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PARENT ABUSERS, MILITARY SHIRKERS,  
AND ACCUSED KILLERS:  
THE AUTHENTICITY OF THE SECOND LAW  
INSERTED AT DEM. 24.105\*

I examine the second of two laws that are inserted into Dem. 24.105. The first (commonly referred to as a ‘law on theft’ and which I designate ‘105A’) deals with the recovery of lost or stolen property; the second (‘105B’) deals with the arrest of certain *atimoi* and accused killers who enter forbidden places. Scholars now and again in the nineteenth and twentieth centuries cast doubt on both laws, but in the last few decades the question of authenticity has not been raised.<sup>1</sup> Recent discussions of the prosecution of homicide in Athens, however, have called attention to ambiguities and inconsistencies in the way forensic speakers depict laws regarding *apagoge* for the trespass of killers.<sup>2</sup> In view of these problems, the question of the authenticity of 105B deserves an airing. The criteria used here for regarding a given inserted law as ‘genuine’ are that its phraseology and idiom are those of Athenian law, and that it is functionally feasible (that is, it is consistent with what we know about Athenian legal practice). Paraphrases of and references to a law within the same speech can confirm the content of an inserted law, but they also contribute to an argument that a ‘Grammarians’ found the materials for his composition in the speech itself. In these instances, the speaker’s paraphrase may carry greater weight than the inserted law if one’s aim is to reconstruct the genuine law, but the paraphrase itself and the context in which it appears must be studied and questions of the speaker’s rhetorical strategies and possible distortion of the law must be raised. On the other hand, when a document inserted in the text is the only witness for a particular provision (i.e., it is not paraphrased by the speaker), then the value of the sole testimony is neutral – it is neither good nor bad; credibility will depend upon the criteria already mentioned.

I begin with a review of recent discussions of types of arrest for killing and trespassing; I conclude that scholars have not succeeded in eliminating inconsistencies among those remedies (i.a). Next I examine passages that have been

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<sup>1</sup> Inauthentic: Benseler 1861 (*non vidi*); Whiston 1868: 490; Wayte 1893: 171-73; Harrison 1971: 226-27 (see n. 30 below) stops short of rejecting the law.

<sup>2</sup> See nn. 3 and 4.

used to corroborate 105B and I show that very little can be claimed for the law (i.b); I conclude that we may have more to gain for an understanding of the laws concerning the trespass of killers by hypothesizing that 105B is *not* authentic (i.c). I then focus on arrest procedures in Dem. 23.28 and 23.80 and I suggest how those laws may have evolved. Finally, I offer two hypotheses concerning the origin of 105B.

i.a. The arrests of killers: inconsistent remedies

MacDowell in 1963 and Hansen in 1976 posited four types of arrest that relate to killers; Gagarin in 1979 used the four types as his starting point in an analysis of the prosecution of homicide in Athens.<sup>3</sup> While others have written on *apagoge* and killing in the interim,<sup>4</sup> the major lines of debate can still be traced by adducing the arguments of Hansen and Gagarin. The four types are as follows:<sup>5</sup>

1. *Apagoge* of men accused of homicide (as well as men convicted of abusing their parents and shirking military duty) who enter forbidden places. Source: lex apud Dem. 24.105B (Butcher OCT):

Ἐὰν δέ τις ἀπαχθῆι, τῶν γονέων κακώσεως ἐαλωκῶς ἢ ἀστρατείας ἢ προειρημένον αὐτῶι τῶν νόμων εἴργεσθαι, εἰσιὼν ὅποι μὴ χρή, δησάντων αὐτὸν οἱ ἔνδεκα καὶ εἰσαγόντων εἰς τὴν ἡλιαίαν, κατηγορεῖτω δὲ ὁ βουλόμενος οἷς ἔξεστιν. ἐὰν δὲ ἀλῶι, τιμάτω ἢ ἡλιαία ὅ τι χρή παθεῖν αὐτὸν ἢ ἀποτεῖσαι. ἐὰν δ' ἀργυρίου τιμηθῆι, δεδέσθω τέως ἂν ἐκτείσῃ.

If someone is arrested because, (a) having been convicted of mistreating his parents or (b) of evading military service, or (c) having been barred by proclamation from places specified in the laws, he goes where he must not, let the Eleven bind him and take him to the Heliaia, and let anyone who wishes of those eligible accuse him. And if he is convicted, let the Heliaia assess the penalty he should suffer or pay, and if he is fined, let him be imprisoned until he pays.<sup>6</sup>

2. '*Apagoge phonou*,' the arrest of an *androphonos* who enters sanctuaries or the agora. Source: Demosthenes' description apud Dem. 23.80 (Butcher OCT):

εἰ ... τὸν ἀνδροφόνον δ' ὀρᾶι περιιόντ' ἐν τοῖς ἱεροῖς καὶ κατὰ τὴν ἀγοράν, ἀπάγειν ἔξεστιν εἰς τὸ δεσμωτήριον, ... κἀνατῦθ' ἀπαχθεὶς οὐδ' ὀτιοῦν πρὶν

<sup>3</sup> MacDowell 1963: 130-40; Hansen 1976: 99-108 and 1981: 17-21, in response to Gagarin 1979.

<sup>4</sup> A rather different view of *apagoge* and killers has recently been taken by Carawan 1998; Carawan's study is thoughtful and challenging but flawed, I think, in arguing that the legal basis for the charge in cases of *apagoge phonou* was not trespass but homicide (see the arguments of Volonaki 2000: 152 and 160-65). There are also many points on which we are agreed and these are noted below.

<sup>5</sup> I have not entirely retained the order of types in MacDowell, Hansen, and Gagarin (see n. 3): types 1 and 2 are the same, but I have reversed their 3 and 4 since I do not discuss *apagoge kakourgon*.

<sup>6</sup> Translation of 105B in Gagarin 1979: 314, to which I have added the alphabetical letters to make clear the three categories of trespasser.

ἂν κριθῆι, πείσεται, ἀλλ' ἐὰν ἀλῶι θανάτῳ ζημιωθήσεται, ἐὰν δὲ μὴ μεταλάβῃ τὸ πέμπτον μέρος τῶν ψήφων ὁ ἀπαγαγὼν, χιλίας προσοφλήσει.

If [someone] ... sees the *androphonos* walking about in sanctuaries or up and down the agora, it is permissible to arrest him to the prison, ... and, once arrested there, he will not suffer any harm at all before a verdict is given; but if he is convicted, he will be penalized with death, and if his arrester fails to get a fifth of the votes, he will incur a penalty of 1,000 dr.

3. *Apagoge* of men in exile for homicide (condemned in absentia for intentional killing, or condemned for unintentional killing) who return to their native land (i.e., Attika). Source: lex apud Dem. 23.28; paraphrase with additional information in c. 31 (Butcher OCT):<sup>7</sup>

(A) Τοὺς δ' ἀνδροφόνους ἐξεῖναι ἀποκτείνειν ἐν τῇ ἡμεδαπῇ καὶ ἀπάγειν, ὡς ἐν τῷ <α'> ἄξονι ἀγορεύει, (B) λυμαίνεσθαι δὲ μὴ, μηδὲ ἀποινᾶν, ἢ διπλοῦν ὀφείλειν ὅσον ἂν καταβλάβῃ ...

