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SOME NOTES ON THE REGULATION OF SEXUALITY IN ATHENIAN LAW[1]

1) Homosexual prostitution and legal overlaps

The legal regulation of homosexual prostitution at Athens has played a major part in recent discussions of Athenian sexuality.[2] The leading piece of evidence, which has provided the focus for much of this work, is the first oration of Aiskhines.[3] This is the published version of a speech delivered in 346/5 BC, and it is one of relatively few cases in the Attic Orators of which the result is known: facing an accusation of treasonable misconduct as ambassador (*parapresbeia*) brought by his political opponent Timarkhos, Aiskhines pre-empted the charge by using the otherwise rarely attested procedure of *dokimasia rhêtorôn* ("scrutiny of orators") against his would be prosecutor, and succeeded in persuading the court that the latter was himself a former prostitute and was consequently debarred from such political activity.[4]

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[1] My thanks are due to the organisers of the *Symposion 2003* conference and editors of this volume for the invitation to participate, to the British Academy for a travel grant, and in particular to Douglas MacDowell and Lorenzo Gagliardi for allowing me to use the drafts of unpublished work (cf. n. 18 below).

[2] A full bibliographical survey is beyond the scope of the present article, but of recent work in English we may highlight the legal analysis of Aiskh. 1 at the start of the chapter on law in Dover's *Greek Homosexuality* (Dover, 1978: 19-39); chapters by Winkler in *Constraints of Desire* and Halperin in *One Hundred Years of Homosexuality* (Winkler, 1990: 45-70, with analysis of Aiskh. 1 at pp. 56-61; Halperin, 1990: 88-112, using Aiskh. 1 as the starting-point); several studies by David Cohen (e.g. 1987: esp. 5-6, and 1991: 171-202, esp. pp. 175-178); and Davidson's *Courtesans and Fishcakes* (1997, passim: the index s.v. "Aeschines: attack on Timarchus" has no fewer than 21 entries). For more detail and further references, see following note. The work of MacDowell is discussed below rather than being cited here because it focuses specifically on the legal regulations themselves rather than on their broader sexual context.

[3] There is a comprehensive and judicious analysis of recent scholarship in Fisher's Clarendon commentary (Fisher, 2001: esp. 36-53); the introduction to Carey's Texas translation (Carey, 2000: 19-21) offers a much briefer discussion of recent trends.

[4] The law as reported by Aiskhines relates specifically to speaking in the Assembly (1. 28), and Timarkhos' behaviour as speaker there is later discussed in detail (1. 81-85, cf. also 1. 26, on which see n. 24 below). It is clear that his defeat rendered Timarkhos unable to continue with his prosecution of Aiskhines, but we do not know whether Aiskhines would have been able to use the procedure by extension if Timarkhos had confined his activity as speaker to the lawcourt, or what would have been his chances of using e.g. the *graphê hetairêseôs* (for which cf. below at n. 10).

Nothing further is known about Timarkhos, though Aiskhines mentions him twice in his subsequent defence speech on the substantive *parapresbeia* charge (Aiskh. 2. 144, cf. 2. 180). The first of these passages suggests an awareness that his use of evidence in the earlier trial had been somewhat creative (cf. below); and seeks to constrain Demosthenes, who had taken over the prosecution following Timarkhos' disgrace, from deploying similarly tendentious arguments against Aiskhines himself (Dem. 19. 241-244). More striking, however, is Demosthenes' depiction of Timarkhos and his family as figures of pity, unjustly ruined by defeat at Aiskhines' hands (Dem. 19. 283-286).[5] For a law-court orator to represent disfranchisement as wrongful conviction is always a risky strategy, because it can easily come across as criticism of a properly constituted court rather than of one's current opponent;[6] and in this case we happen to know that Aiskhines was acquitted, albeit by a fairly narrow margin.[7]

Aiskh. 1 raises a number of points of socio-legal interest which have attracted considerable attention from recent scholars. It is notable for instance that what he alleges against Timarkhos is not homosexual activity (as might have been the case in many early-modern or modern jurisdictions, at least until the 1960s), but having been a homosexual prostitute. Little attempt is made, however, to prove that any money has changed hands. Indeed, the idea that financial details can legitimately be demanded as evidence of prostitution is one that Aiskhines repeatedly belittles, on the grounds that clients will rarely be willing to publicise socially embarrassing transactions (Aiskh. 1. 71-73, 119-120); to which modern scholars have added the further point, that it might have been difficult at least in some cases to distinguish between fees and love-gifts.[8] Instead, Aiskhines relies on general inferences from the defendant's having lived in the houses of other men (1. 40, 42, 53-54), and on general assertions about Timarkhos' reputation (1. 119-131). The latter is a bold strategy, which as we have noted was turned against Aiskhines himself in the subsequent *parapresbeia* trial (Dem. 19. 241-244). It is therefore tempting to suggest that Aiskhines in this speech was inventing a new method or perhaps a new minimalist standard of proof, which may indeed help to explain why such prosecutions are so rare in our sources.

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[5] Cf. esp. Dem. 19. 284: ὁ μὲν ταλαίπωρος ἄνθρωπος ἠτιμώσεται ("the unfortunate [Timarkhos] suffered *atimia*").

[6] There is a limited parallel at Dem. 21. 95, but in that case Straton's conviction is represented primarily as a abuse of process by the prosecutor (the emphasis is on his inability to stand up to the much more powerful Meidias) rather than as an unfair conviction by the court.

[7] Both Pseudo-Plutarch (*Life of Aiskhines*, 840c2-4) and Idomeneos (FGrH 338 fr. 10, in Plutarch, *Demosthenes*, § 15) suggest that he won by thirty votes: given that it was a public trial, the jury will have been either five hundred or possibly a multiple of that number.

[8] Dover (1973: 68) cites Aristophanes, *Wealth*, 153-159; and Carey (2000: 21) describes "the question of payment [as] necessarily a grey area."

