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Carawan, Edwin M. "Akriton apokteinai: execution without trial in fourth-century Athens." *Greek, Roman, and Byzantine Studies* 25, no. 2 (1984): 111-121.

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Akriton Apokteinai: Execution without Trial in Fourth-Century Athens

Edwin M. Carawan

THE EVOLUTION of Athenian legal procedure and the growing power of the courts has been a major focus of work on Athenian law for more than a quarter-century. The studies of H. J. Wolff and M. H. Hansen have shown how the sovereignty of the courts in the fourth century was built upon the ‘suit for illegality’ (*graphe paranomon*), the *paragraphe* to bar litigation, ‘impeachment’ (*eisangelia*), and related procedures.¹ On the other hand, ‘denunciation’ and ‘summary arrest’, *endeixis* and *apagoge*, have been regarded as exceptions to the principle of the sovereignty of the court, *δικαστήριον πάντων κύριον*. Hansen has suggested that the magistrates in charge in these procedures, the Eleven, the *thesmothetai*, or the council of 500, often ordered execution without trial, τὸ ἀκριτον ἀποκτείναι.² This conclusion is based on two arguments: first, it is assumed that the law gave the archon authority for execution not only in *apagoge*, for which we have many references, but also in *endeixis*, which is understood as another stage of the same procedure; second, it is argued that a number of passages in the extant authors allude to executions in these procedures as though they were com-

¹ The work of E. Ruschenbusch, “*Δικαστήριον πάντων κύριον*,” *Historia* 6 (1957) 257–74, led to a reconsideration of some traditional views on the Athenian legal system: the modern notion of ‘separation of powers’ had no place in Athenian government; and the idea that the assembly of the people held supreme authority is unfounded. See H. J. Wolff, “*Normenkontrolle*” und *Gesetzesbegriff in der attischen Demokratie* (SitzHeidelberg 1970) 60–67; and M. H. Hansen, *The Sovereignty of the People’s Court* (Odense 1974) 15–18, 62–65; on *paragraphe*, H. J. Wolff, *Die attische Paragraphe* (Weimar 1966); on the sovereignty of the courts in *eisangelia*, M. H. Hansen, *Eisangelia* (Odense 1975) 51–55.

² M. H. Hansen has concluded, in *Apagoge, Endeixis and Ephegesis* (Odense 1976) 118–19, that, although the courts had assumed sovereignty in political disputes (through the *graphe paranomon* and *eisangelia*), in criminal cases including *apagoge* and *endeixis* there was no forward evolution in the administration of justice, but the Draconian principles of arrest and execution continued in practice; in these procedures “penalties were often inflicted without trial.” For the traditional view see J. H. Lipsius, *Das attische Recht und Rechtsverfahren* II (Leipzig 1908) 317–21, 331–35; A. R. W. Harrison, *The Law of Athens* II (Oxford 1972) 221–30; and the discussion in Hansen, *Apagoge* 9–11.

monplace.³ On closer examination, however, it will be clear that neither argument is compelling, and even in *apagoge* the sovereignty of the court was unquestioned.

Two issues are involved: what were the provisions of statutory law; and what were the procedures in common practice. By law *apagoge* led to execution without trial if the accused were arrested ἐπ' αὐτοφώρῳ, and if they confessed their crimes; but in practice there may have been very few executions on the archons' orders. The clearest testimonia on the statute for execution in *apagoge* are found in Aeschines 1.91, 113, and Aristotle *Ath.Pol.* 52.1:

Aeschin. 1.91: τίς γὰρ ἢ τῶν λωποδυτῶν ἢ τῶν μοιχῶν ἢ τῶν ἀνδροφόνων ἢ τῶν τὰ μέγιστα μὲν ἀδικούντων, λάθρα δὲ τοῦτο πραττόντων, δώσει δίκην; καὶ γὰρ τούτων οἱ μὲν ἐπ' αὐτοφώρῳ ἀλόντες, ἐὰν ὁμολογῶσι, παραχρῆμα θανάτῳ ζημοῦνται, οἱ δὲ λαθόντες καὶ ἕξαρνοι γιγνόμενοι κρίνονται ἐν τοῖς δικαστηρίοις.