It is permissible to kill *the androphonoi* in the native land and to arrest them, as he bids on the <first> axon, but not to maim them, nor even to ransom them, or else to incur a penalty double however much injury he has inflicted ...

4. *Apagoge kakourgon*, arrest of a killer as a *kakourgos*. Source: Ant. 5.<sup>8</sup>

In types 1 (Dem. 24.105B) and 3 (Dem. 23.28), the offense appears to be the entrance into a place forbidden to a person because he has killed or is accused of having killed or because he is *atimos*; accordingly, the offense is what I designate 'trespass.'<sup>9</sup> Hansen has proposed that the trial of an accused killer (type 1) will not have been a substitute for a *dike phonou*, but 'a temporary interruption of the homicide trial' (1976: 99-100). Type 2 (Dem. 23.80) posed the greatest problems for interpretation. Hansen (as MacDowell before him) supposed the *androphonos* to be a 'suspected killer' and thought that this type of *apagoge* could only be used if the *androphonos* had 'trespassed.' The trial, according to Hansen, *would* be a substitute

<sup>7</sup> I have omitted the last sentence of the law which is not relevant to the issues here. Since the provisions of Dem. 23.28 that are relevant (as far as but not including the penalty clause) are paraphrased or quoted later in Demosthenes' text (cc. 29-35; cf. c. 216), we may accept their content (but not necessarily their verbatim form) as genuine. Concerning the relation of the inserted law to *IG I<sup>3</sup> 104*: Stroud 1968: 55 with n. 102 thought that 'although the content and even the vocabulary in the opening clause may be Drakontian, the word order used by the later lawgiver does not necessarily provide a certain basis for restoration in the text of the inscription.'

<sup>8</sup> For other possible examples, see Hansen 1981: 25-30.

<sup>9</sup> In regard to the accused killers of type 1, although there is no explicit mention of the crime, the expression for debarment εἴργεσθαι τῶν νομίμων or τῶν νόμων has been sufficiently documented as a practice preliminary to a trial for homicide to justify the identification of the offender as a man who has been accused of homicide. The expression τῶν νομίμων εἴργεσθαι appears in Ant. 6.34, 35, 36 (bis), and 40, Arist. *AP* 57.2, Plato *Laws* 9.871A3, 873B1-2, Pollux 8.90. Lex. Seg. 310.6; τῶν νόμων εἴργεσθαι appears at Lyk. 1.65. Moreover, προετηρημένον is the verb *par excellence* used of *proclaiming* the ban on an accused killer (e.g., Ant. 6.34, 35, 40).

for a *dike phonou*: the court would decide ‘both whether the defendant was guilty of homicide and whether he had exercised any of the civil rights reserved for *epitimoí*’ (1976: 100). The penalty was death, even for those who may have been guilty of unpremeditated homicide (who would have been sentenced to exile in a *dike phonou*). The more severe sentence may have been justified by the rationale that ‘the accused had not only become guilty of unpremeditated homicide, but had also defiled the state by appearing in a public place’ (1976: 101).

Gagarin saw the four types as representing two divisions, ‘first where the offense is in fact the violation of some debarment resulting from a homicide, and secondly where the killer is considered a *kakourgos*’ (1979: 319). He noted similarities between the *apagogai* of types 1 (105B) and 2 (23.80): ‘the killer is not arrested for the homicide itself but for the crime of being in certain sacred or public places, and this public crime, not the homicide, apparently provides the justification for employing a public procedure against the criminal’ (1979: 315); Gagarin then tried to assimilate the two types by reducing the ‘apparent differences,’ namely:

(1) While the penalty is not the same (it is assessed in type 1, death in type 2), Demosthenes is paraphrasing in 23.80 and so may be reporting the penalty that was usually assessed by the *dikastai* in these cases rather than a penalty stipulated by law.

(2) While no proclamation is mentioned in type 2, Demosthenes may have omitted its mention, or else an arrest without proclamation may have been allowed under specific conditions, namely, if the killing had been ‘public and manifest’ (*ep’ autophoroi*). Thus the phrase *ep’ autophoroi* must be included in the writ for an *apagoge* of type 2, the so-called *apagoge phonou*, when there is no formal proclamation (as in the writ in Lys. 13, an *apagoge phonou* according to Gagarin’s analysis). ‘This restriction would prevent someone from arresting a person merely suspected of homicide or only indirectly involved, such as the choregus in Ant. 6’ (1979: 321).

(3) There is no mention of a 1,000 dr. fine for the losing prosecutor in type 1; the law inserted at Dem. 24.105, however, is abridged and Demosthenes did not need to include that provision for his argument.

Gagarin did not go so far as to say that the accused killer of 105B is arrested by the same procedure as the *androphonos* in 23.80. Indeed, he left one significant difference between the two types: whereas the accused killer in 105B will (apparently) be tried for ‘trespass,’ the *androphonos* of 23.80 (as Agoratos in Lys. 13) will be tried for homicide. While Gagarin does not explicitly address this difference, he used the occasion of his analysis of these forms of *apagoge* to comment on the unsystematic nature of Athenian law.

Hansen in 1981 took up Gagarin’s analysis of *apagogai*; among other matters, he firmly maintained the stipulated penalty of death for *apagoge phonou* in 23.80.<sup>10</sup>

<sup>10</sup> Hansen (1981: 18-19) replies to Gagarin regarding the penalty that if death were not prescribed by law as the penalty in these cases, then ‘it would undoubtedly have been in Demosthenes’ interest to point this out to the jurors, for example by saying:

Not surprisingly, he found the greatest obstacle for the assimilation of types 1 (105B) and 2 (23.80) in the difference pointed out in the last paragraph: whereas the *apagoge* of 23.80 would be a substitute for a *dike phonou*, ‘the *apogoge* against a person accused of homicide (24.105) did not replace a *dike phonou*, but was merely a temporary interruption of the *dike phonou* already initiated by the πρόρρησις.’ He continued:

Otherwise it would have been advantageous for the accused to contravene the restrictions imposed by the πρόρρησις: if he was put on trial by an *apagoge* after the πρόρρησις, he might get off with a fine, whereas the penalty for homicide in a *dike phonou* was inevitably death or exile ... If we follow Gagarin in minimizing the difference between *apagoge* types (1) and (2), we should have to admit that the *apagoge* paraphrased in 23.80 was not an alternative to the other procedures, but only a preliminary trial dealing with the trespassing but not the original offense, viz., the killing of another man (1981: 20).

Hansen thus maintained his earlier depiction of the four types of arrest relating to the prosecution of killers.

Hansen was right to point out that Gagarin’s case for assimilation will not work. Yet there are problems in Hansen’s overall picture of *apagogai* which he himself noted. The first is that the law apud Dem. 24.105B, which concerns not only the arrest of accused killers but also the arrest of *atimoi* (specifically, convicted parent abusers and military shirkers), presents us with the only evidence that *apagoge* was used against *atimoi*; elsewhere, the procedure is *endeixis*.<sup>11</sup> Hansen tries to

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according to the law regulating *apagoge phonou* a homicide may escape with a fine but, in his decree for Charidemus, Aristocrates allows even the killing of the homicide without trial.’ I accept this reasoning.