A second point of socio-legal interest is that the alleged sexual behaviour attributed to Timarkhos does not seem in itself to have been illegal.[9] This is an issue to which we shall return, but for the moment it is sufficient to note that the *dokimasia rhêtorôn* is one of two overlapping procedures which could be used against current or former prostitutes, the other being the *graphê hetairêseôs* ("public prosecution relating to prostitution"). A key feature shared by both these procedures, however, is that they were not available for use against any prostitute, but only against one who attempted to speak in a public context.[10] There is no clear evidence that low-level political activity, such as voting in the assembly or the lawcourt, rendered a prostitute liable to the *graphe hetairêseôs*,[11] nor indeed can we be sure that it was prohibited by conviction at a *dokimasia rhêtorôn*.[12] To that extent, Athens operated an implicit double standard of behaviour, with higher expectations being imposed on political leaders than on other citizens.[13] The idea that certain forms of transgressive behaviour might debar you from performing particular activities is not without parallel in Athenian law, though usually what was prohibited was entering specific locations, especially those with religious significance.[14] The list of

[9] Gagliardi (forthcoming) is the exception among recent scholars in arguing that to be a prostitute was itself illegal (on the grounds that prostitute suffered an automatic loss of rights), albeit not prosecutable. But this distinction may have been less relevant at Athens, where substantive rules of law seem to have arisen out of legal procedure. Moreover, it is by no means the case that a loss of rights can necessarily be regarded as proof of illegality: there is some evidence that men who were disabled were ineligible for the Arkhonship (Lys. 24. 13), but that does not mean that being disabled was a crime.

[10] The *dokimasia rhêtorôn* seems to relate to those who spoke specifically in the Assembly (Aiskh. 1. 28), whereas the *graphê hetairêseôs* covered other public contexts as well (Aiskh. 1. 19-20): cf. further below.

[11] MacDowell (2000: 23-24) notes that several other categories of prohibited activity are omitted from Aiskhines' quotation of the *graphe hetairêseôs* law at 1. 19-20: speaking in a lawcourt (implied at Andok. 1. 100), and entering sanctuaries or the *agora* (for which see Aiskh. 1. 164, Dem. 24. 126, and Dem. 22. 73 = 24. 181). He speculates that voting in the Assembly or the lawcourts may also have been banned, but notes that we do not have evidence for this.

[12] The question of whether the verdict in a *dokimasia rhêtorôn* was simply a confirmation of existing restrictions or the imposition of a penalty is discussed at the end of this section of the paper.

[13] See e.g. Fisher (2001: 39).

[14] Those accused of homicide, for instance, were instructed to keep away from the *agora* (Ant. 5. 10) and perhaps other sacred places also (*hiera*, Dem 23. 80). Women who had been caught with adulterers were prohibited from entering *hiera dêmotelê* ("public sanctuaries," Dem. 59. 85-87). A ban on entering *hiera* was similarly imposed by the decree of Isotimides on those who had admitted impiety (Andok. 1. 71), but this appears to have been an *ad hominem* regulation aimed specifically at undermining the value of the immunity that had been granted to Andokides himself. De Ste Croix (1972: 225-289) has argued that impiety was the reason for the decree(s) banning Megarians from entering "the Athenian *agora* and the harbours of the Athenian empire," but harbours are not obviously sacred sites, and most scholars have rejected this explanation.

transgressive behaviours falling within the scope of the *dokimasia rhêtorôn* was not restricted to prostitution, as we shall see, but it is noticeable that all the other behaviours so covered were themselves actionable in their own right, and were thus unlawful in a sense that prostitution was apparently not.

Thirdly, and more briefly, is the question of age-coding. Our sources, as we shall see, tend to view homosexual activity as being to some extent a rite of passage,[15] and we might therefore have expected the law to be concerned with restricting the political activity of those who were currently prostitutes, but in fact the allegation that you had been a prostitute is something that could be brought at any time during your subsequent political career. To that extent, even though as we have seen prostitution is not in itself legally actionable, it is nevertheless something that marks you out for life. There is no hint of any statute of limitations (*prothesmia*) in such matters, as there was for most categories of transgressive behaviour at Athens.[16] The concept of a reformed or retired prostitute was not something that the law recognised.[17]

In contrast with the wealth of attention devoted to the broader socio-legal aspects of Timarkhos' case, the details of legal procedure have until recently been less well served. This gap, however, has to a considerable extent been rectified in a pair of papers by Douglas MacDowell, including one delivered at the *Symposion 2001* conference, together with the response made on that occasion by my current respondent Lorenzo Gagliardi.[18] The most important contribution here, made in the first of MacDowell's papers, has been to collect and differentiate the various statutes dealing not simply with prostitution but with homosexuality more broadly, and above all to distinguish conclusively between the *graphê hetairêseôs* and the *dokimasia rhêtorôn*.[19] Earlier scholars had tended to conflate these two procedures,

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[15] This pattern however should not however be exaggerated: cf. n. 46 below.

[16] A law on *prothesmia* is referred to at Dem. 36. 27 (in a context which seems intended to suggest that it relates to private contractual disputes). The absence of *prothesmia* for prostitutes brackets them together with those who have committed impiety (Lys. 7. 17) and homicide (Lys. 13. 83).

[17] The use of the perfect participle πεπορνευμένος and ἡταιρηκώς in the *dokimasia* law quoted by Aiskhines at 1. 29 may be significant (the perfect tense in Greek denotes a present condition resulting from a past action), but I have no explanation for the consistent use of the present tenses to denote maltreatment of parents at 1. 28. (The *graphê hetairêseôs* law at 1. 19 is phrased as a future open condition, with aorist subjunctive ἑταιρήσῃ).

[18] MacDowell (2000) on the laws relating to homosexuality; MacDowell and Gagliardi (both forthcoming) on the *dokimasia rhêtorôn*: cf. n. 1 above.

[19] MacDowell (2000), laws [D. 1] (*graphê hetairêseôs*) and [D. 2] (*dokimasia rhêtorôn*). The separate existence of the second of these has indeed been doubted by Lane Fox (but Fisher 2001: 158 notes that there are other attestations, which cannot easily be explained away); and of the first one e.g. by E. Cohen (2000a: 158 n. 11) and (2000b: 115 n. 9). The distinction between the two procedures has since been explored independently, though primarily in terms of rhetorical tactics, by Fisher (2001: 144).

or to discuss their significance jointly without specifying which of the two was under discussion. There are indeed many overlaps. Both procedures, as we have seen, are aimed not at prostitutes in general but at those prostitutes who attempted to take some part in public life; and the regulations governing them are summarised in some detail by Aiskhines at 1. 19-20 and 1. 28-32 respectively. In each case what is presented to us seems to be verbatim quotation interspersed with the orator's own comments, but the extent of the latter is fairly clear on close reading, and the fact that he seems to have had the clerk read out the first of these laws at 1. 21 will presumably have constrained his capacity for misrepresentation,[20] at least at this point in his argument.[21]