1.113: οἱ δὲ νόμοι κελεύουσι τῶν κλεπτῶν τοὺς μὲν ὁμολογοῦντας θανάτῳ ζημοῦσθαι, τοὺς δ' ἀρνούμενους κρίνεσθαι.

Ath.Pol. 52.1: . . . τοὺς ἕνδεκα . . . καὶ τοὺς ἀπαγομένους κλέπτας καὶ τοὺς ἀνδραποδιστὰς καὶ τοὺς λωποδύτας, ἂν μὲν [ὁμολογῶ]σι⁴ θανάτῳ ζημώσοντας, ἂν δ' ἀμφισβητῶσιν εἰσάξοντας εἰς τὸ δικαστήριον.

From these passages it appears that the archons in the fourth century still had authority to execute felons who had been arrested *in flagrante delicto*, “if they confess”; but Aeschines' comments (1.91) suggest that criminals seldom confessed to capital crimes. The accused was not likely to confess if he knew that his life was at stake, and without a confession it is difficult to see how the archon could have given a verdict in the *anakrisis*. It is possible that the archon still had some authority to interpret the statements or actions of the accused as admission of guilt (and this may be the broader meaning of ἐπ' αὐτοφώρῳ and ἐὰν ὁμολογῶσι), but we have very little evidence to suggest that the archon often exercised such authority to order execution without trial.⁵ The statute for execution in *apagoge*

³ Hansen, *Apagoge* 18, claims “we have ample evidence that *endeixis* sometimes led to arrest and immediate execution”; among references to execution in *apagoge* and related procedures he cites Lys. 6.18 (referring to the outlawry proclaimed against those implicated in the profanation of the Mysteries); 13.67, 78 (which refer to military executions in wartime); Dem. 23.31; 24.65, 208; as well as Aeschin. 1.91, 113, and *Ath.Pol.* 52.1 (quoted *infra*).

⁴ Kenyon's restoration, from *Lex.Seg.* 310.4 and *Poll.* 8.102, is surely right; see the discussion and bibliography in P. J. Rhodes, *Commentary on the Aristotelian Athenaeon Politeia* (Oxford 1981) 581.

⁵ From Lys. 13.85–87 it is clear that ἐπ' αὐτοφώρῳ was open to interpretation; Hansen has argued convincingly (*Apagoge* 48–52, cf. *GRBS* 22 [1981] 28–29) that arrest ἐπ'

was still on the books, but whether it was often invoked is another question.

The magistrates may have had authority to order execution in a greater number of cases if, in fact, *endeixis* could also lead to execution without trial. Lipsius had assumed that *endeixis* was available only against exiles who returned without reprieve and *atimoi* who violated prohibitions, and that only exiles could be executed by this procedure; but Hansen has argued that the criteria for *apagoge* and *endeixis* were not the crimes themselves and the penalties prescribed, but the rôles of the accuser and the archon in the procedure, and thus even *kakourgoi*, liable to arrest and execution, could be prosecuted by *endeixis*.⁶ In practice, however, the nature of the crime determined the procedure: ordinarily, arrest was the most effective means of bringing felons to justice; denunciation was in order when exiles returned without reprieve.

Hansen has shown that in *endeixis* the prosecutor himself either makes the arrest, as in *apagoge*, or summons the accused to appear before the archon.⁷ This means that *endeixis* involves the following procedure: (1) the archon, in effect, gives warrant for the arrest or summons; (2) the prosecutor brings his charges before the archon, the Eleven, or the *thesmothetai*; (3) the prosecutor himself either makes the arrest or summons the accused to appear before the archon; (4) there must have been some preliminary hearing or *anakrisis* in which the accused was questioned, entered his plea, and may have cross-examined his accusers; this hearing would lead to (5) trial or execution.⁸ Thus *endeixis* is appropriate only when the prosecutor

αὐτοφώρῳ refers to apprehension of the criminal 'in discovery of the theft' (as *furtum manifestum*), and not necessarily 'caught in the act' as it is often interpreted. *ἐὰν ὁμολογῶσι*, however, was not open to interpretation; see *infra* on Dem. 25 hyp. 1-2.

