THE ATHENIAN COURTS FOR HOMICIDE

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In the time of Aristotle and Demosthenes the Athenians had five courts to judge cases of φόνος, a term which is conveniently translated as "homicide," although the competence of the five courts was wider and approximated to the modern notion of "injuries to life and limb." The first of the five courts was the Council of the Areopagus, and in this court the members of that Council were the judges. The second, third, and fourth courts met in the Palladion, the Delphinion, and at Phreatto. The judges in these three courts were called the *ephetai*. Their identity is enigmatic; the question is not crucial for the present inquiry and will be relegated to an appendix. The fifth court met in the Prytaneion; the judges were the king-archon and the four tribal kings.

Two views are widely held about these five courts.[1] First, it is said that the whole system of five courts came into being at an early date, reaching its final form in the legislation of Draco in 621/620; it is said that the system was preserved without serious change for at least three centuries. Second, it is said that the Areopagus was the oldest of the courts dealing with homicide and that the three ephetic courts were created subsequently, although not later than 621. Accordingly, it is conjectured that the *ephetai* were a commission drawn from among the Areopagites, and that each of the three ephetic courts received its sphere of competence by something like delegation from that Council, which thus gave up parts of its originally comprehensive competence. These views arise from accepting as historical in outline Athenian traditions about Draco and about the legendary origins of the Areopagus. Those traditions will receive incidental attention below. The present paper will scrutinize the distribution of competence between the Areopagus and the ephetic courts. It will claim to find anomalies which demand a historical explanation, and on this basis it will challenge the two views indicated above. It will argue from institutional survivals, that is, from the distri-

1. For views of this kind, see, e.g., G. Glotz and R. Cohen, *Histoire grecque*, vol. 1 (Paris, 1925), pp. 420–24; G. Busolt and H. Swoboda, *Griechische Staatskunde*, vol. 2 (München, 1926), pp. 803–17; R. J. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle*, vol. 1 (Chicago, 1938), pp. 91–129; H. J. Wolff, "The Origin of Judicial Litigation among the Greeks," *Traditio* 4 (1946): 74–75; A. R. W. Harrison, *The Law of Athens: Procedure* (Oxford, 1971), pp. 36–43. W. T. Loomis, "The Nature of Premeditation in Athenian Homicide Law," *JHS* 92 (1972): 86, n. 4, accepts the belief that the law on homicide remained unchanged from 621 until 338 at least; he expresses surprise. M. Gagarin, *Drakon and Early Athenian Homicide Law* (New Haven and London, 1981), pp. 22–26 and 135–37, thinks that the laws of Draco were later changed by addition, not alteration, and that the Areopagus did not acquire competence for homicide until after the time of Draco. His thesis will be considered in section VII.

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bution of competence between the courts in the fourth century, to earlier historical development. It is written in the conviction that institutional survivals are a more reliable clue to early history than legendary traditions.

Extant sources for the competence of the five courts are good. Aristotle (*Ath. Pol.* 57. 2–4) gives an account of them in the course of his discussion of the nine archons (55–59). Early in each Attic year the Athenian assembly took four votes on the question, whether the current laws needed revision, the laws being divided into four categories; the third category was the laws concerning the nine archons.[2] Therefore it is probable that the division into four categories was embodied in the revised code of 403/402–400/399 and that Aristotle drew on that code for his account of the functions of the nine archons. Demosthenes discusses the laws on homicide at length in his twenty-third speech (22–99). His statements confirm and supplement those of Aristotle. There is, further, a significant part of an inscription, which was cut in 409/408 to republish "the law of Draco on homicide."[3] Although the extant text does not name the Areopagus or the buildings where the other four courts met, it mentions the *ephetai* and alludes to some of the legal provisions known from Aristotle and Demosthenes.

A special question concerns the authenticity of the texts, which are preserved in the manuscripts of Demosthenes 23 and purport to give Athenian laws verbatim. Earlier doubts about these texts were in part dispelled by the discovery of the inscription of 409/408. E. Drerup, discussing the documents given in Athenian speeches, expressed himself with the caution befitting a skeptical age; he found that it had not been demonstrated that the laws given in Demosthenes 23 were not authentic.[4] One of these laws deals with lawful homicide (Dem. 23. 53) and will require attention below.

It should perhaps be observed that the present inquiry starts from the competence assigned to the five courts by Athenian laws. It does not deal with the actual practice of litigants and courts. Divergence can arise between the actual administration of justice and the statutory competence of the courts. The speaker of Antiphon 5 complained bitterly because he was called to account by the procedure of ἔνδειξις, although the charge was murder. One cannot determine the validity of his complaint without hearing the other side, but the fact that he could utter the complaint shows that it was possible to open proceedings in a dikastic court for an

2. Dem. 24. 20.

3. See R. S. Stroud, *Drakon's Law on Homicide*, University of California Publications in Classical Studies, 3 (1968). Stroud's improved text is accessible as no. 86 in R. Meiggs and D. Lewis, *A Selection of Greek Historical Inscriptions* (Oxford, 1969) and as *IG* 1^3.104. The epigraphic text has been supplemented from Dem. 23 and [Dem.] 43. 57. The text has been elucidated further by Gagarin, *Drakon*, pp. 30–64.

4. "Über die bei den attischen Rednern eingelegten Urkunden," *Jahrb. f. cl. Phil.*, Supp. 24 (1898), pp. 221–366. Drerup discusses the laws about homicide on pages 264–80 and concludes (p. 280): "Die Fälschung der in die Rede gegen Aristokrates eingelegten Blutgesetze darf hiernach nicht mehr als erwiesen gelten."

injury which amounted to homicide. It is impossible to tell whether this happened frequently.[5] There is reason to believe that the Areopagus heard charges of murder on not more than three days each month.[6] Extant speeches for cases of homicide are few, and they hardly ever specify the court.[7]

I. THE FIVE COURTS

The distribution of competence among the five courts can be summarized as follows:

(1) The Areopagus
  (a) intentional killing and wounding
  (b) poisoning, if allegedly the defendant brought about death by administering the poison with his own hand
  (c) arson
(2) The Palladion
  (a) involuntary injuries
  (b) "planning"
  (c) killing of a slave or a metic or a nonresident alien
(3) The Delphinion
  if the defendant admitted that he had killed but said that the killing was lawful
(4) Phreatto
  if someone who had already gone into exile because of a deed for which αἴδεσις ("pardon") might be offered was accused of committing a further act of homicide or of wounding
(5) The Prytaneion
  (a) animals and lifeless objects which had caused death
  (b) unknown killers

The following points are offered in explanation of the above:

(i) A semantic distinction can be drawn in Greek and in other languages between the pairs "voluntary/involuntary" and "intentional/unintentional." But a comparison of Demosthenes 23. 72 with the inscription of

5. Different views on the employment of ἀπαγωγή for homicide have been offered by M. H. Hansen, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense, 1976), pp. 99–108; idem, "The Prosecution of Homicide in Athens: A Reply," *GRBS* 22 (1981): 17–30; and by M. Gagarin, "The Prosecution of Homicide in Athens," *GRBS* 20 (1979): 313–22.

6. See J. D. Mikalson, "ἡμέρα ἀποφράς," *AJP* 96 (1975): 19–27. Antiphon 6. 41–47 asserts that the preliminary *prodikasiai*, conducted by the king-archon before the trial, had to be spread over three months and that proceedings could not be opened in the last three months of the year, since no king had ever passed such a case on to his successor. These assertions are accepted in substance by D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester, 1963), pp. 34–36. One could wish for better evidence than the unsupported statements of an interested litigant.

7. The procedure for Lysias 12 was εὐθυνα, that for Lysias 13 was ἔνδειξις. There is no objection to supposing that the procedure was δίκη φόνου in the cases where Antiphon 1, Antiphon 6, and Lysias 1 were delivered.