Various differences between the two procedures are explored by MacDowell, including for instance the issue of penalty: Timarkhos' own case makes clear that *atimia* (loss of civic rights) was imposed on those convicted at *dokimasia rhêtorôn*, though as we shall see, there is room for dispute about the precise judicial status of this; Aiskhines on the other hand speaks of *graphê hetairêseôs* as resulting in "the most severe penalties," which presumably means death.[22] More significantly, however, MacDowell argues that because *graphai hetairêseôs* are said elsewhere to have been presided over by the Thesmothetai,[23] this means that the charge will have been laid at the end of the relevant Assembly meeting, whereas the *dokimasia rhêtorôn* was preceded by a formal challenge (*epangelia*) which he suggests will have taken immediate effect, barring the opponent from continuing to address the Assembly until the case was resolved.[24] He uses this as the basis of what is

[20] The law quoted at Aiskh. 1. 21 is generally thought like the other documents in this speech to be a forgery, though in this case the restrictions quoted end with a group of religious locations and occasions (public sanctuaries, public wearing of garlands, the *perirhantêria* of the *agora*) which do not appear to be taken from Aiskhines' speech. In theory, the phrase at 1. 20 with which the law is introduced (λέγε αὐτοῖς καὶ τοῦτον τὸν νόμον "read them this law as well") could have served to denote a law about something completely different, but this would have looked distinctly odd to the jury.

[21] Contrast the general consensus that there is significant misrepresentation in Aiskhines' statement of the law at § 72 (referring back to texts read out much earlier in the speech): cf. n. 30 below.

[22] On the assumption that § 21 is a forged document (see last-but-one note), then as often in these documents its mention of "death" represents no more than an interpretation of Aiskhines *megistai epitimiai* (§ 20), but it is likely to be a correct interpretation: to my knowledge, nowhere in the orators is this phrase used to denote anything less than the death penalty (Lys. 3. 42-43 speaks of exile as *megalai timôriai*, but not *megistai*).

[23] Dem. 22. 21.

[24] It is not certain, however, that this point can be regarded as settled. Given that Aiskhines' *dokimasia* against Timarkhos came to court before Timarkhos' *parapresbeia* charge against Aiskhines, it seems reasonable to infer that the former did block the latter. (Cantarella [1989: 155] describes his prosecution of Timarkhos as an *antigraphê*, presumably in a loose rather than a technical legal sense.) However, the wording of the law as reported at § 28 would suggest that *dokimasia rhêtorôn* was available only because Timarkhos had spoken specifically in the Assembly. We are not given any

essentially a chronological explanation for the existence of two overlapping procedures, proposing that the *dokimasia rhêtorôn* was a later addition to the statute book, introduced with the specific aim of making it possible to block suspect speakers at the outset.[25]

I have to admit to being slightly wary of the logic behind this reconstruction. What worries me is partly the fact that we do know of at least one form of *graphê* – the *graphê paranomôn* – where an undertaking to proceed appears to have had the sort of immediate blocking effect that MacDowell predicates only of the *dokimasia rhêtorôn*, though admittedly what was blocked here was a piece of legislation rather than a man's right to continue speaking.[26] Perhaps a closer parallel is that the right to speak (or indeed to appear) in public contexts is known to have been blocked by a formal charge of homicide, as most famously in one of Antiphon's speeches, where it is alleged that the prosecution had been suborned by the speaker's political opponents into charging him with homicide specifically in order to block the *eisangelia* (impeachment) in which he was prosecuting those opponents for embezzlement of public funds.[27] So I am not convinced that the Athenians would have regarded it as necessary to invent another procedure if they had simply wanted to enable the bringing of a *graphê hetairêseôs* to take immediate effect: they could have achieved it by revising the *graphê hetairêseôs* itself.

It is perhaps worth noting that the categories of persons listed by Aiskhines as liable to *dokimasia rhêtorôn* are nearly all of them potentially subject to other forms of public legal action: those who maltreat their parents can be prosecuted by the *graphê* or *eisangelia kakôseôs goneôn*, military defaulters by the group of procedures related to *graphê astrateias*, and those who mismanage their estates possibly by the *graphê argias*. (The same applies, incidentally, to other forms of *dokimasia* such as that of the Nine Arkhons, where the series of set questions posed to each candidate includes treatment of parents, payment of taxes, and military

details of this, though it is tempting to identify it with his allegedly recent and notorious performance mentioned in § 26: if so, however, the admittedly implausible claim at § 33 that this occasion had led to a change in Assembly procedures might suggest that any *dokimasia rhêtorôn* brought on that occasion had not had the effect of stopping him in mid-flow.

[25] Fisher (2001: 158) similarly suggests that the *graphê hetairêseôs* is the older procedure, but for different reasons: he sees the *dokimasia rhêtorôn* as representing an extension of the principle that those in public life should show higher standards.

[26] Hansen notes the consistent use of the term *probouleuma* to denote the proposals under consideration in two of Demosthenes' *graphê paranomôn* speeches: it is clear that both proposals were suspended until the trial, even though the delay in each case was considerable (at least a year in Dem. 23, and about six years in Dem. 18: Hansen 1974: 33 and 38 with refs.).

[27] Ant. 6. 34-39.

service, all of them actionable offences in their own right.[28]) To that extent, I am not convinced that the overlap of procedures is something that needs a separate explanation that is specific to the *graphê hetairêseôs*, and it may simply be characteristic of at least certain forms of *dokimasia* that they deal with what is also prohibited under separate cover.

But there are two respects in which the *dokimasia rhêtorôn* and to some extent the *graphê hetairêseôs* are different from the parallels that have just been cited. The first of these relates to the scope of those affected by the regulation. There is, as we have seen, general though not universal agreement among scholars that the core Athenian regulations dealing with homosexual prostitution were aimed not at criminalising the activity itself, but rather at regulating the activities of prostitutes.[29] There was certainly no legal sanction against those who hired the services of a male citizen prostitute, provided he was an adult;[30] and to be a serving or former prostitute was not in itself an offence,[31] unless and until the man concerned sought to take part in public affairs – such that it was public participation by an (ex-)prostitute rather than prostitution itself that was prohibited, albeit (as we have seen) by means of a lifelong prohibition. We can emphasise the oddness of this by reiterating the contrast with tax-evasion, maltreatment of parents, or failure to perform military service, all of which render the offender (and I use the term deliberately) liable to immediate prosecution in his capacity as a private citizen.

