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ABORTION* IN ANCIENT GREECE

Foreword

The topic of abortion in ancient Greece, and particularly in Athens, has been studied at length especially in its medical and social dimensions,¹ but has received less consideration in the more specific legal field. One of the most important contributions in this latter perspective is the paper presented at the 1999 Symposium by Stephen Todd,² whose interest was concentrated especially on the difficult and controversial interpretation of the fragments of a lost Lysian speech concerning abortion.³ The purpose of my paper is to reconsider this issue, obviously taking into account Lysias' fragments that in fact may represent our main legal source on the topic, and focusing my attention on the possible ways abortion could be handled under a legal perspective. My paper will be structured on three themes: first I will deal with the issue of the general perception of abortion in the Greek *poleis*, and especially in Athens (§ 1); then, I will attempt an overall interpretation of the fragments of the aforementioned Lysian speech (§ 2); finally, I will take the fragments as a starting point for some reflections about the possible “public” relevance of abortion (§ 3).

* The most common Greek term—but not the sole one (see e.g., *infra*, n. 8)—for abortion is (*ex*)*amblōsis*; it appears, for instance, in the title given to a Lysian speech whose few extant fragments represent one of our main sources concerning the political and legal relevance of the issue. It is important to stress that, as the analysis of these fragments (see *infra*, § 2) shows, the notion covered by the word (*ex*)*amblōsis* comprises not only our “abortion” in a proper sense, but also, more loosely, some cases that we would describe as “miscarriage” (e.g., the expulsion of the foetus as a result of a blow to the woman’s stomach).

¹ See e.g., Fontanille (1977); Carrick (1985); Murray (1991); Angeletti (1992); Hanson (1992); Riddle (1992); Riddle (1997); Laale (1992–1993); Demand (1994), 57–63; Kapparis (2002).

² Todd (2003).

³ The latest editions of the fragments are those of Floristán Imízcoz (2000) and Carey (2007), which are more complete than the previous ones of Thalheim (1913) and Gernet (1926). As for the title, the speech is referred to either as *περὶ [τῆς] ἀμβλώσεως* (Theon Rh. *Prog.* 69 Sp.; Hermog. *Prolegomena in librum περὶ στάσεων* 200 R.; Harpocr. *ss.vv.* ἀμφιδρόμια, ὑπόλογον) or as *περὶ τοῦ ἀμβλωθριδίου* (Sopat. Rh. *Ἐκ διαφόρων τινὰ χρήσιμα* 300 R.) or as *κατὰ Ἀντιγένους ἀμβλώσεως* (*Lex. Cant. s.v.* ἐπιτίμιον).

1. The Perception of Abortion in the Greek *Poleis* and in Athens: an Overview

Today, even if it is of course a private matter, the most echoed feature of abortion is the political one, with its legal, medical, and ethical implications. In this respect, it is impossible not to think about the central role the issue played in the last USA presidential campaign between Mitt Romney and Barack Obama, with the former supporting the “pro-life” movement and the latter promoting the “pro-choice” one.⁴ In fact it is well known that nowadays laws allowing a voluntary interruption of pregnancy are founded upon the idea that it is necessary to protect the physical and mental health of the mother, and that it is the mother who has the right to decide what to do with her pregnancy. By contrast, any opposition to abortion has its rationale in the ethical, if not religious, conviction that the foetus has “right to life,” and that consequently the mother who decides to abort in fact kills a human being. It is of course impossible to find any evaluation of this kind in ancient Greece—as well as in Rome, at least until the Christian era.⁵ Regarding the first point—the choice given to the mother—we are repeatedly told by a good number of sources that the mother was only a vessel for her child, and that fatherhood played a much more important role than motherhood.⁶ Then, as far as the second stance is concerned—the right to life of the foetus—we should note that, even though—as we will see—the concept that the foetus was a living being had already begun spreading towards the end of the fifth century BC, the actual notion of a “right to life” is unknown, and we never read in the sources words of sympathy or pity for an aborted foetus.⁷ So what kind of idea is it possible to draw from our sources about the general perception of abortion in ancient Greece?

From a religious perspective, abortion caused *miasma*, and a lot of sacred laws in different *poleis* and at different times banned women who had had an abortion from entering a temple or a sacred place.⁸ At least two things are noteworthy in

⁴ <http://2012.candidate-comparison.org/?compare=Romney&vs=Obama&on=Abortion>.

⁵ Cf. *e plurimis* Kapparis (2002), 173–174; *contra* Dölger (1933), with the critique by Crahay (1941), 9–10.

⁶ Aesch. *Eum.* 658–661; cf. also Eur. *Or.* 552–554; Arist. *Gen. anim.* 728a; 729a–b. For further analysis of these sources under the particular perspective of the topic here discussed cf. Pepe (2012), 268–269.

⁷ Kapparis (2002), 138–139. For some scholars, a kind of respect for the life of the foetus can be read in Ael. *VH* 5.18, according to which a pregnant woman found guilty by the Areopagus of *pharmakeia* was executed only after she gave birth to her baby, since the newborn was considered “not responsible,” *anaition* (a general principle, unrelated to a specific case, is stated in D.S. 1.77.9); but the passage is “suspiciously late and suspiciously vague” to imply “a perception of rights for the unborn child” (Todd [2003], 237 n. 13, who concludes that “this may be the view of Aelian rather than of the Areiopagos”); see also Crahay (1941), 18.

⁸ For example, the sacred law of 331–326 BC from Cyrene (*SEG* 9,72, esp. 24–27) states that the woman who aborts a formed baby is polluted as with someone’s death, while if the foetus is not yet formed she is polluted as with childbirth (noteworthy here is the fact that at a certain stage of the pregnancy the foetus is considered a human being: cf. *infra*,

these documents: first, no distinction is drawn between miscarriage and induced abortion, so that we may infer that they had exactly the same weight;⁹ second, abortion requires essentially the same kind of purification prescribed for other non-criminal sources of pollution, such as loss of virginity, sexual intercourse, menstruation, childbirth and natural deaths; nowhere is it treated like a private or a public offense. In fact, the greatest Athenian philosophers, Plato and Aristotle, recommended it in the description of their ideal states at least in certain circumstances and under certain conditions, as a means of birth control.¹⁰ The former affirmed that women who conceived in an inappropriate period of their lives had to get rid of the foetus,¹¹ while the latter, fixing a limit to the procreation of children, declared that abortion should be preferred to exposure, provided that it was performed before the foetus reached “life and sensation.”¹² Of course, the rules these philosophers indicate are to be taken only as a display of their personal positions,

esp. § 3). An inscription from Delos (*LSS* 54), which can be ascribed to the second or first century BC, prescribes a purification of forty days after an abortion, and Nardi (1963), 64, comparing these forty days with the seven days required in the same text for a purification after a childbirth, suspects that the term *diaphthora* used in this source to indicate abortion (l. 6) has to be referred only to an induced abortion; *contra* Parker (1983), 355 has shown that—in *LSS* 91 for example—*phthora* (l. 11) is also used in the same way for dogs and donkeys, so that it is impossible to think that its only meaning is “procured abortion.” For further discussion see especially Nardi (1971), 132–134, 191–192, 213–214, 394–395; Parker (1983), 352–356; Adam (1984), 151–153; Kapparis (2002), 170–173.

⁹ The only possible exception concerns a well-known inscription from Philadelphia (*LSA* 20) of the second or first century BC, where (ll. 19–21) there is explicit reference to abortive drugs, contraceptives, and anything else which could cause the killing of a child; cf. Parker (1983), 355–356; Kapparis (2002), 214–218.

¹⁰ On the Platonic and Aristotelian passages discussed hereafter see the rich bibliography cited in Kapparis (2002), 243 n. 44; see moreover Loddo (2013), 107–121.

¹¹ Plat. *Resp.* 460e–461c: after stating that a woman should bear children between her twentieth and fortieth year, while a man should do so between the ages of thirty and fifty-five years—i.e., during “the maturity of their body and mind” (ἀμφοτέρων [...] ἀκμὴ σώματος τε καὶ φρονήσεως; slightly different ages are indicated in Plat. *Leg.* 785b, 833c–d)—the philosopher adds that it is better not to “bring to light” (μὴ εἰς φῶς ἐκφέρειν; on the meaning of this unclear expression see Nardi [1971], 117–122) a foetus conceived beyond the proper age and to dispose of it on the understanding that such an offspring cannot be reared (οὕτω τιθέναι ὡς οὐκ οὔσης τροφῆς τῷ τοιούτῳ). It is worth remembering that Plato’s utopian state had to be composed of a constant number of 5,040 families, and that this number needed to be controlled with the various means indicated in *Leg.* 740 d–e.

