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CONTENTS

	PAGE
RINA TALGAM, <i>The Ekphrasis on the Water Clock: Art, Rhetoric and Measurement of Time in Sixth-Century Gaza</i>	1
NOAM RYTWO, <i>Firmarent velut foedus</i> (Tac. <i>Ann.</i> 6.30): Prolegomenon to the Language of Compromise in Rome.....	33
ALON DEUTSCH, <i>Revisiting Virgil's Heroes' Parade: An Apocalyptic Historical Review</i>	57
YAEL YOUNG, <i>The Invention of the Strigil in Athenian Iconography</i>	73
ANDREW WOLPERT, <i>Sex, Lies, and Murder in Lysias 1</i>	93
ALAN JEFFREY NUSSBAUM, <i>Homeric γόοις 'bewailed' (Z 500)</i>	115
RIVKA GERSHT AND PETER GENDELMAN, <i>Sidewalk Inscriptions from Caesarea Maritima</i>	143
CHRISTOS TSAGALIS, <i>Proemic Bridges: An Intratextual Association Activating an Intertextual Reference</i>	157
ZOIA BARZAKH, <i>On the First Stasimon of Sophocles' OT</i>	175
ARI BELENKIY AND PAVEL KUZENKOV, <i>Ketubah of Antinoopolis, Letter of Resh Galuta and Aramaic Tombstone Inscriptions from Zoar, or: What was the Original Molad Calendar of Hillel Bar Yehuda?</i>	183
BOOK REVIEWS	
Guy Darshan, <i>Stories of Origins in the Bible and Ancient Mediterranean Literature</i> (by Johannes Haubold).....	217
Irad Malkin, Josine Blok, <i>Drawing Lots: From Egalitarianism to Democracy in Ancient Greece</i> (by Nina Roux).....	219
Abraham Arouetty, <i>Prolegomena ad Linguam Latinam: liber ad elementa Latinitatis discenda</i> (by Nir Stern).....	221
Melanie Racette-Campbell, <i>The Crisis of Masculinity in the Age of Augustus</i> (by Jaclyn Neel).....	224
Giulio Iovine (ed.) <i>Latin Military Papyri of Dura-Europos (P.Dura 55-145): A New Edition of the Texts, with Introduction and Notes</i> (by Haggai Olshanetsky).....	226
Walter Ameling, Hannah M. Cotton, Werner Eck, Avner Ecker, Johannes Heinrichs, Benjamin Isaac, Alla Kushnir-Stein (†), Jonathan Price, Peter Weiß, Ohad Abudraham, and Ada Yardeni (†) (eds.), <i>Corpus Inscriptionum Iudaeae/Palaestinae, Volume V: Galilaea and Northern Regions</i> (by Michael Zellmann-Rohrer).....	228
OBITUARIES: DAVID KONSTAN (BY PHILLIP MITSIS)	
JOHN GLUCKER (by RACHEL ZELNICK-ABRAMOVITZ AND YOSEF Z. LIBERSOHN).....	237
GABRIEL HERMAN (by ALEXANDER YAKOBSON).....	241
HANNAH ROSÉN (by DONNA SHALEV).....	245
DISSERTATIONS IN PROGRESS	
PROCEEDINGS: THE ISRAEL SOCIETY FOR THE PROMOTION OF CLASSICAL STUDIES	
	253
	261

Was Lysias 1 Delivered in an Athenian Court?

Andrew Wolpert

Abstract: The defendant of Lysias 1 relies unnecessarily on fallacious legal arguments. The law on justifiable homicide permitted the *kurios* to kill a man whom he caught ‘in the act’ with a legitimate Athenian woman under his guardianship. However, it did not require the guardian to do so, and it did not prevent the guardian from seeking an alternative punishment. Although the law on justifiable homicide does not address the intent or motives of the guardian or specify how the illicit act must be discovered for the killing to be legal, these are central issues in Lysias 1. Ironically, it would have been easier for Euphiletus to catch Eratosthenes in the act, and his case would have been just as compelling, if he had rushed into the bedroom as soon as he had learned that Eratosthenes was in his house rather than wait to kill the adulterer until after he had gathered witnesses and stopped at a nearby tavern for torches. Perhaps the logographer circulated the speech not to memorialize what he wrote for an actual client, but to entertain a reading audience. Thus, we cannot rule out the possibility that the speech is fictional.

Keywords: Attic oratory, homicide, Lysias, *moicheia*

Lysias 1, *On the Murder of Eratosthenes*, has proven to be a particularly useful speech for classicists and ancient historians for the information that it contains about the daily lives of Greek women, Athenian laws on sexual violence and *moicheia*, and the mediation of violence in classical Athens. However, Lysias 1 is also a highly unusual speech. Some scholars have questioned whether the speech was ever delivered to an Athenian court and have suggested that it may instead have been a rhetorical exercise, which Lysias published either to showcase his skill as a logographer or to teach students the art of rhetoric.¹ Their arguments have not swayed most scholars.² Questions about the circulation and transmission of forensic speeches have, for the most part, not troubled ancient historians seeking to reconstruct Athenian social history. As long as the extant speeches resemble the kind of speeches that were delivered in Athenian courts, then they still can help us understand how litigants developed arguments in ways that appealed to Athenian values and beliefs. If the published version of a speech differs from the version delivered in court, presumably these changes were improvements to the original speech, so these improvements do not impede the study of ancient Athens.

Yet, orators and logographers may have chosen to circulate exceptional and particularly noteworthy examples of their oratory, and not necessarily speeches that were

¹ Perotti (1989–1990); Porter (1997); Fredal (2017), 16–22.

² See, for example, Weissenberger (2003), 90–1; Todd (2007), 56–7; Nývlt (2013). Fredal (2017), 18–19 neglects to respond to their criticism of Porter’s argument, which also applies to his own. Although Fredal shows that Lysias 1 is rhetorically sophisticated with a well-crafted ring composition, this does not prove that the speech could not have been delivered to an Athenian court in much the same form.

commonly heard in Athenian courts. Moreover, if the speaker's actions are exceptional, his representations of Athenian values and beliefs may also be out of kilter. As I will show, Euphiletus, the defendant of Lysias 1, took steps that not only made it more difficult for him to catch Eratosthenes in the act with his wife but also created the very suspicion that required him to defend himself in court. The law on justifiable homicide did not require the husband to kill an adulterer caught in the act. Instead, it permitted a guardian to use all necessary force to stop the violation of a woman under his care and to immediately kill the man responsible if caught in the act, whether it be rape or seduction. By planning to catch Eratosthenes in the act, Euphiletus actually made it easier for the prosecution to argue that he had plotted Eratosthenes' murder. Ironically, Euphiletus' case would have been just as compelling, and perhaps even stronger, if he had rushed into the bedroom as soon as the slave girl woke him up to tell him that Eratosthenes was in his house rather than waste time searching for witnesses just in case he might be prosecuted. However, then there would have been no need for the kind of rhetorical artistry that Lysias displayed in the speech.

Perhaps then Lysias circulated the speech not so much to memorialize what he wrote for a client to deliver in court but to showcase his skill as a logographer and even to entertain a reading audience. If the latter is the case, then we cannot rule out the possibility that the speech is fictional or, at the very least, diverges significantly from the kind of speeches that Lysias regularly prepared for his clients to present to Athenian courts. Even if the published version of the speech was based on an actual trial, it is likely that it differed substantially from the speeches that Lysias regularly prepared for his clients. After first discussing previous arguments that have been advanced to suggest the speech was a rhetorical exercise and explaining why their arguments have not convinced scholars, I next examine the narrative and then the legal proofs of the speech to show why it was unnecessary for Euphiletus to assemble witnesses in order to exercise his right to kill Eratosthenes.