The second point to make here is that the *dokimasia rhêtorôn* is in a range of ways wholly unlike the five other forms of *dokimasia*. All of the others are prospective, in that they deal with somebody who is about to take up a right or privilege, whereas the *dokimasia rhêtorôn* is aimed against somebody who has at least started speaking; all five of them are required to be held before certain forms of public administration can take place,[32] whereas the *dokimasia rhêtorôn* requires the equivalent of a prosecutor to take the initiative of *epangelia* or formal challenge; and

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[28] This is of course preceded by questions about parental identity and family cult (*Ath.Pol.* 55. 2). What the various groups of *dokimasia* questions presumably have in common is that they explore areas of what it meant (at least ideally or ideologically) to be an Athenian citizen. To the best of my knowledge, there is no *graphê* procedure attested as dealing with tax evasion, but *apographê* would be available.

[29] There were regulations to which this did not apply: e.g. those dealing with the prostitution of minors, for which cf. Aiskh. 1. 13 and 1. 14 (MacDowell's laws [B. 1] and [B. 2]).

[30] Dover (1978: 28) has argued powerfully that Aiskh. 1. 72 and 1. 89 represent an illicit extension of the penalty imposed on those who hire an Athenian citizen boy as a prostitute. This was accepted by e.g. Cantarella (1989: 156-57; 1992: 50), and now by MacDowell (2000: 27) and by Fisher (2001: 209), though D. Cohen (1987: 5-6; 1991b: 181) is prepared at least to contemplate the possibility that Aiskhines is referring to a separate statute at 1. 72.

[31] For Gagliardi's argument that prostitution was an offence but not prosecutable, see n. 9 above.

[32] [Xen.] *Ath.Pol.*, 3. 4; cf. Lys. 26. 6.

none of the five so far as we know impose any legal punishment on an unsuccessful candidate, even though they might destroy his chance of a political career.[33]

I used to believe that it might be appropriate to regard the verdict in a *dokimasia rhêtorôn* as simply declaratory (in other words, that the result of Timarkhos' conviction would be to formalise the loss of those rights that even previously he had not been entitled to exercise).[34] But on reflection MacDowell is probably right in believing that there was more to it than this. I am not wholly convinced by what I take to be his use of Dem. 19. 283-4 to argue that Timarkhos' conviction imposed some sort of penalty on his family,[35] since the passage might simply refer to the humiliation that his conviction had caused them. MacDowell himself (forthcoming) sees Timarkhos' status prior to the trial as an example of what Wallace (1998) has called "unconvicted or potential *atimoi*"[36] – though Wallace himself is careful to gloss this term as being "subject to many or all of of the restrictions associated with *atimia*" (1998: 74), and rightly emphasises that all those concerned in the case, including Aiskhines himself, are careful not to apply the term *atimos* to Timarkhos until after his conviction (1998: 70-71, 75). An obvious parallel here, which has not I think been discussed in this context, is that of Andokides under the terms of the decree of Isotimides, which itself raised all sorts of legal uncertainties.[37]

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[33] *Ath.Pol.*, 42.1, makes clear that a judicial penalty is imposed at the *dokimasia* of ephebes only if there is a further stage in the process (in cases where a young man loses a subsequent appeal against the deme's decision that he is not of citizen birth, he is penalised by enslavement). In the case of public office, the evidence is negative but consistent: both Leodamas' rejection in Lys. 26. 14-15, and that of Theramenes in Lys. 13. 10, are described with the verb *apodokimazô*, even though it would have suited the speaker in both cases (particularly the latter) to have used stronger language if the result of the decision had been e.g. a penalty of *atimia*.

[34] Thus tentatively Todd (1993: 116 n. 15). This view would evidently be shared by Gagliardi (forthcoming), who argues that it is the prostitution (cf. n. 9 above) rather than the public speaking which is the core of the offence in *dokimasia rhêtorôn*, on the grounds that the defendant had not actually spoken at the moment when the charge was laid. I am not convinced, however, that Athenians would have classified as a non-offender somebody whose clear attempt to commit an offence had been prevented by circumstances outside his control.

[35] Thus MacDowell (2000: 25): it is however hard to see how Timarkhos' mother (as opposed to his children) would have been legally implicated in any form of *atimia*.

[36] MacDowell (2000: 22) is surely right to infer from the text of Aiskh. 1. 19-20 that the law dealing with *graphê hetairêseôs* specified the things that a former prostitute was not allowed to do rather than simply saying "let him be *atimos*," but he appears to accept that these things together constituted the form of partial *atimia* described at Andok. 1. 75 as *kata prostaxeis* ("according to specifications"), thereby implying that an unconvicted prostitute could legitimately be described as *atimos*. On the question of Aiskhines' omissions here, see n. 11 above.

[37] Andok. 1. 71-80. The fact that nobody could decide whether the restrictions imposed on Andokides had or had not lapsed under the decree of Patrokleides, which repealed nearly every category of *atimia*, suggests that his status was problematic; and his own attempt at

2) Aiskhines' age-classes: law and social practice

A standard technique of an Athenian orator when faced with a difficult case is to cite in evidence large numbers of laws that are not directly relevant to his case, and Aiskh. 1 is no exception here.[38] It is generally and in my view rightly held that with some possible exceptions the laws to which he refers are on the whole genuine, though the ways in which he interprets them may well not be.[39] In particular, it is part of his strategy to emphasise the extent to which the various laws on particular topics form a coherent conceptual unity.

One of the most striking features of Aiskhines' treatment of the law is the way in which he promises at 1. 7-8 to divide up his material and deal successively with the legal regulation first of *paides* (boys), secondly of *meirakia* ("youths," but cf. below), and finally of other age groups (*hêlikiai*), a category which he classifies as covering both private individuals (*idiôtai*) and also politicians (*rhêtores*). In the first of these categories he places together a rag-bag of regulations dealing with schools, gymnasia, and dithyrambic choruses (1. 9-12),[40] followed by rules on the hiring out specifically of boys for prostitution, on the procuring of free boys or women (*proagôgeia*), and on *hubris*, here envisaged specifically as sexual assault (1. 13-18). The second category of laws he glosses as referring to those who have recently joined their deme registers as adults, and consists only of the *graphê hetairêseôs* (1. 18-21). The third group is introduced as "laws dealing with *eukosmia* (good discipline)" (1. 22), beginning with rules on the conduct of Assembly meetings (1. 23-24),[41] drifting into a contrast between ancient and modern styles of public speaking (1. 25-26), covering in considerable detail the *dokimasia rhêtorôn* (introduced as a law designed to distinguish those who should and should not be allowed to address the Assembly, 1. 27-33), and culminating in the one law which

§§ 7-79 to blind the jury with a detailed survey of these categories (none of which seem to apply to his own case) suggests that he was aware of this.