⁶ See Lipsius (*supra* n.2) 331-35. On *endeixis kakourgon* cf. Hansen, *Apagoge* 18-20, 36-38; and Harrison (*supra* n.2) 231.

⁷ Whereas Lipsius (331) had held that in *endeixis* the *thesmothetai* make the arrest, Hansen has shown that, in *endeixis* as well as in *apagoge*, it is the prosecutor who makes the arrest (*Apagoge* 13-17). This is now generally accepted: D. M. MacDowell, *The Law in Classical Athens* (Ithaca 1978) 58 and n.86; Rhodes (*supra* n.4) 580-82 on *Ath. Pol.* 52.1; but cf. G. Lalonde, *AJP* 99 (1978) 132-33.

⁸ The first procedural requirement in *endeixis* was that the accuser make his denunciation to the archon before he arrested or summoned the accused. This basic distinction between *endeixis* and *apagoge* is disregarded by Hansen, but the fact that the *endeixis* should be brought before the competent authority (cf. Hansen, *Apagoge* 20, 28-30) suggests that the archon had some authority to reject the *endeixis* if there were patent falsification or illegality; the rôle of the *boule* in rejecting Meidias' proposal for arrest and execution against Aristarchus (Dem. 21.116, cf. *infra*) suggests that the prejudicial authority was expected to exercise some discretion. In some cases the archon's 'warrant' may have been a formality, but the importance of the *endeixis* proper, the denunciation before the magistrate, is indicated in several references: e.g. Pl. *Ap.* 32B

has a strong *prima facie* case, sufficient to convince the archon to authorize a forcible arrest, when the accused is expected to resist arrest, contest the charges, or evade them by going into exile. *Endeixis* would not be a very effective remedy against, for example, robbery in progress; instead, *endeixis* seems designed to enforce legal prohibitions, exile or disfranchisement. For violators of disfranchisement (*atimoi*) jury trial was guaranteed; for exiles who returned without reprieve, Hansen would argue, *endeixis* could lead to immediate execution.⁹

As evidence for execution without trial in *endeixis*, Hansen cites only three testimonia from fourth-century sources, none of which, I shall argue, is compelling:¹⁰

Ath. Pol. 29.4: ... ἔνδειξιν αὐτοῦ εἶναι καὶ ἀπαγωγὴν πρὸς τοὺς στρατηγούς, τοὺς δὲ στρατηγούς παραδοῦναι τοῖς ἔνδεκα θανάτῳ ζημῶσαι.

Lys. 6.15: εἰ μὲν τις ἀνδρὸς σῶμα τρώσῃ ... οὗτος μὲν κατὰ τοὺς νόμους τοὺς ἐξ Ἀρείου πάγου φεύξεται τὴν τοῦ ἀδικηθέντος πόλιν, καὶ εἰ κατὴ ἐνδειχθεὶς θανάτῳ ζημωθήσεται.

Dem. 23.51: φόνου δὲ δίκας μὴ εἶναι μηδαμοῦ κατὰ τῶν τοὺς φεύγοντας ἐνδεικνύτων, εἰ μὲν κατὴ ὅποι μὴ ἔξεστιν.