I. AUTHORSHIP, DELIVERY, AND PERFORMANCE OF LYSIAS I

On the Murder of Eratosthenes is one of only six speeches in the modern Lysianic corpus whose authorship has not been questioned.³ Demetrius of Phaleron cites section 9 of the speech to illustrate Lysias' plain style (4.190). In *De figuris sententiarum et elocutionis* (1.21), Rutilius Lupus quotes from Lysias to demonstrate *ēthopoiia*. In the quoted passage, the speaker describes to the jury how he had returned home, tired and hungry after a long day of working in the fields, but eager to see his loving wife whom he thought was waiting to tend to him, only to discover the cruel plot that she had in store for him. This portrayal

³ Darkow (1917), 10 with n. 15. Dover would reduce this number further because he believes that Lysias served as a consultant and an advisor to his clients whom he collaborated with to prepare the speeches that they delivered. This would make Lysias 12 the only extant speech that we can safely ascribe entirely to the logographer because it is the only one that Lysias delivered on his own behalf (Dover 1968, 193). Most scholars, however, have found Dover's arguments unconvincing and accept instead the traditional understanding of the logographer as a hired speechwriter: see Winter (1973); Usher (1976); Usher and Najock (1982); Todd (2007), 28–30. For the circulation and transmission of Lysias 1, see Appendix.

of the husband is clearly quite different from the one in *Lysias 1*. Porter suggests that Rutilius may have altered his source to illustrate ‘a particular rhetorical technique’.⁴ It is equally possible that Rutilius (or his source) expected his readers to be familiar with the reference and either wanted to amuse them with his adaptations or, as Porter also suggests, make the farmer a more sympathetic figure than Euphiletus.⁵ Whatever the reasons for the alterations in Rutilius’ retelling of the scene, *Lysias 1* was considered an excellent example of the logographer’s rhetorical artistry early in its transmission, and it was celebrated for its sensational content. It is also likely that these are the reasons why the speech continued to remain in circulation when other Lysianic speeches were discarded.

So, while the rhetorical flourishes of the speech secure *Lysias*’ authorship, some scholars have concluded that the speech was not delivered in court for the following reasons. (1) The names, Euphiletus (‘beloved’) for the defendant and Eratosthenes (‘vigorous in love’) for the wife’s lover, are suspiciously appropriate. (2) It is a remarkable coincidence that the adulterer has the same name as the man who was a member of the Thirty and whom *Lysias* prosecuted for murdering his brother (i.e., *Lys. 12*). Euphiletus asserted that he had no ulterior motive for wanting to kill the adulterer (4, 43–5). However, if the adulterer were either the oligarch or his relative, one would have expected Euphiletus to qualify this assertion. It is also difficult to understand why Euphiletus did not capitalize on Eratosthenes’ connection to the Thirty to prejudice the jury against the adulterer if he was either the oligarch or his relative. (3) The speech differs in form and substance from other speeches in the corpus. It is significantly shorter than other homicide speeches (i.e., *Antiphon 5* and *6* and *Lysias 12* and *13*), and it lacks the rhetorical *topoi* and character arguments that often appear in forensic speeches. (4) Euphiletus relies too heavily on narrative to make his case and does not provide adequate space to respond to the prosecution’s claim that the slave girl enticed Eratosthenes to enter his home.⁶

Perotti suggests that the speech was a political allegory with Eratosthenes representing the oligarchic man and Euphiletus his democratic counterpart, which *Lysias* included in his corpus to train students in the art of rhetoric.⁷ For Porter, the speech follows so closely the narrative of adultery stories of Greek novels and mimes and deviates so much from Athenian homicide speeches that it must be a display piece.⁸ Drawing on Porter’s and Perotti’s arguments, Fredal has outlined the elaborate ring composition that appears in Euphiletus’ narrative to suggest that the speech may have been a rhetorical *technē* that

⁴ Porter (1997), 447.

⁵ *Lysias* may have intentionally presented Euphiletus as detached and distant from his wife even before she began the affair to explain the cause of her infidelity; see Johnstone (1998), 226–9.

⁶ Porter (1997), 434–41 provides the most comprehensive summary. Perotti (1989–90), 44–5 adds that the narrative fits together too perfectly and lacks the loose ends that one can often find in forensic speeches while the identity of the parties, bystanders, and witnesses of the dispute is more generic than in other comparable speeches. For attempts to identify the adulterer of *Lysias 1* with the defendant of *Lysias 12*, see most recently Avery (1991); contra: Kapparis (1993); Todd (2007), 59–60. Since there is no proof that Eratosthenes passed his *euthyna* and the speech cannot be dated before 403 (see n. 16), the adulterer may have been a relative of the oligarch, perhaps a cousin or nephew; see Davies (1971), 185.

⁷ Perotti (1989–90), 43.

⁸ Porter (1997), 447–8.

Lysias composed to illustrate the power of enthymemes.⁹ Although the artistry of the speech suggests that Lysias may have revised it significantly for a reading audience, this does not prove that the speech was a rhetorical exercise and could not be based on an actual case.¹⁰

It is true that the names of the parties are suspiciously appropriate, but life is sometimes stranger than fiction. One can find equally remarkable coincidences for even modern scandals. Anthony Weiner, for example, former congressman of the ninth district of New York, pled guilty for sending sexually explicit pictures to a minor.¹¹ There is also Chris Pincher, former member of Parliament, who resigned from his post as chief whip of the Conservative Party after allegations surfaced that he had groped two men.¹² It is not beyond the realm of possibility that Eratosthenes of Lysias 1 was in some way connected to Eratosthenes of Lysias 12. Eratosthenes was a fairly rare name, and the adulterer may have been from the same tribe as Eratosthenes of Lysias 12.¹³ Therefore, it is possible that the adulterer had some connection to the oligarch. Given the infamy of the Thirty, the jury might have recognized this connection when Euphiletus mentioned that Eratosthenes was from the deme of Oe (16).¹⁴ If, however, Euphiletus had chosen to be more explicit, he risked revealing that he had an ulterior motive.¹⁵ So, Euphiletus had to weigh the advantages of explicitly mentioning the Thirty against the disadvantages. Since the prosecution claimed Euphiletus entrapped Eratosthenes, clearly the disadvantages outweighed any possible advantage. Nevertheless, one cannot rule out the possibility that the names are purely coincidental, and the adulterer had no connection with the oligarch. So, the names of the parties do not prove either that the speech was delivered in court or that it was a rhetorical exercise.

Because Lysias 1 is the only extant speech for justifiable homicide, comparisons to other speeches may be misleading. Lysias 12 and 13 are significantly longer, but they are public actions, not *dikai phonou*. Lysias 12 was, in all likelihood, delivered at Eratosthenes' *euthyna*, which he had to pass as a former member of the Thirty to remain in Athens and live under the terms of the amnesty.¹⁶ Lysias 13 is an *apagōgē*, so it is not

⁹ Fredal (2017), 14–19.

¹⁰ Weissenberger (2003), 90; Nývlt (2013), 16.

¹¹ Bever (2017).

¹² Sabin (2022).

¹³ However, it is not certain that the oligarch was from the tribe of Oineis; see Kapparis (1993), 364.

¹⁴ Todd (2007), 59 n. 59 doubts that this was enough for the jury to make the connection.

¹⁵ Pepe (2012), 226. Todd (2007), 60 suggests that Euphiletus was daring the prosecution to offer this motive. If the prosecutor accused Euphiletus of killing Eratosthenes because of his connection to the Thirty, he risked prejudicing the jury against the adulterer. Nývlt (2013), 166–7 believes that the speech may have been delivered before the rule of the Thirty, which would explain why Euphiletus does not mention the oligarchy and he refers to Eratosthenes as *νανίσκος* (37). However, it is generally believed that Lysias did not begin his career as a logographer until after 403—and mainly out of necessity—because the Thirty had confiscated his property; see Todd (2007), 12–15.