¹² Arist. *Pol.* 1335b25–6. After that time—for the reasons we will examine further (*infra*, § 3)—it was considered a crime (μὴ ὄσιον). Probably, in Aristotle’s thought, the foetus acquired “life and sensation” (αἰσθησιν [...] καὶ ζώην) from the moment in which its body began to move and was clearly differentiated in its various parts; this moment—cf. Arist. *Hist. anim.* 583b14–23—was identified with the fortieth day for the male foetus, and with the ninetieth for the female one.

since we do not have any evidence of the existence of a concrete social strategy of this kind in the Athenian *polis*.¹³ In fact, if we now turn to the medical perspective, we find an apparently opposite trend in the oath Hippocrates' followers had to swear, when they promised they would not give abortifacients to women.¹⁴

So what about the legal field? Can this passage of the Hippocratic oath be taken as proof of the presence of a statutory rule prohibiting abortion, which doctors had to respect? Was there in Athens a legal ban on abortion, at least concerning free women who belonged to an *oikos*? Together with the greatest part of the recent scholarship, I seriously doubt it. In fact, the only evidence stating expressly that abortion was forbidden is late and extremely vague. I am referring particularly to a passage of a work included in the *corpus* of Galen, known as “Whether what is in the womb is a living being” (*Ei ζῶον τὸ κατὰ γαστήρα*, in its Latin title *An animal sit quod est in utero*).¹⁵ In order to demonstrate that yes, the foetus is a living being, the unknown author remembers that two of the greatest ancient lawmakers, Lycurgus and Solon, pupils of—hence inspired by—Apollo and Athena, established a punishment for abortion in their laws. They would not have done this if they believed that what is in the womb is not alive.¹⁶ Now, since no other ancient author confirms this point,¹⁷ it is better to take it with a grain of salt.¹⁸

¹³ For the different situation in the Roman world—where abortion was at some point considered as a threat to the state policy of population growth—cf. Kapparis (2002), 148–151.

¹⁴ [Hipp.] *Jusj.* 15–16: οὐδὲ γυναῖκι πεσσὸν φθόριον δώσω. The bibliography concerning this passage—which seems to be in contradiction with other passages of the *Corpus Hippocraticum* that deal with abortive remedies (e.g., [Hipp.] *Mul. aff.* 1.72) or where a doctor is said to cause an abortion ([Hipp.] *Nat. puer.* 13)—is in fact endless, and here I will just offer a little sample of its various interpretations. Jones (1924), 39 takes the Hippocratic prohibition in the sense that the doctor himself was not allowed to apply the pessary. Edelstein (1967), 3–4, pointing to the fact that the medical practice was different from the oath's prescriptions, thinks that the oath was composed by an esoteric group influenced by Pythagorean ideas. According to Mottura (1986) the passage was interpolated after the influence of Christianity. Nardi (1971), 59–66 states that the Hippocratic medicine prohibited only the administration of a *pessos* (vaginal suppository) that was recognized as *phthorios*, hence potentially harmful to the mother's life; for this reason the doctor was allowed to use on pregnant women other remedies, provided that they were not *phthoria*. Similar remarks are developed by Angeletti (1992), 159–161, who insists on the opposition in the Hippocratic *corpus* between *pharmaka phthoria* and *ekbolia*, and underscores that the latter were not forbidden because they served to expel a dead foetus (cf. Soran. *Gyn.* 1.60).

¹⁵ For this pseudo-Galenic work, influenced by Platonic ideas that Galen rejected, cf. Kapparis (2002), 201–204.

¹⁶ [Gal.] *An animal sit quod est in utero*, 19.179 Kühn.

¹⁷ Some of those convinced of the existence of such laws (e.g., Thonissen [1875], 257–258; Lallemand [1885], 34; Calleimer [1877], 225; Laale [1992–1993], 159) indicate as further confirmation of their authenticity a passage of Musonius Rufus (a Roman philosopher of the first century AD) mentioned by Stobaeus (*Anth.* 4.24a.15; the work of

But there is also another reason that the story has to be considered unreliable. It is barely conceivable that both in Sparta and in Athens the exposure of a newborn baby, if not the killing of an infant, was at least socially tolerated, while an interruption of pregnancy was prohibited.¹⁹ Without any doubt, just as it was only the father who had the power to decide whether to rear a newborn child inside the *oikos*, we have to presume—since we do not have any direct evidence on this point—that it was only the father who could decide whether his wife should abort (and in this sense we probably have to take the aforementioned passage of the Hippocratic Oath).²⁰ Certainly women were acquainted with a lot of methods (herbal potions, physical exercises and manoeuvres, midwives' remedies and help)²¹ in order to free themselves of an undesired pregnancy; but of course they had to take this course of action—moreover, at extreme risk to their own lives²²—without their husbands knowing. A married woman could not openly deliberate whether to have an abortion without her husband's consent, but I do not think there was any need of a specific law: basically it was a private matter. Exactly as happened when a woman ventured to expose her newborn child,²³ the husband could immediately repudiate the wife who had aborted if he suspected, or succeeded in finding out, that she had

Musonius *Ei πάντα τὰ γινόμενα θρεπτέον*, which includes this passage, can also be read on a papyrus: see Powell [1937]). In the passage the philosopher wants to show that all the ancient legislators considered it detrimental for their cities to have a small number of children, whereas they thought it advantageous to have a lot of them; for this reason they forbade women to abort, and imposed penalties on those who broke the law. But, as demonstrated by many scholars (cf. e.g., Nardi [1971], 12–16; Kapparis [2002], 149–150), there is little doubt that the “laws” Musonius has in mind are not the Greek, but rather the Augustan ones on abortion.

¹⁸ In order to prove that the passage is unreliable, it has been inferred that probably the information had been generated by an anecdote in Plut. *Lyc.* 3, where it is said that the Spartan legislator prevented a woman from having an abortion (but it is not said that hence he decided to make a general law banning abortion!); and, since the name of the Spartan lawmaker is usually connected with that of his Athenian *alter ego*, the pseudo-Galen (or his source) instinctively mentioned Solon also: see Crahay (1941), 12; Nardi (1971), 37–41. Some scholars (e.g., Kapparis [2002], 179) have however argued against this view, since probably the pseudo-Galenic treatise was written before Plutarch's works.

¹⁹ Cf. Glotz (1904), 350.

²⁰ In this sense Glotz (1904), 352; Harrison (1968), 73 n. 1; Demand (1994), 61.

²¹ Cf. e.g., Theophr. *Hist. plant.* 9.9.2; 9,11.4; for midwives' expertise cf. Plat. *Theaet.* 149 c–d. A practical example of a physical exercise that caused an abortion to a prostitute is provided in [Hipp.] *Nat. puer.* 13, although modern doctors state that the method described (a series of jumps on the heels) would never cause the expulsion of a well-implanted foetus (cf. e.g., Hellinger [1952], 116–117 n. 5).

²² Cf. e.g., Hipp. *Mul. aff.* 1.72.17–21.

²³ See e.g., what happens to Pamphila in Menander's *Epitrepontes*.

intentionally done something in order to free herself of the foetus.²⁴ In fact, he would assume that the most probable reason for the abortion, not to say the only one, was the consequence of her having committed *moicheia*.²⁵ Similar intra-familiar measures were of course valid also for unmarried women, and were effected, once again inside the *oikos*, by their *kyrioi*.²⁶

2. The Fragments of the Lysian Speech: an Attempt at Interpretation

Despite the doubts concerning the existence of a law banning abortion, some scholars believe that the Athenians could rely on a public action for abortion called the *graphē amblōseōs*, and maintained that a fragment of the lost Lysian speech on the topic might actually provide clear evidence for it.²⁷ But, once again, I seriously doubt it, for at least three reasons. First, if we admit that there was no statutory law forbidding abortion, I find it difficult to imagine that there could be an action, since it is reasonable to suppose that a lawsuit was admissible only when it was founded upon an existing statute;²⁸ next, we have no other confirmation that this specific *graphē* really existed; last but not least, I do not think that the content of the passage in question supports the hypothesis of the existence of such a *graphē amblōseōs*. However, it is better to have a closer look at the fragment and at its traditional interpretation.