The *Ath. Pol.* passage seems irrelevant here, as it refers to a decree of the year 411 against any prosecutors who brought *graphai paranomon* or *eisangeliai* to obstruct the government of the Four Hundred. We may assume that arrest and execution were a common practice under the oligarchies, but these precedents were invalidated under the democratic judiciary.¹¹

The argument at *Lys.* 6.15, in the case against Andocides, lends very little support to the notion that *endeixis* could lead to execution

(ἐτοίμων ὄντων ἐνδεικνύναι με καὶ ἀπάγειν) suggests that to prevent Socrates from 'obstructing justice' the prosecutors must first denounce him before they could forcibly remove him from the assembly; cf. *Dem.* 20.156, 53.11; *Hyp.* 5.29; and see the discussion in Hansen, *Apagoge* 15.

⁹ Hansen, *Apagoge* 18–19, and Lipsius (*supra* n.2) 319, 331–32.

¹⁰ To these he adds *Poll.* 8.49; but the lexicographer's explanation seems to be simply an inference from references in the extant speeches: ἔνδειξις δὲ ἢ πρὸς τὸν ἀρχοντα ὁμολογουμένον ἀδικήματος μήνυσις, οὐ κρίσεως ἀλλὰ τιμωρίας δεομένου; cf. *Dem.* 21.182, 24.146, 53.14, and 58.52 (ἐνδειξιν κελεύει καὶ ἄλλας τιμωρίας).

¹¹ For execution without trial under the oligarchies (1500 under the Thirty according to *Isoc.* 7.67, 20.11) cf. *Thuc.* 8.48, *Dem.* 40.46, *Lycurg.* *Leoc.* 121. Autocratic methods under the oligarchy may have affected procedure for a short time after the restoration, but such methods were soon abandoned; cf. R. Rauchenstein, "Ueber die Apagoge in der Rede des Lysias gegen den Agoratos," *Philologus* 5 (1850) 514; P. J. Rhodes, *The Athenian Boule* (Oxford 1972) 182–83.

without trial, for the focus of the speaker's arguments is the *jury's* responsibility in cases of assault and homicide as in the *endeixis* of exiles. The speaker argues that, since those exiled for assault of persons may be punished with death if they return, the jurors should be all the more zealous in the punishment of those who assault the gods themselves. In comparing those who assault other citizens with the infamous Hermokopidai, the speaker is not suggesting that the offender should be executed without trial, but that he should meet with the same condemnation that the jury would give to a murderer or assailant. ἐνδειχθεὶς θανάτῳ ζημωθήσεται simply prescribes the death penalty for convictions by this procedure, and does not suggest that the accuser's denunciation is sufficient for execution; after all, the term *endeixis* often refers to the whole procedure from denunciation to trial. Furthermore, in this case and in others involving the *endeixis* of exiles, it may not be altogether accurate to speak of execution without trial, since the accused had been given trial in the legal action which led to his exile.¹² If he has gone into exile to avoid trial, this is considered to be admission of guilt; if he has been convicted and condemned, then he must face the death penalty if he returns; but if he returns from exile the accused may have some new evidence or there may have been changes in the law to overturn the prior conviction, and in this way the *endeixis* would lead to a new trial, as in the case against Andocides.¹³

The statute cited in Dem. 23.51 is the most difficult to interpret, although it says simply, "There shall be no prosecution for homicide (by *dike phonou*) against those who denounce exiles, if anyone should return where prohibited." Some authors have assumed that this law should be interpreted as a safeguard for those who bring the *endeixis* against charges of homicide for executions carried out by the Eleven or other magistrates without trial.¹⁴ But this explanation hard-

¹² The automatic penalty prescribed for condemned men who returned from exile without reprieve is analogous in Anglo-American law to the sentence upon a convicted criminal who escapes from prison: "The rule is well established as common law that a prisoner who escapes from custody while serving his sentence for a criminal offense is liable to recapture and confinement to serve out his sentence," *American Jurisprudence* XV (San Francisco/New York 1939) 368; this rule applies even to the death penalty (*cf. infra* n. 22).