¹⁶ Lysias blames Eratosthenes for his brother's death because Eratosthenes carried out the arrest which led to Polemarchus' execution by the Eleven. The amnesty, however, exempted Athenians from prosecution for murder and wounding carried out during the civil war unless

comparable to Lysias 1. The length of time that speakers were allotted in homicide cases is unknown, but there is no reason to assume that it was the same for all homicide courts. Since defendants admitted to the killing in cases of justifiable homicide that the Delphinion heard, they did not need as much time as defendants in cases of intentional homicide that came before the Areopagus. It is also worth noting that Lysias 3, which—as a case of intentional wounding—was heard by the Areopagus, is approximately the same length as Lysias 1. Moreover, Lysias 1 is, in fact, comparable in length with Antiphon 6 and longer than Antiphon 1. So, there is no reason to assume that Lysias 1 is unusually short for the first speech that a defendant would deliver to the Delphinion.

The number of supporting documents that litigants ask the clerk to read also varies significantly. Euphiletus has the clerk read sections of three laws (28, 30, 31) and stops his speech twice (29, 42) for witness testimony to be read. The testimonia have not survived, but based on Euphiletus' remarks, they are from multiple witnesses. The defendant of Lysias 3 also stops his speech twice for the clerk to read witness testimony (14, 20). However, he does not provide any other documents to support his case even though Lysias 3 is, in some ways, a more complicated case because the parties dispute who started the fight and whether the defendant was guilty of intentional wounding (i.e., *trauma ek pronoias*). So, there is nothing unusual about the amount of documentary evidence that Euphiletus assembled to support his case.

There is also no reason to conclude that Euphiletus is exceptionally vague about the parties involved in his dispute. He mentions how he had invited Sostratus to his house to have dinner with him on the night that he caught Eratosthenes in the act (22), and he says that he knocked on the doors of several of his neighbors' houses, including Harmodius' (41). While the defendant of Lysias 3 names several people who helped the prosecutor drag off Theodotus (12), he names only one of the men who tried to help Theodotus when the boy sought refuge in the fuller's shop (15–16). The defendant of Lysias 3 is intentionally ambiguous about Theodotus' status to make the actions of Simon seem more outrageous. Sometimes it is to his advantage to give the jury the impression that Theodotus is free. At other times, it is advantageous for the defendant to imply that Theodotus is a slave.¹⁷ In a similar fashion, there are points in the narrative where Euphiletus is equally vague and misleading, but this does not prove the speech is a rhetorical exercise. It simply reveals efforts on the part of the litigant to gloss over weaknesses of his case.

Finally, the speech does not stand out because it lacks the rhetorical *topoi* that litigants regularly employ or Euphiletus fails to respond fully to the prosecution's claim of entrapment. As Porter observes, Euphiletus does not mention his liturgical services, military duty, or other acts of generosity to win the goodwill of the jury.¹⁸ However, defendants in the homicide courts do not typically rely on such ethical arguments.¹⁹

committed *αὐτοχειρία* (by one's own hands). So, if Eratosthenes had passed his *euthyna*, Lysias would not have been able to prosecute Eratosthenes for Polemarchus' death because Eratosthenes did not kill Polemarchus with his own hands; see Todd (2020), 27–28.

¹⁷ Todd (2007), 281; Glazebrook (2021), 97. For Theodotus, as a citizen, see Cohen (2000), 168–70; Kapparis (2018), 214, 217. For Theodotus as a free non-citizen, see Bushala (1968), 63–8; Todd (2007), 281. For Theodotus as a slave, see Carey (1989), 87; Herman (2006), 165; Wrenhaven (2012), 73; Matuszewski (2021), 113.

¹⁸ Porter (1997), 438.

¹⁹ Lanni (2006), 75–114.

Nevertheless, Euphiletus still establishes his character by stating that he had no reason to kill Eratosthenes. He states that he was not involved in a legal dispute with Eratosthenes, had not committed some offense, which he feared Eratosthenes might try to expose, and was not hoping to enrich himself by killing Eratosthenes (4, 44). Although he does not mention that he is inexperienced in law, he maintains throughout the speech that he is a law-abiding citizen, and he uses a variety of rhetorical appeals that appear frequently in forensic speeches. For example, he starts his speech by asking the jurors to imagine how they would feel if they had suffered what he suffered (1),²⁰ and he closes his speech by warning them of the consequences of their verdict (36, 47–8).²¹ He evokes the jury's pity for the dangers that he faces for obeying the laws and protecting his family (50), and he seeks to win the court's sympathy by regularly characterizing Eratosthenes' actions as hybriistic (2, 4, 16, 25).

Euphiletus employs many rhetorical *topoi* in clever and novel ways so that he can place the prosecution on the defense, present himself as the victim, and cast Eratosthenes as the perpetrator.²² After admitting to the jury that he ignored Eratosthenes' pleas for mercy, he explains, 'I considered the law of the city to be of greater authority and exacted that punishment that you established for those who engage in such acts because you believed it to be most just'.²³ Defendants tend to support their case with ethical arguments because they are on trial, and they use their character to establish the probability of their innocence, to support the legal proofs that they are relying on, and to establish their trustworthiness. Prosecutors, by contrast, generally only need to discuss their character to prove that they do not have ulterior motives for prosecuting the defendants.²⁴

So, Euphiletus may be deliberately avoiding some rhetorical appeals that are typical of defendants to present himself as though he were the prosecutor. He begins the speech by telling the jury that they should be angry at Eratosthenes, and he closes the speech by saying that the dispute is not a private matter, but an offense that impacts everyone.²⁵ It is noteworthy that Euphiletus does not attempt to corroborate his version of the events by offering to submit the slave girl to *basanos*, but this may indicate only that he has something to hide.²⁶ Euphiletus clearly applies some rhetorical appeals in unconventional ways, and this may help explain why the speech was later circulated. Lysias I does not, however, deviate or differ significantly in substance or form from other forensic speeches in the corpus. Instead, the speech is problematic, as I will show, because Euphiletus makes it more difficult on himself to catch Eratosthenes in the act for a hypothetical legal defense that creates as many problems as it solves.

²⁰ Cf. Lys. 12.1–2; Dem. 21.108; 54.2, 42.

²¹ For the consequentialist topos, see Lanni (1999).

²² Cf. Edwards (1999), 59–60.

²³ Lys. 1.29: τὸν δὲ τῆς πόλεως νόμον ἡξίουσιν εἶναι κυριώτερον, καὶ ταύτην ἔλαβον τὴν δίκην, ἦν ὑμεῖς δικαιοσύνην εἶναι ἡγησάμενοι τοῖς τὰ τοιαῦτα ἐπιτηδεύουσιν ἐτάξατε. The text of Lysias is from Carey (2007). All translations are my own.

²⁴ Johnstone (1999), 93–108.

²⁵ On appeals to anger in forensic speeches, see especially Rubinstein (2004; 2005).

²⁶ Carey (1989), 63; cf. Carawan (1998), 296. Litigants often did not explain their reasons for refusing to accept a challenge, see Gagarin (1996), 9.