<sup>11</sup> Hansen 1976: 94-95 with nn. 2 and 3 for references to *endeixis* against *atimoi*. MacDowell 1990: 280 and 1985: 73-74, however, thinks that Dem. 21.59-61 provides a further piece of evidence for *apagoge* against *atimoi*. But the language used there – ‘touching’ (ἥψατο), ‘ejecting’ (ἐξαγαγεῖν), ‘a taking hold of by the hand’ (ἐπιλαβόμενον τῆι χειρὶ) – is nowhere else used in our sources for *apagoge*. Significantly, no officials are mentioned, nor is there a hint of a march to prison. Similar gestures do appear elsewhere, but in a rather different context, at Plato *Protagoras* 335c. While Kallias’s ‘laying hold of Sokrates’ (*epilambanesthai*) does appear to mimic a formal act – and one, apparently, before witnesses – nevertheless, it does not appear to be a prelude to a (pretend) arrest – indeed, there is no hint of that. Rather, it serves to stop the ‘wrong’ (i.e., Sokrates’ imminent departure) until a ‘settlement’ can be reached. In Dem. 21.59-61, the repetition of the formulations for ‘touching’ and its foundation in law (οἱ νόμοι διδόασιν ἄψασθαι) suggest that under certain circumstances, when festivals were underway, procedures before magistrates were *not* possible (just as distraintment and seizure of property were not possible during certain festivals: Dem. 21.10-12; 176). The purpose of the gestures will have been to put an immediate end to the offensive conduct and to demonstrate publicly that a wrong was being committed for which witnesses might testify at a later time when the case *could* be brought before officials (cf. *Protag.* 335-38, *mutatis mutandis*). Festivals were not occasions for carrying out arrests.

eliminate the exception by positing that 105B represents the end of the law; accordingly, ‘the clause ἐὼν δὲ τις ἀπαχθῆι refers to arrest as a consequence of a previous *endeixis*,’ and so he keeps *atimoi* in the category of offenders who undergo *endeixis*. But this is clearly an *argumentum e silentio*, which also can be met by another of its own kind: for why would the transcriber of the law, if he had the authentic law to hand, have elided the *endeixis* if all that was needed was one participle: ‘If someone [having first been denounced] is arrested...’?<sup>12</sup> Moreover, if the transcriber of the law has elided one word or even several inside of the ‘quotation’ of the law – or if one word or more has somehow fallen out of the text, are we left with an abbreviated law – or a corrupt one?

A second problem emerges when we set *apagoge* against accused killers (type 1) in the framework of other attested types of *apagoge* that relate to the prosecution of killers. Hansen pointed out the uncomfortable coexistence of the *apagoge* of an accused killer as depicted in 105B with that of the *androphonoi* of Dem. 23.80 when limited to ‘suspected killers’:

Let us, for example, suppose that a man has unintentionally killed another man. If he is arrested in the market before a proclamation has been made against him, the People’s Court will sentence him to death [i.e., Dem. 23.80]. If, on the other hand, he has been found walking in the market only after a πρόρρησις has been issued against him, there is the possibility that the People’s Court will only impose a fine on him [i.e., Dem. 24.105B], after which he may be sentenced to exile before the Palladion. It is possible that this contradiction is due to our fragmentary knowledge of Athenian law, but it could be a real anomaly.<sup>13</sup>

#### i.b. Corroborative passages

I turn now to the passages that have traditionally been used to corroborate 105B, viz., 24.60 and 103.<sup>14</sup> At 24.60, the speaker compares Timokrates’ new law (24.39-40), which is under attack in the trial, to earlier laws. He is especially indignant because of a perceived unfairness: the new law allows defaulting state debtors who have incurred an additional penalty of imprisonment to go free (their sureties are to be jailed in their place) but does not extend that same privilege to defaulting tax farmers, their sureties, collectors, lessees and their sureties – as if that particular quintuplet constituted a profound threat to society.<sup>15</sup> ‘Certainly,’ he says, ‘you would

<sup>12</sup> Cf. Gagarin 1979: 317, n. 49: ‘It is very unlikely that the provision in 24.105 was preceded by a statement that *apagoge* was allowed in these cases, since in that case there would be no need to repeat the list of cases.’ Likewise for *endeixis*: a participle would obviate the need for a doubling of the list of cases.

<sup>13</sup> Hansen 1976: 101. I have supplied the references in the square brackets

<sup>14</sup> The speaker also quotes from a law regarding *apagoge* in c. 146; that law does not appear to be the same as the one inserted in c. 105.

<sup>15</sup> Most of the law inserted in cc. 39-40 is repeated verbatim elsewhere in the speech: cc. 41, 55, 59, 72, 79, 82, 84, 86 (but cf. misrepresentations in cc. 77 and 93), and 87; the prescript which is inserted in c. 71 is not confirmed elsewhere; the list of

not go so far as to say this, that of all men who are meted out imprisonment as an additional penalty (ὡς ὅσοις δεσμοῦ προστιμᾶται), tax farmers are the worst and commit the greatest wrongs and thus are to be shut out from enjoying the benefit of your law.’ The speaker then introduces the contrasting trio: πολλὸν γὰρ δήπου μάλλον οἱ προδιδόντες τι τῶν κοινῶν, οἱ τοὺς γονέας κακοῦντες, οἱ μὴ καθαρὰς τὰς χεῖρας ἔχοντες, εἰσιόντες δ’ εἰς τὴν ἀγορὰν, ἀδικοῦσιν. οἷς ἅπασιν οἱ μὲν ὑπάρχοντες νόμοι δεσμὸν προλέγουσιν, ὁ δὲ σὸς λελύσθαι δίδωσιν. A literal translation runs: ‘for surely do men (a) who betray the community, (b) who maltreat their parents, (c) who have polluted hands – *and enter the Agora*, [surely do all these] commit far greater crimes – for while the existing laws prescribe imprisonment for all of them – your law grants them release [from prison]’ (c. 60).<sup>16</sup>

If c. 60 does confirm information in 105B, then convicted members of the unholy trio of c. 60 should be said to suffer imprisonment as an *additional* penalty if they do not pay their fines to the state (just as the convicted parent abuser, military shirker, and accused killer of 105B) – that is, they become *atimoi*, state debtors, and so are now eligible, by Timokrates’ new law, to be released from prison. This, indeed, is the important point, for Timokrates’ new law only provides release to οἱ ὀφείλοντες τῷ δημοσίῳ. Again, if data in c. 60 corroborate data in 105B, then ‘the men with polluted hands’ in c. 60 must be equivalent to the accused killer in 105B.