¹³ Changes in the law may have persuaded some exiles to return, as in the case of Andocides, whose *atimia* was revoked by the decree of Patrocleides; in the early years of the restoration, the amnesty may have encouraged many men, condemned under the Thirty or guilty of crimes under the Thirty, to return from exile. For the admissibility of new evidence see my comments in *GRBS* 24 (1983) 220 and n.31; *cf. Harrison (supra* n.2) 97 and n.2.

¹⁴ See Hansen, *Apagoge* 16, 26.

ly seems adequate: if the judgment for execution were contested by the relatives, it would seem more suitable for them to bring charges against the archon at his *euthyna* and to pursue other legal remedies against the prosecutor who made the denunciation.¹⁵ It seems more likely that the law is intended to safeguard the prosecutor, who has, in effect, obtained a warrant, in the event the accused is killed in the arrest, and thus to discourage the accused from resisting arrest. Execution without trial is not mentioned, although it would have been pertinent to the speaker's argument against Aristocrates' decree.

There is some evidence, moreover, that a trial would have been necessary in *endeixis*, either required by law or unavoidable in practice. The author of the *Ath. Pol.* seems to draw a distinction between the procedures in *apagoge* and *endeixis* in his discussion of the duties of the Eleven (52.1): he says that the Eleven have the authority to carry out execution without trial if the accused confesses the crime in *apagoge*, but in *endeixis* the responsibilities of the Eleven are to bring the case to court, and to carry out the execution if the jury's verdict is 'guilty'. From this distinction between the archon's duties in *endeixis* and *apagoge*, there is a clear implication that the Eleven were not called upon to carry out execution without trial in *endeixis*.

Thus the law seems to carry no specific provision for execution in *endeixis*, and when we turn to examine the proposals for execution in *apagoge*, it seems more likely that such remedies were extraordinary measures, later regarded as unconstitutional by speakers and jurors alike.

(1) The clearest case of *apagoge* leading to execution without trial occurred in the first year of the restoration: an unknown democrat was arrested by Archinus and brought before the *boule* for violation of the amnesty, and in that hearing he was condemned to death (*Ath. Pol.* 40.2): Ἀρχίνος . . . ἐπεὶ τις ἤρξατο τῶν κατεληλυθότων μνησικακεῖν, ἀπαγαγὼν τοῦτον ἐπὶ τὴν βουλὴν καὶ πείσας ἄκριτον ἀποκτεῖναι . . . Our only source is Aristotle's *Ath. Pol.*, so that we have no clear indication what procedures were followed to decide the case in the preliminary hearing before the *boule*. The author of the *Ath. Pol.* tells us only that, after the execution, there were no other cases

¹⁵ The prosecution of Agoratus (Lys. 13) suggests that those whose false information led to execution could themselves be prosecuted by *apagoge*; the prosecution of Menestratus by *apagoge* (mentioned in Lys. 13.55–57) points to the same conclusion. In other circumstances it may have been possible to prosecute for complicity in illegal execution by other means, such as *probole*, as in the case against Callixeinus for his rôle in the trial of the generals (Xen. *Hel.* 1.7.35).

of violation of the amnesty, ἀποθανόντος γὰρ οὐδεὶς πώποτε ὕστερον ἐμνησικάκησεν.¹⁶

We know that sometime after Archinus' *apagoge* the council was prohibited from ordering the death penalty (*Ath. Pol.* 45.1), and it seems evident that the council had not been in the habit of ordering executions before the tyranny of the Thirty. In fact, it appears that the bouleutic oath prohibited execution without jury trial in the later fourth century.¹⁷ Two apparent exceptions to this principle are found in the cases against the Bosporan banker mentioned in *Isoc.* 17.42 and against the metic grain dealers in *Lysias* 22. Both cases involve the prosecution of persons who were not Athenian citizens, but even in these cases it appears that the *boule* was reluctant to condemn the accused to death without trial.¹⁸

(2) In making his case against Pasion, the banker from the Bosporus suggested that in an earlier arrest he had narrowly escaped the *barathron*,¹⁹ παρὰ μικρὸν ἦλθον ἄκριτος ἀποθανεῖν (*Isoc.* 17.42), but this is no more than the usual appeal for sympathy; in fact, the proposal for execution had been rejected and the defendant was released on bond.