409/408 shows that in Athenian law "involuntary" (ἀκούσιος) meant the same as "unintentional" (μὴ ἐκ προνοίας).[8]

(ii) Concerning charges of poisoning, one should give full value both to the aorist aspect of the verb and to the participle in Aristotle's phrase, ἐὰν ἀποκτείνῃ δούς. That is, the Areopagus was to receive the case only if death ensued and only if the defendant was alleged to have administered the poison himself. If, on the other hand, he was said to have employed an agent, the charge against the principal belonged to the category of "planning."

(iii) The Athenians learned to distinguish between the person who commits an act himself and one who plans the deed but sets an agent to carry it out. A law quoted by Andocides (1. 94) said that he who "planned" (or instigated) the deed was to suffer the same consequences as he who carried the deed out with his own hands. Thus "planning" and "planner" (βούλευσις, ὁ βουλεύσας) acquired a quasi-technical sense, to the limited degree that technical senses could arise in a system of law which dispensed with learned or professional lawyers.

(iv) The homicide-procedure to be studied here was a δίκη, not a γραφή. So in standard cases proceedings could only be initiated by the relatives of the victim, not by anyone who chose to act.[9] This restriction reflects the fact that the origin of the procedure had to do with the blood-feud. In the time of Demosthenes (23. 69) the punishment for intentional homicide was death; the punishment was inflicted by the state, but the plaintiff could be present at the execution. A person found to have committed involuntary homicide was sent into exile and was required to stay in exile until the relatives of the victim admitted him to "pardon" (αἴδεσις). Exile as the consequence of involuntary homicide was considered a punishment in the time of Demosthenes (23. 72). Whether it was originally designed as a punishment is another question (see section VII).

(v) Aristotle and Demosthenes (23. 74) indicate that a case was sent to the Delphinion because of the plea entered by the defendant.[10] It is a more tantalizing question, who or what determined whether a case should

8. Loomis, "The Nature of Premeditation," pp. 86–95. Gagarin, *Drakon* , pp. 31–37, has defended Loomis's view against critics.

9. This view has been doubted by MacDowell, *Athenian Homicide Law*, pp. 17–18, but his arguments are inconclusive. I speak of "standard cases" as distinct from "doubtful cases" and "borderline cases"; the term is employed in this sense, e.g., by H. L. A. Hart, *The Concept of Law* (Oxford, 1961), pp. 3, 15. A borderline case arose if the victim had no relatives; then (I believe) anyone initiating action would try to show that he had a personal tie to the victim (cf. [Dem.] 47. 68–73). My view on this question is substantially that of M. Gagarin, "The Prosecution of Homicide," pp. 302–13, although he does not use the terms "standard" and "borderline cases." I abstain from raising the question of a possible γραφὴ φόνου; for different views on this, see Hansen, *Apagoge*, pp. 108–12; idem, "The Prosecution of Homicide in Athens: A Reply," *GRBS* 22 (1981): 13–17; Gagarin, "The Prosecution of Homicide," pp. 322–23.

10. I am not suggesting that any plea alleging that the homicide was justified sufficed to bring the case to the Delphinion. A plea of killing in self-defense could be made in the course of a trial before the Areopagus: see M. Gagarin, "Self-defense in Athenian Homicide Law," *GRBS* 19 (1978): 111–20. A case was only sent to the Delphinion if the defense entered one of the pleas specified in the law which defined the competence of the Delphinion; on that law, see section IV. From Lys. 1. 30–31 it does not necessarily follow that a case could lawfully be brought before the Areopagus, even if the defense entered one of those pleas: Lysias refers to a provision from the law about the Delphinion and says that this law stood on a stele on the Areopagus.

be sent under the heading of intentional homicide to the Areopagus or under that of involuntary homicide to the Palladion. A priori one might suppose that the plaintiff would always seek to portray the deed in the worst light by calling it intentional homicide; involuntary homicide appears to be a notion which only the defense would assert. But in the case illustrated by Antiphon 6 the plaintiff alleged that the defendant had "planned" involuntary homicide.[11] Accordingly, it is best to follow the current view, that the plea entered by the plaintiff determined whether the charge should be considered intentional homicide and sent to the Areopagus or be considered involuntary homicide and sent to the Palladion; that is, the accusation was considered one of involuntary homicide only if the plaintiff admitted that the act was involuntary.[12]

(vi) It is not clear whether the fourth court met at a place called Phreatto or Phreato or in the sanctuary of a hero called Phreattos or Phreatos. The court met at the coast, for the defendant attended in a boat.[13]

II. THE PALLADION

The task for the court meeting in the Prytaneion was straightforward and will not require attention here. The court meeting at Phreatto will receive only a little attention; its task was defined narrowly, and as Aristotle observed (*Pol.* 1300b28–30), few cases of that kind occurred. The main courts for homicide were the remaining three, the Areopagus, the Palladion, and the Delphinion. Some scholars have thought that, in accordance with the functions of these three courts, Athenian law drew a basic distinction between homicide of three kinds, namely, intentional, involuntary, and lawful homicide.[14] But scrutiny of the Palladion will show that no single principle accounts for the distribution of competence among the three courts.

The Palladion had, on the one hand, competence for charges of involuntary injuries. If the plaintiff alleged that the defendant had killed

11. The a priori supposition is also contradicted by Antiphon's *Second Tetralogy*, where the plaintiff alleged involuntary homicide (Ant. 3. 2. 6). I hope to discuss the *Tetralogies* elsewhere. Here two assertions will suffice. First, K. J. Dover ("The Chronology of Antiphon's Speeches," *CQ* 44 [1950]: 59) recognized that they may be an early work of Antiphon, provided that there were levies of εἰσφορά before the outbreak of the Peloponnesian War. Recognition that such levies were made before 431 depended on dating the financial decrees of Callias to 434/433. That dating has been challenged, notably by C. W. Fornara, "The Date of the Kallias Decrees," *GRBS* 11 (1970): 185–96, although it has also been defended by D. W. Bradeen, "The Kallias Decrees Again," *GRBS* 12 (1971): 469–83. Second, the *Second* and *Third Tetralogies* say repeatedly that the law forbids both just and unjust killing. This alleged prohibition diverges from Athenian law, and therefore it is doubtful that the *Tetralogies* are a reliable source for Athenian law.

12. This view has been taken by J. H. Lipsius, *Das attische Recht und Rechtsverfahren*, vol. 1 (Leipzig, 1905), pp. 130–33, and by others.

13. Phreatto was probably in the Peiraeus, but the grounds for seeking it in Zea are not valid; see A. L. Boegehold, "Ten Distinctive Ballots: The Law Court at Zea," *CSCA* 9 (1976): 7–19.