II. THE NARRATIVE OF LYSIAS 1

Euphiletus claims that the law on justifiable homicide not only granted him the right to kill Eratosthenes, but it required that he do so. It is well established that this is a misleading interpretation of the law (see Section III). Euphiletus was not obligated to kill Eratosthenes. He could have chosen a lesser punishment, including monetary compensation. It is generally believed that Euphiletus denied that he had a choice to avoid having to explain to the jurors why he chose a penalty that they might view as excessive.²⁷ The evidence that adulterers typically provided monetary compensation comes primarily from comic poetry and Apollodorus' speech against Neaera.²⁸ The comic poets do not necessarily describe normative behavior. Apollodorus' speech was delivered fifty years after Lysias 1, so we cannot rule out the possibility that Athenian views on adultery may have changed. Nevertheless, the incident described in Apollodorus is not comparable to Lysias 1. Apollodorus claims that Stephanus pimped out Phano and then extorted money from Epaenetus, whom Stephanus allegedly imprisoned for having an affair with his legitimate daughter. Apollodorus' accusation that Phano was the daughter of Neaera, plying the trades of a prostitute, was probably false. Stephanus was willing to accept monetary compensation from Epaenetus because Phano was divorced at the time, and Stephanus was her father, not her husband. In all likelihood, he was concerned about his ability to support her should the affair make it difficult for him to remarry his daughter to another Athenian.²⁹ Moreover, there is no reason to believe that Stephanus caught Epaenetus in the act with Phano. Although it is possible that Athenian husbands normally accepted monetary compensation, this does mean that a jury would have been unwilling to accept justifiable homicide as a defense provided that Euphiletus could prove that he met the required conditions for such a defense.³⁰ The evidence suggests just the opposite especially if Euphiletus was successful in convincing the jury that Eratosthenes was guilty of *hybris*.³¹

²⁷ See, for example, Carey (1989), 60–1; Todd (2007), 50; cf. Paoli (1950), 164–5; Bateman (1958), 277–8; (1962), 171–2; Usher (1965), 101–2; Edwards (1999), 57–8.

²⁸ Todd (2007), 120.

²⁹ [Dem.] 59.63–72. For Apollodorus' allegations against Phano, see Kapparis (1999), 37–8, 294–301; Spatharas (2011), 109–13; Glazebrook (2021), 67–8. Since Epaenetus was accused of *moicheia* for sleeping with a divorced woman, the law applied to any consensual, but illicit, sexual relationship with a legitimate Athenian woman, regardless of her marital status, as long as she had not engaged in prostitution; see Paoli (1976), 252–307; Cantarella (1976), 131–59; Carey (1995), 407–8; Patterson (1998), 107–25; Omitowaju (2002), 72–115. Cohen (1991), 98–132 argues that *moicheia* applied exclusively to married Athenian women; cf. Todd (1993), 277.

³⁰ Pace Phillips (2017), 51–2 with n. 20, who raises doubts about the two other possible cases of the killing of an adulterer (i.e., Lys. Fr. 62 and 298 Carey). Euphiletus' exercise of his right to kill Eratosthenes under the law of justifiable homicide may have been exceptional—and perhaps unprecedented—for the classical period, but this does not prove that the right had become a 'dead letter' by the fourth century.

³¹ The speaker of Lysias 13 claims that Agoratus could have been executed for being caught as an adulterer (66). Some fifty years later, Euthycles told an Athenian jury that the law on justifiable homicide imposed the penalty of death on men caught in the act to prevent acts of

According to Euphiletus, the prosecution accused him of asking the slave girl to summon Eratosthenes to his house (37). In response, Euphiletus insisted, ‘If I had seized Eratosthenes, however I could, after everything had already been done and he had entered my house on many occasions, I would think that I was acting with self-restraint’.³² This statement sums up neatly Euphiletus’ theory of the trial. First, the affair was ongoing before he caught Eratosthenes in the act. Therefore, it does not matter whether he enticed Eratosthenes to enter his home on the day of the killing. Second, he had no choice but to kill Eratosthenes once caught in the act. But how does Euphiletus prove that the affair was ongoing if he did not know about it until he caught Eratosthenes in the act? He had to convince the jury to accept his account of the night when his wife locked him in the upstairs’ bedroom. Before the jury had time to reflect on the odd exchange that Euphiletus had with his wife over his drunken assault of the slave girl, he proceeded to explain how his wife returned in the morning to unlock the bedroom door. When he asked her why he had heard the doors creak in the middle of the night, she told him that she had to go to the neighbor’s house to relight the lamp that was beside the child’s bed.³³ Although he noticed that his wife was wearing makeup, even though her brother had recently died, he thought nothing more of her explanation and left (11–14).

Sometime later, an old woman, who was waiting for him outside of his house, approached him cautiously and said the following:

‘Euphiletus’, she said, ‘Don’t believe that I come to you because I am a busy body. The man who is committing outrage against you and your wife happens also to be our enemy. Take the girl who goes to the agora for you and serves you and torture her. You will learn everything’. ‘It is Eratosthenes of Oe’, she said, ‘Who is doing this. He has corrupted not only your wife, but many other women. This is his trade’.³⁴

Euphiletus’ extensive use of direct quotation for his exchange with the old woman, who was most likely a slave, is striking. The testimonia of a slave could only be admitted as

hybris (Dem. 23.55–6). According to Demosthenes, Euaeon killed Boeotus in retaliation for just one blow. At his trial, Euaeon was nearly acquitted even though he did not beg or plead for mercy because many on the jury believed that the *hybris* to which Euaeon was subjected warranted his violent response (21.71–5). Although these cases were later than Lysias 1, they suggest that Euphiletus did not need to conflate the law on justifiable homicide with the law on *kakourgoi* to convince the jury that he was allowed to kill Eratosthenes.

³² Lys. 1.38: εἰ δὲ ἤδη πάντων διαπεπραγμένων καὶ πολλάκις εἰσεληλυθότος εἰς τὴν οἰκίαν τὴν ἐμὴν ὄπιτιοῦν τρόπῳ ἐλάμβανον αὐτόν, σῶφρον’ ἂν ἐμαυτὸν ἠγοῦμην.

³³ One of the ironies of the speech is how the baby allowed the wife to carry out the affair. Euphiletus prepares the jury for this moment in narrative by explaining earlier in the speech how he began to trust his wife once their baby was born (6) and by describing how he switched quarters with his wife so that she would not risk falling whenever she needed to use the stairs to look after the baby (9). For the design of the house, see Morgan (1982).

³⁴ Lys. 1.16: ‘Εὐφίλιτε,’ ἔφη ‘μηδεμιᾶ πολυπραγμοσύνη προσεληλυθέναι με νόμιζε πρὸς σέ· ὁ γὰρ ἀνὴρ ὁ ὑβρίζων εἰς σέ καὶ τὴν σὴν γυναῖκα ἐχθρὸς ὢν ἡμῖν τυγχάνει. ἐὰν οὖν λάβῃς τὴν θεράπαιναν τὴν εἰς ἀγορὰν βαδίζουσαν καὶ διακονοῦσαν ὑμῖν καὶ βασανίσῃς, ἅπαντα πεύσῃ. ἔστι δ’,’ ἔφη ‘Ἐρατοσθένης Ὀῆθεν ὁ ταῦτα πράττων, ὃς οὐ μόνον τὴν σὴν γυναῖκα διέφθορεν ἀλλὰ καὶ ἄλλας πολλὰς· ταύτην γὰρ {τὴν} τέχνην ἔχει.’

proof if one party to the dispute submitted a formal challenge (*proklēsis*) to other party to permit the slave to undergo torture (*basanos*). It is doubtful that the challenge could involve a slave who did not belong to one of the parties of the dispute.³⁵ Since Euphiletus did not have a way of introducing the conversation into the record as formal evidence, he quoted the old woman in such a way that her remarks would appear like *testimonia*. Eratosthenes' deme was an extraneous detail that seems contrived for their conversation, but it was necessary information for the trial. Similarly, the old woman's suggestion that he torture the slave girl functions as a kind of proxy challenge that glosses over the fact that Euphiletus did not make such an offer to the prosecutor.