This case was initiated by 'information' or *phasis*, and in this case, as in the next, there is doubt about the precise classification of the procedure, but, as in the case against the grain dealers, most scholars agree that the proper procedure was *apagoge*.²⁰ The legal status of the defendants may have made them seem easy targets for arrest and summary execution.

(3) In the case against the grain dealers (*Lysias* 22.2), the speaker tells us that the defendants were taken into custody and questioned

¹⁶ Aristotle's comment may suggest either that the execution in this case was a very effective deterrent, or that the judicial powers of the *boule* in this instance were later regarded as unconstitutional; cf. Rhodes (*supra* n.4) 477–78.

¹⁷ See the discussion by K. von Fritz and E. Kapp, *Aristotle's Constitution of Athens* (New York 1950) 188 n.152. Cf. [Andoc.] *Against Alcibiades* 3 (τῷ ὄρκῳ τοῦ δήμου καὶ τῆς βουλῆς . . . ἐκεῖ μὲν γὰρ ὄμνυτε μηδένα μῆτε ἐξελεῖν μῆτε δήσειν μῆτε ἀποκτενεῖν ἄκριτον), with Harrison (*supra* n.2) 50 and n.1.

¹⁸ The Chalkis decree (*IG* I³ 40.9) of 446/5 shows that the guarantee of trial before the people extended to some non-Athenians even in the fifth century: οὐδὲ ἀποκτενῶ οὐδὲ χρέματα ἀφαιρέσομαι ἀκρίτο οὐδενός.

¹⁹ For methods of execution see L. Gernet, "Sur l'exécution capitale," *REG* 37 (1924) 261–93 (repr. in *Anthropologie de la Grèce antique* [Paris 1968], tr. J. Hamilton and B. Nagy [Baltimore 1981]). Irving Barkan, however, *Capital Punishment in Ancient Athens* (Chicago 1936) 72, 81–82, concluded that the *barathron* had fallen into disuse by the end of the fifth century; but cf. Lipsius (*supra* n.2) 77. *Apotympanismos* (not precisely crucifixion as Gernet supposed) continued to be used in some cases even after hemlock had been adopted generally as the more humane means of execution.

²⁰ See Harrison (*supra* n.2) 222 and n.3; cf. Hansen, *Eisangelia* 41, 114, *Apagoge* 31.

in the council; some members had moved for execution without trial, but the speaker had moved for trial before a court of the people “according to the law”; in his words there is a clear implication that execution would have been illegal:²¹

ἔλεγόν τινες τῶν ῥητόρων ὡς ἀκρίτους αὐτοὺς χρῆ τοῖς ἔνδεκα
 παραδοῦναι θανάτῳ ζημῶσαι . . . ἀναστὰς εἶπον ὅτι μοι δοκοῖη
 κρίνειν τοὺς σιτοπώλας κατὰ τὸν νόμον.

(4) The incident mentioned in Demosthenes’ speech *Against Aristocrates* (Dem. 23.31) is the only other example after Archinus’ *apagoge* which appears to involve arrest procedures leading to execution without trial:

οἱ θεσμοθέται τοὺς ἐπὶ φόνοφ φευγόντας κύριοι θανάτῳ ζημῶσαι,
 καὶ τὸν ἐκ τῆς ἐκκλησίας πέρυσιν πάντες ἑωρᾶθ’ ὑπ’ ἐκείνων
 ἀπαχθέντα.

The context of the arguments (27–36), however, tends to dispel the notion that such procedures often led to execution without trial—indeed, we cannot be sure even in this case that the exile was executed. In the speaker’s argument, Aristocrates’ decree contradicts existing homicide law on two points: the outlawry proclaimed against those who would assassinate Charidemus first denies trial before the court, and second denies the authority of the *thesmothetai* to carry out the jury’s verdict. The main point of the argument is that the decree disregards the authority of the courts and the officers of the courts.