14. Lipsius, *Das attische Recht*, p. 619; W. Schmid and O. Stählin, *Geschichte der griechischen Literatur*, vol. 3 (München, 1940), p. 97; F. Jacoby, *Die Fragmente der griechischen Historiker*, vol. 3b (Supp.) 1 (Leiden, 1954), p. 23; Gagarin, *Drakon*, p. 3.

the victim but admitted that the defendant had not meant to kill him, the case was heard by the Palladion. That is, the case belonged to the Palladion because admittedly the defendant had not intended to bring about death. On the other hand, charges of "planning" homicide fell within the competence of the Palladion. If the plaintiff admitted that the defendant had not killed with his own hands but alleged that he had planned the deed, the case was heard by the Palladion. That is, the case belonged to the Palladion because allegedly the defendant had intended to bring about death. Thus cases could be assigned to the Palladion for either of two sharply divergent reasons, and these two reasons cannot be derived from any one principle. Therefore, if the Palladion acquired its sphere of competence because cases of specified type were assigned to it, there must have been at least two legislative acts assigning cases of specified types to the Palladion. These two legislative acts were carried out for different reasons and on different occasions. The interval of time need not have been long, but more than one reform must be supposed to account for the competence of the Palladion. This conclusion refutes the hypothesis that the Athenians kept the competence of the five courts essentially unchanged from the time of their first institution.[15]

So far two criteria have been considered for assigning cases to the Palladion; both of them—the assertions, namely, that homicide was involuntary and that it was "planned"—have to do with the intention entertained by the defendant. There was also a third criterion: charges of killing a slave or an alien fell within the jurisdiction of the Palladion. Clearly the criterion arising from the status of the victim had nothing to do with the criteria concerning the defendant's intention. In principle the status of the victim was easier to ascertain than the intention of the alleged killer. Accordingly, if the Palladion acquired its sphere of competence because cases of specified type were assigned to it, there must have been at least three legislative acts assigning cases of specified types to the

15. From Antiphon 6 it appears that there could be a charge of "planning" unintentional homicide; it could be alleged that the defendant had "planned" an action which in fact caused death, although admittedly that had not been his intention (Ant. 6. 16 and 19; cf. E. Heitsch, *Recht und Argumentation in Antiphons 6. Rede*, Akademie der Wissenschaften und der Literatur, Mainz, Abhandlungen der Geistes- und Sozialwissenschaftlichen Klasse, Jahrgang 1980, nr. 7, pp. 5–13). Harpocration, s. v. *βουλεύσεως* (ed. W. Dindorf [Oxford, 1853] = Dinarchus frag. 15. 2, ed. N. C. Conomis), indicates a speech of Dinarchus delivered before the Areopagus in a case of "planning." Mainly for these reasons Lipsius, *Das attische Recht*, pp. 125–27, argued that originally charges of "planning" were of two kinds and were heard by the Areopagus or the Palladion, according as the defendant was alleged to have "planned" intentional or involuntary homicide, and he supposed that all charges of "planning" were later assigned to the Palladion, shortly before Aristotle composed the *Ἀθηναίων Πολιτεία*. If the view of Lipsius is right, it will still be true that a significant change was made in the law after the first institution of the courts. The weakness of his theory is that it is difficult to discern adequate reason for the supposed change transferring charges of "planning" intentional homicide to the Palladion. The speech of Dinarchus before the Areopagus can be explained by calling to mind that the practice of litigants did not necessarily conform to the laws about the competence of the five courts. If, as will be argued shortly, trial of homicide before the Areopagus was a privilege for the victim and his avenger, an obstinate and influential plaintiff might demand that privilege, and it is difficult to discern in Athens any public authority powerful enough to resist him. For further criticisms of Lipsius's view, see MacDowell, *Athenian Homicide Law*, pp. 64–69.

Palladion, and these three acts were carried out for different reasons on different occasions.[16]

Below an alternative will be considered to the view that the Palladion acquired its sphere of competence because cases of specified types were assigned to it. Meanwhile a little more can be said about trials held when an alien had been killed. Athenian decrees honoring aliens sometimes grant them the privilege that anyone killing the honorand shall be subject to the same consequences as if he had killed an Athenian citizen.[17] This provision occurs in the period of the Athenian Empire and occasionally in the fourth century. It indicates that in relation to the law of homicide Athenian citizenship was a privileged status and the privilege was valued. Moreover, for the purposes of the present inquiry it provides an approximate *terminus ante quem:* Athenian law had learned to treat charges of killing a citizen and charges of killing an alien differently, by assigning them to different courts, not later than the middle part of the fifth century.

III. THE INSECURE WIFE

In extant literature no fewer than three passages tell of cases conforming to a pattern which was evidently much discussed. In cases of this type a woman believes that her husband is becoming estranged from her; she administers a drug in the belief that it will restore his affection to her; but in fact it kills him. Brief treatment of the three passages will suffice; a little can be learned from them, especially from the third.

(1) Antiphon 1 was delivered by a man prosecuting his stepmother on a charge of poisoning his father. He said that she had employed a slave-woman to administer the draught, so the charge was probably one of "planning" (1. 26).[18] The plaintiff insisted (1. 19–20) that the stepmother had known that the draught was fatal and had intended to cause death, but the defense probably said that she had tried to recover her husband's affection with a supposed love-philter. It was admitted that the slave-woman had administered the drug to her own lover for that purpose. The speech does not say which court heard the case.

(2) The *Trachiniae* of Sophocles tells the story of Deianeira and Hercules, and an earlier allusion to the same legend can perhaps be recognized at Bacchylides 5. 165–75. Deianeira feared that Hercules had become

16. MacDowell, *Athenian Homicide Law*, p. 69, argues that the cases tried at the Palladion were less important than those tried at the Areopagus, the Delphinion, and Phreatto. But there must have been positive reasons, of three types, for assigning cases of the three types to the Palladion.

17. *IG* 1^2.56.13–17; 2^2.32.9–14, 226.34–40; *SEG* 10.23.7–13, 52.13–16, 83.20–22, 88.9–12, 98.10–13, 99.3–6, 108.13–20; Dem. 23. 88–89. For discussion, see G. E. M. de Ste. Croix, "Notes on Jurisdiction in the Athenian Empire," *CQ* 11 (1961): 275.

18. L. Gernet (*Antiphon: Discours* [Paris, 1923], pp. 33–34) accepted the view of Lipsius, that charges of "planning" intentional homicide were heard by the Areopagus until shortly before Aristotle composed the Ἀθηναίων Πολιτεία. For this reason and because poison was employed, he supposed that the case of Antiphon 1 was tried before the Areopagus. Lipsius's view has been rejected above (n. 15). In supposing that the case was heard at the Palladion, I give full force to the participles δούς in *Ath. Pol.* 57. 3 and βουλεύσασα in Ant. 1. 26.

estranged from her, and so she sent him a garment impregnated with the blood of the monster, Nessus. Interest attaches to two lines of the play. When Deianeira begins to suspect that her gift may cause harm and explains her doubts to the chorus, the latter comment (727–28): "But when people have erred involuntarily, the resentment towards them is mild, and you should benefit from that mildness." Evidently the concept of involuntary homicide was well known to an Athenian audience.

(3) Aristotle (*Mag. Mor.* 1188b31–37) tells of a woman who gave a man a drug in the belief that it was a love-philter, but he died in consequence. She was tried in the Areopagus and acquitted because the homicide was not intentional. Aristotle's account is brief but fully intelligible and self-consistent. One should observe in particular that Aristotle reports the acquittal by means of the aorist infinitive, ἀποφυγεῖν, which is the standard word for a full acquittal.[19] Some readers have held that only the Palladion could convict for involuntary homicide, and that, accordingly, although the Areopagus found the woman not guilty of intentional homicide, the plaintiff could still bring an action for involuntary homicide at the Palladion.[20] This reading of the case depends on subtleties familiar in modern practice, which has been professionalized by an order of lawyers. If one must balance probabilities against probabilities, one may suppose that the acquittal by so respected a body as the Areopagus would constitute such a strong argument for the defense in any subsequent trial before the Palladion as to make that second hearing superfluous. Another reading of the case would suppose that in the Areopagus, as in a *dikasterion* (*Ath. Pol.* 68. 4), the judges cast their votes, not "for condemnation" or "for acquittal," but "(for the assertion) of the plaintiff" or "(for the assertion) of the defendant"; if the defendant admitted homicide but said that it had been involuntary, a vote "for the defendant" might be a verdict of involuntary homicide. This reading discerns more in Aristotle's words than is at first sight apparent. The easiest way, though not the only possible way, of understanding his report is to suppose that the unfortunate woman's troubles came to an end when the Areopagus acquitted her. Thus the report suggests, though not conclusively, that by the time of Aristotle the Areopagus could reach a finding of involuntary homicide, and that that finding did not lead to exile pending "pardon" but was tantamount to a full acquittal.