[fr. 1: *Lex. Cant. s.v. ἐπιτίμιον* (19 Carey)] ἐπιτίμιόν τι ἦν κατὰ τῶν σιωπησάντων [Sauppe: ὀλιγορησάντων] τὴν γραφήν. Λυσίας ἐν τῷ κατὰ Ἀντιγένους ἀμβλώσεως· σκέψασθε δὲ καὶ ὡς Ἀντιγένης πεποίηκεν οὕτως· γραψάμενος τὴν μητέρα ἡμῶν ἀξιοῖ λαβεῖν τὴν ἀδελφὴν, καὶ ἀγωνίσασθαι μὲν ἵνα μὴ ἀποτίσῃ τὰς χιλίας δραχμὰς, ἃς δεῖ ἀποτίνειν ἐάν τις μὴ ἐπεξέλθῃ γραψάμενος.

²⁴ It was not easy, however, to establish whether a woman had suffered a miscarriage or had rather deliberately procured an abortion, since even doctors could have doubts on this point: see e.g., Hipp. *Epid.* 5.53 with the comment of Demand (1994), 57–58.

²⁵ Furthermore, at least in Athens, in earlier times the punishment of a woman caught in *moicheia* was decided exclusively by the family (see e.g., the story of Leimone punished in the house by her father Hippomenes: cf. Aesch. 1.182; Her. Lemb. *Epit.* 1; D.S. 8.22). It is likely that the issue of women's fidelity became a priority for the *polis* as well—which did not want any bastard within the citizen body—only in 451/0 BC, when the well-known Periclean law on citizenship ordered that only the offspring of two citizens (who moreover must be lawfully married) could be citizens; on this point see especially Kapparis (1995), and, more generally, Cohen (1991).

²⁶ Kapparis (2002), 103–107.

²⁷ Caillemer (1877), 225; Gernet (1926), 238–239; Harrison (1968), 72–73, who, however, never uses explicitly the expression *graphē amblōseōs* to indicate the action.

²⁸ On this point, and against the conviction expressed by some scholars that the Athenians lacked the principle *nullum crimen sine lege*, see especially the recent contributions by Harris (2013) and Pellosso (forth.).

The passage, preserved in the *Lexicon Cantabrigiense*,²⁹ is part of a gloss concerning the *epitimion*, i.e., the sum of money that had to be paid by whoever abandoned a public prosecution or did not obtain at least one-fifth of the jurors' votes at the end of the trial.³⁰ The text is commonly translated as follows:

Epitimion was a penalty against those who neglected a graphē. Thus Lysias in his speech Against Antigenes on Abortion: "See [men of the jury] how Antigenes here has behaved. After initiating a public prosecution against my mother, he now thinks it right to take my sister [as a wife],³¹ and to carry on with the prosecution in order that he may not have to pay the 1,000 drachmas that anybody, for initiating a graphē without following it through, has to pay."

Interpreting the passage to mean that Antigenes prosecuted Lysias' client, a woman represented in court by her son, with a *graphē amblōseōs*, Gernet, with an amendment that has been generally accepted,³² corrected the title of the speech from *kata Antigenous* to *pros Antigenē*, since *kata* is used to designate a prosecution speech, while *pros* is the preposition that regularly refers to defence speeches against the prosecutor, in this case Antigenes.³³ The French scholar says very little about the possible procedural and/or substantive terms of the *graphē amblōseōs*; he only states that it had to be "d'application restreinte" and that it should be compared with other *graphai* with which similarly private offences—for example, *moicheia* or *kakōsis*—were prosecuted.³⁴ More detailed is the explanation of its possible practical utility

²⁹ The reference edition for this work, formed by a complex of glosses to Harpocration in a Cambridge manuscript (but four glosses can also be read on a papyrus published by Miller [1868], 385), is that of Houtsma (1870), reprinted in Latte and Erbse (1965), 61–139. On the basis of various clues it is possible to state that the sources used in the work are usually good, and as a rule they are quoted accurately (this happens also in our fragment, which in fact ends with the citation of a Demosthenic passage—[Dem.] 58.6, 20, 34—that similarly mentions the 1,000-drachma fine for a prosecutor's abandoning a *graphē*): cf. Houtsma (1870), 6–7 (= Latte and Erbse [1965], 66–67).

³⁰ On this fine, and the probably connected *atimia*, cf. Paoli (1974), 319–325; Harrison (1971), 83, 103, 175–176; Hansen (1976), 65; Todd (1993), 143; Harris (1999); Wallace (2006).

³¹ Better than "my mother's sister:" see Todd (2003), 242.

³² Cf. e.g., Lecrivain (1932), 532 n. 6; Harrison (1968), 72; Buis (2003), 53–54. The amendment was already suggested by Lipsius (1912), 609 n. 33, and Thalheim (1913), 332 n. 4.

³³ The complex reconstruction of the possible relationship among the parties involved in the trial, proposed by Gernet (1926), 239 and n. 2, has been recently disputed by Todd (2003), 248. There is no need to examine in detail their theories here; I would just like to underscore that in my opinion it is not necessary to suppose, as both scholars do, that the girl Antigenes asks in marriage is an *epiklēros*; actually, in fact, nothing in the text—beginning with the verb *axioi*, which does not mean "he pretends," but rather "he thinks it right"—suggests it.

³⁴ Gernet (1926), 238–239: "l'avortement punissable est un délit qui lèse un intérêt privé—comme le meurtre. Mais, malgré l'analogie du meurtre, rien ne s'opposerait, a priori, à ce que la poursuite de ce délit pût avoir lieu par voie de *γραφή*, comme *l'ὑβρις*, comme la

given by Harrison. It is true, says Harrison, that abortion was normally considered a private wrong against the father; however, “the fact that a *γραφή* was available might suggest that abortion was regarded as a public wrong also and as such open to prosecution by *ὁ βουλόμενος*. [...] We cannot rule out the possibility that it was only the embryo *qua heir to his father* that was thought of as wronged and that the *γραφή* only lay in cases such as the present seems to be, where the father is dead and where it might be very much in the interest of the embryo’s next of kin to procure an abortion.”³⁵

Now, some serious critics have been moved to reject Harrison’s assumptions. For example, Kapparis has underscored that Harrison’s thesis is untenable because “there is not a single scrap of evidence from the classical period suggesting a perception of the unborn as the victim.”³⁶ And Todd stated that “it may be inappropriate to think of the foetus as having rights vis-à-vis the father.”³⁷ Furthermore, I would like to stress that, if the *graphē* had its justification in the aforementioned alleged Solonian law banning abortion, it had to cover all cases of abortion, and not, as Harrison maintains, only some peculiar situations. This hitch has led Todd to propose an alternative hypothesis; for him, the *graphē* the fragment is referring to is not necessary a *graphē amblōseōs*; in fact he wonders whether the case discussed by Lysias “might represent, for instance, an extended use of the catch-all *graphē hybreōs*,” which, in this circumstance, was used by Antigenes, supposed to be the actual husband (cf. the passage of Sopater quoted *infra* as fr. 5), against his wife who “had procured an abortion without proper consent.”³⁸ But I confess I find it very difficult to agree with Todd since I am firmly convinced that a

μοιχεία, et, plus pertinemment, comme la *κάκωσις* (mauvais traitements à l’égard des parents et orphelins).” But it is worth noting that the reason that *moicheia* was prosecuted with a *graphē* is evident, since, after the Periclean law on citizenship, it was in the interest of the community not to introduce a bastard inside the *polis* (see also *supra*, n. 25). As far as the *graphē kakōseōs* is concerned, the reason that the action could be brought by anybody is that “a person of advanced years [and I add that the same can be said also for young orphans] might have found difficulty in setting a *δίκη* on foot, whereas to secure redress by *γραφή* he had only to obtain the goodwill of some third party who was competent to sue (*ὁ βουλόμενος*)” (Harrison [1968], 77; cf. also 117).