My first observation about c. 60 is that the offenses are unclear. A determination of whether the participle εἰσιόντες belongs to all three subjects will determine the offense for which imprisonment might conceivably be due as an *additional* penalty (προστιμᾶται). Is it for being a traitor – or, with participial clause attached, for entering the Agora as a (convicted) traitor? For being a parent abuser – or for entering the Agora as a (convicted) parent abuser (as in 24.103)? While at least one of the numerous remedies for *prodosia* (treason) allows for a monetary fine and hence provides the possibility of imprisonment as an additional penalty upon inability to pay, the penalty for *kakosis* of parents is *atimia* and so imprisonment is not relevant.<sup>17</sup> Accordingly, let us assume that the participial clause applies to each type of offender and let us make the offenses conform to those in 105B (all = ‘trespass’). Even so, the only data that we win for confirmation of 105B are that (1) ‘trespass’

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exceptions from the privileges of Timokrates’ law (c. 40: defaulting tax farmers *et alii*) is abbreviated at cc. 59 and 122.

<sup>16</sup> Vince (Loeb) translates: ‘Surely men who are traitors to the commonwealth, men who maltreat their own parents, *men who enter the market-place with unclean hands*, offend far more heinously; and all those criminals are threatened with imprisonment by the standing laws, while your law offers them instant release.’

<sup>17</sup> Monetary fine for treason: Dem. 24. 127; other penalties for treason: see MacDowell 1976: 176-79. *Atimia* as penalty for *kakosis* of parents: Aiskhin. 1.28; Dem. 24. 103.

was a punishable offense for parent abusers and for ‘men with impure hands,’ and (2) (pre-trial) imprisonment was prescribed by law. Although we may infer that the Eleven would be in charge of the imprisonment, we have no corroboration for procedure or penalty (or ‘additional penalty’). It would not be out of the question for the thesmothetai to preside in court (cf. *AP* 52.1 *fin.* and 63.3).

There is still another problem: the identity of οἱ μὴ καθαρὰς τὰς χεῖρας ἔχοντες. A similar phrase appears at Ant. 5.11 of men accused of killing, but the phrase is also used of men who have not been charged (Ant. 5.82 and And. 1.95, cf. Aiskhin. 2.148 and Lys. 26.8). Moreover, we cannot exclude the possibility that ‘the men with polluted hands’ are exiles (for homicide) who have returned to Athens illicitly. Dem. 23.72-73 and 37.59 with its doublet 36.22 imply that a man convicted and in exile for *akousios phonos* was not *katharos* until he was pardoned by his victim’s kinsmen and purified himself. So a ‘man with polluted hands’ might be suspected of homicide or accused of homicide, or in exile for that offense. The οἱ μὴ καθαρὰς τὰς χεῖρας ἔχοντες of 24.60 might then be said to confirm the law in 23.80. The imprisonment prescribed by the existing laws (24.60) will refer to pre-trial custody (23.80) rather than imprisonment as an additional penalty.

In the paraphrase (?) of the law in c. 103, the speaker complains, ‘Not only does Timokrates deprive the dikasteria of authority over additional penalties (τὰ δικαστήρι’ ἄκυρα ποιεῖ τῶν προστιμημάτων) and offer immunity to men who wrong the community ..., but he also has made a law that is a positive aid to *kakourgoi*, *patraloiai*, and *astrateutoi*, for he subverts the existing penalties that are currently meted out by the laws in force’ (102). The misrepresentations are obvious – for example, *patraloiai* and *astrateutoi* are punished with *atimia* and *not* with imprisonment as an additional penalty;<sup>18</sup> *kakourgoi* are punished with death;<sup>19</sup> none becomes a state debtor as a result of his penalty and Timokrates’ law offers them no assistance. We have left behind the realm of accurate reporting and entered that of sensational hyperbole. Next the speaker contrasts Solonian laws with Timokrates’ new law. He singles out the statutes that are about to be read to the court (allegedly 105A and B), summarizing the first, the so-called ‘law about theft’, in this way: ‘if a man is convicted and not penalized with death, he is additionally penalized with imprisonment’ (προστιμᾶν αὐτῶι δεσμόν). He then paraphrases another law (or laws) as follows: ‘And if anyone convicted of abusing his parents thrusts himself into the Agora, he is to be imprisoned; and if anyone incurs a penalty for shirking military duty and engages in any activity that is the prerogative of the franchised, this man, too, is to be imprisoned’ (κᾶν τις ἄλοους [τῆς] κακώσεως τῶν γονέων εἰς τὴν ἀγορὰν ἐμβάλλῃ, δεδέσθαι, κᾶν ἀστρατείας τις ὄφληι καὶ τι τῶν αὐτῶν τοῖς ἐπιτίμοις ποιῆι, καὶ τοῦτον δεδέσθαι, 103). ‘Timokrates,’ continues the speaker, ‘creates a safe haven for all these offenders by eliminating imprisonment

<sup>18</sup> Hansen 1976: 44 for references.

<sup>19</sup> Hansen 1976: 21 for references.



through the appointment of sureties.’ It is difficult, however, to see how the ‘thief’ of 103 and 105A could use the sureties of Timokrates’ law to rid himself of the additional five days and nights in the stocks, for he has not become a state debtor. Again, there is misrepresentation (cf. 105A: ‘he is to be pilloried for five days and an equal number of nights, if the Heliaia impose an additional penalty’).<sup>20</sup> In the case of the convicted parent abusers and military shirkers who transgress constraints on their freedom, the reference to imprisonment in c. 103 is so elliptical, and follows so briskly upon the offense, that it is difficult to view the imprisonment as the result of an inability to pay a fine imposed by a court after a trial that is not mentioned, rather than as immediate and custodial imprisonment before the trial takes place. Demosthenes’ aim once again appears to be a sensational depiction of the consequences of Timokrates’ law – that it will allow the release of any criminal, whether in custody before trial or imprisoned as an additional penalty after a verdict has been delivered.

Dem. 24.103 tells us that a convicted parent abuser is imprisoned if he enters the Agora and that a convicted military shirker is also imprisoned if he avails himself of any of the prerogatives of the franchised. There is no mention of accused and trespassing killers (although the special category of the *patraloiai* makes an appearance – the very worst case of the parent abuser). Immediately following the secretary’s reading of the law(s) in c. 105, the speaker comments that Timokrates’ law debilitates efforts to assist aging parents and instead extends a helping hand to *kleptai*, *kakourgoi*, and *astrateutoi* (106-7); once again, there are no trespassing killers (unless they lurk beneath the mention of *kakourgoi*). Dem. 24.60 together with 24.103, however, will give us the three categories of offenders who appear in 105B, but only if we restrict the meaning of ‘the men with polluted hands’ to the accused killer of 105B. Without the inserted law, we would not know anything about arrest and subsequent courtroom procedure. We would not know that the parent abusers of cc. 60 and 103 could suffer imprisonment as an additional penalty for transgressing their status as *atimoi*. And we would not think of identifying the men with polluted hands with accused killers who have been the subject of public proclamations. We might not even dream of including them in the same law. We are faced with a predictable dilemma: the inserted law gives us information that is not confirmed elsewhere – neither a loss nor a gain on the scorecard for authenticity.