In any event, Euphiletus started to connect the dots after the old woman told him about the affair:

I was immediately thrown into a state of confusion. Everything came back to my mind, and I was full of suspicion as I thought about how I had been locked up in the bedroom, and I remembered how the inner and outer doors made noises during the night, which had never happened before, and it had occurred to me that my wife was wearing makeup. All these things came back to my mind, and I was full of suspicion.³⁶

Twice he repeats that he was full of suspicion as he recalled that odd evening while he is also careful to avoid saying that he then knew the truth. The relighting of the lamp was more than a minor detail added to the story for the sake of vividness. It is central to Euphiletus' theory of the trial. And just in case the jurors did not immediately recognize the lie about the lamp, Euphiletus explicitly mentions how the doors had never before made such a noise in the middle of the night. Is the jury to believe that this was the first time that the lamp went out in the night? The wife's excuse for the doors making a noise had to be unbelievable to everyone except Euphiletus for it to serve as proof that Eratosthenes had previously entered the house.³⁷

It is likely that Euphiletus fabricated this incident so that he could provide the court with proof that the affair was ongoing. Otherwise, Eratosthenes was either in the house before Euphiletus returned home or entered while Euphiletus was having dinner with his wife. The former is unlikely because the wife did not have makeup on when Euphiletus returned home. It is also hard to imagine that Eratosthenes planned to wait in the house until Euphiletus' wife could extract herself from her husband so that the lovers could then resume their rendezvous while Euphiletus slept. The latter is equally unlikely because it would have required the slave girl to let Eratosthenes into the house as the couple was having dinner rather than tell him to leave because Euphiletus had arrived home unexpectedly. Then at an opportune moment, the slave girl caused the baby to cry as a way of signaling to the wife that Eratosthenes was in the house. Hearing the signal, the

³⁵ For a possible exception, see Ant. 6.23. However, even this challenge seems purely hypothetical.

³⁶ Lys. 1.17: ἐγὼ δ' εὐθέως ἐταραττόμην, καὶ πάντα μου εἰς τὴν γνώμην εἰσῆει, καὶ μεστὸς ἦν ὑποψίας, ἐνθυμούμενος μὲν ὡς ἀπεκλήσθην ἐν τῷ δωματίῳ, ἀναμνησκόμενος δὲ ὅτι ἐν ἐκείνῃ τῇ νυκτὶ ἐνόησα ἢ μεταυλοῦσα θύρα καὶ ἡ αὐλίου, ὃ οὐδέποτε ἐγένετο, ἔδοξε τέ μοι ἢ γυνὴ ἐμμιθιῶσθαι. ταῦτά μου πάντα εἰς τὴν γνώμην εἰσῆει, καὶ μεστὸς ἦν ὑποψίας.

³⁷ For the temporal irony of this retrospection, see Wohl (2020).

wife proceeded to lock her husband in the bedroom, go downstairs, and put on makeup for her rendezvous with her lover while her husband went to sleep. Although Euphiletus did not hear Eratosthenes enter his house or his wife having sex with Eratosthenes, he expects the jury to believe that he later heard the doors creaking in the middle of the night while he was asleep after having spent a long day in the country. Yet, in the morning when he questioned his wife about the obvious clues, he thought nothing of her excuse.³⁸

After the old lady revealed what she knew and Euphiletus recalled the obvious clues that he had previously ignored, his response was quite subdued and suspiciously methodical. Rather than confront his wife, he decided instead to do what the old woman had conveniently suggested and interrogate the slave girl. She first denied the affair, but she eventually revealed everything when he mentioned Eratosthenes by name (18–20). Euphiletus then told her, ‘See to it that no one will learn about this; otherwise, none of my promises to you will hold. I expect you to show it to me in the act. I don’t need words but the deed to be revealed, *if it is in fact so*’ (italics are mine).³⁹ Because he only had the reports of two slaves, he could still claim that he did not yet have sufficient proof of the affair. Next, as promised and as a condition for her safety, the slave girl alerted Euphiletus when Eratosthenes was in his home. If we can believe Euphiletus, he was again fast asleep while his wife was engaged with Eratosthenes, but this time he did not hear anything. After the slave girl woke him up, Euphiletus did not immediately confront Eratosthenes. Instead, he gathered witnesses and risked Eratosthenes leaving before he could return with them. It took him some time to round up his posse since some neighbors, as he explained to the court, were not home, and they first had to stop at a nearby tavern to get torches, so they would have adequate lighting just in case they had to report in a court of law what they saw that night.⁴⁰ Meanwhile, the slave girl was guarding the front door so that it would not make a noise when Euphiletus returned (23–4).

Luckily, Eratosthenes and Euphiletus’ wife were still in the throes of passion when the posse finally barged into the bedroom. Even though Euphiletus now had witnesses and adequate lighting so that they could see Eratosthenes in the act, he did not immediately kill the adulterer. Instead, as he explained to the jury, he knocked Eratosthenes down and bound him. He gave Eratosthenes some time to speak. Eratosthenes pleaded for his life, and he asked Euphiletus to spare him and accept a monetary payment for the offense (25). Euphiletus concluded his account of this quasi-trial by sharing with the jury his response to Eratosthenes in *oratio recta*, ‘I will not kill you, but the law of the city will, which you violated and considered of less importance than your own pleasures’.⁴¹ Why does

³⁸ See Weissenberger (1993), 60–1; cf. Todd (2007), 105–6.

³⁹ Lys. 1.21: ‘ὅπως τοίνυν ταῦτα μηδεὶς ἀνθρώπων πεύσεται· εἰ δέ μή, οὐδέν σοι κύριον ἔσται τῶν πρὸς ἔμ’ ὁμολογημένων. ἀξιῶ δέ σε ἐπ’ αὐτοφώρῳ ταῦτά μοι ἐπιδείξαι· ἐγὼ γὰρ οὐδὲν δέομαι λόγων, ἀλλὰ τὸ ἔργον φανερόν γενέσθαι, εἴπερ οὕτως ἔχει.’

⁴⁰ Scodel (1986), 8 suggests taverns may have sold torches to their patrons. Todd (2007), 118 explains that shops were often operated in private houses, so it may be anachronistic to think of ‘opening hours’. Although the detail about the torches allows Euphiletus to argue that he had sufficient lighting to see Eratosthenes ‘in the act’, it has the effect of undermining his characterization of himself as guileless; see Edwards (1999), 74.

⁴¹ Lys. 1.26: ‘οὐκ ἐγὼ σε ἀποκτενῶ, ἀλλ’ ὁ τῆς πόλεως νόμος, ὃν σὺ παραβαίνων περὶ ἐλάττονος τῶν ἡδονῶν ἐποίησω, καὶ μᾶλλον εἴλου τοιοῦτον ἀμάρτημα ἐξαμαρτάνειν εἰς τὴν γυναῖκα τὴν

Euphiletus go to the trouble of showing not just that he cannot be condemned for murdering Eratosthenes, but also that he had no choice but to kill the *moichos*? Was it necessary to first gather witnesses and then interrogate Eratosthenes to prove that it was an act of justifiable homicide?

III. THE LEGAL ARGUMENTS OF LYSIAS 1

Euphiletus cites three laws to support his claim that he was required to execute Eratosthenes (28, 30, 31). Todd suggests that Euphiletus ‘elide[s] the distinction between public and private summary justice’.⁴² I think we can push this further and conclude that Euphiletus intentionally conflates the law on summary execution carried out by the Eleven with the law on justifiable homicide that prevents Euphiletus from being held liable for the murder of Eratosthenes. The law on justifiable homicide did not permit—let alone require—an Athenian to execute a private citizen. Instead, it specified the circumstances that made it legal for an Athenian to kill another man.⁴³ Since the law on justifiable homicide allowed a husband to kill an adulterer caught in the act, Euphiletus’ reluctance to rely solely on this law seems to suggest that he had something to hide. Based on his characterization of the prosecution’s case, some scholars have suggested that the law on justifiable homicide may have prohibited premeditation or entrapment.⁴⁴ However, it is hard to imagine that a jury would have convicted Euphiletus for planning to murder Eratosthenes as long as he could convince the jury that he killed Eratosthenes when he found the adulterer in bed with his wife.