³⁵ Harrison (1968), 72–73 (author’s italics).

³⁶ Kapparis (2002), 187.

³⁷ Todd (2003), 246.

³⁸ Todd (2003), 247–248, 249. In Todd’s reconstruction (see esp. 249), Lysias’ client, a widow, submitted to the remarriage with Antigenes, but set out to make the union a childless one, in order not to harm her previous children; thus, the situation underlying the speech can be understood—on the basis of the interpretation proposed by Foxhall (1996), 144–149—as intermediate between the one described in Dem. 27.31 (where Demosthenes’ mother refused to marry Aphobos because this union would be detrimental to her children) and the one delineated in Lys. 32 (where Diogeiton’s daughter decided to remarry and have children, with the result that the children of her first marriage were disadvantaged by this situation).

situation like this had to be resolved inside the *oikos*, not in a public trial. In fact, we do not have any other evidence that a husband ever publicly prosecuted his wife for this reason.³⁹

The point is that, in my opinion, the fragment of the *Lexicon* does not need to be understood in the way it is generally understood, namely as a demonstration of the existence of a *graphē amblōseōs* or of a *graphē* whatsoever to prosecute abortion. First of all, the aim of the *Lexicon*'s gloss is not to show the general context of the trial, in order to demonstrate how the *graphē* in cases of abortion worked, but rather to give an example of a practical application of the *epitimion*. Second, even if we admit that abortion, at least in the current case, is prosecuted with a *graphē*, we have to explain why the other significant fragments of the speech⁴⁰ unambiguously agree on the fact that in this circumstance abortion was treated like homicide; hence, we should infer that it was the subject not of a *graphē*, but rather of a *dikē phonou*.⁴¹ Finally, we should not underestimate that the hypothesis we are dealing with is based not on the original text of the gloss but instead on Gernet's amendment of the title of the speech from *kata Antigenous* to *pros Antigenē*, and so on the presumption that the defendant is a woman prosecuted for abortion with a *graphē* by Antigenes. If we were to accept as genuine the bequeathed title *kata Antigenous*, the hypothesis would not hold any more.

There are, I think, two possible solutions to these difficulties. The first and most economical one—recently advanced by Kapparis—postulates that, since the content of this fragment is inconsistent with the others, we may suppose that the author of the gloss has made a mistake, and that he quoted a passage from a Lysian speech against Antigenes that, despite the title erroneously given to it (*amblōseōs*), had nothing to do with abortion.⁴² But I believe that there can be a better solution that saves the text as it is handed down. The *Lexicon*'s passage begins with an exhortation by the speaker to consider how scornfully Antigenes *pepoiēken*, i.e., has behaved in the past and continues to behave in the present. Hence, isn't it possible that, when the speaker mentions the *graphē* (*grapsamenos*), he is talking not about

³⁹ In this perspective, it is interesting to note that the radical change in Athenian society between Solon's reform (which "altéra profondément le caractère primitif de la puissance paternelle:" Glotz [1904], 350) and the age of Demosthenes, did not substantially affect family law: on this point see especially Humphreys (1977–1978); Humphreys (1993); Roy (1999), 8.

⁴⁰ They are quoted *infra*, in the text. I do not consider "significant" the four fragments from the lexicographic tradition (*infra*, n. 46), since they just mention the meaning of some particular words employed in the oration, without adding any valuable detail concerning its background.

⁴¹ Glotz (1904), 352 (with bibliography, n. 3); Laale (1992–1993), 162; Kapparis (2002), 187–193.

⁴² Kapparis (2002), 190–191.

the current trial, but instead about another trial, a *graphē*⁴³ previously initiated against the mother of the speaker?⁴⁴ Isn't it possible that the passage derives from a generic section of the speech, the aim of which is simply to underscore what a haughty individual Antigones is? I rather think so, and I am happy to read that Todd also recognized this as "a possible hypothesis."⁴⁵

Hence, if indeed this passage says nothing relevant about the current trial and the possible legal treatment of abortion, it is necessary to look at the other fragments of the speech. It is worth starting with a few general points that concern the nature and the typology of the works that quote the fragments, and the context in which they are quoted. The works mentioning the speech, all very late (from the second century AD on), are of two types. On one side there is the lexicographic tradition⁴⁶ that, with the sole exception of the fragment of the *Lexicon Cantabrigiense*, displays two constant features: first, it casts doubt on the Lysian paternity of the speech, and second, it is not helpful for the reconstruction of the background of the speech, since

⁴³ In this case, *graphēin* has to be referred to the moment at which the formal charge was presented before the magistrate, or to the *anakrīsis*; see *LSJ*, s.v. γραφή III.1 ("bill of indictment"), s.v. γράφω B.3; for the expression ἀποφέρειν τὴν γραφήν πρὸς τὸν ἄρχοντα, "the technical term for handing in the written claim," see Harrison (1971), 88 and n. 9.

⁴⁴ The possibility of a double litigation is denied by Harrison (1968), 73 n. 1. As far as I know, despite what Harrison writes in the same footnote (and cf. also Todd [2003], 241), Glotz (1904) nowhere states that the passage may be understood as referring to a previous trial.

⁴⁵ Todd (2003), 241–242, who raises however some objections against it. First of all, he thinks that in this case the present tense of the main verb *axioi*, "he thinks it right," might sound "slightly awkward." Second, he finds it difficult to reconcile the idea of a previous trial initiated by Antigones with the content of the fragment of Sopater (quoted *infra* in the text as fr. 5), "which refers to Antigones as accusing his own wife in either the current speech or at least the current case, using the verb *katēgoreō*, standardly predicated of the prosecutor;" even if he admits that this argument "is not wholly conclusive, because *katēgoreō* is occasionally used in a loose sense, for instance to complain that a defendant is behaving inappropriately by seeking to usurp the rôle of prosecutor," I think the explanation I will give in the text can clarify the content and the context of the fragment. As for the first objection, reflecting on the value of Greek tenses, I think it conceivable to admit that the present *axioi* here does not necessarily refer to the actual moment in which the words are uttered. The preceding perfect *pepoiēken* attracts the present *axioi*, so that the latter may represent an action that began in the past and continues to produce its effects in the present, if not and potentially in the future in terms of intention. For example, we can imagine that the *anakrīsis* had already been concluded and that Antigones decided and still has the intention (*axioi*) to carry on (*agōnisasthai*) with the prosecution in the near future (just as he decided in the past and now still has the intention to ask for the hand of the speaker's sister; but it is clear that actually he is not asking for it at that moment).

⁴⁶ This tradition is represented by Poll. 2.7 (27 Floristán Imízcoz); Harpocr. s.v. ἀμφιδρόμια (22 Carey); s.v. θεμιστεύειν (23 Carey); s.v. ὑπόλογον (24 Carey).

it references just single words of it without any indication of the overall context.⁴⁷ On the other side, the second tradition is represented by, mostly late, rhetorical works. One of the fragments comes from the *Progymnasmata* of Theon.⁴⁸

[fr. 2: Theon Rh. *Progymn.* 2,69 Spengel (20b Carey)] ἤδη δὲ τινα καὶ παρὰ ῥήτορσιν εἴρηται θετικὰ κεφάλαια, καὶ δὴ καὶ ὅλοι λόγοι νομίζονται ἂν σχεδὸν εἶναι θέσεως, ὡς ὁ τε περὶ τῶν ἀνακαλυπτηρίων ἐπιγραφόμενος Λυσίου καὶ ὁ περὶ τῆς ἀμβλώσεως [...] ἐν θατέρῳ δὲ εἰ τὸ ἔτι ἐγκυούμενον ἄνθρωπός ἐστι, καὶ εἰ ἀνεύθυνα τὰ τῶν ἀμβλώσεων ταῖς γυναίξι, Λυσίου μὲν οὐ φασιν εἶναι τούτους τοὺς λόγους, ὅμως δὲ οὐκ ἀχάριστον τοῖς νέοις γυμνασίας ἕνεκα καὶ τούτοις ἐντυγχάνειν.⁴⁹

The other fragments are quoted from commentators and commentaries that have to do with Hermogenes, author of the well-known *stasis/status* theory.⁵⁰