[38] It is perhaps worth noting that Aiskhines' *eukosmia* and tribal supervision laws are so marginal to the issue of homosexuality that MacDowell (2000) quite reasonably omits them.

[39] For the tendentious interpretations elsewhere in the speech, see n. 30 above. Fisher (2001: 129) envisages at least the possibility that some of Aiskhines' school regulations here may be "bold inventions."

[40] This is the one of this group of laws which can plausibly be shown to be of fourth-century institution, because it did not apply at the time of Lys. 21. 4, where the speaker claims without hesitation to have been *khorêgos* for a boys' dithyrambic chorus while still in his mid-twenties.

[41] This includes an otherwise unattested rule granting precedence to speakers aged over 50, which is the only one he cites that fulfils his promise to deal successively with the various adult *hêlikiai*, cf. above. His other promise, to cover the laws relating both to private individuals and to orators, is fulfilled only insofar as orators form the subject of the *dokimasia rhêtorôn*: none of his regulations are specific to private individuals.

he recognises as having a recent origin, and which deals with the tribal supervision of Assembly meetings (1. 33-34).[42]

The question arises as to how far Aiskhines' grouping of his material is one which would naturally have been shared by his hearers, and how far he is engaged in persuasive definition. The answer appears to be a complex one. As far as the regulations dealing with boys are concerned, there are internal reasons to believe that some at least of the prostitution-laws relate specifically and only to those who are legal minors: most notably the one penalising any parent or guardian who hired out a boy as a prostitute and anybody who paid for such hire (1. 13).[43] The promise to deal with the various adult *hêlikiai*, on the other hand, receives virtually no attention in 1. 22-34, barring perhaps the claim that those aged over 50 were invited to be the first to address the Assembly (1. 23).[44] And certainly the proposition that there were separate regulations dealing with the sexual activities of *meirakia* is unconvincing: Fisher (2001: 144) righly notes that Aiskhines' claim that the *graphê hetairêseôs* was aimed at *meirakia* and the *dokimasia rhêtorôn* at adults is highly artificial, and suggests that it was designed simply to justify his own choice of the latter procedure.

This raises the further question, of course, of how far the word *meirakion* (or indeed any other age-related term) has a clearly defined meaning in law. Aiskhines himself, as we have seen, glosses it as referring specifically to those who have newly been entered onto their deme registers and are therefore adult. But his failure to find a group of laws that genuinely do deal specifically with the sexual activities of *meirakia* may suggest that the word may not have had such clear parameters – unlike for instance the terms ephebe, or in certain contexts *pais*.[45]

Presumably one of the reasons that Aiskhines can get away with inventing *meirakion* as a legal concept is that this matches the social expectations of the audience, for whom normative homoerotic relationships were age-coded, with the typical *erastês* being in his twenties or early thirties and the typical *erômenos* being in his late teens or early twenties.[46] *Meirakion* is certainly the term which Lysias

[42] The laws quoted in our manuscripts at 1. 35 are less obviously derived from Aiskhines' surrounding remarks than elsewhere in this speech, but this does not make them necessarily reliable: see Fisher (2001: 164).

[43] The context suggests that this relates only to citizen boys, rather than to non-citizens.

[44] Aiskhines is the only evidence for this regulation, and his attribution to "the lawgiver" need not necessarily mean that it was effective at the time of the speech (certainly thirteen years later he claims that it was no longer in force: Aiskh. 3. 4). Some scholars have indeed suggested that the regulation is something that he has invented: a range of views on this question are surveyed in Fisher (2001: 148-149).

[45] Aristoph., *Wasps.*, 578, and *Ath.Pol.*, 42. 1, both suggest that *pais* could be used in contexts of citizenship law where there is a need to distinguish adults from non-adults.

[46] This is a generalisation, and as such may over-state the reality: Aiskhines himself is probably in his mid forties at the time of the speech (some scholars emend the text of 1. 49 to make him still older), and there is no suggestion at 1. 135-136 that his activity as

uses repeatedly to denote Theodotos, whom he is evidently seeking at that stage to construct as the speaker's *erômenos* rather than as a prostitute, and it may be that he is deliberately playing with the ambiguity of the term,[47] just as he may also be playing with the ambiguity of Theodotos' civic status elsewhere in the speech.[48]

If we abandon Aiskhines' tendentious treatment of *meirakia*, we are left with something of a dissonance between law and social practice. In law, the crucial distinction here seems to be the age of majority.[49] Below this age, a range of penal sanctions were available primarily against fathers or guardians who hired out a boy for prostitution or clients who hired his services;[50] above it, as we have seen, the only consequences seem to have been prohibitory rather than penal, and to have applied only to the prostitute himself. In social practice, however, the normative age-span for an *erômenos* does not seem to have taken account of this. David Cohen has

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an *erastês* as something that is now in his past. He is somewhat defensive about this, though he displays nothing like the embarrassment shown by the speaker of Lys. 3 (perhaps because the latter's opponent Simon was significantly younger and therefore more plausible as an *erastês*, or perhaps because Theodotos was more obviously a prostitute).

47 If Theodotos is still legally a minor, and if he is a citizen (both of these are big "if"s), then for either Simon or the speaker to have hired his sexual services would presumably have rendered them liable to the law cited at Aiskh. 1. 13.

48 The key passage here is Lys. 3. 33, which claims that "this *paidion* (little boy) could not have given me any assistance but was capable of denouncing me under torture if I did anything illegal." I am not convinced by the suggestion that *paidion* here denotes somebody other than Theodotos (a view which goes back to Dobree 1874: 194 and Blass 1887: 586 n. 3, and has recently been restated by E. Cohen 2000a: 170-1 [cf. 2000b: 128 n. 63] and by Cairns 2002), since the person referred to clearly plays the same rôle in the fight as is attributed to Theodotos at § 29 (thus rightly Bushala 1968: 66-68). *Paidion* is the normal word for a small child, but in normal Greek usage it can also denote a slave, and Lysias seems to be playing on both meanings: the former allows him to emphasise the lack of physical support, while the latter is reinforced by the terms *basanizomenon* and *mênusai* (both terms associated with slavery, but *mênusis* is normally found in religious contexts where a slave is permitted to denounce without being tortured).