In defining his terms the speaker has made it clear that those who are executed by the *thesmothetai* are murderers convicted by the court, τοῦτον ἀνδροφόνον λέγει τὸν ἐαλώκοτ’ ἤδη τῆ ψήφῳ (29); and the illegality of Aristocrates’ decree lies in this very provision for the execution of suspected assassins without jury trial, παραβὰς τὸ διωρισμένον ἐκ τοῦ νόμου δικαστήριον ἄκριτον . . . (27). In the recent incident to which the speaker refers (31), the *thesmothetai* themselves made the arrest, acting on the accuser’s information by the alternate procedure *epegesis*, against a convicted murderer who had returned from exile. The whole point of the argument is that the accused must be first convicted, and then if a convicted murderer returns from exile it is the office of the *thesmothetai* to see that the sentence is carried out. It is not altogether accurate to regard this procedure as execution without trial, and the term *akriton apokteina* is not used in reference to the office of the *thesmothetai*.²²

²¹ Hansen, *Apagoge* 34, however, interprets the speaker’s argument differently, despite the phrase κατὰ τὸν νόμον.

²² Since the convicted murderer was, in effect, sentenced to death but escaped execution by fleeing into exile (cf. Harrison [*supra* n.2] 185–86), the case here is analo-

Even in this instance we must assume that the *thesmothetai* held a hearing (1) to determine proof of identity—is the accused man the convicted murderer; and (2) to hear arguments against the prior conviction—indeed, it is unlikely that the convicted man would have appeared in the assembly without some legal recourse.²³ Furthermore, it seems unlikely that the speaker would have made reference to this incident if the accused had been executed without trial; again, one of the grounds of the *graphe paranomon* is that Aristocrates' decree punishes the accused as though convicted:

πῶς οὖν ἄν τις μᾶλλον ἐλεγχθείη παράνομ' εἰρηκῶς . . . τὸ τοῦ τῆν αἰτίαν ἔχοντος ἔλαβες ὄνομα, τὴν δὲ τιμωρίαν, ἣν οὐδὲ κατὰ τῶν ἐξεληλεγμένων διδύοασιν οἱ νόμοι, ταύτην κατὰ τῶν ἀκρίτων ἔγραψας (36).

(5) The proposal for execution mentioned in Demosthenes' speech *Against Meidias* (21.116) also involved the procedure known as *ephegesis* in a prosecution for homicide, but in this case we know that the proposal was rejected: οὗτος “ἀγνοεῖτ’” ἔφη “ὦ βουλή, τὸ πρᾶγμα; καὶ τὸν αὐτόχειρ' ἔχοντες . . . οὐκ ἀποκτενεῖτε;” In this curious document the proposal for execution is put in the mouth of Meidias as yet another example of his unscrupulous methods. In this instance, in the year 348 Meidias proposed in the council that Aristarchus, whom he had accused of murder, be arrested and executed without trial; the proposal was rejected, and instead Aristarchus was later prosecuted by the ordinary procedure *dike phonou*; he went into exile and was convicted *in absentia*.²⁴

If we are to believe that such proposals were lawful we must disregard the testimony of Aristotle that the *boule* was formally denied the authority to order execution soon after the restoration.²⁵ All the references thus far point to the conclusion that arrest and execution

gous to that of a condemned man in this country who escapes and is recaptured and returned to death row. The case of Linwood Briley in Virginia is an apt example (see the *Richmond Times Dispatch*, June 19–21, 1984): sentenced to be executed in August, he escaped, was recaptured, and (after waiving the identification hearing) was returned to Virginia to face execution. We would not regard this as execution without trial, nor did the Athenians. In a print-out for *ἄκριτον* from the *Thesaurus Linguae Graecae*, I find no instance where the term is used of this automatic penalty on order of the *thesmothetai*.