[fr. 3: *Proleg. in Hermog. Stat.* 200,16 Rabe (20a Carey)] τῶν γὰρ προβλημάτων τὰ μὲν ἐστὶ πολιτικά, τὰ δὲ φιλόσοφα, τὰ δὲ ἰατρικά, τὰ δὲ μέσα τούτων, ἃ πολιτικὴν μὲν ἔχει τὴν ζήτησιν, ὕλην δὲ ἢ ἰατρικὴν ἢ φιλόσοφον. καὶ περὶ μὲν πολιτικῶν εὐδελόν ἐστι, τίνα φύσιν ἐπιδέχεται, τὰ δὲ ἰατρικά τοιαῦτά ἐστι, οἷον διὰ τί τὸ βρέφος ἐξ μηνῶν οὐ ζῆ, ἐβδόμῳ δὲ γεννώμενον ἢ ἐνάτῳ ζῆ. φιλόσοφα δὲ, εἰ ἢ ψυχὴ ἀθάνατος. τὰ δὲ μικτά, οἷον ἐγκύμονά τις ἔτυψε κατὰ γαστρός καὶ κρίνεται φόνου, [...] ἐναυῖθα μέντοι δεῖ τὸν μελετῶντα τοῖς ἐπισταμένοις ἀνατιθένα τὰς αἰτίας, ὡς καὶ ὁ Λυσίας ἐν τῷ Περὶ ἀμβλώσεως κρίνων φόνου

⁴⁷ The only exception may be represented by the word *amphidromia* handed down by Harpocration (22 Carey), since from that term we could perhaps suppose a polemical allusion in the speech to the fact that abortion had deprived the father of his power to accept the baby inside the *oikos* (cf. also fr. 5, *infra* in the text). *Amphidromia* were “a religious celebration rather than a legal requirement, but legally it was important to the child that his paternity should be acknowledged, for on it depended both his membership of the *oikos* and his citizen status” (MacDowell [1978], 91). Main sources on *amphidromia* are Aristoph. *Av.* 494, 922 (with the relevant *scholia*); *Schol.* Aristoph. *Lys.* 757; Isae. 3.30; Dem. 39.22; Plat. *Theaet.* 160c–161e; Hesych., *Etym. magn.*, *Lex. Seg.* s.v. ἀμφιδρόμια.

⁴⁸ Aelius Theon is a rhetorician and sophist attributed to the first or second century AD; on his work see esp. Lana (1959).

⁴⁹ “Some heads of argument which are connected with a thesis [on the peculiar meaning of the word see *infra*, in the text and n. 62] are already used even in the orators. Indeed, whole speeches could be regarded as close to a thesis, like the speech *Concerning the Wedding-Gifts* attributed to Lysias, and the speech *Concerning the Abortion*. [...] In the other speech the question is whether what is still in the womb is a human being, and whether women are exempt from liability in matters connected with abortions. People say that these speeches are not by Lysias, but nevertheless it is no bad thing for young men to encounter them as well for the sake of practice.” The translation of this and the following fragments is that of Todd (2003), 252–255.

⁵⁰ On Hermogenes see especially Heath (1995); more generally, on the *status* doctrine, cf. Calboli Montefusco (1986).

τὸν αἴτιον βιάζεται ζῶον τὸ βρέφος ἀποδεικνύει καὶ πανταχοῦ φησιν· ὥσπερ οἱ ἰατροὶ καὶ αἱ μαῖαι ἀπεφάναντο.⁵¹

[fr. 4: Sopat. Rh. *Scholia ad Hermog. Stat.* 5,3 Walz (20c Carey)] εἰσὶ γὰρ καὶ ἰατρικὰ καὶ φιλόσοφα ζητήματα· καὶ ἰατρικοῦ μὲν ζητήματος παράδειγμα, ὃ καὶ μεμέληται τῷ Λυσίᾳ· εἰ ὁ ποιήσας ἐξαμβλώσει γυναῖκα φόνον ἐποίησεν· δεῖ γὰρ γνῶναι πρῶτον, εἰ ἕζη, πρὶν ἐτέχθῃ. ὅπερ φυσικῶν καὶ ἰατρικῶν ἐστι.⁵²

[fr. 5: Sopat. Rh. (?) *Ἐκ διαφορῶν τινά χρήσιμα* 300,10 Rabe *Proleg. Syll.* (=RhM 64 [1909] 576) (20d Carey)]: ὅτι Λυσία μεμελέτηται ἰατρικὸν πρόβλημα παράδοξον ῥητορικῶς μεθοδευθὲν περὶ τοῦ ἀμβλωθριδίου, ἐν ᾧ Ἀντιγένης κατηγορεῖ τῆς ἑαυτοῦ γυναικὸς φόνου ἀμβλωσάσης ἐκουσίως, φάσκων ὡς ἐξήμβλωκε καὶ κεκόλυκεν αὐτὸν πατέρα κληθῆναι παιδός.⁵³

This second tradition also displays a constant feature, since all the sources agree that Lysias' speech was written for a case of abortion prosecuted as homicide. This does not mean, however, that they depict a coherent scenario for the trial; on the contrary, since each passage gives very different details, taken together they are "desperately confusing."⁵⁴ The most important information they give can be summarized as follows:

fragment	identity of the defendant	possible context
2	? woman ? (ταῖς γυναιξί)	not indicated
3	man	? a man hit a pregnant woman in the womb

⁵¹ "Of problems, some are political, some philosophical, some medical, and others are combination of these—i.e. the ones where the question at issue is political, but the materials used to answer it are drawn from medicine or philosophy. In the case of political problems, it is clear what nature they take, whereas medical questions are of the following type: for instance why a foetus at six months is not alive, whereas in the seventh or ninth month of conception it is alive. A philosophical question is e.g. whether the soul is immortal. Mixed questions are ones like whether a person who strikes a pregnant woman in the stomach can also be accused of homicide. [...] Here however it is necessary for the orator examining the topic to entrust the task of explanations to those who are experts, as Lysias also does in the speech *On the Abortion*: adjudging as guilty of homicide the person responsible, he needs to present the foetus as a living thing, and on every point he says 'as the doctors and the midwives made clear'."

⁵² "There are also medical and philosophical questions. An example of a medical question is one which is examined in Lysias: whether a person who caused a woman to have an abortion caused homicide—for it is necessary to determine first whether the foetus was alive before birth, and this question is a matter both of natural science and of medicine."

⁵³ "That a medical problem is treated rhetorically and expounded as a paradox by Lysias *On the Aborted Foetus* (in which Antigenes accuses his own wife of homicide, claiming that she deliberately caused an abortion), stating that she had had an abortion and prevented him being called the father of a child."

⁵⁴ Kapparis (2002), 185.

	(τὸν αἴτιον)	causing her an abortion ? (ἐγκύμονά τις ἔτυψε κατὰ γαστρὸς καὶ κρίνεται φόνου)
4	man (ὁ ποιήσας)	a man caused a woman to have an abortion (ὁ ποιήσας ἐξαμβλώσαι γυναῖκα)
5	woman, wife of Antigenes, prosecuted by Antigenes	the woman had deliberately caused an abortion without proper consent (ἀμβλωσάσης ἐκουσίως)

As is evident from the synopsis, it is very difficult to reconcile the material given by these references, inasmuch as they disagree about the possible context of the trial and about the identity, and particularly the gender identity, of the prosecutor and of the defendant. That is why usually, in formulating their theories about the speech, scholars either completely ignore some of the sources—obviously, those inconsistent with the idea they develop—or point out which ones are for them the most reliable and which ones are instead to be discarded.⁵⁵ But I think there could be another possible solution.

I would like to mention, first of all, that while now all scholars agree that the Lysian speech was actually delivered in a court,⁵⁶ in the past some doubts were cast on its nature, since it seemed possible that it should be considered just a rhetorical exercise.⁵⁷ Now, while I acknowledge that some of the details in the fragments make it difficult to deny authenticity to the speech, I also think that some other arguments are developed from a merely rhetorical perspective.