IV. THE LAW OF THE DELPHINION

Aristotle (*Ath. Pol.* 57. 3) states the competence of the Delphinion thus:

19. Note especially the occurrence of the finite aorist of the same verb in the epigraphic record of a verdict: *IG* 2^2.1641B.

20. MacDowell, *Athenian Homicide Law*, pp. 45–47; cf. Loomis, "The Nature of Premeditation," p. 92: "The Areopagus refused to convict her on the grounds that (as we would say) it lacked jurisdiction over this kind of homicide."

> If someone admits that he killed someone but says that he did so lawfully—for example, if he says that he killed the other on taking him in adultery, or in warfare on mistaking his identity, or in the course of athletic competition—then the trial is held at the Delphinion.

The manuscripts of Demosthenes (23. 53) offer the following as the text of a law:

> If someone kills someone involuntarily in the course of athletic competition, or if someone kills someone on overcoming him in the road, or if someone kills someone in warfare on mistaking his identity, or if someone kills someone on taking him in adultery with his wife or his mother or his sister or his daughter or his concubine, whom he keeps for the purpose of begetting free children, then the killer shall not be exiled on any of these counts.

In the next sections of the speech (23. 54–55) Demosthenes discusses the law. His citations guarantee the authenticity of the phrases about killing in athletics, about killing in warfare, and about killing an adulterer. The phrase about overcoming someone on the road is not quoted by Demosthenes and has not been explained satisfactorily.[21] The obscurity of the phrase may furnish a slight argument for the authenticity of the text: a forger would be likely to concoct something more intelligible. The operative clause, as it may be called, of the text, the clause providing that the killer shall not be exiled, is not quoted by Demosthenes but is paraphrased by him in more than one way. He says that the killer is to be "free of penalty," that he "does not commit an injury," and that he is "pure." Thus Demosthenes' discussion of the law does not guarantee the wording of the operative clause but does guarantee its meaning: the law provided that the lawful killer should not suffer any penalty, disability, or restriction.

This law about lawful homicide and Aristotle's statement of the competence of the Delphinion deal with the same subject. One text specifies illustrations of lawful homicide more fully than the other. The one text states the forum proper if the defense pleads lawful homicide; the other states the consequence of a finding of lawful homicide. The provisions stated in the two texts belong together. The combined set of provisions may be called "the law of the Delphinion"; its purport is clear, even though the precise wording of some of its phrases is not fully certain.

Two phrases in "the law of the Delphinion" require attention. One of them concerns killing in athletics. In the text provided by the manuscripts at Demosthenes 23. 53 this phrase includes the word "involuntarily" (*ἄκων*). Demosthenes does not repeat that word when he cites the phrase in discussing the law. The concept specified by the word "involuntarily"

21. Harpocration (s. v. *ὁδός*) understood the phrase as referring to self-defense against an ambush, but he may have had no more evidence than this same text. Cf. Lipsius, *Das attische Recht*, pp. 616–17; E. Ruschenbusch, "ΦΟΝΟΣ. Zum Recht Drakons und seiner Bedeutung für das Werden des athenischen Staates," *Historia* 9 (1960): 150, n. 106. With *ἐν ὁδῷ καθελών* one might perhaps compare *ἐν ὁδῷ λαβών* at Lys. 12. 16 (cf. 12. 30).

is material to the provisions of the law, for clearly if someone met his death in the course of a vigorous athletic competition, it might be argued that the killer did intend to kill his adversary or that he did not intend to do so. Thus "the law of the Delphinion" provided that a plea of involuntary killing in athletics should be heard at the Delphinion and, if upheld, should lead to a full acquittal of the killer. Yet a charge of involuntary homicide was proper business for the Palladion and, if established, led to exile pending "pardon."

A similar puzzle arises from considering another phrase in "the law of the Delphinion." This phrase concerns killing in warfare through mistaken identity. Aristotle discusses the notions "voluntary" and "involuntary" in three of his ethical treatises.[22] Evidently the question was discussed in philosophical circles, and these discussions were akin to those conducted in Athenian courts. The discussion in the *Nicomachean Ethics* is the fullest of the three and probably the latest in order of composition. Here Aristotle recognizes two reasons why an act may be considered involuntary: one is compulsion and the other is ignorance. He examines the kind of ignorance relevant to the issue. As he explains, one cannot escape responsibility for an act by pleading ignorance of the general moral principle that bears on it, but one is acquitted of responsibility if one acted in ignorance of the immediate circumstances. As an illustration Aristotle refers to the story of Merope, told in a play of Euripides: she thought that a certain person was her enemy, but in fact it was her son.[23]

To return to "the law of the Delphinion," if someone kills a fellow-citizen in warfare on mistaking his identity, the killer's predicament is the same as that of Merope. He recognizes the general moral principle, that one ought not to kill one's fellow-citizens, but he is ignorant of the immediate circumstances, namely, the identity of his victim. In view of Aristotle's discussion of the notion "involuntary," one would expect the case against the killer to be classified as a charge of involuntary homicide; it should be heard by the Palladion, and if the court found that the act was indeed involuntary, the consequence should be exile pending "pardon." Yet according to "the law of the Delphinion," the case was to be heard by the Delphinion, if the killer pleaded that he had mistaken the identity of his victim; and if the court upheld his plea, he was not to suffer any restriction.

Thus two phrases in "the law of the Delphinion" deal with subjects which one would expect to find assigned as involuntary homicide to the Palladion. Likewise "the law of the Delphinion" ensured that killers covered by these phrases should suffer no penalty, disability, or restriction, although otherwise the consequence of a finding of involuntary homicide was exile pending "pardon." Surely the conclusion cannot be avoided that

22. *Mag. Mor.* 1187b31–1188b38; *Eth. Eud.* 1223a21–1225b17; *Eth. Nic.* 1109b39–1111b3. On the order of composition of these three passages, see F. Dirlmeier, *Aristoteles: Magna Moralia*[2] (Berlin, 1966), pp. 243–48.

23. Eur. frag. 449–59 Nauck[2]; Hyginus *Fab.* 137 Rose; T. B. L. Webster, *The Tragedies of Euripides* (London, 1967), pp. 137–43.

at least these two provisions of "the law of the Delphinion" came into being at a later date than the jurisdiction of the Palladion over involuntary homicide. Thus a significant change in the law of homicide took place at a date appreciably later than the institution of the Palladion. The change should be associated with a decrease in concern for retaliation. However exile pending "pardon" as a consequence of involuntary homicide should be understood in its original form, it must have arisen in a state of society much concerned for vengeance and the feud, but the two provisions of "the law of the Dephinion" which declare the involuntary killer free of any restriction attest a state of society less preoccupied with those concerns.

V. PHREATTO, AND A HYPOTHESIS

The *ephetai* met at Phreatto to hear the case against a man who, being already in exile for an act for which "pardon" could be offered, was accused of a further act of killing or wounding. The choice of Phreatto on the coast can be explained by considerations of vengeance or pollution or both. The *ephetai* exercised jurisdiction at Phreatto, both if the second charge was one of involuntary homicide and if it was one of intentional homicide. Demosthenes (23. 77) indeed envisions only charges of voluntary homicide as cases to be heard at Phreatto.[24] Thus when the *ephetai* met at Phreatto, they exercised wider jurisdiction than elsewhere. A first offender could expect to be judged by the Areopagites, if he was accused of intentional homicide, or by the *ephetai*, if he was accused of involuntary homicide. But an exile accused of a second act of killing or wounding was to be judged by the *ephetai*, whatever the tenor of the charge. This variation in the competence of the *ephetai* is surprising.

