denounced, whereas he admits those reported of him. And yet, in a trial before the Areopagos (in the court in the Areopagos [*en Areio Pago ... dikasterio*]), that most august and equitable of courts, a man who admits his guilt (*adikein*) suffers death, while if he contests the charge he is put to the proof, and many have been found quite innocent. So you should not hold the same opinion of those who deny and of those who admit the charge. And this, to my mind, is a strange thing ... whoever wounds a man's person, in the head or face or hands or feet, he shall be banished, according to the laws of the Areopagos (*kata tous nomous tous ex Areiou Pagou*), from the city of the man who has been injured (*ten tou adikethentos polin*), and if he returns, he shall be impeached and punished with death

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

Aristoteles, *Rhetorike*, 1354a 26-31 ... it is evident that the only business of the litigant is to prove that the fact in question is or is not so, that it has happened or not; whether it is important or unimportant, just or unjust, in all cases in which the legislator has not laid down a ruling, is a matter for the dicast himself to decide; it is not the business of the litigants to instruct him. (Aristoteles, 1926)

And, as Euphiletos asserted his killing to be justified due to it being without deliberation, the point of dispute between the two opposed parties was to be whether the killing had been done deliberately or not. Demosthenes says that it is most outrageous to accuse a man of being guilty if no decision has been taken on whether it was involuntary or willful.

Demosthenes, XXIII, 79. surely it is most outrageous to provide that a man who has not yet been found guilty (*healokos*), and of whom it is still undecided whether he committed the act or not, and whether the act was involuntary or willful, should be handed over to the mercy of his accusers. (Demosthenes, 1926-1949)

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

Harpokration, *s.v.* bouleuseos, Two kinds of definitions for crime. One is that someone deliberately makes (*kataskeuasei*) a situation, which brings about the death of someone else. The point at issue in that case is whether the death has been caused by a situation deliberately made or not. (Harpokration, 1969)

The court is to judge if a death has been premeditated or not, which corresponds to the case of Euphiletos. If the plaintiff's claim that Euphiletos deliberately killed Eratosthenes prevailed among the judges, Euphiletos' killing, even if he killed the adulterer in the act, was unjust. Thus, the key point to be judged in Euphiletos' case was whether he killed Eratosthenes by premeditated devise or not. So it has absolutely no relation with whether his act of killing was an execution in the name of law of the city-state or the vengeance of a betrayed husband.

'Phonos' (Guilty Murder) and 'Apokteinai' or 'Kteinai' (Simple Killing)

Herman insisted that 'Euphiletos did not, in fact, kill Eratosthenes, but he executed him', thus 'kill' is being juxtaposed to 'execute'. That is, the killing of Eratosthenes was not an act of private vengeance, an act in accordance with the values of the city-state rather than infringing upon them, and Euphiletos is

innocent of the crime of murder as his killing could be justified as a public punishment.

However, when Euphiletos insists that whoever takes vengeance (*timorian poiesetai*) on an adulterer caught in the act with his spouse, shall not be convicted of murder (*phonos*); the opposite of ‘murder (*phonos*)’ is not ‘execution’ carried out in the name of the law of the city-state as Hermann suggests. Instead, my argument is that, as Euphiletos insists, even though he killed Eratosthenes, he is innocent of ‘guilty murder (*phonos*)’. So the opposite of ‘kill’ should be ‘*phonos*’. The latter includes the meaning of culpability, but the former does not necessarily. That is, Euphiletos says that he should not be convicted of a murder (*phonos*), even if he killed another.

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

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

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

[l. 23ff.] If anyone is suspected of murder (*aitios [ei] phono*), 51 *Ephetes* judges to be guilty of murder (*phono helos[i]*). If anyone kills (*ktenei*) the killer or is responsible for his death (*aitios ei phono*), as long as he stays away from the frontier markets (*agora ephoria*), games, and Amphictyonic sacrifices, he shall be liable to the same treatment as the one who kills (*ktenanta*) an Athenian; and the *ephetai* are to judge the case.

[l. 37] whoever has killed to defend himself (*amynomenos ktenei*) another who violently and unjustly snatched something or abducted is not to be punished (*nepoine tethnanai*). (*IG, I²*, 1981)

In the 17th line of Draco’s Law above, ‘involuntary (*akon*) killing’ is referred to, and from the 25th line ‘(guilty) murder (*phonos*)’. In the former, it is simply said that 51 *ephetes* judged ‘involuntary (*akon*) killing’, while in the latter, two different cases are referred to, as simple ‘killing (*ktenei*)’ and the

'suspicion of murder (*aitios ei phono*)' [If anyone kills (*ktenei*) the killer or is responsible for his death (*aitios ei phono*)]. On the other hand, in line 37, for whoever killed another to defend himself the term '*kteinei*' is used, and not '*phonos*'.