49 There is some evidence that other ages mattered in particular contexts: for instance, *Ath.Pol.* 42. 5 claims that those who had reached their majority were not eligible to prosecute or be prosecuted in most categories of case during the two years of the *ephêbeia*, and Hansen (1987: 7) suggests that the same rule is likely to have restricted them from speaking in the Assembly also.

50 Thus 1. 13 (though the name of the *graphê* is not stated) = MacDowell's law [B. 1]: Aiskhines' claim at 1. 13 that the law does not permit a *graphê* to be brought against the boy at first sight suggests that he faced no legal consequences, but the reference to the boy's loss of *parrhêsia* at 1. 14 makes clear that he faced the same prohibitory consequences as an adult prostitute. Similarly 1. 14 = MacDowell's law [B. 2] (*graphê proagôgeias* against anyone who procures a free boy or woman for prostitution). Cf. also 1. 15-17 = MacDowell's law [C. 3] (*graphê hubreôs* against anybody who commits *hubris* against any boy, man or woman, free or slave), though this does not restrict the offence to prostitution.

put forward the unprovable but attractive suggestion that Athens may have had some equivalent of the common-law concept of the age of consent, albeit informally rather than defined in law: in other words, that although the *erastês* of a minor would in principle be liable to an action for *hubris* brought by the boy's father, nevertheless the defence of consent would be much more persuasive if the boy was aged 17 than if he was aged 10.[51]

The sexual significance of *hubris* has recently been further developed by Ed. Cohen,[52] for whom the *hubris* law constituted "effective protection against the sexual abuse of children, slaves and women," but this seems to me to overstate the case. Cohen's most powerful argument, to my mind, draws attention to a passage in Deinarkhos which at first sight would seem to provide examples to back up the notoriously unsupported assertion of Demosthenes that Athenian courts had often executed people for *hubris* against slaves.[53] But Dein. 1. 23 is by no means as clear as might at first seem. Admittedly at least one and possibly all three of his examples relate to citizen offenders,[54] but one of the victims is explicitly stated to be free,[55] the second is unspecified, and the third would seem to fall into a category whose capacity to be enslaved was rejected on ideological grounds by at least some Athenians.[56] Perhaps most significant, however, is a passage not discussed in this context by Ed Cohen, but which in my view tends to confirm more broadly David Cohen's hypothesis that whatever the wording of the law, there are certain situations where it is recognised that an Athenian jury will never convict: this seems to me to be clearly implied by Apollodoros' claim that his hostile neighbours had sent a

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51 D. Cohen (1991b: 182).

52 E. Cohen, e.g. (2000a: 165-167).

53 Dem. 21. 49: πολλοὺς ἤδη παραβάντας τὸν νόμον τοῦτον ἐζημιώκασιν θανάτῳ. The sweeping generalisation would be considerably strengthened by examples, and Demosthenes' failure to cite any may indicate that he did not have them ready to hand.

54 Themistios has an Athenian demotic, though Menon and Euthymakhos do not.

55 The nameless boy from the Peloponnesian *polis* of Pellene (or the Athenian deme of Pallene: the latter is perhaps more likely to be found within Athenian jurisdiction, and the emendation is accepted without comment by Worthington [1992: 169], but I am not aware of any manuscript authority). Incidentally, although the third case (the Olynthian) is clearly and the second (the Rhodian) arguably sexual, the location of the crime in the first case suggests kidnapping or slaving (a free orphaned boy might find it very difficult to prove his status, especially if foreign).

56 Demosthenes' story of the Olynthian *paidiskê* at the ambassadorial party (Dem. 19. 196-198) implies that the jury could be expected to regard the girl's enslavement as illegitimate. Citizens of Olynthos were certainly granted *isoteleia* at Athens (Harpok. s.v. *isoteles*) following the fall of the city to Philip in 348. Indeed, it is possible that the Souda (s.v. *Karanos*) is right to claim that they received Athenian citizenship *en masse*: this is rejected by M.J. Osborne (1981-83. iii: 125-6) on the grounds that Aiskh. 2. 154, delivered in 343, produces a witness named Aristophanes of Olynthos; but given that Aristophanes' Olynthian ethnicity is what makes him a credible witness, I am not convinced that the use of a foreign ethnic here is sufficient to prove him to be a metic.

young boy who was *paidarion aston* (young citizen boy) onto his land to pick the roses, "in order that if I seized and tied him up or struck him in the belief he was a slave, they would be able to bring a *graphê hubreôs*."[57]

3) Heterosexuality and homosexuality

Modern work on Athenian male homosexuality has tended to focus fairly closely on Aiskh. 1 and issues of prostitution, and vice versa. This however raises a series of questions about other forms of sexual activity. We have, as Cantarella notes, no evidence for the legal regulation of lesbianism,[58] which may reflect the male focus of our texts or alternatively the male focus of the legal system that they represent. As far as female prostitution is concerned, Lysias quotes (as an example of archaising language in a law he attributes to Solon) a phrase which presumably denotes some category of prostitute,[59] and we are told of a *pornikon telos* or prostitution tax which appears to have been levied on both sexes: Aiskhines makes clear that Timarkhos' supporters are using the absence of his name from the relevant register as evidence that he is not a registered prostitute, and Androtion is said to have arrested for non-payment two women who are explicitly described as *pornai*.[60] But the wording of the laws quoted at Aiskh. 1. 13-14 makes me wonder how close the parallels are between male and female prostitution, and whether for instance any penal sanctions would have been imposed on men who hired or hired out the sexual services of an under-age citizen girl.[61]

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57 Dem. 53. 16: ἵνα, εἰ καταλαβὼν αὐτὸν ἐγὼ δήσαιμι ἢ κατάξαιμι ὡς δοῦλον ὄντα, γραφήν με γράψαιντο ὕβρεως. E. Cohen (cf. n. 74 below) would dispute the translation "citizen" for *astos*, but even on his reading the boy here is clearly free, since the alleged trick would not have worked if he were a slave.