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<sup>20</sup> Dem. 24. 105A: ὅ τι ἄν τις ἀπολέσῃ, ἐὰν μὲν αὐτὸ λάβῃ, τὴν διπλασίαν καταδικάζειν, ἐὰν δὲ μὴ, τὴν διπλασίαν πρὸς τοῖς ἐπαιτίοις. δεδέσθαι δ’ ἐν τῇ ποδοκάκκηι τὸν πόδα πένθ’ ἡμέρας καὶ νύκτας ἴσας, ἐὰν προστιμήσῃ ἢ ἡλιαία. προστιμᾶσθαι δὲ τὸν βουλόμενον, ὅταν περὶ τοῦ τιμήματος ἦι (Butcher OCT). Lys. 10.16 is usually thought to confirm the provision regarding the pilloring of the thief as Solonian.

## i.c. Conclusions

Inconsistencies remain between Dem. 23.80 and the law inserted at 24.105B – and these certainly must count as losses. Both passages are problematic. In 23.80 the identity of the *androphonos* is ambiguous and in 24.105B an exceptional depiction of *apagoge* against *atimoi* appears. Also, the unintentional killer who trespassed under one law could suffer a different penalty if brought to court under the other law. Rather than seek ingenious ways to harmonize 23.80 with 105B, I suggest we consider, as a hypothesis, that 105B is not authentic. In the next section of this essay, I shall examine the term *androphonos* in 23.28 and 23.80 and show how acceptance of 105B has distorted interpretation of 23.80. Once 105B is out of the picture, I shall then suggest how the laws against trespassing killers may have evolved.

ii. Dem. 23.28 and Dem. 23.80: procedure and the identity of the *androphonos*

Types 2 (Dem. 23.80) and 3 (Dem. 23.28) both concern the *apagoge* of ‘trespassing killers’ – that is, killers who are found in territory forbidden them by law. In type 3, a law inserted into Dem. 23.28, the relevant part of the first sentence reads: τὸς δ’ ἀνδροφόνους ἐξεῖναι ἀποκτείνειν ἐν τῇ ἡμεδαπῇ καὶ ἀπάγειν, ὡς ἐν τῷ <α’> ἄξονι ἀγορεύει, λυμáινεσθαι δὲ μή, μηδὲ ἀποιῶν.<sup>21</sup> Some modern scholars have perceived accretions in the law: clauses permitting the arrest or killing of *androphonoi* may represent Drakon’s legislation (i.e., as far as the ὡς clause); the restrictions on physical injury and ransom may be due to Solon or even a later legislator.<sup>22</sup> The speaker nonetheless treats the law as one seamless fabric, the creation of an ancient lawgiver – but he of course interprets it in the light of his own era (e.g., his allusion to an arrest in the Assembly just last year, Dem. 24.31). He explicitly defines the *androphonoi* in the law as ‘convicted killers’ who unlawfully return to Attika from exile (29-31); presumably, he interprets the term in a way that is credible to his contemporaries; possibly he provides the normal or a common usage. Would the *androphonoi* of the archaic legislation have been similarly restricted? We cannot know. While we may expect the original context of the clause to have at least implied that the *androphonos* was a ‘returning’ killer,<sup>23</sup> we should

<sup>21</sup> See n. 7.

<sup>22</sup> Stroud 1968: 54-56 argued that while some version of the first δέ clause (Dem. 23.28A) probably appeared in the copy of Drakon’s law on homicide (*IG I<sup>3</sup> 104*), what follows surely did not; the remainder might be Solonian. Ruschenbusch 1966 (F 16\*\*) accepts only the portion of the law from τοὺς δ’ ἀνδροφόνους. ... ὡς ἐν τῷ <α’> ἄξονι ἀγορεύει as Solonian; according to Ruschenbusch 1960: 130, *IG I<sup>3</sup> 104* is a revision of Drakon’s homicide law; the remaining part of the law regarding the remedy for maiming and ransom demand is post-Solonian (1960: 139-40).

<sup>23</sup> If the provision did appear in lines 30-31 of *IG I<sup>3</sup> 104*, then the larger context is suggestive of return (notwithstanding the restored locative ἐν] τεῖ ἐμεδί [απει ...). Cf., e.g., the text at 23.51 which quotes or paraphrases a law inserted earlier in the

hold open the possibility that the term may have been less specific in meaning than the speaker of Dem. 23 suggests – perhaps it embraced any killer (not yet accused, already accused, or convicted) who had left Attika and returned without pardon.<sup>24</sup> Such killers who did return might be killed or arrested but could not be maimed or held for ransom. The speaker informs us a little later that such *androphonoi* (i.e., those who were not executed by their ‘finders’) were brought before the thesmothetai who were *kurioi* to penalize them with death (οἱ θεσμοθέται τοὺς ἐπὶ φόνῳ φεύγοντας κύριοι θανάτῳ ζημιῶσαί [εἰσι], c. 31).<sup>25</sup> There has been some debate concerning the extent of the power of the thesmothetai here: some scholars think they put the trespassing *androphonos* to death without a trial;<sup>26</sup> others disagree, maintaining that a trial would take place if the defendant did not confess.<sup>27</sup> The latter view is consonant with what we know of Athenian practice and is to be preferred.

The *androphonos* appears once again in Dem. 23.80; is he suspected, accused, or convicted of killing? Scholars who treat him as a ‘suspected killer’ (i.e., no proclamation has yet been made against him) do so for two reasons. The first is impelled by the desire to eliminate a contradiction between 105B and 23.80: if the person who enters a sacred place prohibited by 23.80 were an accused killer, then his penalty would not be consonant with that of the accused killer of 105B since the latter’s penalty is assessed in court; therefore, the trespassing killer of 23.80 must be restricted to the ‘suspected killer.’ The method of solution (i.e., the differentiation of the types of killer in 105B and 23.80) does not dissolve the problem we saw at the end of the last section, the potentially anomalous penalties for the unintentional killer, depending on whether he is accused or merely suspected.

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same chapter. Even without the mention of *pheugontes*, the text’s version makes clear that the killers are ‘returning’ (*tous kationtas androphonous*).

<sup>24</sup> Similarly Carawan 1998: 335-36. Carawan would also include ‘accused killers who would neither avail themselves of exile nor come to terms with their accusers’ (336 with n. 46), but for that we would have to infer a larger context for the law which, as it is, seems to refer to killers who are ‘returning’ (see the preceding note).

<sup>25</sup> Who carries out the arrest? There is some ambiguity in the text. ‘Or [is a person to kill and arrest the *androphonos*] in his own home? Or however he likes? Far from it! Then how? “As it is bidden on the axon,” [the legislator] says. ‘And what’s that? The very thing you all know!’ The speaker then continues: οἱ θεσμοθέται τοὺς ἐπὶ φόνῳ φεύγοντας κύριοι θανάτῳ ζημιῶσαί [εἰσι] καὶ τὸν ἐκ τῆς ἐκκλησίας πέρυσιν πάντες ἐφρᾶθ’ ὑπ’ ἐκείνων ἀπαχθέντα. ὡς τούτους οὖν ἀπάγειν λέγει.) Westermann/Rosenberg 1890 ad loc. suggest that ὑπ’ ἐκείνων is equivalent to τοῖς ἔνδεκα. Hansen 1976: 108 at n. 46 (and cat. 17) supposes that the ‘finder’ might first point out (by *ephegesis*) the *androphonos* to the thesmothetai who might then carry out the arrest. As alternative, he suggests (cat. 17, n. 1, p. 134) that the particular *apagoge* alluded to by the speaker in c. 31 may have been initiated by the thesmothetai. For arrest of returning deserters to the thesmothetai by *ho boulomenos*, see the decree cited by Lyk. 1.121.