For example, fr. 3 and 4, respectively *prolegomena* and *scholia* to Hermogenes' *Staseis* ("Issues"), discuss the types of issues (*zētēmata*, *problēmata*), distinguishing among political,⁵⁸ philosophical and medical ones. Both agree that Lysias' speech is a clear example of a medical question (or at least of a mixed one, containing a combination of political issues and medical material). In particular, the anonymous

⁵⁵ For example, Glotz (1904), 353 and Harrison (1968), 72–73 build their theories respectively on fr. 3 (*Prolegomena in Hermogenis Status*) and 1 (*Lexicon Cantabrigiense*). Todd (2003), 250, who considers the fragment of the *Lexicon* as the most important one, explains the indications in the other fragments as references to previous cases, and states that "presumably he [*scil.* Lysias] would have presented that discussion by way of contrast, to argue that whatever was alleged against his client's mother had happened before the sixth month of pregnancy" (that is, before the moment the foetus was generally considered alive, and therefore she was not guilty of anything). Kapparis (2002), 188–193 relies on fragments 2 and 4 to demonstrate that an accusation for homicide was brought by Antigenes against his wife "because she had an induced abortion evidently without his consent."

⁵⁶ Thalheim (1913), 333; Gernet (1926), 238 n. 2; Nardi (1971), 86 n. 135; Kapparis (2002), 247 n. 43; Todd (2003), 239.

⁵⁷ Cf. e.g., Baier and Sauppe (1839), 175.

⁵⁸ The meaning of the term "political" here, probably to describe a "legal" question, has been briefly discussed by Todd (2003), 238 n. 18.

author of fr. 3 appreciates the fact that Lysias, accusing of homicide the man responsible for having caused an abortion (i.e., miscarriage) to a woman,⁵⁹ repeatedly refers to the depositions of doctors and midwives, who during the trial demonstrated that a foetus is a living being. In similar terms, Sopater (fr. 4) says that Lysias' speech examined⁶⁰ the issue of whether the foetus is alive before being born.

Now, I think that the way the content of the speech is presented in these two passages, and in particular the insistence on the opportunity of demonstrating that the foetus should be considered a living or a human being, reproduces an example of a rhetorical classification based on *status* theory; the theory, namely, that dealt with the categorization of the "types of issues" treated in a speech. So we know that, for example, the question could concern the reconstruction of the facts ("what really happened?"; this is the *stasis stochasmos, coniectura* in Latin); or, if there was no doubt about what happened, the question could concern the description of the facts themselves ("is it possible to include the facts in a given definition?"; this is the *stasis horos, definitio* in Latin).⁶¹ Now, I think this latter *stasis* is the key to understanding the sense of our passages; the "issue" in Lysias' speech can be identified according to the *stasis horos*, or *definitio*, since what happened is known ("a woman was hit and had a miscarriage"), but it is not clear how what happened has to be categorized ("can this fact be classified as homicide?").

A similar conclusion can be drawn from fr. 2, even though in this case the perspective is different. Also in this passage Theon reports that Lysias examined whether the foetus is a human being (*anthrōpos*) and whether women are or are not responsible in matters connected with abortions. Here, however, Theon is talking about *theseis*, advanced preliminary exercises in which "the student is required to argue for or against some general proposition,"⁶² and he is saying that there are some speeches—like Lysias' *On Abortion*—that can be considered as close to a *thesis*. Hence again, rather than analysing the content of the speech, it is probable that Theon is just examining the case, showing the general situation Lysias had to deal with, and proposing it for his pupils as a training issue (*gymnasias heneka*). At this point it is not difficult to read in the same perspective fr. 5, where it is clearly stated that the problem Lysias was concerned with is a "paradox," and that he developed it in a rhetorical way.

I would like to make it clear that my remarks are not at all intended to deny that Lysias ever wrote a speech for a case involving abortion; actually I do not think we

⁵⁹ If we connect the quotation of the speech with what the author has stated previously, we can infer that the woman lost her baby after being hit in the womb by the defendant; this situation is a *topos*: see *infra*, § 3. On the Greek vocabulary of abortion/miscarriage, see the footnote to the title of this paper.

⁶⁰ In the Greek text we read *memēletai*, a verb that, as Todd ([2003], 239 n. 21) recognizes, was also employed technically with the meaning of "to declaim."

⁶¹ Calboli Montefusco (1986), 35; Heath (1995), 20–21, 101–107.

⁶² Heath (1995), 16, 260; hence I think Todd (2003), 253 n. 53 is incorrect in thinking that the thesis is the "head in which a general proposition is developed in support of a case."

have reason to doubt it. My point is simply that it is not worth trying to reconstruct the procedural situation underlying Lysias' speech from these fragments, since their authors were not interested in it, nor in the details of the original trial; the rhetoricians' attention was caught by the singularity of the issue and by the mix of political and medical arguments in it, so that, from a certain moment on, the speech became a model for rhetorical exercises, a starting point of "variations on the theme" that may probably account for the different and "desperately confusing" information they give.⁶³

3. Some Remarks on the Legal and Political Impact of Abortion in Fourth-Century Athens

Despite the impossibility of reconstructing a real situation through the fragments, the context in which they are preserved permits us to formulate some conclusions and to identify some plausible backgrounds. As for the conclusions, even in the absence of trustworthy evidence that a specific legal regulation on abortion existed, or that it was a kind of offence *ho boulomenos* could ordinarily prosecute with a specific or generic *graphē*, nevertheless the unanimity and the persistence of the rhetorical tradition of Lysias' fragments on the point—beyond the individual and differing details—indicates that at least on certain occasions, such as the trial in which Lysias' client was involved, the woman who aborted or the man who caused her to abort could be prosecuted with an action for homicide.⁶⁴ This is of no little importance, if we consider, for example, that in Rome abortion was never considered homicide, not even when, under the empire, the notion of homicide was extended to include infanticide and newborn exposure.⁶⁵ This divergent attitude between Athens and

⁶³ A good comparison can be provided by one of the lesser declamations attributed to Quintilian (277), where the theme is whether the husband who lawfully killed his pregnant wife caught red-handed in committing adultery, should be considered responsible for the homicide of the foetus, given that "the punishment of pregnant women shall be deferred until the day of delivery" (*supplicia praegnatum in diem partus differantur*).

⁶⁴ Obviously it is out of question that in this trial the defendant could be the husband who induced his wife to have an abortion, since, if he did so, he simply exercised his right (on the point see, *e plurimis*, Glotz [1904], 350–351).

⁶⁵ D. 25.3.4 Paul. 2 *sent.*; on the problems of this fragment, its possible interpolation and chronology cf., *e plurimis*, Harris (1994), 19–20. It is interesting to add that also in the Model Penal Code the possibility of equating abortion to homicide is excluded; in fact, only the "person who has been born and is alive" (MPC § 210.0) is identified with the "human being" who is the victim of a criminal homicide (committed "purposely, knowingly, recklessly or negligently," MPC § 201.1). In Italian law, where the elimination of an embryo beyond the time limits prescribed by law is governed by the specific regulation on abortion, there are many doubts about a possible identification between abortion and homicide, given the heated medical debate on the moment when life is supposed to begin; generally, however, abortion is not considered homicide.

Rome can be easily explained if we cast a quick glance at the different embryological theories developed in ancient times.

All Roman jurists followed the Stoic tradition according to which the foetus should be considered only as a portion of its mother, *mulieris portio vel viscerum* (D. 25.4.1.1 Ulp. 24 *ad ed.*); hence, a not-yet-born baby is not a human being (*partus nondum editus homo non recte fuisse dicitur*, D. 35.2.9.1 Pap. 19 *quest.*), but rather a hope of a human being (*spes animantis*, D. 11.8.2. Marc. 28 *dig.*).⁶⁶ This idea was also popular in the Greek world; for example, in the fifth century Empedocles denied the foetus a human nature, saying that it had to be considered, once again, “part of the mother.”⁶⁷ Between the fifth and the fourth century BC, however, Hippocrates and his school showed for the first time that the foetus is alive, at least from a certain moment of the pregnancy on,⁶⁸ and this idea was accepted by the most important philosophers of the time, especially Aristotle.⁶⁹ Of course, this new medical stance could have significant consequences in the legal field, and it is in light of this new theory that the situation depicted in Lysias’ speech can be understood. If so, we have a confirmation that causing the death of a foetus could sometimes require an institutional means of prosecution. We may also try to imagine under what circumstances such a case went beyond the limits of intraoeal repression, by sketching out some possible scenarios that are suggested by some hints provided by the context in which Lysias’ fragments are preserved.