This puzzle and some others can be solved by the following hypothesis. Let it be supposed that originally the *ephetai* were the sole court for judging cases of homicide. That is, when the state first began to intervene in the previously private sphere of killing and the feud, it instituted the *ephetai* as the sole court to try charges of killing, wounding, and related offenses (injuries to life and limb). At this early stage the *ephetai* had comprehensive authority to try all such charges; the allegations of the plaintiff were not yet classified according to any of the criteria recognized by Aristotle and Demosthenes. On this hypothesis one must suppose that at a later date part of the sphere of competence enjoyed by the *ephetai* was transferred to the Areopagus. It is easy to reconstruct the tenor of

24. Aristotle (*Ath. Pol.* 57. 3–4) fails to say whether the charges to be heard at Phreatto were of intentional or involuntary homicide: there is, then, no explicit evidence that this court tried charges of involuntary homicide. Presumably, however, this court could only try a case if the defendant was willing to present himself. He might wish to do so on charges of either kind in order to escape the consequences either of being suspected on the new charge or of suffering an adverse judgment by default. If a man exiled for involuntary homicide is negotiating with the relatives of the first victim through intermediaries with a view to "pardon," and if meanwhile he is accused of another act of involuntary homicide, he may wish to clear himself of the new charge.

this transfer of competence from the actual sphere of jurisdiction exercised by the Areopagus in the fourth century. By the transfer the Council of the Areopagus was authorized to try the case if the plaintiff alleged that the defendant had killed an Athenian citizen intentionally and with his own hands. In this context the concept of "killing" included poisoning and arson, as well as killing by hand-to-hand violence;[25] but the Areopagus was only to receive the case if the defendant was alleged to have killed intentionally and to have carried out the act himself instead of merely employing an agent.

On this hypothesis it is easy to explain why at Phreatto the *ephetai* continued to judge charges of intentional homicide as well as charges of involuntary homicide. When a sphere of competence in homicide was transferred to the Areopagus, the legislator overlooked the court at Phreatto, because cases proper to that court only arose rarely. Thus at Phreatto the *ephetai* continued to exercise their original and comprehensive competence. Moreover, the same hypothesis accounts for the apparently miscellaneous spheres of competence exercised by the *ephetai* at the Palladion. The court meeting at the Palladion judged charges of involuntary homicide, because only charges of intentional homicide had been transferred to the Areopagus. The Palladion judged charges of "planning," because the Areopagus had only received jurisdiction over charges which alleged that the defendant had carried out the deed with his own hand. The Palladion judged cases where the victim was a slave or an alien, because the Areopagus had only received jurisdiction over cases where the victim was an Athenian citizen.[26] As explained above, the spheres of competence exercised by the Palladion are miscellaneous and puzzling, if one supposes that the Palladion had acquired its competence by transfer from the originally comprehensive competence of the Areopagus. But the competence of the Palladion becomes readily explicable if one supposes that the transfer was carried out in the opposite direction. Then the

25. One may wonder why poisoning was mentioned specifically in the law and why Aristotle's paraphrase of the law (*Ath. Pol.* 57. 3) insists explicitly that the defendant must be alleged to have administered the poison with his own hands, if so much was already to be understood in the general terms of the law assigning some jurisdiction in homicide to the Areopagus. In answer it can be observed that many systems of homicide law give explicit attention to poisoning. In German law, for example, it is one of the six categories of homicide; see Heitsch, *Recht und Argumentation*, pp. 13–18.

26. I refrain from inquiring into the stages whereby Athenian law of homicide developed the distinction between citizens and aliens. The law of Draco as reinscribed in 409/408 (n. 3) included a provision that, provided an exiled homicide avoided specific places, anyone who killed him was to suffer the same consequences as for killing an Athenian citizen (lines 26–29). When that provision was adopted, the distinction of status was apparently recognized in some manner. It is reasonable to suppose that in its first beginnings the Athenian law of homicide superseded a condition of self-help and retaliation, in which the relatives of the victim avenged themselves on the killer or accepted compensation in valuables, without approaching a court or public authority. In that condition the Athenian protector of an alien, who had gained his protection by approaching him as a suppliant, would be likely to avenge the alien's death. Therefore, Athenian law may have paid some attention to the killing of aliens from an early stage in its development. For these reasons I hesitate to accept the view of E. Grace, "Status Distinctions in the Draconian Law," *Eirene* 11 (1973): 5–30, that "in its original design the Draconian homicide law probably made no allowance for a variety of statuses in respect to either victim or killer. . . . the inclusion among cases assigned to the Palladium of all those in which—regardless of the type of homicide—the victim was a non-citizen . . . seems more likely to represent a later extension of the Palladium's jurisdiction than a feature of the law as first promulgated" (pp. 8–9).

classical spheres of competence exercised by the Palladion are the residue left to the *ephetai* when a precisely defined sphere was transferred to the Areopagus.

On this hypothesis the first institution of the *ephetai* marks a first step in the interference of public power in the private sphere of violence and retaliation, but the later transfer of limited jurisdiction to the Areopagus marks a further advance of public power into the same sphere. So one may associate with this transfer the introduction of the practice whereby the death penalty was inflicted on the convicted murderer by a public official (Dem. 23. 69; cf. p. 278 above). From the converse point of view the change marks a relative decrease in reliance on retaliation. The retaliatory element continued to play an essential part in the procedure for homicide, since it was still the task of the victim's relatives to open proceedings. But by assigning jurisdiction to the venerable Council of the Areopagus and by instituting a public executioner, the state presented itself more prominently than before as guarantor of the security of its citizens. Accordingly, the change marks an increase in the privileges of Athenian citizenship. It is presupposed by those decrees which, beginning in the middle part of the fifth century, honor selected aliens by declaring that anyone killing them shall suffer the consequences of killing a citizen (above, p. 281). Increase in the privileges of citizenship belongs to the process whereby the concept of Athenian citizenship grew in content. Three stages in that growth can be specified: first, the codification of the law by Solon, which included a clearer account of the property-classes; second, the reforms of Cleisthenes, which attached citizenship to membership in a deme; and third, the law carried by Pericles in 451/450, to the effect that children were only entitled to citizenship if both their parents were citizens (*Ath. Pol.* 26. 4). So for the transfer of limited jurisdiction in homicide to the Areopagus one might seek a date between the time of Solon and the middle part of the fifth century.

VI. LEGENDS

The classical Athenians attributed all their laws on homicide to Draco.[27] They also attributed all their laws to Solon. Andocides, pleading in 400/399, called a decree of 410/409 "a law of Solon".[28] Mere attribution of a law to Solon or Draco is not adequate as historical evidence, unless there are additional reasons, such as archaic language. Perhaps under interrogation a classical Athenian might admit that his laws were the laws of Solon, as revised by subsequent legislation, and that his laws on homicide were the laws of Draco, as revised by subsequent legislation. Why the Athenians recognized not one early lawgiver but two is a valid question

27. This attribution can perhaps be detected already in line 5 of the inscription of 409/408 (n. 3). See also Dem. 20. 158; 23. 51; [Dem.] 47. 71–72; Arist. *Ath. Pol.* 7. 1.

28. Andoc. 1. 95–98. The discussion by C. Hignett, *A History of the Athenian Constitution* (Oxford, 1952), pp. 18–19, is still useful.

but lies outside the scope of this paper.[29] The language of the inscription of 409/408, purporting to give the law of Draco on homicide, is archaic. The extant part of the text mentions the *ephetai* and some of the distinctions recognized later between types of homicide. It does not mention the Areopagus or name the places where the *ephetai* met. One may well believe that the *ephetai* and the recognition of some special types of homicide, such as involuntary homicide with a prospect of "pardon," originated before the time of Solon. Few would dispute that.