<sup>26</sup> Lipsius 1905-15: 328; MacDowell 1963: 140.

<sup>27</sup> Harrison 1971: 227, n. 2; Hansen 1976: 108 at n. 47.

Now we arrive at the second reason for restricting the *androphonos* of 23.80 to suspected killers. Scholars point to the context of 23.80 and observe that the speaker claims that *apagoge* is available to potential prosecutors who have missed the ‘deadlines’ for starting up a homicide trial (23.80) – that is, the procedure is available after the ninth month of the year when there would be insufficient time both for the three *prodikasiai* (which had to be held in three consecutive months) and for the subsequent trial that are requirements for carrying out a *dike phonou*. Accordingly, the speaker must be alluding to a person who is suspected of killing but who has not yet been accused.<sup>28</sup> Yet the speaker of Dem. 23 provides no grounds for restricting this form of *apagoge* to a prosecutor who has run out of time in one year and so must wait until the beginning of the next. In the prefatory statement to the paraphrase of the law, he in fact offers three grounds for choosing this method of prosecution :

[i] if a person is ignorant of all these matters [ταῦτα = τιμωρία and δικάστηρια: i.e., the Areiopagos for penalizing intentional homicide, the Palladion for penalizing involuntary homicide, etc.] or [ii] even if the deadlines have passed for carrying out each of these [trials], or [iii] if for any other reason he doesn’t want to prosecute following these methods, then if he sees the *androphonos* going about sacred precincts or up and down the Agora, it is permissible for him to arrest and bring him to the prison.<sup>29</sup>

The third ‘if clause’ opens the door to accused and convicted *androphonoi*. For a man might not ‘want to prosecute following these methods’ for any number of reasons, and these do not preclude the circumstance that the alleged killer has already been accused by someone else. For example, a potential prosecutor might not be a kinsman and so might be unable to bring a *dike phonou*; or he might be a kinsman who wants to hurry on the slow process of the private procedure; or, if the killing was unintentional, he might want to secure a death penalty which would not have been possible with a *dike phonou* for unintentional killing. In each of these cases, of course, the potential prosecutor must be ‘fortunate’ enough to find the *androphonos* in the Agora or in sacred precincts. On the other hand, the *androphonos* might also be a convicted killer – he, too, if he returns from exile and enters the Agora is open to arrest. A pious citizen might very well be angered to see an accused or convicted killer in the Agora and so be eager to carry out the arrest. The issues to be determined against trespassing *androphonoi* in trials proceeding from the *apagoge* depicted in 23.80 will then differ depending upon the type of *androphonos* brought before the magistrates. Presumably suspected and accused killers as well as convicted *androphonoi* who have killed again will be tried for homicide and trespass, whereas

<sup>28</sup> Cf. Ant. 6.42.

<sup>29</sup> Dem. 23.80: εἰ πάντα ταῦτά τις ἠγνόηκεν ἢ καὶ παρεληλύθασιν οἱ χρόνοι ἐν οἷς ἔδει τοῦτων ἕκαστα ποιεῖν, ἢ δι’ ἄλλο τι οὐχὶ βούλεται τούτους τοὺς τρόπους ἐπεξιέναι ...

convicted killers will be tried only for trespass (where the issue might be identity).<sup>30</sup> Presumably, a pre-trial meeting would establish the issue(s). There would be no need for *ep' autophoroi* to be a component of the writ; arrests for trespass (especially of 'suspected' killers) would be no more abused than arrests for other crimes in Athens (politicians did not go about in Athens arresting their rivals on phony charges of cloak-stealing); the 1,000 dr. penalty for frivolous prosecution would prevent that, and possibly the threat of a suit for *kakegoria*.<sup>31</sup> The sameness of penalty (death) will be due to the egregiousness of the offense, entering forbidden places with polluted hands.

I conclude that the procedure paraphrased in 23.80 does not *in itself* warrant us to restrict the meaning of *androphonos* to 'suspected killer.' Only the desire to protect the integrity of 105B has led to the strait-jacketing of the apparently open-textured paraphrase of the legislation represented in 23.80.

### iii. Related laws: Dem. 23.28, 31, 80 and Dem. 20.158

Two ramifications of the identification of the *androphonos* in Dem. 23.80 as non-specific need to be explored. First, the *apagoge* of Dem. 23.80 overlaps with the *apagoge* of Dem. 23.28 (not to speak of 105B) insofar as it provides another remedy against trespassing killers. So – at first glance, at any rate – there were a multiplicity of *apagoge* procedures that a potential 'finder' might apply under certain circumstances. Returned killers who were found anywhere in Attika were arrested 'to the thesmothetai' and liable to execution by those magistrates (23.28 and 31). And once in Attika, exiled killers who set foot in the Agora or in sacred places would additionally be liable to the *apagoge* of 23.80 – arrest to the prison and subsequent trial (possibly before the Eleven, but, as we shall see shortly, possibly before the thesmothetai), with death as the fixed penalty. Secondly, apparent overlap of the law apud 23.28 and the law(s) represented in 23.80 can be explained by hypothesizing that one law evolved from the other.<sup>32</sup> We can reasonably surmise that 23.28 is an

<sup>30</sup> Harrison 1971: 226-27. Harrison thought the trespassing killer (a) might already have been accused and hence banned by proclamation or (b) might not yet be accused or (c) might be 'a man who either had or should have gone into exile as a result of a *dike phonou*, and had not done so or had returned illicitly.' In each case, different issues would be contested. While Harrison held 105B suspect, he did not reject it outright and so was hardpressed to explain the stated difference in penalty – death in 23.80 and assessed by the court in 105B.

<sup>31</sup> Gagarin 1979: 320, n. 59 explains why the prosecution in Ant. 6 did not use an *apagoge phonou* against the Khoregos – not only because he had not been 'caught in the act' or 'manifest,' but also 'the prosecution would risk losing 1000 drachmas.'