The first law has the most bearing on this issue, but one cannot trust Euphiletus’ interpretation of this law given how much he distorts the second and third laws to claim that the punishment for rape is a monetary penalty while it is death for seduction (32–3). As Harris has shown, Euphiletus’ interpretation of Athenian law is blatantly incorrect.⁴⁵ First, the law on justifiable homicide applied equally to cases of rape and seduction. Second, there were different legal remedies for *moicheia*, and none of them necessarily resulted in capital punishment. A guardian could avoid the public embarrassment of a trial by imprisoning the alleged seducer until his family ransomed him. Because this remedy was subject to abuse, the alleged seducer, who insists that he was innocent, could charge his captor with wrongful imprisonment. If he lost the suit, the captor could do whatever he wished to the *moichos* so long as it was without a knife. Presumably, this means he could not kill the *moichos*.⁴⁶ Alternatively, an Athenian could lodge a *graphē moicheias* against the seducer. If the defendant was found guilty, then the prosecutor proposed a penalty, and the defendant proposed an alternative punishment. There is no reason to assume that the prosecutor would necessarily propose capital punishment or that a jury

ἐμὴν καὶ εἰς τοὺς παῖδας τοὺς ἐμοὺς ἢ τοῖς νόμοις πειθεσθαι καὶ κόσμιος εἶναι.’ Cf. Lys. 1.29 (quoted in n. 23).

⁴² Todd (2007), 125.

⁴³ Cohen (1984), 151–2; (1991), 103–04; Harris (1990), 371; Harris and Canevaro (2023), 48–9.

⁴⁴ Carey (1989), 64; Pepe (2012), 223–4, 227; Plastow (2020), 120.

⁴⁵ Harris (1990).

⁴⁶ Kapparis (1995), 115; contra: Paoli (1950), 149.

would vote in favor of execution.⁴⁷ Finally, a charge of *hybris* was a legal remedy for both rape and seduction. It is uncertain whether this was a viable path for conviction and what penalty a jury might impose on the defendant, given that this was an *agōn timētos*. However, it is likely that convicted *moichoi* were normally required to pay monetary fines.⁴⁸

The first law is either from the law on *moicheia* or a section of the law on the arrest and execution of *kakourgoi*. Because Euphiletus follows the reading of the first law by stating that Eratosthenes admitted his guilt, Cohen has convincingly argued that it must be from the law on *kakourgoi*.⁴⁹ However, the victim is not permitted to execute the *kakourgos*. He must catch the offender in the act and take him to the Eleven who will then execute the offender only if he admits his guilt. So, Euphiletus must either be misrepresenting the law on *kakourgoi* or the law extended privileges to the victim of the *moichos* that were not afforded to victims of other *kakourgoi*. Since the law on justifiable homicide allowed the guardian to kill the *moichos* on the spot, it is unclear why it was necessary to add this privilege to the law on *kakourgoi*. Cohen suggests that the law on *kakourgoi* may have restricted the law on justifiable homicide, which Euphiletus glosses over through his misrepresentation of the two laws.⁵⁰ A passage in Aeschines seems to support the classification of *moichoi* as *kakourgoi* (1.91).⁵¹ The passage, however, also lists murderers, so it is more likely that *moichoi* and murderers were included in the list with *kakourgoi* because of the point that Aeschines is making about offenses committed in secret and the penalties that certain offenders were subjected to if caught in the act.⁵² Like Euphiletus, Aeschines may even be conflating summary execution of the *kakourgos* with the law on justifiable homicide.

So, if a husband did not have the right to summarily execute his wife's paramour, why did the law on justifiable homicide grant him immunity for murder provided that the paramour was caught in the act? Lysias 1 cannot help us answer this question since Euphiletus clearly distorts the three laws that he cites. Instead, we need to consider the classes of individuals that the law on justifiable homicide protected to get a better sense of its purpose. They are as follows: (1) a soldier who mistakenly kills a comrade in battle ([Arist.] *Ath. Pol.* 57.3; Dem. 23.53), (2) an athlete who unintentionally kills a person in

⁴⁷ On the basis of the law on wrongful imprisonment, Cole (1984), 99 believes that the prosecutor could not propose the death penalty in a *graphē moicheias*. The suits, however, were not comparable. In cases of wrongful imprisonment, the alleged adulterer was the prosecutor, not the defendant, and the woman's guardian had imprisoned him for ransom, so it would not be appropriate for the guardian to now demand the death penalty.

⁴⁸ For the physical humiliation of *moichoi*, see especially Kapparis (1996).

⁴⁹ Cohen (1991), 115.

⁵⁰ Cohen (1991), 116–18. Carawan (1998), 291–2, 298–9 doubts that there were substantive changes to the law on *kakourgoi* and suggests that Euphiletus mentions the law on *kakourgoi* because jurors would have been skeptical of claims of justifiable homicide. Cantarella (1991), 291–2 argues that the law on *kakourgoi* extended the husband's rights, making it easier for him to execute the *moichos* since, unlike the law on justifiable homicide, it did not require the husband to catch the *moichos* in the act of sexual intercourse with his wife (ἄρθρα ἐν ἄρθροισι ἔχων [Lucian *Eun.* 10]).

⁵¹ Paoli (1950), 153; Hansen (1976), 44–5; Cohen (1991), 111.

⁵² Gagarin (1979), 317–22 with n. 60; Harris (1990), 376–7; cf. Fisher (2001), 225.

a competition ([Arist.] *Ath. Pol.* 57.3; Dem. 23.53), (3) a doctor whose patient dies while under his care (Ant. 4.3.5), (4) an individual who, in certain circumstances, kills a robber while protecting himself and his property (Dem. 23.53, 60; *IG I³* 104.37–8); (5) a man who kills a nocturnal thief (Dem. 24.113), (6) a person who kills a man exiled for homicide found in Attica (Dem. 23.28), (7) anyone who kills someone attempting to overthrow the democracy (*SEG* 12.87.7–11), and (8) a *kurios* who kills a man caught in the act with a woman under his care (Lys. 1.30; Dem. 23.53; cf. [Arist.] *Ath. Pol.* 57.3).⁵³

Because of the fog of war, there is always the risk that a soldier might accidentally strike a comrade. If a soldier holds himself back to avoid friendly fire, his hesitation may cause the army to lose the battle and put more lives in danger. Similarly, doctors may hesitate to treat patients or avoid risky treatments if they can be prosecuted for murder when their treatments fail. For obvious reasons, individuals are permitted to defend themselves and their property from thieves and highway robbers. They cannot be held liable if they kill a thief or robber in self-defense during a violent assault. Thieves, however, who are caught at night may be killed even if they commit their crimes without force.⁵⁴ Again, it is likely that the danger to the victim is the issue. Because of darkness, the victim might not be able to see whether the thief has a weapon. So, he is allowed to take the necessary steps to recover his property without putting his own life in jeopardy. In the case of a conspirator caught attempting to overthrow the democracy, the dangers are so great to all Athenians that any means necessary to stop the conspirator are justifiable. If a *kurios* catches a man in the act with a woman under his guardianship, he is permitted to use all necessary force to stop the violation, whether it be rape or *moicheia*, and even kill the perpetrator.⁵⁵ On the one hand, the law on justifiable homicide, as Cohen observes, ‘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’.⁵⁶ On the other hand, it is not surprising if Athenians interpreted the law on justifiable homicide as imposing the death penalty on men caught committing rape and *moicheia* because these acts were considered forms of *hybris* that threatened the sanctity of marriage, male authority over their household, and the integrity of Athenian descent lines.⁵⁷

Phillips suggests that the notion of risk in American tort law may be applicable to the Athenian law of justifiable homicide.⁵⁸ Athletes who participate in competitions, and patients who undergo medical treatment assume certain risks, but it is also worth noting that their actions are legal. The actions of the thief and the conspirator, by contrast, are illegal. The risk that thieves and conspirators incur when they violate the law is not the

⁵³ For a concise summary of the various laws on justifiable homicide, see MacDowell (1963), 70–84; Harris (2010), 131–2.