More can perhaps be learned from the stories told about the origin of the Areopagus. In the *Eumenides*, produced in 458, Aeschylus gave his account of the origin of the Council of the Areopagus. According to that account, Athena founded the Council as a court for trying charges of homicide on the occasion when Orestes came to Athens to seek trial and acquittal for the killing of Clytemnestra. F. Jacoby has argued convincingly that Aeschylus invented the trial of Orestes at Athens and, accordingly, that Aeschylus was the first to make that trial the occasion for founding the Areopagus; an earlier legend said that the Council of the Areopagus was founded at an earlier date in mythical time on the occasion of the trial of Ares.[30] In inventing the trial of Orestes Aeschylus had his own literary and in some sense political purposes to pursue. Some readers have thought that he was concerned with current issues; others have thought that he wished to present more general questions and considerations about the nature of the *polis*. Here it suffices to note that the inherited fund of mythology did not restrict the poet's freedom of invention but provided him with a vocabulary of images, in which he could present political and ethical issues.

The earlier legend said that Poseidon had a mortal son, Halirrhothius, and Ares had a mortal daughter. The latter suffered rape at the hands of Halirrhothius. So Ares killed Halirrhothius. So Poseidon pursued Ares. Ares came to Athens and there the Council of the Areopagus was founded in order to try him. Ares was acquitted and the hill where the Council met derived its name from him. The salient feature of this legend is that it does not portray Ares as a good lawyer. Had he read Aristotle Ἀθηναίων Πολιτεία 57. 3, he would have known that he was entitled to trial before the Delphinion. Had he read Demosthenes 23. 53–55, he would have known that Athenian law imposed no penalty, disability, or restriction on the father who killed the seducer of his daughter. The legend of the trial of Ares is etiological, at least in part, since it explained the name, Areopagus. Yet it does not account for the classical competence of the Areopagus, since the case presented in the legend belonged in classical Athenian law to another court.

29. Codification of the law in whole or in part is an arduous task and is only rarely accomplished, because it conflicts with vested interests. It took a revolution and a military dictator to produce the first modern code of law. Therefore, the Athenian tradition alleging two early lawgivers is surprising. One can with prudence talk about the law of Draco without discussing Draco.

30. *Fragmente*, vol. 3b (Supp.) 1, pp. 22–25. The story of the trial of Ares is first attested by Hellanicus (*FGrH* 3.B323aFl) and Euripides (*El.* 1258–63; *IT* 945–46).

A similar anomaly appears in another legend. Cephalus went hunting and, hearing a noise in the bushes, shot what he thought was an animal. In fact it was his wife. He was tried by the Areopagus.[31] On the basis of the laws current in the time of Demosthenes and Aristotle, one would have expected the case to be tried by the Palladion.

One way of accounting for these two anomalies of legend starts from the belief that legends reflect a kernel of historical truth. This explanation rejects the hypothesis propounded in section V above; it holds that the Areopagus was the earliest court for the trial of homicide and that originally its competence embraced all homicide without distinction. Later, on this view, the ephetic courts were created and competence for special kinds of homicide was deputed to them. Thus the legends of Ares and Cephalus would reflect in mythical time a condition existing at an early but historical time, namely, at the time when the ephetic courts had not been created and the Areopagus judged homicide of all kinds.

The method on which this explanation relies is mistaken. It is not the function of legend to preserve a kernel of historical truth. So much can be ascertained by considering the story of Orestes, as told in the *Eumenides*. From the *Odyssey* (3. 306–10) Aeschylus had learned that Orestes traveled from Athens to Mycenae to kill Aegisthus and Clytemnestra. Aeschylus transformed the legend. He reversed the order of the travels of Orestes; he took Orestes, after the murder and after purification at Delphi, to Athens for trial and acquittal. Clearly, in telling the story of Orestes Aeschylus was not trying to preserve a kernel of historical truth or to reflect back into mythical time a condition which had once obtained in historical time. On the contrary, he started from the rudimentary items which the *Odyssey* offered on Orestes, and he devised a relatively elaborate story for his own literary and ethical or political purposes. A somewhat similar origin should be supposed for the legendary trials of Ares and Cephalus.

History and legend are both creations of the human mind. History must rest ultimately on contemporary documentation, although the historian's contribution should not be belittled. Legend has no need of documentation. A legendary story requires essentially a storyteller. The story of the trial of Orestes presupposes Aeschylus, its inventor. The stories of the trials of Ares and Cephalus presuppose a storyteller, who invented them; for convenience he may be called Protoaeschylus. It makes no matter whether the stories of the two trials were invented by one storyteller or two. A little can be said about Protoaeschylus. The date when he devised his stories was earlier than 458 but not necessarily much earlier. His literary and political purpose can perhaps be conjectured in part. By attributing to the legendary Areopagus of the past comprehensive competence for homicide of all kinds, he may have expressed his approval of a recent reform, which first declared the Areopagus competent to try charges of killing an Athenian citizen intentionally with one's own hand.

31. Hellanicus, *FGrH* 3.B323aF22; cf. Schwenn, *RE* 11. 218–19.

As Aristotle (*Ath. Pol.* 25. 2) reports, in 462/461 Ephialtes carried reforms which deprived the Areopagus of some functions. Aristotle does not say what the functions were. Ephialtes was killed. Evidently his work was controversial. Therefore the tradition may have distorted it. So it is not impossible that he took some functions away from the Areopagus and assigned others to it. Conceivably he carried out the transfer to the Areopagus of jurisdiction for charges of killing an Athenian citizen intentionally with one's own hand. But no insistence should be put on this possibility. An earlier date for the transfer deserves at least as much consideration.[32]

VII. SUMMARY, CONCLUSIONS, AND RECONSTRUCTIONS

On the basis of the arguments set out in the preceding sections, three steps may be distinguished in the development of the Athenian law on homicide:

(1) The state first intervened in the previously private sphere of killing and the feud by creating the *ephetai* as a court to try cases of homicide.
(2) Later the Areopagus received competence to hear charges of killing an Athenian citizen intentionally with one's own hands.
(3) Involuntary killing in athletic competition and killing through mistaken identity in warfare were transferred from the jurisdiction of the Palladion to that of the Delphinion and declared to impose no restriction on the killer.

The third step was taken later than the first. Whether it was taken before the second or after it or at the same time is not clear. It is also not clear whether the other provisions of "the law of the Delphinion" were instituted before the third step or at the same time.[33]

Both the second and the third step mark a relative decrease in reliance on retaliation. They came about when the state had grown much more powerful than at the time of the first step. In the second step the state asserted itself as the primary guarantor of security for Athenian citizens. Its intervention at the first step was much more modest. So a long interval should be supposed between the first and second steps. The general trend in development of Athenian law on homicide was toward greater intervention by the state and a decrease in the significance of private retal-

32. The story in *Ath. Pol.* 16. 8 presupposes that the Areopagus tried some charges of homicide in the time of Pisistratus. But the story is too anecdotal to be taken seriously as evidence. The trial of Pyrilampes (*Anon. Vit. Thuc.* 6) can scarcely have taken place before 460, in view of his probable date of birth (cf. J. K. Davies, *Athenian Propertied Families* [Oxford, 1971], pp. 329–30).

33. D. J. Cohen kindly pointed out to me that the four types of case covered in the law of the Delphinion, though disparate to the modern mind, may have admitted a single analysis in Athenian thought. I recognize this possibility but am unable to follow it up.

iation.[34] The provision for exile pending "pardon" as the consequence of involuntary homicide could give rise to a custom that made a finding of involuntary homicide tantamount to an acquittal, if "pardon" came to be offered as a matter of course. Aristotle's account, in the *Magna Moralia*, of the case of the insecure wife suggests that something like this happened, and a remark of Demosthenes points in the same direction. He says (21. 43): "The laws on homicide punish intentional killers with death and permanent exile and confiscation of property, but they hold involuntary killers worthy of αἴδεσις and plentiful kindness." That is not the language of a man anxious to drive the involuntary killer into exile, although Demosthenes may have distributed emphasis to suit his immediate purpose.