<sup>32</sup> Carawan 1998: 337-38 also posits a relationship between 23.28 and 23.80 but he restricts the *androphonos* of 23.80 to the suspected and accused killer: 'The procedure against "known" or suspected homicides that Demosthenes describes (23.80) is a direct descendant of the ancient remedy... And in the intervening period, it is reasonable to assume, there was nothing novel or irregular in prosecuting homicide by warrant and arrest.' While I disagree with Carawan when he discounts the legal

archaic law; 23.80 came into operation ca. 400 B.C.<sup>33</sup> While it is conceivable that the *apagoge* of 23.28 was rarely used in the mid-fourth century,<sup>34</sup> it could not have been entirely supplanted by 23.80. The former law provides remedies against exiled killers who return *anywhere in Attika*, whereas the latter law provides remedies against all killers who enter *specific, forbidden places*. On the other hand, whereas both laws overlap in treating returning killers, the latter law *additionally* treats killers who may not have left (because they have not yet been accused or tried). It may be that 23.80 evolved from a procedure that has been judiciously hypothesized as stemming from 23.28: returning exiles who had been arrested to the thesmothetai under the older law (23.28 and 31) and who had not confessed may have been permitted a trial.<sup>35</sup> This contingency may provide the connecting link between the older 23.28 and the later 23.80, for if trial was permitted for the arrested, returning killer of 23.28, then *the thesmothetai of 23.31 must have handed him over to the Eleven for pre-trial custody* (cf. 23.80) – surely trial would not take place on the same day as arrest. The presiding magistrates might then be the Eleven (as is supposed in 23.80), and death would be the penalty (as in 23.31 and 80).<sup>36</sup> Alternatively, the thesmothetai may still have presided over the trial; the alternation of the role of the thesmothetai as *hegemonia tou dikasteriou* with the Eleven as agents of custody is paralleled in Timokrates' earlier law (24.63).<sup>37</sup> The legislation concerning trespassing *androphonoi* (23.80), then, exhibits a certain economy by providing a remedy against *androphonoi* of all stripes (suspected, accused, convicted) who entered the Agora and holy places – as well as by cutting out the role of the thesmothetai (if indeed it did cut them out).<sup>38</sup> Instead of abrogating a law of archaic

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significance of trespass, I find his formulation of such arrests attractive ('In such instances [i.e., homicide arrest, 23.80] the rule for arrest in prohibited areas amounts to a restriction on self-help by the plaintiffs and not a penalty in itself' [363 with n. 87]).

<sup>33</sup> Hansen 1976: 101-03.

<sup>34</sup> The speaker's reminder of the person whom all the dikasts had seen last year when he was 'arrested from the Assembly by them [i.e., by the thesmothetai]' (23.31) is surely an allusion to an extraordinary occurrence and not to a daily event.

<sup>35</sup> See text at nn. 26-27.

<sup>36</sup> This proposal is similar to Hansen's explanation (1976: 20) for the alternation in the *hegemonia tou dikasteriou* between the Eleven and thesmothetai in *endeixis* and *apagoge* against *atimoi*. The thesmothetai brought the case before the court when the accused remained at liberty (*endeixis*), whereas the Eleven presided over the court when the offender was arrested and held in custody (*endeixis* and *apagoge*).

<sup>37</sup> For an explanation of the law, see Harrison 1971: 56-57; Rhodes 1972: 168 n. 4.

<sup>38</sup> A similar economy is perceptible if we postulate the evolution of the *nomos hubreos* (lex apud Dem. 21.47) from an archaic, possibly Solonian, law that offered protection for similar offenses against *epikleroi*, orphans, and pregnant widows (lex apud Dem. 43.75). The offenses in both laws are summed up as *hubrizein* and *poiesai paranomon ti*; the *nomos hubreos* is an extension of the protection, offered to the

pedigree (23.28) – and one protected against future alteration (cf. 23.62) – the Athenians added new legislation (23.80) that, while somewhat overlapping, also extended it. The first sentence of 23.28 discussed at the beginning of the last section provides a parallel to this sort of law-making, where the clauses permitting the arrest or killing of the *androphonoi* may represent Drakon’s legislation and the restrictions on physical injury and ransom, Solon’s or even a later legislator’s – thus, an extending of a statute, rather than the abrogation of an old one and a start from scratch.

The legislation in 23.80 will also have expanded the law in another area as well. A separate provision regarding the proclamation against accused killers belonged to the legislation that set out the *dike phonou* under the jurisdiction of the basileus (*AP* 57.2). This provision (or an earlier form of it) is alluded to by the speaker of *Ant.* 6: ‘For the law runs thus, whenever anyone registers a *dike phonou*, he is to be banned from the places specified in the laws’ (εἴργεσθαι τῶν νομίμων). *Dem.* 20.158 provides more details about the ban and also associates it with homicide legislation.<sup>39</sup> While the paraphrases of the law come from the fifth (*Ant.* 6.) and fourth (*Dem.* 20.158) centuries, we might well think that some form of it existed as early as Solon.<sup>40</sup> Would an earlier form of this law or even its *epigonos* as paraphrased in the fourth century have contained the penalty for infringement of the bans? We can only surmise. While religious sanction may not have required an accompanying penalty early on, surely it would have done so by the fourth century – but not in the law that prescribed the ban and assigned the task of proclamation to the *basileus*. Probably the penalty belonged to the laws prescribing the arrests of trespassing killers to the jurisdiction of the thesmothetai or the Eleven. It is not, then, overly bold to suggest that the law(s) paraphrased in 23.80 may have served the function of supplying the penalty for the accused killer who violated the bans. In this way, too, 23.80 may have extended an early and awe-inspiring law without abrogating it and starting from scratch.<sup>41</sup>

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limited categories of the earlier law, to the broad spectrum of the inhabitants of Attika.

<sup>39</sup> *Dem.* 20.158: ‘Drakon in these laws [about homicide] ..., laying down that the *androphonos* be kept away from lustral water, libations, wine bowls, sanctuaries, and the marketplace’ (ἐν τοίνυν τοῖς περὶ τούτων νόμοις ὁ Δράκων ... καὶ γράφων χέρνιβος εἴργεσθαι τὸν ἀνδροφόνον, σπονδῶν, κρατήρων, ἱερῶν, ἀγορᾶς).

<sup>40</sup> Ruschenbusch 1966 F 14\*\* = *Dem.* 20. 158. Carawan 1998: 88 n. 4 does not think the law goes back to Drakon: ‘There is nothing in the extant inscription (*IG* I<sup>3</sup> 104) to indicate the latter provisions [i.e., religious sanctions], and nothing in the primitive procedure to call for a statutory requirement along these lines – the religious sanctions appear to require no prescription.’

<sup>41</sup> Cf. MacDowell 1963: 132: ‘D. 23.80 mentions only the holy places and the agora, but it is possible that he has simply abridged the list given fully in D. 20.158. ... and that a killer was liable to arrest if he entered any of the places or participated in any of the activities forbidden to killers by the “law of Drakon”.’