Let’s first imagine (this is the situation we can reconstruct from fr. 5 and possibly also from fr. 2) that a man divorced his pregnant wife, and that afterwards she decided to abort, perhaps—I take this suggestion from a passage of the Digest I’ll discuss below—due to her hatred toward the man. What could the ex-husband do in this situation? We don’t have any evidence for Athens, but maybe we can infer something from the law code of Gortyn. There it is clearly stated that a divorced man did not lose his potential rights as to the conceived and not yet born child; after the birth, in fact, the woman had to show the baby to him, so that he could decide whether to legitimize it or not (col. III 44–52):

αἱ τέκοι γυναῖκα
εἰ[ρ]ε[ύο]νσα, ἐπελεῦσαι τῷ ἄ-
νδρὶ ἐπὶ στέγαν ἀντὶ ματ-
ύρον τριῶν. αἱ δὲ μὲ δέκσαι-
το, ἐπὶ τῇ ματρὶ ἔμειν τὸ τέκ-
νον ἔ τράπεν ἔ ἀποθέμεν· ὀρκ-
οιστέροδ δ’ ἔμειν τὸς καδεστ-
ἄνς καὶ τὸς μαίτυρανς, αἱ

⁶⁶ Cf. Balestri Fumagalli (1983); Ferretti (2008), 11–16; Bianchi (2009), 273–341.

⁶⁷ [Plut.] *Plac. phil.* 907c; 910c; on the point see Nardi (1971), 154–159.

⁶⁸ For the sources see Nardi (1971), 93–115.

⁶⁹ See *supra*, n. 12.

ἐπέλευσαν.⁷⁰

Now, if a divorced woman exposed her newborn baby without first showing it to the father, she had to pay a fine in the event that she was defeated in court (col. IV 8–17):

γ-
 υνὰ κερύονσ' αἱ ἀποβάλοι
 παιδίον πρὶν ἐπελευσαι κατ-
 ἄ τὰ ἐγραμμένα, ἔλευθέρο μ-
 ἔν καταστασεῖ πεντέκοντα
 στατερανς, δόλο πέντε καὶ ἑ-
 ἰκατι, αἴ κα νικαθεῖ.⁷¹

It is realistic to deduce by *a fortiori* reasoning that she was also subject to a penalty if the ex-husband found out that she had decided to abort. We don't know what the penalty was—we can only suppose it was a greater one. Thus, the law code of Gortyn provides a situation that is not resolved inside the *oikos* but instead is subject to the decision of the judge.

If so—and without entering the complex topic of the unity of Greek law (discussed in this volume by David D. Phillips), but just supposing that similar circumstances received similar regulations—, we might infer that also in Athens, in this particular situation where the *oikos*' mechanisms were not effective (since the husband had already divorced the woman!), matters concerning abortion required regulation by institutional means; and, since a specific action was lacking, a private action for homicide could do. It may be no coincidence, moreover, that exactly this same situation—at least according to Tryphoninus—led the emperors Severus and Caracalla (211 AD) to punish abortion for the first time in Roman law with a public sanction; in fact they established by a rescript that the pregnant woman who after the divorce had aborted in order not to generate a child by her hated previous husband was to be punished with temporary exile.⁷²

⁷⁰ “If a wife who is separated (by divorce) should bear a child, (they) are to bring it to the husband at his house in the presence of three witnesses; and if he should not receive it, the child shall be in the mother's power either to rear or expose; and the relatives and witnesses shall have preference in the oath as to whether they brought it” (the translation of this and the following passage from the Gortynian code is that of Willetts [1967]). The subsequent lines (col. III 52–IV 8) contain the rules concerning the child of an *oikea* born after the divorce. Also in this case, it is stated that the woman has first to show the baby to its father; only if the father decides not to rear it, will the child belong to the *oikea*'s owner.

⁷¹ “If a woman separated (by divorce) should expose her child before presenting it as is written, if she is convicted, she shall pay, for a free child, fifty staters, for a slave, twenty-five.” In fact the situation is more detailed and complicated than has been described in the text: see Maffi (1997), 19–20.

⁷² D. 48.19.39 Tryph. 10 *disp.*; cf. D. 48.8.8 Ulp. 33 *ad ed.*; D. 47.11.4. Marc. 1 *reg.*

We can next imagine a second scenario, this time suggested by fr. 3 and 4. Let's suppose that a third person has hit a pregnant woman in the womb, causing her to abort. Evidently a situation like this could not be resolved by intra-familial means, and for this reason the case we are dealing with is a kind of *topos* envisaged in many other ancient sources (for example, in a Sumerian legal collection, in the Code of Hammurabi, in the Bible)⁷³ as well as by the Roman jurists. The only situation contemplated in the Digest, however, concerns a pregnant slave, and Ulpian says that the person responsible for her abortion in consequence of a blow *Aquilia teneri quasi rupto* (D. 9.2.27.22 Ulp. 18 *ad ed.*; cf. D. 9.2.39 pr. Pomp. 17 *ad Muc.*); we don't know what happened if the abortion was caused in this way to a free woman, although some scholars think that an *actio utilis legis Aquiliae* could be appropriate.⁷⁴ As for the other texts, in a passage of *Exodus* in the Latin translation of Saint Jerome we read of a man who, for hitting a pregnant woman in a fight, has to pay the compensation required by the woman's husband through an arbitration.⁷⁵ More interesting for us, however, is the Septuagint version of the passage, where it is said that this penalty has to be paid only in the case that the aborted foetus is imperfectly formed; on the contrary, if the aborted foetus is perfectly formed, the offender shall give "life for life, eye for eye, tooth for tooth," and so on.⁷⁶ It is not clear how this Alexandrian variant from the Hebrew version could have been generated, but the point it is not relevant here.⁷⁷ It is, however, clearly noteworthy that it supposes the same distinction between not yet formed (hence non-living) foetuses and formed (hence living) ones outlined by Hippocrates and implied by the aforementioned fragments of Lysias' speech. Thus, both Lysias and the passage of the Septuagint gave the same answer to the question of how the violent act of a

⁷³ For a detailed analysis of the various sources see Péter (1992), 216–229. Interesting information can be moreover found in the papyri quoted by Adam (1989), 201–203.

⁷⁴ Nardi (1971), 190 n. 115; Péter (1992), 228–229.

⁷⁵ *Ex. 21.22 (Vulgata): si rixati fuerint viri, et percusserit quis mulierem praegnantem, et abortivum quidem fecerit, sed ipsa vixerit: subiacebit damno quantum maritus mulieris expetierit, et arbitri iudicaverint, "if men quarrel, and one strike a woman with child and she miscarry indeed, but live herself: he shall be answerable for so much damage as the woman's husband shall require, and as arbiters shall award."*

⁷⁶ *Ex. 21.22–5 (Septuagint version): ἐὰν δὲ μάχονται δύο ἄνδρες καὶ πατάξωσιν γυναῖκα ἐν γαστρὶ ἔχουσαν, καὶ ἐξέλθῃ τὸ παιδίον αὐτῆς μὴ ἐξεικονισμένον, ἐπιζήμιον ζημιωθήσεται· καθότι ἂν ἐπιβάλῃ ὁ ἀνὴρ τῆς γυναίκος, δώσει μετὰ ἀξιώματος· ἐὰν δὲ ἐξεικονισμένον ᾦν, δώσει ψυχὴν ἀντὶ ψυχῆς, ὀφθαλμὸν ἀντὶ ὀφθαλμοῦ, ὀδόντα ἀντὶ ὀδόντος, χεῖρα ἀντὶ χειρός, πόδα ἀντὶ ποδός, κατάκαυμα ἀντὶ κατακαύματος, τραῦμα ἀντὶ τραύματος, μάλωπα ἀντὶ μάλωπος, "if two men fight and strike a pregnant woman and her child comes forth not fully formed, he shall be punished with a fine. According as the husband of the woman might impose, he shall pay with judicial assessment. But if it is fully formed, he shall pay life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe."*

⁷⁷ Nardi (1971), 169 n. 53.

person who had caused an abortion to a woman in an advanced stage of her pregnancy was to be considered.