58 Cantarella (1989: 153), who suggests that it was also a private matter with no legal significance (which is probably true if one rules out prostitution).

59 Lys. 10. 19: ὅσαι δὲ πεφασμένως πωλοῦνται, which he interprets to mean "those women who walk about in public." Plutarch, *Solon*, § 23, glosses this phrase as referring to *hetairai*, and claims that they were exempted from rules governing *proagôgeia*, for which see n. 50 above. Dem. 59. 67, however, offers a longer version of the phrase including a clear reference to brothels (ὁπόσαι ἂν ἐπ' ἐργαστηρίου καθῶνται ἢ πωλῶνται ἀποπεφασμένως), which suggests that it may have been from a law defining categories of women with whom sexual relations did not constitute *moikheia* and/or provide an opportunity for justifiable homicide.

60 Timarkhos: Aiskh. 1. 119-120. Androtion's arrest of Sinope and Phanostrate (ἀνθρώπους πόρνας): Dem. 22. 56. (Strictly speaking, what this latter passage denies is they had arrears of *eisphora*, but the point is presumably that it was *eisphora*-defaulters that Androtion was supposed to be pursuing.)

61 The *proagôgeia* law at Aiskh. 1. 14 does refer to women (of any age) as well as boys, but MacDowell (2000: 18: his law [B. 2]) has tentatively suggested that this might apply only to "somebody who made a regular business of sexual exploitation;" there is no mention of girls or women in the law cited at 1. 13.

While on the subject of brothels, incidentally, I am not wholly convinced by the argument that the existence of the *pornikon telos* indicates equal state-support for the practice of both male and female prostitution.[62] The fact that an activity is taxed does not necessarily indicate that it has the full support of the law, as was noted in a recent UK case where a defendant sought unsuccessfully to appeal against her income tax assessment by pleading that prostitution did not have all the legal characteristics of a trade and could not therefore be taxed as trading income.[63] We do have one passage from comedy which describes the purchase of cheap female prostitutes as a populist measure on the part of Solon,[64] but it is hard to know what to make of this; nor of the rules capping the charges for flute-girls,[65] which could have been designed to focus on situations where sexual competition could generate undesirable levels of street-brawling.

One might at first sight seek to explore issues of gender differentiation via the strikingly different way in which Lysias describes the sex-objects in a matching pair of speeches: Theodotos, the male Plataian in Lys. 3, is repeatedly named, whereas the woman in Lys. 4 is not simply never identified by name – and I doubt if this anonymity can be seen as a mark of respectability of the sort suggested for citizen women by Schaps (1977) – but is referred to repeatedly and disparagingly as a slave prostitute.[66] But there may be more important issues possibly of civic status and certainly of rhetorical strategy here. For one thing, the woman in Lys. 4 is unquestionably a slave, whereas the status of Theodotos is much less certain. Moreover, whereas the aim in the one speech is to represent Theodotos as an agent whose affections are to be courted (3. 5, 3. 31), the affections of his female counterpart in the other speech are depicted as fickle (4. 8) and the point of interrogating her is simply to determine the factual question of ownership (4. 9). A better parallel to Theodotos might perhaps be Neaira in Dem. 59, a woman who is repeatedly named (albeit disparagingly so), and who has at least some say over her own affairs (in every sense of the word).[67]

To the extent that the law of *hubris* covers issues of sexual assault, it is striking that the formulation quoted by Aiskhines draws few formal distinctions of gender or

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62 Thus e.g. E. Cohen (2000a: 185-186).

63 "It was submitted that for an activity to be a trade within the Taxes Act, it must have all the attributes of a trade including the right to enter into enforceable contracts, to advertise, to enter into partnership, to employ people and to rent premises; and since it was illegal for a prostitute to do many of these things her activity could not be treated as constituting a trade" (*Inland Revenue Commissioners v Aken* [= the Lindi St Claire case], reported in *Simon's Tax Cases* [1990] p.497).

64 *Dêmotikon pragma*: Philemon, *Adelphoi*, fr. 3, line 7 (Kassel/Austin vii [1989] p. 230) quoted in Athenaios 13. 25 = 13. 569de.

65 *Ath.Pol.* 50. 2 and Hyp., *Euxen.*, § 3.

66 πόρνης ἀνθρώπου at Lys. 4. 9, πόρνην καὶ δούλην ἄνθρωπον at Lys. 4. 19.

67 Though Carey (1992: 16) notes that it is the men who undertake all the negotiations e.g. at Dem. 59. 47, with no apparent reference to Neaira's wishes.

status for the victim: “boy or man or woman, whether free or slave,”[68] though it may be that in practice certain types of *hubris* were envisaged as more likely to affect certain categories of victim.[69] The *dikê biaiôn*, on the other hand, is represented by Lysias as dealing separately first with males (whether man or boy) and then with females (specified categories evidently excluding prostitutes),[70] but since the penalty in each case is the same, it is not absolutely clear that this differentiation will have been laid down in the text that he has had quoted.

4) Marriage: public and private in Athenian law

One area where there is necessarily clear gender differentiation is of course marriage, but it is perhaps worth emphasising the limited extent to which this was legally regulated. With the exception of the epiklerate, where there were clear issues of public policy (including the protection of citizen girls and the orderly transmission of citizen households), marriage at Athens does not seem to have required any form of legally registered ceremony.[71] In part this may have been because inheritance law at Athens, as at Rome, does not seem to have made spouses into each other’s heirs:[72] in modern jurisdictions it can be legally important to determine the moment at which a marriage has taken place (e.g. for intestate succession in case one of the parties drops dead during the ceremony), but in the classical world the existence of a marriage is only of legal significance when children become involved, so the moment of marriage is legally much less important than the continuing fact of marriage.[73] It is worth noting here that Perikles’

[68] Aiskh. 1. 15: ἐάν τις ὑβρίζῃ εἰς παῖδα ... ἢ ἄνδρα ἢ γυναῖκα, ἢ τῶν ἐλευθέρων τινὰ ἢ τῶν δούλων.

[69] The type of *hubris* that Demosthenes claims to have suffered at Meidias’ hands, for instance, relies on his representing himself as a citizen acting in an official public capacity, such that the offence was committed against the *polis*.