I conclude that Dem. 23.80 paraphrases legislation that sets out the procedure and penalty for trespassing *androphonoi* (suspected, accused, convicted). This law (or laws) will have been part of the legislation of the magistrates in charge of these cases (the thesmothetai or the Eleven). It overlapped somewhat with the archaic law concerning the returning *androphonos* (Dem. 23.28) but extended that law to suspected and accused killers; and it expanded the law that provided religious sanctions against the accused killer (Dem. 20.158) by supplying the remedy and penalty (23.80).

v. Conclusions: hypothesis for the inauthenticity of Dem. 24.105B

I have argued that 105B appears inconsistent with what we know of the way Athenian law functioned: *atimoi* elsewhere are denounced by *endeixis*; the *unintentional accused killers* of 105B might be penalized differently from the suspected, unintentional killers of 23.80. Granted, there are ways to wriggle out of these problems: one can hypothesize that 105B included a mention of *endeixis* that was lost in transmission; one can argue that Demosthenes is distorting the penalty for *apagoge phonou*; one can translate *androphonos* as ‘suspected killer’ in one passage and as ‘convicted killer’ in another to suit one’s interpretation; one can accept the potential for anomalous penalties and say ‘Athenian law was unsystematic.’ In my opinion, we ought not to argue in these ways but should instead admit that the inconsistencies and anomalies present a strong case for jettisoning the entire law – or a part of it. A ‘hypothesis of inauthenticity’ allows *androphonos* to have deservedly broad meaning, removes offending inconsistencies, and allows us to postulate evolution in the ‘trespass laws’ that, while not systematic, demonstrates a pattern of ‘extension without abrogation’ that is apparent in other laws (e.g., 23.28 and see n. 38 for 21.47 and 43.75).

A hypothesis of inauthenticity may be radical or conservative – radical, if we declare 105B in its entirety inauthentic, conservative, if we choose only to dagger the clause concerning the accused killer as ‘misplaced.’ In both cases, all killers (suspected, accused, convicted) discovered in forbidden places may have been arrested and brought – not to the Eleven – but to the *thesmothetai* who are attested as the magistrates overseeing the arrests of killers who illicitly return to Athens (Dem. 23.31). Thus:

1. (a) Returned killers who are found anywhere in Attika will be arrested ‘to the thesmothetai,’ and, if they confess, will be executed by those magistrates (23.28 and 31). If they do not confess, the thesmothetai will hand them over to the Eleven for custody and either the thesmothetai or Eleven will preside over the ensuing trial (hypothesis at nn. 26-27) for which the penalty is death (23.31). (b) Returned killers who set foot in the Agora or in sacred places would additionally be liable to the *apagoge* of 23.80 which will follow almost the same procedure except that trial is obligatory (see no. 2 below).



2. Suspected and accused killers discovered in the Agora and sacred places will be arrested (to the Eleven or to the thesmothetai), imprisoned before trial, and then tried for homicide (possibly before the thesmothetai) and penalized with death upon conviction (23.80). Those suspected or accused of unintentional killing and who violate sanctions lose the possibility of a penalty of exile. Infringements of sanctions (e.g., entering the Agora) account for the intensified penalty (23.80).

A ‘conservative hypothesis,’ that only the clause concerning the accused killer is ‘misplaced,’ arises from a consideration of the origin of 105. Scholars have hypothesized on the basis of the appearance of stichometric marginal letters in three manuscripts of Demosthenes that most documents were inserted into the orations after they were first published. MacDowell (among others) has suggested two possible ways in which this may have happened. Demosthenes, he supposes, will have had the documents copied ‘on separate sheets or tablets which could be given to the clerk of the court for reading out at the trial.’ He continues:

Thus, when the speech was first copied for publication and its lines were numbered, the documents may still have been in a separate dossier, from which they were transferred into the text of the speech only when further copies were made at a later date. Another possibility is that an editor, seeing that Demosthenes called for a particular law to be read out, found that law in the archives, or in a collection of Athenian laws and decrees like the one formed by Krateros (*F. Gr. Hist.* 342), and inserted it in the speech.<sup>42</sup>

The first way is less likely since the preservation of a separate ‘original dossier’ for each oration is unthinkable without a collective publication speedily undertaken after Demosthenes’ death; such an edition cannot be supposed for the fourth century. So an editor (possibly Hellenistic) who locates the laws in an archive or collection of laws is more plausible and we should proceed with such a person and process in mind.<sup>43</sup> The editor must study whatever speech is before him and then find the law or laws that seem to correspond to the point in the manuscript where each citation is made. It is possible that he will find the wrong law (but genuine nonetheless) and insert that; some scholars have made just such a claim about the law inserted at Dem. 21.94. Other scholars, however, think that very same law a forgery.<sup>44</sup> The editor might also choose to abbreviate the law; and he might combine several laws, as happens, e.g., in [Dem.] 43.57 which contains parts of two laws, one a homicide law (which resembles a portion of *IG I<sup>3</sup> 104*), and the other a law instructing the *demarkhos* about burying unclaimed corpses.

Dem. 105 is also a combination of laws – but I would argue of a different sort. Our editor begins with a ‘law on theft’ (105A), then follows with an amalgam of different laws. He has studied the context carefully and knows he must find laws in which the wrong-doer is imprisoned (as the thief in 103) or in which an *atimos* (e.g.,

<sup>42</sup> MacDowell 1990: 46.

<sup>43</sup> Drerup 1898: 544-51.

<sup>44</sup> See MacDowell 1990: 317-18.

a person convicted of *kakosis* of parents or of *astrateia* as in 103) violates the prohibitions placed upon him. He has inspected a few collections of Athenian laws written on papyri and has found a number of different laws prescribing penalties against infringements of *atimia*. While the convicted parent abuser and military shirker may have been found in the same law, especially (one might argue) if they were subject to the same prohibitions, remedy, and penalty, yet it is hardly plausible that they were the only *atimoi* penalized in this way (cf. Aiskhin. 3.176); nor is it plausible that the only prohibitions placed upon these *atimoi* were their banning from the Agora and sacred places (cf. 103: κἄν ἀστρατείας τις ὄφλη καὶ τι τῶν αὐτῶν τοῖς ἐπιτίμοις ποιῆι, καὶ τοῦτον δεδέσθαι); furthermore, as has been pointed out, there is no mention of *endeixis*, nor of the 1,000 dr. penalty for the losing prosecutor. Our editor appears to have copied out a bit of the law from one part and then a bit from another part of a longer (possibly much longer) piece of legislation. The law, then, is much abbreviated; it consists of little more than a selection of incomplete provisions regarding the violations of *atimoi*. The patent pick and choose method of our editor, however, does not preclude *contaminatio* – he might also have found the parent abuser and military shirker in different laws and have collapsed them into one – as the paraphrase in 103 suggests (κἄν τις ἀλοῦς [τῆς] κακώσεως τῶν γονέων εἰς τὴν ἀγορὰν ἐμβάλλη, δεδέσθαι, κἄν ἀστρατείας τις ὄφλη καὶ τι τῶν αὐτῶν τοῖς ἐπιτίμοις ποιῆι, καὶ τοῦτον δεδέσθαι). But whether he found the two *atimoi* in one law or two, he surely will have found the accused killer in another law, possibly in the legislation to which 23.80 belonged, but more likely, in my view, in the older law paraphrased at Dem. 20.158, which provided religious sanctions against the accused killer but which may not have included a penalty and remedy. Our editor, having observed that the sanctions against the *atimoi* were similar to those proclaimed against an accused killer, added the latter to the amalgam of 105B; the penalty for the *atimoi* became the penalty for the accused killer.

This imaginary vignette will get rid of the forger (however well-meaning) called into being by the ‘radical hypothesis.’ It will also explain the inconsistencies of 105B with 23.80. The offending clause may have entered the text early on; Dem. 24.105 can still be based, in origin, on a trustworthy archival source. The human intermediary, however, is not reliable.

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