But we can also go further and—taking this idea from fr. 1, where it is said that the woman was represented in court by her adult son—propose a third scenario, supposing that the woman *de qua* is a widow. We know very little about widows, and particularly pregnant widows, in ancient Athens; one piece of the available information is however of primary importance for us, since it is the renowned (and probably Solonian in its kernel)⁷⁸ law quoted in the pseudo-Demosthenic *Against Macartatus*⁷⁹ as well as in the *Athenaion Politeia*⁸⁰ (cf. also Isae. 7.30). The law concerns orphans, heiresses, *oikoi exerēmoumenoi* and widows who stay in their husbands' *oikoi*⁸¹ claiming to be pregnant (*phaskousai kuein*); the archon is ordered to take care (*epimeleisthō*) of them, so that, if somebody mistreats them (*hybrizē*) or does anything contrary to law or custom (*poiē ti paranomon*), he has the power to penalize him. If the offender seems to be deserving of a more severe punishment, the archon is to summon him and bring him before the Heliaia; if he is convicted, the Heliaia is to assess whatever penalty the convicted offender is to suffer or pay. Of course it is not my concern to deal with the many problems this text creates, nor is it my intention to analyse in detail the possible meaning of the expressions *hybrizein* and *paranomon ti poiein*. I think Adele Scafuro in her valuable essay on the identification of Solonian laws has given an accurate definition of them.⁸² Comparing the pseudo-Demosthenic text with the passage of the *Athenaion Politeia* concerning the archon's jurisdiction (56.6),⁸³ she concludes that “*hybrizein* and *poiesai paranomon ti* were yoked to an umbrella concept which at some point came

⁷⁸ Scafuro (2006), *passim* and esp. 179–180. On the law see also Cudjoe (2000), 206–235.

⁷⁹ [Dem.] 43.75: Ὁ ἄρχων ἐπιμελείσθω τῶν ὀρφανῶν καὶ τῶν ἐπικλήρων καὶ τῶν οἴκων τῶν ἐξερημουμένων καὶ τῶν γυναικῶν, ὅσαι μένουσιν ἐν τοῖς οἴκοις τῶν ἀνδρῶν τῶν τεθνηκότων φάσκουσαι κτείν. τούτων ἐπιμελείσθω καὶ μὴ ἐάτω ὑβρίζειν μηδένα περὶ τούτους. ἐὰν δέ τις ὑβρίζη ἢ ποιῇ τι παράνομον, κύριος ἔστω ἐπιβάλλειν κτλ., “let the archon take care of orphans, heiresses, and families that are about to become extinct (*oikoi exerēmoumenoi*), and of women who remain in the houses of their deceased husbands declaring that they are pregnant. Let him take care of these, and not permit anyone to mistreat them. And if anyone mistreats them or does anything contrary to law or custom, he shall have power to penalize him.”

⁸⁰ Arist. *Ath. Pol.* 56.7: ἐπιμελεῖται δὲ καὶ τῶν ὀρφανῶν καὶ τῶν ἐπικλήρων, καὶ τῶν γυναικῶν ὅσαι ἂν τελευτήσαντος τοῦ ἀνδρὸς σκηπτόνται κύειν. καὶ κύριός ἐστι τοῖς ἀδικούσιν ἐπιβάλλειν ἢ εἰσάγειν εἰς τὸ δικαστήριον, “he (*scil.* the archon) takes care of orphans and heiresses and of women who, when their husbands die, declare that they are pregnant. He has full power to fine the offenders or to bring them before the jury-court.”

⁸¹ According to Harrison (1968), 39 n. 2, “the words ὅσαι μένουσιν suggest that there might be women who did not so remain.”

⁸² Scafuro (2006), 181.

⁸³ Scafuro (2006), 182–185.

to be called *kakōsis*.⁸⁴ And *kakōsis*—as we can deduce especially from some specific fourth-century cases and from some Solonian laws—“is treatment of others that may be unlawful or contrary to the social code [...] or, [...] wilful taking advantage of an individual in an act executed in the belief that the individual is without protection and the doer can get away with it.”⁸⁵ Unfortunately, ancient authors do not provide a practical instance of *kakōsis* against a pregnant widow, since the only examples in logographic and lexicographic sources concerns *epiklēroi* and orphans; from these, we can state that *kakōsis* could consist either in a failure to fulfil an obligation (for example, the obligation of the husband to have intercourse with the *epiklēros* thrice a month) or in a plan to commit an unlawful act (for example, a plot to defraud an orphan of his estate).⁸⁶ The only possible but hypothetical evidence concerning *kakōsis* against a pregnant widow, as we can infer from a lemma in Harpocration quoting a Solonian law (F 54: Harpocr. [274], Suid. [502], Phot. [514,6] s.v. σίτος), might be the provision regarding failure to provide maintenance (*sitos*) to orphans and to women, the category of women likely including also pregnant widows.⁸⁷

Given this situation, it is clear that we cannot go so far as to infer that causing or inducing a widow to abort could be included in the concept covered by *hybrizein* or *paranomon ti poiesai*.⁸⁸ However, it is enough to underscore that in this provision the pregnancy of the widow goes well beyond the boundaries of the *oikos* and acquires also a kind of public dimension. Since the law in general clearly has to do with the safeguard of inheritance lines in *oikoi* that were vulnerable under this point of view, and since, in particular, the pregnant widow served as a regulator for the right of succession in the house of her husband, the protection given to her granted protection also to the unborn baby.⁸⁹ Viewed from this perspective, it is conceivable that the “killing” of her child ought to be punished.

⁸⁴ Scafuro (2006), 191; see also Harrison (1968), 101–104; Rhodes (1981), 633.

⁸⁵ Scafuro (2006), 191.

⁸⁶ Scafuro (2006), 187.

⁸⁷ Scafuro (2006), 189.

⁸⁸ On the point see also Cudjoe (2000), 79: “the question as to the extent to which the archon intervened in cases of maltreatment of widows and orphans [...] does not appear to have a definite answer to it. In fact, the available evidence seems to suggest that in many respects the archon had little or no power of initiative against offenders who committed lawless acts against widows and orphans in spite of the powers conferred on him by the law.”

⁸⁹ This observation could bridge a gap in our knowledge of the law of intestate succession traditionally attributed to Solon and preserved at [Dem.] 43.51. In fact, it is noteworthy that in the Solonian law posthumous children are not mentioned at all, since this law seems to concern only children who are already born and legitimate (*gnēsioi*), and it is evident that a *conceptus nondum natus* satisfies neither requirement. Only if there were not legitimate children a father disposed of his estate by will (Dem. 46.14; for a posthumous adoption initiated by the family or by the archon in the case that the head of the *oikos* had died without offspring and without having made a will see especially Isae.

Ultimately, there was no Athenian law banning abortion since, in ordinary circumstances, abortion was something private that affected only the *oikos*; thus, the head of the *oikos* had to take internal measures against the woman who decided to abort without proper consent (the same happened in Rome, from Romulus on). Of course, as far as the man was concerned, no legal action could be initiated against him if he induced his wife (or another woman of whom he was *kyrios*) to have an abortion, since he was simply exercising his right to do so. However, beyond this ordinary rule, there could have been some particular situations that required a more formal intervention or an institutional kind of control and punishment, in order to defend the rights of the father when these rights could not be enforced through his familial authority and power.

ABBREVIATIONS

- DS* Ch. Daremberg, E. Saglio, *Dictionnaire des antiquités grecques et romaines d'après les textes et les monuments*, Paris, 1877–1919
- LSA* F. Sokolowski, *Lois sacrées de l'Asie Mineure*, Paris, 1955
- LSJ* H.G. Liddell, R. Scott, *A Greek-English Lexicon*, revised and augmented throughout by H.S. Jones, Oxford, 1996
- LSS* F. Sokolowski, *Lois sacrées des Cités grecques*. Supplément, Paris, 1962
- SEG* *Supplementum Epigraphicum Graecum*

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7.30. For posthumous adoption and its legal compulsoriness see Rubinstein [1993], 25–28, 105–112). It is true, however, that there are some clues in our sources that a man about to die could give his wife some instructions *mortis causa* concerning an unborn baby (cf. e.g., Lys. 13.39–42; Hyper. Lyc. fr. 4); in case they were lacking, it was the duty of the archon to provide a guardian to the widow and to the unborn son.

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