⁵⁴ Dem. 23.113; see MacDowell (1963), 76

⁵⁵ Although *moicheia* applied to Athenian women regardless of her marital status, Athenian men were especially concerned about illicit sexual activity of married women because of the threat that adultery posed to Athenian descent lines; see Carey (1995), 408; Ogden (1997); Todd (2007), 48.

⁵⁶ Cohen (1984), 151.

⁵⁷ For rape and *moicheia* as *hybris*, see especially Cole (1984), 98–9; Harris (1990), 373–4; (2004); Foxhall (1991).

⁵⁸ Phillips (2017), 48–50.

issue, but the danger that they pose to their victims. The law on justifiable homicide recognizes this danger and grants the victims the necessary means to stop a crime in progress. Pepe observes that intent matters in the case of the soldier and the athlete. As a result, the law specifies that a soldier who kills a comrade by mistake or an athlete who kills a competitor unintentionally is protected from charges of intentional homicide.⁵⁹ Perhaps then intent also matters in the case of the killer of a *moichos*.

The law code of Gortyn expressly prohibited the use of subterfuge to capture seducers (II.36–45). Since Euphiletus had to respond to the prosecution’s accusation of enticement, some scholars believe the Athenian law on justifiable homicide may have had a similar restriction.⁶⁰ This would then explain why Euphiletus goes to the trouble of proving to the jury that he did not plan to kill Eratosthenes that night (40–2). However, unlike the law code of Gortyn, the Athenian law on justifiable homicide states only that a man may not be punished for murder if he kills someone [caught] ‘on his wife, mother, sister, or concubine for [the procreation of] free children’.⁶¹ In Gortyn, the penalty was monetary unless the perpetrator’s family refused to pay the price that the victim had demanded for the perpetrator’s release, in which case the victim could do whatever he wanted to the perpetrator.⁶² The Gortyn law prohibited subterfuge to prevent individuals from arresting an alleged *moichos* and extorting money from him. So, it had more in common with the Athenian law on false imprisonment. Moreover, the prosecutor of Lysias 1 did not place much weight on his claim of enticement since he also accused Euphiletus of dragging Eratosthenes from the street and killing Eratosthenes at the hearth of his home (27).⁶³

The central issues, therefore, seem to be where and when the killing occurred and whether Euphiletus found Eratosthenes in bed with his wife. Drawing on a passage from Lucian’s *Eunuchus* (10), Cantarella suggests that the law on justifiable homicide required the adulterer to be caught in the middle of sexual intercourse with the husband’s wife.⁶⁴ This would explain why Euphiletus gathered witnesses and did not kill Eratosthenes until after he had confessed. Yet, even for Eratosthenes to be in the house without the permission of Euphiletus was a taboo, not to mention that he was found naked in bed with Euphiletus’ wife in the middle of the night.⁶⁵ It is hard to imagine that an Athenian jury would have concluded that Euphiletus had insufficient proof for the killing to be justifiable if he killed a man whom he discovered in bed with his wife in the middle of the night

⁵⁹ Pepe (2012), 183–227. Euthycles claims that the athlete killed in a competition is responsible for his own death because he failed to recognize his own limitations while the opposing athlete is innocent because he was merely using all his force to win the contest (Dem. 23.54).

⁶⁰ Usher (1965), 101 with n. 13; Plastow (2020), 122, 150 n. 19; cf. Weissenberger (1993), 56 with n. 7.

⁶¹ Dem. 23.53: ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ’ ἀδελφῇ ἢ ἐπὶ θυγατρὶ, ἢ ἐπὶ παλλακῇ ἢ ἂν ἐπ’ ἐλευθέροις παισὶν ἔχη, τούτων ἕνεκα μὴ φεύγειν κτείναντα. For the authenticity of this document, see Canevaro (2013), 64–70.

⁶² Phillips (2021), 16–17.

⁶³ Cf. Pepe (2021), 31–2 n. 15.

⁶⁴ See n. 50.

⁶⁵ The defendant of Lysias 3 uses the fact that Simon barged into the room where Athenian women were present as proof that he came to the defendant’s house to commit a crime (6–7, 23).

unless witnesses were present to see the man *in flagrante delicto*.⁶⁶ Yet, Euphiletus was apparently willing to risk Eratosthenes leaving the house before he could return with witnesses because he was afraid that a jury might convict him of intentional murder if Eratosthenes' next of kin decided to prosecute him and he did not have witnesses who could testify on his behalf.

Even if we assume that the jury might be suspicious of Euphiletus' motives, he fuels these suspicions by revealing the plans he had made with the slave girl and his efforts to secure alibis. It would have been easier for Euphiletus to catch Eratosthenes in the act, and his defense would have been simpler, if he did not first gather witnesses. They certainly did not need to stop on the way to get torches before barging into the bedroom. It is doubtful that an Athenian would have waited to stop a thief, whom he heard breaking into his house in the middle of the night, until after he had witnesses present who could prove in a court of law that the man in question was in fact a thief.⁶⁷ So perhaps Euphiletus called on his neighbors and friends not because he needed witnesses, but to prevent Eratosthenes from fleeing or overpowering him. Euphiletus seems to be unintentionally inviting this speculation when he tells the jury that, if he had planned the murder, he would have readied several slaves, not just the slave girl, and he would have sent advance notice to his friends and neighbors because he had no way of knowing whether the adulterer would be armed (40–2). Euphiletus may not have provided his supporters with advance notice, but the posse still provided him with the kind of assistance that he describes in this hypothetical scenario.

Yet, the narrative contains enough information to cause the audience to doubt even this explanation for Euphiletus' delay. If he was trying to conceal the real purpose of the posse by telling the jury that he had assembled them to serve as witnesses, what was his rationale for stopping for torches? Was this delay also necessary to conceal his plot? Why take the chance that Eratosthenes might leave before he returned? It is not surprising that Euphiletus may have wanted some protection, but how many supporters did he need to overpower Eratosthenes? Did he really have to worry that Eratosthenes might be armed when he was in bed with Euphiletus' wife? Why did Euphiletus not kill Eratosthenes as soon as he rushed into the bedroom and saw Eratosthenes in bed with his wife? Was there any doubt about what Eratosthenes was doing? The law on justifiable homicide did not require the mock trial, and Eratosthenes' confession was unnecessary to prove in a court of law that the adulterer was caught in the act. The cumulative effect of all these delays in the detection and killing of Eratosthenes is to invite the listener to suspect that the event was made up.

⁶⁶ Cf. Foxhall (1991), 299; Kapparis (1995), 106–7.

⁶⁷ It was not unusual for bystanders who happened to be present as an alleged crime was being committed to later serve as witnesses (see, for example, Lys 3.14; Isoc. 20.1; Dem. 47.38, 60–2; 53.16; 54.9). Similarly, friends and relatives who were present at weddings and naming ceremonies could later be called on to testify to what they heard and saw, and witnesses were often present during financial transactions, summons, and legal challenges so that they could verify what took place; see Mirhady (2002), 262–5. However, it was unprecedented for an Athenian to wait until after witnesses were present to stop a crime that was ongoing.