[70] Lys. 1. 32: ἐάν τις ἄνθρωπον ἐλεύθερον ἢ παῖδα αἰσχύνῃ βίᾳ, διπλῆν τὴν βλάβην ὀφείλειν· ἐὰν δὲ γυναῖκα, ἐφ’ αἷσπερ ἀποκτείνειν ἔξεστιν, ἐν τοῖς αὐτοῖς ἐνέχεσθαι (“if anybody indecently assaults a free man or boy, he shall pay twice the damages; but if he assaults a woman, in those categories where the death-sentence is applicable, he shall be liable to the same penalty”).

[71] I am not of course denying that there were rituals, but rather that there was any form of state registration of such rituals. Given the extent to which recent scholarship has highlighted the rôle of the phratry in the Athenian *polis*, however, it is worth noting the extent to which custom and practice seems to have dictated that the bridegroom should mark his wedding with a feast for his phratry-members: Isaios 3. 76, 79; 8. 18, 20; Dem. 57. 43, 69.

[72] A question to which I am not sure that an answer can be given: the dowry certainly gets returned to the wife’s agnates in case of divorce, but who gets it if she dies without children?

[73] Hart (1963: 39) emphasises the oddity of how bigamy is treated in English Common Law, by noting that what is penalised is not cohabitation or even pretending to be married, but specifically going through a ceremony of marriage. I suspect, however, that he may be underplaying the rôle of Christian sacramental theology as a historical

citizenship law of 451/0 (even on a conventional reading) was framed not in terms of banning certain categories of marriage, but rather of restricting the civic status of offspring.[74] Admittedly this seems to have changed by the time of Apollodoros' case against Neaira in the 340s, but the fact that the law in question speaks of "cohabitation" even when it apparently means "marriage" suggests a certain linguistic and perhaps conceptual awkwardness.[75]

This may be relevant to the vexed question of *moikheia*. I am still not wholly sure what my view is of David Cohen's famous argument that *moikheia* is used in our sources specifically with reference to married women, or in other words that it should be translated as "adultery" rather than "seduction."[76] There are certainly a lot of attractive features in Cohen's thesis. In particular, he appears to have succeeded in demolishing some of the more implausible arguments of Paoli, whose theory that *moikheia* was an offence against the household led him to believe not simply that it was only *moikheia* if it took place within the house, but also that the right to kill the *moikhos* reflected a residual jurisdiction of the household which remained outside the competence of the *polis*.[77] This seems to me highly implausible: there are admittedly many areas of life (and death) in which the classical Greek *polis* chose

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explanation, which would not have applied in antiquity. It is not clear to me whether we have any evidence as to whether bigamy (or indeed incest) would have been regarded as specifically legal offences (rather than simply as transgressive behaviour) in Athens.

[74] *Ath.Pol.* 26. 3: μὴ μετέχειν τῆς πόλεως, ὃς ἂν μὴ ἐξ ἀμφοῖν ἀστοῖν ᾖ γεγονώς ("that nobody should have a share in the *polis* unless he is born of two *astoi*"). The unconventional reading alluded to here is that of E. Cohen (1997 and 2000a: 49-78), for whom the term *astos* denotes not "citizen" but "local," thus transforming Perikles' law from a restrictive measure to an inclusive one permitting full assimilation of second-generation immigrants into the community. Nobody to my knowledge has succeeded in refuting this hypothesis, but I have yet to find anybody who agrees with it.

[75] Law quoted in Dem. 59. 16: ἐὰν δὲ ξένος ἀστῇ συνοικῇ τέχνῃ ἢ μηχανῇ ᾑτινιοῦν ("if a male *xenos* cohabits with a female *astê* by any manner or contrivance whatever"), paraphrased at 59. 17: ὃς οὐκ ἐᾷ τὴν ξένην τῷ ἀστῷ συνοικεῖν οὐδὲ τὴν ἀστὴν τῷ ξένῳ, οὐδὲ παιδοποιεῖσθαι, τέχνῃ οὐδὲ μηχανῇ οὐδεμιᾷ ("[the law] does not permit a female *xenê* to cohabit with a male *astos*, nor a female *astê* with a male *xenos*, nor to produce children, by any manner or contrivance"). Compare the difficulty faced by Lys. 1. 31 in finding a single word to denote specifically a wife, for which he has to use the periphrasis *gametê gunê* ("married woman").

[76] D. Cohen (1984), cf. (1991a: 98-132), tentatively followed by Todd (1993: 277). For some detailed criticisms of this view, see n. 79 below.

[77] Paoli (1950: 144 = 1976: 270). Carey (1995: 416) does not confront the issue of residual jurisdiction, but notes that there is no basis for Paoli's view that it was only *moikheia* if it took place within the *oikos* (and in fact this is surely disproved by Aristoph. *Thesmo.*, 476-89 and esp. *Ekkles.*, 522). This is not to say, of course, that entering the house might not be rhetorically significant, as it is in Lys. 1 (§ 4, § 23, § 25, § 38, § 40), where it reinforces the transgressive nature of Eratosthenes' act. (I have sometimes wondered whether there is a play on "penetration" here, but I am not aware that the word *eiserkhomai* could have sexual connotations.)

not to intervene, but like the mediaeval papacy it seems to have permitted no rival claims to jurisdiction.

Cohen is certainly right to emphasise that the term *moikhos* is not used in the law listing those categories of women whose violation by a man can justify his being killed, and subsequent scholars have indeed emphasised that this law does not appear to differentiate between seduction and rape.[78] A lot depends on how one interprets the apparent counter-example in Dem. 59. 65-67, where Epainetos is described as *moikhos* at the moment of his capture with Nikarete apparently after her divorce.[79] But I am beginning to wonder whether the view of marriage that I have been presenting in the final section of this paper, as something in which the law took no very great interest, might if anything be an argument against Cohen's thesis.

Looking at the question overall, I think I am probably coming to agree with the consensus of recent scholars for whom sexuality is regarded at Athens as largely a private matter in which the law did not choose to concern itself, except and unless issues of public policy were involved. But of course what constitutes the boundary between public and private is always open to negotiation.

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[78] Text in Dem. 23. 53. Absence of clear differentiation between adultery and rape: Omitowoju (2002). For the claim at Lys. 1. 32-33 that Athenian law regarded seduction more seriously than rape, see variously Cole (1984: esp. 103-104), Harris (1990) and Carey (1995).

[79] For challenges to Cohen on this point, see e.g. Carey (1995: 408 with n. 3) and Omitowoju (2002: 78-79).

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