A date not later than 462/461, but not necessarily much earlier, has been suggested for the second step. The first step, which may be called Draconian, should be associated with a date of approximately 621/620. The date of 621/620 is given by the Eusebian tradition, and recent study has shown that ancient chronographers were careful in estimating dates where full accuracy was not attainable.[35]

One of the views challenged in this paper is that the classic system of five courts came into being at an early date and was preserved without serious change for many centuries. So it will not be amiss to consider the relation of the conclusions to two reconstructions which do not endorse that view. One of these has been proposed recently by M. Gagarin; the other was expounded by E. Ruschenbusch rather more than twenty years ago.[36]

The inscription of 409/408, giving the law of Draco, states the instruction of the assembly to reinscribe that law. It proceeds to give the heading, πρῶτος ἄχσον, and then immediately a provision on unintentional homicide, opening with the words καὶ ἐὰμ μὲ ϝ[π]ρονοί[α]ς [κ]τ[ένει τίς τινα, φεύγ]ε[ν]. One might have expected the law to begin with a provision on intentional homicide, and it is even more surprising that the provisions open with the word καί. Gagarin suggests that the opening was intended in an elliptical sense: by specifying the penalty of exile, even if the killing was unintentional, the law indicated the same penalty for the more common case, where killing was intentional.[37] Thus the law of Draco provided the same court, namely, the *ephetai*, and the same penalty of exile both for intentional and for unintentional homicide. Gagarin supposes that a

34. Tyndareus at Eur. *Or.* 491–517 goes almost as far as a modern lawyer in opposing private retaliation and insisting on legal proceedings for murder.

35. The evidence for 621/620 is scrutinized by Stroud, *Drakon's Law*, pp. 66–70. On the practice of ancient chronographers, see A. A. Mosshammer, *The Chronicle of Eusebius* (Cranbury, N.J. and London, 1979).

36. Gagarin, *Drakon*, esp. 96–110; Ruschenbusch, "ΦΟΝΟΣ," pp. 129–54.

37. *Drakon*, pp. 99–100: "If the law originally began with καί in the adverbial sense of 'even,' we obviously must understand the implied contrary of 'even if a man not intentionally kills another' to be the more common possibility 'if a man intentionally kills another.' Whether or not this more common alternative has been explicitly stated, its existence is implicitly assumed by the clause beginning with 'even if.' A further implication is that the penalty for the more common case, intentional homicide, is the same as the penalty for the remote case, unintentional homicide."

later amendment to the law of Draco gave the Areopagus jurisdiction over intentional homicide; he notes that, according to Plutarch (*Sol.* 19. 3), Draco did not mention the Areopagus in his homicide laws. He observes that in the fourth century both exile and death are attested as penalties for intentional killing, and he suggests that an addition to the law of Draco introduced the death penalty.

Gagarin's monograph has clarified many points of Athenian law. His central thesis, summarized in the preceding paragraph, is presented tentatively, and he acknowledges a philological objection: "The main difficulty with this theory is that the ellipsis in the opening sentence is extreme and, as far as I know, unparalleled" (pp. 109–10). A juristic objection may be developed on the following lines. If the opening clause of the law said that the same penalty was to be imposed as for intentional homicide, even if the homicide was unintentional, then the substantive effect of this provision was to deny the validity of the plea of unintentional homicide, if the defense offered that plea. Clearly, a new law only denies the validity of a plea if previous law or custom has allowed some validity to that plea. Indeed, Gagarin recognizes that "there was probably a growing movement to treat unintentional homicide separately from intentional homicide and perhaps to reduce the penalties for it" (p. 104). By the fourth century Athenian law on homicide gave significant recognition to the intention of the killer: the alleged intention of the killer had a bearing on the forum, and the finding about his intention had a bearing on the penalty. So on Gagarin's view one must suppose that pre-Draconian law gave some recognition to the question of the killer's intention, that Draco denied any validity to that question, and that classical Athenian law later gave it significant recognition. But a rectilinear development is more likely; that is, at first, in a condition of retaliation and compensation unrestricted by legal proceedings, no recognition was given to the question of the killer's intention, but later this question received increasing recognition, as the state encroached on the private sphere of retaliation and compensation by developing the homicide courts.

The reconstruction proposed by Ruschenbusch starts by supposing that the law of Draco originally began with a provision about intentional homicide, but that this provision was deleted when jurisdiction over intentional homicide was transferred to the Areopagus. Consequently, the text available for reinscription in 409/408 began with καί and the provision about unintentional homicide. The same hypothesis explains Plutarch's observation, that Draco did not mention the Areopagus.

Before one proceeds to further features of this reconstruction, it will be convenient to note two objections recently made by Gagarin (pp. 70–71) to the hypothesis summarized in the preceding paragraph. His second objection is that the word καί ought to have been deleted along with the clause about intentional homicide, and if it was not deleted then, those who reinscribed the law in 409/408 ought to have noted the oversight and omitted καί. Gagarin attaches less weight to this objection. Clearly the consequences of deletion might be stylistically anomalous.

Gagarin's main objection is "that the decree calls for the re-publication of Drakon's law on homicide and that the Athenians of the fifth and fourth centuries considered Drakon alone to be the author of all their homicide laws, including the law on intentional homicide. Even if this opinion was not historically accurate, it is the only one expressed in any of our sources, and it is almost inconceivable that at the end of the fifth century the law on intentional homicide was not included among the provisions of 'Drakon's law on homicide.'" If, however, the opening clause of the law of Draco had been deleted before 409/408, those who reinscribed the law in that year could only inscribe the remaining part of it. Gagarin's objection depends on utterances made by Athenians in the fifth and fourth centuries. General attributions of "the laws on homicide" to Draco, without specific reference to intentional homicide, will not suffice to substantiate the objection; an Athenian might in general terms attribute the laws on homicide to Draco, even if he knew that one important law was a later amendment. For a precise attribution one has to turn to Demosthenes' account of the laws on homicide in Speech 23. In discussing particular laws in that speech Demosthenes speaks of "the author of the law" without naming him; but once he names Draco as the lawgiver whom he has in mind.[38] It follows that Demosthenes could name Draco as the author of the law current in the fourth century on intentional homicide. But in a speech delivered a few years earlier Demosthenes attributed the fourth-century procedure of *nomothesia* to Solon, and half a century earlier Andocides called a decree of 410/409 "a law of Solon."[39] Since such wild attributions to Solon could be made in court speeches, the Demosthenic attribution of the current law on intentional homicide to Draco is not a sufficient objection to the hypothesis that that law was made later than the laws of Draco.

One should, therefore, consider further features of the reconstruction offered by Ruschenbusch. As that reconstruction observes, the law reinscribed in 409/408 specified which relatives were to take part in the opening proclamation against the killer. This provision was in force both for charges of intentional homicide and for charges of unintentional homicide. The same relatives were recognized in the law as competent to take part in αἴδεσις, and so one should suppose that the possibility of αἴδεσις arose, whether the homicide was admitted to be involuntary or was intentional. Furthermore, Demosthenes (23. 72) mentions a law providing that a man found to have killed involuntarily must leave Attica by a stated route within a stated period of days. In the light of these various data the reconstruction says that, whereas until the time of Draco homicide was a private matter, to be settled between the families by retaliation or eventually by reconciliation in return for compensation, Draco instituted a court, the *ephetai*, to inquire into the killer's intention. If the

38. Dem. 23. 51: "This law is a law of Draco, gentlemen of Athens, and so are the others which I have cited from the homicide laws." The law on intentional homicide has been cited at 23. 22. "The author of the law" and equivalent phrases occur at 23. 25, 27, 29, 37.