²³ In reference to this passage and Lycurg. *Leoc.* 121, Harrison (*supra* n.2) 17 reasons that, although the *thesmothetai* “may at one time have had this executive power” (of putting to death exiles who returned without reprieve), in the classical period the accused “surely had the opportunity to plead before a court, maintaining for example that it was a case of mistaken identity.” Cf. D. M. MacDowell, *Athenian Homicide Law* (Manchester 1963) 121f.

²⁴ Cf. Aeschin. 1.172; Hansen, *Apagoge* 137.

²⁵ See *supra* 117; Rhodes (*supra* n.11) 181–94.

without trial were common practice only under the oligarchic régimes of 411 and 404, and afterward were regarded as undemocratic if not unconstitutional.

(6) The last instance, described in the hypothesis to Dem. 25 *Against Aristogeiton*, concerns a proposal for summary execution brought before the *ekklesia*, but even here, in the assembly of the people, the sovereignty of the courts was upheld:²⁶

... Ἱεροκλέα φέρονθ' ἱερὰ ἱμάτια ... ἀπάγουσι πρὸς τοὺς πρυτάνεις ὡς ἱερόσυλον ... Ἀριστογείτων γράφει ψήφισμα ... ἐὰν μὲν ὁμολογῇ τὰ ἱμάτια ἐξενεγκεῖν, ἀποθανεῖν αὐτὸν αὐτίκα ... Φανόστρατος ... αἰρεῖ παρανόμων (hyp. 1-2).

In the year 332/1 Pythangelus and Skaphon arrested Hierocles and brought him before the *prytaneis* on a charge of temple robbery; the sacred garments had been found in his possession. In the *ekklesia* Aristogeiton proposed that the accused be condemned to death if he admitted having taken the sacred *himatia*, in effect disallowing the defendant's plea that he had acted on order from the priestess. Aristogeiton's proposal meant that the pre-judicial authority, in this case the *ekklesia* acting in the rôle of the archon at the preliminary hearing, should interpret admission of the fact as admission of guilt. By law, however, the accused has the right to trial before the people if he denies the charges; the proposal for execution was indicted for illegality and Aristogeiton was convicted.

In all the references to proposals for execution without trial in *apagoge* and related procedures, we have only one clear testimony that the execution was actually carried out, and that singular example comes soon after the restoration: Archinus' prosecution before the *boule* against an unknown adversary accused of violating the amnesty. In their verdict in this instance the *boule* may have been willing to sacrifice some legal principles to avert a greater threat to the constitution, but their exercise of this power was shortlived. Afterward, in the case against the grain dealers (3) and in Meidias' proposal for execution against Aristarchus (5), as in Aristogeiton's proposal against Hierocles (6), the judicial power proposed for the *boule* and the *ekklesia* would have been illegal. In each case the proposal for execution without trial was rejected and the sovereignty of the court was upheld.

²⁶ There seems to be a reference to this procedure in the speech itself (25.87): οὐ γὰρ ὁμοίον ἐστίν ... γράψαντά σε τῶν πολιτῶν τρεῖς ἀκρίτους ἀποκτείνειν γραφὴν ἀλῶναι παρανόμων. Evidently the prosecution against Hierocles charged others as accomplices; cf. Hansen, *Apagoge* 140.

As procedure was formalized under the restored democracy, the pre-judicial authorities, whether the Eleven, the *thesmothetai*, the *boule*, or the *ekklesia*, were chiefly concerned with the preliminary legal questions, the legality of the charges and the defendant's plea. The decisive arguments and the final verdict were reserved for trial before the juries of the people. The officers of the court, who were responsible to the court in their accountings, would have been reluctant to condemn the accused to death without trial. In the latter half of the fourth century, the law for execution without trial in *apagoge* and related procedures had become a familiar anachronism, still on the books, but noteworthy only as a legal curiosity.

THE UNIVERSITY OF VIRGINIA
July, 1984