CONCLUSIONS

In conclusion, Euphiletus had substantial proof of the affair. The sounds that he heard in the middle of the night, the locked bedroom door, and his wife's makeup were obvious clues that confirmed the reports of the two slaves, but it might not have been enough to secure a conviction, not to mention the death penalty, if he had lodged a *graphē moicheias*, and he might not have wanted to endure the humiliation of a public trial. Therefore, rather than stop the affair, Euphiletus decided to wait until Eratosthenes was again in his house having sex with his wife so that he could kill the adulterer. Nevertheless, it was well within his rights to kill Eratosthenes because all that mattered was whether he caught the adulterer in bed with his wife. Yet, when the slave girl woke him up to tell him that Eratosthenes was again in his house having sex with his wife, Euphiletus did not immediately stop them. He first collected witnesses who could testify in court just in case he was later prosecuted for murder. As it turns out, Euphiletus was quite prudent. Eratosthenes' next of kin did charge him with murder. The law probably was intended to grant the *kurios* immunity for a murder that he committed at the spur of the moment to protect women under his care, guard the integrity of his family, and preserve his own dignity. It is hard to imagine that an Athenian jury would have convicted Euphiletus if he had decided to immediately rush into his wife's bedroom and kill Eratosthenes as soon as the slave woke him up because he lacked witnesses to corroborate his version of the events. Apparently, this was too risky. So, Euphiletus preferred instead to gather witnesses, stop for torches, and risk Eratosthenes leaving his house before he returned to bolster a hypothetical defense. Was it caution or daring that led him to make this calculation?

So, the more I read Lysias 1 the more I think we cannot rule out the possibility that the speech was a *technē* to showcase the kind of rhetorical and legal gymnastics that Lysias could perform. Lysias's handiwork is clearly visible throughout the speech in everything that Euphiletus utters and even in what he does not say. From his masterful characterization of the defendant to his tightly-woven narrative, which is coherent and consistent but also incredible, and sometimes even funny, Lysias displays the full range of his artistry. Perhaps, then, Lysias 1 was a work of literature, circulated to entertain a reading audience, and not a faithful representation of the kind of speeches that Lysias typically wrote for his clients to deliver in court. It is possible that the published version of the speech was modeled after an actual case heard in an Athenian court. It certainly has similarities to other speeches in the corpus, but the dispute depicted in the speech is clearly exceptional. It is unlikely that another Athenian would have first rounded up a posse and then stopped at the nearest tavern on his way home to get torches just in case he needed his friends and neighbors to prove in a court of law that they saw his wife having sex with another man. Euphiletus did not need witnesses, and he certainly did not need more light.⁶⁸

⁶⁸ Preliminary drafts were delivered at the Cassas Seminar Series in Greek Law and Society at the University of Florida and at the meeting of the Southern Section of the Classical Association of the Middle West and South in Greensboro, South Carolina in 2023. I am grateful to the audiences for their helpful questions and feedback. I would also like to thank Kostas Kapparis, Jakub Filonik, and the anonymous readers of *SCI* for their valuable comments, corrections, and suggestions.

APPENDIX: CIRCULATION AND TRANSMISSION OF LYSIAS I

Although more of Demosthenes' speeches have survived the vagaries of the transmission of classical manuscripts than for any other Attic orator, Lysias rivalled him in popularity for much of antiquity. According to Dionysius and Caecilius, 425 speeches were attributed to Lysias and circulated under his name during the first two centuries of the Roman empire, but only 233 were genuine.⁶⁹ As with the other orators, some speeches were in circulation under Lysias' name that Lysias did not write because people preferred to read him than an obscure orator.⁷⁰ Even if Dionysius and Caecilius were correct to reject the authenticity of nearly half the speeches circulated under his name, a greater number of Lysianic speeches continued to be read during the early Roman empire than of any other Attic orator. Hypereides was a distant second. According to the author of the *Lives of the Attic Orators* (849d), only 52 of the 75 speeches attributed to Hypereides were genuine.⁷¹ Unfortunately, the Lysianic corpus continued to dwindle. Harpocration cites more than 100 speeches attributed to Lysias and doubts the authenticity of a third of them.⁷² Harpocration may have been overly zealous in questioning the authenticity of some of these speeches, but this still represents a significant drop.⁷³

By the twelfth century, Palatinus Graecus 88—the manuscript that contains what would become the modern Lysianic corpus—included 31 of Lysias' speeches.⁷⁴ Three of the remaining four speeches (i.e., Lys. 32–4) have survived as quoted passages in Dionysius of Halicarnassus, and the final speech, *Erōtikos* (i.e., Lys. 35), as the speech of Lysias in Plato's *Phaedrus*. The order of Lysias' speeches in Palatinus Graecus 88 is particularly noteworthy for our purposes. It begins with *On the Murder of Eratosthenes*, which is why this speech is now represented in the modern corpus as Lysias 1. The *Epitaphios* was next. Between Lysias 2 and the rest of the Lysianic corpus, there were five speeches from minor Attic orators: Two from Alcidas (*On the Sophists* and *Odysseus*), two from Antisthenes (*Ajax* and *Odysseus*), and one from Demades (*Pro Duodecennio*). After Lys. 3–31, Gorgias' *Helen* was appended.⁷⁵

It is likely that Lys. 1–2 came from the same rhetorical anthology as the five speeches that followed. Otherwise, it would not have made sense for the scribe of Palatinus Graecus 88 to place the speeches of Alcidas, Antisthenes, and Demades between Lys. 1–2 and Lys. 3–31.⁷⁶ Dover suggests that the anthologist may have confused *On the Murder of Eratosthenes* with *Against Eratosthenes*—the famous speech that Lysias delivered on his own behalf to avenge the death of his brother—because there is nothing particularly remarkable about Lysias 1.⁷⁷ This is an unfair statement. Recent studies have shown that

⁶⁹ [Plut.] *Vit. Or.* = *Moralia* 836a; cf. Phot. 262 p.489b. See Roisman and Worthington (2015), 131–2.

⁷⁰ Dover (1968), 24–5.

⁷¹ Todd (2007), 18 with n. 68.

⁷² Dover (1968), 13.

⁷³ See Todd (2007), 626–7 for questions raised about Harpocration's judgment.

⁷⁴ Dover (1968), 1–3; Sosower (1987); Carey (2007), ix–xx; Todd (2007), 17–25.

⁷⁵ Sosower (1981), 24; Carey (2007), xi.

⁷⁶ Sosower (1987), 81; cf. MacDowell (1961), 120.

⁷⁷ Dover (1968), 2.

On the Murder of Eratosthenes is quite striking.⁷⁸ It was also held in high regard in antiquity, as the references discussed in Section I amply demonstrate. The five speeches from the minor Attic orators are rhetorical exercises and display speeches. As a metic, Lysias would not have been granted the privilege of delivering a funeral oration in honor of Athenian war dead, and it is unlikely that the Athenian chosen to deliver a funeral oration would have paid a logographer to write the speech. Therefore, it is likely that Lysias wrote the *Epitaphios*, and may have privately read the speech, to display his rhetorical skill.⁷⁹ So, six of the seven speeches from the rhetorical anthology were rhetorical exercises and display speeches. Perhaps, *On the Murder of Eratosthenes* made its way into the anthology because it was also a display speech. However, it is also possible that the anthologist did not know the original purpose of the speech but chose to include it because the sensational nature of the narrative and its many rhetorical flourishes made the speech appropriate for the collection.⁸⁰

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⁷⁸ E.g., Fredal (2017); O'Connell (2017), 239–40; Webb (2020); Wohl (2020).

⁷⁹ Todd (2007), 163.

⁸⁰ As Russell observes, 'the fourth century may have produced much more that could almost be called declamation than we can safely assert. It is always possible that the corpus of Attic orators, as we have it, contains speeches so remote from actual occasions that they ought to be treated as exercises' (1983), 17.

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