39. Dem. 20. 89–93; Andoc. 1. 95–96.

court found that he had killed intentionally, the parties could proceed to the private practices of retaliation and eventual compensation. If, however, the court found that the killing had been involuntary, the state could not protect the killer indefinitely; instead it gave him a safe-conduct as far as the border.

This reconstruction has perhaps found fewer echoes in subsequent literature than it deserves.[40] It has the merit of accounting for several diverse phenomena by a single explanatory hypothesis. It explains, for example, why the man found to have killed involuntarily was required to leave Attica by a specified route. Unless that provision was an offer of safe conduct to the border, it would have been almost an invitation to the victim's relatives to waylay the killer on his journey.[41] The reconstruction accords with the little that is known of the rudimentary character of Athenian institutions in the early archaic period. It leaves some questions unanswered. For example, it does not explain why the Athenians assigned a limited competence in homicide to the Areopagus some time after the legislation of Draco. The present paper tries to answer that question; it is a footnote to the reconstruction here recognized.[42]

APPENDIX: *Ephetai* AND *Heliastai*

It used to be inferred, from Isocrates 18. 52 and 54 and [Demosthenes] 59. 10, that *dikastai* replaced *ephetai* in the three ephetic courts by the beginning of the fourth century. MacDowell (*Athenian Homicide Law*, pp. 52–57) challenged this interpretation of the passages and argued that the *ephetai* continued as judges. His view was followed by Harrison (*The Law of Athens*, pp. 40–42). A remark of Antiphon, to which G. Smith drew attention ("Dicasts in the Ephetic Courts," *CP* 19 [1924]: 353–58), was noticed by MacDowell but may deserve more weight. The defendant charged with the murder of Herodes complained that the procedure of ἔνδειξις was being employed against him, although the content of the charge was homicide. He told the judges that they were the same people who would hear his case again in a δίκη φόνου, if they acquitted him at the ἔνδειξις (5. 90). This passage suggests strongly that the judges in the courts for homicide were of the same type as in a *dikasterion*. If Herodes was an Athenian citizen, the δίκη φόνου would belong before the Areop-

40. Ignored by Loomis, "The Nature of Premeditation." The ingenious objection of A. R. W. Harrison, "Drakon's *Protos Axon*," *CQ* 11 (1961): 3–5, was invalidated by Stroud's reading in line 56 of the inscription of 409/408.

41. I thank J. R. Craddock for pointing this out to me.

42. This study was undertaken while I had sabbatical leave from the University of California and enjoyed the hospitality of the University of Düsseldorf; I thank both institutions. A preliminary version was read to the Norddeutsches Althistoriker-Kolloquium at Bremen on 4 July 1981; I am indebted to the audience, especially P. Herrmann, for patient hearing and comments, and to Dorte-Freyja Sealey for help on a matter of expression. I am alone responsible for the views expressed in this paper and for its shortcomings.

agus; so the defendant would commit some distortion in saying that the δίκη φόνου would be heard by the same people as the ἔνδειξις. F. Blass (*Die attische Beredsamkeit*, vol. 1² [Leipzig, 1887], p. 175, n. 1) offered reasons of probability for supposing that Herodes was an Athenian citizen. His arguments were good but not decisive. If Herodes was an alien, the defendant's point about the identity of the judges makes good sense. Aristotle (*Ath. Pol.* 57. 4) probably referred to the judges in the ephetic courts by the noncommittal term ἄνδρες (see M. Chambers, "Notes on the Text of the *Ath. Pol.*," *TAPA* 96 [1965]: 38–39); he had reason to be noncommittal, if they were *dikastai* but were called *ephetai*.

If *dikastai* served in the ephetic courts in the period of the orators, a roundabout route must be taken to discover how this came about. Ἡλιαστής was an older word for δικαστής. Athens had a court called ἡλιαία from early times (Lys. 10. 16; Dem. 24. 105, 23. 97). Commenting on an early law which mentioned it, Demosthenes (24. 114) explained ἡλιαία by "*dikasterion*." A court called "the *heliaia* of the *thesmothetai*" is attested for 446 (Meiggs and Lewis, *Greek Historical Inscriptions*, no. 52. 75). Antiphon (6. 21–24) equates "the *heliaia* of the *thesmothetai*" with "the *dikasterion*." Athenian tradition said that Solon created the *dikasteria* (Arist. *Pol.* 1274a2–3; cf. *Ath. Pol.* 9. 1). That is credible; in addition to reducing the laws to writing, he might create the popular court(s) to administer the laws and to determine cases not covered by them (cf. the opening clause of the dikastic oath).

A tentative reconstruction may be offered as follows. Before the time of Solon, cases of homicide were judged by panels of fifty-one *ephetai*, drawn by lot for each case from a list. The length of the list is unknown. To qualify for entry on the list a citizen had to be at least thirty years old and had to take an oath. Solon instituted a procedure for drawing panels of judges to hear other cases as well as homicide. The list may have become longer, but the qualifications for entry in the list were the same. The size of each panel was not less than 51 but not more than 501 and probably far less than 501. A court consisting of a panel of judges of this kind was called the *heliaia*. By the time of the orators the term "*dikasterion*" had replaced the term "*heliaia*," the panels had grown to sizes of 201, 401, and 501, and the list had grown to 6000. (The inscription of 409/408 does not prove that the number of 51 was retained for any but highly specialized functions.)

This reconstruction has to be tentative. It does no violence to the evidence. It rejects two mutually allied views, which are widely held and in some ways plausible but poorly supported by evidence:

(1) That the *heliaia* was a judicial session of the public assembly. This accords tolerably well with the meaning of the verb ἁλίζειν and with the meanings borne by the words ἀλία, ἀλιαία in Dorian cities. There is no evidence for saying that the Athenian *heliaia* was a session of the assembly, and it is difficult to see how a list of 6000 male citizens, aged at least thirty and bound by oath, could arise from an assembly which all adult male citizens were entitled to attend. (Further reasons for dissociating

the *dikasteria* from the *demos* are given by M. H. Hansen, "Demos, Ecclesia and Dicasterion in Classical Athens," *GRBS* 19 [1978]: 127–46.)

(2) That the *heliaia* was originally a court of appeal. The archaic law quoted by Demosthenes 24. 105 reveals the *heliaia* as a court of first instance (see E. Ruschenbusch, "Ἡλιαία. Die Tradition über das solonische Volksgericht," *Historia* 14 [1965]: 381–84; idem, *Untersuchungen zur Geschichte des athenischen Strafrechts*. Graezistische Abhandlungen, Band 4 [Köln–Graz, 1968], pp. 78–82). The argument for regarding the *heliaia* as a court of appeal has been restated by D. M. MacDowell (*The Law in Classical Athens* [Ithaca, N.Y. and London, 1978], pp. 30–32), but he does not discuss Demosthenes 24. 105. Since the views here challenged have rested partly on consideration of probabilities, a counter-argument from probability may be added. Appeal is only likely to play a significant part in the development of the courts if the state is relatively strong—in particular, if it is strong enough to compel the defendant's attendance at court and strong enough to have some hope of executing the verdict. In the formulary procedure of Roman law appeal played no significant part; the procedure depended on the collaboration of both parties, even though the magistrate could put severe pressure on the defendant to appear before him (see, e.g., J. Gaudemet, *Institutions de l'Antiquité* [Paris, 1967], pp. 627–28, 646–47). Likewise, in the proto-judicial scene of *Iliad* 18. 497–508, the parties have agreed to take their dispute to the elders. Public authority was not nearly as strong in pre-Pisistratid Athens as in Rome of the praetor's edict.

(The article by M. H. Hansen, "The Athenian *Heliaia* from Solon to Aristotle," *Classica et Mediaevalia* 33 [1981–82]: 9–47, appeared after the above had been written. Hansen argues powerfully against the view that the Solonian *heliaia* was a meeting of the public assembly in a judicial capacity.)

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