In Antiphon, too, '*phoneus*' or '*phonos*' differs from '*apokteinantos*' or '*apokteino*', as follows.

Antiphon, IV, c, 4. He further dared to assert that he who struck the first blow, even though he did not slay, is more truly the murderer (*phoneus*) than he who killed (*apokteinantos*); for it is to the aggressor's willful act that the death was due (*bouleuten tou thanatou genesthai*), he says. But I maintain the very opposite (Antiphon, 1960)

Antiphon, VI, 46 ... they did not think that I had either killed (*apokteinai*) the boy, neither I was guilty of murder (*enochon einai tou phonou*), or had any part in the affair at all. (Antiphon, 1960)

According to Gagarin, the term '*phonos*' refers to all the kinds of murder, but chiefly to premeditated murder, while for unpremeditated murder the term '*akousios phonos*' tended to be used.¹ However, different from Gagarin's opinion, the word '*phonos*' is used not only for 'deliberated' but also 'undeliberated' murder. It is proved in Draco's Law, which is well known in dealing with involuntary murder. It proves that, even if one is acknowledged to have killed another involuntarily, he is not always acquitted but could be judged as guilty.

On the other hand, it is not so simple to discern whether a murder, which has been committed, was voluntary or involuntary, even if for a moment, there could be an intention of killing. So, according to Plato, in the case of murder motivated by passion, it is more convenient to distinguish according to the criterion of whether it is premeditated or not.

Platon, *Nomoi*, 866e-867b. We must lay it down, as it seems, that these murders are of two kinds, [867a] both as a rule done in passion, and most properly described as lying midway between the voluntary (*hekousios*) and the involuntary (*akousios*). None the less, each of these kinds tends to resemble one or other of these contraries; for the man who retains his passion and takes vengeance, not suddenly on the spur of the moment, but after lapse of time, and with deliberate intent (*meta epiboules*), resembles the voluntary murderer; whereas the man who does not nurse his rage, but gives way to it at once on the spur of the moment and without deliberate intent, has a likeness to the involuntary murderer; yet neither is he wholly involuntary, but bears a resemblance thereto. [867b] Thus murders (*phono*) done in passion are difficult to

¹Gagarin, 1981, p. 106. Cf. Dem. XXIII, 71. For the reflective discussions on other points of Gagarin's view related to the classification of murder cases, cf. Che, 1991.

define,—whether one should treat them in law as voluntary or involuntary. The best and truest way is to class them both as resemblances, and to distinguish them by the mark of deliberate intent (*epiboule*) or lack of intent (*aproboulia*), and to impose more severe penalties on those who slay (*kteinasi*) with intent and in anger (*orge*), and milder penalties on those who do so without intent and on a sudden. (Platon, 1967-1968)¹

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

Conclusion

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

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

In my opinion, however, Euphiletos' emphasis on the fact that Eratosthenes himself intruded into his house is not to dispel the impression that his killing was an act of private vengeance as Herman suggested, but to vindicate that he did not deliberately 'set up the situation to kill Eratosthenes that night', insisting that his opponents are lying to accuse him to have maneuvered the situation (cf. Lysias, 1930, 37-42). So the issue to be disputed in the court was obviously whether Euphiletos killed Eratosthenes deliberately or not.

At this point the term killing (*kteinai*, *apokteinai*) does not necessarily include the meaning of culpability, and when anyone is suspected of, or found,

¹Cf. Maschke (1926, pp.42-53) also suggested that unpremeditated murder could be divided into two kinds according to whether there is instant intention of murder or not: one is with intention of murder even if only for an instant, and the other is absolutely without it (*akon*); Stroud, 1968, pp. 40-41; Gagarin, 1981, p. 31ff.

guilty, then his act of killing is described as '*phonos* (guilty murder).' Thus, Euphiletos could simply be a killer, and not a culprit of '*phonos*', as the law provided for the right to kill an adulterer whom he had surprised in the act, provided that he did not deliberately devise the murder.

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

Abbreviations

LCL: Loeb Classical Library
PDL: Perseus Digital Library

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